

APRIL 1985

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APRIL

The Commission directed the following cases for review during April:

Robert Simpson v. Kenta Energy, Inc., Docket No. KENT 83-155-D. (Judge Broderick, February 26, 1985).

Secretary of Labor, MSHA v. Cotter Corporation, Docket No. WEST 84-26-M. (Judge Carlson, March 6, 1985).

Emiliano Rosa Cruz v. Puerto Rican Cement Co., Docket No. SE 83-62-DM. (Judge Broderick, March 7, 1985).

Review was denied in the following case during April:

Secretary of Labor, MSHA v. Consolidation Coal Company, Docket Nos. WEVA 83-280-R, 83-281-R, 84-16-R. (Judge Steffey, March 1, 1985).

COMMISSION DECISIONS

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

April 12, 1985

EMILIANO ROSA CRUZ :  
 :  
 : Docket No. SE 83-62-DM  
 v. :  
 :  
 :  
 :  
 PUERTO RICAN CEMENT COMPANY, INC. :

DIRECTION FOR REVIEW AND ORDER

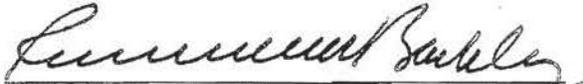
The petition for discretionary review filed by Puerto Rican Cement Company is granted. In his decision in this matter the administrative law judge concluded that complainant was discharged in violation of section 105(c) of the Mine Act, 30 U.S.C. § 815(c), and ordered payment of backpay, interest, attorneys fees and costs, and complainant's reinstatement.

In his decision on the merits of the discrimination claim, the judge expressly declined to make factual findings concerning testimony at the hearing that complainant had threatened the life of the operator's assistant personnel manager. 6 FMSHRC 1753, 1760 (July 1984). The judge stated that since the threat allegedly was made subsequent to complainant's discharge, it was "not relevant to this proceeding." Although the alleged conduct has no bearing on whether complainant was discharged illegally, it may affect the relief to which complainant is entitled. In certain circumstances, post-discharge opprobrious conduct may render an order of reinstatement inappropriate. See, e.g., Alumbaugh Coal Corp. v. NLRB, 635 F.2d 1380, 1385-86 (8th Cir. 1980); Mosher Steel Co. v. NLRB, 568 F.2d 436 (5th Cir. 1978); NLRB v. Yazoo Valley Electric Power Ass'n., 405 F.2d 479, 480 (5th Cir. 1968); NLRB v. R.C. Can Co., 340 F.2d 433 (5th Cir. 1965). Such conduct may also toll the period of time for which backpay is due. Alumbaugh Coal Corp. v. NLRB, 635 F.2d at 1386. Therefore, we remand to the judge for reconsideration and further findings on this issue. We intimate no views, however, as to the appropriate resolution of this issue, leaving this determination in the first instance to the trier of fact.

We also are troubled by the denial of the operator's request for an opportunity to depose complainant concerning his attempts to obtain interim employment and the extent of his interim earnings. In this proceeding, the judge first decided the merits of the discrimination claim and then ordered the parties to file written submissions as to relief. In light of complainant's written submissions, certain questions were raised by the operator concerning complainant's interim employment and earnings. The operator seeks to depose complainant and obtain a statement of his earnings from the Social Security Administration. In

the circumstances, and in light of the need for a remand on the prior issue, we believe the operator should have this opportunity. Elias Moses v. Whitley Development Corporation, 4 FMSHRC 1475, 1483-84 (August 1982).

Accordingly, the case is remanded to the administrative law judge for further expedited proceedings consistent with this order. Any party thereafter adversely affected or aggrieved may thereafter file petitions for discretionary review with the Commission in accordance with 30 U.S.C. § 823(d)(2).

  
Richard V. Backley, Acting Chairman

  
James A. Lastowka, Commissioner

  
L. Clair Nelson, Commissioner

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

April 29, 1985

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket Nos. WEVA 83-280-R
ADMINISTRATION (MSHA)	:	WEVA 83-281-R
	:	WEVA 84-16-R
v.	:	
CONSOLIDATION COAL COMPANY	:	

BEFORE: Backley, Acting Chairman; Lastowka, Nelson, Commissioners

ORDER

BY THE COMMISSION:

On April 9, 1985, the Commission issued a notice informing the parties that the petition for discretionary review filed in this matter by Consolidation Coal Company (Consol) had not been granted and, accordingly, that the decision of the administrative law judge was the final order of the Commission. 30 U.S.C. § 823 (d)(1).

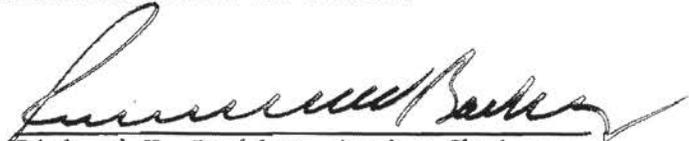
On April 24, 1985, the Commission received a "petition for reconsideration" from Consol. The petition for reconsideration states:

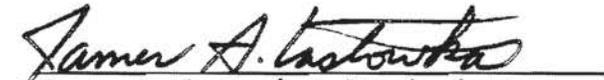
At the present time, the Commission is composed of three members. If the Commission presently consisted of its statutory five members, it would be more likely that this non-frivolous appeal, which is of great importance to Consol specifically and the mining industry in general, would be ordered reviewed.

Consol requests that the Commission reconsider and grant its petition.

Consol correctly observes that two vacancies presently exist on this five-member Commission. We note, however, that section 113(c) of the Mine Act authorizes panels of three members to exercise "any or all of the powers of the Commission". 30 U.S.C. § 823(c). Consol's petition for discretionary review, the administrative law judge's decision, and the entire record were fully considered by each of the present members of the Commission. No two members, however, voted to grant the petition and the judge's decision became the final order of the Commission 40 days after its issuance. 30 U.S.C. § 823(d)(1) and (2). No reasons have been advanced by Consol justifying the reconsideration it seeks. Further review of the Commission's final order is available in an appropriate U.S. Court of Appeals. 30 U.S.C. § 816(a).

Accordingly, the petition for reconsideration is denied.

  
Richard V. Backley, Acting Chairman

  
James A. Lastowka, Commissioner

  
L. Clair Nelson, Commissioner

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We disagree. For the reasons stated below, we hold that the safeguard provisions of section 75.1403-5(g) apply to coal-carrying belt conveyors. Accordingly, we reverse the judge's vacation of the citation and we remand for a determination on the merits consistent with the principles enunciated in Southern Ohio Coal Co., 7 FMSHRC \_\_\_\_, Docket Nos. WEVA 84-166 & WEVA 84-94-R (decided this same date).

On September 8, 1981, an inspector of the Department of Labor's Mine Safety and Health Administration ("MSHA"), T. J. Ingram, conducted an inspection of the Jim Walter Resources ("JWR") No. 3 underground coal mine. Pursuant to section 75.1403, the inspector issued to JWR "notice to provide safeguard" No. 0758641, which stated:

Twenty-four inches of travel space was not provided between the No. 3 longwall belt and the right rib along the pillar inby the No. 1 header. Twenty-four inches of travel shall be provided on both sides of the belt.

On September 8, 1984, while inspecting the same mine, MSHA Inspector Luther McAnally issued the instant citation, which referred to section 75.1403-5(g) and alleged a violation of the safeguard notice issued by Inspector Ingram:

A clear travelway of at least 24 inches on each side of the North Mains A and B belt was not maintained in that large rocks, rolls of belt, and belt structures were obstructing the walkways. Safeguard No. 0758641 was issued by T.J. Ingram on September 8, 1981.

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footnote 1 continued

The procedure by which an authorized representative of the Secretary of Labor may issue a citation pursuant to section 75.1403 is described in 30 C.F.R. § 75.1403-1(b):

The authorized representative of the Secretary shall in writing advise the operator of a specific safeguard which is required pursuant to § 75.1403 and shall fix a time in which the operator shall provide and thereafter maintain such safeguard. If the safeguard is not provided within the time fixed and if it is not maintained thereafter, a notice shall be issued to the operator pursuant to section 104 of the Act.

30 C.F.R. §§ 75.1403-2 through 75.1403-11 set forth specific "criteria" by which authorized representatives are guided in requiring safeguards. Section 75.1403-5 is headed: "Criteria -- Belt Conveyors," and -5(g), the subsection at issue in this case, states in part:

A clear travelway at least 24 inches wide should be provided on both sides of all belt conveyors installed after March 30, 1970.

Inspector McAnally testified that the size and extent of the objects described made it difficult and potentially dangerous to travel the walkway alongside the belt conveyor. It is not disputed that the cited belt conveyor was used solely to transport coal.

In his decision, the judge expressed his agreement with an earlier unreviewed holding by another Commission judge that the statutory and regulatory intent behind section 75.1403 and subsection -5(g) is to address hazardous conditions associated with belt conveyors that transport persons and materials other than coal. 6 FMSHRC at 1819, citing Monterey Coal Co., 6 FMSHRC 424, 451-58 (February 1984) (ALJ). Noting that the safeguard provisions of section 75.1403 are contained in Subpart O, entitled "Hoisting and Mantrips," the judge construed the reference to the "transportation of men and materials" to exclude the transport of coal. 6 FMSHRC at 1819. The judge stated that if the Secretary believed that coal-carrying belt conveyors could be covered under Subpart O, "it would have been a simple matter for him to specifically include them." Id. Lastly, the judge noted that coal-carrying belt conveyors are mentioned specifically in 30 C.F.R. § 75.303. That provision is based on section 303 of the Mine Act, 30 U.S.C. § 863, and deals with pre-shift and on-shift inspections of belt conveyors. The judge viewed the contrast between the reference to coal-carrying belt conveyors in section 75.303 and the lack of express reference to such belts in section 75.1403 as a further indication that section 75.1403 was not intended to apply to coal-carrying belt conveyors. Id.

The argument that section 314 of the Mine Act and Subpart O of 30 C.F.R. Part 75 are limited to the movement of persons and materials other than coal is based on the lack of specific references to "coal-carrying belt conveyors" in these provisions. We find the absence of such explicit mention to be immaterial in view of the inclusive purpose and language of these provisions. We conclude that section 314(b) authorizes the Secretary of Labor to require safeguards with respect to coal-carrying belt conveyors and that the relevant regulations of Subpart O apply to such belts.

The regulatory provisions contained in Subpart O were promulgated to implement section 314 of the Act. Therefore, in construing these regulations, we must look first to the meaning of the statutory provision they effectuate. See Emery Mining Corp., 5 FMSHRC 1400, 1401-02 (August 1983), aff'd sub nom. Emery Mining Corp. v. Secretary of Labor, 744 F.2d 1411, 1414 (10th Cir. 1984). Before focusing on section 314(b), which deals specifically with the subject of safeguards, we examine section 314 from a general perspective.

Unquestionably, a major regulatory concern of section 314, entitled "Hoisting and Mantrips," is the transport in coal mines of persons and of "materials" in the form of equipment and supplies. However, that concern does not exhaust the scope of section 314. Sections 314(e) and (f), for example, address safe braking, stopping, and coupling with respect to "locomotives," "haulage cars," and "haulage equipment." As we have indicated in a related context, the term "haulage car" in mining parlance refers to a car that carries ore, in addition to personnel,

supplies, or equipment. Florence Mining Co., etc., 5 FMSHRC 189, 195-96 (February 1983), aff'd mem. 725 F.2d 667 (3rd Cir. 1983). In mining usage, "track haulage" -- one of the general subjects of sections 314(e) and (f) -- denotes the "movement or transportation of excavated or mined materials...." Bureau of Mines, Dep't of the Interior, A Dictionary of Mining, Mineral, and Related Terms 1156 (1968) ("DMMRT"). See also Florence Mining Co., supra. 2/ Thus, section 314 of the Act clearly extends to the transportation of coal in coal mines.

Section 314(b), the safeguard provision repeated in 30 C.F.R. § 75.1403, is cast in broad terms:

Other safeguards adequate, in the judgment of an authorized representative of the Secretary, to minimize hazards with respect to transportation of men and materials shall be provided.

30 U.S.C. § 874(b) (emphasis added). Section 314(b) is found in a statutory section that, as concluded above, applies to the transport of coal. In this context, reading "transportation of ... materials" to encompass the movement of coal is both natural and logical. The term "transportation" is not qualified by type, power, or mode of transport used. We read the term to cover both track and trackless haulage (n. 2 infra). "Material" is also a broad term. See Webster's Third New International Dictionary (Unabridged) 1392 (1971). The broad language of section 314(b) manifests a legislative purpose to guard against all hazards attendant upon haulage and transport in coal mining, regardless of that which is transported or the mode of transport used.

The legislative history relevant to section 314(b) further evidences such a purpose:

This section authorizes the inspector to require certain safeguards for transporting men and materials.

All mantrip and haulage operations regardless of the motive power or conveyance may be hazardous. It therefore has been deemed wise to make the mandatory provisions all inclusive and not just confine it to any one type of conveyance.

S. Rep. No. 411, 91st Cong., 1st Sess. 81 (1969), reprinted in Senate Subcommittee on Labor, Committee on Labor and Public Welfare, 94th Cong., 1st Sess., Legislative History of the Federal Coal Mine Health and Safety Act of 1969, at 207 (1975) (emphasis added). In light of the foregoing considerations, we interpret section 314(b) to authorize the Secretary of Labor to require "[o]ther safeguards ... to minimize

2/ "Haulage," the general concern addressed by section 314, refers to the transportation of ore, personnel, waste, supplies, and equipment. See DMMRT 530. The two major modes of haulage are track haulage (vehicles running on tracks) and trackless haulage; the latter includes wheeled haulage and conveyor haulage. See, e.g., S. Cassidy (ed.), Elements of Practical Coal Mining 125-42 (1973).

hazards with respect to the transportation" of coal on coal-carrying belt conveyors. 3/

The preceding statutory construction leads to the crucial question in this case: whether the Secretary availed himself of section 314's grant of authority by addressing, in his Subpart O regulations, safeguard requirements for coal-carrying belt conveyors. At first glance, the fact that the specifically challenged regulatory provision, section 75.1403-5(g), refers broadly to "all belt conveyors" (emphasis added) would appear to provide an affirmative answer to that question. Nevertheless, we are met with a related series of objections that Subpart O as a whole, section 75.1403 entitled "Other safeguards," and section 75.1403-5 entitled "Criteria--Belt conveyors," all exclude the movement of coal. For reasons similar to those developed in our examination of section 314, we find no such restrictions.

We start with Subpart O itself. 30 C.F.R. § 75.1401, a section of general applicability covering "hoists" used to transport either persons or "materials," deals with the rated load capacities of "hoists" and the position indicators of "the cage, platform, skip, bucket or cars." All the key terms in section 75.1401 refer, in part, to the transportation of ore in mines. See DMMRT 146, 160, 172, 709, 834, & 1021. 30 C.F.R. § 75.1404 sets braking requirements for "locomotives and haulage cars," and 30 C.F.R. § 75.1405 requires automatic couplers for "all haulage equipment." As demonstrated above in our discussion of the corresponding provisions in section 314, these haulage references are to equipment and processes involved in the transport of coal. Thus, the regulatory provisions contained in Subpart O are not limited to the movement of persons and materials other than coal. Again, while the title to the subpart, "Hoisting and Mantrips," provides a convenient indication of one core concern, the heading is not all inclusive of the subpart's content.

Section 75.1403 itself simply restates section 314(b) of the Act. Accordingly, this regulatory provision repeats the broad statutory language, which, for the reasons set forth earlier, may be applied to the transportation of coal on belt conveyors. Section 75.1403 is part of a larger regulatory subpart that, as just discussed, extends to the movement of coal. Aside from section 75.1403-5, which contains the criteria concerning belt conveyors, a number of the subsections of 75.1403 deal, in part, with the transport of coal. 30 C.F.R. § 75.1403-2 sets braking standards for "hoists" and "elevators" for the transportation of "materials," and uses the terms "cage, skip, car or other devices." All the relevant terms in this section connote, in part, the movement of coal. 30 C.F.R. § 75.1403-8 sets criteria for "track haulage" roads.

3/ Reliance has been placed on the title of section 314 (and of Subpart O), "Hoisting and Mantrips," as an indication that only the transport of persons and materials other than coal is covered. As we have observed previously, titles and organizational arrangements may serve as intrinsic aids to construction in appropriate instances. Frequently, however, titles are merely summary highlights of general content or legislative objectives. In cases of seeming conflict between a shorthand title and clear legislative purpose or text, the latter must control. Allied Chemical Corp., 5 FMSHRC 1854, 1856-57 (August 1984).

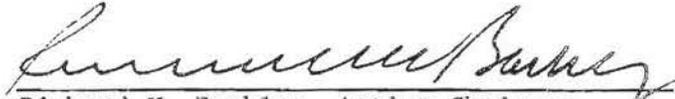
As shown above "track haulage" commonly refers to the "movement or transportation of excavated or mined materials...." DMMRT 1156. Similarly, 30 C.F.R. § 75.1403-10 sets general criteria for haulage pertaining to haulage equipment, tracks, roads, etc. When viewed in its entirety, it is apparent that section 75.1403 contains criteria that address the transportation of coal, as well as the transportation of personnel and other materials. We therefore reject the judge's conclusion that section 75.1403 authorizes safeguards only with respect to the transportation of men and materials other than coal.

Nor can we find that section 75.1403-5 or its subsection (g) were intended to exclude coal-carrying belt conveyors from coverage. We interpret the criteria at 30 C.F.R. §§ 75.1403-5(a), (b), (c), (d), (e), (f), and (i) to require the implementation of additional safety features and practices when belt conveyors are used for the transportation of persons and materials other than coal. 30 C.F.R. § 75.1403-5(h), however, sets out less stringent requirements on belt conveyors that "do not transport men." A reasonable interpretation of this subsection, given the wide scope of Subpart O, is that it applies to belts that carry coal. Likewise, section 75.1403-5(j), which prohibits persons from crossing "moving conveyor belts," necessarily applies to all moving belts, whatever they carry, because the hazard presented is the same.

Turning to the criterion at issue, section 75.1403-5(g), the most natural reading of the plain language of subsection (g) is that it applies to all belt conveyors regardless of whether they move coal, personnel, or materials other than coal. Nevertheless, the judge concluded, in part, that coal-carrying belts are properly the subject of section 75.303, and not of section 75.1403, because Congress, in section 303(d) of the Act (and the Secretary in 30 C.F.R. § 75.303) clearly distinguished between coal-carrying and person-carrying belts. However, section 75.303 only specifies the requirements for pre-shift and on-shift examinations of belt conveyors, and does not set general safety standards for belt conveyors. The only reference to coal-carrying belts in section 75.303 is that "they shall be examined after the shift has begun." We cannot view this separate statutory and regulatory reference as a convincing indication that the broad language of section 314, Subpart O, and section 75.1403-5(g) does not extend to coal-carrying belt conveyors.

More fundamentally, the very purpose of these provisions -- the elimination of transportation-related hazards -- militates against the distinctions that we have been asked to recognize. Section 75.1403-5(g) authorizes safeguards that provide for a "clear travelway ... on both sides of all belt conveyors...." Miners frequently must work, carry out inspection activities, and pass alongside moving coal-carrying belt conveyors. Injuries to miners resulting from accidental contact with these belts would be no different than those involving contact with non-coal-carrying conveyors. Therefore, we find no basis for limiting the requirement of unobstructed travelways to one type of belt conveyor and not the other.

For the reasons stated above, we conclude that section 75.1403-5(g) applies to coal-carrying belt conveyors. Because the citation in this case was vacated by the judge on the threshold issue of coverage under the safeguard regulations, we remand for a finding as to whether the conditions cited constitute a violation of the safeguard issued under section 75.1403-5(g). See Southern Ohio Coal Co., supra. 4/

  
Richard V. Backley, Acting Chairman

  
James A. Lastowka, Commissioner

  
L. Clair Nelson, Commissioner

4/ Pursuant to section 113(c) of the Mine Act, 30 U.S.C. § 823(c), we have designated ourselves as a panel of three members to exercise the powers of the Commission.

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must be determined. The inspector tried to use his anemometer for this determination, but could not obtain an accurate reading. He therefore decided to use a chemical smoke tube test to obtain the measurement. <sup>2/</sup> The inspector divided the crosscut into four quadrants and he and Reed conducted four or five smoke cloud tests in each quadrant. The inspector measured a distance of 10 feet in length along the floor of the two lower quadrants. Reed stood at the "upstream" end of the ten foot line and squeezed the aspirator bulb to release the smoke cloud upon the inspector's command. Reed tried to position himself so that the cloud was released at the beginning of the 10 foot line. The inspector stood at the "downstream" end of the 10 foot line and timed the cloud's speed with the second hand of his wrist watch. The inspector picked a spot high on the rib, in line with the end of the ten foot distance, and when the cloud passed this spot he noted the time. The inspector averaged the times for each quadrant and then averaged the results to obtain the air velocity at the crosscut. These procedures were observed by management representative Webb. The inspector then measured the height and width of the entry, and he multiplied the height by the width to obtain the cross-sectional area of the entry. Multiplying the air velocity by the area of the entry, the inspector calculated the quantity of air reaching the last open crosscut to be 7,654.5 cfm. Because this was less than the required minimum of 9,000 cfm, he issued a citation for a violation of section 75.301.

Subsequently, the MSHA inspector lost the notes containing the figures obtained as a result of his tests, and his measurements and calculations. At the hearing he was unable to recall any of the specific figures. However, both the inspector and miner representative Reed testified regarding the general procedures they had used to conduct the smoke cloud tests. After the Secretary presented his case-in-chief, counsel for Freeman moved to vacate the citation on the basis that the test result alone, without the underlying measurements, could not establish

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<sup>2/</sup> The basic instruments normally used to measure air velocity are the rotating vane anemometer and the chemical smoke tube. The vane anemometer is a small windmill geared to a mechanical counter. The chemical smoke tube is a plastic or glass pipe with an aspirator bulb at one end. Smoke is generated into the mine's atmosphere by squeezing the aspirator bulb which forces air through the tube containing a smoke generating chemical. The smoke cloud moves with the air stream and the cloud is timed over a known distance laid out along the floor of the mine entry. Smoke cloud measurements are made by two individuals. In essence, one person is positioned with the smoke tube at the "upstream" end of the timing distance and the other is positioned with a timing device at the "downstream" end of the timing distance. The smoke is released at the "upstream" position on the command of the timer, who starts timing simultaneously with the release of the smoke or when the cloud passes a preselected starting point. Timing is stopped when the cloud passes the timer. The velocity of the air is determined by calculating the number of feet the cloud has traveled, the time it has taken to cover that distance, and then converting those figures into a feet per minute measurement.

the violation. The administrative law judge denied the motion, ruling that the Secretary had established prima facie that there was less than 9,000 cfm at the crosscut. In rebuttal Freeman's inspector escort, Mr. Webb, and Freeman's senior ventilation engineer attacked the test methodology employed by the inspector and the consequent accuracy of the test results. They called into question the test procedures by citing to U.S. Bureau of Mines published documents addressing the use of smoke cloud tests, generally accepted scientific principles, and by expressing opinions based upon their own mining experience.

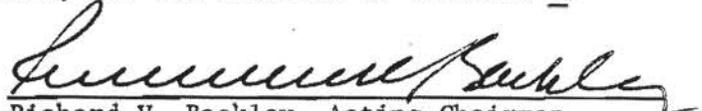
The judge rejected Freeman's arguments. He found that the air reaching the last open crosscut "was approximately 7,654.5 cubic feet per minute." 5 FMSHRC at 593. He found it "significant ... that [Freeman] ... did not itself take a smoke test." 5 FMSHRC at 596. He concluded, "[T]he test was validly taken and the results showed a violation." Id.

Because the precise quantity of air in a mine entry is not susceptible to perceptual determination, proof by test result is a necessary and common element in an MSHA enforcement action. Such proof, however, is not immune from challenge at a hearing, and it is the Secretary who bears the burden of establishing the violation he has alleged and of establishing the adequacy of the proof he offers. In this case, determination of air quantity required the inspector to make four types of mathematical calculations: averaging the smoke cloud test results; conversion of the average from feet per second into feet per minute; multiplication of entry height by entry width; and multiplication of the average air velocity by the area of the entry. Although there is no way to prove absolutely that computations such as these are correctly made without the underlying data, the lack of such data is not necessarily fatal per se to the finding of a violation. For example, (1) such a challenge may not be raised by the mine operator or (2) there may be sufficient additional evidence of the scientific reliability of the test methodology employed by the inspector to corroborate the result. However, where an operator contests the violation, is unable to obtain the underlying data and challenges the Secretary's failure to produce it, and where impeaching evidence of probative worth raises questions regarding the test methodology, the test result, standing alone, will not support a violation. In such circumstances, the record does not afford a basis for an analysis by which the administrative law judge and, ultimately, this Commission may verify the validity of the result. Wirtz v. Baldor Electric Co., 337 F.2d 518, 529-30 (D.C. Cir. 1964). See also Avnet, Inc., 78 FTC 1562, 1563 n. 1 (1971).

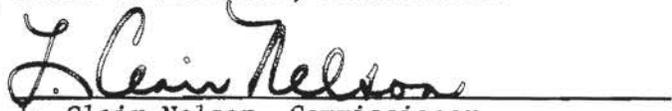
The evidence presented by Freeman in this case raised serious questions regarding the validity of the test procedures and, hence, of the accuracy of the test result. Significantly, the Secretary did not introduce any evidence regarding MSHA approved procedures for conducting smoke cloud tests or the instructions MSHA provides to its inspectors for conducting the tests. Nor did the Secretary's witnesses testify as to test procedures generally accepted in the mining industry. Thus, given the complete lack of underlying data, the questions raised by Freeman concerning the validity of the test methodology employed in this case, and the lack of evidence regarding smoke cloud test methodology

advocated by MSHA or accepted by the mining industry as a whole, we conclude that in this case the judge's conclusion that the Secretary established a violation of 30 C.F.R. § 75.301 is not supported by substantial evidence. 3/

Accordingly, the administrative law judge's conclusion that Freeman violated 30 C.F.R. § 75.301 is reversed, and the citation is vacated. 4/

  
Richard V. Backley, Acting Chairman

  
James A. Lastowka, Commissioner

  
L. Clair Nelson, Commissioner

3/ While Freeman might also have challenged the Secretary's assertions of a violation by conducting its own tests, its failure to do so did not diminish the effect of the evidence that was offered by Freeman. It is the Secretary's responsibility to investigate, allege, and prove violations.

4/ Pursuant to section 113(c) of the Mine Act, 30 U.S.C. § 823(c), we have designated ourselves as a panel of three members to exercise the powers of the Commission.

Distribution

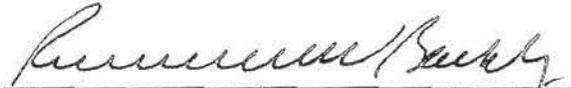
Harry M. Coven, Esq.  
Gould & Ratner  
Suite 1500  
300 West Washington Street  
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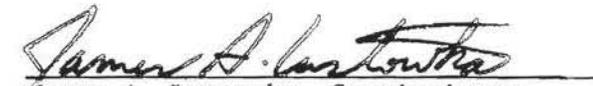
Barry Wisor, Esq.  
Office of the Solicitor  
U.S. Department of Labor  
4015 Wilson Blvd.  
Arlington, Virginia 22203

Administrative Law Judge James A. Broderick  
Federal Mine Safety & Health Review Commission  
5203 Leesburg Pike, 10th Floor  
Falls Church, Virginia 22041



For the reasons explained in our decision in Jim Walter Resources I, we conclude that section 75.1403-5(g) does apply to coal-carrying belt conveyors. Accordingly, we reverse the judge's decision here. We remand for further proceedings and findings as to whether the conditions cited constitute a violation of the safeguard issued under section 75.1403-5(g). See Southern Ohio Coal Co., 7 FMSHRC \_\_\_, Docket No. WEVA 84-166 (issued this same date). 1/

  
Richard V. Backley, Acting Chairman

  
James A. Lastowka, Commissioner

  
L. Clair Nelson, Commissioner

1/ Pursuant to section 113(c) of the Mine Act, 30 U.S.C. § 823(c), we have designated ourselves as a panel of three members to exercise the powers of the Commission.

Distribution

Robert W. Pollard, Esq.  
Jim Walter Resources, Inc.  
P.O. Box C-79  
Birmingham, Alabama 35283

Ms. Joyce Hanula  
United Mine Workers of America  
900 15th St., N.W.  
Washington, D.C. 20005

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

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

April 29, 1985

SECRETARY OF LABOR, :  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA) :  
 :  
 :  
v. : Docket Nos. WEVA 84-166  
 : WEVA 84-94-R  
SOUTHERN OHIO COAL COMPANY :

BEFORE: Backley, Acting Chairman; Lastowka and Nelson, Commissioners

DECISION

BY THE COMMISSION:

This consolidated proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982), presents issues concerning the applicability to coal-carrying belt conveyors of the safeguard provisions of 30 C.F.R. § 75.1403. 1/ A Commission administrative

1/ 30 C.F.R. § 75.1403 repeats section 314(b) of the Mine Act, 30 U.S.C. § 874(b), and states:

Other safeguards adequate, in the judgement of an authorized representative of the Secretary [of Labor], to minimize hazards with respect to transportation of men and materials shall be provided.

The procedures by which an authorized representative of the Secretary may issue a citation pursuant to section 75.1403 are described in 30 C.F.R. § 75.1403-1(b).

The authorized representative of the Secretary shall in writing advise the operator of a specific safeguard which is required pursuant to § 75.1403 and shall fix a time in which the operator shall provide and thereafter maintain such safeguard. If the safeguard is not provided within the time fixed and if it is not maintained thereafter, a notice shall be issued to the operator pursuant to section 104 of the Act.

30 C.F.R. §§ 75.1403-2 through 75.1403-11 set forth specific "criteria" by which authorized representatives are guided in requiring safeguards. Section 75.1403-5 is headed: "Criteria--Belt conveyors" and section 75.1403-5(g) states in part:

A clear travelway at least 24 inches wide should be provided on both sides of all belt conveyors installed after March 30, 1970.

law judge concluded that section 75.1403, in relevant part, applies to coal-carrying belt conveyors, that the citation issued to Southern Ohio Coal Company ("SOCCO") fell within the proscription of an underlying safeguard notice to provide 24 inches of clearance on both sides of belt conveyors, and that SOCCO therefore violated section 75.1403. 6 FMSHRC 2685 (November 1984)(ALJ). Consistent with our decision in Jim Walter Resources, Inc., 7 FMSHRC \_\_\_\_\_, Docket No. SE 84-23 (decided this same date) ("Jim Walter Resources I"), we affirm the judge's conclusion that section 75.1403 extends to the transportation of coal on coal-carrying belt conveyors. However, for the reasons stated below, we reverse the judge's conclusion that a violation of section 75.1403 occurred.

On September 14, 1978, during an inspection of SOCCO's Martinka No. 1 underground coal mine, MSHA inspector Dominick Poster issued notice to provide safeguard No. 018972 pursuant to section 314(b) of the Mine Act and 30 C.F.R. § 75.1403. The notice stated:

A clear travelway at least 24 inches along the No. 1 conveyor belt was not provided at three (3) locations, in that there was fallen rock and cement blocks.

All conveyor belts in this mine shall have at least 24 inches of clearance on both sides of the conveyor belts.

This is a notice to provide safeguards.

On November 30, 1983, during a regular inspection of the same mine, MSHA inspector Harry Marksley, Jr. issued the citation at issue here alleging a violation of section 75.1403. The citation stated:

A clear travelway of 24 inches was not provided along the 1-1 east conveyor belt for a distance of 15 feet in that water was 10 inches in depth from rib to rib at the No. 7 stopping. A slipping and stumbling hazard.

At the hearing before the Commission judge, witnesses for both parties agreed that the cited 1-1 east belt conveyor was used to transport coal only, and that the distance between the belt and the ribs along both sides of the conveyor was at least 24 inches. The witnesses also agreed that the water described in Inspector Marksley's citation extended from rib to rib for a distance of 15 feet. MSHA's witnesses measured the depth of the water at one point as 10 inches. They also testified that the water, in combination with the fireclay bottom, rock dust and mud in the area, created a serious slipping and stumbling hazard for the examiners, maintenance men, inspectors and workers who regularly traveled the belt line. Inspector Marksley testified that damp bottom conditions were not

unusual at this mine, and that the water present probably resulted from seepage through the bottom. No debris was found beneath the surface of the water. SOCCO's witness estimated the water's depth as seven inches, and testified that the bottom was firm and not slippery.

In his decision, the judge found it unnecessary to resolve whether coal is a "material" within the purview of 30 C.F.R. § 75.1403. Instead, he resolved the issue of the standard's applicability by determining that "the safeguard standard applies ... to minimizing hazards associated with the transportation of men and materials by foot, in this case miners traveling along the walkway adjacent to the moving conveyor belt." 6 FMSHRC at 2687. Analyzing the citation and underlying safeguard notice, the judge found that, even under a strict construction of the safeguard notice, the water presented not only a "slipping" hazard but also a "tripping and stumbling" hazard. 6 FMSHRC at 2687-88. The judge reasoned that although "fallen rock" or "cement blocks," the items specifically referred to in the safeguard notice, and other similar debris were not found in the water, it could "reasonably be inferred from the evidence that such debris could very well come to rest under the water from the adjacent ribs." 6 FMSHRC at 2688. The judge concluded that the safeguard notice, in essence, required a clear travelway of 24 inches on both sides of the beltline, and that the cited travelway was not clear due to the obstruction caused by the water. Id.

On review, SOCCO argues that the references in section 314(b) of the Mine Act and in section 75.1403 to the "transportation of men and materials" refers only to the movement of persons and materials other than coal. SOCCO therefore contends that section 75.1403 and its subsection -5(g) do not apply to the transport of coal on coal-carrying belt conveyors. SOCCO further argues that even if the Commission decides that the relevant safeguard provisions of section 75.1403 apply to coal-carrying belt conveyors, safeguard notices are to be strictly construed. SOCCO asserts that the safeguard provisions of the Act and the Secretary's regulations confer extraordinary authority on the Secretary. SOCCO urges that to avoid abuse of that authority, notices to provide safeguards must be written with such precision and specificity as to leave no doubt as to the conditions or hazards proscribed.

For the reasons set forth in our decision in Jim Walter Resources I, we conclude that section 75.1403, and its subsection -5(g), are applicable to coal-carrying belt conveyors. As explained in Jim Walter Resources I, this provision applies to trackless haulage by all conveyors. Thus, while we agree with the judge in result on this point, we do not rest our conclusion on his rationale that section 75.1403-5(g) encompasses transportation of materials by foot.

We further hold that the language of notices to provide safeguards must be narrowly construed, and that under a proper construction of the underlying safeguard notice in this case, the instant citation must be vacated.

It is of paramount importance to recognize the crucial difference in the rules of interpretation applicable to mandatory standards promulgated by the Secretary and those applicable to "safeguard notices" issued by his inspector. This Commission previously has recognized that, in light of the underlying purpose of the Mine Act, mandatory standards are to be construed in a manner that effectuates, rather than frustrates, their intended goal. See, e.g., Allied Chemical Corp., 6 FMSHRC 1854, 1859 (August 1984); Cleveland Cliffs Iron Co., 3 FMSHRC 291, 294 (February 1981). Mandatory standards, however, are adopted through the notice and comment rulemaking procedures set forth in section 101 of the Mine Act. Section 314(b) of the Mine Act, on the other hand, grants the Secretary a unique authority to create what are, in effect, mandatory safety standards on a mine-by-mine basis without resorting to otherwise required rulemaking procedures. We believe that in order to effectuate its purpose properly, the exercise of this unusually broad grant of regulatory power must be bounded by a rule of interpretation more restrained than that accorded promulgated standards. Thus, we hold that a safeguard notice must identify with specificity the nature of the hazard at which it is directed and the conduct required of the operator to remedy such hazard. We further hold that in interpreting a safeguard a narrow construction of the terms of the safeguard and its intended reach is required. See, e.g., Consolidation Coal Co., 2 FMSHRC 2021, 2035 (July 1980) (ALJ); Jim Walter Resources, 1 FMSHRC 1317, 1327-28 (September 1979) (ALJ). See also Secretary's Brief to the Commission at 11 n. 1. ("Accordingly, while the language of safeguard notices should be narrowly construed, the Secretary's issuance authority must be interpreted broadly").

We believe that this approach towards interpretation of the safeguard provisions strikes an appropriate balance between the Secretary's authority to require additional safeguards and the operator's right to notice of the conduct required of him. We further believe that the safety of miners is best advanced by an interpretive approach that ensures that the hazard of concern to the inspector is fully understood by the operator, thereby enabling the operator to secure prompt and complete abatement. 2/

---

2/ The requirements of specificity and narrow interpretation are not a license for the raising or acceptance of purely semantic arguments. See, e.g., Penn Allegh Coal Co., 4 FMSHRC 1224, 1226 (July 1982). We recognize that safeguards are written by inspectors in the field, not by a team of lawyers.

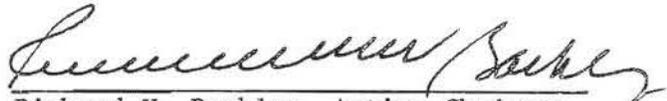
Applying these principles to the case before us, we must next decide whether the notice to provide safeguard at issue here, referencing "fallen rock and cement blocks at three locations," and requiring 24 inches of clearance on both sides of the conveyor belt should have put SOCCO on notice that conditions such as the water described in the citation fell within the safeguard's prohibitions. We conclude that it did not.

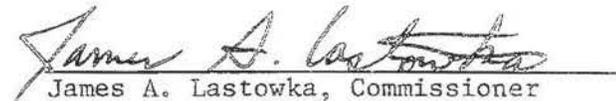
The underlying safeguard notice was issued by an inspector concerned with the presence of cement blocks and rocks in a travelway. The presence of these solid objects in the walkway would present an obvious stumbling hazard and, depending on the amount of material or debris, could prevent passage altogether. Abatement of the identified condition could readily occur by removal of these objects. Similar physical impediments to safe travel have been the subject of identical safeguards issued at other mines. See, e.g., Jim Walter Resources, 6 FMSHRC 1815 (July 1984) (ALJ), rev'd on other grounds, 7 FMSHRC \_\_\_\_\_, Docket No. SE 84-23, April 29, 1985. Under the rule of interpretation enunciated above, further instances of physical obstructions in travelways, whether rocks, cement blocks, or other objects such as construction materials, mine equipment, or debris would fall within the scope of the safeguard.

The alleged obstruction cited in this case, an accumulation of water, was neither specifically identified in the safeguard notice, suggested thereby, nor in our opinion even contemplated by the inspector when he issued his safeguard notice. The presence of water in an underground coal mine is not an unusual condition; it sometimes results from its introduction into the mining process, but often it is caused by natural ground conditions. The record in this case indicates that natural water seepage was common at this mine, particularly at the location involved. Given the frequency of wet ground conditions in the mine, and the basic dissimilarity between such conditions and solid obstructions such as rocks and debris, we find that SOCCO was not given sufficient notice by the underlying safeguard notice issued in 1978 that either wet conditions in general or the particular conditions cited in 1983 by the inspector in this case would violate the underlying safeguard notice's terms.

We do not hold that a safeguard notice pertaining to hazardous conditions caused by wetness could not be issued. Conditions such as those cited by the inspector here, if hazardous, can just as readily be eliminated by issuance of safeguard notices specifically addressing such conditions. By taking this approach rather than bootstrapping dissimilar hazards into previously issued safeguard notices, the operator's right to notice of conditions that violate the law and subject it to penalties can be protected with no undue infringement of the Secretary's authority or loss of miner safety.

For the foregoing reasons, we affirm the judge's finding that section 75.1403 applies in this case, but we reverse his conclusion that SOCCO violated section 75.1403. The civil penalty assessed by the judge for this violation is accordingly vacated. 3/

  
Richard V. Backley, Acting Chairman

  
James A. Lastowka, Commissioner

  
L. Clair Nelson, Commissioner

3/ Pursuant to section 113(c) of the Mine Act, 30 U.S.C. § 823(c), we have designated ourselves as a panel of three members to exercise the powers of the Commission.

ADMINISTRATIVE LAW JUDGE DECISIONS



**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

April 1, 1985

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 84-17-M
Petitioner	:	A. C. No. 04-04643-05501
	:	
v.	:	Sylva Sand & Gravel Mine
	:	
SYLVA SAND & GRAVEL, INC.,	:	
Respondent	:	

DECISION

Appearances: Marshall P. Salzman, Esq., Office of the Solicitor, U. S. Department of Labor, San Francisco, California for Petitioner.

Before: Judge Merlin

The Solicitor filed a proposal for the assessment of civil penalties for three alleged violations dated December 5, 1983 in the above-captioned action. On December 6, 1983 the operator wrote me, stating that it wished a hearing.

On August 24, 1984 an Order of Assignment was issued assigning this case to me. The Order of Assignment was mailed Certified Mail and the file contains the green certified card signed by the operator indicating it received the Order of Assignment. Thereafter on September 21, 1984 a Notice of Hearing was issued and on November 21, 1984 an Amended Notice of Hearing was issued. The operator's copies of both notices were returned unclaimed.

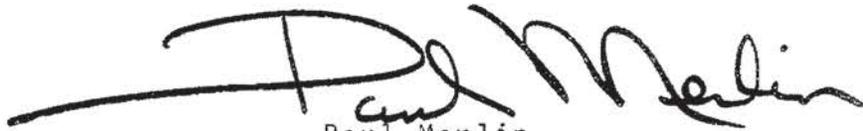
Pursuant to the Amended Notice of Hearing a hearing was held on February 6, 1985. The Solicitor appeared but the operator did not. The Solicitor withdrew the penalty petition with respect to one of the citations. The inspector testified regarding the remaining two citations. Citation No. 2088036 was issued for a violation of 30 C.F.R. § 50.10, a failure to notify MSHA of an accident. The inspector's description of the accident in which a miner's arm was caught in a conveyor belt adequately established a prima facie case that the occurrence fell within the mandatory standard and that there was a violation. Citation No. 2088038 arising out of the same accident was issued for a failure to guard the head pulley of the conveyor belt. Here too, the inspector's recitation of the accident sufficiently made out a prima facie case that the required guarding was not present and that a violation occurred.

After the hearing a show cause order was issued requiring the operator to show cause why it should not be held in default for failure to appear. 29 C.F.R. § 2700.63. The operator responded to this show cause order stating he was not notified of the hearing on February 6, 1985. He further advised that he had moved over 10 months ago and that the hearing notices were not sent to his new address. Finally, he alleges that the last notice he received was a show cause order requiring the Solicitor to file a penalty petition.

The operator must be held in default. According to his own admission he moved several months ago. He knew a case was pending against him. Contrary to his assertion, the last thing he received was not the show cause order directed to the Solicitor dated January 12, 1984 but the Order of Assignment dated August 24, 1984. It was the operator's responsibility to give written notice of his change of address. 29 C.F.R. § 2700.5. The Commission had no way of knowing where he moved. Having failed to notify the Commission of his new address the operator's complaints in his letter of March 18, 1985, are without merit.

It is Ordered that the operator is in default and that the proposed penalties of \$100 for Citation No. 2088036 and \$500 for Citation No. 20888038 are final.

The operator is Ordered to pay \$600 within 30 days of the date of this decision.



Paul Merlin  
Chief Administrative Law Judge

Distribution

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Department of Labor, 11071 Federal Building, 450 Golden Gate  
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Mr. Eugene Sylva, Sylva Sand & Gravel, Inc., 5061 Oro Dam  
Boulevard, Oroville, CA 95965 (Certified Mail)

/g1

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

APR 3 1985

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	
	:	Docket No. KENT 84-89
	:	A.C. No. 15-10339-03526
	:	
v.	:	Pyro No. 11 Mine
	:	
PYRO MINING COMPANY, Respondent	:	

DECISION

Appearances: Darryl A. Stewart, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for Petitioner; William Craft, Assistant Director of Safety, Pyro Mining Company, Sturgis, Kentucky, for Respondent.

Before: Judge Fauver

The Secretary of Labor brought this action for civil penalties under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 891, et seq. The case was heard in Lexington, Kentucky. Having considered the evidence and the record as a whole, I find that a preponderance of the substantial, reliable, and probative evidence establishes the following:

FINDINGS OF FACT

1. Respondent's Pyro No. 11 Mine is an underground coal mine used in connection with its Pyro No. 9 Mine to produce coal for sale or use in or affecting interstate commerce.

2. The parties have stipulated that Pyro Mining Company is subject to the provisions of the Act, that the Pyro No. 11 Mine is part of a division that produces approximately 1.5 million tons of coal annually, that Pyro Mining Company's previous history of violations would not be a significant factor in this case, that the assessment of the penalties in this case would not impose a financial hardship on Respondent's ability to remain in business, and that Respondent acted in good faith in abating the alleged violations cited in the citations involved.

3. On December 7, 1983, MSHA Inspector Paul O. Lee inspected part of Respondent's Pyro No. 11 Mine and issued Citation No. 2217258, alleging a violation of 30 C.F.R. § 75.507, which provides:

Except where permissible power connection units are used, all power-connection points outby the last open crosscut shall be in intake air.

Inspector Lee issued the citation on the ground that return air, air that had been used to ventilate the active workings of Pyro No. 9 Mine, was allowed to mix with neutral air flowing through a track entry in Pyro No. 11 Mine where there were nonpermissible motors on the conveyor belt drives. By using an anemometer, Inspector Lee determined that approximately 11,000 cfm of return air was being dumped into neutral air at the first main east entry overcast where it intersects with the second north main entry. Inspector Lee determined that the return air was mixing with the neutral air in part because Respondent had removed stoppings and had failed to replace them.

4. On December 14, 1983, MSHA Inspector Paul O. Lee inspected part of Pyro No. 11 Mine and issued Citation No. 2338301, alleging a violation of 30 C.F.R. § 75.507.

Inspector Lee issued the citation on the ground that return air, air that had been used to ventilate the active workings of Pyro No. 9 Mine, was allowed to mix with neutral air flowing through a track entry in Pyro No. 11, where there was nonpermissible electrical equipment, i.e. a battery charger and electric water pumps. Inspector Lee used an anemometer in determining that approximately 11,500 cfm of return air was being dumped into neutral air at a damaged overcast at the first east panel off the first submain north entry.

DISCUSSION WITH  
FURTHER FINDINGS

I find that the Secretary proved each charge by a preponderance of the evidence. Inspector Lee was justified

in relying upon Respondent's mine maps and his site inspections of Pyro No. 11 Mine in determining the two violations charged. He was not required to go into Pyro No. 9 Mine to verify the active workings and return air course shown on the maps for No. 9 Mine.

Both violations were due to negligence, because they could have been avoided by the exercise of reasonable care. They were serious violations because of the risk of a methane build-up and explosion by methane contact with nonpermissible equipment.

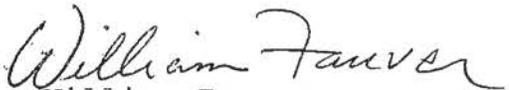
Considering the criteria for assessing a civil penalty under section 110(i) of the Act, I find that an appropriate civil penalty for each violation is \$260.

#### CONCLUSIONS OF LAW

1. The Commission has jurisdiction in this proceeding.
2. Respondent violated 30 C.F.R. § 75.507 as charged in Citations Nos. 2217258 (December 7, 1983) and 2338301 (December 14, 1983) and is ASSESSED a civil penalty of \$260 for each violation.

#### ORDER

WHEREFORE IT IS ORDERED that Respondent shall pay civil penalties in the total amount of \$520 within 30 days of this Decision.

  
William Fauver  
Administrative Law Judge

#### Distribution:

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Department of Labor, 280 U.S. Courthouse, 801 Broadway,  
Nashville, Tennessee 37203 (Certified Mail)

William Craft, Assistant Director Safety, Pyro Mining  
Company, P.O. Box 267, Sturgis, Kentucky 42459 (Certified  
Mail)

/kg

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

333 W. COLFAX AVENUE, SUITE 400  
DENVER, COLORADO 80204

APR 4 1985

VENBLACK, INC.,	:	CONTEST PROCEEDING
Contestant	:	
v.	:	Docket No. WEVA 84-152-R
	:	Citation No. 2124861; 2/22/84
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Austin Black Plant
ADMINISTRATION (MSHA),	:	
Respondent	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 84-313
Petitioner	:	A.C. No. 46-03319-03503
v.	:	
	:	Austin Black Plant
VENBLACK, INC.,	:	
Respondent	:	

DECISION GRANTING CONTEST AND  
DISMISSING PENALTY PROCEEDINGS

Appearances: George V. Gardner, Esq., and J. Edgar Bailly, Esq.,  
Gardner, Moss & Brown, Washington, D.C.,  
for Contestant/Respondent;  
James B. Crawford, Esq., Office of the Solicitor,  
U.S. Department of Labor, Washington, D.C.,  
for Respondent/Petitioner.

Before: Judge Lasher

A preliminary hearing on the record to determine jurisdiction was held in Falls Church, Virginia on October 17, 1984.

This matter is comprised of a contest proceeding filed by VenBlack, Inc., (herein VenBlack), on March 26, 1984, under Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.*, (herein the Act), and a civil penalty proceeding initiated by the Secretary of Labor on August 10, 1984, by the filing of a proposal for assessment of penalty pursuant to Section 110 of the Act.

The penalty docket involves eight citations including Citation No. 2124861 <sup>1/</sup> dated February 22, 1984, which is the subject of the contest proceeding. The contest and penalty dockets were consolidated for processing, hearing and decision by my order of September 6, 1984.

The issue is whether VenBlack is the "operator" of a "coal or other mine" and thus subject to the Act. That determination must be made through interpretation of sections 3(d), 3(h)(1) and (2), and 4 of the Act. 30 U.S.C. §§ 802(d), (h)(1) and (2), and 803, to wit:

Sec. 3. For the purposes of this Act, the term -

\* \* \*

(d). "Operator" means any owner, lessee, or other person who operates, controls, or supervises a coal or other mine or any independent contractor performing services or construction at such mine;

\* \* \*

(h)(1). "Coal or other mine" means (A) an area of land from which minerals are extracted in nonliquid form or, if in liquid form, are extracted with workers underground, (B) private ways and roads appurtenant to such area, and (C) lands, excavations, underground passageways, shafts, slopes, tunnels and workings, structures, facilities, equipment, machines, tools, or other property including impoundments, retention dams, and tailings ponds, on the surface or underground, used in, or resulting from, the work of extracting such minerals from their natural deposits in nonliquid form, or if in liquid form, with workers underground, or used in, or to be used in, the milling of such minerals, or the work of preparing coal or other minerals, and includes custom coal preparation facilities. In making a determination of what constitutes mineral milling for purposes of this chapter, the Secretary shall give due consideration to the convenience of administration resulting from the delegation to one Assistant Secretary of all authority with respect to the health and safety of miners employed at one physical establishment;

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<sup>1/</sup> Citation No. 2124861 charges VenBlack with failure to file a legal identity report in violation of 30 C.F.R. § 41.1.

(h)(2). For purposes of titles II, III, and IV, coal mine" means an area of land 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;

\* \* \*

Sec. 4. Each coal or other mine, the products of which enter commerce, or the operations of products of which affect commerce, and each operator of such mine, and every miner in such mine shall be subject to the provisions of this Act.

#### PRELIMINARY FINDINGS

VenBlack was incorporated in West Virginia in September 1983. In October 1983, VenBlack purchased the Chemical Products Division of Slab Fork Coal Company, which was in bankruptcy (Tr. 96; Ex. C-1). Slab Fork previously had operated what might be termed a completely integrated coal mine at Tams, West Virginia, where coal was actually extracted from the ground and then totally prepared in its Preparation Plant where it engaged in breaking, crushing, sizing, cleaning, washing, drying and mixing the coal. The Chemical Products Division, i.e., the manufacturing plant which was the only part of the Slab Fork operation purchased by VenBlack, was, and is, called the Austin Black Plant and is located on the same premises where the Slab Fork mine and Preparation Plant previously was located. VenBlack did not purchase the underground mine of Slab Fork or the Preparation Plant. In its operation of the Austin Black Plant, Slab Fork obtained the necessary prepared coal from its own Preparation Plant which had been extracted from the Slab Fork mine. All three operational phases previously were inspected and regulated by MSHA. <sup>2/</sup> As noted below, VenBlack obtains its "unique," carefully selected and prepared coal from outside coal producers through brokers.

2/ The historical regulatory pattern is not deemed relevant since the ultimate determination to be made here must be based on the nature of the operation as it now exists rather than on an entirely different configuration in the past. MSHA's regulation of the VenBlack plant in the recent past does indicate its expertise in such regulation and permits the inference that it would be administratively convenient for it to continue such. Administrative convenience is, of course, but one of the factors to be considered.

Slab Fork's entire operation at Tams, West Virginia, has been closed and Slab Fork has ceased all operations of the property (Tr. 96). Slab Fork does act as a coal broker, selling already prepared coal it has obtained from entirely independent coal mine operations (Tr. 96). One of its customers is VenBlack. VenBlack has no other business arrangements, contracts, or dealings directly with Slab Fork (Tr. 96). VenBlack's sole business is the operation of the Austin Black plant where it converts already prepared coal to the product known as Austin Black which it then bags and sells to the tire and rubber industry which uses it as an additive, extender, and "chemical filler" in compounds used to make rubber (Tr. 57, 90, 97, 104-105). The coal purchased on the "outside" market (Tr. 89) through Slab Fork and from other suppliers (Tr. 109, 110) by VenBlack for this purpose mainly from the Maben Energy plants at the Pocohontas Coal vein in West Virginia has already been prepared by breaking, crushing, sizing, cleaning, washing, drying and mixing to an exact specification designated by VenBlack (Tr. 68-72). This coal has additional uniqueness since it must also be (1) bituminous, and have chemical properities and be of a character common to only approximately 5% of the coals that are available (Tr. 120, 121, 133). Upon its arrival at VenBlack's plant, samples of this raw coal are first tested to insure that it meets VenBlack's specifications, including those pertaining to chemical composition (Tr. 85, 133, 134).

The prepared coal, which must be sized in particles of no more than half-inch, is delivered to VenBlack by a contract hauler (Sullivan) who delivers it by truck (Tr. 23, 89, 110, 111). It is first placed in a "truck bin" or raw coal storage silo. Subsequently, it is transported through a network of conveyors (Tr. 111) by conveyor belt and it finally ends up on a 1,000-ton silo where it is stored (Tr. 113). From the storage silo it is transported by conveyor belt to a nearby tipple where it is "scooped off the belt" and put into two small "tanks" or silos (Tr. 113, 114).

From the two small silos the coal, of approximately the same half-inch size as that delivered by Sullivan, is then run into the top of a six-story plant and down a chute into the "mill" (Tr. 115-117). On the way it enters a "hammer mill" which ensures that no particle exceeds the half-inch requirement. <sup>3/</sup> The coal then enters a unique (Tr. 117) air mill grinding process which reduces the coal particles to a fine dust having the consistency of talcum powder (Tr. 32, 118, 128) called Austin Black (Tr. 119). Once the small coal particles enter the grinding stage high-pressure air "bangs" the particles against each other in a closed system resulting in their reduction to powder (Tr. 32, 90, 117-119). This "unique" (Tr. 120) product is

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<sup>3/</sup> The hammer mill in effect "crushes" particles of coal which exceed half-inch down to suitable size. Approximately 10% of the coal entering the process is reduced in size by this method (Tr. 122, 123).

then bagged (forced by high-pressure air into either plastic or paper bags) according to the needs and specifications of the ultimate purchasers/users. Once the product is bagged, it is transported to a "palletizer" (Tr. 33, 34, 90, 106) over a conveyor system, where the bags are stacked uniformly on a pallet after the air has been squeezed out (Tr. 35) to be loaded on trucks with fork lifts (Tr. 90).

VenBlack has only eight employees, including a fork lift operator, a wrapper, a bagger, a palletizer, a compressor supervisor, and a plant manager. Two employees in these occupations work at night and five work in the daytime. The plant manager is the eighth employee.

VenBlack is classified by the State of West Virginia as a manufacturing company; coal mining has a different classification (Tr. 125-126). A competitor, Harwood Chemical, produces a product (Kofil 500) similar to Austin Black and is regulated by OSHA. Harwood Chemical is located approximately 10 miles from VenBlack (Tr. 101).

MSHA and the Occupational Safety and Health Administration, both divisions of the Department of Labor have entered into an agreement ("InterAgency Agreement") to delineate their authority and jurisdiction. The InterAgency Agreement, 44 F.R. 22827-22830 (April 17, 1979), insofar as it relates to "milling," and aside from references pertinent to 1977 Mine Act provisions, provides:

Mining and Milling:

Mining has been defined as the science, technique, and business of mineral discovery and exploitation. It entails such work as directed to the severance of minerals from the natural deposits by methods of underground excavations, opencast work, quarrying, hydraulicking and alluvial dredging. Minerals so excavated usually require upgrading processes to effect a separation of the valuable minerals from the gangue constituents of the material mined. This latter process is usually termed "milling" and is made up of numerous procedures which are accomplished with and through many types of equipment and techniques.

Milling is the art of treating the crude crust of the earth to produce therefrom the primary consumer derivatives. The essential operation in all such processes is separation of one or more valuable desired constituents of the crude from the undesired contaminants with which it is associated.

A Crude is any mixture of minerals in the form in which it occurs in the earth's crust. An ORE is a solid containing valuable constituents in such amounts as to

constitute a promise of possible profit in extraction, treatment, and sale. The valuable constituents of an ore are ordinarily called valuable minerals, or often just minerals; the associated worthless material is called gangue.

In some ores the mineral is in the chemical state in which it is desired by primary consumers, e.g., graphite, sulphur, asbestos, talc, garnet. In fact, this is true of the majority of nonmetallic minerals. In metallic ores, however, the valuable minerals in their natural state are rarely the product desired by the consumer, and chemical treatment of such minerals is a necessary step in the process of beneficiation. The end products are usually the result of concentration by the methods of ore dressing (milling) followed by further concentration through metallurgical processes. The valuable produce of the oredressing treatment is called Concentrate; the discarded waste is Tailing.

(Emphasis supplied)

#### Milling-MSHA Authority

Following is a list with general definitions of milling processes for which MSHA has authority to regulate subject to Paragraph B6 of the Agreement. Milling consists of one or more of the following processes: crushing, grinding, pulverizing, sizing, concentrating, washing, drying, roasting, pelletizing, sintering, evaporating, calcining, kiln treatment, sawing and cutting stone, heat expansion, retorting (mercury), leaching, and briquetting.

#### Crushing

Crushing is the process used to reduce the size of mined materials into smaller, relatively coarse particles. Crushing may be done in one or more stages, usually preparatory for the sequential stage of grinding, when concentration of ore is involved.

#### Grinding

Grinding is the process of reducing the size of a mined product into relatively fine particles.

#### Pulverizing

Pulverizing is the process whereby mined products are reduced to fine particles, such as to dust or powder size.

### Sizing

Sizing is the process of separating particles of mixed sizes into groups of particles of all the same size, or into groups in which particles range between maximum and minimum sizes.

### Washing

Washing is the process of cleaning mineral products by the buoyant action of flowing water.

### Drying

Drying is the process of removing uncombined water from mineral products, ores, or concentrates, for example, by the application of heat, in air-actuated vacuum type filters, or by pressure type equipment.

### Pelletizing

Pelletizing is the process in which finely divided material is rolled in a drum, cone, or on an inclined disk so that the particles cling together and roll up into small spherical pellets. This process is applicable to milling only when accomplished in relation to, and as an integral part of, other milling processes.  
(Emphasis supplied.)

The health and safety hazards inherent in VenBlack's operation and the correlative enforcement objective of MSHA was described by Inspector Blevins as follows:

Well, the inherent hazard, or the inherent problem with this type of an operation is they intentionally produce a 200 to 300 mesh product, and that in turn is hard to control in transferring the material to different locations where it is to be processed and bagged for sale.

Q. So what is the enforcement problem there, if there is one, or condition that you are most concerned with?

A. Well, I deal with respirable dust, that's exposure of the employees. I deal with accumulation to fine coal explosive dust.

Q. What can happen there as far as that goes?

A. Well, when you deal with a real fine float dust, there is a hazard of explosions, which there is always on-going problem of Black Lung or the respirable dust that workers are exposed. (Tr. 25).

## Summary of Contentions of the Parties

### I. The Secretary

A. In view of (1) the list of milling processes contained in the Interagency Agreement, supra, and (2) the provision of Section 3(h)(1)(C) of the Act that all facilities "used in or to be used in the milling of such minerals, or the work of preparing coal or other minerals, and (including) custom coal preparation facilities" are within the Act's definition of "a coal or other mine," and since the Austin Black plant processes coal by milling (through crushing and pulverizing) in order to meet customer coal specifications or market specifications, the plant is a "coal mine."

B. There is no requirement that the operator of a "processing or preparation facility" must actually extract coal, nor is there a requirement that the coal be previously unprepared before it reaches a "secondary preparation facility" for the second facility to be considered a mine under the Act.

C. (1) Section 3(h)(1) of the Mine Act also provides that in making his determination of what constitutes mineral milling "the Secretary shall give due consideration to the convenience of administration resulting from the delegation to one Assistant Secretary of all authority with respect to the health and safety of miners employed at one physical establishment." (2) MSHA has demonstrated expertise in inspecting facilities similar to Austin Black, has executed a continuing enforcement presence at such facility, inspects several other mines and facilities in the area, and has an MSHA office in close proximity to the Austin Black plant.

D. The Occupational Safety and Health Act of 1970 is a residual statute when another federal agency has authority to regulate. Thus, Section 4(b)(1) thereof provides:

Nothing in the Act shall apply to working conditions of employees with respect to which other Federal agencies . . . exercise statutory authority to prescribe or endorse standards or regulations affecting occupational safety and health.

### II. VenBlack

A. VenBlack is a customer, consumer and purchaser only of coal already prepared to its specification, to be used in its manufacturing processes and the product delivered to its customers.

B. The Secretary's position (Tr. 14) that "all there is a need to show that here is a processing of coal, that it is processed, it is mixed, or is . . . crushed, or is . . . sized or is . . . pulverized," over simplifies the issue; that if this were so almost every consumer of coal would be declared by MSHA to be a coal preparation facility.

C. VenBlack, the same as the coking industry and utilities, is not a coal preparation facility, does not "produce" coal and should not be under the jurisdiction of MSHA.

D. The fact that MSHA previously inspected the facility of the Slab Fork Coal Company and the process carried on at its coal mine operation and preparation plant is not relevant because only manufacturing is performed by VenBlack.

#### DISCUSSION AND ULTIMATE FINDINGS AND CONCLUSIONS

Early on the Secretary anticipated that toward the end of the industrial chain as minerals move from extraction toward their destination in the commercial market-difficulty would be encountered in the classification of certain firms as mining (including milling and coal preparation facilities), manufacturing, or the ultimate consumer. <sup>4/</sup> In the instant proceeding the Secretary has effectively shown that MSHA's regulation of VenBlack would be both convenient and expert. On the other hand, the record does not indicate that OSHA regulation thereof would be inconvenient or lacking in expertise. Indeed, OSHA regulates a nearby competitor, Harwood Chemical, which produces a product similar to Austin Black, and coking plants handling a similar type of coal (Tr. 101-103). Consequently, I do not find this factor to tilt the scales one way or the other.

During the hearing and in its post-hearing brief, the Secretary also expressed the view that the mere engagement of a business enterprise in any of the mechanical functions, i.e., "processes" listed in the Interagency Agreement under the heading

4/ Paragraph B(3) of the InterAgency Agreement states:

"Appendix A provides more detailed descriptions of the kinds of operations included in mining and milling and the kinds of ancillary operations over which OSHA has authority. Notwithstanding the clarification of authority provided by Appendix A, there will remain areas of uncertainty regarding the application of the Mine Act, especially in operations near the termination of the milling cycle and the beginning of the manufacturing cycle."

"milling," automatically stamped the firm as a coal mine operator. Thus, Inspector Blevins testified that: If you "process coal, then it comes under the jurisdiction of MSHA" (Tr. 56). The Secretary, in opening argument, again took the position that all that need be shown is that "there is a processing of coal," i.e., that it is mixed, crushed, sized, or pulverized. This contention is found to be without merit.

There is no question but that VenBlack performs several of the listed processes on coal incidental to its business purpose of converting it, by unique mechanical means from the select, highly prepared raw material it purchases from the coal industry to its final commercial product which is considered a chemical additive in the tire and rubber industry. However, the InterAgency Agreement provides a prerequisite characteristic to any listed process being considered "milling," i.e., that such process bring about "separation of one or more valuable desired constituents of the crude from the undesired contaminants with which it is associated." (Thus, under the Agreement, "mining" is not a general engineering or industrial term, but is instead vested with a specific meaning.) Such is clearly not the case with respect to VenBlack's machine, the unique air mill grinding process described herein above <sup>5/</sup> which pulverizes but does not "separate" desired constituents from contaminants. Any such "separation" has previously taken place in the coal preparation plants, VenBlack's suppliers. It is manifest from the portion of the Agreement quoted above that while processes such as crushing, pulverizing, sizing, and storing, can be milling, they are not as the Secretary contends, automatically milling and thus in the regulatory domain of MSHA.

It is ultimately concluded that VenBlack is engaged in manufacturing operations and that the position of the Secretary that VenBlack is a secondary coal preparation facility is not meritorious. The Federal Mine Safety and Health Review Commission noted in its decision in Oliver M. Elam, Jr., 4 FMSHRC 5 (1982) that the 1977 Mine Act's definition of "coal preparation" was taken from section 3(i) of the 1969 Coal Act, 30 U.S.C. § 802(i)(1976), which definition in turn was updated from the 1952 Coal Act. The Commission stated:

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<sup>5/</sup> Although referred to as a "grinding" process, the unique machine which performs this operation more precisely "pulverizes" the raw material-as that term is defined in the InterAgency Agreement-since the product emerges with the consistency of a fine powder.

"Although the legislative history of the 1969 Coal Act sheds no light on the reasons for the 1969 Act's modification of the 1952 Act's definition, we find it significant that the types of activities comprising 'the work of preparing the coal' have consistently been categorized as 'work ... usually done by the operator.' Thus, inherent in the determination of whether an operation properly is classified as 'mining' is an inquiry not only into whether the operation performs one or more of the listed work activities, but also into the nature of the operation performing such activities. In Elam's operations, simply because it in some manner handles coal does not mean that it automatically is a 'mine' subject to the Act."

(Emphasis added.)

Any incisive inquiry into the "nature" of VenBlack's operation seemingly must resolve the fundamental question of whether it is producing coal--in this instance through the process of milling it or "preparing" it--or is manufacturing a separate, distinguishable product.

Three preliminary observations concerning VenBlack and its product serve to shed some light on this question. First, although the Secretary with some creativity contends that VenBlack is a "secondary" coal preparation facility, it is established in the record that the coal pieces purchased by VenBlack for its manufacturing purposes have already been carefully and extensively prepared (by breaking, crushing, sizing, cleaning, washing, drying and mixing to an exact specification), having first been carefully selected for its chemical composition. Secondly, it is noted that VenBlack's operation is two steps removed from the coal mine operations which extracted the coal, and one step removed from the remarkably detailed process at a preparation facility. Finally, after going through VenBlack's pulverizing process, this raw material has lost its "mineral" identity as coal, having become a separate, distinguishable product having an entirely different identity and commercial purpose--as an additive and filler from the already refined mineral raw material unloaded by Sullivan. Other than from the exercise of tracing its origin, it no longer is identifiable as coal. <sup>6/</sup>

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<sup>6/</sup> These are three of the bases upon which it is concluded that the VenBlack operation is to be distinguished from the "slate gravel processing facility" found to be a mine in Donovan v. Carolina Stalite Company, 734 F.2 1547 (D.C. Cir., 1984), which is discussed further subsequently.

VenBlack clearly does not "produce coal," in the sense that a mill, preparation plant, or commonly-perceived, "classic" coal mine operator does. An interesting case for comparison is Secretary v. Alexander Brothers, Inc., 4 FMSHRC 541 (1982) wherein the Commission, in finding Alexander Brothers to be a coal preparation facility, pointed out that Alexander Brothers (which was engaged in reclamation activities) did not dispute that it undertook its processes (crushing, sizing, storing, crushing, etc.) in order to make coal-bearing refuse marketable "as coal." In contrast, it is clear that VenBlack undertakes its manufacturing processes in order to make already extracted, already prepared, coal pieces into a distinct and unique product for marketing as a chemical additive--not as coal.

As the United States Court of Appeals for the District of Columbia Circuit points out in Carolina Stalite, supra, every company whose business brings it into contact with minerals is not to be classified as a mine within the meaning of section 3(h); the jurisdictional line rests upon the distinction between milling and preparation, on the one hand, and manufacturing on the other; classification as the former carries with it Mine Act coverage; classification as the latter results in Occupational Safety and Health Act regulation.

Superficially, Carolina Stalite seems to support the Secretary's position since the slate and gravel processing facility owned and operated by the company was found to be a "mine". However, close examination of the Court's decision therein raises various grounds for differentiation between Carolina Stalite's business operation and that of VenBlack. Carolina Stalite's "slate gravel processing facility" was situated on property in North Carolina immediately adjacent to a quarry owned and operated by another independent corporation, Young Stone Company. Approximately 30% of the stone quarried by Young was delivered to Carolina Stalite by means of conveyor systems owned, operated and maintained by Young which was regulated by MSHA. Carolina Stalite then "bloated" the slate in a rotary kiln with intense heat, creating a light-weight material called "stalite" (its unregistered trade name) which was then crushed and sized and sold by Carolina Stalite for use in making concrete masonry blocks. In disagreeing with the Commission's conclusion that Carolina Stalite was engaged in manufacturing rather than mining <sup>7/</sup> the Court delivered the primary thrust of its rationale in the following language:

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<sup>7/</sup> The Court determined that the Commission had incorrectly held that the Act required a company actually to extract a mineral before being subject to Mine Act jurisdiction.

"Were we governed by ordinary English usage, we might well agree with the Commission. Carolina Stalite does not extract the slate it processes and, as the Commission said, its facility cannot be considered a "mine in the classic sense." However, neither does Carolina Stalite manufacture concrete masonry blocks, the primary end use for stalite, and it is by no means perverse to characterize the Stalite facility as a mine. The physical proximity and operational integration of Carolina Stalite and Young Stone, whose plant is unquestionably subject to the Act, permit those facilities to be viewed, in industrial and economic reality, as distinct from questions of legal title to the premises, as a unified mineral processing operation. That consideration makes less artificial the statute's clear classification of Carolina Stalite's facility as a mine."  
(Emphasis added)

By comparison, VenBlack can in no sense be viewed as "a unified mineral processing operation" with the operators who extract its coal from the ground. Nor can it similarly be viewed as unified mineral processing operation with the coal preparation plants which thereafter prepared its coal.

The following chart to some extent depicts the distinguishing features distinguishing VenBlack from Carolina Stalite.

#### CAROLINA STALITE

1. Extraction: Carolina Stalite and Young Stone Company are seen as a "unified" slate gravel processing facility with physically contiguous premises with Young doing the extracting and delivery to Stalite, which mills the original mineral. Young is already regulated by MSHA.
2. Delivery: Carolina Stalite's unrefined mineral is delivered to it for processing by Young's conveyors as part of a unified, integrated slate gravel operation.
3. Process Performed  
on the Mineral: Heat expansion, crushing, and sizing.
4. Identity of original  
Mineral after Processing: Essentially the same as the original mineral extracted.
5. End use of Product: Stalite is used in the manufacture of concrete blocks.

VENBLACK

1. Extraction: VenBlack is not unified, physically contiguous, or operationally integrated with any mine operator engaged in extraction whether or not such is regulated by MSHA. After extraction, the original mineral is subjected to exhaustive preparation by
2. Independently owned and Operated Preparation Plants: VenBlack is not unified, physically contiguous, or operationally integrated with any mine operator engaged in mineral preparation whether or not such is regulated by MSHA.
3. Delivery: VenBlack's highly-prepared mineral raw material is delivered to it by an independent hauler.
4. Process Performed on Original Mineral: Sampling for chemical composition, storage, sizing (by crushing), pulverizing, and bagging.
5. Identity of Original Mineral after processing: Austin Black is no longer coal, having become a separate chemical product.
6. End use of Product: As a chemical additive and filler in the tire and rubber industry. 8/

The Court in Carolina Stalite made a final point with respect to the determination of covered mine activity which must be considered:

"Because the Act was intended to establish a "single mine safety and health law, applicable to all mining activity," S.Rep No. 461, 95th Cong., 1st Sess. 37 (1977)(emphasis added), its jurisdictional bases were expanded accordingly to reach not only the "areas ... from which minerals are extracted," but also the "structures ... which are used or are to be used in ... the preparation of the extracted minerals." S.Rep. No. 181, 95th Cong., 1st Sess. 14 (1977), U.S.Code Cong. & Admin. News 1977, 3401, 3414. See also S.Rep. No.

8/ It might be said of stalite's relationship to the original mineral that "a rose is a rose by any other name," whereas Austin Black has become perfume.

461. supra, at 38 (the bill "broadly defined mine to include ... all surface facilities used in preparing or processing the minerals"). Section 3(h) thus "contains amendments to the definitions in the [predecessor statute] which reflect ... the broader jurisdiction of th[e] Act." S.Rep. No. 181 supra, at 14, U.S.Code Cong. & Admin. News 1978, at 3414."

The question thus remains whether VenBlack's surface facilities and structures are used in preparing or processing minerals. It is concluded that inherent in the determination that a process is "preparing" or "processing" (milling) minerals is the proposition that at the end of the preparation or processing there must still remain a distinguishable mineral left for marketing and sale as such mineral. This is one of the salient factors differentiating manufacturing from milling/preparing. If the mineral substantially loses its original identity in such process or preparation and a separate, unique, clearly identifiable product emerges for sale and marketing, then it would seem that the operation involved is manufacturing rather than mining. In other words, the nature of the business operation must be discerned and the retention of mineral identity at the end of the processing is necessary to the conclusion that the operation is engaged in mineral preparation or mineral milling. Otherwise, the mere performance of any of the mechanical processes listed in the InterAgency Agreement on any mineral would "automatically" be construed as mining activity rather than manufacturing.

Here, it is clear that VenBlack is not an integral part of a unified extraction/mineral processing operation the extraction part of which is already regulated by MSHA; the "convenience of administration" factor does not weigh against either MSHA or OSHA regulation; the original mineral processed by VenBlack has, upon completion of such process, lost its original identity and, in economic reality, given way to a new product.

This proceeding involves difficult issues and the positions of the parties both have some merit in the present stage of the development of the law on the subject. The Congressional mandate to generously extend MSHA's jurisdiction over questionable enterprises is clear. Old Dominion Power Company, 6 FMSHRC 1886 (1984), at 1890. Nevertheless, accepting the Secretary's own jurisdictional guidelines and upon careful consideration of the nature of VenBlack's operation and other relevant determinants, I have concluded that it is engaged in manufacturing a separate chemical product rather than producing (milling or preparation) coal. The position advanced by VenBlack is accepted as having the greater merit.

ORDER

All proposed finding of facts and conclusions of law not expressly incorporated in this decision are rejected.

VenBlack's contest of Citation No. 2124861 on the basis of lack of regulatory jurisdiction having been found meritorious, the subject Citation is vacated.

On the same basis, the remaining 7 Citations involved in penalty Docket WEVA 84-313 are vacated, and that proceeding is dismissed.

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

333 W. COLFAX AVENUE, SUITE 400  
DENVER, COLORADO 80204

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No. WEST 85-18-M  
Petitioner : A.C. No. 48-00152-05523  
: :  
v. : FMC Trona Mine  
: :  
FMC WYOMING CORPORATION, :  
Respondent :

DECISION

Appearances: Robert J. Lesnick, Esq., Office of the Solicitor,  
U.S. Department of Labor, Denver, Colorado,  
for Petitioner;  
John A. Snow, Esq., and James A. Holtkamp, Esq.,  
VanCott, Bagley, Cornwall & McCarthy  
Salt Lake City, Utah,  
for Respondent.

Before: Judge Lasher

Upon Petitioner's written motion for approval of a proposed settlement on the record on March 7, 1985, in Salt Lake City, Utah, and the same appearing proper and in the full amount of the initial assessment, the settlement which was approved from the bench during proceedings involving Respondent, is here affirmed.

Respondent, if it has not previously done so, is ordered to pay to the Secretary of Labor within 30 days from the date hereof the sum of \$168.00.

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

333 W. COLFAX AVENUE, SUITE 400  
DENVER, COLORADO 80204

APR 15 1985

RAYMOND L. COPELAND,	:	DISCRIMINATION PROCEEDING
Complainant	:	
	:	Docket No. SE 84-48-DM
v.	:	MD 83-53
	:	
AGRICO MINING COMPANY,	:	
Respondent	:	

DECISION

Appearances: Raymond L. Copeland, Lakeland, Florida,  
pro se;  
Mary A. Lau, Esq., Holland & Knight, P.A., Tampa,  
Florida,  
for Respondent.

Before: Judge Lasher

This proceeding, which was initiated by the filing with the Federal Mine Safety and Health Review Commission of a complaint of discrimination by Raymond L. Copeland (herein "Complainant") on April 12, 1984, arises under section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., (1976 & Supp. V 1981), hereinafter "the Act."

Complainant was previously notified by letter dated March 6, 1984, from the Mine Safety and Health Administration (MSHA) that his complaint of discrimination with it had been investigated and the determination made that a violation of section 105(c) of the Act had not occurred.

The matter came on for hearing in Lakeland, Florida, on November 7, 1984, at which Respondent was represented by counsel and Complainant appeared pro se.

PRELIMINARY FINDINGS

The Complainant was discharged on June 3, 1983, pursuant to a "Notice of Disciplinary Action" (Exhibit R-4) which specified:

"Insubordination: Refuse to do flagperson work, instructed by the shift supervisor."

Complainant is a 44-year-old flagman who had been employed by Respondent for approximately 13 years prior to his discharge. The duties of a flagman who is part of a train crew comprised of a locomotive engineer and two flagmen consist of flagging locomotives in and out, loading and unloading cars, switching cars, checking car doors to determine if they are open or closed, observing the track and the train when the train is in transit, and bleeding air off cars by pulling levers (Tr. 41-42, 160, 176-177, 182, Ex. C-1). At all times material herein, Complainant's immediate supervisor was Robert B. Durden, a foreman in the transportation department (sometimes referred to as a "dispatcher") (Tr. 41, 173-175).

Article XV, Section 9, of the Agreement between Respondent and the International Chemical Workers Union (herein "Union"), of which Complainant is a member provides:

"Except where to do so would place them or others in a real and present danger of serious bodily harm or cause them to violate the criminal laws of the State or Nation, the employees will obey the directives and orders of their supervisors. If the directives or orders cause a violation of the terms of this agreement, the employee can subsequently, after carrying out the directive, resort to the grievance procedure for redress. Subject to the foregoing, refusal to obey such orders or directives of a supervisor will result in discharge or other disciplinary action." (Ex. R-1).

In 1976, Complainant was terminated from employment by Respondent because of insubordination (Tr. 148). In the course of processing a grievance filed by the Union protesting his discharge, the Union and Respondent reached a settlement reducing the penalty from discharge to a six-month suspension (Tr. 148). That settlement was expressly conditioned upon Complainant's execution of a letter agreeing that he would be subject to immediate and permanent discharge if he was "ever again insubordinate or threatening" to his supervisors (R-3). This settlement was in effect at the time of Complainant's termination for insubordination on June 3, 1983 (Tr. 149).

On May 31, 1983, Complainant was to work as a flagman on the third shift, from 11:00 p.m. to 7:00 a.m. (on June 1), and on a train crew comprised of himself, locomotive engineer, Edward Francis and flagman William Cheeseman (Tr. 186) under the direct supervision of foreman Durden.<sup>1/</sup> At the beginning of the shift, the crew received instructions from Durden which included moving a train of cars to the dumping area to unload, moving the empty

<sup>1/</sup> Complainant and Francis are black and Cheeseman and Durden are white.

cars to the South Pierce Chemical Plant and returning to the yard at Pierce (Tr. 72, 187-189). The crew completed these assignments and returned to the yard at Pierce at approximately 4:00 a.m. At that time Durden radioed instructions from the dispatcher's office in the yard to Francis, the engineer, to move some cars to a repair area to be repaired (Tr. 73, 188-189). While Francis and Complainant were completing that assignment, Cheeseman returned to the dispatcher's office (Tr. 190, 258). Durden informed Cheeseman that he wanted Cheeseman and Complainant Copeland to ride in a truck to an area called the "two-mile post", located approximately 400 yards from the office to check the bottom of the rail car doors and to bleed the air off the rotary dump cars on Track 4 (Tr. 76, 191-258). Complainant had performed both these functions previously at night (Tr. 177-178; Ex. R-6 at pg. 14).

Durden and Cheeseman then left the dispatcher's office and met Complainant at the bottom of the stairs outside the office on his way back from the train area (Tr. 192). Durden repeated to Copeland, "Raymond, I want you and Cheeseman to go to the two-mile post to check the bottom doors and bleed the air off the rotary dumps." Complainant replied that he was not going to the two-mile post to check the bottom doors and bleed the air and he told Durden that if that was all Durden had for him to do, to pay him for his time up to that point and he would "go in" (Tr. 70, 192-196, 256). Durden repeated the instruction and asked Complainant if he was refusing to do the assigned work (Tr. 193, 256). At that point Complainant stated for the first time that he wouldn't do the assigned work because it was unsafe unless he could use a radar light rather than the customary flagman's lantern (Tr. 70, 193, 224, 256; Ex. R-6, pg. 9). Durden advised Complainant that he did not have an available radar light and could not get one because the storeroom was closed (Tr. 109, 195). Durden asked Cheeseman if the work was unsafe to perform without a radar light and Cheeseman stated that it was not unsafe (Tr. 197, 256, Ex. R-6, pg. 9). Both Cheeseman and Complainant had flagman's lanterns which were in working order at the time Durden gave the assignment to go to the two-mile post (Tr. 76, 133, 197).

Complainant then suggested that the crew move the train into a different well-lighted area of the yard (Tr. 84), a procedure which had never been used for checking doors and bleeding air off cars at the two-mile post (Tr. 196). When Durden rejected Copeland's suggestion, Copeland said that he would not go to the two-mile post (Tr. 196). At that point, Durden suspended Copeland for insubordination pending further investigation to determine appropriate discipline, including possible discharge (Tr. 85, 200).

On the basis of its own subsequent investigation Respondent terminated Complainant's employment for insubordination (Tr. 87-88, 242; R-3, R-4), and issued its formal notice of Complainant's termination on June 3, 1983 (R-4).

Tests of the two lanterns in question by the undersigned both in the darkened hearing room and at the "two-mile post" site itself revealed that the flagman's lantern, which Complainant refused to use, is at least equal in lighting capacity and suitability for the tasks to have been performed, and in some respects, superior to the radar light Complainant insisted on using but which was not available (Tr. 135-140, 287, 283-296, 297, 298).

Respondent has promulgated a manual containing general rules for engineers and flagpersons in its transportation department (Ex. C-2). A list of safety equipment required to be worn and cared for by flagpersons in the performance of their duties appears at page 12 thereof, and includes - in addition to such items as safety hat and safety glasses - a "flagman's lantern."

On October 14, 1983, Complainant filed charges with the Equal Employment Opportunity Commission and the Florida Commission on Human Rights alleging that his discharge was due to race (Exs. R-6, R-7. and R-8).

Complainant also filed a grievance pursuant to Article X of the Agreement between the Respondent and the Union (Ex. R-1) on June 3, 1983. The Report of Arbitrator George V. Eyraud, Jr., was issued on March 26, 1984, determining that the Union failed to show that Complainant's discharge was due to safety reasons (Ex. R-6).

Had Complainant been given a radar light he would not have refused to perform the work assigned him by Durden at approximately 4:30 a.m. on June 1, 1983 (Tr. 110).

Complainant testified that he had never previously used a radar light or flagman's lantern to close car doors at night but felt that "it's (the radar light) indicating more lighting than a flagman's lantern" (Tr. 100, 125). <sup>2/</sup> He also felt that the flagman's lantern was "unsafe for that type of job" (Tr. 103).

2/ Complainant failed to establish any persuasive basis on the record why he thought the radar light put out more light than his flagman's lantern. Also, Arbitrator Eyraud found that "Grievant himself established he had indeed previously performed the very duties assigned by Durden on June 1, and without a radar light."

The motivation behind Complainant's work refusal was (1) resentment - possibly of a racial nature - because Durden had informed Cheeseman what the duties of the third shift were to be on two occasions several hours earlier but did not so inform Complainant and Francis until the time arrived for the duties to be performed (Tr. 68, 69, 84, 96, 97, 112, 113, 114, 115), and (2) dissatisfaction with Durden's actions which made it seem as though Cheeseman was in charge even though Cheeseman, according to Complainant, "had just come there" and "had just started working in the department" (Tr. 115, 116). Complainant's reaction to this and possibly other wrongs perceived by him was to test Durden to see how much Durden "cared about safety" by raising the issue of lighting (Tr. 115, 116, 133).

The jobs of checking doors and bleeding the air off rotary dumps, when done after dark, typically were done by flagmen using flagman's lanterns (Tr. 177-178, Ex. R-6). No complaints that these two jobs were unsafe to perform at night had been received prior to the night of Copeland's suspension (Tr. 178, 232-236). There was no evidence that Copeland or anyone else ever complained about the safety of those two jobs using a flagman's lantern instead of a radar light, prior to the night of May 31 - June 1, 1983 (Tr. 236).

#### ULTIMATE FINDINGS AND CONCLUSIONS

The Complainant has established no justification whatsoever for his contention that the flagman's lantern (a) was inferior to the radar light, or (b) was insufficient for the job he had been instructed to perform. Indeed, the record in this case in fact actually establishes that the flagman's lantern is somewhat superior to the radar light which Complainant insisted on using as a condition of performing his assigned tasks. It was therefore clearly unreasonable for Complainant to engage in a work refusal since he has admitted that he would not have refused to work had he been given a radar light. This conclusion is further supported by the fact that the Complainant's real complaint was not safety-related but resulted from a perceived slight - justified or not.

In view of the foregoing, and since it is also clear that Complainant did not raise a safety issue until after his foreman had asked him if he was refusing a direct order, it is also concluded that Complainant did not entertain a good faith belief that a hazardous condition existed. His sudden assertion on the night of May 31, June 1, 1983, after ten year's experience as a flagman, that a hazardous condition existed because of the inadequacy of the flagman's lantern was not a genuine safety complaint.

Under the analytical guidelines established in Secretary on behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2786 (1980),

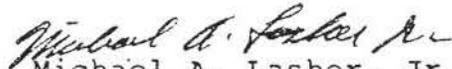
rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall 663 F.2d 1211 (3d Cir. 1981), and Secretary on behalf of Robinette v. United Castle Coal Company, 3 FMSHRC 803 (1981), a prima facie case of discrimination is established if a miner proves by a preponderance of the evidence (1) that he engaged in protected activity and (2) that some adverse action against him was motivated in any part by that protected activity.

A miner's work refusal is a protected activity under the Mine Act if the miner has a reasonable, good faith belief in a hazardous condition. Secretary on behalf of Pasula v. Consolidation Coal Co., supra; Secretary on behalf of Robinette v. United Castle Coal Co., supra. See also Miller v. FMSHRC, 687 F.2d 194 (7th Cir. 1982).

Here, the Complainant's work refusal, being based on neither a good faith belief, or a reasonable belief, in the existence of a hazardous condition, was not a protected activity under the 1977 Mine Act. Accordingly, there is no remedy for his discharge under this Act.

ORDER

Complainant having failed to establish Mine Act discrimination on the part of Respondent, his complaint herein is DISMISSED.

  
Michael A. Lasher, Jr.  
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

APR 15 1985

SOUTHERN OHIO COAL COMPANY, : CONTEST PROCEEDING  
Contestant :  
 :  
v. : Docket No. WEVA 84-296-R  
 : Citation No. 2420016; 6/19/84  
 :  
SECRETARY OF LABOR, : Martinka No. 1 Mine  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), :  
Respondent :

SUMMARY DECISION

Before: Judge Steffey

Counsel for the Secretary of Labor filed on December 7, 1984, in the above-entitled proceeding a "Motion for Partial Summary Judgment". Counsel for Southern Ohio Coal Company filed on December 24, 1984, a cross motion for summary decision.

Because I was in doubt as to certain procedural aspects of the parties' motion and cross motion, I issued an order on February 7, 1985, requesting that they clarify those points. The Secretary's reply to that order was filed on February 27, 1985, and explains that the word "partial" used in the title of the motion simply means that the Secretary is not requesting me to rule on any issues at this time which may later be raised with respect to the imposition of a civil penalty when and if the Secretary subsequently files a related civil penalty case with respect to Citation No. 2420016 which is the subject of SOCCO's notice of contest in this proceeding.

SOCCO filed its reply to my order on February 28, 1985. Both the Secretary's reply to the order and SOCCO's reply to the order state unequivocally that no genuine issues of material fact remain to be adduced beyond those which have been submitted by the parties in the form of replies to interrogatories and the depositions taken of three persons by SOCCO's counsel on September 20, 1984. SOCCO's reply (p. 2) to the order also states that to the extent that I encounter discrepancies in the information submitted by the parties, it will be necessary for me to "make factual conclusions based on the information in the file." The parties' replies to my order make it clear that they are requesting that I issue a summary decision pursuant to 29 C.F.R. § 2700.64.

I have reviewed all of the information in the official file and I conclude that the materials in the file support the following findings of fact:

#### Findings of Fact

1. Jesse Lowell Satterfield lives in Fairmont, West Virginia (Dep. 4). <sup>1/</sup> He gave a deposition on September 20, 1984. At that time he had been unemployed for 3 days, but prior to that, he had worked for Consolidation Coal Company in various capacities from 1973 to 1984 (Dep. 6). He has been a member of the United Mine Workers of America since 1973. He is financial secretary of Local 4060 and was chairman of the mine safety committee from 1982 to 1984 (Dep. 8). He has often accompanied MSHA inspectors while they were inspecting Consolidation Coal Company's Mine No. 20 where Satterfield worked (Dep. 39; 70). Satterfield graduated from high school and lacks only one semester of having graduated from Fairmont State College (Dep. 6). Satterfield's experience as a coal miner resulted in his becoming acquainted with the mandatory health and safety standards and with several inspectors employed by the Mine Safety and Health Administration.

2. Satterfield is 35 years old and has always lived in Fairmont (Dep. 4). At the present time he lives in a house owned by his mother and his mother lives in another of her houses which is located only a short distance from the house occupied by Satterfield (Dep. 36; 49; Exh. 1). A bump appeared in the road about 1/4 mile from Satterfield's house (Dep. 10). People were observed checking the foundations of homes in the area where Satterfield lives and Satterfield assumed that the persons doing the checking were working for Southern Ohio Coal Company (SOCCO). Property owners in the area expressed the belief that SOCCO's Martinka Mine extended under their homes and Satterfield's mother asked him to find out where SOCCO was mining (Dep. 10-12).

3. Satterfield believed that SOCCO was required by the Federal Mine Safety and Health Act of 1977 to make its mine map available for inspection by interested persons. As a person living on the surface of the mine, he did not give SOCCO any prior notice of his wish to see the map because he believed that SOCCO was under a legal obligation to show him

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<sup>1/</sup> Depositions of Jesse Lowell Satterfield, Frank Dowell Bowers, and Raymond Leon Ash were taken by SOCCO's counsel on September 20, 1984. All references are to pages in the depositions given by those three persons. The depositions were transcribed and placed in a single volume having consecutive page numbers.

the mine map (Dep. 14). Satterfield was working at the election polls on June 5, 1984. About midday he was told that he could take 3 or 4 hours off because few persons were coming to the polls to vote at that time (Dep. 9).

4. Satterfield went to SOCCO's Martinka Mine about 1 p.m. on June 5, 1984, and was admitted by the guard to mine property after he had told the guard that he wanted to see the mine map. Satterfield then went to the mine office and told the receptionist that he wanted to see the mine map so as to determine whether SOCCO was mining near his house (Dep. 15). She made a phone call and advised Satterfield that John Riley, SOCCO's land manager, was not at the mine at that time and that he was the only person who could show him the map. Satterfield told the receptionist that he had come to the mine to see the map, not John Riley (Dep. 16). About that time, Satterfield saw an MSHA inspector named Wayne Fetty with whom he was personally acquainted. Satterfield explained to Fetty that he was having a problem because he had come to see the mine map and it looked as if no one would show it to him. Fetty suggested that Satterfield see someone else (Dep. 17). Lud Gowers, an employee in SOCCO's safety department, overheard Satterfield's remarks and volunteered to check in the Engineering Department to see if someone else might be able to show Satterfield the mine map. When Gowers returned, he stated that John Riley was the only person who could show Satterfield the map. Satterfield thereafter told the receptionist, whom he had known for several years, that SOCCO would be in violation of the Act for refusing to allow him to see the mine map (Dep. 18). The receptionist again stated that only John Riley could show him the map (Dep. 19).

5. Satterfield returned to his home about 2 p.m. on June 5, 1984. He then called Ron Keaton at MSHA's Morgantown Office and Keaton read some of the Mine Act to him and confirmed Satterfield's belief that SOCCO was obligated to show him the mine map. Keaton advised Satterfield that an MSHA inspector could be made available to meet Satterfield at the mine to assure that he would be shown the map, but Satterfield said he would try again to see the map without resorting to asking MSHA for assistance (Dep. 20). Satterfield thereafter called the receptionist at the mine and told her that he had checked with MSHA and that he was correct in stating that SOCCO was legally obligated to show him the mine map. The receptionist connected Satterfield with Wesley Hough in SOCCO's Engineering Department. Hough stated that since Satterfield had to work at the polls until late that day, he would get John Riley to show Satterfield the mine map at 7:30 p.m. (Dep. 21).

6. About 7:25 p.m. on June 5, 1984, Satterfield called the mine office and was advised that Riley had gone home for the day. Satterfield then called Riley at home who stated that he would not go to the mine that late to show Satterfield the mine map and that Satterfield could see the map at the mine between 8 a.m. and 4:30 p.m., but Satterfield stated that he worked the day shift and could not come to the mine between 8 a.m. and 4:30 p.m. Riley then volunteered to come in early before the day shift started, but Satterfield said that he had to leave for work at 6:30 a.m. and could not come to the mine before work. Satterfield also noted that he had already been to the mine between the hours of 8 a.m. and 4:30 p.m. and had not been able to see the map at that time (Dep. 22). Satterfield worked 2 hours overtime about 8 days out of 10 and did not leave the mine until 6 p.m. Satterfield also worked on Saturday and some Sundays. Satterfield said that if he did not work overtime, he could leave the mine at 4:30 p.m. and be at SOCCO's mine by 5:30 p.m. because it takes him an hour to drive home, but Riley declined to stay an hour late to show him the map. Satterfield's conversation with Riley resulted in an impasse because Riley was unwilling to stay as much as 1 hour late to show the map and Satterfield could not come to the mine before 8 a.m. or during normal working hours extending from 8 a.m. to 4:30 p.m. (Dep. 23-24).

7. After Satterfield had failed to reach an agreement with Riley as to a time when he could see the mine map, Satterfield called an MSHA supervisor of inspectors named Raymond Ash at his home and told him about his previous discussion with Ron Keaton mentioned in Finding No. 5 above and Ash told Satterfield that he would have another inspector, Dave Workman, check into the matter. Several days thereafter, Satterfield was told by an inspector named Homer Delovich at Consol's mine where Satterfield was employed that Workman had indicated to him that SOCCO would make available to Satterfield the information he needed (Dep. 28-29).

8. Relying on Delovich's statements, Satterfield again went to SOCCO's mine about 7 p.m. on June 19, 1984. When Satterfield told the guard at SOCCO's mine that he wanted to see the mine map, the guard called someone on the phone and then advised Satterfield that John Riley was not on mine property. Thereafter, the guard called Riley on the phone and Satterfield had another conversation with Riley which again resulted in no agreement as to a time when Satterfield could see the mine map without having to come to the mine between the hours of 8 a.m. and 4:30 p.m. (Dep. 26-27). Satterfield asked the guard if there was an MSHA inspector on mine property and the guard checked and found that an MSHA inspector named Frank Bowers was at the mine. Satterfield explained to Bowers the difficulties he had had in trying to

see the mine map and that he had come to see the mine map again on the basis of statements by two other inspectors to the effect that SOCCO would make the map available. Bowers stated that he was not familiar with the problem and suggested that Satterfield discuss the matter with some of the inspectors whose help he had previously sought (Dep. 32-33).

9. After Satterfield had returned home on June 19 without being able to see the map, he again called Raymond Ash at home to inform him of his most recent unsuccessful efforts to see the mine map. Satterfield's call to Ash resulted in several other phone calls involving Frank Bowers, who was the MSHA inspector on mine property at that time, and Mike Resetar, a SOCCO employee who worked in SOCCO's Safety Department. Subsequently, Resetar called Satterfield to tell him that he was checking to see if someone would be available the next day to show Satterfield the map. Bowers then called Satterfield and told him to be at the mine at 7 p.m. the next day, June 20, and someone would show him the map (Dep. 34).

10. When Satterfield went to the mine on June 20, John Riley was near the gate with the map and other persons present were the security guard, Mike Resetar, Frank Bowers, and the UMWA walk-around representative, Henry Metz (Dep. 55). Riley laid the map on the hood of a pickup truck and pointed to two little squares on the map which had been placed there to indicate the location of his home and the house in which his mother lives. Riley would not answer any other question which Satterfield asked him, such as inquiries about the location on the map of a church, a new air shaft, and projection of the longwall panel. Satterfield subsequently discussed what he had seen on the map with his mother. Other people who live in the area or travel the road have asked him whether the longwall had mined under his house and he told them that SOCCO had mined under his house, but not with the longwall. One of Satterfield's neighbor's told him that a SOCCO official had contacted him and that he believed his house would be on the surface above SOCCO's next mining panel (Dep. 37-38).

11. As indicated in Finding No. 8 above, Frank D. Bowers is the MSHA inspector who was present at SOCCO's mine on June 19, 1984, when Satterfield came to the mine for the second time and was unsuccessful in being shown the mine map (Dep. 57; 59). Bowers talked to Satterfield on the phone after the guard refused to allow Satterfield to go on mine property. Satterfield wanted Bowers to issue a citation for SOCCO's refusal to show him the mine map, but Bowers declined to do so until he had obtained additional information. Satterfield became angry and hung up and Bowers "sort of forgot" (Dep. 59) the matter until he received a call from Ash, his supervisor, who told him to check into the map situation and

see what he could do to take care of it. Bowers learned from Ash that Dave Workman had been to the mine to investigate the matter, so Bowers talked to Workman on the phone and Workman stated that he had arranged for SOCCO's personnel to set up a meeting so that the matter could be taken care of (Dep. 60-61). Bowers then engaged in conversations with Mike Resetar in SOCCO's Safety Department and Resetar talked to Jim Tompkins and John Merrifield who are mine officials (Dep. 62; 96). Bowers had great difficulty in getting SOCCO's personnel to agree upon a time when Satterfield could see the mine map (Dep. 63). SOCCO finally agreed to have someone show Satterfield the mine map at 7:30 p.m. the next day, June 20.

12. Bowers had decided to issue a citation for SOCCO's refusal to show the mine map to Satterfield on June 5, but Bowers did not actually issue the citation until after a time for seeing the map had been agreed upon (Dep. 65). Bowers said that his decision to issue the citation was based on the fact that Satterfield had been to the mine on June 5 at 1 p.m. to see the map and no one would show it to him. Then when a time of 7:30 p.m. was agreed upon for Satterfield to see the map on that same day, no one would show Satterfield the map. The citation Bowers wrote is No. 2420016, and was issued on June 19, 1984, at 10 p.m. under section 104(a) of the Act alleging that SOCCO had violated section 312(b) of the Act. The condition or practice described in the citation reads as follows:

According to Lowell Satterfield, a landowner on the surface of the Martinka No. 1 Mine, a request was made on June 5, 1984, to see the mine map. A meeting was set to see the map at 7:30 p.m. on June 5, 1984, with a company official, and no one would show him the map after 5 p.m.

A meeting has now been set with the Company and Lowell Satterfield for 7:30 p.m. on June 20, 1984, at the mine. The time set for the meeting is agreeable with both parties.

Bowers Deposition Exh. 1. Citation No. 2420016 was modified on August 24, 1984, to cite 30 C.F.R. § 75.1203 which is identical in wording with section 312(b) of the Act. The modification was made because MSHA's computers are programmed to reject any citation which reflects a violation of a section of the Act if there is a parallel regulation pertaining to the violation being charged (Dep. 77; Bowers Deposition Exh. 3).

13. The deposition given by Raymond Ash, the MSHA supervisory inspector to whom Satterfield appealed for assistance in getting SOCCO to show him the mine map, does not disagree with the facts given by Bowers or Satterfield in any significant particulars. Ash's deposition is useful, however, in

revealing why SOCCO resisted showing the map to Satterfield except between the hours of 8 a.m. and 4:30 p.m. Ash was specifically told by John Riley just about 10 days prior to September 20, 1984, when Ash appeared to give his deposition, that SOCCO was not going to show their maps or anything else to people except by appointment during normal working hours between 8 a.m. and 4:30 p.m. Riley said that SOCCO is a business just like a courthouse is a business and should be open only during normal working hours (Dep. 105). Ash also said that John Merrifield had told him essentially the same thing about June 19 when he was engaged in conversations with SOCCO's personnel about getting SOCCO to show Satterfield the mine map (Dep. 108).

14. Ash's deposition also seems to support Satterfield's belief that he went to SOCCO's mine on June 19 about 7:00 p.m. because Ash thinks that Satterfield first called him about 8 p.m. after Satterfield had already been to the mine and had been refused admittance (Dep. 100).

#### Consideration of Parties' Arguments

The arguments in the Secretary's motion for summary decision are straight forward and to the point. The Secretary relies upon the literal meaning of the words of section 312(b) of the Act, or of section 75.1203 of the regulations which are identical with those of section 312(b), and asserts that since Satterfield was a person owning, leasing, or residing on the surface area of SOCCO's mine, that he was a person who is entitled to inspect the map. The Secretary then concludes that since SOCCO failed to make the map available to Satterfield when he went to the mine about 1 p.m. on June 5, 1984, and asked to see the map, SOCCO was necessarily in violation of section 75.1203 and that the inspector correctly issued Citation No. 2420016 on June 19, 1984, alleging that SOCCO had violated section 75.1203 (Secy's Motion, pp. 4-8).

SOCCO's cross motion for summary decision concedes that Satterfield was not shown the mine map on June 5 when he went to the mine to see the map, but SOCCO seeks to avoid being cited for a violation of section 75.1203 by arguing that SOCCO had a policy of showing the map to the persons designated in section 75.1203 so long as they ask to see the map during SOCCO's normal business hours of 8 a.m. to 4:30 p.m. and so long as they assure, in advance of coming to see the map, that John Riley, SOCCO's land manager, is also at the mine to show such persons the map. SOCCO argues that at no time did it refuse to make the map available to Satterfield and only insisted that Satterfield come to see the map during normal business hours, or come at some other time when John Riley was willing to show the map to Satterfield. SOCCO states that it is unreasonable for Satterfield or the Secretary

to expect it to respond to the demands of a surface resident who insists on seeing the mine map on his terms and at his convenience (Cross motion, pp. 7-14).

Section 312(b) of the Act and section 75.1203 provide as follows:

The coal mine map and any revision and supplement thereof shall be available for inspection by the Secretary or his authorized representative, by coal mine inspectors of the State in which the mine is located, by miners in the mine and their representatives and by operators of adjacent coal mines and by persons owning, leasing, or residing on surface areas of such mines or areas adjacent to such mines. The operator shall furnish to the Secretary or his authorized representative and to the Secretary of Housing and Urban Development, upon request, one or more copies of such map and any revision and supplement thereof. Such map or revision and supplement thereof shall be kept confidential and its contents shall not be divulged to any other person, except to the extent necessary to carry out the provisions of this Act and in connection with the functions and responsibilities of the Secretary of Housing and Urban Development.

#### Legislative History

The Secretary's motion (p. 7) states that there is no legislative history pertaining to section 312(b) of the Act, but that is not entirely correct. Section 312(b) was not changed when the Federal Coal Mine Health and Safety Act of 1969 was amended and renamed the Federal Mine Safety and Health Act of 1977. Therefore, the legislative history pertaining to section 312(b) is contained in Part 1 of the LEGISLATIVE HISTORY OF THE FEDERAL COAL MINE HEALTH AND SAFETY ACT OF 1969 prepared for the Subcommittee of Labor of the Committee on Labor and Public Welfare, United States Senate. The discussion which follows cites pages in the 1969 History.

When Congress began considering the legislation which ultimately became the 1969 Act, the primary bill introduced in the House was H.R. 13950 and the primary bill introduced in the Senate was S. 2917. Section 215(b) of S. 2917 contained a provision that the mine map was to be made available to certain persons, but no reference was made to surface landowners. History, pp. 75; 208; 856. Section 312(b) of H.R. 13950 contained the same provision as section 215(b) of S. 2917, that is, the bill required the map to be made available to certain persons, but made no reference to surface landowners and the House bill also did not refer to the confidentiality of the map. History, pp. 1003; 1317; 1337.

When S. 2917 was called up by the House, the bill had been renumbered so that section 312(b) of S. 2917 pertained to the same subject matter as section 312(b) of H.R. 13950, but the revised numbering of S. 2917 still did not contain any reference to making the map available to surface landowners. History, pp. 1402; 1427. The House, however, insisted that S. 2917 be amended to conform with H.R. 13950 and requested a conference with the Senate. History, p. 1438.

Conference Report No. 91-761, 91st Cong., 1st Sess. to accompany S. 2917 shows that the conferees had amended section 312(b) to add the confidentiality provision which is now contained in that section and also added the provision that the map was to be made available to "persons owning, leasing, or residing on surface areas of such mines or areas adjacent to such mines." History, p. 1486. The Conference Report explained the changes as follows:

Both the Senate bill and the House amendment required the maintenance of a mine map. The Senate bill required that the map be confidential except for disclosure for certain specified persons. The House amendment directed that the Secretary of Housing and Urban Development receive a copy. The conference substitute provides that the map shall be made available to the Secretary and his inspectors, the Secretary of Housing and Urban Development, the miners and their representatives, operators of adjacent mines, and to persons owning, leasing, or residing on surface areas of such mines or on areas adjacent to such mines, but that otherwise it shall be kept confidential.

History, p. 1529.

The section-by-section analysis of S. 2917 states with respect to section 312(b) that:

Subsection (b) requires that mine maps shall be available upon request, to the Secretary, State coal mine inspectors, the miners, operators of adjacent coal mines, persons owning, leasing or residing on surface areas and the Secretary of Housing and Urban Development.

History, p. 1618.

It is obvious from the above discussion of the legislative history that when the conferees added "persons owning, leasing, or residing on surface areas of such mines or on areas adjacent to such mines" that they did not distinguish the rights of the surface residents from the rights of the Secretary's inspectors to see mine maps. Section 312(b)

provides that the mine map "shall be available for inspection" and there is no hint that the named persons who are entitled to see the map are required to make an advance appointment to see the map or make certain that any specific individual is present at the mine to show them the mine map.

While I sympathize with SOCCO's management that it should never have to show its mine map to any person who is demanding in his or her insistence upon seeing the map, the fact remains that Satterfield was among those persons who are entitled to see the map. Since section 312(b) does not specify any conditions which a surface resident must meet in order to see the mine map, the surface resident is in the same position as an inspector is when he asks to have the map made available for his inspection. Inspectors go to mines during all three working shifts to make their examinations. They are just as likely to ask that the mine map be made available at 3 a.m. on the midnight to 8 a.m. shift as they are to ask that the map be made available during a day shift between 8 a.m. and 4 p.m. If a surface resident should wake up in the middle of the night and find that his house is sinking into a coal mine, there is every reason to believe that he might want to see the mine map at 3 a.m. if he could find anyone at the mine at that time of night.

While SOCCO's land manager may tell an inspector that SOCCO is a business just like a courthouse and is entitled to keep regular hours just like any other business (Finding No. 13 above), it is a fact that courts do not dig tunnels under people's homes and courts are not likely to cause the apprehension which people experience when they see bumps in roads and see strangers examining the foundations of their houses (Finding No. 2 above). A surface resident who is disturbed by the condition of the ground under and around his home is likely to go to see the mine map in a state of agitation. At such times, he may forget to be polite when he is told by the coal company that he may see the mine map only when a single person is conveniently present to show him the map.

The fact that at least one of SOCCO's employees felt on June 5 that Satterfield ought to have been able to see the map, even though the land manager was not present to show him the map indicates that SOCCO's policy of allowing only the land manager to show a surface resident the map was not a well-known rule (Finding No. 4 above). Additionally, the fact that another of SOCCO's employees fixed an evening appointment of 7:30 p.m. when Satterfield could see the mine map indicates that SOCCO's policy of allowing only the land manager to show surface residents the map only during the hours of 8 a.m. to 4:30 p.m. was not well known (Finding No. 5 above).

SOCCO also seeks to make an issue of the fact that Satterfield did not offer any proof that he was a surface resident at the time he asked to see the map on June 5 (Cross motion, p. 8). There are defects in that argument. First, the receptionist was a person who was well known to Satterfield and she knew that he was a surface resident and did not need to ask for any proof. Second, SOCCO did not decline to show Satterfield the map on the ground that he had not proven he was a surface resident who was entitled to see the map. The sole ground given by SOCCO for refusing to show Satterfield the map was that SOCCO's land manager was not at the mine to show him the map (Finding No. 4 above). Third, when the land manager finally did show Satterfield the map on June 20, 1984, he had already drawn squares on the map to designate the location of the houses in which Satterfield and his mother lived (Finding No. 10 above).

There is no merit to SOCCO's argument that it ought to be able to designate the land manager as the sole person to show the mine map to surface residents because he would be the most knowledgeable person to perform such duties (Cross motion, p. 11). SOCCO does not challenge Satterfield's statement that when the land manager finally did show him the map the land manager refused to answer any of Satterfield's questions about the map, such as the location of a church in which Satterfield was interested (Finding No. 10 above).

#### SOCCO's Alleged Efforts To Accommodate Satterfield

SOCCO emphasizes the length to which its land manager went in his efforts to make the mine map available for Satterfield's inspection (Cross motion, pp. 9-10). SOCCO claims that the land manager offered to come to the mine before 8 a.m. to show Satterfield the map and also offered to stay late to show Satterfield the map. Satterfield agrees that the land manager offered to come in early to show him the map, but Satterfield explained that he was working the day shift at Consolidation Coal Company's No. 20 Mine and that he had to leave for work at 6:30 a.m. and that he could not come to the mine to see the map before 8 a.m. Satterfield additionally testified that he works overtime about 8 days out of 10 and did not leave the mine until 6:00 p.m. Satterfield also worked on Saturdays and some Sundays. Satterfield said that if he did not work overtime, he could leave the mine at 4:30 p.m. and be at SOCCO's mine by 5:30 p.m. because it takes him an hour to drive home, but the land manager refused to stay an hour late to show him the map (Finding No. 6 above).

Despite the above testimony given by Satterfield under oath, SOCCO's cross motion (pp. 9-10) emphasizes that the land manager volunteered to stay late to show Satterfield the map. The only factual reference cited by SOCCO to support its claim that the land manager agreed to stay late to show Satterfield

the map is its Answer No. 9b to the Secretary's interrogatories. SOCCO's answers to the Secretary's interrogatories were prepared by SOCCO's counsel on September 10, 1984, which was 10 days prior to the time that SOCCO's counsel took Satterfield's deposition on September 20, 1984. I believe that there is more validity and credibility in the statements of a deponent made under oath than there is to a generalized statement made in an answer to an interrogatory. Therefore, I reject SOCCO's claim that its land manager volunteered to stay late after work to show Satterfield the mine map.

Other aspects of the facts support my conclusion that the land manager never agreed to stay late to show Satterfield the map. First, SOCCO's Answer No. 9b agrees that the land manager refused to stay late on June 5 to show Satterfield the map despite the fact that another of SOCCO's employees had advised Satterfield that he could come to the mine about 7:30 p.m. and see the map on June 5. Second, it is uncontroverted that Satterfield did come to the mine about 7 p.m. on June 19 in an effort to see the map and returned to the mine at 7:30 p.m. on June 20 at which time the land manager did show him the map. The fact that Satterfield came to the mine about 7:30 p.m. on two different occasions to see the map shows beyond any shadow of doubt that Satterfield was willing to come to the mine after work to see the map. If the land manager had been willing to stay late to show Satterfield the map, the two men would have had a meeting of minds on June 5 and no citation for failure of SOCCO to show Satterfield the map would ever have been written. Finally, if the land manager had been as accommodating as SOCCO's cross motion contends, Inspector Bowers would not have had to say in his deposition that "I couldn't get no one to set a time -- one before 5:00 and one could be there after 5:00 -- okay? I went ahead and cited the citation to try to get this over with." (Deposition, p. 63).

#### SOCCO's Claim that the Map was "Available"

SOCCO's cross motion (p. 12) refers to section 312(b) of the Act and notes that the pertinent requirement of that section is that the "[t]he coal mine map \* \* \* shall be available for inspection by \* \* \* persons \* \* \* residing on surface areas of such mines". SOCCO then states that the definition for "available" in WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1976) is "accessible" or "obtainable". SOCCO then contends that it could not have violated section 312(b) because it has a policy of having its land manager to show the mine map to persons residing on surface areas of its mine between the hours of 8 a.m. and 4:30 p.m. SOCCO claims that since the map is available for inspection during that period of time, it is "accessible" and "obtainable" by surface residents. SOCCO argues further that since its land manager went out of his way to make the map available to Satterfield before and after

those hours, that it went far beyond its normal policy in trying to make the map available for inspection by Satterfield.

As I have already explained above and as I have shown in Finding Nos. 4 through 10 above, SOCCO did not make the map available for inspection by Satterfield when he came to the mine to see it at 1 p.m. on June 5. SOCCO did not make the map available for inspection at 7:30 p.m. on June 5 even though one of SOCCO's employees had told Satterfield it would be made available at that time. SOCCO did not make the map available for inspection when Satterfield again went to the mine to see it about 7 p.m. on June 19. Finally, SOCCO did make the map available for inspection about 7:30 p.m. on June 20 after SOCCO's management had been pressured by several MSHA inspectors and a supervisory inspector to make the map available. In the circumstances described above, one simply cannot find that SOCCO made its map available for inspection by Satterfield in conformance with the provisions of section 312(b) until after Citation No. 2420016 was written.

As I have pointed out above, SOCCO's policy of making the map available from 8 a.m. to 4:30 p.m. only if a single designated person is available to show the map is not a policy which can be accepted as compliance with section 312(b). The land manager, like any other person, is likely to take an annual vacation, get sick occasionally, be given assignments away from his regular office at various times during the year, and may often be out of his office to each lunch. Consequently, SOCCO's policy of permitting a person to see its mine map only if the land manager is present between the hours of 8 a.m. and 4:30 p.m. is not an acceptable way to comply with section 312(b). Congress did not differentiate between the right of a surface resident to see the map and the right of an MSHA inspector to see the map. No MSHA inspector is likely to sit and wait patiently while the land manager gets around to finding it convenient to make the map available for his or her inspection. Similarly, a surface resident like Satterfield is entitled to see the mine map when he comes to the mine for that purpose and SOCCO cannot successfully claim that the map is "available for inspection" when a surface resident is denied the right to see the map simply because SOCCO's land manager happens to be out of the office at the time the surface resident comes to see the map.

#### SOCCO's Claim of Confidentiality

SOCCO's cross motion (p. 13) quotes the following pertinent provision from section 312(b) of the Act:

Such map or revision and supplement thereof shall be kept confidential and its contents shall not be divulged to any other person, except to the extent necessary to carry out the provisions of this Act.

SOCCO argues that the confidential provision of section 312(b) shows that Congress was aware of the importance of the information shown on the mine map and that SOCCO's policy of having the map available only during regular business hours, provided its land manager is present, is a fully reasonable requirement in light of its confidential nature. SOCCO then states that Satterfield readily admitted that he had divulged the contents of SOCCO's map to several individuals, some of whom were not even owners, lessors, or residents of the surface area of the mine (Satterfield's Deposition, p. 37). SOCCO then concludes that "Satterfield blatantly violated the express terms of the regulation he so adamantly wishes to strictly construe and enforce" (Cross motion, p. 13, n. 13).

There are defects in SOCCO's reliance on the confidential provision of section 312(b). The legislative history discussed above shows that Congress specifically stated:

that the map shall be made available to the Secretary and his inspectors, the Secretary of Housing and Urban Development, the miners and their representatives, operators of adjacent mines, and to persons owning, leasing, or residing on surface areas of such mines or on areas adjacent to such mines, but that otherwise it shall be kept confidential. [Emphasis supplied.]

The incriminating statements from Satterfield's deposition (pp. 37-38) on which SOCCO relies for its contention that Satterfield "blatantly violated the express terms" of section 312(b) are as follows: [The questions were asked by SOCCO's counsel.]

Q And who were these people, as best you can recall?

A I think I told Ernie Carpenter. Let's see -- Paul Morrison. Let's see -- I believe -- I don't know whether I -- I really don't recall who all had asked me but at different times, you know -- since there was so much road damage, you know, they just wanted to know, asked me if they were going to go under my house.

Q Are these your neighbors?

A Oh, various people that --

Q That live in that area?

A Probably a couple of them live in that area. Probably a couple -- just people who travel that road.

Q Who just wanted to know where they had been mining?

A Well, they just wanted to know if they were going under my house.

Q Going under your house?

A Yes, where I live.

Q Did anyone want to know if they were going under their own houses, if Southern Ohio Coal Company was going under their own house?

A No. One conversation with a neighbor, he said he thought his house was going to be in the next panel.

Q Had he seen the mine map?

A A Martinka official had contacted him.

Since Congress made it very clear in the legislative history that the confidential provisions of section 312(b) did not apply to surface residents of SOCCO's mine or to surface residents of "areas adjacent to such mines", it does not appear that Satterfield was required to refrain from discussing the small amount that he learned from seeing SOCCO's map with the persons with whom he discussed the contents of the map.

As I have indicated above, the land manager refused to answer any of Satterfield's questions about the map except to point out on the map the location of the houses in which Satterfield and his mother lived. The land manager's uncooperative attitude in discussing the map with Satterfield left Satterfield with scarcely any information obtained from the map for discussion with other persons who had not seen the map. Moreover, it does not appear that Satterfield discussed the map with anyone who might not have had a right to see the map if he had taken the time to go to SOCCO's mine for the purpose of asking that the map be made "available for inspection." All of the persons who asked Satterfield whether SOCCO was mining under his house at least traveled the road under which SOCCO had mined or was about to mine. The deposition fails to show whether those persons also resided on "areas adjacent to" SOCCO's Martinka Mine, but that probably accounts for their interest in the matter. In any event, SOCCO did not establish for certain that Satterfield discussed the mine map with persons who were not entitled to know about it under the express provisions of section 312(b).

## SOCCO's Claims that Citation No. 2420016 Was Improperly Issued

SOCCO's cross motion (p. 14) contends that Citation No. 2420016 is invalid because it was written on June 19 for acts which SOCCO allegedly committed on June 5 in refusing to show Satterfield the map when he came to the mine office at 1 p.m. on that date (Finding No. 12 above). SOCCO argues that the citation is invalid because it is based on what the inspector was told rather than on what he personally observed.

There is no merit to SOCCO's contention that an inspector may issue a citation only on the basis of something which he has personally observed. Section 104(b) of the 1969 Act did provide that an inspector should issue a notice of violation if, "upon any inspection", he "finds" that a violation has occurred. When Congress amended the 1969 Act to promulgate the present Act, it considerably broadened the inspector's authority to issue citations by providing that he could do so "upon inspection or investigation" if he "believes" that a violation has occurred. Congress explained its reasons for enlarging the inspector's authority as follows:

Section [104(a)] provides that if, upon inspection or investigation, the Secretary or his representative believes an operator has violated this Act or any standard, rule, order or regulation promulgated pursuant to this Act, he shall with reasonable promptness issue a citation to the operator. There may be occasions where a citation will be delayed because of the complexity of issues raised by the violations, because of a protracted accident investigation, or for other legitimate reasons. For this reason, section [104(a)] provides that the issuance of a citation with reasonable promptness is not a jurisdictional prerequisite to any enforcement action. Citations shall describe with particularity the nature of the violation, and fix a reasonable time for the violation's abatement.

LEGISLATIVE HISTORY OF THE FEDERAL MINE SAFETY AND HEALTH ACT OF 1977, July 1978, 618.

MSHA frequently is required to base its citations of violations on information obtained from interviewing eyewitnesses to violations rather than on information gained by an inspector's own observations of violations. Many citations issued after investigations of accidents are based on information obtained by inspectors who interview witnesses after the accidents occur. In cases involving explosions, it is sometimes too hazardous for inspectors to make personal examinations of actual sites of the explosions and they ultimately issue citations based on interviews of persons who observed the site of the explosion at the time or after the explosion occurred.

MSHA is not barred from issuing citations for a considerable time after a violation occurs if there is a reason for the delay. In Old Dominion Power Co., 6 FMSHRC 1886, 1894 (1984), the Commission affirmed a judge's decision which had upheld the validity of a citation which did not cite Old Dominion for the violation there involved until 12 months after the violation had occurred. There was a reasonable basis for the delay in issuing the citation in the Old Dominion case just as there is in this case.

In this proceeding, Satterfield reported to MSHA on June 5 that SOCCO had refused to show him the mine map that day when he went to the mine at 1 p.m. to see the map. MSHA confirmed Satterfield's belief that SOCCO was required to show him the mine map because of his status as a surface resident, but Satterfield, at that time, declined MSHA's offer of assistance in getting to see the map and stated that he would make another attempt to see the map through his own efforts (Finding No. 5 above). The fact that Satterfield initially declined to ask MSHA to intercede actively on his behalf shows that he was at first inclined to be quite reasonable in giving SOCCO another chance to make the map available for inspection. If SOCCO's land manager had shown any flexibility in his willingness to stay late to show Satterfield the map, no citation would ever have had to be issued.

When the land manager again refused to show Satterfield the mine map on June 19 after Satterfield had gone to the mine under a mistaken impression that SOCCO had agreed to make the map available, Satterfield asked Inspector Bowers, who happened to be at the mine at that time, to issue a citation. The inspector declined to issue a citation at first because he had not investigated the facts. Subsequently, when he received a call from his supervisor requesting him to check into SOCCO's refusal to show Satterfield the map, he talked to another inspector who had already investigated the matter and Bowers thereafter personally experienced considerable difficulty in obtaining an agreement by SOCCO's management to show the map to Satterfield after 5 p.m.

Section 104(a) not only provides for an inspector to issue a citation on the basis of an investigation if he believes that a violation has occurred, but also provides that "the citation shall fix a reasonable time for the abatement of the violation." The inspector explained in his deposition that he did not issue the citation until SOCCO had agreed upon a time for showing Satterfield the map, that is, had agreed upon a time for abatement of the violation. The inspector then stated that he issued the citation "to try to get this over with" (Deposition, p. 63).

Using the inspector's statement that he issued the citation "to get this over with", SOCCO argues in its cross motion (p. 15), that the inspector's motive in issuing the citation

was to resolve a difference of opinion between SOCCO and Satterfield rather than cite a violation of the Act which he believed had occurred. The inspector clearly stated that he had decided to issue the citation based on SOCCO's refusal to show Satterfield the map on June 5, but that he did not issue the citation until SOCCO had finally agreed upon a time for abatement (Deposition, pp. 63; 65). The discussion above shows that Citation No. 2420016 was properly issued under section 104(a) because it was based on an investigation of the facts underlying SOCCO's refusal to show Satterfield the map on June 5 and was issued after Inspector Bowers had finally obtained a time for abatement for insertion in the citation as required by section 104(a) of the Act.

SOCCO's cross motion (p. 15) cites two cases in support of its final argument that Citation No. 2420016 must be vacated because no violation of section 312(b) existed at the time the citation was issued. The first case on which SOCCO relies is one decided by Chief Administrative Law Judge Merlin in Republic Steel Corp., 5 FMSHRC 1158 (1983), in which Chief Judge Merlin held that no violation of 30 C.F.R. § 75.604 existed in circumstances, based on credibility determinations, showing that the defective permanent splice described in the citation had been removed from a trailing cable before it was cited by the inspector as being defective. In the Republic case, Chief Judge Merlin specifically stated that his ruling did not apply to a violation which remained in existence at the time the violation was cited. 5 FMSHRC at 1162. The other case relied on by SOCCO is Consolidation Coal Co., 5 FMSHRC 1463 (1983), which involved an order by Chief Judge Merlin requiring MSHA to explain why Consol was being allowed to pay a \$20 penalty in a case in which MSHA had asked to withdraw its petition for assessment of civil penalty. Chief Judge Merlin's order stated that it was "inconsistent for the Solicitor to seek to withdraw his penalty petition and at the same time allow the operator to pay a \$20 penalty". 5 FMSHRC at 1463.

Obviously, the two cases cited by SOCCO do not support a claim that the citation in this case should be vacated because no violation existed on June 19, 1984, when the citation was issued. SOCCO refused to make its mine map "available for inspection" by Satterfield on June 5 2/ and SOCCO continued to

2/ As the Secretary's reply brief (p. 3) notes, "Besides the original copy of the map located in a vault (on mine property), there are at least 11 "500 scale" reproductions located throughout various mine offices and rooms". SOCCO's Answer No. 3(c)(ii) to the Secretary's interrogatories. When Satterfield finally saw the map, he was shown a "500 scale" reproduction. SOCCO's Answer No. 9b.

refuse to make the map available to Satterfield, despite requests by both Satterfield and MSHA's inspectors that the map be made available. Those refusals had continued to be made up to the very time the citation was issued (Finding Nos. 4 through 10 above). Consequently, SOCCO's contention that no violation of section 312(b) or of section 75.1203 occurred must be rejected as being contrary to the facts and unsupported by the cases cited in SOCCO's cross motion.

WHEREFORE, it is ordered:

(A) The motion for summary decision filed on December 7, 1984, by the Secretary of Labor is granted and the cross motion for summary decision filed on December 24, 1984, by Southern Ohio Coal Company is denied.

(B) The notice of contest filed on June 25, 1984, by Southern Ohio Coal Company, as supplemented on August 30, 1984, is dismissed and Citation No. 2420016 issued June 19, 1984, alleging a violation of section 75.1203, is affirmed.

(C) The issues raised in this proceeding in Docket No. WEVA 84-296-R are severed for purpose of separate disposition from the issues raised in Docket No. WEVA 84-281-R with which the issues raised in Docket No. WEVA 84-296-R were previously consolidated in a prehearing order issued on August 23, 1984.

*Richard C. Steffey*  
Richard C. Steffey  
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

333 W COLFAX AVENUE, SUITE 400  
DENVER, COLORADO 80204

16 1985

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. SE 84-68-M
Petitioner	:	A.C. No. 40-00041-05502
	:	
v.	:	Marmor Quarry & Mill
	:	
JOHN J. CRAIG COMPANY,	:	
Respondent	:	

DECISION

Appearances: Mary Sue Ray, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for Petitioner;  
Mr. John J. Craig, President, John J. Craig Company, Knoxville, Tennessee, for Respondent.

Before: Judge Lasher

This matter came on for hearing in Knoxville, Tennessee, on January 9, 1985. MSHA seeks assessment of a \$91 penalty each for the violations of 30 C.F.R. § 56.14-1 <sup>1/</sup> alleged in Citation Nos. 2080846 and 2080847, issued by MSHA Inspector Dallas Shipe on April 18, 1984 during a regular inspection.

At the end of the hearing, <sup>2/</sup> Respondent's president, John J. Craig, conceded the occurrence of the violation described in

<sup>1/</sup> 30 C.F.R. § 56.14-1, pertaining to guards, provides as follows:

56.14-1 Mandatory. Gears; sprockets; chains; drive, head, tail, and takeup pulleys; flywheels; couplings; shafts; sawblades; fan inlets; and similar exposed moving machine parts which may be contacted by persons, and which may cause injury to persons, shall be guarded.

<sup>2/</sup> Tr. 133-135, 139.

Citation No. 2080847 3/ and with respect to Citation No. 2080846, 4/ Respondent made no persuasive or substantial denial or rebuttal of the Secretary's substantial evidence establishing the occurrence of the violation. Accordingly, both violations are found to have occurred.

Respondent's contentions before and during the hearing focused primarily on the amount of penalties which should be assessed.5/

#### PRELIMINARY FINDINGS

Based on stipulations reached by the parties, and the testimony and documentary evidence of record, it is found:

(1) Respondent, a small family corporation historically engaged as a producer of and wholesale dealer in Tennessee Marble and Terrazzo chips, operated the Marmor Quarry and Mill at all times pertinent to these proceedings (Tr. 64) and is subject to the jurisdiction of the Federal Mine Safety and Health Act.

(2) Respondent is a medium-sized mine operator in the marble industry (Tr. 124).

(3) Assessment of reasonable penalties will not jeopardize Respondent's ability to continue in business (Tr. 66).

(4) Respondent proceeded in good faith to attempt to achieve abatement of both violations after notification thereof (Tr. 58). No finding is made, however, that both violations have remained abated.

3/ The condition cited in Citation No. 2080847 is as follows:

The flywheel and the wide drive belt on the No. 5 gang saw was not guarded to keep a person from falling into them. A walkway is heavily traveled by the employees.

4/ The violative condition cited is described therein as follows:

"The pinion shaft for the derrick hoist in the Engine Room No. 3 was not guarded. The shaft extends out about 4 inches with a key in it. The end of the shaft was about one-foot from the derrick operator's leg. His clothing could be caught in it."

5/ The amount of a penalty should relate to the degree of a mine operator's culpability in terms of willfulness or negligence, the seriousness of a violation, the business size of the operator, and the number of violations previously discovered at the mine involved. Mitigating factors include the operators good faith in abating violative conditions and the fact that a substantially adverse effect on the operator's ability to continue in business would result by assessment of penalties at some particular monetary level. Factors other than the six criteria expressly provided in the Act are not precluded from consideration either to increase or reduce the amount of penalty otherwise warranted.

(5) During the 2-year period immediately preceding the issuance of the subject Citations Respondent had a commendable record of prior violations: a total of two, one of which was a guarding violation similar to those involved in this proceeding (Ex. P-4).

#### DISCUSSION AND ULTIMATE FINDINGS

##### Citation No. 2080846

Inspector Shipe credibly testified that, having in mind a fatality in North Carolina caused by an unguarded rotating shaft (Ex. P-5), he observed the condition described in the Citation and determined it to be a violation even though in several previous inspections conducted over the prior 4 years or so he had seen the same condition at Respondent's mine but had not recognized it as a violation. <sup>6/</sup>

When operating the machinery (drum) the derrick hoist operator sits facing it on an elevated bench with the end of the large (3-4 inches in diameter) pinion shaft exposed approximately 4 inches-rotating directly in front of him at approximately knee height, pointed not toward him but at right angle to his right, and about 1-foot from his legs (Tr. 15, 16, 50, 51; Ex. R-1). The condition, as such, was readily visible. The rotating shaft has a gear on it which pulls the drum and a "key" - which sticks out on the shaft to help hold the gear to the shaft - could "grab anything that got wrapped around it" according to the Inspector (Tr. 17, 59). The derrick hoist with the unguarded pinion shaft had apparently been operated in the same manner by the same operator, Ray Davis, for a period of many years (Tr. 73).

The hazard envisioned by the Inspector was (1) that the machine operator's clothing could become entangled in the shaft, pulling him into the machinery and suffocating him in the manner

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<sup>6/</sup> Sketches of the small shed-like building (engine room) where the derrick hoist was located, were prepared at the hearing by both the Inspector (Ex. P-6) and Mr. Craig (Ex. R-1). At the end of the hearing, a view of the area was taken by the undersigned which was unreported since the Court Reporter had no portable equipment available to record the same. The view indicated that neither sketch is entirely accurate. In particular, neither sketch correctly depicts the relative positions of the walkway through the area relative to the elevated bench upon which the operator sits and the shaft. The direction which the unguarded shaft faced relative to the operator's bench is correctly shown in Ex. R-1. However, R-1 incorrectly shows the walkway behind the bench, rather than its actual location between the shaft and the bench.

depicted in Exhibit P-5, and (2) in like manner, other miners coming into the building could be exposed to the same risk (Tr. 22-24, 32, 59, 60).

Had the operator, Mr. Davis, or the foreman in his absence, actually been caught by the rotating shaft, the shut-off switch for the hoist would not have been within reach (Tr. 25, 45). In addition to the machinery operator, other miners, who Respondent admits would from time to time, come into the building for various purposes, were placed in jeopardy by the violative condition.

Although the parties differed on the probabilities of the hazard posed by the violation ever coming to fruition, the opinion of the Inspector that it was reasonably likely to happen and that such could happen anytime is credited, particularly in view of the close proximity of the operator to the exposed shaft in the ordinary course of his operation of the derrick hoist. Mr. Craig's opinion to the contrary, based at least in part on the belief that no such accidents had happened previously, is not so well founded. Must a serious injury or fatality actually occur before a hazard is cognizable? As noted above, had the clothing of the operator or other person been caught in the rotating pinion shaft the shut-off switch would not have been within reach. Thus, the elements for a serious, if not fatal, accident are present: (1) an unguarded rotating shaft, (2) in close proximity to the operator as well as the walkway which occasionally is traveled by other miners. The possibility of the accident occurring as contemplated by the Inspector clearly was not remote. There was at least a reasonable possibility of a miner's contacting the rotating shaft and suffering a resultant injury. Secretary v. Thompson Brothers Coal Company, Inc., 6 FMSHRC 2094 (September, 1984). Such an accident could have occurred because of the inadvertence or pre-occupation of a miner while performing his routine or assigned tasks in an otherwise reasonable or prudent manner. Aberrational conduct or reckless disregard of a miner for his safety would not have been required for such an accident to occur.

Respondent contends that the degree of its negligence with respect to this violation should be significantly reduced because MSHA for a period of several years prior to April 18, 1984, had not found the condition to be an infraction. While the Secretary's lack of enforcement does not estop later enforcement if the safety standard is applicable, Secretary v. Burgess Mining and Construction Corporation, 3 FMSHRC 296 (February, 1981), lack

of enforcement by the regulator can induce a mine operator into relying on what it believes is a construction of the application of the standard to its operation. In a similar situation the Federal Mine Safety and Health Review Commission has rejected the applicability of the doctrine of equitable estoppel to the Secretary but viewed the Secretary's erroneous interpretation as a factor which should be considered in mitigation of any penalty to be assessed, Secretary v. King Knob Coal Company, Inc., 3 FMSHRC 1417 (June, 1981), stating:

"The Supreme Court has held that equitable estoppel generally does not apply against the federal government. Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380, 383-386 (1947); Utah Power & Light Co. v. United States, 243 U.S. 389, 408-411 (1917). The Court has not expressly overruled these opinions, although in recent years lower federal courts have undermined the Merrill/Utah Power doctrine by permitting estoppel against the government in some circumstances. See, for example, United States v. Lazy F.C. Ranch, 481 F.2d 985, 987-990 (9th Cir. 1973); United States v. Georgia-Pacific Co., 421 F.2d 92, 95-103 (9th Cir. 1970). Absent the Supreme Court's expressed approval of that decisional trend, we think that fidelity to precedent requires us to deal conservatively with this area of the law. This restrained approach is buttressed by the consideration that approving an estoppel defense would be inconsistent with the liability without fault structure of the 1977 Mine Act. See El Paso Rock Quarries, Inc., 3 FMSHRC 35, 38-39 (1981). Such a defense is really a claim that although a violation occurred, the operator was not to blame for it."

It is concluded from the circumstances presented here that the pattern of MSHA's non-enforcement does greatly mitigate the Respondent's culpability. One would reasonably infer from the record as a whole that the hazard to miners' safety was actually not recognized by MSHA or the operator over a great period of time. Accordingly, the degree of Respondent's negligence is found to be only minimal. On the other hand, in view of the distinct possibility for serious or grievous harm to result from this violation, it is found to be very serious.

Citation No. 2080847

Upon walking into Respondent's saw room on April 18, 1984, Inspector Shipe observed 2 gang saws (Nos. 5 and 6) running while unguarded. These two saws which had not been in operation for "a long time", had been placed into operation approximately two days before the inspection. Respondent admitted the violation which pertained only to saw #5 (Tr. 112), and also conceded that it was aware that guarding (railing) was required on the 2 saws in

question since it was required on 4 others (Nos. 1-4) which it had been operating previously. Mr. Craig testified that "he (the inspector) hit us just a very few days before" the guarding was to have been put in place. However, on the day of the inspection, railing or pipe to have been used for the guard was not seen by the inspector in the area.

The flywheel, a huge wheel with spokes, is approximately 5 feet in diameter and constructed of heavy metal. It runs fairly rapidly and could catch a miner or other person walking, nearby. The hazard envisioned by the Inspector was that a person could slip, fall or stumble into it or inadvertently walk into it. He indicated that occasionally there was "heavy traffic" along the walkway which is immediately adjacent to the revolving flywheel (Tr. 108, 109). Both miners and visitors to the office, which is adjacent to the gang saws, were placed in jeopardy of serious, if not fatal, injuries by the hazard created by the violation. There was at least a reasonable possibility of contact and injury. Secretary v. Thompson Brothers Coal Company, Inc., supra. This is found to be a serious violation resulting from a high degree of negligence on the part of Respondent.

The evidence bearing on all six mandatory penalty assessment criteria having been considered with respect to the 2 violations, it is concluded that the penalties proposed by the Secretary in this matter are appropriate and amply supported in the record with respect to both Citations.

#### ORDER

Respondent is ordered to pay the Secretary of Labor penalties totaling \$182.00 (\$91.00 for each violation) within 30 days from the date of issuance of this decision.

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

#### Distribution:

Mary Sue Ray, Esq., Office of the Solicitor, U.S. Department of Labor, 280 U.S. Courthouse, 801 Broadway, Nashville, Tennessee 37203 (Certified Mail)

Mr. John J. Craig, John J. Craig Company, P.O. Box 9300, Knoxville, Tennessee 37920 (Certified Mail)

/blc

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

333 W. COLFAX AVENUE, SUITE 400  
DENVER, COLORADO 80204

APR 16 1985

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No. WEST 83-68  
Petitioner : A.C. No. 42-00094-03504  
: :  
v. : Sunnyside No. 2 Mine  
: :  
KAISER STEEL CORPORATION, :  
Respondent :

DECISION APPROVING SETTLEMENT

Appearances: James H. Barkley, Esq., Office of the Solicitor,  
U.S. Department of Labor, Denver, Colorado,  
for Petitioner;  
Jeffrey Collins, Esq., Kaiser Steel Corporation,  
Colorado Springs, Colorado,  
for Respondent.

Before: Judge Lasher

Prior to commencement of formal hearing on March 1, 1985,  
the parties proposed voluntary settlement of this matter which  
involved a fatality. Respondent agreed to pay a penalty of  
\$2,000.00. The Secretary's motion to amend the Citation  
(No. 2073181) to allege a violation of 30 C.F.R. 77.404(b) rather  
404(c) as originally cited, 1/ was granted at the same time.  
There were no eyewitnesses to the fatal accident which resulted  
when a "utility belt person" who was working alone was caught  
between a return idle roller and a belt while performing mainte-  
nance or repairs. 2/ The Respondent, a large coal mine operator  
with a moderate history of previous violations during the 2-year

1/ Thus changing the nature of the infraction from performing  
maintenance or repairs with the power on and the machinery  
unblocked to operation of machinery by persons not trained and  
authorized to operate such.

2/ MSHA's original penalty assessment was \$206.00.

period preceding the subject violation <sup>3/</sup>, showed in considerable mitigation of its culpability that the deceased miner had 11 years mining experience, had received some training, had previously worked around belts and was chairman of the Mine Safety Committee. While the violation was found to be serious since it resulted in a fatality only a low degree of negligence on the part of the Respondent was demonstrated. <sup>4/</sup> Abatement of the violation was, upon notification, accomplished promptly and in good faith by Respondent. <sup>5/</sup> Upon consideration of the representations of the parties, and it otherwise appearing reasonable and proper, the proposed settlement was approved from the bench and is hereby affirmed.

Accordingly, if it has not previously done so, Respondent shall pay the Secretary of Labor the sum of \$2,000.00 within 30 days from the date hereof.

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

Distribution:

James H. Barkley, Esq., Office of the Solicitor, U.S. Department of Labor, 1585 Federal Building, 1961 Stout Street, Denver, Colorado 80294 (Certified Mail)

Jeffrey Collins, Esq., Kaiser Steel Corporation, 105 E. Kiowa, Suite 200, Colorado Springs, Colorado 80901 (Certified Mail)

3/ Precise information with respect to the six mandatory penalty assessment factors was submitted on the record by stipulation and agreement of the parties.

4/ Although the decedent had received some prior training, it is inferred from Respondent's admission of the occurrence of the violation that he was insufficiently trained.

5/ Significantly, abatement was accomplished by retraining employees in belt cleaning and safety procedures, thus supporting the Secretary's on-the-record amendment of the violation to one involving training.

/blc

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

333 W. COLFAX AVENUE, SUITE 400  
DENVER, COLORADO 80204

APR 16 1985

BOBBY W. CAMPBELL,	:	DISCRIMINATION PROCEEDING
Complainant	:	
	:	Docket No. WEST 83-86-DM
v.	:	
	:	MSHA Case No. MD 83-15
DANIELS CONSTRUCTION COMPANY,	:	
Respondent	:	

DECISION APPROVING SETTLEMENT

Before: Judge Carlson

The parties, through counsel, have filed a stipulation which settles all matters at issue in this discrimination proceeding.

At the center of the settlement is an agreement by the respondent to pay a sum of money to complainant in return for which complainant agrees not to seek employment with respondent or its subsidiaries or divisions, and in which complainant agrees to withdraw his complaint and to release respondent from any and all claims.

The parties further stipulate that respondent admits no violation of the Federal Mine Safety Act or any other law, state or federal, in terminating complainant's employment.

I conclude that the proposed settlement should be approved in all respects. Respondent shall therefore pay to complainant, with dispatch, the monies agreed upon, whereupon all other provisions of the settlement shall be deemed in effect, and this proceeding shall be dismissed with prejudice.

SO ORDERED.

  
 John A. Carlson  
 Administrative Law Judge

Distribution:

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Carl B. Carruth, Esq., Thompson, Mann and Hutson, 2200 Daniel Building, Greenville, South Carolina 29602 (Certified Mail)

/ot

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

333 W. COLFAX AVENUE, SUITE 400  
DENVER, COLORADO 80204

APR 16 1985

PLATEAU MINING COMPANY, Contestant	:	CONTEST PROCEEDING
	:	
v.	:	Docket No. WEST 84-106-R
	:	Citation No. 2213805; 1/5/84
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Star Point No. 2 Mine
	:	
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	
v.	:	Docket No. WEST 84-122
	:	A.C. No. 42-00171-03523
	:	
	:	Star Point No. 2 Mine
	:	
PLATEAU MINING COMPANY, Respondent	:	

DECISION APPROVING SETTLEMENT

Appearances: John A. Snow, Esq., VanCott, Bagley, Cornwall & McCarthy, Salt Lake City, Utah, for Contestant/Respondent; James H. Barkley, Esq., and Margaret Miller, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Respondent/Petitioner.

Before: Judge Lasher

Prior to commencement of formal hearing on March 4, 1985, the parties submitted a proposed settlement of this contest/penalty proceeding. The parties agreed to a penalty assessment of \$9,000.00 for the violation of 30 C.F.R. § 75.1722(c) cited in Citation No. 2213805 <sup>1/</sup> which involved a fatality.

1/ The citation was modified by Petitioner and approved on the record to reflect its issuance under section 104(a) of the Act rather than 104(d)(1).

Based on stipulations entered on the record <sup>2/</sup>, it was found that the Respondent, a large coal mine operator with a moderate to average history of previous violations during the 2-year preceding January 5, 1984 (the issue date of the subject citation), proceeded in good faith to achieve prompt abatement of the violation upon notification thereof. With respect to gravity, it was determined on the record that the violation resulted in the fatal injury to the operator of a shuttle car as described in the citation. A low degree of negligence on the part of the Respondent was also stipulated and determined on the record.

Upon due consideration of the premises, the settlement was approved from the bench and is here affirmed.

Respondent, if it has not previously done so, shall pay the Secretary of Labor the sum of \$9,000.00 on or before 30 days from the date hereof. <sup>3/</sup>

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

Distribution:

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<sup>2/</sup> The parties emphasized that their stipulations were submitted solely for purposes of resolving this proceeding under the Federal Mine Safety and Health Act of 1977 and were to be confined thereto.

<sup>3/</sup> Consistent with the penalty settlement, the contest in Docket No. WEST 84-106-R is denied.

/blc

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

APR 19 1985

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No. LAKE 85-4  
Petitioner : A. C. No. 12-00337-03521  
: :  
v. : Lynnville Strip Mine  
: :  
PEABODY COAL COMPANY, :  
Respondent :

DECISION

Appearances: Miguel J. Carmona, Esq., Office of the Solicitor,  
U. S. Department of Labor, Chicago, Illinois,  
for Petitioner;  
Michael O. McKown, Esq., St. Louis, Missouri,  
for Respondent.

Before: Judge Steffey

Pursuant to a notice of hearing dated January 14, 1985,  
a hearing in the above-entitled proceeding was held on Febru-  
ary 14 and 15, 1985, in Evansville, Indiana, under section  
105(d), 30 U.S.C. § 815(d), of the Federal Mine Safety and  
Health Act of 1977.

After the parties had completed their presentations of  
evidence and had made their respective closing arguments, I  
rendered a bench decision, the substance of which is set forth  
below (Tr. 414-443):

In a civil penalty case, the issues are whether viola-  
tions occurred and, if so, what penalties should be assessed,  
based on the six criteria set forth in section 110(i) of the  
Act.

Although counsel for the Secretary of Labor seemed to  
be asking me in his closing argument to make a ruling on  
whether the order was valid or not, in a civil penalty case,  
the validity of the order is not considered to be an issue.  
The Commission so held in Wolf Creek Collieries Company, a  
decision which is not included in the Commission's reports,  
but which was issued on March 26, 1979, in Docket No. PIKE  
78-70-P. In that case, the Commission cited the decisions  
of the former Board of Mine Operations Appeals in Plateau  
Mining Co., 2 IBMA 303 (1973), Buffalo Mining Co., 2 IBMA  
327 (1973), and North American Coal Corp., 3 IBMA 93, 120

(1974), in which the Board had made similar rulings. The Commission reiterated that ruling in Pontiki Coal Corp., 1 FMSHRC 1476 (1979).

For the above reason, I shall make findings as to whether violations occurred, and if I find a violation, I shall assess a civil penalty, but I shall not rule on whether the order was a technically valid order issued under section 104(d) of the Act.

The parties entered into some joint stipulations, which I think should be a part of the decision. Those are as follows:

1. Peabody Coal Company owns and operates the Lynnville Strip Mine in Lynnville, Warrick County, Indiana.
2. The Lynnville Strip Mine is subject to the Federal Mine Safety and Health Act of 1977.
3. The Federal Mine Safety and Health Review Commission has jurisdiction over this proceeding.
4. On April 4, 1984, Dennis Springston, a miner working at the Lynnville Mine, was killed during an accident at that mine.
5. On April 5, 1984, Inspector Joseph L. Hensley, a duly authorized representative of the Secretary of Labor, issued Citation No. 2322072 and Order of Withdrawal No. 2322073, in reference to the above-mentioned accident.
6. During the calendar year prior to the issuance of the citations involved in this case, the Lynnville Strip Mine had a production of approximately 3,287,102 tons of coal.
7. During the calendar year prior to the issuance of the citations involved in this case, the controlling entity had a production of approximately 51,660,483 tons of coal.
8. Payment of the penalties assessed by the Mine Safety and Health Administration for the citation and order of withdrawal involved in this case would not affect the ability of Peabody Coal Company to remain in business.

The evidence in this proceeding supports the following findings of fact, which I shall set forth in enumerated paragraphs:

1. Citation No. 2322072, which is Exhibit 1 in this proceeding, was issued on April 5, 1984, under section 104(d)(1) of the Act, citing a violation of 30 C.F.R. § 77.1006(a). The citation alleged that men were working in an area near and adjacent to an unstable and dangerous highwall. One

hundred seventy-four feet of loose, unconsolidated material of the highwall collapsed and covered up a KW Dart 110-ton truck that was being loaded with coal. The driver of the KW Dart truck was fatally injured. The collapse of the highwall covered up a pickup truck and also damaged the 170(L) loader, and another pickup truck. Citation No. 2322072 was terminated on April 6, 1984, pursuant to a subsequent action sheet issued that day, as modified by another subsequent action sheet dated December 3, 1984.

2. Section 77.1006(a), which was alleged to have been violated in Citation No. 2322072, reads as follows: "Men, other than those necessary to correct unsafe conditions, shall not work near or under dangerous highwalls or banks."

3. Order No. 2322073, which is Exhibit 3 in this proceeding, was issued on April 5, 1984, under section 104(d)(1) of the Act, citing a violation of section 77.1001, and alleging that "[l]oose, hazardous and overhanging material on the highwall of the 1150 No. 2 Pit was observed on the entire length of the approximately 2,800 foot highwall. This condition was observed during an investigation of a fatal accident."

4. Section 77.1001, which was alleged to have been violated in Order No. 2322073, reads as follows: "[l]oose, hazardous material shall be stripped for a safe distance from the top of pit or highwalls, and the loose unconsolidated material shall be sloped to the angle of repose, or barriers, baffle boards, screens, or other devices be provided that afford equivalent protection."

5. A modification of Order No. 2322073 was issued on April 10, 1984. That modification stated that it was issued to reflect the following change (Exhibit 3, p. 3):

Loose hazardous and overhanging material on the highwall of the 1150 No. 2 Pit begins at the north end of the pit and extends approximately 1,090 feet southeast on the highwall, for a total length of 1,090 feet. Area No. 2 begins at a point 110 feet south of the center of the entrance road, at the pit floor, then extends south approximately 380 feet, for a total length of 380 feet.

6. A subsequent action sheet was written on April 16, 1984, and that sheet terminated the order with the statement that "[t]he north end of the pit, approximately 1,090 feet, was posted, and workmen were removed from the area. Area No. 2, 380 feet south of the center of the entrance road at the pit floor, berms were installed approximately 8 feet in height and approximately 30 feet from the highwall" (Exhibit 3, p. 4).

7. Inspector Hensley, who issued both the citation and the order initially, but who did not modify or terminate them, examined the highwall from the pit area and from the top of the highwall, and concluded that there was a large amount of unconsolidated or loose material. He observed cracks in the wall which were gapped open from 4 to 6 inches. He also observed 14 charged holes in which explosives had not been detonated. Two such bags of explosives are shown in the photograph, which is Exhibit 11 in this proceeding. He believed that the violations of sections 77.1006(a) and 77.1001 were associated with a high degree of negligence because Peabody had failed to keep miners away from the highwall, which management knew was unsafe because of the large number of entries in the onshift books showing the pit foremen's comments about the bad conditions observed in the highwall (Exhibit 13). He also expressed the belief that the violations were very serious because a fatal accident had occurred as a result of them. He believed that management should have constructed a berm at the base of the highwall to catch falling material when there was an indication of loose material in the highwall, as indicated in the onshift book, and he thought that the berms would have kept both miners and equipment away from the dangerous highwall.

8. Inspector Ritchie investigated the accident by interviewing miners and foremen who were working when the accident occurred. The interviews of Peabody's miners, foremen, and mine officials have been transcribed and are a part of Exhibit B in this proceeding. Inspector Ritchie also prepared a report of the accident, which is Exhibit 4. Based on his examination of the accident site, he concluded that the violations of sections 77.1006(a) and 77.1001 had occurred. The inspector agreed, on cross-examination, however, that he cannot be certain that Peabody could have determined that a fall was imminent, based on an examination of the highwall prior to the occurrence of the accident.

9. Charles Hester is a pit foreman who made some of the entries in the onshift book, Exhibit 13, and he referred to the highwall as being "ragged" on many pages of the onshift book, but he insisted that his use of that term merely indicated that the wall was uneven and did not mean that he thought the wall was unsafe for work to be performed in close proximity to the wall.

10. Cecil O'Dell is an MSHA field office manager who assigns work to inspectors and evaluates their work. He believed that use of the word "ragged" meant that the highwall was very unreliable and that the use of terms like "some bad areas", shown in the onshift book, indicated that Peabody's foremen were expressing existence of unsafe conditions. He thought that the onshift reports showed that the foremen had

failed to take proper corrective action, such as keeping the miners away from the highwall, or eliminating the hazards by barricading or constructing berms at the foot of the highwall.

11. Gaylon Leslie is a shooter and has been for 10-1/2 years. He is also chairman of the safety committee, and he said there was overhanging material on the day of the accident, because he saw it. He had received complaints from miners regarding the 1150 No. 2 Pit. He examined the basis for their complaints and agreed with their belief that the highwall was hazardous, especially because of the practice of blast casting, which is a method of using explosives to throw overburden into the pit rather than just to shake it loose by lifting overburden straight up, as is done in conventional shooting. Leslie was with Inspector Bryant, who made a spot inspection of the 1150 No. 2 Pit on the day before the fatal accident. He said that Inspector Bryant did not cite any violations as to the highwall, but Bryant was close to the No. 4 Panel, shown on the mine map (Exhibit A), rather than the northern end of the pit, where the accident occurred. Bryant also testified that he saw no conditions requiring issuance of a citation on the day before the accident even though he did inspect the very same area where a berm had to be constructed in order to abate Order No. 2322073.

12. Leonard Hughes was superintendent at the time of the fall of the highwall. He has 38 years of experience, 13 of them being at Lynnville. He stated that highwall conditions vary and can go from a safe condition to an unsafe condition as the result of rain, wind, freezing, and thawing. He had not seen a fall of the magnitude of the one which occurred on April 4, which was about 170 feet long and 15 feet thick. The term "ragged", used in the onshift book, to him, means "uneven", but not necessarily hazardous. He said that they were having problems with the highwall and with the spoil bank, so they went to blast casting as an alternative which they hoped would improve both production and safety. Nevertheless, in his interview by MSHA investigators, as shown in Exhibit B, he recognized that a sloping highwall would have prevented the magnitude of the fall which occurred on April 4.

13. Tom Hughes is a blasting foreman. He examines the top of the highwall which has about 4 to 5 feet of dirt on top. He drills from sites on top of the highwall as well as from locations down in the parting in the pit, and has to evaluate the condition of the highwall from both the top and the pit. His entries in an onshift book, which is restricted to the drill area, and which is Exhibit 14 in this proceeding, show that on at least one occasion, he instructed his crew to leave 25 to 30 feet of parting in the pit in order to stay away from the highwall (Exhibit 14, p. 21). He also explained

how a change in placement of blasting caps overcame the problem of explosives failing to go off, so that problem ceased to exist after the accident on April 4. He claimed that failure of the third row of holes to explode on April 4 made the highwall more solid than if they had exploded, because there was less breaking of the rock at the rear of the highwall than would have occurred if all the charges had exploded as was intended.

14. Charles Bellamy is a safety supervisor of the entire mine, and he believed, from his interviews of personnel present at the time of the accident, that foremen and miners could not have anticipated the fall based on an examination of the wall. He was with Inspector Hensley on April 5, when the citation and order here involved were written, and he does not think that the inspector properly described the area of the loose rock. He stated that they constructed the berm to get the order terminated, but that he did not believe the wall had loose materials on it.

15. Bob Hart is Peabody's Indiana drilling and blasting manager. He testified that they went to the blast casting method because they had reached a point that it was uneconomic to mine coal if they had to move more than 15 cubic yards of overburden to obtain one ton of coal. Doubling the amount of explosive moves more overburden with blasting and increases the yardage obtained by use of the dragline. He agreed that after the accident, Peabody went to using angle drilling so that blast casting could continue to be used to achieve economy, while leaving an increased slope on the highwall to improve safety of the highwall's condition.

16. Conny Postupack is an official with Atlas Powder Company, and he explained that blast casting was begun in 1935, and then became somewhat unfashionable because explosives lost their economic advantage to the increased economies of scale accompanying the use of draglines, until the increasing labor and material costs associated with mechanical overburden removal were overcome by economies in the manufacturing of explosives. Consequently, blast casting is now in vogue and is being used in Pennsylvania, West Virginia, Ohio, Kentucky, Wyoming, New Mexico, and Alaska. He emphasized that unconsolidated materials are not subject to blast casting, as there must be good integrity of the formation being shot.

17. Curtis Ault is a supervising geologist who works for the Indiana Geological Survey. He has been working for the last 7 years in studying faults and joints in Indiana. A fault is a crack with slippage between the materials making

up the sides of the fault, whereas joints are cracks without any slippage of the materials. His studies are based on examinations of exposed outcroppings of bedrock and rock exposed by mining in coal mines or construction. He expressed the belief, based on testimony of witnesses Hart and Leslie, and pictures made by MSHA, especially Exhibits 7, 8, 11, and 12, that the fall of the highwall in the 1150 No. 2 Pit was caused by joints. He cannot be certain of that belief because he did not personally examine the Lynnville Mine here involved. Moreover, his testimony shows that the joints he observed in the pictures were not parallel to the slice of rock which fell, and that would mean that Peabody was constructing the highwall in the direction which would have been recommended in order to prevent a fall as a result of the presence of joints in the overburden which had been blasted.

I believe that those findings cover the important aspects of the evidence which was introduced in this proceeding.

The Secretary's attorney asked me to find that the violations, alleged in Citation No. 2322072 and Order No. 2322073, occurred.

Counsel for Peabody argues that his evidence shows that the violations did not occur, and he also pointed out that when there is a fatality and MSHA conducts an investigation, there is a considerable amount of pressure on the inspectors to find something wrong, and he feels that that gives them a motivation to be more critical after such an accident than they would be otherwise.

I agree with Peabody's counsel that such pressure undoubtedly exists and that is one of the reasons that I asked a great many questions during the hearing which were intended to bring out all the good aspects that Peabody was trying to present, because it always worries me in a case of this nature that MSHA may unfairly cite violations because of the pressure of finding a problem when a fatality has occurred. I have reviewed the evidence in great detail and I believe that there is probably a middle ground between what MSHA has presented and what Peabody has introduced, and that is often the case in these proceedings.

I was at first disposed to find no violations, but Mr. McKown introduced the transcript from MSHA's investigation, and I read that in great detail last night. That is Exhibit B in this proceeding and that exhibit is made up of testimony of the miners and foremen who were present when the fatality occurred. That exhibit contains some statements by the witnesses which motivated me to believe that there was considerable support for the inspectors' belief that violations had occurred.

The difficulty about finding a violation of section 77.1006(a) is that all of the witnesses to this fall of the highwall stated that the wall, just before it fell, looked as well as it had for some time, and that they did not see anything that would indicate that it was about to fall. So if one takes that testimony, by itself, then he would conclude that there is no way that Peabody could have been aware that men were working near a highwall which was hazardous.

The Commission has held that an operator is liable without regard to fault for the occurrence of a violation. United States Steel Corp., 1 FMSHRC 1306, 1307 (1979). Consequently, Peabody may be held liable for the violation despite the fact that the record contains evidence tending to show that Peabody may not have been at fault for occurrence of the violation. In addition to the statements, referred to above, of witnesses who said that they could not have determined from looking at the wall, prior to its fall, that a massive rock fall was about to occur, there is testimony by the superintendent, Leonard Hughes, and by the explosives expert, Bob Hart, to the effect that the company went to the blast casting method in order to achieve economies, and it did so based on the fact that blast casting had been done at other Peabody mines without any apparent problems. The evidence discussed above makes it difficult to say that management was necessarily at fault for using blast casting at the 1150 No. 2 Pit, particularly since mine officials had tried that method at the 5900 Pit and had had no problems, but that was a different kind of operation, with a shovel instead of a dragline.

On the other hand, there is considerable evidence to support a conclusion that Peabody ought to be held at fault for the violation of section 77.1006(a). For example, when MSHA was conducting its investigation, the coal loader operator, Raymond Speicher, said that he did not like vertical walls; that they have given a lot of trouble. He specifically stated that after they started using blast casting, there was "ragged looking highwall, rocks breaking out every now and then. I always like a sloped bank myself" (Exhibit B, p. 41). Speicher also was of the opinion that rain had gone into a crack behind the large hunk of wall that fell out and had weakened it, and that that accounted for the fact that it fell.

Mike Denton, the oiler on the coal-loading machine, also stated that he prefers the slope, and it seems that the slope is a safer wall (Exhibit B, p. 42).

Ron Sutton, the tractor operator, stated that he does not like the vertical highwall at all. He said they had a slide just after that highwall was opened up, and they had to go back and reclean it. He also pointed out about the bags of powder that he found unexploded. He stated that he was afraid to haul the explosives on his tractor and that he put

them off in a separate place by themselves. He said he had worked with the tractor under the highwall more than anyone, and that he had seen 50 slides on slopes, but the way it is now, with the vertical walls, you cannot get away if you are sitting next to that wall, because the whole wall will come down. He stated that he is against vertical walls. He said that Peabody used to remove the dirt at the top of the highwall, but Peabody does not do that any more. Sutton stated that the dirt collects rain and that increases the burden on the top of the highwall. The dirt soaks up the water and results in slides, or in complete collapse of the wall, as occurred on April 4 (Exhibit B, pp. 46-48).

Fred Leatherland, the water boy, stated that the slope is less dangerous, and he feels they have a better chance of getting out of the way if materials fall (Exhibit B, p. 52). He said that he does not like the ragged, vertical highwall that they have been having (Exhibit B, p. 54).

When the superintendent, Leonard Hughes, was interviewed, he stated unequivocally, and repeated it twice, that if the highwall had been sloped on April 4, the wall would not have toppled down (Exhibit B, pp. 59-60). He also stated that they had been having trouble with the highwall ever since 1971 (Exhibit B, p. 63).

When Bob Hart, Peabody's drilling and blasting manager, was interviewed, he stated that he had not talked directly to the people who work in the pit, and that he did not know what their opinion was (Exhibit B, p. 74).

Finally, Gaylon Leslie stated that he thinks blast casting works all right in the 5900 Pit, but that he does not think it works with the 1150 No. 2 Pit, and he said until somebody can show him a good highwall in that pit, he will be against use of blast casting in that area (Exhibit B, p. 74).

I believe that when one reviews all the testimony of the people who were down there exposed to the highwall, that Peabody cannot successfully argue that it did not know that that highwall was hazardous. If Peabody's management did not know it, it should have known it, because Bob Hart should have known and found out what the men felt who were working in that pit. For the reasons I have given, I find that a violation of section 77.1006(a) occurred. Having found a violation, it is necessary that I assess a penalty. Tazco, Inc., 3 FMSHRC 1895 (1981).

With respect to the six criteria, the parties' stipulations deal with two of those criteria. One of them is the size of the operator's business. Paragraphs 6 and 7 of the joint stipulations, which have been quoted above, show that a

large operator is involved. Therefore, under the criterion of the size of the operator's business, a penalty in an upper range of magnitude would be appropriate.

Paragraph 8 of the joint stipulations stated that payment of civil penalties would not adversely affect Peabody's ability to continue in business. Consequently, the penalty does not have to be reduced under the criterion that payment of penalties would cause the operator to discontinue in business.

There was a statement by one of the inspectors to the effect that Peabody showed a good-faith effort to achieve rapid compliance after the violation was cited. It has been my practice not to increase a penalty under that criterion unless a lack of good faith is shown, and it has been my practice not to reduce a penalty under that criterion unless there is some outstanding effort made to achieve compliance. If there is normal effort to achieve compliance, which appeared to be the situation in this case, then the penalty should neither be raised nor lowered under the criterion of good-faith effort to achieve compliance.

Insofar as the history of previous violations is concerned, Exhibit 15 in this proceeding shows that Peabody has not previously been cited for a violation of section 77.1006(a). Therefore, no portion of the penalty should be assessed under the criterion of history of previous violations.

The two criteria of gravity and negligence remain to be considered. As I have already indicated at some length, there is a considerable body of evidence showing that Peabody had a reasonable basis for assuming that if it adopted the blast casting method, which has been described above, there was no reason to assume that a highwall would fall and kill anyone.

The company had done that type of mining at mines in other geographical locations and it had also succeeded in using that method in the 5900 Pit at the Lynnville Mine here involved. Consequently, I do not think that I can agree with Inspector Hensley that there was a high degree of negligence in the occurrence of the violation.

I believe that there was some ordinary negligence, because as I have pointed out, I do believe that when Bob Hart was giving advice to the company about how to achieve economies with explosives, he should have followed up on his recommendations, after they were adopted, by discussing the experimental nature of blast casting with the miners who were exposed to any hazards associated with those experimental techniques, even though the method was adopted with a good-faith belief that it would be safe. I believe that additional care should have been taken in determining just what was going on

in the pit as a result of utilizing that method. For the above reasons, I find that there was some ordinary negligence which warrants assessment of an amount of \$500 under the criterion of negligence.

When it comes to the criterion of the gravity of the violation, I must recognize the fact that the fall caused the death of one miner and completely covered up a 110-ton truck, as well as a pickup truck, along with doing some damage to a large shovel in the area. A fall of that magnitude is necessarily serious and I believe that a penalty of \$1,000 should be assessed under the criterion of gravity, so that a total penalty of \$1,500 is warranted for the violation of section 77.1006(a) alleged in Citation No. 2322072.

I shall now turn to the question of whether a violation of section 77.1001 occurred. Some conflicting evidence exists with respect to that violation because, as Peabody's counsel pointed out in his argument, Inspector Bryant was at the Lynnville Mine on April 3, 1984, prior to the occurrence of the accident on April 4, 1984, and prior to issuance of Order No. 2322073 on April 5.

It is a fact that Inspector Bryant on April 3 was in the same area, which was later the subject of construction of a berm 8 feet high to protect people from any falls from the highwall which had been cited on April 5 for existence of loose and hazardous materials. The aspect of the evidence that makes it difficult to find a violation of section 77.1001 is that if Inspector Bryant saw that same area on April 3 and did not think the loose and hazardous materials constituted a violation, why would existence of those materials suddenly be a violation on April 4, when all people seem to agree that a massive fall of rock 174 feet long would not have adversely affected the remainder of the highwall at a place which was a distance of at least 500 feet from the place where the highwall collapsed?

I do not know whether the preponderance of the evidence would support a finding of a violation of section 77.1001 except for the fact that Gaylon Leslie was present after the accident had occurred, and he said, unequivocally, that he saw loose and hazardous materials on the highwall. I do not think that he would have stated that he saw loose materials if they had not existed and I do not think Inspector Hensley would have either, for that matter.

Nevertheless, it is a fact that one inspector did not find loose material in a hazardous amount on April 3 and another inspector did find loose material on April 5. Another reason which supports the finding of a violation of section 77.1001 is that photographs were introduced in this case which show some portions of the highwall which were not

in the immediate vicinity of the fall (Exhibits 5 through 12). There are enough cracks and enough irregularities about the highwall shown in those pictures to support a finding that there were loose and unconsolidated materials on the highwall on April 5, 1984. Therefore, I find that there was a violation of section 77.1001.

Having found a violation, I must assess a civil penalty. In discussing the penalty assessment for the previous violation, I covered the two criteria of the size of respondent's business and the fact that payment of penalties will not cause respondent to discontinue in business.

The inspector indicated that a good-faith effort was made to correct the violation. Achieving compliance was a simple matter insofar as 1,090 feet of the highwall was concerned because that portion of the highwall was dangered off and the men were reinstructed concerning safe conduct near highwalls. Compliance was achieved with respect to the remainder of the highwall by the erection of an 8-foot berm at the bottom of the highwall. As I have already indicated above, since this was an instance of normal abatement, the penalty should neither be increased nor decreased under that criterion.

Insofar as the history of previous violations is concerned, Exhibit 15 shows that Peabody previously violated section 77.1001 once on May 17, 1982, and once on February 10, 1984. In the legislative history, Congress indicated that it wanted a civil penalty to be increased two or three times over a previous penalty for a violation of the same mandatory standard which is before a judge or the Commission for assessment of a civil penalty if that same standard has been violated several times immediately preceding the occurrence of the violation under consideration. 1/

In this instance, since one of the previous violations occurred almost 2 years before the violation here involved was cited, I do not think that that one would merit assessment of any portion of the penalty under history of previous violations, but since one of the previous violations did occur on February 10, 1984, just 2 months before the violation cited here, I believe that I necessarily must assess some portion of the penalty under history of previous violations. Therefore, under that criterion, a penalty of \$50 will be assessed.

The two criteria of gravity and negligence remain to be considered. In evaluating the criterion of negligence, it is appropriate to examine the entries regarding the highwall made by Peabody's foremen in the daily onshift report. The onshift report was introduced as Exhibit 13 in this proceeding. The

1/ S. REP. NO. 95-181, 95th Cong., 1st Sess. 43 (1977), reprinted in LEGISLATIVE HISTORY OF THE FEDERAL MINE SAFETY AND HEALTH ACT OF 1977, 631 (1978).

entry for the second shift on March 3, 1984, indicates existence of "some bad areas."

On March 4 for the first shift, there is an entry, "stable in some and some loose; rock falling due to rain". On the second shift, there is an entry, "unstable".

On March 5 for the first shift, there is an entry, "some areas have slides due to heavy rain". On the second shift, "several bad areas".

On March 6, first shift, "some slides, loose rock"; second shift, "some bad areas".

On March 7, first shift, "some areas fair; some have loose rock"; on the second shift, "some bad areas".

On March 8, on the first shift, "cleaned up slides; some areas not good"; second shift, "several bad areas".

On March 9, second shift, "some bad areas".

On March 12, the entry "ragged" appears. Charles Hester testified that an entry of "ragged" should not be interpreted to mean that the highwall was necessarily hazardous. Therefore, I am omitting from my discussion 17 references to the highwall as being "ragged".

On March 13, first shift, "some areas poor"; also on March 13, there is an entry "some small slides noticed during third shift; all men warned".

On March 14, first shift, "some areas poor; south end flagged and men warned on unstable highwall".

On March 15, first shift, "Squaw Creek truck refused to drive under highwall, so this area will be flagged and no personnel are to go under this wall until corrected".

On March 16, first shift, "keep all personnel away from highwall and loading spoil side only; poor condition; is not stable; area flagged"; second shift, "rocks falling from recent bad weather"; third shift, "very bad area; falling off due to heavy rain; all men warned of wall condition".

On March 17, first shift, "no one working under highwall; all operations will be performed under area of bad highwall". The foreman may have misstated himself in the entry just quoted, but that is the way the entry reads. The entry for the third shift on March 17 states existence of "bad rock slide but appears to be in stable condition".

On March 18, first shift, "highwall in south end bad and shift foreman was aware of this"; second shift, "highwall, north end stable -- south end bad. All personnel made aware of this".

On March 19, first shift, "some areas appear to be not stable".

On March 20, first shift, "some areas not stable; men warned"; third shift, "highwall in south end of pit is very unstable due to rain. Men warned of said condition".

On March 21, first shift, "some areas poor. Inclement weather. Some areas not stable"; second shift, "poor in working area"; third shift, "poor in south end, but appears to be in a stable state".

On March 22, first shift, "some areas fair. Some areas have loose rock and slides". Third shift, "Poor conditions exist. All men warned of bad walls".

On March 23, first shift, "fair; some areas not good"; third shift, "poor".

On March 24, first shift, "Fair; some areas loose rock".

On March 25, first shift, "Appears stable in work areas at present time".

On March 26, first shift, "loose rock; fair; some areas not stable".

On March 27, first shift, "fair; some areas not stable".

On March 28, first shift, "water, mud, rocks coming off highwall due to heavy rain"; third shift, "appears to be in a stable condition".

On March 29, first shift, "fair; some areas poor"; third shift, "fair, but stable".

On March 30, first shift, "fair; some areas not real good"; third shift, "stable condition; men not working under highwall on third; also men warned of highwall condition".

On March 31, first shift, "fair; some areas poor".

All entries for April 1 and 2 indicated that the condition of the highwall was "fair"; one entry for the second shift on April 1 evaluated the highwall as "stable".

On April 3, first shift, the highwall was described as "fair" with "some rocks falling off due to rain".

The entries quoted above were made by the shift foremen during the entire month of March and right up to the day before the accident occurred when a huge portion of the highwall fell. There was a considerable amount of negligence in Peabody's failure to take some corrective action to assure that the highwall was maintained in a safer condition than it was. As I have indicated in my findings of fact, Peabody found, after the fatal accident, that it could continue to utilize the blast casting method and still manage to put a slope on the highwall so as to provide it with additional stability which would avoid the vertical state which contributed to the fact that a huge portion of the wall suddenly fell on April 4 without prior warning. In such circumstances, I believe that a penalty of \$2,000 should be assessed under the criterion of negligence.

In considering the gravity of the violation, it is necessary to bear in mind that the violation here under consideration is the loose and unconsolidated material which existed on the portion of the highwall which did not fall, as opposed to the portion which did fall. Those people who had examined the portion of the highwall which did fall all seemed to agree that it did not look as if it would fall on that particular day. The loose materials, however, were not confined to just that portion of the wall which fell because the inspector cited an expanse of 2,800 feet as having loose and hazardous and overhanging materials on it. While the order was modified, as I have explained in the findings above, to reduce the extent of the loose materials to 1,090 feet that were endangered off and to indicate that a berm was constructed along an expanse of 380 feet, the fact remains that an area of over 1,400 feet of the highwall had loose and unconsolidated materials on it.

The entries of the foremen in the onshift book, as given in detail above, do not specify the location of the loose materials they are describing in their frequent references to "bad areas" and "loose rock". Some of the witnesses stated that they had never seen a "good" highwall and Tom Hart testified that he never rated any highwall as being better than "fair", and that "fair" meant to him that it was safe to work under the wall. The fact that the foremen on several occasions warned the miners that it was not safe to work near the highwall is a further indication that they believed that the loose materials were hazardous. The preponderance of the evidence, therefore, supports a finding that the violation of section 77.1001 was a serious violation and that a penalty of \$1,000 should be assessed under the criterion of gravity.

In the above discussion, I have indicated that a penalty of \$50 should be assessed under the criterion of history of previous violations, that \$2,000 should be assessed under the criterion of negligence, and that a penalty of \$1,000 should be assessed under the criterion of gravity, making a total penalty of \$3,050 for the violation of section 77.1001.

WHEREFORE, it is ordered:

Peabody Coal Company, within 30 days from the date of this decision, shall pay penalties totaling \$4,550.00. The penalties are allocated to the respective violations as follows:

Citation No. 2322072 4/5/84 § 77.1006(a) .....	\$1,500.00
Order No. 2322073 4/5/84 § 77.1001 .....	<u>3,050.00</u>
Total Penalties Assessed in This Proceeding ...	\$4,550.00

*Richard C. Steffey*  
Richard C. Steffey  
Administrative Law Judge

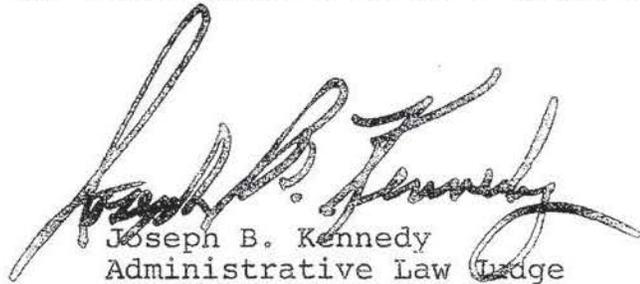
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at the hearing of April 18, 1985, be, and hereby are,  
CONFIRMED and ADOPTED as the trial judge's final disposition  
of this matter.



Joseph B. Kennedy  
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

333 W. COLFAX AVENUE, SUITE 400  
DENVER, COLORADO 80204

APR 23 1985

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 84-87-M
Petitioner	:	A.C. No. 05-03007-05509
	:	
v.	:	Ralston Quarry
	:	
ASPHALT PAVING COMPANY,	:	
Respondent	:	

DECISION

Appearances: Margaret A. Miller, Esq., Office of the Solicitor,  
U.S. Department of Labor, Denver, Colorado,  
for Petitioner;  
Shane Rogers, Safety Director, Asphalt Paving  
Company, Golden, Colorado,  
for Respondent.

Before: Judge Carlson

This case, heard under the provisions of the Federal Mine Safety and Health Act of 1977 (the Act), arose out of the investigation of a conveyor accident which occurred at respondent's rock quarrying and crushing operation on November 10, 1983. Respondent, Asphalt Paving Company (Asphalt), concedes the two violations cited by the investigating inspectors, but contests the appropriateness of the penalties proposed by the Secretary of Labor (the Secretary). For Citation No. 2099795, the Secretary proposes a civil penalty of \$1,500.00. For Citation No. 2099796 he proposes \$500.00. At the evidentiary hearing held in Denver, Colorado on March 20, 1985, the Secretary was represented by counsel; Asphalt was represented by its safety officer. Both parties waived the filing of post-hearing briefs.

REVIEW OF THE FACTS

The facts giving rise to the two citations in this case are essentially undisputed. Respondent conducts a stone quarrying and crushing operation in connection with its paving business. At the time of the accident which produced the citations, it employed approximately 200 persons. Of these, 8 to 12 were employed in the quarrying and crushing operation which was subject to the regulatory provisions of the Act.

The morning of November 10, 1983 was cold and wet. Snow had fallen the night before. Under such conditions, the head roller on the large belt conveyor at the crusher site tends to become clogged, necessitating cleaning. The conveyor is electrically powered; the controls (on-off switches) are located in a small building some 80 feet from the conveyor.

One mine employee, the crusher operator, had been working with another employee, a laborer, cleaning frozen mud from the conveyor rollers. The latter worker became cold and walked to the conveyor-control building to warm up. While he was there, the crusher operator came to the building, switched on the power, returned to the conveyor, crawled inside its frame, and proceeded to knock mud from the return roller with a claw hammer. The man was caught up between the moving belt and roller. He suffered severe, non-fatal injuries before he could be freed.

The laborer, who claimed to have specifically warned the victim against working on the machine with the power on, had quickly turned off the power when he saw that his co-worker was in difficulty.

Asphalt had a general policy that electrical power was to be locked out during maintenance and repair procedures. The company did not enforce that policy, however, for cleaning mud from the return pulleys. Instead, Asphalt expected its employees to work as a team with one at the controls in the control building, and the other at the roller. Upon a signal from the person at the roller, the employee at the control would "bump" the belt forward a short distance, thus exposing a fresh segment of the roller. The team would repeat this procedure several times to clean the entire surface of the roller (Tr. 58-60, 64-65). In addition, the employee at the roller was expected to keep his distance from the roller by using a shovel to scrape off the accumulated mud (Tr. 65).

Upon the completion of their investigation, the federal inspectors issued two citations. In the first, Citation No. 2099795, they charged Asphalt with a violation of 30 C.F.R. § 56.14-33, which provides:

Pulleys of conveyors shall not  
be cleaned manually while the  
conveyor is in motion.

The Secretary proposes a penalty of \$1,500.00 for this violation.

The second citation, No. 2099796, charges a violation of 30 C.F.R. § 56.12-16, which provides:

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

The Secretary asks for a \$500.00 penalty for this violation.

#### DISCUSSION

Since Asphalt admits the violations charged, the only issue to be decided here is what penalties are appropriate under the Act. Asphalt complains that the proposed penalties of \$1,500.00 and \$500.00 are excessive. For the reasons which follow, I must agree.

Section 110(i) of the Act requires the Commission, in penalty assessments, to consider the operator's size, its negligence, its good faith in seeking rapid compliance, its history of prior violations, the effect of a monetary penalty on its ability to remain in business, and the gravity of the violation itself.

The evidence discloses that the overall size of Asphalt's business was moderate, whereas the mining portion of the business was quite small. Records introduced by the Secretary show that in the two years immediately prior to the violations in this case, the company had 36 paid violations. The penalties were mostly small, totaling \$1,111.00. For an operator of Asphalt's size, this history of prior violations is moderate. The evidence indicates that Asphalt's ability to continue in business would not be adversely affected by payment of the penalties proposed by the Secretary. The evidence also indicates that Asphalt abated both violations swiftly. The violations were of a high order of gravity. The severe injuries received by the crusher operator are ample proof of that.

We now consider the most important penalty criteria under the facts of this case: negligence. Asphalt maintains that the

violations would not have occurred had the accident victim observed the well-known company policies concerning cleaning of the conveyor rollers. Plainly, this plea enjoys some validity. Such evidence as there is shows that the crusher operator, for reasons we shall never know, decided to start the conveyor himself and to clean it himself. Worse, he climbed several feet into the framework of the machine to work on the roller at close range. I am inclined to give credence to the evidence which shows that Asphalt had instructed its workers to use a two-man team to clean the rollers - one starting and stopping the belt on signal, the other knocking the mud off with a shovel. 1/

Had the victim followed those precepts there presumably would have been no violations of 30 C.F.R. § 56.14-33. The conveyor would not have been "in motion" while the cleaning took place. 2/

The question about "lockouts" under 30 C.F.R. § 56.12-16 is more complex. Arguably, the two-man procedure used by Asphalt is a measure, other than lockout, "which shall prevent the equipment from being energized without the knowledge of the individuals working on it." I decline to decide that question because it is not truly in issue. It was not briefed, and, indeed, was never directly raised or discussed at the hearing. 3/ What is clear is this: when the crusher operator proceeded to energize the conveyor with the intent of working on it himself, he violated that part of the standard which requires that "electrically powered equipment shall be deenergized before mechanical work is done ...."

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1/ As to whether cleaning with a shovel is a "manual" cleaning under the standard need not be decided in this case. Cleaning with a short claw hammer clearly is "manual" since common sense dictates that it is not appreciably safer than use of the hands alone.

2/ One of the federal inspectors testified that the laborer who had been working with the accident victim earlier in the morning admitted that it was "common practice" to clean the conveyor belt while it was in motion. The matter was apparently pursued no further. The declarant may well have been referring, in an unsophisticated way, to the two-man "bumping" procedure for cleaning. It is clear that the declarant himself understood that it was wrong to try to clean a roller in the way the crusher operator was doing at the time of his accident. I accord the admission little weight.

3/ At one point counsel for the Secretary did assert, in response to a question from the judge, that she was not able to say if the government had a position on whether or not the two-man procedure was violative of 30 C.F.R. § 56.12-16 (Tr. 62).

If a miner deliberately disregards a company safety policy, does it follow that the mine operator is free of negligence for penalty purposes? I hold that it does not. Even if the offending miner is shown to have known of the policy, there must be more. There must also be evidence that the policy was vigorously enforced. Put another way, the miner must know that he will be subject to some sanction, some form of meaningful discipline, if he violates safety practices. Without such an expectation, company safety rules may merely be seen by workers as non-compulsory company preferences.

In the present case I am convinced that the accident victim had to know that he was ignoring safety rules. Lacking evidence that he could reasonably expect the imposition of substantive disciplinary measures by management, however, I must find that some degree of fault still resides with Asphalt.

Having carefully considered all the evidence bearing upon the statutory criteria for penalty assessments, with particular emphasis on the negligence factor, I conclude that the appropriate assessments are as follows:

For Citation No. 2099795,	\$800.00
For Citation No. 2099796,	200.00

#### CONCLUSIONS OF LAW

Consistent with the findings contained in the narrative portion of this decision, the following conclusions of law are made:

- (1) The Commission has jurisdiction to decide this case.
- (2) Asphalt, the respondent, admits violation of 30 C.F.R. § 56.14-33 as charged in Citation No. 2099795 and violation of 30 C.F.R. § 56.12-16 as charged in Citation No. 2099796.
- (3) A civil penalty of \$800.00 is appropriate for the violation of 30 C.F.R. § 56.14-33.
- (4) A civil penalty of \$200.00 is appropriate for the violation of 30 C.F.R. § 56.12-16.

#### ORDER

Accordingly, it is ORDERED that Asphalt pay a total civil penalty of \$1,000.00 within 30 days of the date of this decision.

  
John A. Carlson  
Administrative Law Judge

Distribution:

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Mr. Shane Rogers, Safety Officer, Asphalt Paving Company, 14802 West 44th Avenue, Golden, Colorado 80403 (Certified Mail)

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF ADMINISTRATIVE LAW JUDGES  
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5203 LEESBURG PIKE  
FALLS CHURCH, VIRGINIA 22041

APR 24 1985

CONSOLIDATION COAL COMPANY, : CONTEST PROCEEDING  
Contestant :  
v. : Docket No. WEVA 81-620-R  
: Order No. 853383/8/25/81  
: Ireland Mine  
SECRETARY OF LABOR, :  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), :  
Respondent :

DECISION

Appearances: Robert M. Vukas, Esq., Consolidation Coal Company, Pittsburgh, Pennsylvania, for Contestant;  
David T. Bush, Esq., Office of the Solicitor, U. S. Department of Labor, Philadelphia, Pennsylvania, Pennsylvania, for Respondent.

Before: Judge Fauver

This proceeding was brought by Consolidation Coal Company under section 105(d) of the 1977 Federal Mine Safety and Health Act, 30 U.S.C. § 801, et seq., to review an imminent danger withdrawal order issued by Federal mine inspectors.

Having considered the hearing evidence and the record as a whole, I find that a preponderance of the substantial, reliable and probative evidence establishes the following:

FINDINGS OF FACT

1. On August 25, 1981, Federal mine inspectors Lyle Tipton and Donald Moffett conducted a regular inspection at Consolidation Coal Company's Ireland Mine.
2. During this inspection the inspectors were accompanied by representative Robert Clark and United Mine Workers' safety representative Harold Lewis.
3. The purpose of such inspection was to inspect the haulage in the area from the portal to the rotary dump.

4. During the inspection the inspectors and others reached an S curve in the track where they stopped to wait for an approaching train to pass.

6. The train, a locomotive pulling coal cars, passed through the S curve and over the track switch at a high rate of speed. Its rate of speed was not necessary to negotiate the curve or ascend the grade following the curve, but was an excessive and dangerous rate of speed.

7. Based upon their observation of the speed of the locomotive, the inspectors issued an imminent danger order (No. 853383), which alleged the following condition:

The No. 46 50 ton haulage locomotive operated by Leonard Parsons and pulling 37 (20-ton) loaded mine cars followed by No. 96 50 ton locomotive operated by Gary White was observed operating at an unsafe speed unreasonable for track and mine conditions around an 'S' turn and through a track switch. This order will not be terminated until Norbert Becker, principal officer of Health and Safety for this mine, instructs these motormen to pull their trip through this area at a reasonable safe speed.

#### DISCUSSION WITH FURTHER FINDINGS

The inspection party was stopped short of the S curve by a motorman, because a locomotive pulling coal cars was approaching the curve. Upon observing the speed of the train, Inspector Tipton told the Company representative, Clark, that he believed the train was moving too fast and should be slowed down. Clark used a phone to order the locomotive operator to slow down the train. The train, however, did not slow down and at that point Inspector Tipton talked with Inspector Moffett and both agreed that an imminent danger existed. Inspector Tipton then instructed Clark to stop the train under a section 107(a) order.

The Union representative, Lewis, also an eye-witness, agreed that the train was traveling too fast and that an imminent danger existed. To illustrate how fast the train was moving, Lewis testified that, although he could normally count the coal cars in a moving train, this train was moving so fast that he could not count the cars. He had never seen a mine train traveling that fast in his experience.

The S curve included a switch in the tracks. The switch, over which the train must pass, increased the danger of traveling at a high rate of speed at this location.

The term imminent danger is defined by section 3 of the Act as:

the existence of any condition or practice in a coal or other mine which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated.

In Freeman Coal Mining Company v. Interior Board of Mine Operations Appeals, 804 F.2d 741 (7th Cir. 1974), the court affirmed the following test of whether an imminent danger exists:

Would a reasonable man, given a qualified inspector's education and experience, conclude that the facts indicate an impending accident or disaster, threatening to kill or to cause serious physical harm likely to occur at any moment but not necessarily immediately?

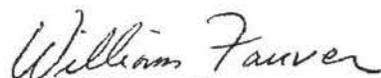
I find that the preponderance of the reliable and probative evidence establishes that Inspectors Tipton and Moffett exercised reasonable judgment in concluding that an imminent danger existed.

#### CONCLUSIONS OF LAW

1. The Commission has jurisdiction in this proceeding.
2. Order No. 853383, issued by Inspectors Tipton and Moffett on August 25, 1981, was reasonably and justifiably issued based on the facts. The Secretary met his burden of proving the allegations of the order by a preponderance of the substantial, reliable, and probative evidence.

#### ORDER

WHEREFORE IT IS ORDERED that Order No. 853383, dated August 25, 1981, is AFFIRMED and this proceeding is DISMISSED.

  
William Fauver  
Administrative Law Judge

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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APR 24 1985

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No. WEVA 83-211  
Petitioner : A.C. No. 46-01456-03541  
: :  
v. : Federal No. 2 Mine  
: :  
EASTERN ASSOCIATED COAL CORP., :  
Respondent :

DECISION

Appearances: Kevin C. McCormick, Esq., Office of the  
Solicitor, U.S. Department of Labor,  
Pittsburgh, Pennsylvania, for Petitioner;  
R. Henry Moore, Esq., Rose, Schmidt, Dixon  
& Hasley, Pittsburgh, Pennsylvania, for  
Respondent.

Before: Judge Fauver

This civil penalty case involves an order, No. 2115661,  
issued by a Federal mine inspector under section 104(d)(2)  
of the Federal Mine Safety and Health Act of 1977, 30 U.S.C.  
§ 801 et seq. The order alleges a violation of 30 C.F.R.  
§ 75.400 at Eastern's Federal No. 2 Mine, as follows:

Damp to wet coal fines were being stockpiled  
in the #4 crosscut of the 10 Right Section  
Longwall #1 belt. The stockpile of fines was  
about 18 feet long, 15 feet wide, and about 6  
inches deep. This belt is examined each  
production shift by a certified foreman and  
this condition was easily visible to any  
miner passing this area.

Having considered the hearing evidence and the record as  
a whole, I find that a preponderance of the reliable, probative,  
and substantial evidence establishes the following:

### FINDINGS OF FACT

1. Respondent's Federal No. 2 Mine is an underground coal mine that produces coal for sale or use in or affecting interstate commerce.

2. On February 18, 1983, Federal Mine Inspector Terry Palmer inspected the subject mine and observed an accumulation of coal fines stockpiled in No. 4 crosscut in 10 Right section. The accumulation covered the floor of the crosscut, and was black, about 18 x 15 feet, and up to 6 inches deep. It was wet in the middle and damp to dry toward the edges. About three feet of the edge area had a thin dry crust and when the inspector tamped this area the material did not exude moisture. This part of the accumulation was about three or four feet from the belt rollers.

3. The accumulation was intentionally stored there about 16 days before the inspection, when the belt line had been extended about 200 feet.

4. The belt entry was about 15 feet wide. A 110-volt control wire ran up the heading and the belt was transporting coal at the time of the inspection.

5. Samples of the accumulation "in place" were not taken to test combustibility, but some samples were taken of material after it was put on the belt conveyor during the abatement of the cited condition. The material placed on the belt was a mixture of the wet and dry parts of the accumulation. The samples of the mixed material showed 21% moisture, 43% ash, and the rest presumably coal.

### DISCUSSION WITH FURTHER FINDINGS

Pursuant to the safety standard (30 CFR § 75.400), coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials shall be cleaned up and not permitted to accumulate in any active workings of a mine. This standard, which is a statutory mandate (§ 304(a) of the Act), was originally included in the 1969 Coal Act as a method of eliminating fuel sources for explosions or fires in the mines. By prohibiting accumulations of these substances, Congress attempted to achieve one of the prime purposes of the Act, that is, the prevention of loss of life and serious injury arising from explosions and fires in the mines (see Old Ben Coal Corp., 1 FMSHRC 1954 (1979)).

Consistent with this broad policy to protect the health and safety of miners, the Commission has further defined the contours of this standard. For example, in Old Ben Coal Corporation, 2 FMSHRC 2806 (1980), the Commission ruled that an accumulation under 30 C.F.R. § 75.400 exists "where the quantity of combustible materials is such that, in the judgment of the authorized representative of the Secretary, it likely could cause or propagate fire or explosion if an ignition source were present." The Commission also noted that the actual or probable presence of an ignition source is not an element of the violation. So long as an accumulation of combustible materials exists, there is a violation of both section 304(a) and 30 C.F.R. § 75.400. Old Ben Coal Corporation, 1 FMSHRC 1954 (1979).

Under these principles, it is clear that a violation of 30 C.F.R. § 75.400 occurred in this case.

The standard by its terms applies to "coal dust... loose coal and other combustible materials" (30 C.F.R. § 75.400, emphasis added). Inspector Palmer visually identified the coal fines as small particles of coal, too large to be considered coal dust, yet too small to be classified as loose coal. It was, nevertheless, an accumulation of coal. Therefore, under the standard, Respondent was not permitted to store or allow the coal fines to accumulate in an active working of the mine.

The fact that the center of the accumulation was wet does not preclude a finding of a violation under this standard, because water does not inert coal. In the event of a mine fire, the heat from the flames could dry out the wet portions of the coal, and thus provide additional fuel for the fire. Water on the coal would only slow down the burning process; it would not make the coal incombustible. Furthermore, only a part of the accumulation was wet. The outer edges of the fines had begun to dry out. According to Palmer, the edges of the accumulation were dry enough to intensify an existing mine fire and could possibly cause a fire if an ignition source were close by. In a somewhat similar case, Judge James Broderick found a violation of 30 C.F.R. § 75.400 even where the accumulations were so wet that they could not be shoveled, United States Steel Mining, Inc., 5 FMSHRC 1873 (1983). In that case, rock dust had to be applied to soak up the water before the accumulation could be removed. Despite that fact, Judge Broderick found that there was an accumulation of combustible material in violation of 30 C.F.R. § 75.400. In the instant case, there was no such difficulty removing the coal fines, and only a portion had to be bucketed out.

The fact that Eastern's sample of the accumulation showed approximately a 64% incombustible content is no defense to the charge. First, the combustible content of the accumulation is not relevant to 30 C.F.R. § 75.400. That section concerns the accumulation of coal dust, loose coal and other combustible materials in the active workings of a mine. It does not address the combustible content of any particular materials. Section 75.403 does address this issue as it relates to permissible amounts of rock dusting in particular areas of the mine. But this case involves an accumulation of coal fines left in a crosscut for over two weeks, not an issue whether the roof, ribs and floor were sufficiently rock-dusted to meet permissible limits.

Second, the sample taken is not representative of the accumulation, because it was not taken until the fines, both wet and dry, had been placed on the belt line and mixed, thereby changing its previous separate consistency.

I find that this is a serious violation. With an energized belt line running in close proximity to the coal fines, the arcing or sparking from a severed power cable or a stuck roller on the belt line could be a sufficient ignition source to cause an explosion or fire in the area. The accumulation of coal fines could intensify a fire or explosion and could possibly cause a fire if there was an ignition source close by. As mentioned, the fact that some of the coal fines were wet did not make the accumulation incombustible because water does not render coal inert, and because the outer edges of the accumulation were only damp or dry.

Respondent was negligent in storing and leaving the accumulation in the mine, because by the exercise of reasonable care it could have prevented the violation. Respondent contends that the material was stored in No. 4 crosscut because, when it was first discovered (February 3, 1983) the belt had already been dismantled, and "material could not be placed immediately in the belt and taken out of the mine" (Respondent's Brief, p.4). However, when the belt was assembled and running again by February 8, the accumulation could have been removed from the mine but was not removed. Respondent contends that the material was left there because it was so wet that it presented no hazard, and the belt foreman was keeping an eye on it so that when it dried out it would be promptly removed. This vague procedure of "keeping an eye on" an accumulation of coal fines is not permitted by the safety standard. The standard proscribes the accumulation of combustible material in the

active workings of a mine. Wet coal is combustible, because a fire can dry out the moisture and then ignite the coal. Moreover, a substantial part of this accumulation was only damp or dry and was thus more readily combustible than the wet part.

The parties have stipulated as to the rest of the six statutory criteria for assessing a civil penalty, that is: the size of the operator (large) and the mine (large); whether a penalty will adversely affect Eastern's ability to remain in business (no); whether the condition cited was timely abated in good faith (yes); and Eastern's history of previous violations (903 paid violations amounting to \$106,409).

I conclude that special findings in a section 104(d)(2) order ("significant and substantial" or "unwarrantable") are not reviewable in a civil penalty proceeding. However, based on the findings as to negligence and gravity, above, I would affirm the inspector's findings that the violation was "significant and substantial" and "unwarrantable" if I were reviewing those allegations of the order.

#### CONCLUSIONS OF LAW

1. The Commission has jurisdiction in this proceeding.
2. On February 18, 1983, Respondent violated 30 C.F.R. § 75.400 as alleged in the "Condition or Practive" part of MSHA's section 104(d)(2) Order No. 2115661.
3. Considering the criteria for assessing a civil penalty under section 110(i) of the Act, Respondent is ASSESSED a civil penalty of \$305 for the above violation.

#### ORDER

WHEREFORE IT IS ORDERED that Respondent shall pay a civil penalty of \$305 within 30 days of this Decision.

*William Fauver*  
William Fauver  
Administrative Law Judge

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