

## MARCH 1999

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## **MARCH 1999**

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

Secretary of Labor, MSHA v. Martin Marietta Aggregates, Docket No. SE 98-156-M.  
(Judge Merlin, January 25, 1999)

No cases were filed in which review was denied during the month of March:





## COMMISSION DECISIONS



WASHINGTON, D.C. 20006

SECRETARY OF LABOR,  
MINE SAFETY AND HEALTH  
ADMINISTRATION (MSHA),  
on behalf of LONNIE BOWLING,  
EVERETT DARRELL BALL,  
and WALTER JACKSON

V.

MOUNTAIN TOP TRUCKING  
COMPANY, INC., ELMO MAYES,  
WILLIAM DAVID RILEY, ANTHONY  
CURTIS MAYES, and MAYES  
TRUCKING COMPANY, INC.

Docket Nos. KENT 95-604-D  
KENT 95-605-D  
KENT 95-613-D

### DECISION

These consolidated discrimination proceedings arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) (“Mine Act” or “Act”). The Secretary of Labor, as well as Lonnie Bowling, Everett Darrell Ball, and Walter Jackson (collectively the “drivers”), on whose behalf the Secretary filed complaints alleging violations of section 105(c) of the Act,<sup>1</sup> seek review of parts of Administrative Law Judge Jerold Feldman’s Decision on

No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner . . . because such miner . . . has filed or made a complaint under or related to [the Act], including a complaint notifying the operator . . . of an alleged danger or safety or health violation in a coal or other mine, . . . or because of the exercise by such miner . . . of any statutory right afforded by [the Act].

Liability, 19 FMSHRC 166, 188-97, 203-04 (Jan. 1997) (ALJ), and his Supplemental Decision and Final Order, 19 FMSHRC 875 (May 1997) (ALJ). For the reasons that follow we reverse the judge's determinations that Bowling and Ball were not constructively discharged and that Jackson failed to mitigate his damages from his discriminatory discharge.

## I.

### General Factual and Procedural Background

These proceedings are before the Commission as a result of discrimination complaints filed by the Secretary on behalf of the three drivers pursuant to section 105(c)(2) of the Mine Act, 30 U.S.C. § 815(c)(2).<sup>2</sup> 19 FMSHRC at 167. The complaints were filed against Mountain Top Trucking Company, Inc. ("Mountain Top"), Mayes Trucking Company, Inc. ("Mayes Trucking"), Elmo Mayes, Anthony Curtis Mayes ("Tony Mayes"), and William David Riley (collectively the "operators").<sup>3</sup> *Id.*

On July 12, 1993, Mountain Top contracted with Lone Mountain Processing, Inc. ("Lone Mountain"), to haul coal approximately 8 miles between Lone Mountain's Huff Creek underground mine in Harlan County, Kentucky, and its processing plant in Lee County, Virginia.

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30 U.S.C. § 815(c)(1).

<sup>2</sup> Section 105(c)(2) provides in part:

Any miner . . . who believes that he has been discharged, interfered with, or otherwise discriminated against by any person in violation of this subsection may, within 60 days after such violation occurs, file a complaint with the Secretary alleging such discrimination. Upon receipt of such complaint, the Secretary shall forward a copy of the complaint to the respondent and shall cause such investigation to be made as he deems appropriate. . . . If upon such investigation, the Secretary determines that the provisions of this subsection have been violated, he shall immediately file a complaint with the Commission . . . alleging such discrimination or interference and propose an order granting appropriate relief.

<sup>3</sup> In unappealed rulings, the judge reaffirmed his determination, made in the temporary reinstatement proceeding (*see* 17 FMSHRC 1695, 1708-09 (Oct. 1995) (ALJ)), that Mayes Trucking was liable as the successor to Mountain Top for remedying its discrimination, and further concluded that Elmo and Tony Mayes, but not Riley, should be treated as operators under the Mine Act and thus responsible parties personally liable for discriminating against the three drivers. *See* 19 FMSHRC at 197-203.

*Id.* at 170.<sup>4</sup> Mountain Top operated approximately 30 trucks to haul that coal, paying its drivers \$13.00 per load of coal and \$6.00 per hour for down periods when their assigned trucks were being repaired. *Id.* at 170, 172.

Lone Mountain permitted its contract with Mountain Top to expire on April 12, 1995. 17 FMSHRC at 1700. At that time, Mayes Trucking took over the contractual rights and obligations that Mountain Top had with Lone Mountain. *Id.* Mayes Trucking, whose President was Tony Mayes, continued to employ Mountain Top's drivers and its truck foreman, Riley. *Id.* Mayes Trucking also continued to operate the trucks that Mountain Top had used in hauling Lone Mountain coal. *Id.* Neither trucking company owned trucks, but instead leased them from E&T Trucking, a sole proprietorship owned and operated by Elmo Mayes, Tony's father. 19 FMSHRC at 170; 17 FMSHRC at 1700.

## II.

### Bowling and Ball

#### A. Factual and Procedural Background

##### 1. The Initial Discrimination Against Bowling and Ball

Mountain Top hired Ball in July 1994 and Bowling the following month, and they routinely drove to work together. 19 FMSHRC at 173. In addition to driving, Bowling's and Ball's duties included general preshift inspections and minor maintenance of their assigned trucks. *Id.* Mountain Top's drivers usually arrived at its truck lot around 5:00 a.m., so that they could start their trips in the next half hour. *Id.* at 172, 173. Drivers would make round trips until the "cutoff" driver for that day was designated, which, in late 1994 and the beginning of 1995, usually occurred between 4:00 and 6:00 p.m. *Id.* at 171-72. The cutoff driver was required to make one last round trip, while all of the other drivers finished for the day once they had completed their current round trip. *Id.* at 171.

In late January and early February 1995, Lone Mountain's coal stockpile increased substantially, as it opened a new section of the Huff Creek mine. *Id.* at 172. At the same time, snow and icy conditions interfered with Mountain Top's normal haulage operations. *Id.* In response to Lone Mountain's pressure to increase haulage, Mountain Top required its drivers to work longer hours. *Id.* From early February 1995 until mid-to-late March 1995, it was not unusual for Mountain Top's drivers, including Bowling and Ball, to work 15 to 16 hours per day, 6 days per week. *Id.* at 172, 174.

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<sup>4</sup> The approximately 1 hour and 15 minute-round trip between the mine and plant consisted of travel over a Kentucky state road for approximately 2-1/2 miles and the remainder over a mountain via a steep, narrow, bumpy, winding gravel haul road owned by Lone Mountain. *Id.* at 170-71, 173.

Beginning in February 1995, Bowling and Ball periodically complained to Riley, Tony Mayes, and loader man Bill Lefevers about the long hours the drivers were working. *Id.* at 174. Many of the other drivers also complained about their extremely long workdays. *Id.* Riley responded to the complaints by promising that, when Lone Mountain's coal stockpile was reduced, the company would do what it could to cut back the hours, though warning that the cutoff time would still be between 5:00 and 6:00 p.m. *Id.*

Bowling and Ball called the Commonwealth of Kentucky's Transportation Cabinet, Division of Motor Vehicle Enforcement, to complain about their long working hours. *Id.*; Tr. I 282-85.<sup>5</sup> Both spoke with Major Michael Maffett, who told them of the federal and state laws that govern how many hours truck drivers could lawfully drive or be on-duty. 19 FMSHRC at 174.<sup>6</sup> In response to Ball's opinion that he would be terminated if he refused to drive the hours Mountaintop required, Maffett referred Bowling and Ball to the Occupational Safety and Health Administration in Atlanta, Georgia. *Id.* at 175. Maffett also recommended that they file a written complaint with the Federal Highway Administration office in Frankfort, Kentucky. *Id.* No one from Maffett's organization investigated Bowling and Ball's complaint. *Id.*

On March 7, 1995, Bowling and Ball decided to confront management about the excessive hours. *Id.* at 175. At approximately 5:30 p.m., after hearing over the CB radio that the cutoff driver would not be designated until 7:00 p.m., Ball pulled into the truck lot to talk to Riley. *Id.* Ball was followed by trucks driven by Bowling and Leonard McKnight. *Id.* Ball and Bowling told Riley they could not continue working such long hours because they were exhausted and thought it unsafe. *Id.* They also told Riley that they had been advised about a 10-hour workday rule. *Id.*

Ball testified that Riley was sympathetic until Elmo Mayes pulled into the truck lot. *Id.* When the three drivers expressed their concerns to Elmo Mayes regarding the long hours, he responded "the cutoff time tonight is 7:00 o'clock, you get your ass back out there and haul coal." *Id.* at 175-76. Ball testified that, in response to their statements that "DOT" had told them that they were not supposed to be hauling such long hours, Riley told the three that he "didn't give a shit what the DOT said" because the drivers worked for him, and if they couldn't work the required hours "they didn't need us and to get our ass to the house." *Id.* at 176. Bowling and Ball each turned in their time sheets, at which point, according to Ball, Elmo Mayes "hollered" to

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<sup>5</sup> References to the transcripts for the hearings in this matter are to Tr. I, Tr. II, and Tr. III, corresponding to the hearings held in June, July, and August 1996, respectively.

<sup>6</sup> For example, Maffett advised the two drivers of 49 C.F.R. Part 395, which contains the United States Department of Transportation regulations limiting the amount of driving time and on-duty time for truck drivers covered by the regulations. *Id.* at 174-75. Included in the regulations is a requirement that 10 hours of driving be followed by at least an 8-hour break. *See* 49 C.F.R. § 395.3(a)(1).

both “don’t bring your ass back.” *Id.* Although McKnight supported Bowling’s and Ball’s concerns, he decided to return to work to avoid losing his job. *Id.*

Bowling and Ball each filed discrimination complaints with the Department of Labor’s Mine Safety and Health Administration (“MSHA”) on March 9, 1995. *Id.* Included in the relief sought was backpay for all lost wages, reinstatement and assignment to the trucks they had driven previously, and regulated 10-hour workdays and required breaks and lunch periods for all employees. *Id.*; see Gov’t Ex. 9.

## 2. The Constructive Discharge Claims

On March 22, 1995, following MSHA investigator Gary Harris’ interviews with company personnel, Tony Mayes telephoned Harris. 19 FMSHRC at 176. Tony Mayes explained that Mountain Top was under a lot of pressure because of the coal that was accumulating at the Huff Creek mine, conceded that many of its employees had been complaining about the long hours, and expressed a willingness to work things out, saying that Bowling and Ball were good truck drivers. *Id.* Shortly after talking to Harris, Tony Mayes called the two drivers to offer them their jobs back. *Id.* at 176-77. Both agreed to return to work. *Id.* at 177.

### a. Bowling’s Return to Work

Bowling reported to work on Thursday, March 23, at approximately 5:00 a.m. *Id.* Riley did not follow the normal practice of assigning Bowling his truck immediately, but instead told him to wait to speak with Tony Mayes. *Id.*; Tr. I 425. When Tony Mayes arrived approximately 2-1/2 hours later, instead of assigning Bowling the truck he had been driving before his discharge, truck 144, he assigned him truck 139, an older, slower truck in worse condition. 19 FMSHRC at 177, 181; Tr. I 426. When Bowling asked Tony Mayes why he was not assigned his regular truck, Tony Mayes told him that he did not want to cause any conflict with the other drivers. 19 FMSHRC at 177.<sup>7</sup>

Bowling refused to drive truck 139, citing a missing license plate, a broken rear wheel stud, and concerns regarding its wipers and lights. *Id.* Bowling left the site around 8:00 a.m. *Id.* Before departing, according to Tony Mayes and Riley, Bowling informed them that he would not drive truck 139, and that he would wait on MSHA’s investigative decision. *Id.* Bowling did not go to the truck lot on Friday, March 24. *Id.* at 178.

On Monday, March 27, Bowling telephoned Tony Mayes and received assurance that the job offer remained open. *Id.* Bowling reported to work at approximately 8:00 a.m. that day, but found that the broken wheel stud on truck 139 had not been repaired. *Id.* When Bowling

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<sup>7</sup> Tony Mayes had asked Harris if he could assign Bowling and Ball to drive any truck, and was told that he could as long as the trucks were safe and preshift inspections performed. 19 FMSHRC at 193.



complained to mechanic William Bennett, he was told that while the other necessary repairs to truck 139 had been made, Bennett could not replace the wheel stud because the welder needed to remove it was not available. *Id.* Bennett also told him that Riley would need to approve the repair before it could be made. Tr. I 433-34. This surprised Bowling because it was a minor repair that would not take long to finish, which usually meant that no prior approval by management was necessary. Tr. I 434, 655, 661, Tr. II 581-82. Bowling told Bennett to have the truck fixed by 5:00 a.m. the next day, when he would be back to work. 19 FMSHRC at 179. He then went home approximately 1-1/2 hours after he arrived and was paid \$9.00 for his down time. *Id.*

At approximately 5:00 a.m. on Tuesday, March 28, Bowling and Ball arrived at the truck lot together. *Id.* at 180. While Bowling was still assigned truck 139, it was out at the time, and he was not assigned one of the many other trucks in the lot. Tr. I 437-41. During the approximately 2-1/2 hours that Bowling waited for the truck to return, Tony Mayes told Bowling that the wheel stud on truck 139 had not been fixed. 19 FMSHRC at 180; Tr. 441. The wheel stud was not repaired because the diesel-powered welding machine required to remove the stud was not working, and alternative means of repairing the stud were not utilized. 19 FMSHRC at 180; Tr. I 670-71, 672, Tr. II 365, 418. Bowling stated he would not drive the truck in that condition, and left with Ball before the truck returned. 19 FMSHRC at 180.

Tony Mayes telephoned Bowling on the morning of Wednesday, March 29 about returning to work. *Id.* at 180, 192. During that phone conversation, Tony Mayes accused Bowling of "nitpicking shit about this wheel stud" and Bowling hung up on him. *Id.* at 180; Tr. I 446-47. Bowling did not return to work for the operators. 19 FMSHRC at 168.

b. Ball's Return to Work

Ball did not return to work until Monday, March 27. *Id.* at 179. When he arrived that morning at approximately 5:00 a.m., he was told by Tony Mayes that the truck he had previously driven, truck 147, which also was one of the newer and better trucks, was not available, and he was given a choice between trucks 139 and 134, both of which, because of their condition, were considered to be among the worst of the fleet and thus less desirable to drivers. *Id.*; Tr. I 121, 663-64. Ball chose 134, and told Tony Mayes he would preshift it and that he "would work a ten-hour shift and that was all I was going to work." 19 FMSHRC at 179. Tony Mayes told Ball he didn't want to hear about "any ten hour bullshit." *Id.*

Ball completed his last round trip on March 27 at 4:00 p.m., even though the cutoff driver was not designated that day until between 5:00 and 6:00 p.m. *Id.* At approximately 4:15 p.m., before leaving the truck lot, Ball told mechanic Lee Payne there was a loose U-joint that caused truck 134 to "wander real bad" whenever it hit a hole. *Id.* When Riley saw Ball leaving he asked him where he was going and was told that he was not going to drive for more than 10 hours, because that was what he had been told was the safe and legal limit. *Id.* at 191. Tony Mayes



testified that, upon learning of Ball's complaint about the U-joint, he and Riley checked and found nothing wrong with it. *Id.* at 180, 191.

When Ball arrived with Bowling the next day, he asked Riley if he was fired for having left the previous day at 4:00 p.m., and Riley responded that he never said that. *Id.* at 180. As with Bowling, Ball's assigned truck was out, but he also was not assigned another one, even though many were in the lot, including his former truck, 147. Tr. I 138-41. After waiting 2-1/2 hours for truck 134 to return to the lot, and learning that its U-joint had not been repaired, Ball said he would not drive truck 134 until the repair was made. 19 FMSHRC at 180; Tr. I 142-43. Ball was then assigned truck 147, but when he told Tony Mayes he would preshift it, Mayes called him a "cry-ass" who wanted to "preshift everything in the damn lot." 19 FMSHRC at 180. Tony Mayes also accused Ball of just wanting to find some "bullshit" because he "wasn't interested in working." *Id.* Ball told Tony Mayes he was not going to allow himself to be cursed at and he left with Bowling. *Id.*

During a March 29 telephone call, Ball told Tony Mayes "he felt like he was getting the run around." *Id.* Tony Mayes told Ball there were several trucks without drivers and asked Ball to come to work. *Id.* Ball told him that he could not return to work because of all the cursing and friction the previous 2 days. *Id.*

The complaints the Secretary filed on behalf of both Bowling and Ball alleged that each was "unlawfully discriminated against, discharged, and harassed during his temporary return to work by respondents for engaging in" protected activity on March 7, 1995. S. Am. Compls. at 2-3. While the judge determined that Bowling and Ball had been discriminatorily discharged on March 7 for engaging in protected work refusals, he concluded that their departure from the operators' employ after returning to work in late March 1995 did not qualify as a "constructive discharge," and thus was not a further adverse action for those work refusals. 19 FMSHRC at 187-97.<sup>8</sup> Both the Secretary and the drivers seek review of the judge's determination that the two drivers were not constructively discharged.

#### B. Disposition

The question presented on review with respect to Bowling and Ball is whether the judge correctly determined that the operators did not take further adverse action against the two drivers upon their return to work from their initial discharge by constructively discharging them, i.e.,

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<sup>8</sup> Consequently, the judge reduced the Secretary's proposed penalties of \$3,000 each for the discrimination against Bowling and Ball to \$750 each, and limited the backpay relief period for the two drivers to the time from March 8 through March 22, 1995. 19 FMSHRC at 197; 19 FMSHRC at 883-84. The parties eventually agreed that Bowling and Ball would receive \$1,500 each in backpay for that period. 19 FMSHRC at 877-78.

forcing them to quit their jobs.<sup>9</sup> The Mine Act, like other federal anti-discrimination provisions, has been interpreted to prohibit constructive discharge, in order to prevent employers from accomplishing indirectly what the law prohibits directly. *See, e.g., Simpson v. FMSHRC*, 842 F.2d 453, 461 (D.C. Cir. 1988); *see generally* I Barbara Lindemann and Paul Grossman, *Employment Discrimination Law* 839 (3d ed. 1996). Under the Mine Act, “[a] constructive discharge is proven when a miner engaged in protected activity shows that an operator created or maintained conditions so intolerable that a reasonable miner would have felt compelled to resign.” *Secretary of Labor on behalf of Nantz v. Nally & Hamilton Enterprises, Inc.*, 16 FMSHRC 2208, 2210 (Nov. 1994) (citing *Simpson*, 842 F.2d at 461-63).<sup>10</sup>

1. Whether Substantial Evidence Supports the Judge’s Finding that Bowling and Ball Engaged in Protected Work Refusals on March 7, 1995

The first inquiry in a constructive discharge analysis is whether the miner was engaged in protected activity. *See Nantz*, 16 FMSHRC at 2210. In this case, the alleged protected activity took the form of work refusals. Consequently, we address, under the substantial evidence standard,<sup>11</sup> the operators’ contention that the judge erred in concluding that the March 7, 1995, work refusals of Bowling and Ball were protected under the Mine Act.<sup>12</sup>

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<sup>9</sup> At oral argument, the operators contended that the Commission lacks jurisdiction over the trucking operations at issue here, because those operations do not cause Mountain Top to fall within the definition of “operator” contained in section 3(d) of the Mine Act, 30 U.S.C. § 802(d). Oral Arg. Tr. 47-48. We reject that contention, because Section 3(d) defines “operator” to include “any independent contractor performing services or construction” at a mine. This definition clearly includes a contractor providing trucking service between a mine and its processing plant. *See Bulk Transp. Servs., Inc.*, 13 FMSHRC 1354, 1357-59 (Sept. 1991) (trucking company transporting coal under contract with mine found to be operator under section 3(d)).

<sup>10</sup> Despite the dissent’s reliance on “aggravating factors” (slip op. at 27-32), the Commission and courts have not always insisted on this concept when discussing constructive discharge in Mine Act cases. *See, e.g., Simpson; Nantz*. Instead, those cases uniformly apply the constructive discharge standard set forth above.

<sup>11</sup> When reviewing an administrative law judge’s factual determinations, the Commission is bound by the terms of the Mine Act to apply the substantial evidence test. 30 U.S.C. § 823(d)(2)(A)(ii)(I). “Substantial evidence” means “such relevant evidence as a reasonable mind might accept as adequate to support [the judge’s] conclusion.” *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

<sup>12</sup> The operators did not file a petition for discretionary review with respect to any part of the judge’s decisions in these proceedings. However, because the question of whether Bowling

The Mine Act grants miners the right to complain of a safety or health danger or violation, but does not expressly state that miners have the right to refuse to work under such circumstances. Nevertheless, the Commission and the courts have recognized the right to refuse to work in the face of such perceived danger. See *Secretary of Labor on behalf of Cooley v. Ottawa Silica Co.*, 6 FMSHRC 516, 520 (Mar. 1984), *aff'd mem.*, 780 F.2d 1022 (6th Cir. 1985); *Price v. Monterey Coal Co.*, 12 FMSHRC 1505, 1514 (Aug. 1990). A miner refusing work is not required to prove that a hazard actually existed. See *Secretary of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 810-12 (Apr. 1981). In order to be protected, a work refusal must be based upon the miner's "good faith, reasonable belief in a hazardous condition." *Id.* at 812; see also *Gilbert v. FMSHRC*, 866 F.2d 1433, 1439 (D.C. Cir. 1989). The complaining miner has the burden of proving both the good faith and the reasonableness of his belief that a hazard existed. *Robinette*, 3 FMSHRC at 809-12; *Secretary of Labor on behalf of Bush v. Union Carbide Corp.*, 5 FMSHRC 993, 997 (June 1983). A good faith belief "simply means honest belief that a hazard exists." *Robinette*, 3 FMSHRC at 810.<sup>13</sup>

The judge found that Bowling's and Ball's March 7, 1995, complaints about being fatigued as a result of their excessive work hours, as communicated to the operators, were reasonable safety-related concerns to which the operators failed to adequately respond, thereby provoking the two drivers' work refusals that day. 19 FMSHRC at 185-86. The judge concluded that, while Bowling and Ball had failed to establish that a 4:00 to 6:00 p.m. cutoff time was unlawful or otherwise unreasonable, their work refusals on March 7 were protected under the Mine Act because of the long hours they had put in during the preceding weeks driving multi-ton haul vehicles over mountainous terrain on narrow and winding roads. *Id.* at 188.

The operators object that the judge should not have accepted Bowling's and Ball's claims of fatigue as a reason for their refusing to continue to drive on March 7 because Bowling stated at trial that he only considered driving 80 to 90 hours a week to be excessive (Tr. II 190), and Ball

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and Ball engaged in protected work refusals is a prerequisite to a determination of whether the two were constructively discharged, we denied the Secretary's motion to strike the operators' protected work refusal arguments. See Unpublished Order dated July 27, 1998, at 1.

<sup>13</sup> Once it is determined that a miner has expressed a good faith, reasonable concern about safety, the analysis shifts to an evaluation of whether the operator addressed the miner's concern "in a way that his fears reasonably should have been quelled." *Gilbert*, 866 F.2d at 1441; see also *Bush*, 5 FMSHRC at 998-99; *Thurman v. Queen Anne Coal Co.*, 10 FMSHRC 131, 135 (Feb. 1988), *aff'd mem.*, 866 F.2d 431 (6th Cir. 1989). A miner's continuing refusal to work may be deemed unreasonable after an operator has taken reasonable steps to dissipate fears or ensure the safety of the challenged task or condition. *Bush*, 5 FMSHRC at 998-99. The operators do not contest the judge's finding that their response to Bowling's and Ball's March 7 safety concerns was insufficient.

stated that a cutoff time up to 8:00 p.m. was not unreasonable (Tr. I 119). Op. Br. at 11-12.<sup>14</sup> Because the record contains ample evidence to support the judge's decision to credit their claims of fatigue, we will not disturb that determination.<sup>15</sup>

The operators also contend the judge's conclusion that the Mine Act protected the 5:30 p.m. work refusals is inconsistent with his earlier findings that, even under normal working conditions, it was customary for the cutoff driver to be designated as late as 6:00 p.m., and that Bowling and Ball had accepted their positions under those conditions. Op. Br. at 11. However, such an analysis views the events of March 7, 1995, in a vacuum, which the judge properly refused to do. See 19 FMSHRC at 172 (Bowling's and Ball's complaints regarding hours must be viewed in context of their 15 to 16-hour workdays and 6-day work weeks leading up to March 7). Given that the drivers had been exceeding their normal hours for a number of weeks, it was not error for the judge to recognize that their fatigue on March 7 posed a safety hazard even prior to the normal cutoff time. Moreover, the record establishes that Bowling and Ball only acted after it was announced that the cutoff time would again be later than 6:00 p.m. *Id.* at 175.

The judge recited the hours the drivers had been working and the necessity for them to drive multi-ton haul vehicles over mountainous terrain on narrow and winding roads. See 19 FMSHRC at 187-88. Thus the judge adequately supported his finding that Bowling and Ball were fatigued and his conclusion that their fears were reasonable regarding fatigue posing a serious driving hazard. Also, the record reflects that snow and icy conditions interfered with haulage operations that winter, and the haul road was in worse shape than normal. *Id.* at 172, 173. Moreover, there was testimony not only from Bowling and Ball but many others regarding fatigue the drivers were suffering due to their long work hours. See Tr. I 82, 385-86, 408, 573-74, 606-08.<sup>16</sup> Accordingly, we affirm, as supported by substantial evidence, the judge's

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<sup>14</sup> The operators filed two briefs. We cite herein to the brief they filed in response to the Secretary's brief. The operators' other brief, filed in response to the drivers' brief, raises no new arguments and incorporates by reference the operators' brief in response to the Secretary.

<sup>15</sup> A judge's credibility determinations are entitled to great weight and may not be overturned lightly. *Farmer v. Island Creek Coal Co.*, 14 FMSHRC 1537, 1541 (Sept. 1992); *Penn Allegh Coal Co.*, 3 FMSHRC 2767, 2770 (Dec. 1981). Here, the very record citations the operators offer in support of their argument actually buttress the judge's decision to credit the two drivers' claims of fatigue. With regard to Bowling's testimony, the 15 to 16-hour days and 6-day weeks the drivers were working (see 19 FMSHRC at 172, 174) resulted in a work week of at least the 90 hours Bowling found to be excessive. Ball's testimony on the issue was that he believed that working these "[f]ourteen (14), 15, 16 hour shifts, constantly[,] would "get somebody killed," because "everybody was tired and half asleep on the job and wasn't paying attention to what they were doing." Tr. I 115-19.

<sup>16</sup> The operators argue that the judge erred in failing to consider that Mountain Top never had an accident resulting in an injury to a driver or other person. Op. Br. at 12. However, in



conclusion that the March 7, 1995, work refusals of Bowling and Ball were protected under the Mine Act.

2. Whether Bowling and Ball Were Constructively Discharged

In rejecting Bowling's and Ball's claims of constructive discharge, the judge concluded that the two drivers had failed to "demonstrate[] that they were forced to endure intolerable working conditions that forced them to refuse to return to work." 19 FMSHRC at 197. Questioning whether the two drivers "truly desired to return to their jobs" (*id.* at 192), he found that "their actions during the period March 22 through March 29, 1995, were provocative in nature and evidenced attempts to provoke their discharge for the apparent purpose of preserving their pending discrimination complaints." *Id.* at 197. The judge was especially critical of Bowling and Ball's "refusal to work 'a minute' more than ten hours per day[.]" finding such conduct "unreasonable" and that it "provided an independent and unprotected basis for their termination." *Id.* at 194, 197.

a. Whether Working Conditions Were Intolerable

While, as will be discussed below, much of the judge's analysis of the evidence improperly focused on the actions of Bowling and Ball upon their return to work, he did correctly state the proper test for constructive discharge, which is whether it was established that the conditions the two drivers faced upon their return to work were so intolerable that they were forced to quit their jobs. 19 FMSHRC at 189, 197; *see Nantz*, 16 FMSHRC at 2210; *Simpson v. Kenta Energy, Inc.*, 11 FMSHRC 770, 777 (May 1989). The judge also made some findings in that regard. Specifically, the judge noted that Bowling and Ball had been assigned less desirable trucks than they had driven prior to their discharge, acknowledged but did not resolve the question of whether the newly assigned trucks had safety problems, and recognized that the drivers had been the subject of cursing and epithets when complaining about their working conditions. 19 FMSHRC at 193-94. The Secretary and the drivers claim that, in concluding the drivers failed to demonstrate that such conditions were not so intolerable so as to compel them to quit, the judge ignored or failed to appreciate the import of evidence showing how badly Bowling and Ball were treated upon their return to work. S. Br. at 17-22; Drivers Br. at 28-43.<sup>17</sup> The

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considering whether the drivers' fears were reasonable, the judge was obligated to view their perception of a safety hazard from their perspective at the time of their work refusals, and there is no requirement that a miner objectively prove that a hazard actually existed. *Gilbert*, 866 F.2d at 1439.

<sup>17</sup> The judge did not address the drivers' claim below that the record established that Bowling had not actually been reinstated to his job. *See Drivers Post-Hearing Br.* at 2, 38 n.79, 65. The issue not having been raised on appeal, for the purposes of review we do not consider the separate question of whether Bowling and Ball were not returned to work upon legally sufficient offers of reinstatement.

operators contend the record supports the judge's determination that the two drivers were not constructively discharged. Op. Br. at 12-13.

In conducting our review, we keep in mind that intolerable working conditions may be established by evidence of the "alteration of . . . working conditions or other forms of harassment." *Kaynard v. Palby Lingerie, Inc.*, 625 F.2d 1047, 1053 (2d Cir. 1980) (finding, on basis of employer harassment over course of 1 week, reasonable cause to believe that employee was constructively discharged due to union activity). In addition, in determining whether working conditions were so intolerable that a reasonable person would have felt compelled to resign, each incident or working condition should not be viewed discretely, but rather in the context of the cumulative effect it could have on the employee. *See Stephens v. C.I.T. Group/Equipment Financing, Inc.*, 955 F.2d 1023, 1027-28 (5th Cir. 1992). Those incidents or conditions are viewed from the perspective of a reasonable employee alleging such conditions. *See, e.g., Levandos v. Stern Entertainment, Inc.*, 860 F.2d 1227, 1230-31 (3d Cir. 1988); *Williams v. Caterpillar Tractor Co.*, 770 F.2d 47, 50 (6th Cir. 1985).

It is clear that the judge did not take the foregoing principles into account, and thereby failed to conduct a proper review of the evidence regarding Bowling and Ball's working conditions upon their return to work. The judge did not consider whether the operators' treatment of Bowling and Ball constituted harassment in retaliation for their earlier invocation of Mine Act rights. Moreover, when the judge examined the operators' conduct towards Bowling and Ball, he made findings regarding only some of those actions, and then only in isolation. The judge thus failed to consider the totality of the circumstances Bowling and Ball faced from their perspective as employees who had already been discriminated against by the operators, and had complaints pending with MSHA. Consequently, we find fatal flaws in the judge's conclusion that the working conditions imposed upon the two drivers were not intolerable.

Furthermore, we agree with the contentions of the Secretary and the drivers that the judge failed to properly consider that Bowling and Ball were treated differently upon their return to work, both in comparison to the operators' other drivers and in comparison to how the two were treated prior to engaging in their protected work refusals. *See* S. Br. at 18-21; Drivers Br. at 32-35. While the judge acknowledged that the assignment of trucks less desirable than the two drivers' former trucks could be an indication that the operators were discriminating against them because of their protected activity, he asserted that discrimination alone is not sufficient to show constructive discharge. 19 FMSHRC at 194. He stated that in such an instance, a driver can instead bring another discrimination complaint for the disparate treatment. *Id.* The judge erred in dismissing any evidence of disparate treatment as relevant to the question of constructive discharge. *See Watson v. Nationwide Insurance Co.*, 823 F.2d 360, 361-62 (9th Cir. 1987) (discriminatory acts over course of less than 1 month sufficient to establish intolerable conditions). Moreover, the discrimination Bowling and Ball suffered upon their return to work was not limited to being assigned trucks less desirable than they had driven prior to their March 7 protected work refusals.

While we could remand this case for a proper analysis of the evidence, we have found remand unnecessary where the record as whole admits only one conclusion on an issue. See *Walker Stone Co. v. Secretary of Labor*, 156 F.3d 1076, 1085 n.6 (10th Cir. 1998), *affirming* 19 FMSHRC 48, 52-53 (Jan. 1997). Reviewing the record here, we see no reason for remand, as the operators' disparate treatment of Bowling and Ball, considered in its totality from the drivers' perspective, including the delay in assignment and repair of vehicles, their assignment to drive trucks in poor condition, and the scorn and verbal abuse to which the operators subjected the drivers, compels the conclusion that the drivers were subject to intolerable working conditions.

i. Delay in the Assignment and Repair of Vehicles

The judge's constructive discharge analysis does not reflect that, on returning from their previous discriminatory discharge, both Bowling and Ball were made to wait by the operators for a number of hours for their truck assignments. Bowling had to wait on March 23 for approximately 2-1/2 hours to receive his assignment to drive truck 139, and on March 28 both drivers had to wait 2-1/2 hours for their assigned trucks to return to the lot before they could begin hauling, even though there were at least 20 other trucks then in the lot. 19 FMSHRC at 177, 180; Tr. I 138-43, 437-41. As the Mountain Top drivers were not paid an hourly wage, but by the load each hauled, such treatment was clearly adverse to them. We agree with the Secretary and the drivers (S. Br. at 18; Drivers Br. at 36) that the operators' actions in making Bowling and Ball wait without pay before assigning them trucks contributed to the intolerability of their working conditions. Therefore the judge erred in failing to take those actions into account in his constructive discharge analysis.

Moreover, in addition to making Bowling wait without pay for over 2 hours on March 23 before being assigned a truck, even though other trucks were available, the operators eventually assigned him a truck with a broken wheel stud that was still not fixed as of March 28, despite his requests for a repair that would normally be completed in no more than an hour.<sup>18</sup> 19 FMSHRC at 177, 178, 179, 180; Tr. I 428-29, Tr. II 581-82. Because drivers were paid a flat rate of \$6.00 per hour during such repairs, instead of the higher rate they earned while driving, there was a substantial economic cost to Bowling from such disparate treatment.<sup>19</sup>

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<sup>18</sup> Although the welder normally used to make such repairs was disabled during that time period, the operators' agents acknowledged there were other methods of repair that were not attempted. Tr. II 365, 417-18. Furthermore, during that time Mountain Top sent other trucks to a nearby welding shop when necessary. Tr. I 670-71, 672; Tr. II 418. Consequently, we reject the operators' claim that there is no evidence they treated Bowling differently from other drivers' with respect to requests for repairs. See Op. Br. at 13.

<sup>19</sup> The judge found that a Mountain Top driver putting in a 12-hour workday would normally make nine round-trips. 19 FMSHRC at 187. At the \$13.00 per round trip being paid the driver, he would earn \$117.00 for the day, or \$9.75 per hour.

Ball likewise was assigned the older truck 134, and after driving it for one shift, requested repair of a loose U-joint on the truck's steering arm. 19 FMSHRC at 179, 191. When he returned the following morning, and waited 2-1/2 uncompensated hours before again being assigned truck 134, he learned that its U-joint had not been repaired. *Id.* at 180, 191; Tr. I 138, 143. The operators ultimately assigned Ball another truck after he declined to drive the unrepared truck 134, thus implicitly acknowledging that the truck was not in safe operating condition. *See* 19 FMSHRC at 180, 191.

The judge erred by failing to take into account that, upon their return to work, both Bowling and Ball were prevented from driving, and thereby earning the same level of wages they had earned prior to their protected work refusals, due to delays in truck assignments and repairs to the trucks they were assigned. "[E]nforced idleness" has been found by itself to constitute intolerable working conditions, even at a rate of pay that is not reduced. *See Parrett v. City of Connersville*, 737 F.2d 690, 694 (7th Cir. 1984) (policeman given nothing to do). Here, the enforced idleness was at reduced pay, or no pay at all.

ii. Condition of Assigned Vehicles

In discussing the missing wheel stud on Bowling's truck 139, the judge acknowledged that being required to drive an unsafe truck is an intolerable working condition. 19 FMSHRC at 193. He nevertheless rejected Bowling's refusal to drive the truck as "pretextual in nature given [his] other provocative conduct and his refusal to work past 3:00 p.m." *Id.* The judge similarly dismissed Ball's complaint about the U-joint on his newly assigned truck 134. *See id.*

We agree with the Secretary's contention (S. Br. at 20-21) that the judge erred in failing to properly consider the condition of the vehicles which Bowling and Ball were assigned to drive upon their return to work. As will be discussed below, the judge's summary conclusions on the subject are not supported by substantial evidence. *See* slip op. at 16-17. Moreover, Bowling's and Ball's complaints about the condition of the trucks they were assigned were not minor. MSHA Inspector Adron Wilson testified that steering problems related to a faulty U-joint can result in the total loss of control of a truck, and that a broken wheel stud can cause a wheel to come off a truck. Tr. II 578-79.

iii. Scorn and Verbal Abuse by Management

The judge recognized that curses and epithets were directed by management towards Bowling and Ball upon their return, but concluded that the operators' behavior did not make working conditions intolerable under the circumstances, explaining that "[t]here is no evidence of any personal threats," and that "[p]assions run high in labor disputes and epithets and accusations, particularly by truck drivers, are not uncommon in such instances." 19 FMSHRC at 194 (citing *Crown Central Petroleum Corp. v. NLRB*, 430 F.2d 724, 731 (5th Cir. 1970)). The Secretary contends that the verbal abuse and scorn management heaped on Bowling and Ball by itself supports a finding of constructive discharge. S. Br. at 19-20 & n.14.



We agree that this abusive language directed at an employee contributed to intolerable working conditions for Bowling and Ball, particularly when viewed in the context of their prior protected work activity under the Mine Act. In considering whether abusive language directed at an employee contributed to intolerable working conditions, courts have been persuaded by language considerably less harsh than that directed at the two drivers here. *See Wilson v. Monarch Paper Co.*, 939 F.2d 1138, 1140 (5th Cir. 1991) (supervisor referring to employee as "old man"). The courts have also taken such language into account even though it was used on only one occasion. *See Goss v. Exxon Office Sys. Co.*, 747 F.2d 885, 888 (3d Cir. 1984). Here, there were several incidents of abusive language. In addition, courts have considered whether abusive language accompanied demotions to lesser responsibilities or efforts to prevent an employee from doing his or her job, took place in front of other employees, or was in retaliation for the filing of a discrimination complaint. *See Meeks v. Computer Associates Int'l*, 15 F.3d 1013, 1015 (11th Cir. 1994); *Aviles-Martinez v. Monroig*, 963 F.2d 2, 6 (1st Cir. 1992); *Wilson*, 939 F.2d at 1140-41; *Goss*, 747 F.2d at 888. All of those factors are present here, and therefore clearly contributed to the intolerable and coercive effect of the abusive language directed at Bowling and Ball.

We find *Crown Central*, relied on by the judge, inapposite. There, the court found the employer committed an unfair labor practice by disciplining two employees for the language they used and the accusations they made in a *grievance meeting* held pursuant to a collective bargaining agreement. 430 F.2d at 724-31. Here, it is undisputed that the operator's agents directed abusive language at two employees *while they attempted to do their jobs and asserted protective rights*. The judge found that the March 7 complaints by both drivers regarding the danger of working long hours were met with vituperative responses by Elmo Mayes. 19 FMSHRC at 176, 194. The judge also found that Tony Mayes and Riley responded similarly to Ball's statements regarding his working hours, the condition of truck 134's U-joint, and his desire to preshift truck 147. *Id.* at 179, 180, 194.<sup>20</sup> Such a pattern of abusive language in response to miners' exercise of their rights under the Mine Act evinces a contempt for the law and contributes to intolerable working conditions.

The foregoing establishes that, upon their return to work, Bowling and Ball were consistently confronted with pretextual situations orchestrated by the operators to prevent them from driving and thus earning the wages they otherwise would have earned. Having invoked the protection of the Mine Act, first when they engaged in protected work refusals on March 7, 1995, and then when they filed their first discrimination complaints with MSHA shortly thereafter, it was reasonable for the drivers to believe that this mistreatment was a strong indication that the operators would continue to make it impossible for them to work steadily and safely at their livelihood. We are aided in reaching this conclusion by the explicit statements of the operators

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<sup>20</sup> For example, Ball's statement to the operators that he would only drive truck 147 after he had performed the required preshift safety inspection was met with the response that Ball was "a 'cry-ass' who wanted to 'preshift everything in the damn lot.'" 19 FMSHRC at 180 (quoting Tr. I 146).

themselves who colorfully and often profanely reiterated their complete disrespect for statutorily protected safety complaints.

b. Whether the Judge Applied the Proper Test

We also agree with the Secretary's assertion that the judge's constructive discharge analysis is fundamentally flawed because his primary focus was on the actions of Bowling and Ball, rather than on the operators' actions. *See* S. Br. at 17-18. While, as pointed out, the judge correctly stated the proper test for constructive discharge and discussed some of the evidence pertaining to the allegedly intolerable conditions, he devoted the overwhelming majority of his analysis to examining the drivers' actions upon returning to work. *See* 19 FMSHRC at 189-94.

Such an inquiry strays far from the proper focus in a constructive discharge case under the Mine Act, which is on working conditions. Because it is the employer who is ultimately responsible for working conditions, it is the employer's actions that must be closely examined. *See generally Employment Discrimination* at 839-41.<sup>21</sup> Thus, to the extent that the judge ignored how Bowling and Ball were treated by the operators upon their return to work, we reject his analysis as incorrect.

The judge's analysis is further undercut by a number of other errors he made in concluding that the drivers were attempting to provoke another discharge upon their return to work. For instance, because Ball had driven the truck the previous day and only stopped after driving for what he thought to be the legal maximum of 10 hours, the judge rejected as "self-serving and uncorroborated" Ball's refusal on March 28 to drive truck 134 on the ground that it had a loose U-joint. 19 FMSHRC at 192. However, there is record evidence that Ball complained about the U-joint before leaving on March 27, another driver complained about how the truck was handling on the morning of March 28, and the operators consequently agreed to assign Ball to a different truck. *See* 19 FMSHRC at 180, 191; Tr. I 134, 137, 138-45. Substantial evidence, therefore, does not support the judge on this point.

The judge similarly erred in considering Ball's desire to conduct a preshift inspection of that alternate truck, 147, "as provocative and calculated to antagonize." 19 FMSHRC at 193. The judge did so even while recognizing that "preshifts are required." *Id.* We fail to see, and the

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<sup>21</sup> *See, e.g., Liggett Indus., Inc. v. FMSHRC*, 923 F.2d 150, 152-53 (10th Cir. 1991) (court agreed that welder with diagnosed respiratory condition was justified in quitting inadequately ventilated mine where operator demonstrated no intention of improving ventilation); *Simpson*, 842 F.2d at 463 (miner justified in quitting rather than continuing to work in mine in which operator was responsible for multiple "blatant" safety violations that had repeatedly and continually occurred); *Nantz*, 16 FMSHRC at 2210-13 (bulldozer operator's decision to quit justified in light of operator's failure to protect him from dust which caused breathing and visibility problems).

judge does not explain, why Ball's desire to preshift the truck should be held against him. Preshifting was not only Ball's right, but his duty.

The judge also erred in his analysis of Bowling's actions. Most notably, the judge concluded that Bowling's refusal to drive truck 139 with a broken wheel stud could not qualify as protected activity because it was not made in good faith. *Id.* The judge based his finding of a lack of good faith on, among other things,<sup>22</sup> "Bowling's . . . refusal to work past 3:00 p.m." *Id.* However, as previously mentioned, Bowling made no such refusal.

c. Conclusion

We think this record leads to only one conclusion — that, considered cumulatively, the conditions Bowling and Ball encountered upon their return to work were so intolerable that it was reasonable for them to cease attempting to convince the operators of the seriousness of their safety complaints, and terminate whatever employment relationship remained. *See Gold Coast Restaurant Corp. v. NLRB*, 995 F.2d 257, 265-66 (D.C. Cir. 1993) (constructive discharge established where employer took actions resulting in reduction of employee's pay, engaged in disparate disciplinary action, and threatened employee). When "an employee quits because she reasonably believes there is no chance for fair treatment, there has been a constructive discharge." *Kimzey v. Wal-Mart Stores, Inc.*, 107 F.3d 568, 574 (8th Cir. 1997). In light of the foregoing, we reverse the judge's determination that Bowling and Ball failed to prove that they were constructively discharged as of March 28, 1995, and remand the case for a determination of the proper remedies and penalties in light of our ruling.<sup>23</sup>

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<sup>22</sup> The judge also appears to discredit Bowling's initial complaints regarding the condition of truck 139 because those complaints were based not on the driver's inspection of the truck upon its assignment to him, but on his previous experience with it. *See* 19 FMSHRC at 177. However, it is undisputed that Bowling was correct in his claim that truck 139 had a broken wheel stud.

<sup>23</sup> Our dissenting colleague disputes our finding of a constructive discharge by suggesting that Bowling and Ball were not exposed to adverse working conditions following their rehiring for a sufficient period of time to support such a finding, and that they did not make an adequate effort to remain on the job and thereby mitigate their damages. *See slip op.* at 28, 29, 30, 31-32. We respectfully disagree. We do not believe that any miner could be reasonably expected to endure the extremely intolerable working conditions to which Bowling and Ball were exposed, or the high degree of hostility that management officials demonstrated to them and their protected activities, for a period of months or years. Rather, in our view, the record compels the conclusion that the operators convincingly demonstrated to these miners in just a few short days that they were unwanted and would continue to experience highly intolerable working conditions until they voluntarily terminated their reestablished employment relationship. Even our dissenting colleague acknowledges that the case law will support a finding of constructive discharge where, considered cumulatively, "the conditions alleged to be intolerable existed over

### III.

#### Walter Jackson

##### A. Factual and Procedural Background

Jackson, who had no prior experience as a truck driver, was hired by Mountain Top approximately 9 months prior to his discharge on February 17, 1995. 19 FMSHRC at 181. That night, after dumping his tenth load of coal for the day, he pulled into Mountain Top's truck lot for a prearranged meeting with Riley so they could inspect the truck he was driving that day, 139. *Id.* at 181-82. Jackson had reported experiencing problems with the truck's transmission, blue smoke emissions, and a lack of oil pressure during his previous return trip from the mine. *Id.* As soon as Riley began inspecting the truck, Elmo Mayes, who had overheard the CB conversations between Riley and Jackson but had nonetheless told the scaleman to designate Jackson as the cut-off driver, arrived in the lot and ordered Riley to get Jackson back out on the road to get the last load. *Id.* at 171, 182-83. When Jackson told Elmo Mayes he would return for the last load as soon as it was determined that it was safe to do so in his truck, Elmo Mayes objected to any further delay and told Jackson he was fired if he did not get the load. *Id.* at 183. The next month, Jackson filed a discrimination complaint with MSHA, alleging that he was fired for refusing to operate an unsafe truck after having operated the truck for 16 hours that day. *Id.*; see Gov't Ex. 34. As relief, he requested reinstatement with backpay and regulated working hours, breaks, and lunch breaks. *Id.*

The Secretary filed an application for temporary reinstatement on Jackson's behalf that was consolidated with similar applications filed on behalf of Bowling and another of the operators' drivers, whose discrimination complaint was later withdrawn.<sup>24</sup> 19 FMSHRC at 168; 19 FMSHRC 661, 662 (Mar. 1997) (ALJ). At the outset of the first day of hearings on the applications, the Secretary moved to withdraw Jackson's application at his request because he had obtained full-time employment with Cumberland Mine Service ("Cumberland") as of August 1, 1995. 19 FMSHRC at 878. Consequently, while the two other applications were granted by

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an extended period of time *or* there were indications that they had become permanent employment conditions." Slip op. at 31 (citations omitted) (emphasis added). We conclude the record unequivocally demonstrates that the latter situation was clearly present here.

<sup>24</sup> Under section 105(c)(2), upon investigating a miner's complaint of discriminatory discharge, and finding that complaint has not been "frivolously brought," the Secretary must apply to the Commission for an order temporarily reinstating the miner to his position, pending a final order on the discrimination complaint, if the miner desires temporary reinstatement. 30 U.S.C. § 815(c)(2). The Commission is required to grant the application if it finds the statutory standard has been met. *Id.*; see generally *Jim Walter Resources, Inc. v. FMSHRC*, 920 F.2d 738 (11th Cir. 1990).



the judge, Jackson's was dismissed without prejudice to his discrimination complaint. 17 FMSHRC at 1709-10.

Jackson was employed at Cumberland until October 10, 1995, when he was laid-off. 19 FMSHRC at 878. The only subsequent time Jackson was employed between that layoff and June 21, 1996, when Mayes Trucking allegedly stopped hauling coal for Lone Mountain, was 2 weeks in January 1996. *Id.* at 878-79. The Secretary was unable to specify when she first learned of Jackson's layoff from Cumberland, and Jackson never requested that his application for temporary reinstatement be reopened. *Id.* at 879.

The judge found that Jackson was discriminatorily discharged. 19 FMSHRC at 185-86. In order to determine the proper period for relief, the judge requested information on whether Jackson, after being laid off from Cumberland, had ever inquired of the Secretary regarding refiling or reopening his temporary reinstatement application. 19 FMSHRC at 664. The judge also asked for the parties' views on whether Jackson's failure to make such an inquiry should be considered in determining whether he had made reasonable efforts to mitigate his damages. *Id.*

In his decision on relief, the judge found it reasonable that Jackson withdrew his temporary reinstatement application upon finding a permanent position, and that Jackson continued to seek full-time employment for a period of time after being laid off from that job. 19 FMSHRC at 882. However, he concluded that "there comes a point in time when one who has been unsuccessful at securing other employment, and who is seeking reinstatement relief in this proceeding, is obliged to make efforts to reopen his temporary reinstatement application." *Id.* Distinguishing the Commission's decision in *Secretary of Labor on behalf of Dunmire v. Northern Coal Co.*, 4 FMSHRC 126, 144 (Feb. 1982), the judge found that it was unreasonable for Jackson to remain unemployed for months without making at least an inquiry of the Secretary regarding reopening of the temporary reinstatement case, especially given that the two other drivers whose applications had been consolidated with his had been successful in obtaining temporary reinstatement orders. *Id.* at 879-82. Consequently, the judge limited the backpay period to the 60 days subsequent to Jackson's layoff from Cumberland. *Id.* at 882-83. On review, the Secretary and the drivers challenge the judge's decision on the mitigation issue.

#### B. Disposition

The Secretary argues that, contrary to the judge's conclusion, a miner has no affirmative duty to seek temporary reinstatement as a means of mitigating damages, especially when he is otherwise actively seeking alternative employment. S. Br. at 24-28. The Secretary also suggests that it was not unreasonable for Jackson, a non-lawyer, to believe that, by withdrawing his application, he had permanently terminated his right to temporary reinstatement. S. Br. at 28-29. The operators argue that once Jackson withdrew his temporary reinstatement application on August 23, 1995, he forfeited the right to further backpay, so the judge erred in including in the relief order backpay for any time after that point. Op. Br. at 14-15.

The Commission applies an abuse of discretion standard in reviewing a judge's remedial orders. See *Secretary of Labor on behalf of Reike v. Akzo Nobel Salt Inc.*, 19 FMSHRC 1254, 1257-58 (July 1997). "Abuse of discretion may be found when 'there is no evidence to support the decision or if the decision is based on an improper understanding of the law.'" *Id.* at 1258 n.3 (quoting *Mingo Logan Coal Co.*, 19 FMSHRC 246, 249-50 n.5 (Feb. 1997), *aff'd*, 133 F.3d 916 (4th Cir. 1998) (per curiam) (unpublished table decision)).

Under Section 105(c), the Commission is authorized to "require a person committing a violation of this subsection to take such affirmative action to abate the violation as the Commission deems appropriate, including, but not limited to, the rehiring or reinstatement of the miner to his former position with back pay and interest." 30 U.S.C. § 815(c)(2). Accordingly, the Commission endeavors to make miners whole and to return them to their status before the illegal discrimination occurred. *Secretary of Labor on behalf of Bailey v. Arkansas-Carbona Co.*, 5 FMSHRC 2042, 2056 (Dec. 1983). "Our concern and duty is to restore discriminatees, as nearly as we can, to the enjoyment of the wages and benefits they lost as a result of their illegal terminations." *Dunmire*, 4 FMSHRC at 143. "Unless compelling reasons point to the contrary, the full measure of relief should be granted to" a discriminatee. *Bailey*, 5 FMSHRC at 2049 (quoting *Secretary of Labor on behalf of Gooslin v. Kentucky Carbon Corp.*, 4 FMSHRC 1, 2 (Jan. 1982)).

*Dunmire* recognized the failure of a discriminatee to mitigate his damages as one such compelling reason that could warrant less than complete relief. See 4 FMSHRC at 144 (while "back pay is ordinarily the sum equal to the gross pay the employee would have earned but for the discrimination less his actual net interim earnings[.]" a discriminatee's award of "back pay may be reduced in appropriate circumstances where an employee incurs a 'willful loss of earnings'" (quoting *Oil, Chemical & Atomic Workers Int'l Union v. NLRB*, 547 F.2d 598, 602-03 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 1078 (1977)). In *Dunmire* the operator alleged that a discriminatee who had not sought temporary reinstatement had failed to mitigate his damages to the extent that he could have earned more upon reinstatement than he did from the alternative employment he had obtained. *Secretary of Labor on behalf of Dunmire v. Northern Coal Co.*, 3 FMSHRC 1331, 1344 (May 1981) (ALJ). In concluding that the discriminatee had made the required reasonable efforts to mitigate his loss of income, the Commission expressly stated that the Mine Act does not "require[]" the discriminatee "to seek temporary reinstatement[.]" *Dunmire*, 4 FMSHRC at 144 (emphasis in original).

In this case, the only record evidence upon which a finding of a failure to mitigate by Jackson could rest is his failure to seek reopening of his reinstatement application.<sup>25</sup> Given that

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<sup>25</sup> The operators attached to their briefs three pieces of evidence not submitted below. The evidence relates to their arguments that Jackson was not discriminated against for engaging in a protected work refusal, and, that by withdrawing his temporary reinstatement application on August 23, 1995, he forfeited any right to backpay beyond that point. Op. Br. at 13-16 & Addendums 1-2. However, because these contentions were not raised by the operators in a PDR,

there is no evidence that Jackson even knew that he had a right to ask the Secretary to refile his application for temporary reinstatement, and because the burden of proving a failure to mitigate is on the operator (*Metric Constructors, Inc.*, 6 FMSHRC 226, 233 (Feb. 1984), *aff'd*, 766 F.2d 469 (11th Cir. 1985)), the only conclusion that the record can support is that the operator did not show a failure to mitigate on the part of Jackson.<sup>26</sup> Accordingly, remand is limited to a recalculation of backpay and interest owed Jackson consistent with our conclusion that it was not shown that Jackson failed to mitigate his damages.

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were not ordered by the Commission sua sponte for review, and attack the judge's orders granting Jackson's discrimination complaint and establishing a backpay period for him running until December 9, 1995, they are not properly before the Commission. *See* 30 U.S.C. § 823(d)(2)(A)(iii), (B); *Secretary of Labor on behalf of Price v. Jim Walter Resources, Inc.*, 12 FMSHRC 1521, 1529 (Aug. 1990) (respondent may not attack judgment or seek to enlarge its rights thereunder without filing cross-petition for discretionary review). In addition, because they were not part of the record before the judge, the documents the operators attached to their brief cannot properly be considered by the Commission on review. *See Consolidation Coal Co.*, 18 FMSHRC 1541, 1544-45 (Sept. 1996). Consequently, we granted the Secretary's motion to strike those documents and all references thereto in the operators' briefs. *See Unpublished Order* dated July 27, 1998, at 1-2.

<sup>26</sup> We take no position on whether a miner's failure to seek temporary reinstatement can ever be taken into account in determining whether that miner made reasonable efforts to mitigate damages.

V.

Conclusion

For the foregoing reasons, we reverse the judge's determinations that Bowling and Ball were not constructively discharged and that Jackson failed to mitigate his damages. The proceeding is remanded for a determination of the proper relief to be awarded for the constructive discharge of Bowling and Ball, a reassessment of the penalty against the operators for their violations of section 105(c) with respect to Bowling and Ball, and a recalculation of the backpay and interest owed Jackson.

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Mary Lu Jordan, Chairman

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Marc Lincoln Marks, Commissioner

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James C. Riley, Commissioner

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Robert H. Beatty, Jr., Commissioner



Commissioner Verheggen, dissenting in part and concurring in part:

As explained below, I concur in result with Part III.B of the majority decision, and dissent from Part II.B of their decision.

A. Jackson's Duty To Mitigate Damages

I agree with my colleagues that the judge improperly reduced Jackson's award of backpay based on Jackson's failure to seek temporary reinstatement while unemployed. I write separately, however, because I reach this conclusion on different grounds.

First, I believe that the procedural facts relating to Jackson's claim raise concerns with the Secretary's role as Jackson's counsel.<sup>1</sup> Jackson was fired by Mountain Top on February 17, 1995. 19 FMSHRC at 181. In the ensuing months, the Secretary filed a discrimination complaint on Jackson's behalf, and applied for his temporary reinstatement. *Id.* at 167; 17 FMSHRC at 1696. On August 1, 1995, Jackson obtained a job with Cumberland Mine Service. 19 FMSHRC at 882. The Secretary moved to withdraw Jackson's application for temporary reinstatement at a hearing held on August 23-24, 1995 (17 FMSHRC at 1696), a motion the judge granted in a decision released on October 5, 1995 (*id.* at 1695, 1710). On October 10, 1995, five days after the judge issued his decision, Cumberland Mine Service laid off Jackson. 19 FMSHRC at 882. Jackson's complaint went to a hearing during the summer of 1996. 19 FMSHRC at 168. On January 23, 1997, the judge issued a decision finding that Mountain Top discriminated against Jackson and ordering the parties to propose appropriate relief. *Id.* at 204-05.

On March 6, 1997, Jackson submitted a statement of the relief he sought, and also stated, among other things, that Cumberland Mine Service laid him off in October 1995. 19 FMSHRC 661, 662 (Mar. 1997). In response to Jackson's submission, the judge directed the parties to address the issue of whether Jackson was under any obligation after being laid off to mitigate his damages by seeking to reopen his temporary reinstatement application. *Id.* at 664. In her response to the judge's order, the Secretary was unable to state when she discovered that Jackson had been laid off. 19 FMSHRC at 879. In his final decision, the judge held:

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<sup>1</sup> Section 105(c)(2) of the Mine Act in effect designates the Secretary as statutory counsel for any miner who complains of discrimination and whose complaint is found to be meritorious by the Secretary. 30 U.S.C. § 815(c)(2). Although such a miner has the statutory right to "present additional evidence on his own behalf," *id.*, has a right to private counsel, *Secretary of Labor on behalf of Bowling v. Mountain Top Trucking Co.*, 18 FMSHRC 487, 488 (Apr. 1996), and is accorded party status, 29 C.F.R. § 2700.4(a), he or she has no independent cause of action under section 105(c)(2). The Secretary has the *exclusive* right to proceed before the Commission on behalf of a complainant under section 105(c)(2), including the filing of any application for temporary reinstatement.

While . . . it may have been reasonable for Jackson to pursue permanent employment for a reasonable period of time after his October 10, 1995, lay-off, there comes a point in time when one who has been unsuccessful at securing other employment, and who is seeking reinstatement relief in this proceeding, is obliged to make efforts to reopen his temporary reinstatement application. . . . [W]ithout so much as an inquiry with the Secretary about the possibility of reopening his temporary reinstatement case . . . does not persuade me that Jackson has demonstrated reasonable efforts to mitigate his loss of earnings.

*Id.* at 882. The judge then held that the “point in time” when Jackson was obligated to “make efforts to reopen his temporary reinstatement application” was 60 days after being laid off. *Id.* at 883.

I find several aspects of the judge’s holding erroneous. But more importantly, as a threshold matter, I find disturbing the fact that, in the course of an ongoing discrimination proceeding, the Secretary failed to keep abreast of Jackson’s employment status. She was, after all, Jackson’s statutory counsel, and was presumably preparing for a hearing on this matter during the spring of 1996. I fail to comprehend how such trial preparations could adequately be made without the Secretary preparing an appropriate prayer for relief on which to present evidence at trial. The outcome in this case can only lead me to conclude that no such preparations took place and that the Secretary was apparently less than zealous in representing Jackson’s interests. I also find troubling the fact that, when the Secretary moved to withdraw Jackson’s temporary reinstatement application, she apparently failed to inform him that she could reopen his application if his job at Cumberland Mine Services failed to work out.

As to the judge’s decision, I disagree that *Jackson* was “obliged to make efforts to reopen his temporary reinstatement application.” *Id.* at 882. Clearly, only the *Secretary* could have made any such efforts. 30 U.S.C. § 815(c)(2). Moreover, I do not believe that, in the absence of any evidence that the Secretary informed Jackson of the possibility of reopening his application, that the judge should have retroactively placed the burden upon Jackson to have made “an inquiry with the Secretary about the possibility of reopening his [application].” 19 FMSHRC at 882.

I also find the judge erred as a matter of law in applying Commission precedent on mitigation of damages. The Commission has held that to properly mitigate damages, a discriminatee “must reasonably search for a suitable alternative job.” *Metric Constructors*, 6 FMSHRC at 232. Under this objective standard, all the particular facts and circumstances of a case must be weighed against what would constitute a reasonable effort upon the part of the discriminatee to find employment. The judge, however, in effect based his ruling simply on the fact that Jackson neglected to ask the Secretary to reopen his temporary reinstatement application, it being the single circumstance on which the judge based his conclusion that

Jackson failed to make “reasonable efforts to mitigate his loss of earnings.” 19 FMSHRC at 882. As a matter of law, the judge’s inquiry was inadequate to determine whether Jackson “reasonably search[ed] for a suitable alternative job.” 6 FMSHRC at 232. I also find that the judge’s conclusion is not supported by substantial evidence since the record is largely silent on this point.<sup>2</sup>

I agree with the majority that “the burden of proving a failure to mitigate is on the operator . . .” Slip op. at 21 (citing *Metric Constructors*, 6 FMSHRC at 233). Here, I have reviewed the record and determined that Mountain Top simply failed to adduce any evidence whatsoever that Jackson failed to “reasonably search for a suitable alternative job,” 6 FMSHRC at 232, and that it was the *Secretary* who offered evidence into the record that Jackson had been laid off and did not ask for his temporary reinstatement application to be reopened, 19 FMSHRC at 879. Insofar as Mountain Top could be said to have raised this defense,<sup>3</sup> I find as a matter of law that they failed to carry their burden to establish such a defense. I therefore join with my colleagues in reversing the judge’s calculation of Jackson’s damages and remanding for a recalculation of his damages “consistent with [the] conclusion that it was not shown that Jackson failed to mitigate his damages.” Slip op. at 21.

B. The Constructive Discharge Claims of Bowling and Ball

I disagree with my colleagues’ holding that Bowling and Ball were constructively discharged. The majority correctly recognizes that, “[u]nder the Mine Act, ‘[a] constructive discharge is proven when a miner engaged in protected activity shows that an operator created or maintained conditions so intolerable that a reasonable miner would have felt compelled to resign.’” Slip op. at 8 (quoting *Nantz*, 16 FMSHRC at 2210). What the majority fails to acknowledge is that when this standard of proof was established, in *Simpson v. FMSHRC*, 842 F.2d 453, 461-63 (D.C. Cir. 1988), the court, by then Judge Ruth Bader Ginsburg, was careful to state that “the requirement that conditions be ‘intolerable’ to support a constructive discharge will not easily be met. Minor or technical violations of the Mine Act, or those that do not endanger health and safety, ordinarily will not support a finding of constructive discharge.” *Id.* at 463. Just as importantly, the court also explained that “[w]hether conditions are so intolerable that a reasonable person would feel compelled to resign is a question for the trier of fact.” *Id.*<sup>4</sup>

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<sup>2</sup> Incidentally, I find that the judge’s imposition of a 60-day period beyond which Jackson was purportedly under an obligation to ask the Secretary to reopen his temporary reinstatement application (19 FMSHRC at 883) has no basis in law or the record of this case.

<sup>3</sup> In fact, it was the *judge* who raised the issue of mitigation sua sponte in his Order Requesting Comments on the Calculation Period for Damages. See 19 FMSHRC at 663-64.

<sup>4</sup> While the majority reviews the record primarily in light of non-Mine Act case law (see slip op. at 11-15, 17), the court in *Simpson* stated that the test it was establishing under the Mine Act for constructive discharge was “[t]he same test [that] is employed in adjudicating

Despite these clear pronouncements that the burden of proving constructive discharge under the Mine Act is not easy to meet, and that the question of the intolerability of working conditions is for the Commission administrative law judge hearing the case to resolve in the first instance, the majority reverses the judge's factual finding that Bowling and Ball failed to prove that their working conditions were intolerable. I cannot agree with the majority's decision. It is clear from the judge's decision that he applied the proper standard for constructive discharge.<sup>5</sup> As will be discussed in further detail below, it is also clear that he adequately considered the relevant evidence on the two drivers' working conditions upon their return to work. The judge noted that the two drivers had been assigned less desirable trucks than they had driven prior to their discharge, that those trucks had safety problems, and that the drivers had been the subject of cursing and epithets when complaining about their working conditions. 19 FMSHRC at 193-94. Nevertheless, he concluded that the drivers had not demonstrated that the conditions they faced were so intolerable so as compel them to quit. *Id.* at 197.

I believe that substantial evidence supports the judge's conclusion that Bowling and Ball did not prove that they faced intolerable working conditions. *See* 30 U.S.C. § 823(d)(2)(A)(ii)(I); *Wyoming Fuel Co.*, 16 FMSHRC 1618, 1627 (Aug. 1994). Under the substantial evidence test, the Commission is not only limited to searching for, as the majority recognizes, "such relevant evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion" (slip op. at 8 n.11), but it also may not "substitute a competing view of the facts for the view [an] ALJ reasonably reached." *Donovan ex rel. Chacon v. Phelps Dodge Corp.*, 709 F.2d 86, 92 (D.C. Cir. 1983); *see also Wellmore Coal Corp. v. FMSHRC*, No. 97-1280, 1997 WL 794132 at \*3 (4th Cir. Dec. 30, 1997), *cert. denied*, 142 L. Ed. 2d 541 (1998). As will be demonstrated

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constructive discharge claims under other statutes that protect employees exercising statutory rights from adverse job action." 842 F.2d at 461-62. A review of the case law under such other statutes confirms the court's statement. *See, e.g., Chrystal Princeton Refining Co.*, 222 NLRB 1068, 1069, 91 LRRM 1302, 1303 (1976) (to establish constructive discharge under National Labor Relations Act, employee must prove that burden imposed upon him by change in working conditions is so difficult or unpleasant as to force him to resign).

<sup>5</sup> While it is true that the judge engaged in a lengthy analysis of the actions of the two drivers upon their return to work, that analysis was in addition to, and not in the place of, application of the proper test for constructive discharge. As the majority recognizes (slip op. at 11), before analyzing the evidence, the judge correctly stated that "Bowling and Ball have the burden of establishing that they were forced to endure the requisite intolerable working conditions that forced them to quit their jobs on March 29, 1995." *See* 19 FMSHRC at 189. After discussing the evidence, including that on the allegedly intolerable conditions (*see id.* at 193-94), the judge concluded that "Bowling and Ball have not demonstrated that they were forced to endure intolerable working conditions that forced them to refuse to return to work." *Id.* at 197. Consequently, I cannot agree with the majority that the judge's discussion of Bowling and Ball's actions prevents a finding that the judge applied the proper test for constructive discharge. *See* slip op. at 16-17.



below, in this case the majority ignores the foregoing precedent and draws its own conclusions from the evidence on a question of fact reserved to the judge and on which his determination is amply supported by the record and thus reasonable.

# 1. Discriminatory Treatment

The majority asserts that the judge “erred in dismissing any evidence of disparate treatment [of Bowling and Ball] as relevant to the question of constructive discharge. Slip op. at 12. The judge, however, did not dismiss the evidence that Bowling and Ball were discriminated against upon their return to work. The judge correctly recognized that the assignment of trucks less desirable than the drivers’ former trucks could be an indication that the operators were discriminating against them because of their protected activity. See 19 FMSHRC at 194. The judge concluded, however, that discrimination alone is not sufficient to establish the intolerable conditions necessary to prove constructive discharge. *Id.*<sup>6</sup>

The judge’s conclusion has a solid legal foundation. In *Clark v. Marsh*, the District of Columbia Circuit held that discrimination by itself is generally insufficient to establish the requisite intolerable conditions, but instead must be accompanied by “aggravating factors.” 665 F.2d 1168, 1173-76 (D.C. Cir. 1981). Most of the courts that apply the intolerability standard are in agreement with the approach followed in *Clark*. See *Employment Discrimination* at 842.<sup>7</sup> See also *Ramsey v. Industrial Constructors Corp.*, 12 FMSHRC 1587, 1593 (Aug. 1990) (“The cases cited by the [District of Columbia Circuit] in *Simpson* [842 F.2d at 461-63] agree that a finding of constructive discharge must demonstrate ‘aggravating factors such as a continuous pattern of discriminatory treatment.’”).

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<sup>6</sup> The judge stated that in such an instance, the drivers can instead bring a discrimination complaint for the disparate treatment. 19 FMSHRC at 194. Actually, all the drivers needed to do was amend their complaints that were pending with MSHA. However, despite the focus by the Secretary and the drivers on the discrimination Bowling and Ball suffered upon their return to work, there is no indication in the record that there was an alternative claim made that, even if they were not constructively discharged, the drivers were at least entitled to back pay relief for that discrimination, such as for the waiting time for which they were not paid or, in Bowling’s case, the repair time for which he received reduced pay. In essence, the Secretary and drivers adopted the risky litigation strategy of putting all of their eggs in one basket.

<sup>7</sup> Nevertheless, the majority’s analysis does not mention the concept of “aggravating factors.” Instead, my colleagues state that “the Commission and Courts have not always insisted on this concept [of aggravating factors] when discussing constructive discharge.” Slip op. at 8 n.10. What my colleagues mean by this statement is unclear, other than to suggest that they reject the *Clark* court’s holding that discrimination alone is generally insufficient to justify a discriminatee from walking off a job and establish a constructive discharge. See 665 F.2d at 1173-76.

In *Clark*, aggravating factors were found in the “historic” and “continuous pattern of discrimination” the plaintiff faced, as well as her “repeated but futile attempts to obtain relief from that discrimination” that took place over the course of 5 years. *Clark*, 665 F.2d at 1170, 1174, 1175. Other courts have also “upheld factual findings of constructive discharge when the plaintiff was subjected to incidents of differential treatment over a period of months or years.” *Watson v. Nationwide Insurance Co.*, 823 F.2d 360, 361 (9th Cir. 1987) (citing cases).

Even though the discrimination suffered by Bowling and Ball took place over a far shorter period of time, the majority finds it persuasive. *See slip op.* at 12. After his discriminatory discharge on March 7, Ball returned to work later that month for little more than one day before leaving and never returning. While Bowling appeared for work on three separate days, he never did so for more than a few hours, even though he would have been paid \$6.00 per hour until his assigned truck was repaired. Under such circumstances, and given the case law, I cannot agree that the judge erred in concluding that the discrimination suffered by Bowling and Ball was insufficient, by itself, to establish that the working conditions they faced upon their return were intolerable.<sup>8</sup>

Because the discrimination against the two drivers was insufficient by itself to establish intolerable conditions, it was thus necessary for the judge to examine how the two were otherwise treated.

## 2. Other Aggravating Factors

### a. Delay in the Assignment and Repair of Vehicles

The majority agrees with the Secretary and the drivers that the judge erred by failing to take into account that the operators delayed assigning trucks to the two drivers and delayed repairing the trucks that were eventually assigned them, characterizing this as “enforced idleness” that by itself could constitute intolerable working conditions. *Slip op.* at 13-14. The majority is apparently swayed by the Secretary’s and the drivers’ argument that the judge failed to consider that Bowling and Ball were made to wait “long periods,” “hours on end,” and “without pay” before trucks were assigned to them. *S. Br.* at 18; *Drivers Br.* at 36.

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<sup>8</sup> The majority cites *Watson*, 823 F.2d at 361-62, in support of its decision, because the discrimination and abusive treatment the plaintiff suffered in *Watson* occurred over a period of less than one month. *Slip op.* at 12. However, the court in *Watson* stated that “these facts . . . could constitute the necessary aggravating factors such that a trier of fact could (but not necessarily would) conclude that reasonable person would find the conditions so intolerable and discriminatory as to justify resigning.” 823 F.2d at 362 (emphasis added). Thus, *Watson* cannot be relied upon as support for reversing the judge’s conclusion that the drivers’ working conditions were not proven to be intolerable.

However, with regard to delay in the assignment of trucks, what is at issue is, at most, only the 2½-hour period Bowling had to wait on March 24 to receive his assignment to drive truck 139 and the 3-hour period he waited for that truck to return to the lot on March 28, as well as the 2½-hour period Ball had to wait on March 28 for his assigned truck to return to the lot before he could begin hauling in it. As for the delay in truck repair, the record indicates that Bowling waited for only 1-1/2 hours on the mornings of March 24 and March 27 for the wheel stud to be repaired on truck 139 before leaving each day, thus forfeiting the \$6.00 per-hour he would have been paid for continuing to wait. See 19 FMSHRC at 190-91, 193.

While I agree with the majority that delays in assignment of vehicles and their repair are relevant considerations in examining working conditions, the few hours at issue here hardly justifies reversing the judge and independently finding that the two drivers' working conditions were intolerable. To the extent that the two drivers were subject to "enforced idleness,"<sup>9</sup> even the cases the drivers cite as having applied that concept were all ones in which the idleness occurred over a period of much longer than a few hours, or appeared to have become a permanent condition of employment. See *Drivers Br.* at 42-43.<sup>10</sup> That not being the case here, I do not believe the judge committed error, much less reversible error, by failing to take into account the time the drivers waited to be assigned trucks, or the time Bowling waited for his truck to be repaired, in concluding that constructive discharge was not established.

b. Condition of Assigned Vehicles

The majority also finds that the judge erred in his consideration of the condition of the vehicles Bowling and Ball were assigned to drive upon their return to work. Slip op. at 14. However, it is clear from his decision that the judge adequately considered the issue, as he acknowledged that being required to drive an unsafe truck is an intolerable condition. See 19 FMSHRC at 193. He stopped his analysis at that point because the record is clear that neither driver was "required" to drive an unsafe vehicle. As the majority recognizes (slip op. at 3, 5-6), when Bowling refused to drive truck 139 without the wheel stud being repaired, the operators did

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<sup>9</sup> Ironically, in the case cited by the majority, *Parret v. City of Connersville*, 737 F.2d 690, 693-94 (7th Cir. 1984), the court suggested that constructive discharge may not lie for enforced idleness if the work an employee was being paid not to do was "dangerous . . . or otherwise disagreeable." *Id.* at 694. In any event, that is another case in which the court held that the record evidence of enforced idleness could support the finding of intolerable conditions reached below, a much different proposition than the majority's conclusion here that a finding of intolerable conditions is compelled by the record and is the only conclusion a reasonable trier of fact could reach.

<sup>10</sup> Citing *Parish v. Immanuel Medical Center*, 92 F.3d 727, 732-34 (8th Cir. 1996) (permanent demotion to demeaning and intolerable work); *Sanchez v. Puerto Rico Oil Co.*, 37 F.3d 712 (1st Cir. 1994) (6 months); *Wilson v. Monarch Paper Co.*, 939 F.2d 1138 (5th Cir. 1991) (months); *Parret*, 737 F.2d at 693-94 (3 months).

not order him to drive it, but rather took it out of service for repairs, during which time Bowling was to receive reduced pay. *See Drivers Br.* at 37 (citing Tr. II 356, 358). Similarly, and again as the majority acknowledges, when Ball refused to operate truck 134, asserting that the U-joint was loose, he was offered another truck. *Slip op.* at 7. Consequently, unlike the majority, I cannot agree with the Secretary's contention that the resignations of Bowling and Ball were justified by their "repeated exposure to unsafe conditions." *See S. Br.* at 19 n.14. Unlike in previous Mine Act constructive discharge cases, the employees here were not faced with the choice of continuing to work in dangerous conditions or quitting.<sup>11</sup> The record amply demonstrates that Bowling and Ball each had other choices available to them.

c. Language Used by Management

The majority acknowledges that the judge took into account in his constructive discharge analysis the language the operators used when speaking with Bowling and Ball, but examines the same record and agrees with the Secretary that such language contributed to intolerable working conditions for the two drivers. *See slip op.* at 14-15. Again, the majority bases its conclusion on case law (*see id.* at 14-15), but, again, in none of the cases cited did the court hold that a finding of intolerable working conditions was compelled by the facts. Moreover, all of those cases contain key facts vastly different than the facts of this case. *See, e.g., Meeks v. Computer Associates Intl.*, 15 F.3d 1013 (11th Cir. 1994) (confrontations taking place over months); *Wilson v. Monarch Paper Co.*, 939 F.2d 1138 (5th Cir. 1991) (same); *Aviles-Martinez v. Monroig*, 963 F.2d 2 (1st Cir. 1992) (daily abuse for 1 year); *Goss v. Exxon Office Systems Co.*, 747 F.2d 885, 888 (3d Cir. 1984) (pregnancy-related abuse). It thus is hardly reversible error for the judge to have come to a different conclusion in this case, given that Bowling and Ball returned to work for only a matter of hours before resigning.

d. Cumulative Effect of Conditions

I agree with the majority that the question of intolerability of working conditions must be addressed by examining the totality of the circumstances. *See slip op.* at 12, 15, 17.<sup>12</sup> However,

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<sup>11</sup> *See, e.g., Liggett Indus., Inc. v. FMSHRC*, 923 F.2d 150, 152-53 (10th Cir. 1991) (welder with diagnosed respiratory condition justified in quitting inadequately ventilated mine where operator demonstrated no intention of improving ventilation); *Simpson*, 842 F.2d at 463 (miner justified in quitting rather than continuing to work in mine in which operator was responsible for multiple "blatant" safety violations that had repeatedly and continually occurred); *Nantz*, 16 FMSHRC at 2210-11 (dust which caused breathing and visibility problems and which operator could have protected him from but did not justify bulldozer operator's decision to quit); *see also Ramsey*, 12 FMSHRC at 1593-94 (no constructive discharge established, given working conditions and no continuous pattern of operator misconduct).

<sup>12</sup> Regardless of whether the operators "had it in" for Bowling and Ball upon their return, as the majority essentially asserts (*see slip op.* at 15), "an employer's subjective intent is



in almost all of the cases they cite in support of that proposition the conditions alleged to be intolerable existed over an extended period of time or there were indications that they had become permanent employment conditions, neither of which was the case here. See, e.g., *Kimzey v. Wal-Mart Stores, Inc.*, 107 F.3d 568 (8th Cir. 1997) (years of sexual harassment); *Gold Coast Restaurant Corp. v. NLRB*, 995 F.2d 257 (D.C. Cir. 1993) (2 months of anti-union organization retaliation); *Stephens v. C.I.T. Group/Equipment Financing, Inc.*, 955 F.2d 1023 (5th Cir. 1992) (signs of permanence to discrimination).<sup>13</sup> Consequently, it was reasonable for the judge to conclude that neither Bowling nor Ball had established that the conditions they faced upon their return to work were intolerable. The Mine Act reserves that determination for the judge to make in the first instance, and substantial evidence supports his conclusion here.<sup>14</sup>

It is worth noting that courts require that aggravating factors be present in employment discrimination cases before constructive discharge will be found because “[employment discrimination law] policies are best served when the parties, if possible, attack discrimination within the context of their existing employment relationships.” *Watson*, 823 F.2d at 361. “A . . . plaintiff must, therefore, ‘mitigate damages by remaining on the job’ unless that job presents such an aggravated situation that a reasonable employee would be forced to resign.” *Clark*, 665 F.2d at 1173 (quoting *Bourque v. Powell Electrical Manufacturing Co.*, 617 F.2d 61, 66 (5th Cir.

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irrelevant” to the issue of constructive discharge” under the Mine Act. *Simpson*, 842 F.2d at 462 (quoting *Clark*, 665 F.2d at 1175 & n.8).

<sup>13</sup> These are also cases in which it was held that the facts could support a finding of constructive discharge, not that such a finding was compelled by the record. The same is true of *Kaynard v. Palby Lingerie, Inc.*, 625 F.2d 1047 (2d Cir. 1980), which is also cited by the majority. See slip op. at 12.

<sup>14</sup> The majority states that “in our view, the record compels the conclusion that the operators convincingly demonstrated to these miners in just a few short days that they were unwanted and would continue to experience highly intolerable working conditions until they voluntarily terminated their reestablished employment relationship.” Slip op. at 17 n.23. The majority goes on to “conclude the record unequivocally demonstrates” that indications that the conditions Bowling and Ball faced “‘had become permanent employment conditions’” were “‘clearly present here.’” *Id.* (citations omitted). Aside from the problem of finding indications of permanence arising in “a few short days,” the majority appears to have lost sight of the fact that their role is not to find facts on review. *Island Creek Coal Co.*, 15 FMSHRC 339, 347 (Mar. 1993) (“It would be inappropriate for the Commission to reweigh the evidence in [any] case or to enter de novo findings based on an independent evaluation of the record.”); see also *Wellmore Coal Corp.*, 1997 WL 794132 at \*4 (“[T]he ALJ has sole power to . . . resolve inconsistencies in the evidence”) (citations omitted). Put another way, my colleagues essentially compare apples to oranges when they cite in their opinion the quantum of evidence that *could support* a finding of constructive discharge versus the much greater quantum necessary to *compel* such a finding and to set aside the judge’s contrary findings.

1980)). Here, there is ample evidence to support the judge's conclusion that neither Bowling nor Ball made sufficient efforts to remain on the job to mitigate their damages.<sup>15</sup> Accordingly, I would affirm the judge's determination that the two failed to establish that they had been constructively discharged.

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Theodore F. Verheggen, Commissioner

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<sup>15</sup> For instance, as the judge correctly pointed out, each day that Bowling reported to work, instead of remaining and receiving reduced pay, he left the truck lot while his assigned truck was awaiting repair, and consequently was not paid for the remainder of those days. *See* 19 FMSHRC at 190-91. Although the majority believes that the miners acted "reasonably" in this case (slip op. at 17 n.23), "reasonableness" has been recognized as a lower standard than that to be applied in constructive discharge cases. *See Employment Discrimination* at 846 (case law under various statutes requires that to establish requisite intolerable conditions to show constructive discharge, circumstances must be such to *compel* resignation, not just that resignation was reasonable reaction).

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## ADMINISTRATIVE LAW JUDGE DECISIONS



# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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March 3, 1999.

MIDWEST MINERALS, INC.,	:	CONTEST PROCEEDING
Contestant	:	
v.	:	Docket No. CENT 98-231-RM
	:	Citation No. 7925924; 9/6/98
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Portable Plant #2 Mine
ADMINISTRATION (MSHA),	:	Mine ID 14-01463
Respondent	:	

## DECISION

Appearances: Katherine Shand Larkin, Esq., and Karen L. Johnston, Esq., Jackson & Kelly, PLLC, Denver, Colorado, for Contestant;  
Mark W. Nelson, Esq., Office of the Solicitor, Department of Labor, Denver, Colorado, for Respondent.

Before: Judge Hodgdon

This case is before me on a Notice of Contest filed by the Respondent, Midwest Minerals, Inc., against the Secretary of Labor, acting through her 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 to it of Citation No. 7925924 on June 26, 1998. A hearing was held in Pittsburg, Kansas. For the reasons set forth below, I affirm the citation, as modified.

## Factual Setting

Portable Plant No. 2 is a crushing plant owned and operated by Midwest Minerals. On June 22, 1998, it was being operated at a limestone quarry, owned by Midwest, which was located about eight miles southwest of Chetopa, Labette County, Kansas. William F. Feathers, 67, was plant superintendent.

On that date, Feathers suffered injuries in an accident involving a 1955 Caterpillar D-7 bulldozer. On July 20, 1998, Feathers died as a result of his injuries.

No one saw the accident. The parties are in agreement, however, that the accident probably occurred as described by Midwest in its Report of Accident Investigation submitted to MSHA on August 10, 1998. It states:

Based on our investigation, we believe the following events occurred: On the afternoon of June 22, 1998, Bud Mayberry assisted Bill Feathers in tightening the tracks on the D-7 dozer, Equipment #872, which was parked on the north side of the chips pile at the Chetopa Quarry. Mayberry and Feathers finished the tightening job and collected the tools used to tighten the tracks and put the tools away. Mayberry left the scene shortly thereafter in the water truck to continue watering rounds.

Although there were no eyewitnesses to the accident, based on the injuries suffered by Feathers, we believe that Feathers was kneeling on the tracks of the dozer, attempting to start the pony motor.<sup>1</sup> It appears that the dozer was in gear at this time and once the pony motor started, the diesel started and the dozer began running in reverse gear. We believe that Feathers was pulled between the service platform and the tracks of the dozer before being deposited on the ground. Bill Feathers passed away at 8:30 p.m. on Monday, July 20, 1998.

The only conclusion that can be drawn from the facts as we know them is that Feathers failed to make sure that the dozer was out of gear before attempting to start it. Prior to the accident, Feathers was the only person who operated the dozer. Thus, to the extent the dozer was left in gear, Feathers was the only individual who could have done so. An inspection of the dozer following the accident showed no evidence of any mechanical problems that could have caused the accident.

(Govt. Ex. 7.)

When the accident was discovered, Feathers reportedly stated to those who found him: "Someone must have put it in reverse." (Govt. Ex. 9, p. 4.) There is no evidence that Feathers ever said anything again about the accident.

MSHA Inspector David Moehle investigated the accident on June 23, 1998. On June 26, 1998, he issued Citation No. 7925924, alleging a violation of section 56.14105, 30 C.F.R.

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<sup>1</sup> The "pony motor" is a starting engine that must be operating in order to start the bulldozer's diesel engine. (Govt. Ex. 10, pp. 25-28.)

§ 56.14105, of the regulations.<sup>2</sup> On August 6, 1998, after apparently being convinced by Midwest that maintenance on the bulldozer had been completed, Wayne J. Wasson, Supervisory Mine Safety and Health Inspector in the Topeka, Kansas, Field Office, issued a modification to the citation charging a violation of section 56.9101, 30 C.F.R. § 56.9101. The modification alleged:

The plant superintendent was seriously injured at this mine on June 22, 1998 and later died of his injuries on July 20, 1998, when he failed to maintain control of the Caterpillar D-7B tractor, in that he started the main diesel by engaging the pony (starting) motor with the transmission in reverse gear. The main engine started and the tractor moved backwards. He was standing or kneeling on the track and was drawn between the track and the operator's platform/framework. The superintendent's actions constituted more than ordinary negligence and is an unwarrantable failure to comply with a mandatory safety standard.

(Govt. Ex. 3.)

On receiving this modification, the company filed its Notice of Contest.

#### **Findings of Fact and Conclusions of Law**

The Secretary has alleged that this violation was "significant and substantial" and resulted from an "unwarrantable failure" on the part of the operator. As discussed below, I find that the violation occurred as asserted and was "significant and substantial," but did not take place because of an "unwarrantable failure" by the company.

Section 56.9101 requires, as pertinent to this case, that: "Operators of self-propelled mobile equipment shall maintain control of the equipment while it is in motion." Midwest argues that this regulation does not apply to the facts in this case because the words "maintain control" presume that the operator had "control of the mobile equipment initially." Resp. Br. at 6. The company further points out that it is apparent that Feathers never had control of the

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<sup>2</sup> Section 56.14105 provides that:

Repairs or maintenance of machinery or equipment shall be performed only after the power is off, and the machinery or equipment blocked against hazardous motion. Machinery or equipment motion or activation is permitted to the extent that adjustments or testing cannot be performed without motion or activation, provided that persons are effectively protected from hazardous motion.



bulldozer and that he was not in a position to maintain control. While I agree that once the pony motor started and the bulldozer began moving in reverse Feathers probably neither had control of the vehicle nor was in a position to maintain control, I do not conclude that such a scenario removes the case from the scope of the regulation.

The only Commission decision construing this, or a similar, regulation is *Daanen & Janssen, Inc.*, 20 FMSHRC 189 (March 1998). In that case, the vehicle apparently was moving under control before the driver lost control of it. There is nothing in the decision, however, that states, or even implies, that if a vehicle operator loses control of his vehicle immediately on starting it he could not violate this standard. Furthermore, I find such an interpretation to be unreasonably narrow.

The dictionary contains several definitions of "maintain," but the only one that is germane to this case is "3 : to persevere in : carry on : keep up : CONTINUE." *Webster's Third New International Dictionary (Unabridged)* 1362 (1986). Feathers had control of the bulldozer when he started the starting engine. He evidently lost control of it immediately upon its beginning to move. Thus, he failed to keep up or continue in control while the vehicle was moving. The fact that he was never in a position to regain control is insignificant. As the Commission stated in *Daanen & Janssen*, "[t]he reasons for a loss of control are irrelevant to consideration or whether control over moving equipment was maintained." *Id.* at 196.

I find that the facts of this case bring it within the meaning of section 56.9101. While I find that Feathers actions, or lack of actions, come within the plain meaning of the standard, I am also mindful of the "Commission's long-held principle that the Mine Act and its regulations must be broadly construed to further the Act's remedial goals." *Cyprus Emerald Resources Corporation*, 20 FMSHRC 790, 797 (August 1998). Accordingly, I conclude that Midwest Minerals violated section 56.9101.

### Significant and Substantial

The Inspector found this violation to be "significant and substantial." A "significant and substantial" (S&S) violation is described in Section 104(d)(1), 30 U.S.C. § 814(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 four criteria that have to be met for a violation to be S&S. *See also Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 135 (7th Cir. 1995); *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). Evaluation of the criteria 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).

In order to prove that a violation is S&S, the Secretary must establish: (1) the underlying violation of a safety standard; (2) a distinct safety hazard, 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 will be of a reasonably serious nature.

In view of Feathers' fatal injuries, there can be little doubt that this violation satisfies the *Mathies* criteria. "Clearly, it was a significant contributing cause to the fatal accident." *Walker Stone Co., Inc.*, 19 FMSHRC 48, 53 (January 1997). Consequently, I conclude that the violation was "significant and substantial."

#### Unwarrantable Failure

The citation alleges that this violation resulted from an "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). See also *Buck Creek* at 136 (approving Commission's unwarrantable failure test).

The problem in this case, is that there is almost no evidence on which to determine the level of Feathers' negligence. Mayberry left Feathers after completing tightening the bulldozer's tracks. Witnesses next observed the bulldozer going backwards, apparently unattended. Feathers' said, when he was found, "someone must have put it in reverse." It is impossible from this to determine exactly what happened, let alone the degree of negligence. Indeed, when the company first reported the accident to MSHA, the report stated that Feathers had been run over by the bulldozer.

The Secretary, relying on *Lafarge Construction Materials*, 20 FMSHRC 1140 (October 1998) and *Midwest Material Co.*, 19 FMSHRC 30 (January 1997), argues that as a supervisor Feathers should be held to a high standard of care, that there was a high degree of danger involved, and that, therefore, there was an unwarrantable failure. The difference between this case and the ones cited by the Secretary, however, is that in those cases we know what the supervisor did, or did not do. Here we do not.

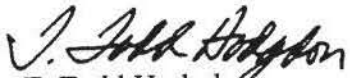
While it can be inferred from what is known that this was not an act of God, but involved negligence of some degree, the level of negligence cannot be inferred. It is just as likely that Feathers was merely inadvertent, as concluded by Inspector Moehle in his testimony, (Tr. 128-29, 138), and his accident investigation reports, (Cont. Exs. C and D), as that his negligence was aggravated. In fact, based on the evidence that Feathers had been operating the bulldozer for three years, had never started it in gear before, had instructed other miners in starting and operating the bulldozer and was viewed by superiors and subordinates as being safety conscious, it is more likely that he was unthinking, rather than indifferent.

The Secretary has the burden of proving that this violation resulted from an "unwarrantable failure." To establish this the Secretary has relied on inferences. However, due to the lack of evidence, there is no "rational connection between the evidentiary facts and the ultimate fact inferred." *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2153 (November 1989). Consequently, I conclude that the negligence in this case does not rise to the level of an "unwarrantable failure."

In conclusion, I find that the Secretary has established a violation of section 56.9101 of the regulations and that the violation was "significant and substantial." However, I do not find that the violation resulted from an "unwarrantable failure" on the part of the operator. I will modify the citation accordingly.<sup>3</sup>

#### Order

It is **ORDERED** that Citation No. 7925924 is **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), by deleting the "unwarrantable failure" designation and that the citation is **AFFIRMED** as modified.

  
T. Todd Hodgdon  
Administrative Law Judge

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<sup>3</sup> Both parties discussed in their briefs whether the level of negligence in this case, whatever it is, can be imputed to the operator. Since the level of negligence is relevant only in arriving at an appropriate civil penalty, a matter that is not before me, I have not discussed or decided that issue.

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/fb

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1244 SPEER BOULEVARD #280

DENVER, CO 80204-3582

March 4, 1999

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 94-445-M
Petitioner	:	A.C. No. 02-00157-05506
	:	
v.	:	
	:	Mission Mill
ASARCO INCORPORATED,	:	
Respondent	:	

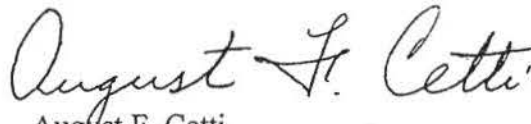
**ORDER OF DISMISSAL ON REMAND**

This case is before me on remand from my Order of Dismissal of November 21, 1994. My Stay Order of March 14, 1995, is lifted.

On March 1, 1999, the Secretary filed an unopposed Motion to Dismiss this case with prejudice and states that the only citation at issue in this docket, Citation No. 4124874, was vacated by the Mine Safety and Health Administration (MSHA) on February 22, 1999. This is the only violation at issue in this docket.

**ORDER**

The Secretary's unopposed Motion to Dismiss this proceeding is **GRANTED**. Citation No. 4124874 is **VACATED** and this proceeding is **DISMISSED** with prejudice.



August F. Cetti  
Administrative Law Judge

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

March 4, 1999

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 94-446-M
Petitioner	:	A.C. No. 02-00855-05526
	:	
v.	:	
	:	Mission Mill
ASARCO INCORPORATED,	:	
Respondent	:	

**ORDER OF DISMISSAL ON REMAND**

This case is before me on the Commission's Remand of my November 21, 1994, Order of Dismissal. My Stay Order of March 14, 1995 is lifted. On March 1, 1999, the Secretary of Labor filed a Motion to Dismiss this case with prejudice stating that MSHA vacated Citation Nos. 4333444, 4333445, 4333446, 4333447 and 4333448 on February 22, 1999. These are the only violations that are at issue in Docket No. WEST 94-446-M.

**ORDER**

The Secretary's unopposed Motion to Dismiss this proceeding is **GRANTED**. Citation Nos. 4333444, 4333445, 4333446, 4333447 and 4333448 are **VACATED** and this proceeding is **DISMISSED** with prejudice.



August F. Cetti  
Administrative Law Judge

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

March 9, 1999

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. SE 98-141-M
Petitioner	:	A. C. No. 54-00141-05538
v.	:	
	:	
CANTERA GREEN,	:	
Respondent	:	Cantera Green Mine

**DECISION**

Appearances: James A. Magenheimer, Esq., Office of the Solicitor, U.S. Department of Labor, New York, New York, on behalf of Petitioner;  
Edgardo R. Jimenez Calderin, Esq., Jimenez, Calderin & Carrasquillo, San Juan, Puerto Rico, on behalf of Respondent.

Before: Judge Melick

This case is before me upon the Petition for Civil Penalty filed by the Secretary of Labor against Cantera Green pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, *et seq.*, the "Act," alleging 17 violations of mandatory standards and seeking an amended civil penalty of \$16,400.00 for those violations. The general issue before me is whether Cantera Green committed the violations 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.

Six of the charging documents allege violations of the mandatory standard at 30 C.F.R. § 56.11001. That standard requires that "[s]afe means of access shall be provided and maintained to all working places."

Citation No. 7795306 (amended at hearing to delete the "unwarrantable failure" and high negligence findings and then modified to a citation under Section 104(a) of the Act) alleges a "significant and substantial" violation of the above cited standard and, as amended, charges as follows:

The primary crusher motor belts did not have a safe means of access. The plant employee visits the area at least once each 15 days, being exposed to fall from 12 ft. to the ground. Employees were allowed to perform their tasks prior to

correcting safety violations. Operator was involved in the installation of additional equipment and for this reason his priority was not focused on complying with safety violations.

Inspector Armando Peña of the Department of Labor's Mine Safety and Health Administration (MSHA), conducted an inspection of the Cantera Green Mine on February 17, 1998. Mine owner Adriel Colón accompanied him during his inspection. Peña opined that the primary crusher motor belt had no safe means of access. It was necessary to access this area for purposes of lubrication, oil changes, maintenance and to replace and restore the conveyor belts. Peña observed that employees were in the vicinity of the belt every fifteen days for maintenance placing them about 12 feet above ground. Peña concluded that in the absence of a work platform with handrails, there was a falling hazard subjecting miners to serious injury. Within this framework of evidence it is clear that a violation existed as charged.

The violation is also alleged to have been "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 (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 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 Inc. v. Secretary*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g* 9 FMSHRC 2015, 2021 (December 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 (August 1984)). The likelihood of such injury must be evaluated in terms of continued normal mining operations without any assumptions as to abatement. *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (July 1984); See also *Halfway, Inc.*, 8 FMSHRC 8, 12 (January 1986) and *Southern Ohio Coal Co.*, 13 FMSHRC 912, 916-17 (June 1991). Within this framework of law I conclude that the violation was indeed also "significant and substantial."

In reaching these conclusions I have not disregarded the testimony of mine owner Adriel Colón. I find, however, that while Mr. Colón's testimony does not disprove the violation it may nevertheless be considered in mitigation of negligence. In this regard, it is undisputed that

MSHA Inspector Alejandro Batista, had, in April of 1997, inspected the same equipment at issue herein and did not cite any violations at the locations here cited. Based on this evidence I conclude that the violations here cited were not so obvious as initially suggested. Moreover, Mr. Colón could reasonably have placed some reliance upon Inspector Batista's prior inaction.

Mr. Colón also testified without contradiction that he had specifically asked Batista, when he was inspecting the Cantera Green premises in April 1997, if there were other problems he should correct. The conditions cited herein were obviously not then noted by Batista. Under the circumstances the Secretary's action at hearing in deleting her "unwarrantable failure" findings and reducing negligence to "low," was appropriate.

In reaching the above conclusions I have also not disregarded Inspector Peña's testimony that, during his inspection in February 1998, Colón told him, in essence, that he knew there were violations (including the six citations/orders now under consideration) but that he was too busy with the construction of a new plant to correct those violative conditions. I find credible however, Colón's explanation at hearing that, while he in fact made such a statement, Peña erroneously believed that this admission applied to all violations cited on that date. Colón specifically and credibly denied that his admission went to the first six charging documents here at issue and explained that he always believed that these conditions were not violations because of Inspector Batista's failure to cite the same conditions during his April 1997, inspection.

The Secretary also argues in her posthearing brief that all six of the violations of the standard at 30 C.F.R. § 56.11001 were the result of "unwarrantable failure" and presumably also of high negligence, because they were repeated violations of the same mandatory standard (See Joint Exh. No. 2)<sup>1</sup>. However, since the similarity of the prior violations and the precise nature of the equipment involved in those prior cases has not been established, it is impossible to determine whether the operator was on notice from those prior violations that the precise conditions at issue herein were also violative. Under all the circumstances I find a civil penalty of \$100.00 to be appropriate.<sup>2</sup>

Order No. 7795309, issued pursuant to Section 104(a)(1) of the Act, also charges a

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<sup>1</sup> The Secretary amended Citation No. 7795306 at hearing, however, to delete the unwarrantable failure findings and to charge only low negligence.

<sup>2</sup> In assessing civil penalties in this case I have also considered the small size of the operator (12 employees), that the violative conditions were abated in good faith, that the operator had a history of 18 violations within the previous two years and that there was an absence of evidence regarding the effect of the penalties on the operator's ability to stay in business.

violation of the standard at 30 C.F.R. § 56.11001 and alleges as follows:<sup>3</sup>

The #2 conveyor head pulley did not have a safe means of access. The plant employee visits the area at least once each 15 days being exposed to fall from 10 ft. to the floor. Employees were allowed to perform their tasks prior to correcting safety violations. Operator was involved in the installation of additional equipment and for this reason his priority was not focused on complying with safety violations. Management was engaged in aggravated conduct constituting more than ordinary negligence. This violation is an unwarrantable failure.

According to Inspector Peña, the No. 2 conveyor head pulley did not have hand rails nor a work platform or ladder. He noted that the head pulley was at the top of the conveyor 10 feet above ground and that maintenance was performed here at least twice a month. According to Peña, these conditions created a falling hazard from which a miner could receive serious or fatal injuries. I find based on the credible evidence that the violation existed as charged and presented a hazard of high gravity. It may also reasonably be inferred that the violation was "significant and substantial."

The Secretary also argues that the violation was a result of the operator's "unwarrantable failure" because this was a repeated violation at other locations at the mine. The Secretary also maintains that mine owner Adriel Colón was aware of this condition since access had been provided at similar locations at other conveyors, e.g., the head pulleys at the Nos. 7 and 8 conveyors. While I agree that the operator is chargeable with negligence, I do not find that such negligence was of such a serious nature as to constitute "unwarrantable failure." I find such

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<sup>3</sup> Section 104(d)(1) of the Act provides as follows:

"If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this Act. 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."



reduced negligence for the same reasons applicable to Citation No. 7795306, previously discussed. A civil penalty of \$100.00, is appropriate. The order must accordingly be modified to a "significant and substantial" citation pursuant to Section 104(a) of the Act.

Order No. 7595310, also issued pursuant to Section 104(d)(1) of the Act alleges a violation of 30 C.F.R. § 56.11001, and charges as follows:

The #3 conveyor head pulley did not have a safe means of access. The maintenance employee visits the area at least once each 15 days, being exposed to fall from 10 ft. to the floor. Employees were allowed to perform their tasks prior to correcting safety violations. Operator was involved in the installation of additional equipment and for this reason his priority was not focused on complying with safety violations. Management was engaged in aggravated conduct constituting more than ordinary negligence. This violation is an unwarrantable failure.

This violation is virtually identical to the violation charged in Citation No. 7795309 and for the same reasons the order is modified to a "significant and substantial" citation under Section 104(a) of the Act with its "unwarrantable failure" findings vacated. As with the prior citation, the violation is of high gravity and the result of moderate negligence. A civil penalty of \$100.00 is appropriate.

Order No. 7795311, also issued pursuant to Section 104(d)(1) of the Act, alleges a violation of 30 C.F.R. § 56.11001, and charges as follows:

The vibrator motor did not have a safe means of access. Maintenance employee visits the area weekly, being exposed to fall from 8 ft. to the ground floor. Employees were allowed to perform their tasks prior to correcting safety violations. Operator was involved in the installation of additional equipment and for this reason his priority was not focused on complying with safety violations. Management was engaged in aggravated conduct constituting more than ordinary negligence. This violation is an unwarrantable failure.

According to Inspector Peña, there was no safe means of access to the motor and pulley of the No. 1 vibrator. According to Peña, a miner who is performing maintenance or lubrication at the motor or replacing the screens on the vibrator would be subject to a falling hazard of approximately 8 feet. He noted that maintenance had been performed by use of a ladder. Peña believed this was particularly unsafe because of the instability of the ground and concluded that serious injuries could result from a fall from that height. Based on the credible evidence, I find that the violation is proven as charged and that it was serious and "significant and substantial." The Secretary's arguments that the violation was unwarrantable and of high gravity are rejected for the reasons previously stated. The violation was the result of moderate negligence and, under the circumstances, a civil penalty of \$100.00 is appropriate. The order is modified to a citation under Section 104(a) of the Act.

Order No. 7795316, also issued under Section 104(d)(1) of the Act, alleges a violation of the standard 30 C.F.R. § 11001 and charges as follows:

The #5 conveyor head pulley did not have a safe means of access. Maintenance employee visits the area each 15 days, being exposed to fall from 12 ft. to the ground floor. Employees were allowed to perform their tasks prior to correcting safety violations. Operator was involved in the installation of additional equipment and for this reason his priority was not focused on complying with safety violations. Management was engaged in aggravated conduct constituting more than ordinary negligence. This violation is unwarrantable failure.

It is stipulated that this condition is in all respects the same as the conditions cited at the Nos. 2 and 3 head pulleys. Accordingly, the result is also the same. The order is accordingly modified to a "significant and substantial" citation under Section 104(a) of the Act with a civil penalty of \$100.00.

Order No. 7795317 alleges a violation of the standard at 30 C.F.R. Section 56.11001 and charges as follows:

The #6 conveyor head pulley did not have a safe means of access. Maintenance employee visits the area each 15 days, being exposed to fall from 11 ft. to the ground. Employees were allowed to perform their tasks prior to correcting safety violations. Operator was involved in the installation of additional equipment and for this reason his priority was not focused on complying with safety violations. Management was engaged in aggravated conduct constituting more than ordinary negligence. This violation is an unwarrantable failure.

It is stipulated that this condition is the same condition as cited at the Nos. 2, 3 and 5 conveyor head pulleys. Under the circumstances the order is modified to a "significant and substantial" citation under Section 104(a) of the Act with a civil penalty of \$100.00.

The next eleven orders are uncontested and only the amount of penalty is at issue. Order No. 4545862, issued pursuant to Section 104(d)(1) of the Act, charges a violation of the standard at 30 C.F.R. § 56.14107 and alleges as follows:

The #9 conveyor tail pulley was not guarded. Persons did not work or walk in the area while the equipment is running. Maintenance is performed in the area when the equipment is running. Maintenance is performed in the area when the equipment is turned off. Employers were allowed to perform their tasks prior to correcting safety violations operator was involved in the installation of additional equipment and for this reason his priority was not focused on

complying with safety violations. Management was engaged in aggravated conduct constituting more than ordinary negligence. This violation is an unwarrantable failure.

The cited standard, 30 C.F.R. Section 56.14107(a), provides that "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."

According to Inspector Peña, there was an exposed pinch point between the conveyor belt and tailpulley of the No. 9 conveyor. No guarding was provided. According to Peña, miners could become entangled in the pinchpoint while working or walking around the tail pulley and suffer serious or fatal injuries. Peña observed that the area was cleaned six or seven times a day. It is not disputed that the violation was of high gravity.

The Secretary maintains the violation was the result of high negligence because it was a repeat violation and Colon had admitted to Inspector Peña that he was aware of the violation but did not correct it because he was focused on constructing his new plant. Under the circumstances, I agree that this violation was the result of high operator negligence. In particular consideration of the size of the operator, however, I find that a civil penalty of \$400.00 is appropriate for the violation.

Order No. 4545863, also issued pursuant to Section 104(d)(1) of the Act, alleges a violation of the standard at 30 C.F.R. § 56.14132 and charges as follows:

The Cat 980C (S.N. 63X07021) front-end loader back-up alarm was damaged, while the equipment was used to load trucks in the plant area. Persons were seen where the loader backed-up. Employees were allowed to perform their tasks prior to correcting safety violations. Operator was involved in the installation of additional equipment and for this reason his priority was not focused on complying with safety violations. Management was engaged in aggravated conduct constituting more than ordinary negligence. This violation is an unwarrantable failure.

The cited standard, 30 C.F.R. Section 56.14132(a), provides that "[m]anually operated horns or other audible warning devices provided on self-propelled mobile equipment as a safety feature shall be maintained in functional condition."

According to the undisputed testimony of Inspector Peña, the Cat 980C front-end loader indeed had a damaged and non-functioning backup alarm. The loader operator told Peña that the condition had existed for two weeks and stated that he had reported this fact to mine owner Adriel Colón. It is undisputed that operating such equipment in reverse without a functioning backup alarm could result in fatalities. The condition was particularly hazardous because this loader had blind spots and lacked clear visibility to the rear. Under the circumstances, the

violation was indeed of high gravity and the result of high negligence. Colón maintains that he had not had any similar violations in the prior ten years. Because of the size of the operator and lack of a recent history of similar violations, a penalty of \$400.00 is appropriate.

Order 454864, also issued pursuant to Section 104(d)(1) of the Act, charges a violation of the standard at 30 C.F.R. § 56.14101(a) and charges as follows:

The Cat 980C (S.N. 63X07021) Front-end loader parking brake system was damaged, while the equipment was used to load trucks in the plant area. The area where the equipment was parked was flat. Employees were allowed to perform their tasks prior to correcting safety violations. Operator was involved in the installation of additional equipment and for this reason his priority was not focused on complying with safety violations. Management was engaged in aggravated conduct constituting more than ordinary negligence. This violation is an unwarrantable failure.

The cited standard, 30 C.F.R. § 56.14101, provides in relevant part that "[i]f equipped on self-propelled mobile equipment, parking brakes shall be capable of holding the equipment with its typical load on the maximum grade it travels."

According to the undisputed testimony of Inspector Peña, this was the same Caterpillar 980C front end loader cited in the previous order for the absence of a backup alarm. According to Peña, without a functioning parking brake persons could be run over or other equipment struck if the cited loader was parked on a grade. He observed that some areas were indeed irregular at the mine site. It is undisputed that this condition had been reported to mine owner Adriel Colón two weeks before this inspection. Colón admitted that he knew of the condition but explained that he had other equipment to repair.

Within this framework of evidence I find that the violation was of high gravity and the result of high negligence. Colón maintains that no similar violation had occurred in ten years. Considering the size of the operator and the absence of a recent history of prior violations of this standard, I find that a civil penalty of \$400.00, is appropriate.

Order No. 4545865, also issued pursuant to Section 104(d)(1) of the Act, alleges a violation of the standard at 30 C.F.R. § 56.18002, and charges as follows:

The mine operator or his designated person was not conducting the examination of working places, at least once each shift for conditions which may adversely affect safety or health. Employees were allowed to perform their tasks prior to correcting safety violations. Operator was involved in the installation of additional equipment, and for this reason his priority was not focused on complying with safety violations. Management was involved in aggravated conduct constituting more than ordinary negligence this violation is an

unwarrantable failure.

The cited standard, 30 C.F.R. § 56.18002, provides as follows:

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

It is undisputed that Respondent was not performing examinations of the working places on each shift as required. Indeed, mine owner Adriel Colón had no records of any such examinations. Pená concluded that the violation was of high gravity because of the large number of violations (17) found on his inspection on February 17, 1998. Colon argued only that he had not performed the required examinations because he was too busy working on his new plant. Within this framework of evidence I find that the violation was indeed of high gravity and the high operator negligence. Particularly in light of the absence of a recent history of similar violations and the size of the operator, I find that a civil penalty of \$1,500.00, is appropriate.

Order No. 7795305, also issued pursuant to Section 104(d)(1) of the Act, charges a violation of the standard at 30 C.F.R. § 56.11001 and charges as follows:

The plant motor feeder did not have a safe means of access. The plant employee visits the area at least once each 15 days, being exposed to fall from 15 ft. to the ground. Employees were allowed to perform their tasks prior to correcting safety violations. Operator was involved in the installation of additional equipment and for this reason his priority was not focused on complying with safety violations. Management was engaged in aggravated conduct constituting more than ordinary negligence. This violation is an unwarrantable failure.

As previously noted the cited standard requires that "safe means of access shall be provided and maintained to all working places." The violation is admitted and it is undisputed that there was no safe means of access to the plant motor feeder. There was also a 15 ft. drop-off with no handrails, work platform or ladder available. It is also undisputed that employees would be exposed twice a month to the hazard of falling while performing maintenance at the cited location. It may reasonably be inferred therefore that the violation was of high gravity.

The violation was also clearly the result of high negligence considering the undisputed evidence that Colón knew of this condition for two or three weeks. A civil penalty of \$400.00, is accordingly warranted.

Order No. 7795307, also issued pursuant to Section 104(d)(1), of the Act, alleges a violation of the standard at 30 C.F.R. § 56.11012, and charges as follow:



The primary crusher walkway had an opening of 13" X 38" (south side). The plant operator walks by the area daily, being prior exposed to fall and sustain serious injuries. Employees were allowed to perform their tasks to correcting safety violations. Operator was involved in the installation of additional equipment and for this reason his priority was not focused on complying with safety violations. Management was engaged in aggravated conduct constituting more than ordinary negligence. This violations is an unwarrantable failure.

The cited standard, 30 C.F.R. § 56.11012, provides as follows:

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

This violation is also undisputed. According to Inspector Peña, miners could fall into the cited opening resulting in broken legs, arms or chest injuries. Miners on all shifts were exposed to the hazard. It may reasonably be inferred from this evidence that the violation was of high gravity.

The Secretary also maintains that the violation was also the result of high negligence based upon Colón's purported admission that he had been aware of the cited condition. Colón testified, however, that the first time he observed this condition was when he accompanied Inspector Peña on February 17. He also noted that the violative condition was in a corner and not readily visible. In light of the large number of violations issued on this occasion possibly leading to confusion and the absence of a corroborative written statement by Colón, I am inclined to give credence to Colón's testimony. In addition, even Inspector Peña acknowledged that Colón had told him that he had no idea when the condition had occurred or who had removed that section of the flooring. Under the circumstances, I do not find that the Secretary has sustained her burden of proving high negligence or "unwarrantable failure." Accordingly, Order No. 7795307 is modified to a citation under Section 104(a) of the Act. I find that a civil penalty of \$100.00 is appropriate

Order No. 7795308, also issued pursuant to Section 104(d)(1) of the Act, alleges a violation of the standard at 30 C.F.R. § 56.14107(a), and charges as follows:

The fan and motor belts of the primary crusher were not guarded. The crusher operator turns on and off the equipment in a regular basis, being exposed to sustain serious injuries. Employees were allowed to perform their tasks prior to correcting safety violations. Operator was involved in the installation of additional equipment and for this reason his priority was not focused on complying with safety violations. Management was engaged in aggravated conduct constituting more than ordinary negligence. This violation is an unwarrantable failure.



The cited standard, 30 C.F.R. § 56.14107(a), provides that "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."

This violation is undisputed. According to Inspector Peña, the unguarded fan and motor belts at the primary crusher created a hazard from potential entanglement. In particular, Peña observed that there was no guard in place at the "on-off" switch. It may reasonably be inferred that this violation was therefore of high gravity.

The Secretary maintains the violation was also the result of high negligence because Colón admitted that he had been aware of the violative condition but was focusing on building a new plant. The facts support the Secretary's findings of high negligence. Considering the criteria under Section 110(i) of the Act, I find that a civil penalty of \$400.00, is appropriate.

Order No. 7795312, also issued pursuant to Section 104(d)(1) of the Act, alleges a violation of the standard at 30 C.F.R. § 56.12032 and charges as follows:

The electrical junction box of the #1 vibrator motor did not have a cover plate. The electrical cables and connections were insulated. Employees were allowed to perform their tasks prior to correcting safety violations. Operator was involved in the installation of additional equipment and for this reason his priority was not focused on complying with safety violations. Management was engaged in aggravated conduct constituting more than ordinary negligence. This violation is an unwarrantable failure.

The cited standard, 30 C.F.R. Section 56.12032 provides that "inspection and cover plates on electrical equipment and junction boxes shall be kept in place at all times except during testing or repairs."

It is not disputed that the absence of a cover plate for the vibrator motor junction box presented an electrocution hazard and that employees would be exposed to this hazard once a week. It may be reasonably be inferred that the violation was therefore of high gravity. Based upon Colón's admission that he had not had time to correct the condition because of work on his new plant, the violation is also correctly characterized as the result of high negligence. Considering the criteria under Section 110(i) of the Act, an appropriate civil penalty of \$400.00 will be assessed.

Order No. 7795313, also issued pursuant to Section 104(d)(1) of the Act, alleges a violation of the standard at 30 C.F.R. § 56.14107(a) and charges as follows:

The #4 conveyor tail pulley was not guarded. Employees did not walk in the area while the equipment is running. Maintenance is performed in the area when the equipment is turned off. Employees were allowed to perform their tasks

prior to correcting safety violations. Operator was involved in the installation of additional equipment and for this reason his priority was not focused on complying with safety violations. Management was engaged in aggravated conduct constituting more than ordinary negligence. This violation is an unwarrantable failure.

The cited standard, 30 C.F.R. Section 56.14107(a), provides for protection from moving machine parts. The violation is undisputed. The tail pulley at the No. 4 conveyor was not guarded. The evidence of high gravity is undisputed. Colón admitted that he knew that the cited condition had existed but maintains he had not had time to correct it because of work on his new plant. This evidence supports a finding of high negligence. A civil penalty of \$400.00 will be assessed.

Order No. 7795314, also issued under Section 104(d)(1), alleges a guarding violation under the standard at 30 C.F.R. § 56.14107(a) and charges as follows:

The #5 conveyor tail pulley was not guarded. Persons did not work or walk by the area while the equipment is running maintenance is performed in the area when the equipment is turned off. Employees were allowed to perform their tasks prior to correcting safety violations. Operator was involved in the installation of additional equipment and for this reason his priority was not focused on complying with safety violations. Management was engaged in aggravated conduct constituting more than ordinary negligence. This violation is an unwarrantable failure.

The violation is undisputed as is the evidence incorporated by reference at hearing. It is undisputed that serious and fatal injuries could result from the violative condition. Under the circumstances, the violation is of high gravity. Since Colón admitted that he had prior knowledge of the violative condition it is also the result of high negligence. The order is accordingly affirmed as written and a civil penalty of \$400.00 is assessed.

Order No. 7795315, also issued pursuant to Section 104(d)(1) of the Act alleges a violation of the standard at 30 C.F.R. § 56.12032, and charges as follows:

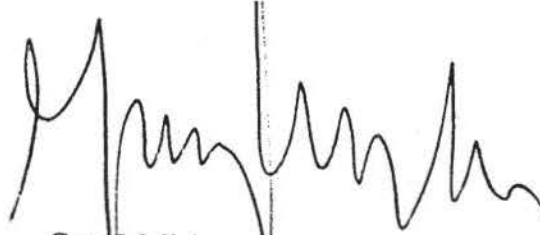
The electrical junction box of the #5 conveyor motor did not have a cover plate. Employees were allowed to perform their tasks prior to correcting safety violations. Operator was involved in the installation of additional equipment and for this reason his priority was not focused on complying with safety violations. Management was engaged in aggravated conduct constituting more than ordinary negligence. This violation is an unwarrantable failure.

The cited standard was admittedly violated and the hazard of electrocution undisputed. Colón also admitted that he knew of violative condition but was too busy installing his new plant to correct it. The Secretary's findings of a serious hazard and high negligence are

therefore proven as charged. The order is accordingly affirmed as written and a civil penalty of \$400.00 will be assessed.

**ORDER**

Order Nos. 7795306, 7795307, 7795309, 7795310, 7795311, 7795316 and 7795317, are hereby modified to citations pursuant to Section 104(a) of the Act with "significant and substantial" findings. Order Nos. 4545862, 4545863, 4545864, 4545865, 7795305, 7795308, 7795312, 7795313, 7795314 and 7795315, are affirmed. Cantera Green is hereby directed to pay civil penalties of \$5,800.00 within 40 days of the date of this decision.



Gary Melick  
Administrative Law Judge  
703-756-6261

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# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

March 12, 1999

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. YORK 98-23-M
Petitioner	:	A. C. No. 30-02566-05516
v.	:	
	:	
SAM PUGLIA EXCAVATING,	:	
Respondent	:	Mine: Granby Pit

## DECISION

Appearances: Suzanne Demitrio, Esq., Office of the Solicitor, U.S. Department of Labor,  
New York, New York for Petitioner  
Samuel Puglia, Sam Puglia Excavating, Fulton, New York, *Pro se*

Before: Judge Bulluck

This case is before me upon a Petition for Assessment of Penalty filed by the Secretary of Labor, through her Mine Safety and Health Administration ("MSHA"), against Sam Puglia Excavating ("Sam Puglia"), pursuant to section 105 of the Federal Mine Safety and Health Act of 1977 ("the Act"), 30 U.S.C. § 801.

A hearing was held in Syracuse, New York, in which Sam Puglia represented himself. The parties' post-hearing memoranda and Sam Puglia's supporting financial documentation are of record. For all the reasons set forth below, the citations at issue shall be AFFIRMED.

### I. Factual Background

On November 5, 1997, MSHA Inspector Gary Kettelkamp performed a regular inspection of Sam Puglia's Granby Pit, a surface sand and gravel mine, located in Fulton, New York (Tr.8-9). During his inspection, accompanied by foreman Scott Knight, Inspector Kettelkamp observed a front-end loader without a functional back-up alarm when operated in reverse, in the process of loading a truck (Tr. 9-10). Accordingly, Inspector Kettelkamp issued section 104(a) Citation No. 7707681, alleging a significant and substantial violation of 30 C.F.R. §56.14132(a), describing the condition as follows:

The Trojan 7500 front-end loader, used to load trucks and feed the crusher hopper, was observed operating without an operable backup alarm. Customer

trucks were entering the loading yard at the time. A person could have been run over should they not here [sic] a reverse signal alarm (Tr. 12-17). Additionally, as a consequence of his inspection of the mine's repair shed, Inspector Kettelkamp issued section 104(a) Citation No. 7707679, alleging a non-significant and substantial violation of 30 C.F.R. §56.14100(b), specifying the condition in the following manner:

The grounding lug had been knocked off the plug, on the electrical extension cord, in the shop. There was nothing plugged into the cord at the time. It was plugged into an outlet on the west wall of the shop. A person could have received an electrical shock from 110 volts should a fault occur while using the cord

(Tr. 17-20; Ex. P-2).

## II. Findings of Fact and Conclusions of Law

### A. Citation No. 7707681

#### 1. Fact of Violation

The instant citation charges a significant and substantial violation of 30 C.F.R. § 56.14132(a), which mandates the following:

Manually-operated horns or other audible warning devices provided on self-propelled mobile equipment as a safety feature shall be maintained in functional condition.

Inspector Kettelkamp testified that the Trojan 7500 front-end loader is manufactured with a backup alarm and, due to the location of the radiator and the casings that house the motor, the operator's rear view is restricted by 15-20 feet (Tr. 10). In describing the area in which the front-end loader was operated, the inspector testified that he observed a truck backed up to the loader in the process of being loaded, as well as some workers on foot, a good distance away from the loader, repairing a broken feed belt (Tr. 12). Three or four trucks were loaded in the same manner during the course of his inspection, according to the inspector, and at no time did he observe any driver outside of his truck (Tr. 13).

Supervisory mine inspector Randall Gadway, an MSHA inspector of 24 years and currently a member of an MSHA fatal investigation team, testified to 15 fatalities and 31 serious injuries in the mining industry, between 1990 and 1996, caused by inoperative or inaudible backup alarms (Tr. 74). In citing several examples of fatalities, he noted that "these trucks are so big that they can run over a small vehicle and not know they run over you" (Tr. 75). Finally, Inspector Gadway testified that he does not recall any fatalities under circumstances in which the

backup alarm operated properly (Tr. 75, 81-83).

Sam Puglia presented no evidence that rebutted Inspector Kettelkamp's assessment of the condition which he cited. In fact, Puglia conceded the violation as written by the inspector, but contested the amount of proposed penalty (Tr. 91-92; see 116-17). Accordingly, the Secretary having established that a miner had been operating the front-end loader without a functional backup alarm, the evidence is clearly sufficient to sustain the violation.

## 2. Significant and Substantial

Section 104(d) of the Mine Act designates a violation "significant and substantial" ("S&S") when it is "of such a 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 the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Division, National Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981).

In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984), the Commission set forth the four criteria that the Secretary must establish in order to prove that a violation is S&S under *National Gypsum*: 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 Buck Creek Coal, Inc. v. FMSHRC*, 52 F. 3d 133, 135 (7<sup>th</sup> Cir. 1995); *Austin Power, Inc. v. Secretary*, 861 F. 2d 99, 103-04 (5<sup>th</sup> Cir. 1988), *aff'd* 9 FMSHRC 2015, 2021 (December 1987) (*approving Mathies criteria*). Evaluation of the third criterion, the reasonable likelihood of injury, should be made in the context of "continued mining operations." *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984). Moreover, resolution of whether a violation is S&S must be based "on the particular facts surrounding the violation." *Texasgulf, Inc.*, 10 FMSHRC 498, 501 (April 1998).

Inspector Kettelkamp found the violation to be S&S. He testified that, based on the enormity of the front-end loader, he had determined it reasonably likely that a person (truck driver being loaded) run over by one of the tires, would die as a result of injuries sustained (Tr. 15-17). I find, based on the evidence that workers were in the vicinity of the front-end loader, that there was a reasonable likelihood that any pedestrian in the loader's rear path, failing to hear the reverse alarm signal when it backed up, would sustain injuries of a very serious nature. Therefore, I conclude that the violation was S&S.

## 3. Penalty

While the Secretary has proposed a civil penalty of \$595.00, the judge must independently determine the appropriate assessment by proper consideration of the six penalty criteria set forth in section 110(i) of the Act, 30 U.S.C. §820(j). *See Sellersburg Co.*, 5



FMSHRC 287, 291-92 (March 1993), *aff'd* 763 F. 2d 1147 (7<sup>th</sup> Cir. 1984).

Sam Puglia is a very small operator, with an overall history of prior violations that is not an aggravating factor in assessing an appropriate penalty (Ex. P-1). <sup>1</sup> I have considered the financial documentation submitted by Puglia and conclude that the proposed civil penalty will not affect Sam Puglia's ability to continue in business.<sup>2</sup>

The remaining criteria involve consideration of the gravity of the violation and the negligence of Sam Puglia in causing it. I find the gravity of the violation to be serious, since the potential for grave injuries, including death, to pedestrians as well as persons in small vehicles, is substantiated by the record. Moreover, considering that the inoperable alarm should have been detected during a pre-shift examination, I ascribe moderate negligence to Sam Puglia, as did Inspector Kettelkamp (Tr. 11-12). Consequently, having considered Sam Puglia's small size, insignificant history of prior violations, seriousness of violation, moderate negligence and demonstrated good faith in achieving rapid compliance, I find no reason to raise the penalty from that assessed in June 1996 for violation of the same standard. Therefore, I find that a civil penalty of \$267.00 is appropriate.

B. Citation No. 7707679

1. Fact of Violation

This citation charges a non-S&S violation of 30 C.F.R. §56.14100(b), which provides as follows:

Defects on any equipment, machinery, and tools that affect safety shall be corrected in a timely manner to prevent the creation of a hazard to persons.

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<sup>1</sup>The undersigned notes that Sam Puglia had twice been cited in June 1996 for violations of section 56.14132(a). While he has been given the benefit of the doubt based on his overall good history of prior violations, continued failure to properly maintain audible warning devices would seem to indicate a level of complacency that may result in a significant escalation in penalty.

<sup>2</sup>It is unclear from Sam Puglia's testimony and he has failed to clearly establish, through quarterly production reports to MSHA, bank statements, utility bills, New York State Sales Tax Return, or any other documentation, the extent to which he is shutting down his business under the New York Department of Environmental Conservation reclamation requirements, as alleged, and the extent to which he is continuing to operate.

Inspector Kettelkamp testified that the extension cord was rolled up and plugged into the west wall of the repair shed, without attachment of any tool (Tr. 17-18). Although no work was being performed during the time of his inspection, it was evident to the inspector that work had been performed in the shed (Tr. 22). Because it became necessary for the operator to store his tools elsewhere in a more secure location, the only tool that Inspector Kettelkamp observed in the shed was a gas-powered cutting torch (Tr. 21). He explained the utility of the cord's grounding lug as providing a path back to ground, which trips a circuit breaker and prevents a person from being electrocuted, in the event of a short or fault in electrically powered equipment (Tr. 20). The inspector further testified that he cited the violation under section 56.14100(b) because the extension cord is a "tool" (Tr. 23). While Inspector Kettelkamp felt it unlikely that injury would occur as a result of the defective plug, due to the fact that the electrically powered tools were maintained properly, in the rare event of a fault, because the shed floor was comprised of oily earth, the inspector concluded that the resultant injury could be fatal (Tr. 23-25).

Supervisory Inspector Gadway testified that approximately one-third of annual fatalities in the mining industry is attributable to faulty grounding, as a major contributory factor (Tr. 44-45, 71-72).


Sam Puglia presented no evidence contrary to Inspector Kettelkamp's assessment of the extension cord's condition and location, but did establish that some extension cords, without grounding lugs, may be used in conjunction with hand-held electric equipment at the mine (Tr. 39). The fact remains, however, that the cord at issue, as originally manufactured, was intended to have a grounding prong. Indeed, Puglia acknowledged that the cord was defective by conceding the violation as written by the inspector; as with the companion citation, however, Puglia strongly opposed the amount of proposed penalty (Tr. 90-91). Accordingly, the Secretary having established that the extension cord was defective, the defect affected safety, and the defect was not corrected in a timely manner to prevent the creation of a hazard, Citation No. 7707679 is AFFIRMED. See *Ideal Cement Co.*, 12 FMSHRC 2409, 2414-15 (November 1990) (*Ideal I*); *Ideal Cement Co.*, 13 FMSHRC 1346, 1350 (September 1991) (*Ideal II*).

## 2. Penalty

Addressing the six penalty criteria set forth in section 110(i), as discussed above, Sam Puglia is a very small operator, has an insignificant history of prior violations, and I conclude that the proposed penalty of \$362.00 will not affect Puglia's ability to continue in business. Respecting consideration of the gravity criteria, I find failure to maintain the grounding mechanism of the extension cord a serious violation, given that miners have no warning of faults or other non-visible defects in hand-held electric tools unless they are tested before each use, which is not customary in the mining industry (Tr. 38). Because Sam Puglia contends that it was not on notice of the cord's condition until Inspector Kettelkamp brought it to the foreman's attention, I ascribe moderate negligence to Sam Puglia, as did the inspector (Tr. 89). Accordingly, having considered Sam Puglia's small size, insignificant history of prior violations, ability to stay in business, seriousness of violation, rapid and good faith abatement and moderate degree of negligence, I find that a civil penalty of \$55.00 is appropriate.

**ORDER**

Accordingly, Citation Nos. 7707679 and 7707681 are **AFFIRMED**, and Sam Puglia is **ORDERED TO PAY** civil penalties of **\$322.00** within 30 days of the date of this decision. Upon receipt of payment, this case is **DISMISSED**.

  
Jacqueline R. Bulluck  
Administrative Law Judge

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# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES  
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FALLS CHURCH, VIRGINIA 22041

March 16, 1999

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. VA 98-61
Petitioner	:	A. C. No. 44-03795-03797
v.	:	
	:	
ISLAND CREEK MINING COMPANY,	:	
Respondent	:	VP 8 Mine

## DECISION

Appearances: Yoora Kim, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, and Larry A. Coeburn, Conference and Litigation Representative, U.S. Department of Labor, Mine Safety and Health Administration, Norton, Virginia, on behalf of the Petitioner; Elizabeth S. Chamberlin, Esq., Consol Incorporated, Pittsburgh, Pennsylvania, on behalf of the Respondent.

Before: Judge Melick

This case is before me upon the Petition for Civil Penalty filed by the Secretary of Labor against the Island Creek Mining Company (Island Creek) pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.*, the "Act," alleging one violation of the mandatory standard at 30 C.F.R. § 75.400 and seeking a civil penalty of \$396.00 for that violation. The general issue before me is whether Island Creek 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. A secondary issue is whether "Section 104(b)" Order No. 7297719 is valid.<sup>1</sup>

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

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 mien or his agent to immediately cause all

The one citation at issue, No. 7297718 alleges that "loose coal from 1-12 inches in depth was present underneath and along the offside of the 2-East No. 3 conveyor belt beginning at Break No. 68 and extending inby for a distance of approximately 1,000 feet." The cited standard provides that "coal 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 diesel powered and electric equipment therein."

Ronald Blankenship, an inspector for the Department of Labor's Mine Safety and Health Administration (MSHA) was conducting an ongoing inspection at the VP No. 8 Mine on June 22, 1998. He was accompanied underground by company safety supervisor Ray Phillips and union walkaround Will Smith. At the 2 East No. 3 conveyor he observed an accumulation of coal alongside the belt, underneath the belt and on the offside of the belt. The accumulation was one inch to twelve inches deep and extended for 1,000 feet. Blankenship discussed the problem with Phillips and advised him that he would be issuing a "Section 104(a)" citation. Abatement time was discussed and Blankenship concluded that the condition should be abated by 9:00 a.m. the next day. Blankenship could not recall whether Phillips objected to the abatement time. Since the coal was damp, rockdust had been applied over some areas, there was no coal contacting any rollers or the belts and since the carbon monoxide monitoring system was functioning, Blankenship concluded that a fire was unlikely. He concluded that the violation therefore, was not "significant and substantial" and presumably therefore not of high gravity. He found that the cited area was an area traveled and pre-shifted on a daily basis and observed that no one was cleaning the belt at the time. Accordingly, he felt that the violation was result of moderate operator negligence. While the violation does not appear to be disputed, it is, in any event, proven as charged.

On the following day, June 23, 1998, Blankenship returned to the VP No. 8 Mine. Before proceeding underground he was told by Island Creek safety inspector Mike Canada that the 2 East No. 3 conveyor belt had been cleaned. Arriving at that location Blankenship observed one employee shoveling loose coal from beneath the belt. Blankenship traveled the length of the belt and observed that it had been only spot cleaned. There was coal spillage on the offside of the belt. He opined that it was fine coal dust and not lumps as if from sloughage. He therefore concluded that the offside of the belt had not been cleaned at all. Indeed, one of the miners, Jim Tolliver, told Blankenship that he was instructed only to clean underneath the belt and was not told to clean the offside of the belt.

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persons, 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.



Mike Canada accompanied Blankenship during his inspection of the entire belt. Canada admitted that it did not look like there had been any cleaning on the back side. Blankenship then issued the subject Section 104(b) order and gave Canada a copy of the order at 10:40 that morning. Once the order was issued 15 employees cleaned the belt in about four hours. After Blankenship told Canada he was issuing the "Section 104(b) order, no one asked for an extension of time to abate the condition nor was Blankenship told of any problems causing delay in the abatement process.

When the validity of a Section 104(b) order is challenged by the operator, the Secretary, as the proponent of the order, bears the burden of proving: 1) the existence of a previously issued citation charging a violation of a mandatory standard, 2) that a reasonable time for abatement of the violation had been provided, 3) that the time for abatement had expired, 4) that the violation had not been abated and 5) that the period of time for abatement should not be extended. *Clinchfield Coal Company v. UMW*, 11 FMSHRC 2120, 2135 (November 1989).

In this case Island Creek contends only that the inspector did not provide a reasonable time for abatement of the violation and that the period of time for abatement should have been extended. Establishing an appropriate abatement time is obviously not an exact science and considerable judgment must be exercised. Inspector Blankenship opined that it would require four to six men over three shifts and therefore concluded that the operator "could have it cleaned by tomorrow." He set abatement to be completed by 9:00 a.m. the next day. It appears that in response, Phillips, if he said anything at all, said only "I think I need some more time." There is no evidence that Phillips or anyone else even attempted to explain or justify why additional time would be needed.

I further note that when Blankenship returned to abate the cited condition no one asked for additional time and in fact he was told by safety supervisor Canada that everything had been abated except for two or three crosscuts on the No. 2 conveyor belt which had been the subject of another citation. While I also have considered the testimony of the Respondent's witnesses, regarding their difficulty in accomplishing abatement within the time set forth by Blankenship in his citation, none of these witnesses, including Ray Phillips, Danny Crutchfield and Michael Canada, requested any extension or additional time to abate the violative condition at the time the order was issued. In the absence of such a request it is perfectly understandable that the abatement time was not extended. The operator has the burden to bring to MSHA's attention any matters justifying extension of the abatement time. *Energy West Mining Co. v. FMSHRC*, 111 F.3d 900 (D.C. Cir. 1997).

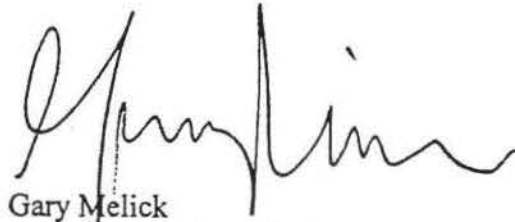
Under all the circumstances, I find that the inspector acted reasonably in issuing the order. It is clearly too late for Respondent to now claim that he acted otherwise. I have also considered the testimony of Mr. Canada that much of the coal that remained on the offside of the belt originated from rib sloughage rather than belt spillage. This testimony does not however necessarily contradict Inspector Blankenship's findings that substantial amounts of violative coal accumulations also remained on the offside on his return to the mine on June 23rd. Under the circumstances the citation and order must be affirmed.



While the problems which hindered timely abatement were not brought to Inspector Blankenship's attention before he issued the order at bar, I nevertheless consider those factors in mitigation of Respondent's penalty. Therefore, considering all of the criteria under Section 110(i) of the Act, I find that a penalty of \$250.00 is appropriate.

**ORDER**

Citation No. 7297718 and Order No. 7297719 are hereby affirmed and Island Creek Coal Company is directed to pay a civil penalty of \$250.00 within 40 days of the date of this decision.

A handwritten signature in black ink, appearing to read 'G. Melick', is written over the printed name.

Gary Melick  
Administrative Law Judge

Distribution: (Certified Mail)

Larry A. Coeburn, Conference & Litigation Representative, U.S. Department of Labor, Mine Safety and Health Adm., (MSHA), P.O. Box 560, Norton, VA 24273

Yoora Kim, Esq., Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Boulevard, Suite 516, Arlington, VA 22203

Elizabeth S. Chamberlin, Esq., Consol Inc., 1800 Washington Road, Pittsburgh, PA 15241

\mca

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

March 16, 1999

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket Nos. WEST 93-336-DM
on behalf of JAMES HYLES,	:	WEST 93-337-DM
DOUGLAS MEARS, DERRICK SOTO	:	WEST 93-338-FM
and GREGORY DENNIS	:	WEST 93-339-DM
Petitioner	:	WEST 93-436-DM
	:	WEST 93-437-DM
v.	:	WEST 93-438-DM
	:	WEST 93-439-DM
ALL AMERICAN ASPHALT	:	WEST 94-21-DM
Respondent	:	

**DECISION ON REMAND**

Before: Judge Cetti

These consolidated cases are before me on remand from the Commission. The cases include All American Asphalt, Docket Nos. WEST 93-336-DM through WEST 93-339-DM and WEST 93-436-DM through WEST 93-439-DM and WEST 94-21-DM<sup>1</sup>. The Commission remanded this matter to me for the limited purpose of reinstating my back pay order, set forth in my decision in 17 FMSHRC at 801 and directed me to add the accrued interest due on these back pay amounts. The Commission also directed me to reassess the penalties after reviewing the parties' stipulations concerning penalties and considering the section 110(i) criteria. The Commission cited and directed my attention to the way this was done in Commission decision *Energy West Mining Co.*, 16 FMSHRC 4 (Jan. 1994) and thus demonstrated how this could be accomplished in the present cases without reopening the record at this late date to take further evidence.<sup>2</sup> There has been no indication the parties have or wish to present further evidence on the statutory criteria in section 110(i) of the Act. As directed by the Commission, I must determine the appropriate amount of penalty, taking into consideration the penalty criteria set

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<sup>1</sup> Forthcoming as All American Asphalt, 21 FMSHRC 34 (January 1999).

<sup>2</sup> The hearing on the issue of back pay and penalties set for May 8, 1995, was canceled at the request of all parties when the parties reached stipulations on the dollar amount of back pay and the penalties to be assessed. 17 FMSHRC at 801.

forth in section 110(i) of the Act, 30 U.S.C. § 820(i) and the stipulations of the parties with respect to assessment of the penalties in these cases.

The Secretary of Labor, the Respondent All American Asphalt and the independent private attorney for the four complainants filed an agreement in which all parties stipulated that the civil penalties assessed, assuming liability on the part of Respondent, "shall be Three Thousand Five Hundred Dollars (\$3,500.00) per violation for each of the eight alleged violations" of section 105(c) for a total of Twenty Eight Thousand Dollars (\$28,000.00). The parties also stipulated that there shall be no penalty in the case bearing Docket No. WEST 94-21-DM.<sup>3</sup>

Section 110(i) of the Act specifies the criteria to be considered in assessing penalties as follows:

[1] the operator's history of previous violations, [2] the appropriateness of such penalty to the size of the business of the operator charged, [3] whether the operator was negligent, [4] the effect on the operator's ability to continue in business, [5] the gravity of the violation, and [6] the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

Keeping in mind this statutory criteria, I again perused the record and found nothing in the record that demonstrates that the penalties agreed upon by the Solicitor, the Respondent and all the Complainants are not the appropriate penalties to be assessed in this matter. With respect to the statutory criteria of "negligence" and "gravity", I find both to be high. I find few mitigating circumstances. In addition to credible evidence of management making vocal threats of retaliation against those who engaged in the protected activity, there was testimony that there were rumors throughout the plant "that mine management was planning to retaliate for the hazard complaint" and that "everyone knew that if they (management) ever found out for sure who made the complaints to MSHA they would probably be fired." (Tr. Vol. II 391). The "history" of violations, prior to the adverse actions taken against the Complainants, cannot be considered good since Respondent's history includes 29 unwarrantable failure citations and a number of other citations that were issued shortly after the April 1991 MSHA inspection.

Respondent's stipulation to accept a total penalty of up to \$28,000, if liability is found, demonstrates, to my satisfaction, that such a penalty would not have a significant effect on the operator's ability to continue in business. All the parties were represented by experienced

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<sup>3</sup> It is undisputed that Docket No. WEST 94-21-DM was properly dismissed by the judge for lack of prosecution as well as the stipulation of the parties.

counsel and their stipulations in this matter speaks well for the appropriateness of the agreed penalties.

Upon consideration of the statutory criteria and the stipulations of the parties, I again find as I did in my decision in 17 FMSHRC at 801 that the appropriate penalty for each of the 8 violations of section 105(c) of the Act is a civil penalty of \$3,500.00. The Solicitor in requesting approval of this stipulated penalty, is in effect, proposing the stipulated penalty and the Respondent having agreed to accept (not contest) this penalty, if liability is established, it appears that Commission Procedural Rules No. 25 and 27 may arguably apply. I, however, repeat that upon consideration of the statutory criteria in section 110(i) and the stipulations of the parties that I find the penalty of \$3,500.00 for each of the 105(c) violations is an appropriate penalty that is consistent with this and the Commission decision and the overall deterrent purposes underlying the Mine Act.

The Commission in its decision remanding this matter for assessment of penalties also remanded it for the limited purpose of reinstating my back pay order which is set forth in 17 FMSHRC at 801, (which adopted the parties' stipulations regarding back pay owed) and directed me to add interest due on the back pay amounts accruing from the date referred to in the parties' stipulation, pursuant to the Commission's decision in *Secretary of Labor on behalf of Bailey v. Arkansas Carbona Co.*, 5 FMSHRC 2042, 2051-53 (Dec. 1983), *modified*, *Local 2274, UMWA v. Clinchfield Coal Co.*, 10 FMSHRC 1493, 1504-06 (Nov. 1988).

The amount of the accrued interest calculated in this manner from the stipulated date of March 15, 1993 through March 15, 1999, for each Claimant is as follows:

James Hyles	\$10,567.08
Douglas Mears	\$19,603.60
Derrick Soto	\$17,418.29
Gregory Dennis	\$18,337.28

Based on the record and the stipulations of the parties, I enter the following:

### **ORDER**

Respondent is **ORDERED TO PAY** each of the Complainants back pay lost prior to December 17, 1993, in the following respective amounts plus accrued interest from March 15, 1993, through March 15, 1999, as follows:

<u>Name</u>	<u>Back Pay Plus Accrued Interest</u> <sup>4</sup>
James Hyles	\$20,837.24 + accrued interest through 3/15/99 \$10,567.08 = \$31,404.32
Douglas Mears	\$38,656.34 + accrued interest through 3/15/99 \$19,603.60 = \$58,259.94
Derrick Soto	\$34,347.10 + accrued interest through 3/15/99 \$17,418.29 = \$51,465.39
Gregory Dennis	\$36,159.32 + accrued interest through 3/15/99 \$18,337.28 = \$54,496.60

It is further **ORDERED THAT RESPONDENT PAY** a civil penalty of \$3,500.00 to the Secretary of Labor for the each of the 8 violations of section 105(c) of the Mine Act established in the above-captioned proceedings. All amounts payable by Respondent pursuant to this order shall be paid within 40 days of the date of this decision.

  
 August F. Cetti  
 Administrative Law Judge

**Distribution:**

Yoora Kim, Esq., Office of the Solicitor, U. S. Department of Labor, 4015 Wilson Boulevard, Arlington, VA 22203

Naomi Young, Esq., Lawrence J. Gartner, Esq., Gregory P. Bright, Esq., GARTNER & YOUNG, 1880 Century Park East, Suite 1410, Los Angeles, CA 90067

William Rehwald, Esq., REHWALD RAMESON LEWIS & GLASNER, 5855 Topanga Canyon Blvd., Suite 400, Woodland Hills, CA 91367

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<sup>4</sup> Interest shall continue to accrue each day after March 15, 1999, calculated pursuant to the Commission's decision in *Secretary of Labor on behalf of Bailey v. Arkansas Carbona Co.*, 5 FMSHRC 2042, 2051-53 (Dec. 1983), *modified*, *Local 2274, UMWA v. Clinchfield Coal Co.*, 10 FMSHRC 1493, 1504-06 (Nov. 1988). The applicable interest rates and daily interest factors may be obtained from the Commission's Executive Director, 1730 K St., N.W., Washington, D.C. 20006.

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

March 19, 1999

DARRELL M. PERRY,	:	DISCRIMINATION PROCEEDING
Complainant	:	
v.	:	Docket No. KENT 98-318-D
	:	
HUSKY COAL COMPANY, INC.,	:	Pike CD 98-12
Respondent	:	
	:	Mine No. 8
	:	Mine ID 15-17839

## DECISION

Appearances: Stephen Sanders, Esq., Appalachian Research and Defense Fund of Kentucky, Inc., Prestonsburg, Kentucky, and James J. Barrett, Esq., Pillersdorf, Derossett and Barrett, Prestonsburg, Kentucky, for Complainant;  
David C. Stratton, Esq., Stratton, Hogg & Maddox, P.S.C., Pikeville, Kentucky, for Respondent.

Before: Judge Weisberger

This case is before me based on a Complaint filed by Darrell M. Perry alleging that Husky Coal Company discriminated against him in violation of section 105 of the Federal Mine Safety and Health Act of 1977. The matter was scheduled for hearing, and was partially heard on February 23, 1999.

On February 23, 1999, during a recess, the parties advised that they had reached a settlement of this matter, and the Complainant made a motion to approve the settlement and dismiss the case. The parties presented the terms of the settlement on the record. After due consideration, the motion was granted as follows, with the exception of minor changes not of a substantive nature.

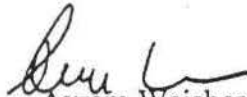
The parties divulged to me all the terms of the settlement and taking into account the terms of the settlement and the entire record, including the testimony presented this morning, I find that the settlement is a fair resolution of the issues presented in this case and also is consistent with the terms of the Federal Mine Safety and Health Act of 1977.



**ORDER**

I therefore accept the settlement and grant the motion. It is **ORDERED** as follows:

1. That the record in this case shall be **SEALED**.
2. It is further **ORDERED** that the parties in this case shall abide by all of the terms of the settlement.



Avram Weisberger  
Administrative Law Judge

Distribution:

Stephen A. Sanders, Esq., Appalachian Research and Defense Fund of Kentucky, Inc., 120 North Front Avenue, Prestonsburg, KY 41653-1221 (Certified Mail)

James J. Barrett, Esq., Pillersdorf, Derossett and Barrett, 18 West Court Street, Prestonsburg, KY 41653 Certified Mail)

David C. Stratton, Esq., Stratton, Hogg & Maddox, P.S.C., P. O. Box 1530, Pikeville, KY 41502-1530 (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

March 19, 1999

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA), on behalf	:	Docket No. PENN 99-129-D
of LEONARD M. BERNARDYN,	:	
Petitioner	:	WILK CD 99-01
v.	:	
	:	Wadesville Pit
READING ANTHRACITE COMPANY,	:	Mine ID 36-01977
Respondent	:	

## **DECISION** **AND** **ORDER OF TEMPORARY REINSTATEMENT**

Appearances: Troy E. Leitzel, Esq., Office of the Solicitor, U. S. Department of Labor, Philadelphia, Pennsylvania, for the Complainant;  
Martin J. Cerullo, Esq., Cerullo, Datte & Wallbillich, P.C., Pottsville, Pennsylvania, for the Respondent.

Before: Judge Weisberger

### **Introduction**

On November 12, 1998, Leonard M. Bernardyn filed a Discrimination Complaint with the Mine Safety and Health Administration (MSHA) alleging that he was discharged by Reading Anthracite Company ("Reading") on November 10, 1998, after he informed Reading's superintendent that his haul truck "was unsafe to travel at a normal pace because of slippery conditions."

On March 4, 1999, the Secretary filed an Application for Temporary Reinstatement alleging, in essence, that the Complaint of Discrimination filed by Bernardyn was not frivolous. On March 8, 1999, in a telephone conference call, initiated by the undersigned with counsel for both parties, counsel for Reading advised that Reading was requesting a hearing. After discussion, the parties agreed that the hearing should be scheduled to commence on March 16, 1999. The matter was heard in Harrisburg, Pennsylvania, on March 16, 1999.

At the conclusion of the hearing, the parties presented oral arguments. After considering the oral arguments, and the evidence of record, a bench decision was rendered. The decision, aside from minor corrections, not relating to matters of substance is set forth below.

### I. The Secretary's Witnesses

Leonard Bernardyn, a truck driver at the pit in question, testified that at the start of the shift on November 10, 1998, the weather was misty and the road was starting to get slick. In general, the drivers of trucks are not informed by the company as to the maximum speed at which the trucks are to be driven. Bernardyn indicated that on the morning of November 10, he felt that if he were to go at his normal speed he would go in circles. He indicated that he was stopped by Stanley Wapinski, the general superintendent at Reading, who told him that he was going slow. Bernardyn told Wapinski that it was getting slippery, and Wapinski informed him to get moving. Shortly thereafter, Bernardyn was stopped again by Wapinski who told him that he was holding everything up, and directed him to park.

Bernardyn utilized a CB radio that was in his truck to attempt to contact a union representative, a co-worker, Thomas Dodds. Bernardyn broadcasted over the CB radio that he has being harassed and was asked to drive faster than warranted by the road conditions. Bernardyn conceded that he did use curse words at the time.

After Bernardyn stopped the truck, Frank Derrick, the general manager, informed him that he was fired. According to Bernardyn, Derrick did not tell him that he was being fired for cursing, or for using threatening language.

Thomas Dodds, another truck driver, confirmed that on the morning at issue the roads were slick. He also confirmed Bernardyn's testimony with regard to what Bernardyn communicated over the CB radio. Dodds indicated that generally miners on the site at issue do not use curse words on the CB radio.

Thomas Goodman, a retired Reading employee and former truck driver, confirmed that the roads were slick on the morning at issue. Goodman testified that at approximately 8:00 a.m., the truck that he was driving began to slide. He also essentially confirmed Bernardyn's testimony as to what Bernardyn had said over the CB radio.

### II. Reading's Witnesses

Frank Derrick, the general manager testified that at approximately 7:00 a.m., on the date at issue he observed a Titan truck being driven very slowly. He stated that other trucks that he observed were driving normally. He indicated that he radioed Wapinski and asked him to investigate why that particular truck was driving slow. Wapinski indicated that he would do it.

At approximately 7:30 a.m., Derrick observed that there were two trucks right behind a Titan truck. Derrick radioed Wapinski and asked him to investigate and to let him know if the Titan was the same truck that had been observed earlier. According to Derrick, Wapinski stopped the truck and told him that it was the same truck and that the driver was Bernardyn. Derrick stated, in essence, that he decided that Bernardyn should be taken off the route that he was driving, and be put in another driving position. He indicated this was not considered to be disciplinary action. Derrick testified that he heard Bernardyn talking on the CB radio, located in his office, using expletives describing Wapinski on numerous times over a 10 minute span. According to Derrick, a number of employees chimed in the conversation on the CB radio.

Derrick went down to the pit area after he had concluded that he had had enough, and that Bernardyn should not be cursing. Derrick entered the pit area intending to discharge Bernardyn for cursing. According to Derrick, when he encountered Bernardyn, Bernardyn again used expletives, and Derrick told him that he ought to be ashamed of himself and that he had never heard anyone curse as bad as Bernardyn had done when he had cursed Wapinski for 10 minutes. Derrick then informed Bernardyn that he was being fired. According to Derrick, after Bernardyn had parked his truck in the designated area, he informed him again that he was being terminated for cursing Wapinski.

Ronald Shellhammer, Reading's maintenance superintendent, confirmed that he heard Bernardyn use expletives in describing Wapinski and also heard him say "I'll get that little s---." According to Shellhammer, he drove Bernardyn out of the pit as directed by Derrick and Bernardyn told him that he could not believe that he got fired for cursing on the radio.

Stanley Wapinski testified that at about 7:00 a.m., on November 10, he was called on the radio by Derrick and informed that a Titan truck was holding up other trucks. He then flagged the truck down and spoke to its driver, Bernardyn, and informed him that the boss said that he had been holding up two trucks and asked him if he was having any problems. Bernardyn stated that he felt that the road was a little slippery, and Wapinski informed him to "pick it up where and when you can."

Subsequently, Wapinski was called by Derrick who told him that the Titan was again holding up the traffic. Wapinski came up to Bernardyn and told him that he had received another call from the boss that he was holding up some trucks, Wapinski then told Bernardyn to take the truck and park it. Wapinski then went to the trailer and confirmed the testimony of Derrick regarding Bernardyn's use of expletives over the CB radio.

### III. Discussion

Under section 105(c)(2) of the Act, the Secretary is required to file an application for the temporary reinstatement of a miner when he finds that the underlying discrimination complaint has not been "frivolously brought." Under Commission Rule 45(d), 29 C.F.R. § 1700.45(d), the issues in a temporary reinstatement hearing are limited to whether the miner's Complaint was frivolously brought. The Secretary has the burden of proving that the Complaint was not frivolous.

The Eleventh Circuit Court of Appeals in *Jim Walter Resources, Inc., v. FMSHRC*, 920 F.2d 738, 747 (11<sup>th</sup> Cir. 1990), concluded that "not frivolously brought" is indistinguishable from the "reasonable cause to believe" standard under the whistleblower provisions of the Surface Transportation Assistance Act. In addition, the Court equated "reasonable cause to believe" with a criteria of "not insubstantial or frivolous" and "not clearly without merit." 920 F.2d 738 at 747.

In applying the above law, I conclude that the issue presented is not whether Bernardyn was discriminated against, but rather whether his Complaint was not clearly without merit. I find that the Secretary has met the burden of establishing that the Complaint was not without merit.


In support of Bernardyn's claim as set forth in his Complaint, testimony was adduced that Bernardyn, in essence, told Wapinski that he was not driving faster due to weather conditions. This was not contradicted by Wapinski. Shortly thereafter, Bernardyn was terminated, a coincidence in time similarly not disputed. The conflicts in the testimony between Bernardyn's version of his discussions with Derrick, i.e., that Derrick did not tell him why he was fired, and Reading's witnesses who testified that Bernardyn was told that he was fired for cursing raise credibility issues which arise in most discrimination cases, and which do not, per se, establish that the Complaint was clearly without merit or was frivolous.

Reading has referred to the case of the *Secretary of Labor on behalf of Ronald A. Markovich v. Minnesota Ore Operations* 18 FMSHRC 1349 (1996). In *Minnesota Ore Operations* the Commission, in a two to two split decision, affirmed a decision by former Commission Judge Arthur Amchan denying an application for temporary reinstatement. Under Commission rules, a two to two split decision has the effect of leaving standing the decision of the trial Judge, and affirming that decision. However, a two to two split decision has very little, if any, precedential value. The decision of Judge Amchan in *Minnesota Ore* 18 FMSHRC 1250 is similarly not dispositive. A decision of a fellow Judge is not binding, and I choose not to follow it regarding any particulars that are inconsistent with my decision herein.

For all the above reasons, I conclude that the Complaint filed with the Mine Safety and Health Administration was not frivolously brought.

#### **ORDER**

It is **ORDERED** that the Application for Temporary Reinstatement is **GRANTED**, and that Reading is **ORDERED** to **REINSTATE** Bernardyn to his former position that he held on November 10, 1998, or to a similar position at the same rate of pay and benefits immediately upon receipt of this Decision.

  
Avram Weisberger  
Administrative Law Judge

**Distribution:**

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Martin Cerullo, Esq., Cerullo, Datte & Wallbillich, P.C., 450 West Market Street, P. O. Box 450, Pottsville, PA 17901 (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

March 19, 1999

JAMES M. RAY Employed by	:	EQUAL ACCESS TO JUSTICE
LEO JOURNAGAN CONSTRUCTION	:	PROCEEDING
COMPANY, INC.,	:	
Applicant	:	Docket No. EAJ 96-4
v.	:	
	:	Journagan Portable
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	
Respondent	:	

## DECISION APPROVING SETTLEMENT

Before: Judge Weisberger

### Introduction

This proceeding involves the recovery of attorneys' fees and expenses under the Equal Access to Justice Act ("EAJA"), 5 U.S.C. § 504 (1996). James "Mike" Ray ("Ray"), who was employed by Leo Journagan Construction Company, Inc. ("Journagan"), prevailed over the Mine Safety and Health Administration ("MSHA") in the underlying section 110(c) proceeding under the Federal Safety and Health Act of 1977 ("Act"), 30 U.S.C. § 820(c) (1994). 18 FMSHRC 892 (June 1996). Thereafter, Ray filed an application for fees and expenses under the EAJA on the basis that the Secretary's position on the two citations at issue was not substantially justified. Former Administrative Law Judge William Fauver denied the application. 18 FMSHRC 2033 (Nov. 1996) (ALJ). Ray filed a petition for review with the Commission challenging the Judge's determination that the Secretary's position was substantially justified. The Commission reversed Judge Fauver's determination of substantial justification on the first citation,<sup>1</sup> but affirmed as to the second. (20 FMSHRC 1014 (1998)).

The Commission remanded this proceeding "... in order to allocate from the total amount of fees and expenses originally applied for those attributable to Ray's defense of section 110(c) liability arising from the first citation." (20 FMSHRC *supra* at 1029.)

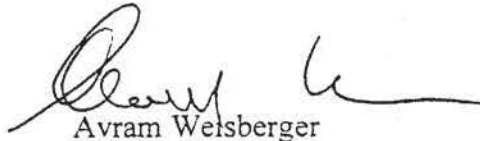
The parties filed a Motion to Approve Settlement of the issues raised in this case. I have reviewed the motion and representations of the parties along with the record in this case. I find that the settlement is proper under the terms of the EAJA, and I approve It.

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<sup>1</sup>/ This Citation alleges a violation of 30 C.R.R. § 56.12016

**ORDER**

It is **ORDERED** that the motion is **GRANTED**. It is further **ORDERED** that the Secretary shall pay James M. Ray \$27,000 within 40 days of this Decision.



Avram Weisberger  
Administrative Law Judge

Distribution:

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# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES  
2 Skyline, Suite 1000  
5203 Leesburg Pike  
Falls Church, Virginia 22041

March 22, 1999

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 98-73-M
Petitioner	:	A.C. No. 21-01600-05657
v.	:	
	:	Docket No. LAKE 98-74-M
HIBBING TACONITE COMPANY,	:	A.C. No. 21-01600-05658
Respondent	:	
	:	Docket No. LAKE 98-75-M
	:	A.C. No. 21-01600-05659
	:	
	:	Docket No. LAKE 98-76-M
	:	A.C. No. 21-01600-05660
	:	
	:	Docket No. LAKE 98-77-M
	:	A.C. No. 21-01600-05661
	:	
	:	Docket No. LAKE 98-86-M
	:	A.C. No. 21-01600-05662
	:	
	:	Docket No. LAKE 98-87-M
	:	A.C. No. 21-01600-05663
	:	
	:	Docket No. LAKE 98-88-M
	:	A.C. No. 21-01600-05664
	:	
	:	Docket No. LAKE 98-89-M
	:	A.C. No. 21-01600-05665
	:	
	:	Docket No. LAKE 98-123-M
	:	A. C. No. 21-01600-05666
	:	
	:	Hibbing Taconite Company

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 98-90-M
Petitioner	:	A.C. No. 21-00282-05662
v.	:	
	:	Docket No. LAKE 98-101-M
USX CORPORATION-MINNESOTA	:	A.C. No. 21-00282-05663
ORE OPERATIONS,	:	
Respondent	:	Docket No. LAKE 98-102-M
	:	A.C. No. 21-00282-05664
	:	
	:	Minntac Mine
	:	
	:	Docket No. LAKE 98-91-M
	:	A.C. No. 21-00820-05869
	:	
	:	Docket No. LAKE 98-92-M
	:	A.C. No. 21-00820-05870
	:	
	:	Docket No. LAKE 98-94-M
	:	A.C. No. 21-00820-05872
	:	
	:	Docket No. LAKE 98-95-M
	:	A.C. No. 21-00820-05873
	:	
	:	Docket No. LAKE 98-96-M
	:	A.C. No. 21-00820-05874
	:	
	:	Docket No. LAKE 98-97-M
	:	A.C. No. 21-00820-05876
	:	
	:	Minntac Plant

### **DECISION**

Appearances: Christine M. Kasak Smith, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois, for Petitioner;  
R. Henry Moore, Esq., Buchanan Ingersoll, P.C., Pittsburgh, Pennsylvania, for Respondents.

Before: Judge Hodgdon

These consolidated cases are before me on Petitions for Assessment of Civil Penalty filed by the Secretary of Labor, acting through her Mine Safety and Health Administration (MSHA),

against USX Corporation-Minnesota Ore Operations and Hibbing Taconite Company, pursuant to section 105 of the Federal Mine Safety and Health Act of 1977 (Mine Act), 30 U.S.C. § 815. The petitions allege 68 violations of section 56.12028, 30 C.F.R. § 56.12028, of the Secretary's mandatory health and safety standards. A hearing was held in Duluth, Minnesota. For the reasons set forth below, I vacate 67 of the citations and affirm one.

### **Background**

USX operates the Minntac Mine and the Minntac Plant and Hibbing operates the Hibbing Plant in St. Louis County, Minnesota. Both operations are involved in mining taconite<sup>1</sup> and processing it into pellets for shipment.

MSHA Inspector James King went to Hibbing management personnel on February 1, 1994, to inform them that MSHA intended to begin examining mine records to determine whether grounding conductors in trailing cables, power cables, and cords that supply power to tools and portable or mobile equipment had been tested annually as required by section 56.12028. He gave them a copy of Program Policy Letter No. P94-IV-1, (Jt. Ex. 2), and advised them that they should develop a plan for complying with the regulation. He later furnished them with a copy of a written report on the "Metal and Nonmetal Electrical Standards Interpretation Workshop" held at the National Mine Health and Safety Academy in Beckley, West Virginia, on February 23 - March 3, 1994. (Jt. Ex. 5.) On March 17, 1994, Inspector Alan Brandt paid a similar visit to the Minntac operations.

Section 56.12028, entitled "Testing Grounding Systems," requires that: "Continuity and resistance of grounding systems shall be tested immediately after installation, repair, and modification; and annually thereafter. A record of the resistance measured during the most recent tests shall be made available on a request by the Secretary or his duly authorized

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<sup>1</sup> "Taconite" is

[a] local term used in the Lake Superior iron-bearing district of Minnesota for any bedded ferruginous chert or variously tinted jaspery rock, esp. one that enclosed the Mesabi iron ores (granular hematite) . . . . The term is specif. applied to this rock when the iron content, either banded or disseminated, is at least 25%. . . . Since World War II, a low-grade iron formation suitable for concentration of magnetite and hematite by fine grinding and magnetic treatment, from which pellets containing 62% to 65% iron can be produced.

American Geological Institute, *Dictionary of Mining, Mineral, and Related Terms* 560 (2d ed. 1997).

representative.” This requirement has been in effect, as worded, since at least November 30, 1977.<sup>2</sup>

Prior to the inspectors’ visits to the companies, MSHA had not enforced section 56.12028 with regard to power cables, extension cords and cords supplying power to tools and portable or mobile equipment. The 1988 version of MSHA’s *Program Policy Manual*, at pp. 51-52, stated, with regard to section 56.12028:

Ground systems normally include all the following:

1. Grounding electrode - usually are driven rods, buried metal or other effective methods for connection to the earth located at the power source.
2. Grounding electrode conductor is the conductor from the grounding electrode extending to the equipment grounding conductor or the service entrance.
3. Equipment grounding conductors and bonding jumpers are the conductors used to connect the metal frames or enclosures of electrical equipment to the grounding electrode conductor.

The grounding system tests required are as follows:

1. Grounding electrode - resistance shall be tested immediately after installation, repair and/or modification, and annually thereafter.
2. Grounding electrode conductor - continuity of this conductor and its connections shall be tested immediately after installation, repair, and/or modification, and annually thereafter.
3. Equipment grounding conductors and bonding jumpers - continuity of these conductors and their connections shall be tested immediately after installation, repair, and/or modification. Equipment grounding conductors and bonding jumpers which

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<sup>2</sup> A final rule using this language was published on October 31, 1977. 42 Fed. Reg. 57038, 57039 (1977). The regulation was renumbered effective April 15, 1985. 50 Fed. Reg. 4048, 4073 (1985).



are exposed or subjected to vibration, flexing, corrosive environments or frequent lightning hazard shall be tested annually.

A record of the most recent tests of items 1 and 2 directly above shall be made available on request to the Secretary or his authorized representative.

*The annual test does not apply to grounding conductors in trailing cables, power cables and cords which supply power to portable or mobile equipment. The grounding conductors in these cables require more frequent testing.*

(Jt. Ex. 4)(emphasis added).

The 1993 edition of the *Program Policy Manual* contained some changes with regard to section 56.12028. The definition of grounding systems remained essentially the same, except the words "and bonding jumpers" were deleted from definition of "equipment grounding conductors." The required grounding systems tests were changed to require "continuity *and* resistance" testing for grounding electrode conductors and equipment grounding conductors. A record of the most recent tests for all three elements of the grounding system was required. With regard to cables, it stated: "The grounding conductors in trailing cables, power cables, and cords which supply power to portable or mobile equipment should be tested more frequently than stationary grounding conductors. However, a record of such tests is only required in accordance with the standard. (Jt. Ex. 3.)

The 1994 Program Policy Letter changed the definition of grounding system from the 1993 manual by deleting the words "or the service entrance" from the definition of "grounding electrode conductor" and added "to provide a low resistance earth connection" to the end of the definition of "grounding electrodes." The testing requirements remained the same, except that testing of grounding electrode conductors had to occur immediately after installation, repair, or modification, and "annually if conductors are subjected to vibration, flexing or corrosive environments." With regard to cables, it stated: "Grounding conductors in trailing cables, power cables, and cords that supply power to tools and portable or mobile equipment must be tested as prescribed in the regulation." The record keeping requirement was also changed, requiring that a record of the most recent *resistance* tests be kept. (Jt. Ex.2.) The requirements for section 56.12028 set out in the Program Policy Letter are the same as those in the 1996 edition of the *Program Policy Manual*. (Jt. Ex. 1.)

Between September 1997 and January 1998 MSHA issued 38 citations to Hibbing and 29 to USX alleging violations of section 56.12028 with respect to assorted types of extension or power cords or cables. The citations contain various allegations of the violative condition. The following are examples of the types of allegations. Citation No. 7809804, issued to Hibbing, states: "An annual continuity and resistance test of the grounding system of the power cord for

the Miller welding machine, located on the fifth level of the #2 crusher, had not been performed. The cord appeared to be undamaged. This condition created a shock or burn hazard.” (Govt. Ex. 3.) Citation No. 7808451, issued to Hibbing, states: “The operator failed to provide a record of continuity and resistance test on the 110 volt pendant cable of the no.# [sic] 401 overhead crane. No damage to the cords was observed.” (Govt. Ex. 6.) Citation No. 7810037, issued to USX, states: “AGGLOMERATOR: A 110 volt power cord for the portable air blower located on the east side of the line 5, step 2 grate was not tested for grounding continuity. No damage was observed to the power cord.” (Govt. Ex. 8). Citation No. 7809683, issued to USX, states: “West Pit: The 110 volt extension cord and 110 volt heater, located in the Port-a-John by the #21 sub station, had not received a ground test to insure that the cord and heater were properly grounded. The heater was on and the extension cord was suppl[y]ing power to the heater. The extension cord and heater appeared to be in good condition.” (Govt. Ex. 10.)

All 67 citations indicate that the likelihood of injury from the violation is “unlikely” and that the violation is not “significant and substantial.”<sup>3</sup> Thirty-seven of the citations allege that the operator’s negligence is “low” and 30 allege that it is “moderate.” The parties stipulated “that if the Judge determines that the standard applies to the types of equipment cited . . . he should uphold all 67 citations. If he should find that the standard does not apply . . . he should vacate all 67 citations.” (Jt. Ex. 6, at 5.) The parties also stipulated “that a \$50 penalty is appropriate for all the citations should the Judge find that violations existed.” (Jt. Ex. 6, at 4.)

Citation No. 7808522 in Docket No. LAKE 98-91-M alleges a violation of section 56.12028 because: “The operator failed to provide a record of the fixed grounding systems visual inspections for the crushing department plant electrical equipment. This is a record violation.” (Jt. Ex. 6, at 9.) The parties stipulated that a \$50.00 penalty was appropriate for this violation and that USX would not contest it. (Jt. Ex. 6, at 10.)

### **Findings of Fact and Conclusions of Law**

The Respondents argue that the citations should be vacated because MSHA was required to issue a notice of proposed rule making and an opportunity for public comment before applying section 56.12028 to extension and power cords and cables. They also argue that the equipment cited is not covered by the language of the regulation and that the regulation is unconstitutionally vague. As discussed below, I find that by not proceeding with “notice and comment” rule making, the Secretary has impermissibly changed the requirements of section 56.12028 to apply to equipment not covered by it.

#### **Statutory Requirements for Rule Making**

Section 101(a) of the Mine Act, 30 U.S.C. § 811(a), requires that:

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<sup>3</sup> The “significant and substantial” language is taken from section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), which distinguishes as more serious any violation that “could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard.”

The Secretary shall by rule in accordance with procedures set forth in this section and in accordance with section 553 of Title 5 (without regard to any reference in such section to sections 556 and 557 of such title), develop, promulgate, and revise as may be appropriate, improved mandatory health or safety standards for the protection of life and prevention of injuries in coal or other mines.

Section 551(4) of the Administrative Procedure Act (APA), 5 U.S.C. § 551(4), defines a "rule" as "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy . . . ."

Section 101(a)(2) of the Mine Act, 30 U.S.C. § 811(a)(2), provides that: "The Secretary shall publish a proposed rule promulgating, modifying, or revoking a mandatory health or safety standard in the Federal Register. . . . [and] shall afford interested persons a period of 30 days after any such publication to submit written data or comments on the proposed rule." Likewise, section 553(b) of the APA, 5 U.S.C. § 553(b), requires that a notice of a proposed rule making be published in the Federal Register, and section 553(c), 30 U.S.C. § 553(c), requires that there be an opportunity for interested persons to comment on the proposed rule.

Notice and Comment Rule Making was Required to Implement the Change

Trailing cables, power cables and cords are not explicitly mentioned in section 56.12028. As recently as 1988, MSHA was of the opinion that annual testing did not apply to them. Further, the evidence is that they were not even inspected, with regard to this section, until MSHA informed operators in 1994 that it intended to begin doing so.

It is undisputed that MSHA did not publish a notice of proposed rule making or provide a comment period with regard to including trailing cables, power cables and cords within the requirements of section 56.12028. However, that is not the end of the inquiry, because the APA provides four exceptions to the notice requirement: (1) "interpretive rules," (2) "general statements of policy," (3) "rules of agency organization, procedure or practice," and (4) "when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to public interest." 5 U.S.C. § 553(b)(3)(A) and (B).

While the exceptions appear explicit, as the courts have correctly observed:

The distinction between those agency pronouncements subject to APA notice-and-comment requirements and those that are exempt has been aptly described as "enshrouded in considerable smog," *General Motors Corporation v. Ruckelshaus*, 742 F.2d 1561, 1565 (D.C. Cir. 1984)(en banc) (quoting *Noel v. Chapman*, 508 F.2d 1023, 1030 (2d Cir. 1975); see also *American Hospital Association v. Bowen*, 834 F.2d 1037, 1046 (D.C. Cir.

1987) (calling the line between interpretive and legislative rules “fuzzy”); *Community Nutrition Institute v. Young*, 818 F.2d 943, 946 (D.C. Cir. 1987) (quoting authorities describing the present distinction between legislative rules and policy statements as “tenuous,” “blurred” and “baffling”).

*American Mining Congress v. MSHA*, 995 F.2d 1106, 1108-09 (D.C. Cir. 1993).

Nonetheless, exceptions (2), (3) and (4) can be eliminated quickly. MSHA does not claim that the 1994 Program Policy Letter and its subsequent inclusion in the 1996 Program Policy Manual is a general statement of policy. Nor could it, since “[a] general statement of policy, the second exception set forth in section 553, is ‘merely an announcement to the public of the policy which the agency hopes to implement in future rulemaking, or adjudications.’ *Pacific Gas & Electric Co. v. FPC*, 506 F.2d 33, 38 (D.C. Cir. 1974).” *Drummond Co., Inc.*, 14 FMSHRC 661, 685 (May 1992). In addition, it is obvious that the Program Policy Letter did not announce rules of MSHA organization, procedure or practice, nor does the letter state that MSHA is not publishing the rule because it finds “that notice and public procedure thereon are impracticable, unnecessary, or contrary to public interest,” the third and fourth exceptions in section 553 of the APA.

The Secretary argues that notice and comment were not necessary because the Program Policy Letter merely interprets section 56.12028, thus coming within the first exception to section 553. On the other hand, it is the Respondents’ position that the letter changed section 56.12028 and was, therefore, a legislative rule requiring notice and comment. Although stating, as set out above, that the difference between an interpretive rule and a legislative one is far from clear, the Court of Appeals for the D.C. Circuit has provided a test for distinguishing between the two. The court said that the difference can be determined:

on the basis of whether the purported interpretive rule has “legal effect”, which in turn is best ascertained by asking (1) whether in the absence of the rule there would not be an adequate legislative basis for enforcement action or other agency action to confer benefits or ensure the performance of duties, (2) whether the agency published the rule in the Code of Federal Regulations, (3) whether the agency has explicitly invoked its general legislative authority, or (4) whether the rule effectively amends a prior legislative rule. If the answer to any of these questions is affirmative, we have a legislative, not an interpretive rule.

*American Mining Congress*, 995 F.2d at 1112.

While the answer to the first three questions is “no,” I find that the fourth question must be answered “yes.” The application of section 56.12028 to trailing cables, power cables and cords, effectively amends the rule. The rule clearly applies only to grounding systems. While



the term "grounding systems" is not defined in the regulations, the Secretary has defined it elsewhere.

The Program Policy Letter and the 1996 version of the *Program Policy Manual*, which provide MSHA's latest definition of grounding systems, state that:

Grounding systems typically include the following:

1. equipment grounding conductors - the conductors used to connect the metal frames or enclosures of electrical equipment to the grounding electrode conductor;
2. grounding electrode conductors - the conductors connecting the grounding electrode to the equipment grounding conductor; and
3. grounding electrodes - usually driven rods connected to each other by suitable means, buried metal, or other effective methods located at the source, to provide a low resistance earth connection.

(Jt. Exs. 1 and 2.) As previously noted, this definition has remained essentially the same since, at least, the 1988 *Program Policy Manual*. When the regulation and this definition are read in conjunction with the three sections preceding section 56.12028, it is apparent that the grounding systems required in those sections are the grounding systems referred to in the regulation, not trailing cables, power cables and cords.<sup>4</sup> In this regard, I note particularly that mobile equipment powered through *trailing cables* must have *frame grounding* or equivalent protection.

Furthermore, it is evident that operators in the mining industry did not understand that grounding systems included trailing cables, power cables and cords. For example, the report of MSHA's 1994 Electrical Standards Interpretation Workshop stated, in connection with section 56.12028, that: "MSHA had determined that the majority of operators were testing and recording only the grounding electrode." (Jt. Ex. 5 at 5.) William Jankowski, an electrical engineer and Senior Engineer for U.S. Steel Minntac, testified that prior to MSHA's 1994 Program Policy

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<sup>4</sup> Section 56.12025, 30 C.F.R. § 56.12025, requires that: "All metal enclosing or encasing electrical circuits shall be grounded or provided with equivalent protection. This requirement does not apply to battery-operated equipment." Section 56.12026, 30 C.F.R. § 56.12026, states that: "Metal fencing and metal buildings enclosing transformers and switchgear shall be grounded." Section 56.12027, 30 C.F.R. § 56.12026, provides that: "Frame grounding or equivalent protection shall be provided for mobile equipment powered through trailing cables."

Letter it had never crossed his mind that "a conductor in an extension cord or a Calorad heater cord had to be tested for continuity" under the standard. (Tr. 606.)

That the grounding systems required to be tested are those systems in the preceding three sections of the regulations is further borne out by the requirement that the system be tested immediately after "installation." "Installation" means, among other things, "the setting up or placing in position for service or use . . . something that is installed for use." *Webster's Third New International Dictionary (Unabridged)* 1171 (1986). Thus, a cord would be "installed" every time it is plugged in. But William J. Helfrich, MSHA's electrical expert, was not sure when a cord is installed. When asked whether installation occurs every time a cord is plugged or just the first time it is put into service, he replied: "I guess you could rationalize that it would be the first time they were putting it in." (Tr. 123.) On the other hand, there is no such doubt as to when the grounding systems in sections 56.12025-56.12027 are placed in position for service.

The final, and most significant indication, that MSHA's new interpretation amended the rule is that they have changed the requirements of the standard when it is applied to trailing cables, power cables and cords. The rule requires *continuity* and *resistance* testing, but it only requires that the measured *resistance* be recorded. Yet Helfrich testified that for trailing cables, power cables and cords, only the *continuity* needed to be tested and recorded, that resistance is something that has to be tested "mainly on the ground bed."<sup>5</sup> (Tr. 342.)

In *Drummond*, the Commission, in determining that an MSHA program policy letter concerning the imposition of penalties was not an interpretive rule, but a substantive one, said: "The PPL does not simply 'remind' operators of existing penalty proposal formulas under the Part 100 scheme, but imposes new substantive formulas." 14 FMSHRC at 685. Here MSHA has not merely reminded operators of existing requirements under section 56.12028, but imposed new requirements. Trailing cables, power cables and cords, which had not been inspected for compliance with section 56.12028 prior to 1994, now had to be tested annually, but only for continuity, not resistance, and the continuity test had to be recorded in some way to show that it had been performed.

Accordingly, I conclude that the 1994 Program Policy Letter announced a substantive change in section 56.12028, and that, therefore, notice and comment rule making was required before it could be implemented. As noted at the beginning of this discussion, the difference between legislative, or substantive, rules and interpretive, or clarifying or explanatory, rules is not always obvious. While I find that MSHA made a substantive change in the rule in this case, I have also considered the guidance of the Court of Appeals for the D.C. Circuit that:

Congress intended the exceptions to § 553's notice and comment requirements to be narrow ones. The purpose of according notice and comment opportunities were twofold: "to reintroduce public

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<sup>5</sup> Helfrich also testified that performing continuity and resistance testing on trailing cables, power cables and cords "would be very burdensome." (Tr. 346.)



participation and fairness to affected parties after governmental authority has been delegated to unrepresentative agencies," *Batterton v. Marshall*, 648 F.2d 694, 703 (D.C. Cir. 1980), and to "assure[] that the agency will have before it the facts and information relevant to a particular administrative problem, as well as suggestions for alternative solutions." *Guardian Federal Savings & Loan Insurance Corp.*, 589 F.2d 658, 662 (D.C. Cir. 1978). In light of the obvious importance of these policy goals of maximum participation and full information, we have consistently declined to allow the exceptions itemized in § 553 to swallow the APA's well-intentioned directive. See, e.g., *Alcaraz v. Block*, 746 F.2d 593, 612 (D.C. Cir. 1984) ("The exceptions of section 553 will be 'narrowly construed and only reluctantly countenanced'" (citation omitted); *National Association of Home Health Agencies v. Schweiker*, 690 F.2d 932, 949 (D.C. Cir. 1982), *cert. denied*, 459 U.S. 1205, 103 S.Ct. 1193, 75 L.Ed.2d 438 (1983) (exceptions to the notice and comment provisions of § 553 are to be recognized "only reluctantly," so as not to defeat the "salutary purposes behind the provisions"); see also *American Federation of Government Employees v. Block*, 655 F.2d 1153, 1156 (D.C. Cir. 1981); *American Bus Association v. United States*, 627 F.2d 525, 528 (D.C. Cir. 1980); *New Jersey Department of Environmental Protection v. EPA*, 626 F.2d 1038, 1045 (D.C. Cir. 1980).

*American Hosp. Ass'n v. Bowen*, 834 F.2d 1037, 1044-45 (D.C. Cir. 1987). Clearly, if there is doubt as to whether a rule is legislative or interpretive, it should be resolved in favor of notice and comment rule making.<sup>6</sup>

As expressed in the quotation above, one of the reasons notice and comment rule making is favored is to permit the agency to have before it all the facts and information it needs to solve a problem. For example, in this case, the Respondents presented evidence that in attempting to comply with MSHA's new policy concerning trailing cables, power cables and cords it takes them as many as 2180 man-hours a year to complete the process, at a cost of \$35-\$40 an hour.<sup>7</sup> Such evidence has little relevance in a proceeding to determine whether or not a regulation has been violated. However, it is exactly the type of information that should be considered when a rule is being adopted.

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<sup>6</sup> See *Drummond*, 14 FMSHRC at 682-83, for a discussion of the important purposes served by notice and comment rule making.

<sup>7</sup> It takes USX 600 man-hours a year to check the cables and cords in its Minntac shop and 1000-1200 man-hours per year to perform the process in its agglomerator. (Tr. 614-15, 650.) It takes Hibbing 200-300 man-hours in its concentrator and 60-80 man-hours in the pit area. (Tr. 544-45, 549.)

Finally, it does not appear that requiring MSHA to go through the rule making procedures to adopt this rule will have an adverse affect on the safety of miners. All 67 of the citations in this case stated that an injury was unlikely as a result of the violation and that the violations were not "significant and substantial." Testing for continuity and resistance of trailing cables, power cables and extension cords is not required in coal mines, which indicates that, although they are not used as extensively in coal mines, failure to test them is not considered a safety hazard. Lastly, section 56.12030, 30 C.F.R. § 56.12030, requires that: "When a potentially dangerous condition is found it shall be corrected before equipment or wiring is energized." This would seem to require that trailing cables, power cables and cords be examined for potentially dangerous conditions before they are used, thus affording protection to miners.

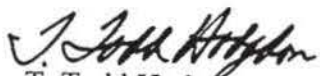
#### Civil Penalty Assessment

The Secretary has proposed a penalty of \$50.00 for Citation No. 7808522 in Docket No. LAKE 98-91-M. However, it is the judge's independent responsibility to determine the appropriate amount of penalty in accordance with the six penalty criteria set out in section 110(i) of the Act, 30 U.S.C. § 820(i). *Sellersburg Stone Co. v. FMSHRC*, 736 F.2d 1147, 1151 (7<sup>th</sup> Cir. 1984); *Wallace Brothers, Inc.*, 18 FMSHRC 481, 483-84 (April 1996).

In connection with the penalty criteria, the parties have stipulated that the Minntac Plant worked over 1.6 million hours in 1996, making it a large mine. The Assessed Violation History Report shows that the plant had 732 violations in the two years preceding the violation. (Govt. Ex. 1c.) This is not a good history of violations. The parties have also stipulated that both the gravity and the negligence for this violation is "low" and that a \$50.00 penalty is appropriate. I agree.

#### Order

In view of my conclusion that notice and comment rule making was required before section 56.12028 could be applied to trailing cables, power cables and cords, all of the citations in the captioned dockets, with the exception of Citation No. 7808522 in Docket No. LAKE 98-91-M, are **VACATED** and the captioned dockets, with the exception of Docket No. LAKE 98-91-M, are **DISMISSED**. Citation No. 7808522 in Docket No. LAKE 98-91-M is **AFFIRMED** and USX Corporation - Minnesota Ore Operations is **ORDERED TO PAY** a penalty of \$50.00 within 30 days of the date of this decision.



T. Todd Hodgdon  
Administrative Law Judge

Distribution:

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/nj

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

March 23, 1999

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. SE 98-184-D
on behalf of BENNARD SMITH,	:	BIRM CD 98-02
Complainant	:	
v.	:	
	:	No. 3 Mine
JIM WALTER RESOURCES INCORPORATED,	:	Mine ID No. 01-00758
Respondent	:	

## DECISION

Appearances: William Lawson, Esq., Office of the Solicitor, U. S. Department of Labor, Birmingham, Alabama, on behalf of Complainant;  
David M. Smith, Esq., and James P. Naftel, Esq., Maynard, Cooper & Gale, P.C., Birmingham, Alabama, and Guy W. Hensley, Esq., Jim Walter Resources, Inc., on behalf of Respondent.

Before: Judge Melick

This case is before me upon the complaint by the Secretary of Labor, on behalf of Bennard Smith, under section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.*, the "Act." The Secretary alleges that Jim Walter Resources, Inc. (JWR) twice violated Section 105(c)(1) of the Act, when it transferred Mr. Smith, a longwall helper, from the No. 2 Longwall to the No. 1 Longwall on October 28, 1996, and again on October 24, 1997.<sup>1</sup>

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<sup>1</sup> Section 105(c)(1) of the Act provides as follows:

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

Respondent maintains preliminarily that the Complaint herein as to the October 28, 1996, transfer should be dismissed for untimely filing. It is undisputed that the Complainant was first transferred from the No. 2 Longwall to the No. 1 Longwall on October 28, 1996, and that he did not file his complaint with the Secretary alleging that this transfer was in violation of the Act until almost a year later, on October 22, 1997 (Gov. Exh. No. 1). Section 105(c)(1) of the Act prohibits discrimination against miners for engaging in certain protected activities. If the miner believes that he has suffered discrimination in violation of the Act, and wishes to invoke his remedies under the Act, he must file his initial discrimination complaint with the Secretary of Labor within 60 days after the alleged violation in accordance with section 105(c)(2) of the Act.

The Commission has held that the purpose of the 60-day limit is to avoid stale claims but that a miner's late filing may be excused on the basis of justifiable circumstances. Hollis v. Consolidation Coal Company, 6 FMSHRC 21 (January 1984); Herman v. IMCO Services, 4 FMSHRC 2935 (December 1992). In those decisions, the Commission cited the Act's legislative history relevant to the 60-day time limit:

While this time limit is necessary to avoid stale claims being brought, it should not be construed strictly where the filing of a complaint is delayed under justifiable circumstances. Circumstances which could warrant the extension of the time limited would include a case where the miner within a 60-day period brings the complaint to the attention of another agency or his employer or where the miner fails to meet the time limit because he is misled as to, or misunderstands his rights under the Act.

The Commission noted accordingly that timeliness questions must be resolved on a case-by-case basis taking into account the unique circumstances of each situation.

Smith testified at hearing that he first learned of "Section 105(c)" following a meeting in late July or early August 1997, when the local union president, Buddy Humphreys, told him that since the company had denied his grievance and refused to return him to the No. 2 Longwall, he might as well file a "105(c)." In a statement to MSHA Smith claimed that this event occurred on August 21, 1997. This is contradicted, however, by the fact that his letter to safety committee chairman James Woods, requesting an MSHA investigation, was dated August 17. Smith maintains that he also asked Woods about the procedures to file a "Section 105(c)." In any event, according to Smith, Woods later obtained a complaint form from MSHA and advised him that he had 30 days to return the form. Smith maintains that he did in fact return the form to Woods within 30 days.

James Woods had been a member of the Union Safety Committee for nine years and its

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applicant for employment has instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding, or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by the Act.



chairman for six years. According to Woods, Smith asked him about a "105(c)" for the reason that he felt he was being transferred from the No. 2 Longwall because of his "race and younger people with less seniority was still on that wall, and because he had made several safety suggestions or what have you" (Tr. 12-13). Smith later provided Woods with a written statement (Gov't Exh. No. 8). Smith apparently also filed a copy of this statement with MSHA on August 19, 1999 (Tr. 18). Woods testified that he then obtained a "complaint form" from MSHA which Smith completed and returned to him. Woods then hand delivered this form to MSHA.

Within this framework of evidence it is apparent that Smith knew as early as August 17, 1997, (Gov't Exh. No. 8) that he had the right to file a complaint of discrimination with MSHA and that the actual complaint was not filed until October 22, 1997, (Gov't Exh. No. 1). The Respondent has not provided sufficient credible evidence that Mr. Smith was aware of his rights under Section 105(c) of the Act prior to August 17, 1997. Accordingly, Smith's delay in filing a complaint with MSHA may be excused. Smith's delays may also be excused in part because of delays attributable to mine safety committee chairman James Woods. Considering the evidence that Smith only learned of his rights on August 17, 1997, this delay was in any event not more than five days beyond the 60-day time limit. Under the circumstances Respondent's motion to dismiss for untimeliness is denied.

### **The Merits**

Bennard Smith alleges two acts of discrimination in retaliation for activities protected under the Act. The first act of discrimination purportedly occurred on October 28, 1996, when Smith was transferred from the No. 2 Longwall to the No. 1 Longwall. In particular, in his complaint to the Secretary (Gov't Exh. No. 1) Mr. Smith alleges as follows:

In December 1996, I was transferred from No. 2 Longwall (full-time helper) to part-time Longwall helper and part-time other classification. This was done without regard to seniority or experience. The longwall foreman who initiated this action was Mr. Oscar Owens. Several reasons were given for the move, they are as follows:

1. I was too "safety conscious" and posed a threat to shut down the Longwall operations if safety standards were not met.
2. Not doing my job (although no verbal or written warnings have ever been issued).
3. Mr. Owens also expressed a total dislike for my "attitude."<sup>2</sup>

Smith has been employed by JWR since 1976 primarily in coal production on continuous mining and longwall sections. Since May 1983 Smith has worked almost exclusively as a longwall machine operator helper or as a shear operator. The record shows that in April 1996, an

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<sup>2</sup> It was stipulated at trial that Smith's transfer actually occurred on October 28, 1996, and not in December as stated in his complaint.



MSHA representative met with JWR officials at the No. 3 Mine regarding its violation and accident history. As a result of this meeting, JWR implemented a plan which included disciplinary action to be taken against miners involved in any two accidents during a twelve-month period. JWR officials thereafter met with individual miners to explain this plan. Smith met with industrial relations specialist Mike Johnson. Johnson told him he had had too many accidents and could be disciplined for future accidents. Smith maintains that he was therefore particularly concerned about accidents from unsafe work conditions. Sometime later, Smith was advancing the longwall shields by dragging them with a chain. Smith maintains that this was an unsafe procedure and that he therefore presented his foreman, Oscar Owens, with an ultimatum "either get [the] chain off of [the] shield by the next evening," or else he "would file a first step safety grievance against him running that wall like that."

The longwall shields provide roof support for the longwall. The shields are normally advanced by hydraulically activated relay bars. On this occasion one of the shields was broken and was being dragged with a chain. Smith maintains that he had seen such chains break and was aware of the dangers involved. He therefore complained to Owens. Record evidence indeed shows that employee Harold Oglesby had previously been seriously injured when a chain broke while used in the same manner Smith was protesting. Oglesby was struck in the face and suffered a contusion, laceration and puncture. He also lost twelve days work.

It is not disputed that the filing of a safety grievance could have required that Oscar Owens immediately address the matter. If Owens disagreed with the complaint, the union safety committee would be called to the area and then, if necessary, an MSHA inspector. Since the longwall was idled in this case for reasons unrelated to the defective shield, the longwall was not then shut down. Owens instructed Smith and another miner to repair the broken shield. The Secretary maintains that Smith's demand to have the shield repaired by the next evening was protected activity.

Five months later, on October 28, 1996, foreman Owens removed Smith from the No. 2 (production) Longwall and transferred him to the No. 1 (idle) Longwall. The No. 1 Longwall was then an idle section on which maintenance and repair work was performed rather than coal production. According to Smith, the work at the No. 1 Longwall was more demanding and arduous than that of coal production on the No. 2 Longwall. In addition, it is undisputed that miners working at the No. 2 Longwall received more overtime pay for the longer trip to and from the surface than at the No. 1 Longwall.

Smith maintains that he asked Owens for an explanation for his transfer and Owens only responded that he did not know why Smith was being moved and that he had nothing to do with it. Smith claims that he also approached other management officials, including mine superintendent Fred Kozell, but apparently got no explanation. However, when Owens later asked longwall coordinator Grizzelle who decided to move him, Grizzelle gestured towards Oscar Owens. Smith understood this gesture to mean that Owens was the person responsible for his move.

Smith testified that when he was first removed from the production wall, he did not know whether his complaints about dragging the shield with a chain had played a role in Owens' decision to move him. Smith claims that he thought Owens' actions were racially motivated. Smith and Roy Milton were the only two members of the No. 2 production wall who were moved. Smith and Milton are black and were two of the more senior members on the longwall crew. Oscar Owens replaced them with two more junior employees, both of whom were white. Since the third shield puller on the No. 2 wall was also white, Owens had assembled an all-white shield-pulling crew.

Smith's efforts to resolve the matter with management were unsuccessful and he filed a grievance with the union in March 1997. Smith claims that at a later meeting with management Owens stated that Smith's complaints about dragging the shield with a chain played a role in his decision to remove him from the production wall. Since Smith maintains that he was then unaware of the remedies afforded by Section 105(c) of the Act, he continued to seek a remedy through the grievance proceedings. As previously noted, when it became apparent that JWR would not return Smith to the No. 2 Longwall, the local UMW president purportedly advised Smith to contact his safety committeeman about the procedures for filing a discrimination complaint under the Act. According to Smith he then contacted safety committee chairman James Woods regarding the procedures to file a complaint with MSHA. Woods later visited MSHA investigator Bob Everett. Woods inquired if he could complete a complaint form on behalf of Mr. Smith, but was informed that it would be necessary for Smith to personally sign the complaint. As previously noted, Smith later completed the complaint form and it was hand delivered by Woods to the MSHA office on October 22, 1997.

Five days before his discrimination complaint was filed with MSHA, Smith was returned to the No. 2 Longwall. He maintains that he then engaged in two additional protected activities. On his return to the No. 2 Longwall he was assigned to pull the tailgate shields and had difficulty ramming over the tailgate. According to Smith the delay in ramming the tailgate placed him more than 20 feet downwind of the shearer in an area more exposed to coal dust. On October 21, Smith complained to Oscar Owens about the problem he was having ramming over the tailgate. Smith maintains that he was concerned that "in the long run, staying down there in that dust is not good for your health when you're in all that dust." Owens purportedly responded that he had already talked to Grizzelle who decided that they were not purchasing any more jacks for the tailgate. The next day, however, Owens reassigned Smith to pull the mid-face set of shields, thereby removing him from the dusty conditions in the tailgate area.

Smith maintains that two days later, on October 23<sup>rd</sup>, he engaged in a third protected safety complaint after observing that a water spray known as the crescent spray had broken off the longwall shearer. Smith testified that he had experienced methane ignitions in the past and believed the crescent spray was essential to settle the coal dust. The crescent spray was, in fact, designed to suppress coal dust by dissipating water over the coal face. Smith understood that the water spray would be replaced prior to the commencement of coal production, so he proceeded down the longwall face to his duty station on the mid-face shields. Shortly thereafter, the longwall shearer began moving toward the tailgate. Smith testified that he then observed that the crescent spray had not been replaced. He then filed a first step safety grievance with foreman

Oscar Owens for not repairing the crescent spray.

Oscar Owens did not know if the water spray was required to be on the shearer, nor did safety committeeman Woods. Woods called another safety committeeman who was also uncertain as to the necessity of the spray. Smith eventually spoke to longwall coordinator Ken Grizzelle who told him the spray was not required under the existing dust control plan. Smith doubted Grizzelle's representation but after speaking again with the union safety committee, Smith was apparently satisfied that the spray was not required. He then told Owens that he had no objection to the resumption of production with the shearer. JWR nevertheless opted to replace the water spray before resuming production. The following day, on October 25, 1997, Smith was again transferred from No. 2 Longwall to the No. 1 Longwall. An oral complaint about this transfer was made to an MSHA investigator on October 30, 1997. The Secretary filed her complaint of discrimination with the Commission on July 27, 1998, and Smith returned to the No. 2 Longwall on August 25, 1998.

This Commission has long held that a miner seeking to establish a *prima facie* case of discrimination under Section 105(c) of the Act bears the burden of persuasion that he engaged in protected activity and that the adverse action complained of was motivated in any part by that activity. Secretary on behalf of Pasula v. Consolidated Coal Co., 2 FMSHRC 2786, 2797-2800 (1980), rev'd on grounds, *sub nom.* Consolidated Coal Co. v. Marshall, 663 F.2d 1211 (3<sup>rd</sup> Cir. 1981); and Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 803, 817-18 (1981). The operator may rebut the *prima facie* case by showing either that no protected activity occurred or that the adverse action was in no part motivated by the protected activity. If an operator cannot rebut the *prima facie* case in this manner, it may nevertheless defend affirmatively by proving that it would have taken the adverse action in any event on the basis of the miner's unprotected activity alone. Pasula, supra; Robinette, supra. See also Eastern Assoc. Coal Corp. v. FMSHRC, 813 F.2d 639, 642 (4<sup>th</sup> Cir. 1987); Donovan v. Stafford Construction Co., 732 F.2d 194, 195-196 (6<sup>th</sup> Cir. 1983) (specifically approving the Commission's *Pasula-Robinette* test). Cf. NLRB v. Transportation Management Corp., 462 U.S. 393, 397-413 (1983) (approving nearly identical test under National Labor Relations Act.)

The second element of a *prima facie* case of discrimination is a showing that the adverse action was motivated in any part by the protected activity. As this Commission noted in Chacon v. Phelps Dodge Corp., 3 FMSHRC 2508 (1981), rev'd on other grounds *sub nom.* Donovan v. Phelps Dodge Corp., 709 F.2d 86 (D.C. Cir. 1983), "[d]irect evidence of motivation is rarely encountered; more typically the only available evidence is indirect." The Commission considered in that case the following circumstantial indicia of discriminatory intent: knowledge of protected activity; hostility towards protected activity; coincidence of time between the protected activity and the adverse action or disparate treatment. In examining these indicia the Commission noted that the operator's knowledge of the miner's protected activity is "probably the single most important aspect of the circumstantial case."

#### October 28, 1996, Transfer

There is no dispute that if Smith in fact made a complaint to his foreman, Oscar Owens,

regarding the use of chains to drag the longwall shields, it was a protected activity. Since Owens himself acknowledged that Smith made such a complaint, that element of a *prima facie* case has been established. Furthermore, I have no difficulty finding that Smith's transfer from the No. 1 (production) Longwall to the No. 2 (idle) Longwall was an adverse action. As a result of the transfer Smith was denied overtime pay for the additional travel time to the No. 2 Longwall. The work on the No. 1 Longwall was also clearly of a more arduous nature.<sup>3</sup>

The Complainant maintains that there is in this case both direct and indirect evidence of motivation evidencing discriminatory intent. As direct evidence she cites the testimony of Bennard Smith himself that, at a meeting with Owens, Grizzelle and Evans following the second step grievance meeting, Evans asked Owens why Smith had been transferred. According to Smith, Owens stated it was because he had complained about pulling a shield with a chain, that he did not like Smith's attitude and that Smith was not doing his job. This meeting purportedly occurred in March of 1997. For several reasons however, I cannot accept Smith's testimony that Owens in essence admitted at this meeting to violating the Act by transferring Smith for his safety complaints.

In this regard I note that the other participants at this meeting, Owens, Evans and Grizzelle all denied under the oath that Owens ever mentioned the use of chains to pull shields or any safety complaints at this meeting. It would also be quite unusual for anyone in management to admit to retaliating against an employee because of a safety complaint. I further note that in his discrimination complaint filed with MSHA Smith never mentioned that he had been transferred because of his complaints about pulling a shield with a chain. He alleged only in a general way that he had been "too safety conscious." Finally, Smith's allegations herein are seriously undermined by his own assertions under oath in a complaint to the Equal Employment Opportunity Commission (EEOC) on December 22, 1997, two months after he filed his complaint with MSHA. In that affidavit Smith declared under penalty of perjury that, "I was removed from my position solely because of race." (Exh. R-5). This affidavit is inconsistent with Smith's claims that he was told by his foreman that his transfer was based on his prior safety complaint about pulling the shields with a chain and with Smith's complaint herein that he was transferred because of that safety complaint. Given these inconsistencies and contradictions, I am unable to conclude that Owens ever in fact stated that he transferred Smith because of Smith's complaints about dragging the shields with a chain. The Secretary's claim that there is direct evidence of motivation is accordingly not supported by credible evidence.

The Secretary next cites as circumstantial evidence of discriminatory intent illustrations of what she maintains is evasive and inconsistent testimony by William Owens, who was Smith's foreman and the person responsible for Smith's transfer. It is indeed true that Owens did testify inconsistently in some respects with regard to his reasons for transferring Smith off the No. 2 Longwall. His testimony that he transferred Smith at least in part because of Smith's excessive

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<sup>3</sup> Indeed Respondent seems to acknowledge that Smith lost overtime pay due to the shorter travel time to the No. 1 Longwall and that the work at the No. 1 Longwall was more physical. The evidence is clearly sufficient to show that Smith's transfer was adverse.



use of the mine telephone and his failure to wash down the longwall shields appears to be contradicted by his deposition testimony. These contradictions may indeed raise suspicions as to the credibility of those alleged non-protected reasons and suggests that those reasons were merely pretextual. However, that inconsistent testimony could equally suggest a pretext for a racially motivated discriminatory transfer. Indeed, there is evidence in this case to suggest that the transfer may in fact have been racially motivated and Smith himself, as already noted, has filed a complaint with the EEOC alleging that his race was the sole motivation for his transfer (Resp.'s Exh. No. 5). Under these unique circumstances none of the inconsistencies in themselves support a conclusion that the reasons given by Owens were a pretext for safety related discrimination against Smith.

Indeed, even aside from the evidence that Smith's transfer was racially motivated, I find from the totality of the evidence that Smith's transfer in this case was not motivated by his safety complaint. In this regard I note that Owens was not evasive and did not deny that Smith in fact had once complained to him about dragging the shields with a chain, and that Smith intimated he would file a first step safety grievance if the shield was not repaired. I also note however, that this event occurred in May 1996 and Smith's transfer did not occur until October 28, 1996. Such a lapse of time certainly negates a strong connection between the events. Owens also provided other non-protected and uncontradicted reasons for Smith's transfer to the idle longwall including his maintenance skills, the belief that Smith did not want to work for him, and that Smith "was unsatisfied with the change in supervisors and griping about everything" (Tr. 703). Under all the circumstances I do not find direct or circumstantial evidence sufficient to sustain the Secretary's burden of proving that Mr. Smith was transferred on October 28, 1996, in violation of the Act.

#### October 24, 1997 Transfer

It is undisputed that Smith complained on October 21 and 22, 1997, of practices and defects that could reasonably have been considered unhealthy, i.e., his exposure to coal dust because of his difficulty in ramming over the tailgate shields and from a broken crescent spray on the longwall shearer. Accordingly, Smith's complaints in this regard constituted protected activity. His transfer only a few days later, on October 24, 1997, to the No. 1 Longwall was, for the reasons previously stated, also clearly an adverse action.

Following his October 28, 1996 transfer, Smith was reassigned to the No. 2 Longwall on October 17, 1997. He worked there for only five shifts and was sent back to the No. 1 Longwall on October 24. As previously noted, during the interim he had complained to Oscar Owens on October 21, about the difficulty ramming over the tailgate shields and on October 23, asserted his safety rights under the collective bargaining agreement over the missing crescent water spray. The issue here to be decided then, is whether his reassignment was improperly motivated by these protected activities in violation of Section 105(c). In this regard, it is undisputed that at the time Smith was removed from the production longwall in October 1997, JWR was aware that Smith had complained about his problems in ramming over the tailgate shields and the missing crescent water spray (Tr. 816-817). Moreover, after Smith filed a first step grievance against foreman Owens on the day after Smith had raised the second of his two health complaints, he

was removed from the production longwall and placed back on the idle longwall. JWR management therefore knew of Smith's protected activity and took adverse action against him almost immediately following the second of his two protected complaints. Hostility towards those complaints and unlawful motivation may be inferred from this prompt action. I find that

the Secretary has accordingly met her burden of proving that Smith's transfer from the production longwall on October 24, 1997, was motivated at least in part by his protected activity.

JWR maintains however, that it would have removed Smith from the No. 2 Longwall, in any event, based on a business justification and Smith's unprotected activity alone. This argument addresses the affirmative defense under the *Pasula* analysis. In *Chacon* the Commission explained the proper criteria for analyzing an operator's business justification for an adverse action:

Commission judges must often analyze the merits of an operator's alleged business justification for the challenged adverse action. In appropriate cases, they may conclude that the justification is so weak, so implausible, or so out of line with normal practice that it was a mere pretext seized upon to cloak discriminatory motive. But such inquiries must be restrained.

The Commission and its judges have neither the statutory charter nor the specialized expertise to sit as a super grievance or arbitration board meting out industrial equity. Cf. *Youngstown Mines Corp.*, 1 FMSHRC 990, 994 (1979). Once it appears that a proffered business justification is not plainly incredible or implausible, a finding of pretext is inappropriate. We and our judges should not substitute for the operator's business judgment our views on "good" business practice or on whether a particular adverse action was "just" or "wise." Cf. *NLRB v. Eastern Smelting & Refining Corp.*, 598 F.2d 666, ((1<sup>st</sup> Cir. 1979). The proper focus, pursuant to *Pasula*, is on whether a credible justification figures into motivation and, if it did, whether it would have led to the adverse action apart from the miner's protected activities. If a proffered justification survives pretext analysis . . . , then a *limited* examination of its substantiality becomes appropriate. The question, however, is not whether such a justification comports with a judge's or our sense of fairness or enlightened business practices. rather, the narrow statutory question is whether the reason was enough to have legitimately moved that the operator to have disciplined the miner. Cf. *R-W Service System Inc.*, 243 NLRB 1202, 1203-04 (1979) (articulating an analogous standard).

In this regard I note JWR's evidence that Smith was planning to cause Oscar Owens problems and "set him up." Ken Grizzelle told Babe Evans, who made the transfer decision, that "there was some trouble brewing on 2 Longwall; that some people had come to him and told him that Bennard was going to set Oscar Owens up" (Tr. 795). Grizzelle testified that he obtained his information from two miners, i.e., Jesse Buffet and Red Parra. Buffet told him that "Smitty was trying to set Oscar up and causing trouble" (Tr. 776). Grizzelle explained that he understood



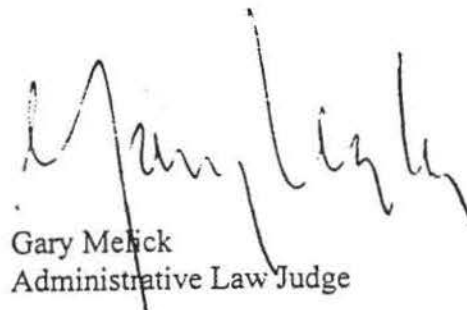
from these reports that Smith planned on "just keeping the crew in an uproar, lunches and meal tickets, working two hours overforce and dragging around the force two hours overtime." (Tr. 778). Evans also testified that Parra told him to "move Smitty back down on that wall, he's causing trouble again." (Tr. 797). Evans did not know however and did not inquire what kind of "trouble" was suspected. Evans acknowledged that it could indeed have involved health or safety matters.

Thus, even assuming, *arguendo*, that credible information had been received by JWR management, that Smith was trying to set up Owens and was "causing trouble" on the No. 2 Longwall, that information alone is far too ambiguous to support the proposed affirmative defense. Indeed, based on the reported information, the "trouble" Smith was about to cause may very well have been the same protected health complaints asserted herein to be the basis for Smith's unlawful transfer.

Under all the circumstances I find that not only was Smith's transfer on October 24, 1997, from the No. 2 Longwall to the No. 1 Longwall motivated by Smith's protected activity, I find that JWR has failed to sustain its burden of proving by credible evidence that it would have transferred Mr. Smith in any event for non-protected reasons alone and that it has accordingly failed to establish its proposed affirmative defense.

#### **ORDER**

The Complaint with respect to the October 28, 1996 transfer of Bennard Smith is hereby denied. The Complaint with respect to the October 24, 1997 transfer of Bennard Smith is affirmed. Accordingly the parties hereto are directed to confer with respect to a civil penalty and damages and to attempt to resolve these issues by stipulation or settlement on or before April 16, 1999. If the parties are unable to reach an agreement on these issues the undersigned must be notified on or before April 16, 1999, of that fact and hearings on these issues will then proceed on Thursday, May 13, 1999, at 9:00 a.m., in Birmingham, Alabama. The assigned courtroom will be designated at a later date.



Gary Melick  
Administrative Law Judge

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# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES  
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March 25, 1999

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. YORK 98-25-M
Petitioner	:	A. C. No. 30-02333-05517
v.	:	
	:	Weaver Pit #2 Mine
ROBERT L. WEAVER,	:	
Respondent	:	

## DECISION

Appearances: Susan Demitrio, Esq., U.S. Department of Labor, Office of the Solicitor,  
New York, New York, for Petitioner;  
Karan A. Weaver, Constantia, New York, for Respondent.

Before: Judge Bulluck

This case is before me upon a Petition for Assessment of Penalty filed by the Secretary of Labor, through her Mine Safety and Health Administration ("MSHA"), against Robert L. Weaver ("Robert Weaver"), pursuant to section 105(d) of the Federal Mine Safety and Health Act ("the Act"), 30 U.S.C. §801 *et seq.*

A hearing was held in Syracuse, New York, in which Karan Weaver, co-owner and spouse of Robert Weaver, represented the company. The Secretary's post-hearing memorandum is of record. For all the reasons set forth below, the citations at issue shall be AFFIRMED.

### I. Factual Background

On June 23, 1997, MSHA Inspector Brian Yesko conducted a regular inspection of Robert Weaver's Pit No. 2, a sand and gravel operation located in Constantia, New York (Tr. 12-13). Upon entering the mine, Inspector Yesko observed mine foreman Loren Nesbitt in the pit without any means of communication, feeding a screen plant with a front-end loader (Tr. 13-15, 91). In response to the inspector's request that Nesbitt show him a form of communication in the pit, Nesbitt responded that there was none, explaining that the operator had discontinued cellular phone service and that the CB radio previously used was no longer available (Tr. 14, 17; see also 32-33). Moreover, in general discussion between Inspector Yesko and Nesbitt, the inspector was told that Nesbitt worked in the pit alone most of the time (Tr. 18).

Subsequently, Inspector Yesko learned from the Weavers' son, Randy, that the CB radio in his pickup truck had "burned up a few months prior," and that the Weavers were in the process of working with the telephone company to get service installed in a new office trailer (Tr. 18-20). Consequently, Inspector Yesko issued section 104(a) Citation No. 7706707, alleging a non-significant and substantial violation of 30 C.F.R. §56.18103, describing the condition as follows:

A communication system was not provided at the mine site for assistance in the event of an emergency. This standard was cited on the last regular inspection of the mine property on 7/10/96

(Tr. 21-22).

Subsequently, during an October 22, 1997, regular inspection of the mine, MSHA electrical mine inspector William Korbel, Jr. observed a worker "down by the plant," foreman Nesbitt operating a front-end loader "near the plant hopper on top" without the seat belt fastened and with the left cab door open, and a Robert Weaver truck "up there to be loaded" (Tr. 40-41). Consequently, Inspector Korbel issued 104(d)(1) Citation No. 4431099, alleging a violation of 30 C.F.R. §56.14130(g), describing the condition in the following manner:

The plant leadman was operating a Yale 3000 loader, company number 24, without wearing a provided seat belt. The loader was feeding the plant hopper in an area shared with haulage trucks. This is an unwarrantable failure

(Tr. 43). Inspector Korbel also terminated Citation No. 7706707, upon observing an operative telephone in the trailer (Tr. 39-40).

## II. Findings of Fact and Conclusions of Law

### A. Citation No. 7706707

#### 1. Fact of Violation

The instant citation charges a non-significant and substantial violation of section 56.18103, which requires the following:

A suitable communication system shall be provided at the mine to obtain assistance in the event of an emergency.

Inspector Yesko testified that the foreman operating the front-end loader, being exposed to risks of injury, including slipping and falling, straining from lifting, exposure to fire and accidents with mobile equipment, should have a means of seeking help in the case of an emergency, especially in a situation where he is working alone (Tr. 14-16). The inspector further testified, due to stockpiles of material, that the foreman could not be seen from the main road,

some 400-500 yards away from the pit, that the nearest pay phone is located approximately one-half mile away, and that the mine's main office, equipped with a telephone, is located a mile and a half from the pit (Tr. 16-17, 31).

Supervisory mine inspector Randall Gadway, an MSHA inspector of 24 years and currently a member of an MSHA fatal investigation team, testified that the industry sees "a lot of cases documented where ... the lack of quick response ... resulted in fatal or more serious injuries" (Tr. 68-69).

Karan Weaver suggested, during her questioning of Inspector Gadway, that Robert Weaver's trucks are equipped with communication systems, but the inspector pointed out in response, that the trucks are not in the pit at all times (Tr. 84-86). Robert Weaver essentially presented no evidence contrary to Inspector Yesko's assessment of the circumstances surrounding the violation. Karan Weaver, Robert Weaver's sole witness, testified that she is not questioning the violations, but that the proposed penalties are excessive (Tr. 99). She did acknowledge, however, that the penalties would not cause the company to go out of business (Tr. 99-100). Accordingly, the Secretary having established that no communication system had been provided in the pit on the day in question, the evidence is sufficient to sustain the violation.

## 2. Penalty

While the Secretary has proposed a civil penalty of \$150.00, the judge must independently determine the appropriate assessment by proper consideration of the six penalty criteria set forth in section 110(i) of the Act, 30 U.S.C. §820(j). *See Sellersburg Co.*, 5 FMSHRC 287, 291-92 (March 1993), *aff'd*, 763 F.2d 1147 (7<sup>th</sup> Cir. 1984).

Robert Weaver is a very small operator, which had previously been cited for violation of the same standard in July 1996, but otherwise has a good history of prior violations (Ex. P-1). Based on Karan Weaver's testimony, which is the only evidence of the company's financial status, I conclude that the proposed civil penalty will not affect Robert Weaver's ability to continue in business.<sup>1</sup>

The remaining criteria involve consideration of the gravity of the violation and the negligence of Robert Weaver in causing it. I find the gravity of the violation to be serious, especially in a situation where a miner is operating large mobile equipment alone, because prompt medical attention to injuries in that environment may make the difference between life

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<sup>1</sup> On November 9, 1998, the undersigned received a copy of Notice of Motion for an Order of the United States Bankruptcy Court, Northern District of New York, to Modify the Chapter 13 Case, dated November 5, 1998. The record is devoid of any other documentation respecting the operator's financial status. In the event that Robert Weaver has filed for bankruptcy, the Secretary may file as a creditor in that proceeding.

and death. Inspector Yesko testified that he ascribed high negligence to Robert Weaver because he had issued a citation for the same violation on July 10, 1996, he had discussed the need for pit communication with the operator at that time, and on September 12, 1996, he had extended the termination due date in order for the operator to activate a newly purchased cellular phone (Tr. 22-30, 33-34; Exs. P-2, P-3, P-4, P-5). While the former citation was terminated on October 29, 1996, by satisfying Inspector Yesko that a CB radio had been provided in the pit, I am persuaded, based on Randy Weaver's statement to the inspector and Karen Weaver's testimony, that the CB radio had been inoperable for quite some time when the instant citation was written (Tr. 20, 96-98). Like Inspector Yesko, based upon the operator's demonstrated complacency in complying with the standard, I attribute high negligence to Robert Weaver. Consequently, having considered Robert Weaver's small size, the previous citation for the same violation a year earlier, seriousness of the violation, high negligence, good faith abatement and no other mitigating factors, I find that the \$150.00 penalty proposed by the Secretary is appropriate.

#### B. Citation No. 4431099

##### 1. Fact of Violation

This citation charges a "significant and substantial" violation, due to Robert Weaver's unwarrantable failure to comply with 30 C.F.R. §56.14130(g), which provides the following:

Wearing seat belts. Seat belts shall be worn by the equipment operator except that when operating graders from a standing position, the grader operator shall wear safety lines and a harness in place of a seat belt.

Inspector Korbelt testified that, with the left door of the loader open, he could see that Nesbitt was not wearing a seat belt (Tr. 41). He also attested to observing that "the berms were up, so that I didn't believe there was much of a chance for overturn, although a loader could go through that, any kind of an accident such as whether he went into another truck or if he overtraveled in the plant hopper ... or you know, another vehicle hit him without being restrained, he could come forward and hit his knees, legs into the steering column, steering wheel could cause some injuries, head could hit the windshield. The extreme case is if he is bouncing, it could happen that he would come out of the door, you know, fly out the open door, but as I looked at the situation, I thought that was remote. Otherwise, it would have been marked as fatal" (Tr. 41-42). Moreover, in response to questioning about the speed necessary to cause injuries, the inspector responded that "a lot of it depends on what it's doing. We've had cases where loaders are traveling under five miles an hour with the bucket raised, where a wheel will blow and the loader itself will flip over. Here, you know, in the range of five to ten miles an hour, if he hit something, or something hit him, it would cause enough momentum to carry him into something" (Tr. 42-43).

Inspector Gadway, drawing on his fatality investigation experience, gave compelling testimony that 90% of all haulage fatalities would be avoided if operators would wear seat belts



(Tr. 69). Moreover, the inspector explained that, given the virtual indestructibility of the cabs due to rollover protection, securing operators to their seats preserves their ability to control the equipment (Tr. 70-71). Even in extreme situations where equipment has plunged some 80 feet, Inspector Gadway asserted, "being tied into the seat and secured" results in injuries rather than a fatality, since the cab remains "perfectly intact" (Tr. 71-72). Finally, Inspector Gadway opined that the gravity of the instant citation was more serious than assessed by Inspector Korbel, since ejection from the seat could result in rollover and windshield fatalities (Tr. 69-72).

Robert Weaver has presented no evidence contrary to Inspector Korbel's assessment of the violation. Therefore, the violation is sustained.

## 2. Significant and Substantial

Section 104(d) of the Mine Act designates a violation "significant and substantial" ("S&S") when it is "of such a 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 the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Division, National Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981).

In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984), the Commission set forth the four criteria that the Secretary must establish in order to prove that a violation is S&S under *National Gypsum*: 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 Buck Creek Coal, Inc. v. FMSHRC*, 52 F. 3d 133, 135 (7<sup>th</sup> Cir. 1995); *Austin Power, Inc. v. Secretary*, 861 F. 2d 99, 103-04 (5<sup>th</sup> Cir. 1988), *aff'g* 9 FMSHRC 2015, 2021 (December 1987) (*approving Mathies criteria*). Evaluation of the third criterion, the reasonable likelihood of injury, should be made in the context of "continued mining operations." *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984). Moreover, resolution of whether a violation is S&S must be based "on the particular facts surrounding the violation." *Texasgulf, Inc.*, 10 FMSHRC 498, 501 (April 1998).

Inspector Korbel found the violation to be S&S. He testified that, considering the loader operator's exposure to accidents based on the other traffic in the area, the elevated travelway, and the open cab door, he found it reasonably likely that the operator would sustain serious head or orthopedic injuries from being thrown about the interior of the cab (Tr. 48-49, 50-51). I find, based on the evidence of other trucks operating in the immediate area, in the reasonably likely event of the front-end loader colliding with another vehicle, the loader operator, without seat belt fastened, would be ejected from his seat and would sustain serious injuries.

### 3. Unwarrantable Failure

Inspector Korbel testified that he attributed Nesbitt's failure to wear his seat belt to an "unwarrantable failure" to comply with section 56.14130(g), considering that Nesbitt was the plant leadman in charge of enforcing safe work procedures, and because less than a month earlier, MSHA had conducted a "haulage sweep" in all the mines to address the rise in haulage incidents, and to emphasize safety regulations and procedures, particularly the seat belt requirement (Tr. 43-44; see also 100). Moreover, the inspector referenced a prior violation, as an indication that the seat belt requirement had been emphasized to Robert Weaver (Tr. 44-46; see also 57-66; Exs. P-6, P-7A, P-7B).<sup>2</sup>

Unwarrantable failure is aggravated conduct consisting of more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2001 (December 1987). Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *Id.* At 2001-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (February 1991).

Robert Weaver relies on the distinction between failure to provide seat belts in equipment and failure to wear available seat belts, to argue that this is a first-time offense (Tr. 53-55, 96). I simply find this distinction immaterial. I find that the operator was on notice from the prior 1993 violation that the precise condition at issue herein was violative, and that the foreman, charged with a heightened responsibility to adhere to mandatory safety standards, engaged in grossly negligent conduct that amounted to a serious lack of reasonable care. Therefore, I find that the Secretary has proven that the violation was the result of Robert Weaver's unwarrantable failure.

### 4. Penalty

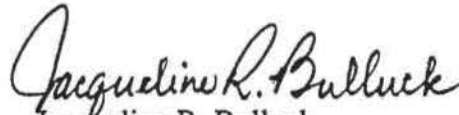
Addressing the six penalty criteria set forth in section 110(i) of the Act, as discussed above, Robert Weaver is a very small operator, has a good history of prior violations, and payment of the proposed penalty of \$500.00 will not affect its ability to continue in business. Respecting consideration of the gravity criteria, I find failure to wear seat belts, under the circumstances addressed herein, to be a serious violation, given the importance of remaining secure in the seat under all conditions, from a safety as well as operational perspective. While I have imputed gross negligence to Robert Weaver based on foreman Nesbitt's conduct, that conduct is mitigated by Karan Weaver's credible testimony that she, personally, goes into the pit every morning to conduct safety checks that include hard hat and seat belt usage (Tr. 102-104). Accordingly, having considered Robert Weaver's small size, good history of prior violations, seriousness of violation, gross negligence, good faith abatement and daily safety checks as mitigating factors, I find that a civil penalty of \$200.00 is appropriate.

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<sup>2</sup>Judicial notice was taken at the hearing of *Secretary of Labor v. Robert L. Weaver*, 15 FMSHRC 2117 (October 1993) (ALJ Melick upheld violation of section 56.14130(a)(3) for Robert Weaver's failure to provide seatbelts in a front-end loader).

**ORDER**

Accordingly, 104(a) Citation No. 7706707 and 104(d)(1) Citation No. 4431099 are **AFFIRMED**, and Robert Weaver is **ORDERED TO PAY** civil penalties of **\$350.00** within 30 days of the date of this decision. Upon receipt of payment, this case is **DISMISSED**.

  
Jacqueline R. Bulluck  
Administrative Law Judge

Distribution:

Susan Demitrio, Esq., Office of the Solicitor, U.S. Department of Labor, 201 Varick St.,  
Room 707, New York, NY 10014 (Certified Mail)

Karan A. Weaver, Robert L. Weaver, 76 Avery Road, Constantia, NY 13044 (Certified Mail)

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# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

March 29, 1999

ROBERT D. ADKINS,	:	DISCRIMINATION PROCEEDING
Complainant	:	
v.	:	Docket No. KENT 98-133-D
	:	MSHA Case No. PIKE CD 98-02
RONNIE LONG TRUCKING,	:	
Respondent	:	Millard Processing
	:	Mine ID 15-17776 HDV

## SUPPLEMENTAL DECISION AND FINAL ORDER

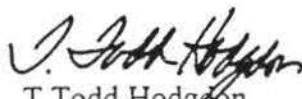
Appearances: James L. Hamilton, Esq., Hamilton & Stevens, Pikeville, Kentucky, for Complainant;  
Timothy D. Belcher, Esq., Elkhorn City, Kentucky, for Respondent.

Before: Judge Hodgdon

On February 10, 1999, a decision was issued in this proceeding determining that the Respondent had discriminated against the Complainant by discharging him in violation of section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c). *Robert D. Adkins v. Ronnie Long Trucking*, 21 FMSHRC 171 (February 1999). The parties were given 30 days to agree on the specific relief due Mr. Adkins or to submit their separate relief proposals with supporting arguments. Instead, the parties have agreed to settle the case and have submitted a Settlement Agreement and Release.

The agreement contains provisions concerning employment, consideration, release of claims, covenants and other agreements that the parties wish to remain confidential. I have reviewed the agreement and conclude that the settlement is reasonable and in the public interest.

Accordingly, the motion for approval of settlement is **GRANTED** and the parties are **ORDERED** to comply in full with the terms and conditions of the agreement within the times provided. The terms and conditions of the settlement are declared **CONFIDENTIAL**. The file in this case is **ORDERED TO BE PLACED UNDER SEAL** subject to review only by the Commission or other appellate body. In view of the settlement, this case is **DISMISSED**.



T. Todd Hodgdon  
Administrative Law Judge

Distribution:

James L. Hamilton, Esq., Hamilton & Stevens, 234 Second Street, P.O. Box 1286, Pikeville, KY 41502 (Certified Mail)

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/nj

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**  
**1730 K STREET, N.W., 6<sup>TH</sup> FLOOR**  
**WASHINGTON, D. C. 20006-3868**

March 30, 1999

SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. YORK 99-11-M
Petitioner	:	A. C. No. 30-00835-05518 A
	:	
v.	:	
MARC BOWERS, EMPLOYED BY	:	Wingdale Quarry Plant 75
PATERSON MATERIALS	:	
CORPORATION,	:	
Respondent	:	

**DECISION APPROVING SETTLEMENT**  
**ORDER TO PAY**

**Before:        Judge Merlin**

This case is before me upon a petition for assessment of a civil penalty under section 110(c) of the Federal Mine Safety and Health Act of 1977. 30 U.S.C. § 820(c). On March 1, 1999, an order was issued disapproving the settlement motion submitted by the Solicitor and directing him to submit additional information to support his motion. The motion had recommended a penalty reduction from \$1,500 to \$750.

On March 23, 1999, the Solicitor filed a second motion to approve settlement for the one violation involved. A reduction in the penalty from \$1,500 to \$1,000 is now proposed. The Secretary has proposed a penalty against Marc Bowers, the operator's mine manager in charge of blasting operations, for a knowing violation of 30 C.F.R. § 56.6604 because mine personnel were not withdrawn immediately upon the first signs of an approaching electrical storm as required by the regulation. The Solicitor advises that the violation was serious and knowing in nature. However, he seeks a reduction because all the events in question including the decision to continue blasting operations, occurred within a very short period of time when weather conditions were rapidly changing. In addition, the Solicitor states that proposed settlement accurately reflects the respondents ability to pay. I accept the Solicitor's representations and find that the proposed settlement is appropriate under section 110(i) of the Act.



In light of the foregoing, it is **ORDERED** that the motion for approval of settlement be **APPROVED** and that the respondent **PAY** a penalty of \$1,000 within 30 days of the date of this decision.

A handwritten signature in black ink, reading "Paul Merlin". The signature is fluid and cursive, with a large initial "P" and "M".

Paul Merlin  
Chief Administrative Law Judge

Distribution: (Certified Mail)

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

L. Joseph Ferrara, Esq., Jackson & Kelly, 2401 Pennsylvania Avenue, N.W., Suite 400, Washington, DC 20037

/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, 1999

LONE STAR INDUSTRIES, INC.,	:	CONTEST PROCEEDINGS
Contestant	:	
v.	:	Docket No. LAKE 98-16-RM
	:	Citation No. 7824109; 11/4/97
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. LAKE 98-18-RM
ADMINISTRATION (MSHA),	:	Citation No. 7824110; 11/4/97
Respondent	:	
	:	Greencastle Plant
	:	Mine ID: 12-00064
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 98-172-M
Petitioner	:	A. C. No. 12-00064-05539
v.	:	
	:	Greencastle Plant
LONE STAR INDUSTRIES, INC.,	:	
Respondent	:	

## DECISION

Appearances: William I. Althen, Esq., Heenan, Althen & Roles, Washington, DC for  
Lone Star Industries, Inc.;  
Christine M. Kassak, Esq., Office of the Solicitor, U. S.  
Department of Labor, Chicago, Illinois for U.S. Department of  
Labor.

Before: Judge Barbour

These contest and civil penalty proceedings arise under sections 105(d), 105(a), and 110(a) of the Federal Mine Safety and Health (30 U.S.C. §815(d), §815(a), and §820(a)). They involve two citations issued to Lone Star Industries, Inc. (Lone Star) at its Greencastle Plant, a cement and limestone facility located near Greencastle, Indiana. The citations allege that Lone Star violated 30 C.F.R. §56.5050, a mandatory health standard that regulates miners' exposure to

noise.<sup>1</sup>

The citations charge that two general laborers working in the plant's mill processing building were subjected to noise levels that exceeded the allowed limit and that the company did not implement required feasible controls. The citations also allege that the violations were serious, that they significantly and substantially contributed to a mine health hazard, and that they were the result of the company's negligence.

Lone Star sought review of the citations arguing that there were no violations; or, if the violations existed, the findings of the inspector regarding the gravity of the violations and the negligence of the company were not justified. The Secretary answered, asserting the citations were proper in all respects.

The review proceedings were assigned to me. At the parties' request, I stayed them pending the filing of an associated civil penalty proceeding. When initiation of the proceeding was delayed, the parties agreed to dissolution of the stay and to trial of the review cases. The parties understood that at the trial evidence would be taken on the civil penalty aspects of the alleged violations and that the evidence would be applied to the civil penalty case when it was filed.

The review cases were tried in Greencastle, Indiana. In the subsequently filed civil penalty proceeding, the Secretary proposed a penalty of \$50 for each alleged violation. The civil penalty case herein is consolidated for decision with the contest proceedings. Counsels have

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<sup>1</sup>Section 56.5050(a) is the noise standard for surface metal and non-metal mines. Its goal is to limit exposure of an operator's employees to noise over specified periods of time in excess of specified levels of sound. If the levels are exceeded, the standard requires the use of feasible administrative or engineering controls to reduce the employees' exposure.

30 C.F.R. § 56.5050 states:

(a) No employee shall be permitted an exposure to noise in excess of that specified in the table below. ....

Permissible Noise Exposures	
Duration per day, hours of exposure	Sound level dBA, Slow response
8 .....	90
6 .....	92
4 .....	95
3 .....	97
2 .....	100
1 ½ .....	102
1 .....	105
½ .....	110
1/4 or less .....	115

No exposure shall exceed 115 dBA. Impact or impulsive noise shall not exceed 140 dBA, peak sound pressure level.

(b) When employees' exposure exceeds that listed in the above table, feasible administrative or engineering controls shall be utilized. If such controls fail to reduce exposure to within permissible levels, personal protection equipment shall be provided and used to reduce sound levels to within levels of the table.

filed helpful briefs.

### THE CENTRAL ISSUES

The central issues are whether the Secretary proved the cited laborers were working in a violative noise environment, and, if so, whether there were feasible engineering or administrative noise controls the company should have been using (see Tr. 14-21).

### STIPULATIONS

At the commencement of the hearing, the parties stipulated as follows:

1. The . . . Commission has jurisdiction over these proceedings.
2. Lone Star is an operator within the meaning of the . . . Act . . . and the Greencastle plant is a mine within the meaning of the Act.
3. [A]t all times relevant to these proceedings, Lone Star operated the Greencastle plant.
4. Lone Star and its . . . plant are subject to the jurisdiction of the Act.
5. [T]he plant's operations affect interstate commerce.
6. [O]n November 4, 1997, an [MSHA inspector] . . . issued [Loan Star] Citation N[o.] 7824109 pursuant to Section 104[a] . . . of the Act . . . alleging a violation of . . . [s]ection 56.5050.
7. [O]n November 6, 1997, the . . . [MSHA inspector] issued a modification to Citation N[o.] 7824109. . . .
8. Citation [No.] 7824109 and the modification were properly served .
9. [O]n November 4, 1997, [the MSHA inspector] . . . issued . . . Loan Star . . . Citation N[o.] 7824110 pursuant to Section 104[(a)] of the . . . Act . . . alleging [a] . . . violation of . . . [s]ection 56.5050.
10. [O]n November 6, 1997, the [MSHA inspector] issued a modification to Citation N[o.] 7824110.

11. Citation N[o.] 7824110 and the modification were properly served .

(Tr. 9-11; see also Joint Exh. 1)

## **THE FACTS**

### **The Kiln, The Burner Pipe , And The Replacement Of The Pipe**

One of the processes undertaken at the plant is the burning of coal in a kiln. The kiln is operated at extremely high temperatures. Fuel is fed into the kiln through a "burner pipe". The burner pipe usually needs to be replaced once or twice a year. When the time comes, the kiln is shut down, the pipe is removed, and a new pipe is readied for insertion into the kiln. Once the new pipe is installed and operating, the pipe requires no further maintenance, and the kiln is operated twenty four hours a day, seven days a week until the pipe again is replaced (Tr. 174-175).

Before a new burner pipe can be installed in the kiln, the pipe must be insulated to protect it from the kiln's high temperatures. This is done by standing the pipe upright, setting a two-part form around the pipe, and pouring refractory material into the form.<sup>2</sup> An overhead crane is used to lift the pipe and to move the two parts of the form into position.

After the refractory is poured, the pipe and the material are allowed to set for a day or two after which the form is removed, and the pipe is moved to a furnace where the insulation is heat cured. Once the refractory is cured, the insulated pipe is inserted into the kiln, and the kiln is restarted.

The process of changing the pipe usually involves two workers. Until November 1997, the job was done in the plant's machine shop (Tr. 131). The machine shop has an overhead crane that can lift the pipe and the two-part form, and it has a work area that can accommodate the pipe, form, and laborers (Tr. 127-128). The machine shop is a very quiet area of the plant.

In 1997 Lone Star decided it would experiment with a new type of pipe (Tr. 171, 175). The new pipe was longer than the pipe it was using and its diameter was different. The company hoped that the new pipe would result in the more efficient burning of fuel in kiln, the release of less emissions, and a better product (Tr. 174).

In November the time came to replace the burner pipe with the new and longer pipe.

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<sup>2</sup>"Refractory" is "A material of a very high melting point with properties that make it suitable for such uses as furnace linings and kiln construction" (U.S. Department of the Interior, A Dictionary of Mining, Mineral, and Related Terms 908 (1968)). (The witnesses also referred to refractory as "castable".)

Because of the length of the new pipe, the machine shop could not be used as the work site. Rather, the company decided to use its mill processing building because it had a overhead crane that was high enough to accommodate the new and longer pipe (Tr. 131-132, 137, 156).

### **The Mill Processing Building**

The mill processing building contains three overhead mills — two finish mills and one raw mill.<sup>3</sup> The work area in the mill processing building measures approximately 87 feet by 29 feet. The finish mills were located over the area, approximately 15 to 17 feet above the floor (Tr. 140, 145; Conts. Exhs. 6, 7). The raw mill had to be shut down in order safely to transport the pipe two-part form to the work area under the crane, to erect the pipe, and to put the form in place. However, the finish mills continued to operate (Tr. 132).

When the mills are operating it is very noisy in the building. Usually, no one is assigned to work in the building for an extended time. Miners only access the building for short periods to do maintenance work, to cleanup, or to traverse the building to get from the shop to the office area (Tr. 189-190). Because of the noise the company has posted signs at various entrances to the building. The signs advise miners to limit their time in the building.<sup>4</sup>

### **The Laborers**

When the work of replacing the pipe was announced, two laborers, Steven Welker and Ron Costin, bid for and were awarded the job. They bid pursuant to the company-union labor agreement (Tr. 60, 123, 125). Under the agreement, laborers who then worked at the plant had the right to bid for the job on the basis of seniority.<sup>5</sup> The job was classified higher than the work of a general laborer, and Welker and Costin were entitled to more pay as a result (Tr. 124-125, 170).

Welker and Costin began the job on November 4. Their work shift was approximately 6:30 a.m. and 3:30 p.m. The job required them to be in and out of the mill processing building. Welker described their duties in the morning:

We . . . went over to the carpenter shop and got our tools  
and started by getting the tow motor . . . and bringing the back

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<sup>3</sup>All of the overhead mills grind material. The finish mills grind clinker into cement (Tr. 130).

<sup>4</sup>According to Lone Star's manager of maintenance and engineering, Fred Dismukes, the signs advise miners to limit their time from one and three fourths hours to six hours. They are directed at miners who are not wearing ear plugs (Tr. 183-184, 188).

<sup>5</sup>In November 1997, in addition to Welker and Costin, there were four or five other laborers at the plant (Tr. 120, 175).



form [into the mill processing building] and setting it up and chaining it off. And then we brought the burner pipe in and for that we had to use the . . . crane to pick that burner pipe up and set it in the form, and then we used the tow motor to bring in the back part and then [we] bolted it together (Tr. 118-119, see also Tr.138).

The laborers completed this part of the job by their lunch break. After lunch they:

had to go outside and get the mixer and bring it in and . . . had to go over to the other side and get a pallet and set the mixer on [it] to raise it up off the floor. We had to bring in the refractory and other stuff to mix it with, so we were in and out [of the mill processing building] in the afternoon (Tr 119; see also Tr. 126).

The laborers spent between six and seven hours doing the job. They worked between five and five and one half hours in the mill processing building (Tr. 119, 177, 192). During all the time they worked on the job they were wearing company provided ear plugs.

The laborers believed they were the workers with the most experience in insulating the burner pipe and that they were the best people available for the job (Tr. 126-128). Welker stated, "[W]e had been there the longest and were the most senior people and had been around that kind of stuff probably more than the other people had been" (Tr. 146). Further, he and Costin were the workers most experienced when it came to using the overhead crane (Tr. 142). (Costin was the one who actually operated the crane (Tr. 138).) Welker explained, "[Y]ou have to be shown how to run [the crane] . . . to be broke in on it before you can run it" (Tr. 151). In Welker's view, if he and Costin had been rotated out of the job part of the time, the company would have lost the use of its most experienced people and the job would have taken more time to complete (Tr. 143, 168).

### **The Inspector, The Inspection, And The Citations**

In November 1997, William Oglesby, an inspector from the Secretary's Mine Safety and Health Administration (MSHA), was scheduled to conduct his first regular inspection of the Greencastle Plant. The inspection was going to include testing the noise levels to which Lone Star's employees were exposed.<sup>6</sup>

On the morning of November 4, Oglesby went to the plant. Oglesby explained to Dismukes that he needed to test employees' noise exposure to determine if there were any "compliance problems" at the plant (Tr. 32, 170). Oglesby asked Dismukes to select two laborers for noise testing (Tr. 170). Dismukes called the plant foreman on the mine telephone and the foreman sent Welker and Costin to the office. Prior to their arrival, Oglesby checked two

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<sup>6</sup>Oglesby began working for the agency in April 1994. During his time with MSHA, Oglesby conducted between 60 and 70 noise surveys (Tr. 28).

dosimeters he had in his possession to make sure the instruments were working properly (Tr. 40). They were, and when the men arrived, Oglesby fitted them with the dosimeters (Tr. 56, 60, 176).<sup>7</sup> Once the dosimeters were in place, the men wore them for the rest of the work day. Dismukes explained to Oglesby that the job the laborers were going to do was not their regular work (Tr. 62).

Oglesby inspected other parts of the mine while the miners were working, but he visited the miners three times, at 11:00 a.m., 2:20 p.m., and at the end of their work period. At 11:00 a.m. the dosimeters indicated Welker was exposed to an average noise level of 132.3 % and Costin to an average noise level of 122.7% (Tr. 86-87; Conts. Exhs. 1 and 2). At 2:20 p.m. the dosimeters showed readings of 132.4% for Welker and 141.4% for Costin (Tr. 87; Conts. Exhs. 1 and 2). The last time Oglesby read the dosimeters was at the end of the laborers' shift, and the readings respectively were 181.5% and 171.5% (Id.). (Oglesby's tests were the only ones conducted on November 4. The company did not perform its own tests.)

Oglesby matched the sound level readings of the dosimeters against those of his sound level meter (SLM). He found the readings were the same (Tr. 58-59). From the results of the dosimeter readings, he calculated Welker and Costin respectively were exposed to time-weighted average exposures of 94.3 and 93.7 dBA during the period they worked. This was more than the level allowed by section 56.5050 (Tr. 58-59).<sup>8</sup> Because Oglesby also believed Lone Star was not using feasible engineering or administrative controls, he issued citations to the company.

Citation No. 7824109 is based on the noise levels to which Welker was subjected and Citation No. 7824110 is based on the dosimeter readings with regard to Costin. The citations as issued stated that "[f]easible engineering controls were not being used to eliminate the need for hearing protection" (Cont. Exh 1 at 1, Cont. Exh. 2 at 1). Later in the day on November 4, Oglesby modified both citations to indicated "[f]easible engineering or administrative controls were not being used" (Id. at 2). Oglesby could not recall whether or not he talked to anyone at MSHA about the modifications (Tr. 70). He agreed, however, that in issuing the citations he did

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<sup>7</sup>A dosimeter is an electronic device that measures noise exposure. The dosimeter contains a memory cell that is sensitive to all sound. The cell stores information relating to cumulative noise exposure during a shift. The cell is read by the inspector at the end of the shift and based on the reading the inspector determines whether the miner has been exposed to more noise than is allowed under section 56.5050. The dosimeter usually is placed in the miner's shirt pocket and a microphone is attached to the miner's collar. The microphone is approximately six to eight inches away from the miner's ear (Tr. 37,39, 41-42, 161).

<sup>8</sup>MSHA determines compliance with the standard based on the percent of dos. A dosimeter reading of over 100% indicates an exposure of more than 90 dBA. Because of the error factor of a dosimeter, MSHA does not cite a violation of section 56.5050 until a dosimeter reads more than 132% (Tr. 242, 244).

not make a significant analysis with regard to either engineering or administrative controls (Tr. 71-72).

### **Sources Of The Noise And Their Control**

All of the witnesses testified that the mill processing building was very noisy. Welker believed that although sound came from "all around," due to the finish mills "more sounds [came] from above" (Tr. 145). Costin testified that most of the noise was from overhead, or, as he put it, from "the mills right above you" (Tr. 16). Oglesby, who admitted he was "not very familiar" with the plant (Tr. 47), testified the sound to which the laborers were exposed was coming from above, from the side, and that some was reverberating off the concrete floor (Tr. 62-63).

The noise coming from overhead was produced by the "big steel balls [in the mills] that roll[ed] around and crush[ed] [the material in the mills into smaller particles]" (Tr. 47). Oglesby described the noise as "like a bolt or something that fell out of your pocket in the washing machine [and] that was banging up against the sides" (Tr. 64).

In Oglesby's opinion there were engineering controls the company could have used to reduce the miners' noise exposure. Although it was not practical to install engineering controls to dampen the sound from the overhead mills, he thought that Lone Star could have installed local sound barriers, or as he described them "some small [wooden] barriers," around the work area (Tr. 55, see also Tr. 72-73). As he envisioned it, the barriers could have been eight to ten feet high, "like partitions in offices, but . . . [with] sound absorbing type material" (Tr. 55). He also described ten to twelve feet high lead-lined partitions ("lead curtains") that could have been installed where the men were working (see Tr. 216-218). He believed that either kind of partition could have offered "some reduction" in noise (Tr. 218). Further, he suggested panels of sound absorbing material could have been placed over the laborers' heads, between the men and the mills (Tr. 102). He acknowledged, however, that given the fact the insulation of the burner pipe was infrequently performed in the mill processing building and that it was essentially a "one-day job", installation of engineering controls might be "ridiculous" (Tr. 75).

In addition to Oglesby's opinions, the Secretary offered the testimony of George Schorr, an MSHA industrial hygienist. At the time of the hearing, Schorr, who holds a masters degree in industrial hygiene and safety, had worked for MSHA for five years (Tr. 196-201). Schorr's testimony was based on his expertise in the field of noise and its control, on his review of Oglesby's notes, and on hearing the testimony of Oglesby, Welker, Costin, and Dismukes.

Schorr shared Oglesby's view that partitions could have been used as noise barriers. He suggested panels made of lead, or vinyl, or plywood (Tr. 220-221). He was of the opinion that just using plywood would result in a "substantial drop" in the noise level (Tr. 221), but he did not know how much noise reduction could be expected "without monitoring or testing, without taking a look at noise reduction ratings in the specifics of the room" (Tr. 222).

Like Oglesby, Schorr seemed to have doubts about engineering controls. When asked what his opinion was with regard to cutting down noise exposure in the area where the pipe was erected, he replied:

[W]ithout looking at specific information on the cost of the materials, it would be hard to give . . . an estimate. You could probably do it for less than \$10,000, but it would probably cost you more than a couple hundred dollars. . . . I didn't look at engineering controls specifically because we were more interested in administrative controls (Tr. 223).

He added, "My opinion is that engineering controls, although available, may not be feasible, the cost may be significant" (Tr. 212).

David Starr is the general manager and chief consultant of American Star International, a firm that specializes in vibration and noise analysis. Since 1983, he has conducted approximately 60 noise analyzes at various companies (Tr. 168). Starting in February 1998, he conducted such an analysis at the Greencastle Plant. He not only evaluated noise sources in the mill processing building, he also evaluated them in the pump room, the compressor room, in the warehouse, and in other areas of the plant. He took up to 60 noise readings throughout the entire plant (Tr. 270-274). He testified as an expert in noise analysis (Tr. 270, 279).

Starr did not believe engineering controls were feasible. Based upon his noise analysis, he concluded that in the mill processing building the dominant noise was coming from the overhead finish mills (Tr. 273). In his view, there was no way to meaningfully diminish this noise. Partitions were not practical because they did nothing to stop the noise coming from overhead. The only way to interdict that the noise would be to put panels or a "ceiling" between the men and the mills. This was not possible because the ceiling would have prevented use of the overhead crane (Tr. 275). Asked if he was able to suggest any effective engineering control, Starr responded "not really" (Tr. 276).

The real focus of the Secretary's suggestions with regard to noise control was the administrative area. Oglesby believed the company should have rotated its employees so that laborers in the area were limited to four hours of work (Tr. 55, 88-89). He thought the company had laborers available who could have been rotated (Tr. 56). However, he did not do noise tests on any other miners on November 4, nor did he or anyone else from MSHA conduct a noise survey of the plant. Therefore, he did not know what the noise level was for laborers who might have replaced Welker and Costin, nor could he give a knowledgeable opinion as to the noise level to which Welker and Costin reasonably could have been expected to be subjected once they were replaced (Tr. 101).

Schorr, Lone Star's expert, also believed there were feasible administrative controls that the company could have instituted. Lone Star could have broken up the job over two, three, or four days, exposing Welker and Costin to reduced noise levels each day. Or, it could have used



two different crews (Tr. 227, 239). Since the total time worked would have been the same, the cost to the company of instituting the controls would not have been significant, or out of proportion to the benefit expected (Tr. 230, 232, 239). Finally, Schorr suggested the company could have eliminated the problem altogether by doing the work outside the mill processing building (Tr. 228). If he had been in charge, it is how he would have solved the problem (Tr. 240).

Not surprisingly, perhaps, Lone Starr's employees doubted the efficacy of the suggested administrative controls. With regard to rotating employees, Welker stated:

In my opinion, it wouldn't have been feasible to bring someone new into the job. They don't know where we left off, what bolts we tightened, what we hadn't tightened. To me, it wouldn't make sense to switch people out of a job like that. If it was a simple job that anybody could do . . . it might be okay. But it wouldn't make any sense to do it on that job (Tr. 144).

Dismukes agreed. He stated, "[W]hen a person starts on a job, it's our contention that [the] person should finish the job. And . . . as long as it is done safely, that's what we do" (Tr. 189-190). In addition, Dismukes noted that Welker and Costin were receiving an upgrade in pay for doing the job (approximately an additional \$3.00 an hour), and that rotating Welker and Costin out of a job for which they had successfully bid and for which they received augmented pay could have violated the company-union agreement (Tr. 190).

Starr agreed the administrative controls could cause labor problems. He stated that "scuttlebutt" he hear from the crew lead him to believe "it would be very difficult to make the work force split" (Tr. 276) because the miners "are pretty strong on what they want to do and don't want to do" (Tr. 275-276). He also stated that to evaluate the adequacy of the suggested administrative controls it was necessary to understand the noise levels of areas to which the laborers might be sent and from which they might come, something MSHA did not know (Tr. 278).

#### **SECTION 56.5050 AND THE ELEMENTS OF PROOF**

The elements of proof of a violation of section 56.5050 are set forth in Callanan Industries, Inc., 5 FMSHRC 1900, 1909 (November 1983), wherein the Commission stated that the Secretary establishes a prima facie case of violation by offering:

- (1) sufficient credible evidence of a miner's exposure to noise levels in excess of the limits specified in the standard;
- (2) sufficient credible evidence of a technologically achievable engineering control that could be applied to the noise source;
- (3) sufficient credible evidence of the reduction in the noise level that would be obtained through implementation of the engineering control;
- (4)

sufficient credible evidence supporting a reasoned estimate of the expected economic costs of the implementation of the control; and (5) a reasoned demonstration that, in view of the elements 1 through 4 above, the costs of the control are not wholly out of proportion to the expected benefits.<sup>9]</sup>

### **The Miners' Exposure To Noise Levels**

The citations state that Welker was exposed to a noise level equivalent to 94.30 dBA for the period worked (Conts. Exh. 1) and Costin was exposed to a level equivalent to 93.89 dBA (Conts. Exh. 2). Oglesby described where he placed the dosimeters and microphones (Tr. 37, 39, 41-42, 161). He also described how he checked the dosimeters to make sure they were working properly (Tr. 40). Further, he matched the results shown by the dosimeters against the readings he obtained using a SLM (Tr. 58-59). The company did not challenge the accuracy of the dosimeters or the methods used by Oglesby to measure the sound levels. Nor did the company conduct its own noise survey (Tr. 177).

Given these factors, there is sufficient credible evidence to find that on November 4, 1997, Welker and Costin were exposed to an average noise level in excess of that specified in the standard. In other words, I find that the laborers were exposed to 94.30 dBA and 93.89 dBA for the equivalent of an eight hour day. Because the exposure level exceeded 90 dBA, both laborers' exposure exceeded that specified in section 56.5050(a).

### **Available Engineering Controls**

It is clear from the testimony that although Welker and Costin were working in an environment where noise was emanating from multiple sources, there was one primary, overriding source — the overheard finish mills. Welker, Costin, and Starr, were far more familiar with the mill processing building and the noise sources than were Oglesby, who was on his first inspection of the plant, and Schorr, who never visited the plant. Welker, Costin and Starr agreed that most of the sound came from above (Tr. 145, 164, 273). Thus, I find there is ample testimony to support the inference that the predominant source of the noise that caused the laborers to be overexposed was the overhead mills.

To establish the second element proof as set forth in Callanan, the Secretary had to establish the existence of a technologically achievable engineering control that could be applied to this predominant source. It would have done no good to diminish some of the ambient sound, if the noise from the overhead mills continued to descend on the laborers. Oglesby thought it would be "almost impossible" to muffle the mills themselves (Tr. 72-73), and Schorr, who also

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<sup>9</sup>Although the language of Callanan reflects the fact the case involved the application of an engineering control to a noise source, there is no apparent reason why the same elements of proof should not be applicable to administrative controls as well.



had doubts about whether they could be muffled, believed that even if it were possible, control would be economically prohibitive (Tr. 212).

Therefore, the Secretary fell back on suggesting indirect engineering controls for the sound. Oglesby, and to a lesser extent Schorr, suggested Lone Star erect partitions in the mill processing building. The problem with the suggestion is the lack of any credible evidence the partitions would have lessened significantly any of the sound from above (See Tr. 62-63). Although Oglesby thought it might have been possible to put "panels" of sound absorbing material over the partitions and between the laborers and the mills, the fact the laborers had to work with an overhead crane and with a pipe that would have extended through part of the "ceiling" made the suggestion totally impractical. Moreover, the Secretary's witnesses never explained clearly how the partitions could have been placed so as to both diminish the sound and to allow the laborers to do the job they were assigned (see Tr. 216-217). As was apparent from the testimony, the Secretary's priorities simply were not directed at engineering controls (Tr. 75, 223).

For these reasons, I conclude the Secretary did not present sufficient credible evidence of technologically achievable engineering controls and that her case with regard to engineering controls has failed.

In view of this finding, I need not reach questions regarding the reduction in the noise level that could have been obtained or the expected cost of implementing the suggested controls. Nevertheless, I note Schorr's admission that "without monitoring and testing" and without being familiar with "the specifics of the room", he was not certain how much noise reduction could be expected (Tr. 222), and that even if engineering controls were achievable, they might not be feasible because of "significant" costs (Tr. 212).

#### **Available Administrative Controls**

The Commission has not ruled regarding what constitutes a feasible administrative control (see A.H. Smith, 6 FMSHRC 199, 201, n.2 (February 1994)). However, it is generally accepted that "administrative controls" involve the management of personnel and work practices to achieve compliance with the standard, and in Callanan, the Commission defined "feasible" as "capable of being done, executed, or effected" (5 FMSHRC at 1907, citing American Textile Mfrs. Inst. v. Donovan, 452 U.S. 490, 508-509 (1981)). These principles offer guidance when analyzing the Secretary's suggested administrative solutions to the laborers' noise exposure.

When implementing administrative controls it is not unusual for an operator to organize work assignments so that a miner exposed to a high noise level for part of his or her shift is moved to a different job involving less noise exposure; or for an operator to keep the miner at the same job, but reduce the time spent on the job. Also, where it is possible, it is not unusual for an operator to choose to move the work to a less noisy site. The Secretary offered all of these traditional administrative control measures as "fixes" for Lone Star's problem.

As I have noted, Oglesby testified the company could have rotated employees so that the laborers were limited to four hours of work in the building (Tr. 55, 88); and Schorr suggested the company could have spread the job over two, three, or even four days, thus exposing the laborers to reduced noise levels each day; or that the company could have spread the job over several days and used different crew members (Tr. 227, 239). In addition, Schorr suggested the company simply could have done the work outside rather than in the building (Tr. 228, 240).

I have found the Secretary offered sufficient credible evidence the miners were exposed to noise levels in excess of the limits specified in the standard. I also find that the Secretary presented sufficient evidence the suggested rotation of employees was capable of being done. At the plant there were four or five additional workers who were classified as laborers (Tr. 120, 175). By establishing their availability the Secretary created a presumption that they could have been rotated into the job. Lone Star's argument that Welker and Costin were better trained for the job does not successfully rebut the presumption and overcome the Secretary's proof. The company is responsible for training its employees, and the fact that some of its similarly classified employees were inadequately trained for a particular job cannot be used as an excuse for exposing other of its employees to a health hazard. To allow such a defense would be to place enforcement in the hands of the company.

Likewise, the company's argument that the laborers doing a particular job are entitled to higher pay under a company-union agreement, can not be used to undermine the Secretary's case. The company, not MSHA, has control over and responsibility for its labor contracts, and the company cannot contractually abrogate the health protections afforded by the Act.

In addition to finding the Secretary presented sufficient evidence the rotation of employees was achievable, I also find she presented sufficient evidence the job could have been spread over several days. It is certain the company was in a hurry to have the work completed and to resume full production, but nothing in the record compels the conclusion it was technologically or administratively impossible to do work over two or more days. (It might have been inconvenient for Lone Star — very inconvenient — but it could have been done.)

Having presented sufficient credible evidence of the achievability of the suggested administrative controls, it was incumbent upon the Secretary to establish the third of the Callanan elements, — sufficient credible evidence of the reduction in the noise level that would have been obtained had the laborers been rotated or the job extended, and here the Secretary failed. She offered no credible evidence regarding the noise level the laborers reasonably could have been expected to be subjected to once they were removed from the job site and were assigned to other work. Nor did she offer credible evidence of the noise level the laborers reasonably could have been expected to be subjected to if to the job was extended for several days and they were reassigned. Without such evidence, it is impossible to determine whether replacement or removal of the laborers would have reduced the level of their exposure.<sup>10</sup> In this regard, Starr's

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<sup>10</sup>How the Secretary chose to elicit such evidence was for the Secretary to decide. She  
(continued...)

testimony was compelling.

Q. With respect to exposure to noise by splitting a shift in half, that would, only work to split the noise in half if the noise was equal over the entire shift; wouldn't that be true?

A. Yes.

Q. So . . . if a miner were in . . . 105 decibel noise for the first 15 minutes of the shift and then in much lower decibel noise for the rest of the shift, to split it in the middle really wouldn't affect the exposure significantly, would it?

A. No.

Q. If a worker leaves one location after four hours and then goes to another work location, does the worker's exposure to noise stop?

A. No.

Q. And depending upon where the worker went, could that noise exposure actually go up?

A. Oh, yes.

Q. So to know if . . . by removing one worker and putting another worker in is going to actually reduce either worker's exposure to noise, you would have to know their respective noise levels, wouldn't you?

A. That's correct.

Q. And if you didn't know that, you couldn't make an evaluation?

A. No.

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<sup>10</sup>(...continued)

might have had her expert conduct a noise survey at the plant. She might have offered testimony regarding what was reasonable to expect the laborers to be doing when they were not working at insulting the burner pipe and what was reasonable to expect sound levels at those jobs to be. She pursued neither of these possibilities, nor did she attempt to pursue others.

Q. Would that also be true . . . with respect to doing a job over several days? For example, if you did . . . half a job one day, went someplace else for the rest of that day and came back another day and did the second half of that job, [and] went someplace else, could you determine the effect of that noise level on either of those days without knowing what noise . . . those workers were in on the second half of the days that they weren't doing the job?

A. No (Tr. 280-282).

The deficiencies in the Secretary's proof were exemplified by Oglesby's and Schorr's testimony. Oglesby did not know the noise levels of areas to which Welker and Costin reasonably could have been expected to be subjected after they were rotated (Tr. 101). Schorr had no knowledge of other work the laborers might have done while the job was extended and the noise levels that could have been expected at those other jobs.<sup>11</sup> Starr's testimony that at the plant there are very noisy areas within a few feet of very quiet areas meant that without testimony from the Secretary's witnesses as to reasonable expectations regarding work assignment areas and noise levels of those expected work areas, implementation of administrative controls could not be assumed to reduce the displaced miner's exposure (Tr. 282).

The Secretary's evidentiary failing was highlighted by Oglesby.

Judge:

[H]ow can you know . . . that administrative controls are feasible when you don't know what the average noise the people outside are going to be exposed to? [I]sn't it conceivable that they could be exposed to noise that would be above 90 [dBA]?

Witness:

Right. What we would look for are administrative controls because everything below 90 is not what you want. What you want to do is find an area of your facility where people could work for a period of time below 90[d]BA. (Tr. 245).

To meet her requirements under Callanan, the Secretary should have offered credible proof of the area to which Oglesby referred. She did not, and for the reasons stated above, I conclude the Secretary has failed to carry her burden of proof by establishing the third element of the Callanan elements as it relates to worker rotation and job extension.

Finally, I reject Schorr's unsupported suggestion the work could have been done outside the mill processing building. Dismukes testified without dispute that there were no outside areas

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<sup>11</sup>Lone Star could not be expected to remove the laborers from the mill processing building and excuse them from work altogether.

where the pipe could be secured properly and the refractory material poured (Tr. 171-173). Further, the Secretary's own witness, Oglesby, questioned whether the temperatures were warm enough in November to do the job outside and to do it safely (Tr. 155-157).

### CONCLUSION AND ORDER

Because the Secretary failed to prove the existence of feasible engineering or administrative controls to reduce the laborers' exposure to noise, Citation No. 7284109 and Citation No. 7284110 are **VACATED**. Lone Star's contests (Docket Nos. LAKE 98-16-RM and LAKE 98-18-RM) are **GRANTED**. The Secretary's civil penalty petition (Docket No. LAKE 172-M) is **DISMISSED**.



David Barbour  
Administrative Law Judge

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# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES  
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March 31, 1999

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 98-132
Petitioner	:	A. C. No. 12-02226-03502
v.	:	
	:	Docket No. LAKE 98-134
COLLIE COAL COMPANY,	:	A.C. No. 12-02226-03501
Respondent	:	
	:	Collie Coal Company

## DECISION

Appearances: Christine M. Kassak Smith, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois, and Michael D. Rennie, Conference and Litigation Representative, Mine Safety and Health Administration, U.S. Department of Labor, Benton, Illinois, for Petitioner;  
Joseph L. Hensley, Collie Coal Company, Terre Haute, Indiana, for Respondent.

Before: Judge Hodgdon

These consolidated cases are before me on Petitions for Assessment of Civil Penalty filed by the Secretary of Labor, acting through her Mine Safety and Health Administration (MSHA), against Collie Coal Company, pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815. The petitions allege nine violations of the Secretary's mandatory health and safety standards and seek penalties of \$488.00. A hearing was held in Greencastle, Indiana. For the reasons set forth below, I affirm the citations and assess penalties of \$488.00.

## Background

The Collie Coal Company began operating at an abandoned coal mine site in Vigo County, Indiana, approximately three years ago. On February 19, 1998, MSHA Coal Mine Inspector Vernon Stumbo was directed by his supervisor, who had learned of the operation from a state mine inspector, to go to the Collie Coal Company to determine if the facility came under MSHA jurisdiction and, if so, to conduct an inspection. Stumbo concluded that the operation did involve coal mining and issued the three citations in Docket No. LAKE 98-134. He returned in March and issued the six citations in Docket No. LAKE 98-132.



Collie asserts that it is not a coal mine because it does not prepare coal within the meaning of section 3(i) of the Act, 30 U.S.C. § 802(i), and, therefore, is not subject to MSHA jurisdiction. Aside from the jurisdictional issue, the Respondent does not contest the citations. (Tr. 10.)

### **Findings of Fact and Conclusions of Law**

When the site, which Collie now operates, was used by a functioning coal mine, slurry from the preparation plant was pumped into pits, as waste product, and covered with dirt. The non-liquid part of the slurry consisted, among other things, of coal "fines."<sup>1</sup> Collie has found a way to use the coal fines.

The earth cover is removed from the material in the pit and the fines are removed from the pit by a back hoe and loaded into a pit truck. The truck either takes the fines to be "screened" or takes the fines to be placed on the ground and dried out. If the material is to be screened, it is dumped into a hopper where it goes through a large screen which takes out any dirt, rocks, wood and other rough material. The dirt, rocks and wood are dumped on the ground and the coal fines are deposited on a conveyor belt and discharged into piles on the ground to dry. Once the fines are dry, the piles are covered with tarpaulins to keep them dry. The dry fines are sold to Indiana Power and Light and other coal mines.

Section 3(h)(2), 30 U.S.C. § 802(h)(2), of the Act provides that:

"coal mine" means an area of land and all structures, facilities, machinery, tools, equipment, shafts, slopes, tunnels, excavations, and other property, real or personal, placed upon, under, or above the surface of such land by any person, used in, or to be used in, or resulting from, the work of extracting in such area bituminous coal, lignite, or anthracite from its natural deposits in the earth by any means or method, and the work of preparing the coal so extracted, and includes custom coal preparation facilities.

Section 3(i) defines "the work of preparing coal" as "the breaking, crushing, sizing, cleaning, washing, drying, mixing, storing, and loading of bituminous coal, lignite, or anthracite, and such other work of preparing such coal as is usually done by the operator of a coal mine."

It has long been the law that the definitions of coal mine and coal preparation are to be broadly interpreted and questions as to whether a facility comes within the jurisdiction of the Act are to be resolved in favor of inclusion. As the Commission has recently restated:

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<sup>1</sup> "Fines" are: "Finely crushed or powdered material, e.g., of coal, crushed rock, or ore, as contrasted with the coarser fragments; esp. material smaller than the minimum specified size or grade, such as coal with a maximum particle size less than 3.2 mm . . ." American Geological Institute, *Dictionary of Mining, Mineral, and Related Terms* 208 (2d ed. 1997) (DMMRT).

The definitions of coal mine and coal preparation in sections 3(h) and 3(i) are "broad[,] "sweeping" and "expansive[.]" [sic] *Marshall v. Stoudt's Ferry Preparation Co.*, 602 F.2d 589, 591-92 (3d Cir. 1979), *cert, denied*, 444 U.S. 1015 (1980). Congress intended that "doubts be resolved in favor of inclusion of a facility within the coverage of the Act." S. Rep. No. 181, 95<sup>th</sup> Cong., 1<sup>st</sup> Sess. 14 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95<sup>th</sup> Cong. 2d Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 602 (1978).

*RNS Services, Inc.*, 18 FMSHRC 523, 527 (April 1996), *aff'd as RNS Services Inc. v. Secretary of Labor*, 115 F.3d 182 (3<sup>rd</sup> Cir. 1997).

In *RNS*, the Commission held that the processing of refuse and other material containing small amounts of coal constituted the work of preparing coal and that loading and hauling coal waste was sufficient for concluding that a refuse pile was subject to MSHA jurisdiction. *Id.* at 529. In this case, Collie *cleans* the coal by screening it to remove dirt, rocks, wood and other rough material.<sup>2</sup> It *drys* the coal. It *stores* the coal. It *loads* and hauls the coal from the pit to the conveyor or to the storage space. And it *loads* the coal in trucks to be hauled to Indiana Power and Light and, apparently, other coal mines. Finally, all of this takes place on "land . . . resulting from[] the work of extracting in such area bituminous coal, lignite, or anthracite from its natural deposits in the earth . . . ."

Accordingly, I conclude the Collie Coal Company is a coal mine subject to the Act. In view of this conclusion, and the fact that the citations are not contested, I affirm the citations.

### **Civil Penalty Assessment**

The Secretary has proposed penalties of \$488.00 for the nine violations in these cases. However, it is the judge's independent responsibility to determine the appropriate amount of penalty in accordance with the six penalty criteria set out in section 110(i) of the Act, 30 U.S.C. § 820(i). *Sellersburg Stone Co. v. FMSHRC*, 736 F.2d 1147, 1151 (7<sup>th</sup> Cir. 1984); *Wallace Brothers, Inc.*, 18 FMSHRC 481, 483-84 (April 1996).

In connection with the penalty criteria, the parties have stipulated that: (1) the Collie Company Coal Mine was the company's only mine during 1998; (2) the operator had no violations prior to the ones in these cases; and (3) the payment of the proposed penalties will not affect Collie's ability to remain in business. (Jt. Ex. 1.) From these I conclude that Collie is a small operator with no history of prior violations and that payment of \$488.00 will not affect the company's ability to continue in business. I further find that, with the exception of Citation No.

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<sup>2</sup> "Cleaning" is "[a] general term for the methods and processes of separating dirt from coal . . . ." *DMMRT* at 104.

4264894 in Docket No. LAKE 98-132, the gravity of all the violations was low and, with the exception of Citation No. 4265116 in Docket No. LAKE 98-134, the negligence was moderate. The gravity for Citation No. 4264894 was moderate and the negligence in Citation No. 4265116 was low. Finally, the evidence indicates that Collie demonstrated good faith in attempting to achieve rapid compliance after notification of the violations.

Taking all of this into consideration, I conclude that the penalties proposed by the Secretary are appropriate, and assess them as follows:

Docket No. LAKE 98-132

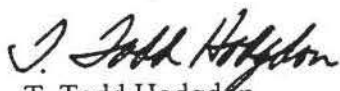
<u>Citation No.</u>	<u>Penalty</u>
4264890	\$ 50.00
4264891	\$ 50.00
4264892	\$ 50.00
4264893	\$ 50.00
4264894	\$ 88.00
4264896	\$ 50.00

Docket No. LAKE 98-134

4265112	\$ 50.00
4265116	\$ 50.00
4265117	<u>\$ 50.00</u>
Total	\$488.00

Order

In view of the above, Citation Nos. 4264890, 4264891, 4264892, 4264893, 4264894 and 4264896 in Docket No. LAKE 98-132 and Citation Nos. 4265112, 4265116 and 4265117 in Docket No. LAKE 98-134 are **AFFIRMED**. Collie Coal Company is **ORDERED TO PAY** civil penalties of **\$488.00** within 30 days of the date of this decision.

  
T. Todd Hodgdon  
Administrative Law Judge

Distribution:

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/nj

# 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, 1999

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. SE 98-146
Petitioner	:	A. C. No. 01-00851-04032 A
v.	:	
	:	Oak Grove Mine
MIKE SUMPTER, Employed by	:	
UNITED STATES MINING COMPANY	:	
LLC,	:	
Respondent	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. SE 98-147
Petitioner	:	A. C. No. 01-00851-04033 A
v.	:	
	:	Oak Grove Mine
DANNY JOE COOK, Employed by	:	
UNITED STATES MINING COMPANY	:	
LLC,	:	
Respondent	:	

## DECISION

Appearances: Robert A. Cohen, Esq., Office of the Solicitor, U. S. Department of Labor, Arlington, Virginia, for the Secretary;  
R. Henry Moore, Esq., Buchanan Ingersoll Professional Corporation, Pittsburgh, Pennsylvania, for the Respondents.

Before: Judge Weisberger

## STATEMENT OF THE CASE

This proceeding is before me based upon Petitions for Assessment of Civil Penalty filed by the Secretary of Labor ("Secretary") alleging that Phillip Michael Sumpter and Danny Joe Cook, agents of United States Steel Mining Company, LLC, ("U.S. Steel") are each liable under

section 110(c) of the Federal Mine Safety & Health Act of 1977 ("the Act"), for payment of an individual civil penalty. Pursuant to notice, the cases were heard in Hoover and Vestavia, Alabama, on January 26-27, 1999, respectively. On March 15, 1999 the parties filed post hearing briefs.

## 1. Introduction

United States Steel operates the Oak Grove Mine, an underground coal mine. As part of normal mining operations, at certain locations overcasts are constructed in entries to provide for efficient air ventilation. In constructing an overcast the first step is to remove part of the existing roof by drilling holes in the existing roof and then inserting explosives, and blasting the roof. After removal of blasted material from the floor, the resulting new roof is then bolted which allows miners to work under supported roof while constructing an overcast. In order to stabilize the roof and protect the bolters during bolting, an Automatic Temporary Roof Support System ("ATRS") is raised vertically from the Fletcher Dual Boom Bolter and placed flush against the roof.

On August 16, 1996, during the day shift, in the North Main Section, Lawrence Pasquale and Jim Hubbard working under the supervision of J. T. Williams, a production foreman, blasted the exiting roof. Towards the end of the day shift, prior to the removal of the blasted material that had fallen on the floor, Lonnie Daniel, Jr. and Nebitt (Pete) Wright, roof bolters on a production crew, were told by the foreman, Robert Cunningham, to bolt the overcast. The ATRS on the bolter was raised to its maximum extension of 11 feet, but did not reach the top of the roof. Daniel told Cunningham that the ATRS was not touching the top and that he, (Daniel) would not bolt if the ATRS was not touching the top. According to Daniel, Cunningham told him that he would bolt it himself, and the latter proceeded to bolt the roof without the ATRS being in contact with the roof. Neither Cook, the construction foreman, nor Sumpter, the general mine foreman, were in the area at the time of the blasting of the roof, and did not have notice or knowledge of the depth of the blasting. Nor were they present during the bolting of the new roof.

On August 17, 1996, MSHA Inspector Owneth Leslie Jones issued Order No. 4478891,<sup>1</sup> a section 104(d)(1) Order, alleging a violation of 30 C.F.R. § 75.202(b).<sup>2</sup>

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<sup>1/</sup> The parties stipulated that "there was no direct connection between the roof fall fatality which occurred on the Main North on August 16 1996, at the Oak Grove Mine, and the issuance of section 104(d)(1) Order No. 4478891."

<sup>2/</sup> Section 75.202(b) provides that "[n]o persons shall work or travel under unsupported roof unless in accordance with this subpart."



The order alleges as follows:

Persons were working beneath unsupported roof where roof bolting was being performed on the Main North Section. This occurred one cross cut inby survey point 9+04 in the cross cut to the right of the number 3 entry where overcast construction was in progress. The Automatic Temporary Roof Support System (ATRS) on the company number 43, model number D-D-O-13-B-C-F, serial number 96310/84042, Fletcher dual boom roof bolting machine would not engage the roof. The overcast height was 12 feet and the ATRS at maximum extension would only reach 11 feet. Supplemental supports were not being used.

United States Steel did not contest this order and the parties, in their filed stipulation, agreed that the Secretary "will not be required to establish the fact of violation, if the violation was significant and substantial and caused by the unwarrantable failure of the mine operator, as part of its burden of proof in this case."

It appears to be the Secretary's position that Sumpter and Cook are liable under section 110(c) of the Act, for knowingly violating section 75.202(b), supra, since it was a common practice at the mine to bolt the roof in situations where the ATRS, fully extended, was not high enough to be placed flush against the roof. The Secretary argues that Sumpter and Cook knew of this common practice, and should have taken steps to ensure that Cunningham<sup>3</sup> would not bolt under unsupported roof where the height of the roof exceeded the height of the ATRS fully extended. In this connection, the Secretary appears to argue that Sumpter and Cook did not supply extenders, used to provide extra height to the ATRS, to the section at issue where the overcast was being constructed.

## II. Applicable Law

Section 110(c) of the Act provides that, whenever a corporate operator violates a mandatory health or safety standard, a director, officer, or agent of such corporate operator who knowingly authorized, ordered, or carried such violation shall be subject to an individual civil penalty. 30 U. S. C. § 820(c). (Emphasis added.)

The proper legal inquiry for determining liability under section 110(c) is whether the corporate agent knew or had reason to know of a violative condition. *Kenny Richardson*, 3 FMSHRC 8, 16 (January 1982) *aff'd on other grounds*, 689 F.2d 632 (6<sup>th</sup> Cir. 1998), cert. denied, 461 U.S. 928 (1983). *Accord, Freeman United Coal Mining Co. v. FMSHRC*, 108 F.3d 358, 362-64 (D.C. Cir. 1997). To establish section 110(c) liability, the Secretary must prove only that an individual knowingly acted, not that the individual knowingly violated the law. *Warren Steen Constr., Inc.*, 14 FMSHRC 1125, 1131 (July 1992) (citing *United States v.*

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<sup>3</sup>/ The Secretary had also filed a section 110(c) proceeding against Cunningham. Cunningham subsequently paid the full penalty assessed against him and the proceeding was dismissed.

*International Minerals & Chem. Corp.*, 402 U.S. 558, 563 (1971)). An individual acts knowingly where he is "in a position to protect employee safety and health [and] fails to act on the basis of information that gives him knowledge or reason to know of the existence of a violative condition." *Kenny Richardson*, 3 FMSHRC at 16. Section 110(c) liability is predicated on aggravated conduct constituting more than ordinary negligence. *BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1245 (August 1992).

### III. Discussion

#### A. The Secretary's Evidence

The Secretary relies on the testimony of MSHA Inspector Oneth Leslie Jones and four roof bolters who worked on the day shift. In this connection, Jones testified that he interviewed J. T. Williams,<sup>4</sup> the day shift construction foreman, who told him that he had known for a month prior to August 16, that the ATRS as extended has not been reaching the roof. However, Williams indicated that he did not report this to management. Jones did not indicate that Williams told him that it was common practice to bolt in situations where the height of the roof exceeded the height of the ATRS.

Lawrence Pasquale and Albert J. Rogers, worked together on the same bolter on the day shift as part of the construction crew. In general, Pasquale testified that Cook normally told the crew what to do and "... he would talk about how deep he wanted each hole drilled, and I'd drill them" (sic) (Tr. 103). Pasquale indicated that generally Cook visited the section during lunch time once a day and that he (Cook) and Sumpter have been present during construction of overcasts. Pasquale testified that approximately 50 percent of the time during construction, the ATRS did not touch the roof and that on a "number of times" (Tr. 107) he informed Cook of this problem, and his response was "[g]et the job done as best as you can" (Tr. 106). Pasquale testified that it was "common practice" to drill holes in the roof in situations where the ATRS was not in contact with the roof, that all the roof bolters "done it" (Tr. 116), and that it was "common knowledge" that he would be required to drill in this situation (Tr. 116).

I do not place much weight on Pasquale's testimony for the reasons that follow. Even if it be found that Pasquale was credible regarding his version of his conversations with Cook, I find that it can not be reasonably inferred from Cook's statement to "get the job done" when advised that the ATRS did not reach the roof, as either condoning or authorizing bolting to be performed in that situation. The plain meaning of Cook's words do not preclude an inference that his intention was to communicate to Pasquale to use some means to raise the height of the

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<sup>4</sup>/ J. T. Williams died between the date Jones interviewed him, and the date of the hearing.

bolter, by ramping<sup>5</sup> or the use of jacks. Also, not much weight is accorded his testimony that all the bolters drilled holes in situations where the ATRS did not reach the roof, and that this was a "common practice," as little foundation was provided for these conclusionary statements.

Further, the record indicates that although Pasquale handled miners' grievances against U.S. Steel when he worked as a miner at U.S. Steel, he did not complain to management,<sup>6</sup> or MSHA, that he was asked to bolt in situations where the ATRS was not in contact with the roof. Hence, the credibility of his testimony is somewhat diminished.

Rogers testified that Cook usually gave him his work assignments. According to Rogers, he and Pasquale had informed Cook that the ATRS was not in contact with the roof, and in response Cook said that he wanted the job done and did not care how. The weight to be accorded Rogers' testimony regarding Cook's actions and responses is diminished by considering that a certain degree of animus existed between Rogers and Cook. In this connection, Rogers indicated that he did not get along with Cook, and that Cook had previously suspended him and tried to fire him based upon his (Rogers') refusal to work beyond the usual quitting time. Also, the record contains some inconsistency between Rogers' testimony at the trial, and testimony he had previously given in a deposition (Tr. 202, 204-211). Hence, not much weight is accorded his testimony due to the principle of falsus in uno, falsus in omnibus.

Terry McGill and Wayne Carl Pippen worked together bolting as part of a production crew on the day shift. McGill testified that one time a couple of months prior to August 1996, Sumpter had seen him bolt in a situation where there was an 8 to 10 inch gap between the ATRS and the roof.

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<sup>5</sup>/ Ramping is performed by not removing from the floor materials that fall from the roof upon blasting, and then riding the bolter up on the material so as to increase the height between the roof and the floor and allow the ATRS to reach the roof.

<sup>6</sup>/ The only evidence that Pasquale had communicated to management a complaint or information regarding this practice consists of his testimony that he had informed a Union Safety Committee member, Morris Ivy, who brought the matter to management. According to Pasquale, Ivy told him that management said that it would cost too much. Not much weight was placed upon this hearsay testimony. Ivy did not testify on behalf of the Secretary, and no reason was offered to excuse his not testifying. Further, the record does not contain any corroborating evidence regarding the details of Ivy's communication to management, the persons to whom Ivy made this communication, and the specific details of management's response to Ivy. The only evidence possibly related to this issue consists of Sumpter's testimony, that at meeting he attended, Ivy did not raise this issue, and that the only discussion concerning costs pertained to replacement of bolters with improved side protection.

Pippen testified that, in general, he got along with Cook. Pippen, indicated that often the ATRS did not reach the roof, and he had to bolt anyway. He did not indicate why he had to do it, and whether anybody in management ordered him to bolt, or had condoned it. Pippen testified that on a number of occasions, he saw other bolters bolt in situations where the ATRS was below the level of the roof. Not much weight is accorded this statement in the absence of particulars as to when this occurred, in what circumstances, and the identity of the miners involved. Pippen also indicated that the roof bolters talked among themselves about this problem, and it was a concern of everybody and not just the bolters. Due to the lack of specific details not much weight is accorded this general statement.

Pippen indicated that on one occasion the ATRS did not reach the roof and it fell off. According to Pippen, Cook was in the area when "we" bolted, and the bolting continued until Cook said to move off. In contrast to the testimony of Pippen, Cook testified that, regarding this incident, after the extension on the bolter broke, there was no further bolting. I observed the demeanor of the witnesses and, based upon their demeanor, I found Cook to be the more credible and reliable.

#### B. Further Findings and Conclusions of Law

The evidence adduced by the Secretary fails to establish that either Sumpter or Cook had actual knowledge of the specific violative condition herein cited by the inspector i.e., the bolting by Cunningham on August 16, under unsupported roof in violation of section 75.202(b), supra. Neither Cook nor Sumpter were present when this act was performed. Further, as explained by Sumpter and Cook, Cook was not Cunningham's supervisor, and Cunningham, not Cook, was responsible for the removal of the material after blasting, and the subsequent bolting of the overcast.


Additionally, in contrast to the testimony of the Secretary's witnesses, U. S. Steel's miner witnesses denied that there was any common practice to bolt in situations where the ATRS was not in contact with the roof. In this connection, Larry Neil McCarty, who supervised a crew that bolted overcasts, indicated that it was normal practice that if the ATRS did not reach the roof, the bolter was placed on top of the material that had fallen on the floor in order to allow it to reach the roof. He stated specifically that it was not common practice to bolt with the ATRS not up against the roof. Further, any inference that it was a common practice and common knowledge that bolting in an overcast was performed in situations where the ATRS did not touch the roof, is negated to a great degree by the testimony of Lonnie Daniel, Jr., a roof bolter who worked under the direction of Cunningham on August 16, 1996. According to Daniel's uncontradicted and unimpeached testimony, when he was told by Cunningham to bolt the overcast after it became apparent that the ATRS did not reach to the roof, he (Daniel) and Nebitt Wright, the other bolter on the machine, refused to bolt, and Cunningham indicated that he would do the bolting himself, which he did. Daniel also indicated that he never bolted with the ATRS not against the roof. He also stated that, prior to August 16, 1996, Cunningham had never bolted, in his presence, in a situation where the ATRS was not against the roof.



Based on all the above, I find that in normal mining operations it was a common occurrence, due to roof conditions, for the ATRS, as fully extended, not to be flush against the roof. However, as discussed above, the Secretary's evidence falls short of establishing that bolting in situations where ATRS was not in contact with the roof was such a prevalent practice in the mine that Cook and Sumpter should reasonably have been aware that, following this practice, Cunningham would bolt under unsupported roof on August 16, 1996. It is not contested that the height of the roof in an overcast varied due to the variations in the height of the coal seam and the rock layer above. There is no evidence that either Sumpter or Cook should have reasonably been aware that on August 16, 1996, that the distance between the floor and the roof after it had been blasted would exceed the height of the ATRS as fully extended, i.e. 11 feet. In this connection, there is no evidence that either Cook or Sumpter knew or should reasonably have been expected to know the depth of the holes drilled in the original roof in order to insert blasting devices to create the overcast. Further, most importantly, the Secretary has failed to adduce sufficient evidence to establish that either Sumpter or Cook should reasonably have been aware that Cunningham would bolt under unsupported roof on August 16, which is the violative condition cited. There is no evidence that Cunningham had ever bolted or ordered another miner to bolt under unsupported roof. No binding authority has been cited by Petitioner which requires the imposition of section 110(c) liability upon agents for acts that violate a regulatory standard, but which have not been established to have been of a nature that should have reasonably been anticipated. Hence, for all these reasons, I find that neither Sumpter nor Cook knowingly authorized, ordered, or carried out the violation cited in the order at issue. Specifically, it has not been established that there were any extant conditions that provided them with knowledge or reason to know of the existence of the violative act, i.e. bolting on August 16, under unsupported roof. Accordingly, I find that the Secretary has not established that either Sumpter or Cook knowingly authorized, ordered, or carried out the violation cited in the order at issue. Thus, I find that it has not been established that either Cook or Sumpter violated section 110(c) of the Act.

### ORDER

It is **ORDERED** that the Petitions for Assessment of Civil Penalty filed against Cook and Sumpter be **DISMISSED**, and that Docket Nos. SE 98-146 and SE 98-147 be **DISMISSED**.

  
Alan Weisberger  
Administrative Law Judge

#### Distribution:

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## ADMINISTRATIVE LAW JUDGE ORDERS





**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**  
**1730 K STREET, N.W., 6<sup>TH</sup> FLOOR**  
**WASHINGTON, D. C. 20006-3868**

March 1, 1999

SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. YORK 99-11-M
Petitioner	:	A. C. No. 30-00835-05518 A
	:	
v.	:	
MARC BOWERS, EMPLOYED BY	:	Wingdale Quarry Plant 75
PATERSON MATERIALS	:	
CORPORATION,	:	
Respondent	:	

**ORDER VACATING ORDER TO SHOW CAUSE**  
**DECISION DISAPPROVING SETTLEMENT**  
**ORDER TO SUBMIT INFORMATION**

**Before: Judge Merlin**

The show cause order dated February 5, 1999, was issued in error and is hereby **VACATED**.

This case is before me upon a petition for assessment of a civil penalty under section 110(c) of the Federal Mine Safety and Health Act of 1977. 30 U.S.C. § 820(c). The Solicitor has filed a motion to approve settlement for the one violation involved. A reduction in the penalty from \$1,500 to \$750 is proposed.

Section 110 (c) provides that when a corporate operator violates the Act, any director, officer or agent who knowingly authorizes orders or carries out the violation, shall be subject to the same penalties as the operator. 30 U.S.C. § 820(c). In this case the Secretary has proposed a penalty against Marc Bowers, the operator's mine manager in charge of blasting operations. The citation charges a violation of 30 C.F.R. § 56.6604 because mine personnel were not withdrawn immediately upon the first signs of an approaching electrical storm as required by the regulation. According to the citation, Mr. Bowers had a five hole shot loaded and ready, and had notified the surface mine manager of his intention to blast. The inspector stated in the citation that as a result of Mr. Bower's actions, employees, mine management and MSHA personnel were located less than a hundred feet from the face during the approach of the electrical storm. The inspector ended his recitation of the events with the statement that the approach of the storm had been obvious for at least 30 minutes before Mr. Bowers' notification of his intent to blast. The citation, which was issued under section 104(d) (1) of the Act, 30 U.S.C. § 814(d)(1), recites that a fatal injury was reasonably likely and that negligence was high. These allegations meet the

requirement of section 104(d) (1) that the violation be significant and substantial in nature and have resulted from unwarrantable failure. MSHA subsequently notified Mr. Bowers that he was an agent of the operator, that his actions were covered by section 110(c) and that a penalty of \$1,500 was proposed.

It is well established 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). The Commission has recently reaffirmed that the judges must consider all the criteria and are responsible to see that the record contains sufficient evidence for them to do so. Sec. of Labor on behalf of James Hyles, et al. v. All American Asphalt, 21 FMSHRC 34, 56-57 (Jan. 1999); Sec. Labor on behalf of Kenneth Hannah, et al. v. Consolidation Coal Co., 20 FMSHRC 1293, 1302-1303 (Dec. 1998); Sec. Labor on behalf of Richard Glover v. Consolidation Coal Co., 19 FMSHRC 1529, 1539 (Sept 1997).

In addition, in Sunny Ridge Mining Company et al., 19 FMSHRC 254, 271-272 (Feb. 1997), the Commission set forth the rules whereby the criteria are to be applied to individuals in 110(c) cases as follows:

The penalty criteria, as well as section 110(c), were carried over with no significant changes from section 109 of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 et seq. (1976) (amended 1977) ("Coal Act"). The legislative history of these sections provides little guidance of Congressional intent regarding how the penalty criteria be applied to individuals. The drafters of the Coal Act did, however, indicate a recognition that the criteria for penalties assessed against agents be independent of the operator criteria:

It was ultimately decided to let the agent stand on his own and be personally responsible for any penalties or punishment meted out to him.... The committee does not, however, intend that the agent should bear the brunt of corporate violations.

H.R. Rep. No. 563, 91st Cong., 1st Sess. 11-12 (1969), reprinted in Senate Subcommittee on Labor, Committee on Labor and Public Welfare, 94th Cong., 1st Sess., Part I Legislative History of the Federal Coal Mine Health and Safety Act of 1969, at 1041-42 (1975). We view this as evidence that Congress did not intend the penalty criteria to be applied to individuals in the same fashion they are applied to operators. Such an approach would be unfair because it would tie the individual's liability to the operator's conduct and financial resources, and would not allow "the agent [to] stand on his own." *Id.* It could also result in inordinately high penalties being assessed against individuals, which would clearly be contrary

to Congress's intention that agents not "bear the brunt of corporate violations." Id.

The Supreme Court has held that, in interpreting a single enactment, courts should give the statute "the most harmonious, comprehensive meaning possible." Weinberger v. Hynson, Westcott and Dunning, Inc., 412 U.S. 609, 631-32 (1973). Interpreting sections 110(c) and 110(i) harmoniously, we hold that, in keeping with our prior holding that "findings of fact on the statutory penalty criteria must be made," Sellersburg, 5 FMSHRC at 292 (emphasis added), Commission judges must make findings on each of the criteria as they apply to individuals. The criteria regarding the effect and appropriateness of a penalty can be applied to individuals by analogy, and we find that such an approach is in keeping with the deterrent purposes of penalties assessed under the Mine Act. In making such findings, judges should thus consider such facts as an individual's income and family support obligations, the appropriateness of a penalty in light of the individual's job responsibilities, and an individual's ability to pay. Similarly, judges should make findings on an individual's history of violations and negligence, based on evidence in the record on these criteria. Findings on the gravity of a violation and whether it was abated in good faith can be made on the same record evidence that is used in assessing an operator's penalty for the violation underlying the section 110(c) liability.

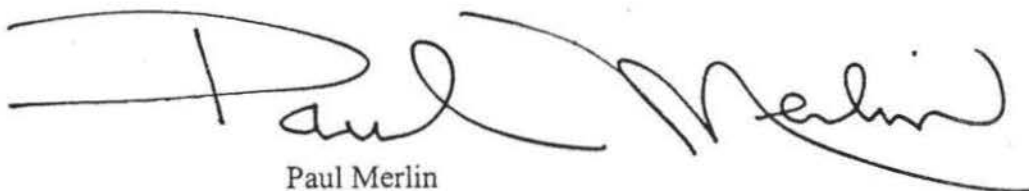
In this case the Solicitor recommends approval of the proposed settlement which is a 50% reduction, stating as follows: the respondent has agreed within thirty days of the order of dismissal to review and certify that he has read and is familiar with the regulations at 30 C.F.R. § 56.6000 through 56.6905, Blasters Training Manual for Metal/Non Metal Miners, Chapter 3, Blasthole Loading, and the fatality report dated October 26, 1992, for Matthes Borrow Pit.

The Solicitor's motion cannot be approved. He says nothing about the six criteria. The inspector's findings of high gravity and negligence apparently remain unchanged. The inadequacies of the Solicitor's motion make it impossible for me to comply with the requirements of the Act and the mandates of the Commission in fixing a suitable penalty.

In recent years MSHA has approved so-called holistic settlements where in addition to paying an adjusted penalty the operator agrees to undertake meaningful actions to abate the violation and prevent further occurrences, thereby improving overall health and safety at the mine. Mine Safety and Health News Vol. 3, No. 11 at 303 (May 31, 1996); Mine Safety and Health News, Vol. 2, No. 21 at 604 (Nov. 3, 1995); Mine Safety and Health News, Vol. 2, No. 20 at 563 (Oct. 20, 1995). This type of settlement has been approved by Commission Judges. See e.g. Southern Minerals, Inc. et al., 18 FMSHRC 2112 (Dec. 1996). Here the respondent promises nothing more than to read materials that he should have already read. Certainly, a blasting foreman should be familiar with MSHA regulations on blasting and the training manual for blasters. And he also should know about fatalities that have occurred in similar operations. Otherwise, he would not be qualified to act as a blasting foreman in the first place. In short, even apart from its other fatal deficiencies, this proposed settlement does not qualify as a valid holistic settlement.

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 Solicitor submit appropriate information to support his settlement motion. Otherwise, this case will be set for hearing.

A handwritten signature in black ink, appearing to read "Paul Merlin". The signature is fluid and cursive, with a large initial "P" and "M".

Paul Merlin  
Chief Administrative Law Judge

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