APRIL

COMMISSION DECISIONS

ADMINISTRATIVE LAW JUDGE DECISIONS

APRIL

The following case was granted for review during the month of April:

Emerald Mines Corporation v. Secretary of Labor, Docket No. PENN 85-298-R. (Judge Melick, March 5, 1986)

The following case was denied for review during the month of April:

Secretary of Labor, MSHA v. Youghiogheny & Ohio Coal Company, Docket No. LAKE 85-37. (Judge Maurer, March 7, 1986)

COMMISSION DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

April 1, 1986

MINERALS EXPLORATION COMPANY	:	
	:	
v.	:	Docket No. WEST 81-189-RM
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	

BEFORE: Backley, Lastowka and Nelson, Commissioners

DECISION

BY THE COMMISSION:

This case arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982), and involves two related proceedings. The first is a consolidated contest by Minerals Exploration Company ("Minerals") of an imminent danger withdrawal order issued pursuant to 30 U.S.C. § 817(a) and a civil penalty proceeding dealing with an alleged violation by Minerals of 30 C.F.R. § 55.3-5 (1984). That matter was presided over by Commission Administrative Law Judge John A. Carlson. The second proceeding, heard on an interlocutory basis by former Commission Administrative Law Judge Jon D. Boltz, involves Minerals' motion for sanctions against officials of the Department of Labor's Mine Safety and Health Administration ("MSHA") and the Secretary of Labor's trial counsel for alleged improprieties in prosecuting the proceeding before Judge Carlson. In an unpublished order issued on April 7, 1982, prior to Judge Carlson's decision on the merits, Judge Boltz denied Minerals' motion for sanctions. Approximately one year later, Judge Carlson issued his decision upholding both the imminent danger withdrawal order and the citation and the judge assessed a civil penalty. 5 FMSHRC 669 (April 1983)(ALJ). Following Judge Carlson's decision, Minerals filed with the Commission a petition for discretionary review primarily challenging Judge Boltz's order denying sanctions. 1/

1/ The Commission is an independent adjudicatory agency established to resolve legal disputes arising under the Mine Act. 30 U.S.C. § 823. The Commission is not a part of and is in no way connected with the Department of Labor or the Mine Safety and Health Administration.

The crucial issues before us concern allegations of impropriety on the part of MSHA officials and counsel for the Secretary. For the reasons set forth below, we affirm Judge Boltz's order denying sanctions and we affirm Judge Carlson's decision on the merits. At the same time, we express our strong disapproval and, as appropriate, serve warning with respect to some of the activities of certain MSHA officials and the Secretary's trial counsel.

I.

Facts and Procedural History

At the time of the operative events in this case, Minerals operated the Sweetwater uranium project, a large surface uranium mine located near Rawlins, Wyoming. The underlying case arose in connection with a citation and imminent danger withdrawal order issued in February 1981 by MSHA to Minerals for allegedly violating section 55.3-5 by permitting loose, overhanging rock on the east wall of the C-1 pit. 2/ A hearing on the merits of the citation and withdrawal order was held before Judge Carlson in April 1981, and was continued until June 29, 1981.

Prior to resumption of the hearing, a telephone conference call was held on June 22, 1981, among Judge Carlson, Anthony Weber, counsel for Minerals, Phyllis Caldwell, counsel for the Secretary, and Bevelyn Suter, President of the Progressive Mineworkers Union ("the Union"), representative of miners at the Sweetwater mine. The conference call was initiated by Judge Carlson for the purpose of discussing the Union's written request that Union Secretary Daphne Hamilton be permitted to appear at the hearing to "help make sure that the facts are correctly represented." During the call, Ms. Suter expressed concern that falsified documents would be introduced by Minerals at the hearing. Attorney Weber subsequently testified that due to a bad connection he could not hear Suter's end of the conference call. Weber did understand, however,

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2/ Former section 55.3-5 provided:

> Mandatory. Men shall not work near or under dangerous banks. Overhanging banks shall be taken down immediately and other unsafe ground conditions shall be corrected promptly, or the areas shall be barricaded and posted.

30 C.F.R. § 55.3-5 (1984). In January 1985, this provision was replaced by 30 C.F.R. § 56.3005 (1985), which is virtually identical.

through the comments of Judge Carlson, whom he could hear, that the Union was concerned over possibly falsified documents being used by Minerals at the hearing. 3/

Later that same day, following the conference call, attorney Caldwell received a telephone call from the MSHA sub-district office covering the Sweetwater mine, informing her that a letter had been received from Union Secretary Hamilton making similar allegations that falsified documents would be introduced at the hearing. As a result of that phone call, Caldwell and her supervisor, Senior Attorney James Barkley, arranged for an MSHA investigation into the claims of document falsification. MSHA Special Investigator Jerry Thompson was assigned to the task. Inspector Thompson began talking privately with Minerals drafting department employees and, by the next day, June 23, 1981, learned that Brian Baird was the Minerals draftsman who had worked on original drawings of the C-1 pit -- drawings that had become the focus of the inspector's investigation. Caldwell directed Inspector Thompson to interview Baird.

The inspector visited Baird's home in the Rawlins area on Sunday, June 28, 1981, the day before the resumption of the hearing before Judge Carlson. Thompson identified himself as an MSHA special investigator and stated that he wanted to ask Baird questions about the documents to be used at the hearing the next day in the Denver. Baird indicated that the drawings of the C-1 pit originally had been completed from survey notes but later had been changed, supposedly upon the basis of visual observations. Baird showed Thompson one of the original drawings and told him that there were other original drawings at the mine. Baird expressed concern that the modified drawings were not accurate. Before Thompson left Baird's home, he obtained a written statement from Baird regarding the changes in the drawings.

3/ During the call, Weber made comments which led other participants in the conversation to believe that he was threatening with discharge Union representatives Suter and Hamilton (who were then on sick-leave status with Minerals) if they participated in the hearing. Weber's comments became the focus of several additional proceedings. Prior to the resumption of the hearing on June 29, 1981, the Secretary filed with Judge Carlson a letter seeking the institution of disciplinary proceedings against Weber. Judge Carlson referred this letter to the Commission and the Commission referred the matter to Commission Administrative Law Judge Paul Merlin for disciplinary proceedings. The matter was resolved, based on stipulations, at a hearing before Judge Merlin. The judge admonished Weber concerning his remarks but held that no further disciplinary proceedings were warranted. Disciplinary Proceeding (Minerals Exploration Co.), 3 FMSHRC 1919, 1920-21 (August 1981)(ALJ). The Secretary also initiated a discrimination case against Minerals based on this incident. FMSHRC Docket No. WEST 82-38-DM. That case eventually was settled by the parties.

The hearing on the merits reconvened in Denver on June 29, 1981. Prior to the taking of testimony, counsel for the Secretary presented Judge Carlson with the letter requesting disciplinary proceedings against Minerals' counsel, Weber (n. 3 supra). On the afternoon of June 29, Minerals began its defense by presenting the testimony of Project Manager Larry Dykers. Mr. Dykers testified about the plan map covering the C-1 pit. After Weber moved for introduction of the drawing, counsel for the Secretary, Barkley, requested voir dire. Barkley established that the map originally had been drawn by Baird and, as presented at the hearing, showed the existence of a safety bench on the east wall of the C-1 pit. Barkley then objected to the admission of the map as "irrelevant because it would seem to be a document that may have been falsified to the point that it is irrelevant." M. Tr. 472. 4/ Barkley indicated that he was prepared to subpoena Minerals' entire drafting department to testify concerning the alleged falsification.

Weber reacted with surprise but expressed a willingness to bring the Minerals employees to the hearing in order to resolve the matter. It was then 5:00 p.m. and the judge suggested an adjournment -- but only until the afternoon of the following day. Weber did not request a longer continuance or object to this procedure. This procedural decision set into motion the main series of events which led to the present litigation.

Barkley requested subpoenas for Minerals' employees and documents. The judge issued signed subpoenas in blank to Barkley. The evidence indicates that the parties never reached any understanding as to the individuals who would be subpoenaed. Barkley conferred with Inspector Thompson concerning the Minerals employees to be subpoenaed. They agreed that Thompson and another MSHA Inspector, Merrill Wolford (who had issued the underlying citation and imminent danger order), were to drive 250 miles to Rawlins to serve the subpoenaed individuals. Thompson telephoned Baird from Denver to inform him that he would be subpoenaed that evening to appear at the hearing in Denver the following day. Thompson asked Baird to inform the other draftsmen that they would be subpoenaed. Thompson inquired as to whether Baird had brought home his original drawings of the C-1 pit. Baird replied that he had not. Thompson told Baird not to worry because he would be bringing a subpoena requiring Baird to obtain the original documents.

At approximately 1:30 a.m. on June 30, 1981, the two inspectors arrived in the Rawlins area and began serving the subpoenas. Apart from Baird, they served four Minerals employees, all of whom refused an offer of transportation to Denver. The inspectors reached Baird's home at 3:00 a.m., and then proceeded to the mine offices, some 40 minutes away, to obtain original drawings of the C-1 pit. Baird questioned the propriety of taking the documents from the mine, and Thompson replied that the subpoena required that action.

4/ For purposes of this decision, transcript citations to the hearing before Judge Carlson on the merits are designated M. Tr. __. Transcript citations to the hearing before Judge Boltz on Minerals' Motion for Sanctions, are designated S. Tr. __.

The inspectors and Baird arrived at the mine offices at 4:00 a.m. After finding several mine entrances to be locked, the party finally found one that was unlocked. They proceeded to Baird's desk, where Baird picked up a cardboard tube containing the drawings. They then drove to Denver. The other subpoenaed Minerals employees went to work later in the morning of June 30 and they attempted to gather all documents possibly relevant to the C-1 pit. They then flew to Denver in two company chartered planes.

Barkley met with Baird on the morning of June 30, 1981, upon the latter's arrival in Denver. Baird again expressed concern about his removal of the documents from the mine and Barkley told him "not to worry about it." S. Tr. 842. Later that morning, Barkley arrived at the Commission's Denver office, where the hearing was being held. He instructed Inspector Thompson to locate two of the subpoenaed witnesses, who worked in the drafting department, so that he could talk with them. Those two individuals told Barkley that the modifications in the drawings were based upon good faith subjective judgment. Barkley stated that "people had gone to jail trying to take refuge in subjective judgment." Dickey Affidavit at 4; Hill Affidavit at 6-7.

When the reconvened hearing commenced, Barkley announced that he would present all his evidence through Baird, and excused the other four subpoenaed employees. During the course of Baird's testimony, Barkley used the drawings that Baird had obtained from Minerals' office. These documents were entered into evidence without objection from Weber. At the conclusion of Baird's testimony, Weber requested and Judge Carlson permitted a continuance to allow Weber to respond on the matter of possible document falsification. After the close of the hearing, and upon request from Barkley, the judge ordered that the documents which had been produced in response to the subpoenas be kept in the hearing room overnight. The parties agreed that the next morning Minerals' employees would separate the documents into relevant and irrelevant categories. The Secretary's counsel was to arrive later in the morning for document inspection.

The following morning, Weber departed from the Denver area and left Minerals' Project Manager Dykers, who is not a lawyer, in charge of the document separation and production process. Dykers decided that the daily reminder diaries that some of the employees had brought did not have to be produced. Those employees returning to the mine that morning took their diaries with them. Barkley and other representatives of the government arrived later in the morning and proceeded to review the documents, including those separated out by Minerals as irrelevant.

During the examination of the documents, it was realized that the daily diaries were not present. Dykers indicated that they had been determined to be irrelevant and had been given to the employees returning to Rawlins. At Barkley's insistence, Dykers agreed to try to retrieve the diaries from the Minerals employees at the Denver airport. Dykers succeeded, and when the diaries were returned to the Commission offices, Barkley took them into a separate room for examination. Barkley subsequently refused to return the diaries to Minerals for a period of months, despite repeated requests from Minerals.

The hearing on the merits did not resume as anticipated. Initially, the delay was because of the Secretary's request for disciplinary proceedings against Weber. After that matter was concluded, Minerals filed in September 1981 the motion for sanctions that is the primary subject of this review. That motion was transferred to then Judge Boltz because of the possibility that Judge Carlson might be called as a witness. The hearing on the sanctions motion covered four days (November 9-12, 1981), and Judge Boltz issued his order denying sanctions on April 7, 1982. 5/

In his decision denying Minerals' motion for sanctions, Judge Boltz found that Inspector Thompson had not coerced Baird's written statement and that Inspectors Thompson and Wolford had not acted improperly by serving the subpoenas and by entering the mine property with Baird in order to obtain the subpoenaed documents. The judge also determined that there was no impropriety on the part of counsel for the Secretary in conducting an independent investigation of the falsification allegations without notifying Minerals' counsel, in examining the subpoenaed documents that Minerals had designated as irrelevant, and in retaining and refusing to return the daily reminder diaries of Minerals' employees. The judge concluded that he found "nothing in the conduct of counsel for the Secretary or in the conduct of Inspectors Thompson and Wolford that was improper in the circumstances of this case." Slip op. 8.

Subsequently, on September 15, 1982, following negotiations between the parties, a joint motion for decision on the merits based on the existing record was filed with Judge Carlson. The judge issued his decision on the merits on April 6, 1983. In finding a violation, Judge Carlson did not utilize the record from the hearing before Judge Boltz on sanctions. Judge Carlson indicated that he was "not prepared to hold whether or not the drawings were 'falsified'," because "such a holding [was] not necessary to reach a proper decision on the merits of the case." 5 FMSHRC at 676. The judge stated:

> I did find Baird an earnest and believable witness with no discernible motive for dissembling. At the very best, the process by which the final set of drawings came about betrays a subjectivity, a flexibility, which robs them of any weight favorable to Minerals. Beyond that, even if the modified drawings were accepted as accurate, they would not persuade me of the absence of violation.

Id. Finding that other evidence independently supported á finding of violation, the judge concluded that Minerals had violated section 55.3-5 and that the imminent danger order had been issued appropriately.

5/ Minerals petitioned the Commission for discretionary review of Judge Boltz's order denying its motion for sanctions. The Commission, treating Minerals' petition as one for interlocutory review, denied the request without prejudice to renew after final disposition of the case by Judge Carlson.

II.

Disposition of Minerals' Assertions of Improprieties

On review, Minerals repeats the assertions of governmental impropriety raised before Judge Boltz. Minerals argues that it was prejudiced by the actions of MSHA officials and counsel for the Secretary and requests vacation of the civil penalty and dismissal of the proceeding. Minerals contends that these sanctions are necessary to deter the government from future impropriety and illegality, and to prevent the tainting of Commission proceedings. We examine separately each assertion of impropriety.

A. Minerals' objections concerning the Secretary's initial investigation into the possible falsification of evidence

1. The general propriety of the Secretary's investigation

Minerals contends that it was improper for the Secretary to authorize and direct between June 22 and 28, 1981, a "secret" investigation involving interviews with employees of the opposing party without advising the judge and opposing counsel. Minerals argues that such actions violated Commission discovery procedure and opened the door to unethical conduct.

As Judge Boltz noted, the time period for completion of discovery under Commission Procedural Rule 55, 29 C.F.R. § 2700.55, had expired on June 22, 1981. However, when charges surfaced during the June 22 conference call that falsified evidence might be introduced, it was wholly appropriate for both parties' attorneys -- as responsible advocates and as officers of the court -- to pursue the matter. We hold that at that juncture of the case, in light of the nature of the allegations, either party could have proceeded properly by requesting the reopening of discovery (see 29 C.F.R. §§ 2700.55(a) & (b)), or by investigating the allegations. Within the adversarial framework of Commission trial proceedings, there is no general bar against investigations by either party into possible new evidence whose existence is suggested during the course of a trial.

We reject the contention that Minerals' counsel, Weber, was not on notice as to the existence of the falsification problem and the likelihood that the opposing party would have a vital interest in determining the truth of the allegation. As noted above, Weber was made aware from the comments of Judge Carlson during the conference call that the Union was raising an issue concerning his client's possible falsification of evidence. Weber should have been alert to the obvious implications of such a charge.

Thus, we discern no impropriety in the fact that the Secretary decided to investigate further the Union's allegations of falsified evidence. We note, however, certain ethical constraints relevant to such private inquiries. The American Bar Association ("ABA") Model Code of Professional Responsibility provides in relevant part:

> During the course of his representation of a client a lawyer shall not ... communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party....

DR 7-104(A)(1)(1980 ed.). Cf. ABA, Model Rules of Professional Conduct, Rule 4.2 (1983). These model rules prohibit communications with an opposing "party" without the other lawyer's consent. We do not find it necessary in the present context to adopt formally these particular model rules or to construe the full scope of the term "party." Here, the Minerals employees contacted during the Secretary's private investigation appear to have been non-managerial draftsmen lacking substantial organizational responsibility. Moreover, we are mindful of the important purpose of these contacts and of the unusual circumstances of this case. For present purposes, we remind the Commission Bar of the need to be respectful of the ethical provisions cited above and of the developing law in this area. Cf. Massa v. Eaton Corp., 39 FEP 1211 (D. Mich. 1985). On the basis of the foregoing, we agree with Judge Boltz that there was no general impropriety in the Secretary's undertaking his investigation into allegations of evidentiary falsification.

2. Whether Inspector Thompson coerced Baird's written statement

Minerals contends that Inspector Thompson coerced Baird's written statement during their meeting at Baird's home. The evidence shows that Inspector Thompson identified himself to Baird as an MSHA special investigator and indicated that he wanted to discuss the drawings which were to be presented at the hearing in Denver. Inspector Thompson also told Baird that a refusal to talk with him could be construed as assisting in an attempt to cover up the falsification.

Judge Boltz found that Baird's statement was not coerced. The interview with the MSHA investigator occurred in Baird's home and was conducted in the presence of his wife. It lasted 45 minutes and unfolded in a conversational atmosphere. Baird himself displayed a generally cooperative attitude, although he experienced some understandable discomfort in supplying information that he believed might reflect badly on his employer. He volunteered a drawing from his portfolio and made free-hand sketches to help the inspector understand the modifications made to the drawings. On the other hand, Thompson's statement that a refusal to talk with him could imply guilt was overbearing and a reflection of poor judgment. We disavow such investigative tactics, but we conclude that this errant statement did not coerce a statement from Baird. Accordingly, in consideration of the totality of the circumstances, we find that substantial evidence supports Judge Boltz's conclusion that Baird's statement was not coerced.

3. Barkley's use of Baird's statement at the reconvened hearing

Minerals asserts that Barkley's use of the products of the Secretary's investigation into the allegations of falsified evidence at the reconvened hearing was improper. Minerals argues that Barkley introduced Baird's statement in a theatrical effort to disrupt its case by interrupting the hearing and catching Minerals by surprise. The surprise in question was not the type removed by the procedural rules or cases cited by Minerals. The surprise was collateral--that is, it was intended as an attack on the credibility of evidence. There was no change in the theory of the case upon which either side was proceeding. Moreover, given the fact that Weber was aware of the falsification allegations as of June 22, 1981, it strains credulity to believe that Barkley's production of Baird's statement could have come as a complete surprise to Minerals.

B. Mineral's objections to the subpoena process

Minerals' next major claims of impropriety focus on the subpoena process, which began at the recess of the hearing on June 29, 1981, following the introduction of Baird's statement. It is obvious that this juncture of the hearing was an unfortunate turning point, and most of the additional allegations of misconduct can be traced to the failure of the parties and the judge to evaluate adequately a practical and just method for proceeding with the case and resolving the complication that had arisen. The judge's late afternoon decision to allow a continuance of only one-half day when the witnesses and documents to be subpoeanaed were 250 miles away in Rawlins, Wyoming, was ill-conceived. Sound judicial practice requires that sufficient time be provided for the issuance, service of, and compliance with subpoenas. Such practice will avoid serving subpoenas in the middle of the night that require witnesses to travel with subpoenaed documents 250 miles to a hearing the next afternoon. However, we must observe that Weber's lack of protest and his acquiescence in this procedure seriously undercut Minerals' present objections.

1. Subpoenas in blank

Minerals challenges the judge's issuance of subpoenas in blank to Barkley. The issuance of subpoenas in blank is authorized by Fed. R. Civ. P. 45(a), which applies "so far as practicable" to Commission proceedings. 29 C.F.R. § 2700.1(b). Therefore, we perceive no error in the judge's issuance of blank subpoenas although such practice must be governed by careful discretion.

2. Scope of the subpoenas

Minerals next objects to the scope of the subpoenas duces tecum, in that they covered documents relevant to the entire C-1 pit from December 11, 1980, rather than being limited to the section of the east wall of the C-1 pit at issue from the later date of citation in February 1981.

Relevance is the touchstone in analyzing the proper scope of a subpoena or discovery request. We have no trouble concluding that the request was relevant, especially in the context of a possible falsification of documents. In any event, even if the subpoena was overbroad, the appropriate remedy for Minerals was to object on the basis of irrelevance or burdensomeness. 29 C.F.R. § 2700.58(c). However, trial counsel for Minerals failed to object to the scope of the subpoenas. Accordingly, we find no error.

3. Service of the subpoenas

Minerals also objects to the service of the subpoenas in the middle of the night and by an interested party. As a general legal proposition, there is no prohibition against either of these occurrences, although obviously better and preferable practice calls for service during normal hours. This is particularly so in a situation like the present, in which a reasonable continuance could have been granted without prejudice to either party. The subpoenas then could have been served during normal hours and the subpoenaed individuals would have had sufficient time to travel the 250 miles to the hearing in Denver. As a matter of policy, we do not encourage or favor service of Commission subpoenas in the middle of the night absent genuine emergency or extraordinary circumstances, which were not present here.

However, the clear inconvenience attendant upon the service conducted in this case does not render the service improper or illegal. Again, it must be emphasized that Weber, counsel for Minerals, failed to object and failed to urge an alternate timetable. We are also influenced by the fact that all but one of the subpoenaed Minerals employees was notified by telephone in the early evening of June 29, 1981, that they were to be subpoenaed to appear at the hearing in Denver the following day.

Notwithstanding the above, we are compelled to observe and disapprove the heavy-handed manner in which Thompson proceeded. The record indicates that he represented himself in a manner causing several of the subpoenaed witness to believe that they were being confronted by an agent of the Federal Bureau of Investigation. S. Tr. 278, 280, 312, 410, 443, 444. Moreover, several of these witnesses testified that Thompson's early morning intrusion caused genuine fear and intimidation. S. Tr. 253, 254, 346, 347, 413.

As to Minerals' objection to service by an interested party, Commission Procedural Rule 58(a) governing subpoena service states that a subpoena "may be served by any person who is not less than 18 years of age." 29 C.F.R. § 2700.58(a). Inasmuch as Rule 58(a) does not prohibit service by an interested party (assuming Inspector Thompson to be such a party), we find no irregularity in service of the subpoenas by Inspector Thompson.

4. Entry of Inspectors into Minerals' mine offices

Minerals challenges Judge Boltz's finding that there was no impropriety in the actions of Inspectors Thompson and Wolford in connection with Baird's removal of drawings from the mine office at approximately 4:00 - 4:30 a.m. on the morning of June 30, 1981. The Secretary argues that the inspectors did nothing illegal and that it was Baird who took the documents as required by the subpoena. Our review of the record, however, convinces us that Baird would not have travelled to the mine and taken the documents on his own. In the early hours of June 30 when the inspectors served Baird with the subpoenas and proceeded with him to the mine offices, Baird questioned the propriety of taking the documents from the mine and Thompson replied that the subpoena required it. To this extent, the entry and taking of the documents may be viewed as the action of MSHA. Thus, the next question is whether the removal of the documents was illegal or otherwise improper.

In deciding this question, control or custody of documents as well as ownership is critical in the determination of the propriety of document production under subpoena. Service on one who has control of documents may be sufficient as against the owner. See, e.g., Mattie T. v. Johnston, 74 F.R.D. 498, 502 (N.D. Miss. 1976), and authorities cited. However, the present case is different from the control involved in the cases relied upon by the Secretary. In those cases, the person subpoenaed exerted substantial control over the documents. Here, the evidence shows that Baird's control over the drawings was nominal, encompassing only the requirements of his immediate work assignment. In short, the subpoena did not allow Baird to take the documents without the permission of his superior. Thus, Judge Boltz's conclusion that there was no impropriety on the part of the inspectors in removing the drawings from Minerals' mine offices is erroneous. We are particularly disturbed by the MSHA inspectors' middle-of-the-night entry into private mine offices, without identification to appropriate agents of the operator. We strongly denounce Thompson's abuse of authority and reiterate our disapproval of the ill-controlled subpoena process agreed to by the parties.

Despite our conclusion that the exhibits were improperly obtained, we find no prejudice to Minerals. The outcome on the merits rested on adequate, independent grounds. Accordingly, we deem it inappropriate to invoke the extreme remedy of dismissal of the proceedings on the merits.

C. Mineral's objections to counsel's conduct after service of the subpoenas

1. Barkley's treatment of the subpoenaed Minerals employees

Minerals argues that counsel for the Secretary, Barkley, improperly questioned two of its employees who had been subpoenaed and that Judge Boltz failed to address this objection. Dealing with the latter assertion first, we note that although Judge Boltz did not address this objection

directly he resolved it indirectly when he found that counsel for the Secretary had not abused the Commission subpoena power and that the persons subpoenaed were witnesses for MSHA. Slip op. 7.

As to the merits of this particular contention, Minerals' argument is focused on Barkley's meeting with two subpoenaed Minerals draftsmen in advance of the resumption of the hearing on June 30, 1981, to discuss their testimony. These individuals were subpoenaed as MSHA's witnesses. While the authority for the issuance of subpoenas is through the Commission (30 U.S.C. § 823(e) & 29 C.F.R. §§ 2700.54(a), .57 & .58), witnesses appear on behalf of the party requesting the subpoena. Because the draftsmen were witnesses for MSHA, it was reasonable and proper for Barkley to attempt to interview them before they gave their testimony.

Minerals also argues that Barkley improperly threatened the two employees by commenting that people had gone to jail trying to take refuge in subjective judgment. However, no one who heard Barkley's remark indicated that it was an assertion of an action to be taken or a prediction of events to follow. Although Barkley's comment was clearly improper and ill-chosen, evidencing a lack of understanding of proper prosecutorial conduct, it did not constitute an improper threat of criminal prosecution.

2. Barkley's release of the subpoenaed witnesses

Minerals' allegations of misconduct as to the release of the subpoenaed witnesses involves more comments by Barkley which Minerals asserts misled Judge Carlson. Immediately after Barkley's discussion with the two draftsmen discussed above, the hearing resumed. Barkley informed Judge Carlson that he would present all of his evidence through Baird and, therefore, was excusing the remaining subpoenaed witnesses. Barkley's stated reason for this action was effectively that the testimony of the other witnesses would be cumulative. This explanation was a distortion of the facts known to Barkley and certainly beneath the level of candor reasonably expected of an officer of the court. As Barkley explained at the sanctions hearing, the real reason for his excusing the other witnesses was that they had given him a "very pat kind of response or defense to their involvement." S. Tr. 800. Barkley should not have represented otherwise to the judge.

3. Barkley's examination and retention of subpoenaed documents

Minerals next argues that Judge Boltz erred in finding no impropriety in Barkley's examining all the produced documents, including those separated out by Minerals as irrelevant, on July 1, 1981, and that it was improper for Barkley to take and refuse to return for a period of months the daily reminder diaries of the Minerals employees.

All of Minerals' witnesses testified that because they were pressed for time at the mine on the morning of June 30, they gathered all possibly relevant documents to take to Denver to be sorted out later. In general,

absent permission, one party has no right to examine the opposing party's documents to ascertain what is properly obtainable. However, the record indicates an utter lack of clear agreement between the parties as to how the documents would be produced and examined. Indeed, this dispute over the documents occurred largely because of the absence of Weber from the document production activities. At the recess of the hearing on June 30, the parties agreed to meet the next morning to exchange and examine documents. Nevertheless, prior to the document exchange Weber departed Denver and left in charge Dykers, a Minerals employee who is not an attorney. Weber did not explain to the judge or to counsel for the Secretary his intention to depart before the document examination took place. At the very least, we find it surprising that an attorney would allow documents to be produced to opposing counsel without first approving their release. Furthermore, Weber failed to give Dykers any instructions regarding the actions that should have been taken if a dispute arose. Given Weber's abdication of his adversarial responsibility, we cannot find wrongdoing in Barkley's examination of the produced documents.

We do not agree, however, with Judge Boltz's conclusion that there was no impropriety in Barkley's taking and refusing to return the diaries of the subpoenaed employees. A subpoena duces tecum does not allow retention of the originals of subpoenaed documents without permission. Whatever may be argued about the scope of the subpoena or the agreement of the parties, it is clear that Minerals did not agree to give the originals of the diaries to MSHA. In fact, the record supports the opposite conclusion. Minerals emphatically requested their return and the request should have been honored. Barkley was without authority to take and withhold the diaries and his actions are extremely troubling. Notwithstanding this conclusion, we do not perceive any fatal prejudice to Minerals' case on the merits in this instance as a result of Barkley's actions. In finding a violation, Judge Carlson noted that he relied on other unrebutted evidence and that the diary entries were too vague to be used. 5 FMSHRC at 676 n. 3.

D. Minerals' request for sanctions

We have detailed our serious concern regarding several aspects of the conduct of certain Department of Labor employees. Most troubling are Barkley's taking and retention of documents belonging to the operator, his misrepresentation to the judge as to the reason that he was excusing witnesses, and Thompson's abuse of authority, his middle-of-the-night entry into mine offices, and his taking mine documents. The record also indicates that Weber's performance as Minerals' counsel significantly contributed to the disruptions and in fact to some of the allegations of improprieties now raised by Minerals. We have noted further the procedural mismanagement of some aspects of this case by the Commission judge.

Minerals supports its arguments that sanctions should be imposed by relying primarily on criminal cases involving the Fourth and Fifth Amendments involving defendants' motions to exclude improperly obtained evidence, and on a series of cases involving defendants' attempts to have criminal indictments dismissed because of alleged prosecutorial

misconduct during grand jury investigations. We do not find these cases controlling. As we have emphasized, Judge Carlson's decision on the merits rests on adequate, independent grounds apart from the drawings taken from the mine and the improperly retained diaries. Furthermore, even courts dealing with the possible dismissal of criminal indictments have required a showing that the alleged prosecutorial misconduct has materially prejudiced the defendant's case. See, e.g., Laughlin v. Unites States, 385 F.2d 287, 292 (D.C. Cir. 1967). As explained above, we cannot conclude that the objectionable conduct of the Secretary's representatives prejudiced Minerals' case on the merits, or affected the substantive outcome of the citation and withdrawal order contest. We believe, however, that the noted serious deficiencies in the performance of the Secretary's personnel must be addressed. We find it appropriate in this instance to address those deficiencies by strongly urging the Secretary of Labor to review the noted objectionable performance by his employees and to take appropriate remedial action to ensure that such conduct by his representatives will not be repeated.

Accordingly, under all the circumstances of this case, we conclude that sanctions or disciplinary proceedings before the Commission are inappropriate.

III.

Conclusion

For the reasons set forth herein, we decline to impose the severe sanction of dismissal sought by Minerals. We affirm Judge Carlson's decision, and on the bases discussed above, we affirm Judge Boltz's order denying sanctions against the Secretary. 6/

Richard V. Backley, Commissioner

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

6/ 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 in this matter.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

April 18, 1986

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. WEVA 82-152-R WEVA 82-369
WESTMORELAND COAL COMPANY	:	

BEFORE: Backley, Doyle, Lastowka, and Nelson, Commissioners

DECISION

BY THE COMMISSION:

This case arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982)("Mine Act"). The issue is whether a Commission administrative law judge abused his discretion by failing to reduce, in his decision on remand, the civil penalty imposed for a violation of 30 C.F.R. § 75.202, a mandatory roof control standard. For the following reasons we conclude that the judge's penalty assessment constitutes an abuse of discretion.

The complete factual background of this case is set forth in our decision remanding this matter to the judge. 7 FMSHRC 1338 (September 1985). It is sufficient to note here that in his initial decision the judge found that the foreman for Westmoreland Coal Company ("Westmoreland") had knowledge of the violative condition but failed to correct it "through indifference or lack of reasonable care." The judge concluded that the violation was the result of the "unwarrantable failure of the operator to comply with the law and ... of gross negligence." 5 FMSHRC 132, 137 (January 1983)(ALJ). Considering this negligence finding, and the other statutory civil penalty criteria set forth in section 110(i) of the Mine Act, 30 U.S.C. § 820(i), the judge assessed a civil penalty of $8,000. 5 FMSHRC at 137. The Commission granted Westmoreland's petition for review.

On review, the Commission found that the judge's conclusion that the violation was the result of Westmoreland's "unwarrantable failure" not only "lack[ed] substantial support in the record" but was "contrary to the overwhelming weight of the evidence." 7 FMSHRC at 1342. The Commission stated that it "[could] not conclude that the foreman's actions in allowing the work to proceed represent[ed] the degree of aggravated conduct intended to constitute an unwarrantable failure under the Act." The Commission also stated that "the violation ... did not result from Westmoreland's indifference, willful intent, or serious lack of reasonable care." 7 FMSHRC at 1342. Consequently, the Commission reversed the judge's unwarrantable failure finding. The Commission concluded, "[b]ecause the judge's penalty assessment rested in part on his determination that the foreman acted with indifference and without reasonable care, the case is remanded to the judge for reconsideration of the amount of civil penalty in light of our decision." 7 FMSHRC at 1343.

On remand, the judge acknowledged that the case was before him for the purpose of reconsideration of the amount of the civil penalty in light of the Commission's finding that the violation was not the result of Westmoreland's "indifference, willful intent, or serious lack of reasonable care." 7 FMSHRC at 1647 (October 1985)(ALJ). The judge revised his original finding that the violation was caused by Westmoreland's "gross negligence" and concluded instead that Westmoreland was negligent. 7 FMSHRC at 1648. In spite of his conclusion that the degree of Westmoreland's lack of care was less than originally found, the judge again assessed a civil penalty of $8,000.

A Commission judge is accorded broad discretion in assessing civil penalties under the Mine Act. This exercise of discretion, however, is not unbounded. The penalty must reflect proper consideration of the statutory penalty criteria. Sellersburg Stone Co., 5 FMSHRC 287, 290-94 (March 1983), aff'd 736 F.2d 1147 (7th Cir. 1984). When a judge's penalty assessment is at issue on review, the Commission must determine whether the penalty is supported by substantial evidence and whether it is consistent with the statutory penalty criteria. Pyro Mining Co., 6 FMSHRC 2089, 2091 (September 1984). When the Commission, using this standard, has concluded that the penalties assessed do not properly reflect the penalty criteria, it has assessed new penalties as warranted by the record. In some instances the resulting assessments have been higher, e.g., Pyro Mining Co., supra, in others, the assessments have been lower, e.g., United States Steel Corp., 6 FMSHRC 1423 (June 1984). In all instances, the objectives have been the same: fidelity to the record and effectuation of the enforcement scheme of the Act.

Here, the judge modified his prior finding of "gross negligence" in light of our conclusion that the violation did not result from Westmoreland's "indifference, willful intent, or serious lack of reasonable care." His determination of an appropriate penalty to be assessed necessarily should have been affected by his finding of a lesser degree of negligence. Instead, the judge imposed the same penalty without change. The judge's failure to modify the penalty in accordance with his modified findings is unsupportable and an abuse of discretion.

In considering the other statutory penalty criteria, the judge found that the violation reflected a high degree of gravity, that Westmoreland was a large operator, that Westmoreland had a fairly substantial history of previous violations, and that Westmoreland's ability to continue in business would not be affected by the penalty imposed. 5 FMSHRC at 137. These findings, which were not disturbed on remand, are supported by substantial evidence. Based upon these findings, and upon the finding of a lesser degree of negligence, we conclude that a civil penalty of $5,000 is appropriate.

Finally, the violation of 30 C.F.R. § 75.202 was alleged in an order issued under section 104(d)(1) of the Act. 30 U.S.C. § 814(d)(1). Westmoreland requests that we modify the section 104(d)(1) order to a citation issued under section 104(a), 30 U.S.C. § 814(a), because of our previous reversal of the judge's finding of "unwarrantable failure." 7 FMSHRC at 1342. We conclude that the requested modification is appropriate. See Consolidation Coal Co., 4 FMSHRC 1791, 1794 (October 1980).

Accordingly, we vacate the judge's assessment of a penalty of $8,000 for the violation of 30 C.F.R. § 75.202 and assess a civil penalty of $5,000. Further, we modify the subject order issued under section 104(d)(1) to a citation issued under section 104(a). 1/

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

1/ Chairman Ford did not participate in the consideration or disposition of this case.

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ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

333 W. COLFAX AVENUE, SUITE 400
DENVER, COLORADO 80204 April 1, 1986

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. CENT 85-20-M A.C. No. 39-00055-05537
v.	:	Homestake Mine
HOMESTAKE MINING COMPANY, Respondent	:	

DECISION

Appearances: Margaret Miller, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
Robert A. Amundson, Esq., Amundson, Fuller & Delaney, Lead, South Dakota, for Respondent.

Before: Judge Lasher

This matter arose upon the filing of a Petition for Assessment of Civil Penalty by Petitioner on February 13, 1985, pursuant to Section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. Section 820(a) (herein the Act). Petitioner seeks assessment of a penalty against Respondent for violation of 30 C.F.R. 57.9-16 1/ which was described in Citation No. 2097700 issued August 29, 1984, as follows:

> "On the 2150 level the main haulage line was not being maintained in a safe condition the rail was loose with the track spikes being pulled loose, fish plates loose at the joints and track ties rotted creating a safety hazard to persons who must use the main line to haul the man trip, hauling personal (sic) to and from work places. Heavy equipment travels the line hauling ore and materials to and from work areas a person could be seriously injured should the haulage motor derail."

1/ This regulation provides:

> "Roadbeds, rails, joints, switches, frogs, and other trackage elements on railroads subject to the control of the operator shall be designed, installed and maintained in a safe manner consistent with the speed and type of haulage."

On August 31, 1984, the Citation was modified to read:

> "On the 2150 level main haulage line a section of railroad from the stairway entranance (sic) to the Green light at the curve and another area from H2 fan to the 34a Sill x-cut was not being properly maintained in a safe condition. The rail and rail spikes was pulled loose from the track ties Fish plate Bolts loose, track ties rotted to a point that spikes would not hold and in some areas the rail was starting to lean to one side. This condition creates a safety hazard for the motor person who must travel this haulage line to haul personal (sic) to and from work places on the mantrip. Deliver materials and supplies to and from work places. The motorperson must also haul with a 6 ton motor 6-10 ore cars with a capacity of 3 tons each. A train derailment could cause serious injury to persons who must travel this rail line many times during a shift."

The Citation, issued under Section 104(a) of the Act, also charged that the violation was "significant and substantial" (herein "S & S").

In Secretary v. Consolidation Coal Company, 6 FMSHRC 189 (1984), the Commission held that S & S findings may be made in connection with a citation issued under Section 104(a) of the Act. Considering this ruling in conjunction with U.S. Steel Mining Company, 6 FMSHRC 1834 (1984), where the mine operator was allowed to contest S & S findings entered on Section 104(d)(1) citations in a penalty case, it is concluded that S & S findings contained in a Section 104(a) Citation similarly are properly reviewable in this penalty proceeding.

The matter came on for hearing in Lead, South Dakota on November 13, 1985. Both parties were ably represented.

The Secretary contends that Respondent did not maintain the track in question in a safe manner, that the track in question was deteriorating and in need of repair, that Respondent should have known that the track was not being properly maintained and was unsafe, that such violation was S & S, and that the penalty assessment of $276.00 originally proposed administratively by the Secretary should be assessed.

Respondent contends that the safety standard cited, 30 C.F.R. 15.9-16 is unconstitutionally vague, i.e., that it does not give a mine operator fair notice of what is required to maintain track in a safe manner consistent with speed and type of haulage. Respondent also maintains that the Secretary failed to prove a violation, and in the alternative if a violation is established that Respondent was not negligent in its commission, that the violation was not S & S , and that the gravity thereof was slight.

The pertinent factual events commenced on August 29, 1984, when MSHA Inspector Jeran C. Sprague issued Citation No. 2097700 on a regular inspection of the Homestake Mine, during which he was accompanied by Fred Bichler, shift foreman. (Tr. 14, 209).

The track on the 2150 level of this underground mine-where the violation was observed by the Inspector-runs from one end of the level to the other for approximately one mile and is used for the transportation of men as well as materials (Tr. 15, 16, 60, 150). The Inspector felt that approximately 3000 feet of track was not being properly maintained and that 800 feet was in "bad repair". (Tr. 61, 170). There is approximately 400 miles of track in the entire mine (Tr. 91). However, only three levels were inspected on the day the Citation was issued.

On the inspection day the Inspector observed Granby ore-haulage cars on the track: these cars are approximately 7' long, 5' wide and 5' high, carry 3-5 tons of ore, and are pulled by 6-ton motors (locomotives)(Tr. 13, 16, 160, 174). In addition, the motors also pull man cars which are used to transport 4 to 8 miners to and from their workplace at the beginning and end of the shift (Tr. 18-21, 65, 150, 198, 204, 210, 327). Both ore-haulage cars and man cars move on iron wheels and both are braked by the motor (Tr. 19, 79). The length of track described in the Citation was "zero-grade", that is, level (Tr. 175-176).

Reliable and probative evidence of record established that the following defects in the track existed at the time of Inspector Sprague's inspection:

1. Loose rail (Tr. 24, 162-164, 188, Ex. P-1). At one area (near the H-2 fan) the track was spread more than 19 inches which could cause derailment (Tr. 187, 188, 337).

2. An area along a wood track tie where the tie had been moving back and forth (Tr. 26; Ex. P-2).

3. An area of track where a track spike was "pulled out" and was not holding the rail in place on one side and where a track spike on the opposite side of the rail was missing (Tr. 27, 28; Ex. P-3).

4. Areas of track where the wood track ties were rotted and where track spikes were entirely missing on one track tie (Tr. 28, 29, 84, 85, 187, 188; Ex. P-4). In abating the violative condition of the track, Respondent's track repairman, Dennis Willuweit, replaced 25 to 35 ties out of a possible 480 present in the 1000 foot section he worked on (Tr. 154, 172, 173, 201).

5. An area of track where the rail was misaligned because the fishplates [2]/ intended to hold two joint sections together were loose (Tr. 29, 81, 133, 134; Ex. P-5).

6. A fishplate - broken in the middle - at an area of track where two sections of rail were joined together with a deteriorated flange used to spike the rail (Tr. 30, 184, 185, 231; Ex. P-6). As to this condition, Respondent's witness, track repairman Dennis Willuweit, conceded that the "worst place" a fishplate could break was in the middle and that "with a fishplate broken right in the middle, the joint could move enough to let a car derail" (Tr. 184-186).

7. An area of track where the top flange of a piece of rail was completely worn away and could break any time (Tr. 31, 278-283; Ex. P-7).

8. An area of track where the bolts holding a fishplate were loose and also deteriorated to a point that the threads were "gone" so that the bolts could not be tightened (Tr. 31; Ex. P-8).

9. Rust, rotted ties, loose spikes and deterioration were prevalent in various of the track areas mentioned above (Tr. 32, 73, 91, 94, 95, 185, 198-200, 215, 226, 233, 234). Inspector Sprague summed up the general condition of the track in question as follows:

"For the most part, there was either a loose section; spikes missing; ties rotted out. There had been some areas on the far end that had been repaired, some new installation" (Tr. 32, 33).

It is concluded from considerable probative evidence of record showing the general condition of the track that it was not being properly maintained and that work was not being done to keep the track in a safe, manner (Tr. 33, 35, 51, 66, 67, 96, 97, 212, 213, 226, 236). This situation had been allowed to continue "for quite some time" (Tr. 35). Mine management knew or should have known of the defective conditions since they travelled the area daily and the condition had been reported to them (Tr. 47-49, 213, 220, 274). Also, as part of his inspection, Inspector Sprague talked to a motorman and other miners who indicated that the track had been in such condition "for quite some time". The motorman reported to Inspector Sprague that he

---

2/ A fishplate is a piece of angle iron approximately 3/4" thick, 18" long and 1-1/2" wide which has four bolt holes. Fishplates, who purpose is to keep rail in alignment so that the joints don't separate or move from side to side, are bolted to each side of a rail (Tr. 30, 63, 270).

was being derailed on a daily basis, "sometimes 3 and 4 times a shift" and that he had not seen a trackman (track repairman) on the 2150 level in months (Tr. 35-38).

Normally derailments result because of the condition of the track (Tr. 82, 83, 206, 292). Inspector Sprague gave this explanation of the cause of derailments:

> "Just the normal condition of the track, with the fishplates being broken, not holding the joints together; no track spikes in the ties; the rotted condition of ties, which would, in no way, hold the rail in position, and it could very easily cause misalignment of the joints which could cause derailment." (Tr. 41).

Derailments are a relatively common occurrence at this mine (Tr. 38, 82, 205, 261, 291). Usually, when a derailment occurs, the equipment simply drops off the track (Tr. 83, 188, 283). According to the Inspector, if the motor were to derail it would probably stop instantly. On the other hand, if an ore car were to derail, the motorman might travel half a mile before becoming aware of it (Tr. 84). In this connection it should also be noted that there were 3 curves in the track on the 2150 level which the motorman could not see around (Tr. 191, 205).

The track in question is 18-gauge, that is, the distance between the rails is 18 inches (Tr. 22, 79, 155). The rails themselves are 20 to 25 feet in length and are attached by spikes to wood ties placed at 2-foot intervals along the track (Tr. 30, 41, 61, 62, 88, 285). Track gauge must spread to 19-20 inches before derailment occurs, i.e., the equipment drops between the rails (Tr. 155-158, 282); derailment can also occur if the rails move inward to a gauge of 17 inches. Should this happen, the equipment would drop off to the outside of the rail (Tr. 158, 197).

As indicated heretofore the hazard posed by the track defects described by the Inspector - the existence of which were for the most part admitted by Respondent - was derailment of (1) the motor (locomotive), (2) the trailing haulage cars, and/or (3) the trailing man cars (Tr. 38, 39, 41, 42, 86, 292). Derailments usually occur because of such track conditions (Tr. 82, 83, 206, 292, 294, 295), and it was very likely that such derailments (accidents) would occur (Tr. 38, 41, 52, 106. 179, 187-188, 203, 205-206, 325, 334).

Track conditions and defects which cause derailments are unsafe (Tr. 69, 114, 204-205, 236, 337-339, 343). Thus, should a derailment occur when miners were being hauled on a man car (mantrip) the miners could have been injured from being thrown around in the man car, from being thrown out of the man car, from

being pinched between the man car and the rib, and/or being run over (Tr. 41-43, 110-112, 236, 316-317). In addition, similar injuries could occur to a motorman while engaged in rerailing derailed equipment (Tr. 43-46, 87, 109, 110) and to persons standing or walking along the track at the time of a derailment (Tr. 45, 113, 132, 195, 204). Such injuries could be serious or even fatal (Tr. 46, 111-113, 314-317) and were reasonably likely to occur as a result of a derailment (Ct. Exs. 1 and 2; Tr. 46, 132, 161-162, 198-200, 204-206, 240-244, 333-334, 347-348).

30 C.F.R. § 57.9-16 mandates that the track be maintained in a safe manner consistent with speed of haulage. The estimates of various witnesses and sources had considerable range. Although at the hearing Respondent's witnesses testified that Respondent's "policy" was that the motormen would not travel faster than-or should slow down to (a) 2 mph (Tr. 151) or (b) 2 to 3 mph (Tr. 178), or (c) 4 mph (Tr. 179, 325), in correspondence to the Secretary's counsel and to the undersigned prior to the hearing (Ct. Exs. 1 and 2), Respondent's Director of Safety and Health indicated that the following was one of the issues upon which it built its case:

> "... Speed of travel of the locomotive and cars would never exceed 10 miles per hour with normal speed being 5-7 miles per hour."

Even accepting Respondent's evidence at the hearing that the speed was 2, 3, or 4 mph, and I do not so find, the record establihes that the speed actually was left to the judgment or discretion of the motorman who was supposed to slow down when men were seen walking along the track or where track defects were noted (Tr. 179, 203). It is clear that there were curves in the 2150 level track where the motorman could not see what was ahead (Tr. 191, 204-205). In its post-hearing brief (p. 3) Respondent characterizes the speed at from 2-10 mph, and concedes that the speed could be up to 10 mph. (Ct. Exs. 1 and 2; Tr. 116, 242). Finally, Inspector Sprague guessed the speed at 6-7 mph (Tr. 22, 71), and the Secretary's expert witness, Michael Sheridan, based his opinion on a speed of 5-7 mph (Tr. 117). This latter speed is well-supported in the evidence and provides a reasonable foundation for the opinions and findings based thereon, particularly those of the Secretary's witnesses relating to the question of the safety of the 2150 level track. Further, in the background of the entire record, the opinion of Inspector Sprague as to the bearing of the speed factor on the question of track safety is persuasive:

> "It doesn't really matter what speed you're going. If the rail is in a deteriorating condition, it could fall off at any time. I don't think speed really has a bearing on it, as far as whether you go off the track or how many could go off the track." (Tr. 97).

The speed factor is found less decisive than the regulation's second requirement that the track be maintained in a safe manner consistent with "type of haulage". In this connection, evaluation of the testimony of Respondent's witnesses reflects that the quality of track maintenance varied throughout the mine and that the track in areas of the mine where there was greater production were better maintained (Tr. 179, 198-200 203, 273-274, 292, 319-320) than the track on the 2150 level and areas where there was less production. The testimony of Mr. Willuweit in this connection is significant:

> "JUDGE LASHER: Do you have an opinion of whether or not the 2150 section--area of track that you performed these repairs on after the citation was issued--whether that at that time, was any different from most of the other track areas of the mine?
>
> THE WITNESS: It was was-- it was a lot different than areas that are used for mass haulage, where they have to move a lot of rock, but it was similar to a lot of other areas of the mine, where your use is minimal.
>
> JUDGE LASHER: Okay. You're saying that, at this time, this area of this track was used for what?
>
> THE WITNESS: Basically, it was used to haul four to eight men into their work area and out, and haul a few supplies to them and haul a little bit of rock occasionally, and that was it.
>
> X X X X X X X X X X X X
>
> JUDGE LASHER: So are you saying it was in a state of higher repair than the areas that haul the ore? - or less repair?
>
> THE WITNESS: Less repair.
>
> JUDGE LASHER: And why would that be?
>
> X X X X X X X X X X X X
>
> THE WITNESS: It's not carrying the traffic. And if you have a timber track off, and you're going at a reasonable speed, basically it is--it is an in inconvenience. Now, in an area where you are trying to get some work done and you're trying to move rock and you have wrecked cars, or derailments, then they start costing you money because then they are affecting production; they're not affecting just one man. Instead of moving 300 to 400 ton of rock

that day, if they have derailments they may only move half the rock, and that affects the output of the rock at the mine, so the levels where they have--where they move a lot of rock, or where they move a lot of men, they move a lot of supplies, they have to keep that in a lot better condition than you have to keep the levels where they just don't use the track much." (Tr. 198-200).

The 1977 Mine Act is remedial legislation intended to promote the safety of miners. It would seem that the regulation's provision that track be maintained in a safe manner consistent with "type of haulage" if anything contemplates a higher standard of maintenance on track where miners primarily are being transported - such as the 2150 level - rather than the lesser standard evidenced in this record. It is concluded on the basis of the various findings above that the rails and track elements on the 2150 level were not maintained in a safe manner consistent with the speed and type of haulage and that the violation described in the Citation did occur.

We next take up Respondent's contention that the cited regulation is unconstitutionally vague and fails to give the mine operator "fair notice" of what is required to maintain track "in a safe manner consistent with the speed and type of haulage". Such is found to lack merit and is rejected. Safety standards such as 30 C.F.R. § 57.9-16 cannot be considered in a vacuum. Generally when a safety regulation is examined for meeting due process certainty requirements, it must be looked at "in light of the conduct to which it is applied." Ray Evers Welding Co. v. OSHRC, 625 F.2d 726, 732 (6th Cir. 1980). General terms such as "unsafe" or "dangerous" appear frequently in federal safety and health standards. This approach has been recognized as necessary where narrower terms would be too restrictive. Standards, that is to say, must often be made "simple and brief in order to be broadly adaptable to myriad circumstances." Kerr McGee Corporation, 3 FMSHRC 2496 (1981). In Alabama By-Products Corporation, 4 FMSHRC 2128 (1982) the issue was whether the Secretary could enforce a similarly worded standard requiring machinery to be kept in "safe operating condition." The Commission established the following test:

> [I]n deciding whether machinery or equipment is in safe or unsafe operating condition, we conclude that the alleged violative condition is appropriately measured against the standard of whether a reasonably prudent person familiar with the factual circumstances surrounding the allegedly hazardous condition, including any facts peculiar to the mining industry, would recognize a hazard warranting corrective action within the purview of the applicable regulation.

Applying this test to the situation here, it is clear that a reasonably prudent person familiar with the circumstances extant on the 2150 level, including any facts peculiar to the mining industry, would have recognized a hazard warranting corrective action. The track defects were numerous. At least two of the defects documented by the Inspector were admitted by Respondent's witnesses to have been susceptible of causing a derailment in and of themselves (Tr. 184-186, 187, 188, 231). The evidence of general deterioration of the area of track involved and lack of maintenance thereon was substantial. A considerable body of reliable evidence in this record demonstrates the potential of such track conditions, singly or in combination, to cause derailments, and of derailments to cause significant injuries or even fatalities. The Secretary met its burden of establishing a nexus between the widespread track problems and the effect such would have on the safe operation of equipment on the track. As the Commission has noted in other contexts, and contrary to the general thrust of Respondent's argument, the cited regulation, requiring maintenance of a mine part in a safe manner, is aimed at the elimination of potential dangers before they actually become present dangers. Here, some of the track conditions were shown to have already become present dangers. See Secretary v. Pittsburg & Midway Coal Mining Company, 8 FMSHRC 4, 6 (1986). Respondent's vagueness challenge is rejected.

The final question raised by Respondent is whether the subject Citation cited a violation which was "of such nature as could significantly and substantially contribute to the cause and effect of a ... mine safety or health hazard" as that phrase is used in the Act.

The Commission has held that a violation is properly designated S & S "if, based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (April 1981). In Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984), the Commission explained:

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

The Commission subsequently explained that the third element of the Mathies formula "requires that the Secretary establish a

reasonable likelihood that the hazard contributed to will result in an event in which there is an injury," U.S. Steel Mining Co., 6 FMSHRC 1834, 1836 (August 1984), and also emphasized that, in accordance with the language of section 104(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be S & S. See 6 FMSHRC at 1836.

It has previously been determined that a violation occurred, that the failure to maintain the track in a safe manner contributed to the cause and effect of a safety hazard, i.e., a derailment accident, that it was likely that such derailments would result in injuries, and that there was at least a reasonable likelihood that such injuries would be of a reasonably serious nature or fatal. The record indicates several injuries, including a severed finger, which resulted, directly or indirectly, from derailments in the past. The fact that more serious injuries - or fatalities - have so far been avoided is fortunate, but not determinative. Secretary v. Ozark Mahoning Company, 8 FMSHRC _____, Docket No. LAKE 84-96-M, (decided February 28, 1986). See also Secretary v. U.S. Steel Mining Co., Inc., 7 FMSHRC 327, 329 (1985). It is concluded that the violation was properly designated S & S.

There remains the determination of an appropriate penalty. Based on stipulations of record, it is found that the Respondent is a large gold mine operator (Tr. 221) with a payroll of approximately 1,350 employees at its mine near Lead, South Dakota; that a reasonable penalty assessment will not jeopardize its ability to continue in business; and that upon notification of the violation it proceeded in good faith to promptly abate the violative conditions cited (Tr. 8, 9, 93). The Secretary's evidence with respect to Respondent's history of violations reflects 253 violations during the 2-year period prior to the issuance of the subject citation. Absent further explication or characterization thereof in the record, and in view of the mine's size it is concluded that such is a moderate history of prior violations and that such mandatory penalty assessment criterion should provide no basis for increasing the penalty amount otherwise warranted. Based on the findings specified above it is further found that (1) this was a relatively serious violation and (2) that Respondent's management was aware of the defective condition of the track at the 2150 level and failed to exercise reasonable care in not recognizing the hazards posed thereby and in not maintaining the track in a safe manner. This constitutes ordinary negligence.

After weighing these various assessment considerations and it appearing that Respondent's belief that the various defective track conditions did not amount to unsafe track was sincerely advanced, a penalty of $300.00 is found to be appropriate.

ORDER

Citation No. 2097700 is affirmed in all respects. Respondent shall pay the Secretary of Labor within 30 days from the date hereof the sum of $300.00 as and for a civil penalty.

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

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/blc

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

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

April 2, 1986

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 84-134-M
Petitioner	:	A.C. No. 48-00155-05502 K28
	:	
v.	:	Docket No. WEST 85-170-M
	:	A.C. No. 48-00155-05503 A K 28
BIG HORN CONSTRUCTION CO.,	:	
BERNARD BANKS,	:	Docket No. WEST 85-171-M
BRUCE PARKER,	:	A.C. No. 48-00155-05504 A K28
JAMES WAGAMAN,	:	
Respondents	:	Docket No. WEST 85-172-M
	:	A.C. No. 48-00155-05505 A K28
	:	(Consolidated)
	:	Alchem Mine

DECISION APPROVING SETTLEMENT

Before: Judge Morris

These consolidated cases are civil penalty proceedings initiated by the petitioner against the respondents pursuant to Section 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820.

Prior to a hearing the petitioner filed a motion seeking approval of a settlement agreement entered into by the parties.

1. The agreement reflects that at the time of the alleged violations respondent Big Horn Construction Company (Big Horn) was the corporate contractor-operator of the Alchem Mine, a trona mine in Sweetwater County, Wyoming. Further, respondent Bernard Banks (Banks) was acting as master mechanic at the mine and as agent for Big Horn; respondent Bruce Parker (Parker) was acting as foreman at the mine and as an agent for Big Horn; and respondent James Wagaman (Wagaman) was acting as project manager at the mine and as an agent for Big Horn.

2. In WEST 84-134-M respondent Big Horn is charged under section 110(a) of the Act, in Citation No. 2083234 and Order No. 2083235, with violating the mandatory safety standard published at 30 C.F.R. § 57.14-36.

3. In WEST 85-170-M respondent Banks is charged under section 110(c) of the Act with knowingly authorizing, ordering, or carrying out the two foregoing violations as an agent of Big Horn.

4. In WEST 85-171-M respondent Parker is charged under section 110(c) of the Act with knowingly authorizing, ordering, or carrying out the same two violations as an agent of Big Horn.

5. In WEST 85-172-M respondent Wagaman is charged with knowingly authorizing, ordering, or carrying out the same two violations as an agent of Big Horn.

6. The citations, the original assessments and the proposed dispositions for the violations of 30 C.F.R. § 57.14-36 are as follows:

Respondent	Citation & Order Number	Assessment	Settlement
Big Horn	2083234	$ 800	$ 800
	2083235	1,000	1,000
Banks	2083234	500	375
	2083235	600	450
Parker	2083234	600	450
	2083235	700	525
Wagaman	2083234	700	525
	2083235	800	600

The proposed settlement constitutes a payment in full of the originally proposed civil penalties against Big Horn and a 25% reduction of the originally proposed civil penalties against the three individual respondents.

Discussion

In support of their proposed settlement the parties have submitted information relating to the statutory criteria for assessing civil penalties as set forth in 30 U.S.C. § 820(i).

I have reviewed the proposed settlement and I find it is reasonable as well as in the public interest. The agreement should be approved.

Accordingly, I enter the following:

ORDER

1. The settlement agreement is approved.

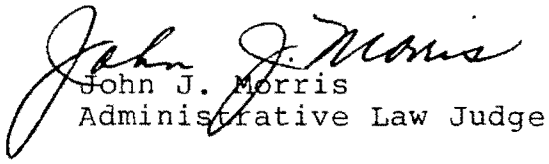
2. Citation No. 2083234 and Order No. 2083235, as modified, are affirmed as to the respondents in all consolidated cases.

3. In WEST 84-134-M the proposed civil penalty of $1,800 against respondent Big Horn is affirmed.

4. In WEST 85-170-M a civil penalty of $825 is assessed against respondent Bernard Banks.

5. In WEST 85-171-M a civil penalty of $975 is assessed against respondent Bruce Parker.

6. In WEST 85-172-M a civil penalty of $1,125 is assessed against respondent James Wagaman.



John J. Morris
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

April 3, 1986

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. LAKE 85-47
	:	A.C. No. 33-02929-03505
v.	:	North Mine
WILMOT MINING COMPANY, Respondent	:	

DECISION

Appearances: Patrick M. Zohn, Esq., Office of the Solicitor, U.S. Department of Labor, Cleveland, Ohio, for Petitioner;
Thomas Eddy, Esq., Eddy & Osterman, Pittsburgh, Pennsylvania, 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. § 801, et seq. 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. At all relevant times, Respondent operated a strip mine known as North Mine, which produced coal for sale or use in or substantially affecting interstate commerce.

2. On May 25, 1984, at about 2:00 p.m., a vehicle accident occurred in the 001-0 pit of the North Mine, resulting in the death of John D. Schrock, who was the pit foreman.

3. Schrock was operating a Terex 72-41 front-end loader on a pit road that had a 20% grade. As he was exiting the pit, he stopped about 100 feet from the pit bottom and began to back up, to make room for a descending coal truck. Schrock's vehicle rolled backward downhill, went off the road, struck the face of the highwall, and rolled over.

4. The vehicle did not have a rollover protective structure. The cab roof was crushed and Schrock was fatally injured when the vehicle rolled over.

5. The vehicle rolled downhill and went out of control because it did not have adequate brakes.

6. On May 24, 1984, the day before the accident, Schrock left his regular vehicle, a 510 International Harvester front-end loader, in the pit so that a part could be removed for repair. A short time before May 24, Schrock told the General Manager, Harold Bain, that he was having starter trouble on his 510 International Harvester. Bain said that whenever Schrock was ready, he would take the starter to Dover "and let the electrial people rebuild" it (Tr. 86). He also said that a 910 Caterpillar was available for Schrock's use and that, when the starter finally gave out, Schrock should "go to the garage, and get the 910 Caterpillar" (Tr. 86). However, Schrock decided to use another vehicle as a substitute, a Terex 72-41 front-end loader.

7. The Texex 72-41 loader was not equipped with a rollover protective structure. Schrock's regular vehicle, the 510 International Harvester, and the vehicle offered by Bain, the 910 Caterpillar, were both equipped with a rollover protective structure.

8. Schrock made several trips into the pit with the Terex 72-41 loader on May 25. At about 7:00 a.m., the pit crew went to their work areas. Schrock met Glen Shoup, a front-end loader operator, at the pit about 7:20 a.m., and discussed plans for loading coal from the pit. Shortly thereafter, Schrock used the Terex 72-41 loader in the pit to clear overburden from the coal seam so Shoup could load coal into coal trucks. Schrock left the pit about 10:00 a.m., using the Terex 72-41 loader for transportation, and drove to another part of the mine. He returned with the loader to continue the clearing process in the pit two other times, and left to travel to other areas of the mine.

9. On May 25, not very long before the accident, Bain saw Schrock with the Terex 72-41 loader near the road to the pit and gave him the employees' paychecks to deliver in the pit. He knew, or by the exercise of reasonable judgment should have known, that Schrock would use the Terex loader to go into the pit to deliver the checks. Bain also knew that the Terex 72-41 loader did not have a rollover protective structure.

10. About 1:45 p.m., Schrock drove the Terex 72-41 loader to the parking area near the entrance to the pit. He saw a mechanic, Ralph Hoover, and told him that he was having brake trouble. Hoover went to get tools to check the brakes, but Schrock drove off before Hoover could inspect the brakes. Schrock then drove into the pit, where the accident occurred about 2:00 p.m.

11. Bain was in charge of annual refresher training at the mine. However, he conducted no refresher training in 1982, in 1983, or in 1984 up to the date (May 26) when the Federal inspection team requested to see the annual refresher training records. Bain did not provide refresher training in those periods because in his opinion there were not enough miners to justify the expense of a training class.

12. Following an investigation of the fatal accident, Federal Mine Inspector Ray Marker issued three citations charging violations of mandatory safety standards:

a. Citation 2327028, charging a violation of 30 C.F.R. § 48.28 (requiring a minimum of 8 hours annual refresher training for each miner).

b. Citation 2327029 charging a violation of 30 C.F.R. § 77.403a(a) (requiring rollover protective structures on front-end loaders).

c. Citation 2327030, charging a violation of 30 C.F.R. § 77.1605(b) (requiring adequate brakes on mobile equipment).

13. Respondent is a small operator. At the time of the citations, Respondent employed 14 miners, producing about 300 tons of coal a day.

14. In each instance, Respondent made a good faith effort to achieve rapid compliance after a violation was charged in the above-cited citations.

15. In the 2-year period before the citations involved here, Respondent had three paid violations at the North Mine.

DISCUSSION WITH FURTHER FINDINGS

Citation 2327028

This citation alleges that Respondent's 14 miners did not receive the required 8 hours refresher training in 1982 or 1983, in violation of 30 C.F.R. § 48.28(a), which provides:

> Each miner shall receive a minimum of 8 hours of annual refresher training as prescribed in this section.

Respondent acknowledges that there was no refresher training of its miners in 1982 or 1983, but it argues, among other things, that:

(1) The regulation impliedly requires that a miner be employed at least 12 months to be covered by the annual refresher training provision.

(2) The Secretary has not shown that any of the 14 miners was a covered miner, i.e., not an exempt supervisor, and was employed at least 12 months without training.

This argument is not persuasive. The Secretary made a prima facie case of a violation by showing that 14 miners were employed at the time of the inspection, that the mine was a going concern in 1982 and 1983, and that no refresher training was conducted for any miner in 1982 or 1983. Respondent did not rebut this prima facie case by any evidence that there were no covered miners in 1982 or 1983 or that the required training was in fact conducted. Instead, Respondent's evidence showed that refresher training was not conducted for over two years because the General Manager was waiting for a larger employment body (than just a few miners) to justify, in his opinion, the expense of refresher training.

However, the training regulation requires annual training for "each miner," and does not provide an exemption based on the number of miners employed.

Respondent further argues that the regulation is unconstitutionally vague as to the type of refresher training required. This argument is rejected. Section 48.28(a) requires refresher training "prescribed in this section," and section 48.28(b) spells out in ample detail the type of refresher training required.

Finally, Respondent contends that the proposed penalty of $500 is "grossly excessive and unreasonable as a matter of law." This contention is apparently based upon the ground that Schrock, as a supervisor, was not subject to the refresher training requirement and, therefore, a violation of section 48.28(a) had no connection with the fatal accident. This argument does not render the violation nonserious. The requirements of section 48.28 are at the heart of a preventive safety and health program for miners. Failure to provide the required training (see section 48.28(b)) could jeopardize each miner and expose other persons to dangers that could result from a failure to follow the safety, health, and job rules involved in the refresher training. Respondent has demonstrated a negligent, lax, and wholly unjustified attitude toward this mandatory and important safety and health training requirement. Considering all of the six criteria for civil penalties in section 110(i) of the Act, I find that a penalty of $500 is appropriate for this violation.

Citation 2327029

This citation charges a violation of 30 C.F.R. § 77.403a(a), which requires that "All rubber-tired ... front-end loaders ... that are used in surface coal mines or the surface work areas of underground coal mines shall be provided with rollover protective structures ...."

It is undisputed that Schrock operated a front-end loader that had no ROPS, drove it into the pit, and was fatally injured when the vehicle rolled over and crushed him.

Respondent contends, among other things, that:

1. John Schrock willfully acted in contravention of his job responsibilities as mandated by the operator when he operated the Terex loader in the pit.

2. This act of malfeasance was unforseeable by the operator.

3. John Schrock risked injury only to himself by operating the Terex in the pit.

4. The operator was not negligent as a matter of law.

I find that the General Manager knew that Schrock was operating a vehicle without ROPS when he gave Schrock paychecks to be delivered in the pit and that he knew or should have known that it was probable that Schrock would drive that vehicle (the Terex) into the pit to deliver the paychecks. Respondent was therefore negligent in allowing Schrock to operate the Terex in the pit. Because of the gravity of this violation, I find that this conduct was gross negligence.

Apart from Bain's action in allowing Schrock to drive the Terex into the pit, Schrock himself was grossly negligent in driving the Terex into the pit. Because Schrock was a supervisor representing Respondent, his gross negligence is imputed to Respondent.

The gravity of this violation -- operating a front-end loader in a coal pit without ROPS -- is most serious because, in the event of an accident, a rollover could result in the death or serious injury of the vehicle driver.

Considering all of the six criteria in section 110(i) for assessing civil penalties, I find that a civil penalty of $2,000 is appropriate for this violation.

Citation 2327030

This citation charges a violation of 30 C.F.R. § 1605(b), which provides:

> Mobile equipment shall be equipped with adequate brakes, and all trucks and front-end loaders shall also be equipped with parking brakes.

About 15 minutes before the fatal accident, Schrock drove the Terex front-end loader into the equipment parking area and told a mechanic that he was having brake problems. However, before the mechanic could get his tools and come back to examine the brakes, Schrock drove off and entered the pit knowing he had defective brakes. A careful test of the brakes after the accident showed that the brakelines, wheel cylinder and hydraulic brake fluid lines were all intact, i.e., they had not leaked because of the accident, but the master cylinder and auxiliary brake cylinder were very low in brake fluid. When the brakes were tested on level ground, it took 36 feet to stop with the amount of fluid found after the accident, but when fluid was added to the normal level, it took only five to ten feet to stop. On a steep road, such as the pit road with a 20% grade, the Terex loader would have virtually no brakes at all. At the hearing, the General Manager, Bain, testified that Schrock's act of driving the Terex on the pit road, with effectively no brakes, was, in Bain's opinion, tantamount to suicide. Schrock knew that the brakes were defective, and told the mechanic about the problem. However, for some unknown reason he drove off before the mechanic could inspect the brakes.

I find that Schrock's act of driving the Terex into the pit with known defective brakes was an act of gross negligence which greatly endangered himself and other persons who might have been injured in an accident involving the Terex. Because of his supervisory position, Schrock's gross negligence is imputed to Respondent.

Considering all of the six criteria in section 110(i) for assessing penalties, I find that a civil penalty of $5,000 is appropriate for this violation.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction in this proceeding.

2. Respondent violated 30 C.F.R. § 48.28(a) as charged in Citation 2327028. Respondent is ASSESSED a civil penalty

of $500 for this violation.

3. Respondent violated 30 C.F.R. § 77.403a(a) as charged in Citation 2327029. Respondent is ASSESSED a civil penalty of $2,000 for this violation.

4. Respondent violated 30 C.F.R. § 77.1605(b) as charged in Citation 2327030. Respondent is ASSESSED a civil penalty of $5,000 for this violation.

ORDER

Respondent shall pay the above civil penalties in the total amount of $7,500 within 30 days of this Decision.

William Fauver
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

April 4, 1986

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. KENT 83-212 A.C. No. 15-10339-03516
v.	:	No. 11 Mine
PYRO MINING COMPANY, Respondent	:	

DECISION

Appearances: Carole M. Fernandez, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for Petitioner;
Steven P. Roby, Esq., Pyro Mining Company, Providence, Kentucky, for Respondent

Before: Judge Fauver

This case was remanded by the Sixth Circuit Court of Appeals for reconsideration of the civil penalty assessments and for findings on the factors whether the penalties assessed would affect Pyro's ability to continue in business and whether Pyro demonstrated good faith in attempting promptly to abate the violations.

I find from the record that, with regard to each of the charges, Respondent abated the violative condition promptly after receiving notice from MSHA. Therefore, there was good faith in attempting to achieve prompt abatement of the violations; I considered this fact in my original assessments.

I also find from the record that Respondent is a large operator, a fact which I considered in my original assessments. At the time of the citations, the No. 11 mine employed 288 miners and had a daily production of 3,500 tons. Pyro No. 11 is one of many mines owned by Pyro Mining Company.

Financial hardship or an adverse business impact of civil penalties is an affirmative defense, but such was not raised by Respondent. Respondent made no claim or argument, nor was there any evidence or indication, that any penalties assessed would have an adverse effect upon Pyro's ability to continue in business. Indeed, Respondent acknowledges the absense of such defense in its brief on remand, by stating that it "will not be submitted that Pyro Mining Company will be unable to continue in business or that it must cut back its operation by paying either the $7,000.00 originally proposed to be assessed or the $12,000.00 actually assessed" (Resp. Br. p.2).

In summary, I find that:

(1) Good faith was demonstrated by Respondent in attempting to achieve prompt abatement of each relevant violation after notice of the violation by MSHA.

(2) The civil penalties assessed in this case will not have an adverse effect on Respondent's ability to continue in business.

Both of the above facts are clear as a matter of record, and they were considered by me in reaching my original penalty assessments. The civil penalties assessed in my original decision as to the violations affirmed by the Sixth Circuit are therefore not changed in this decision on remand.

With respect to the remaining charge (Citation 2075924), for a violation of 30 C.F.R. § 75.1725(a), the Court reversed my finding of gross negligence and indicated that no negligence could be found since I found that Respondent was not negligent before the accident occurred.

Lack of negligence does not preclude a finding of a violation under this statute. I find that Respondent violated the cited standard as charged because a defective transformer was used before and after the accident, up to the time MSHA notified Respondent of the violation. In compliance with the Court's decision, I find that this violation was not due to

negligence by the operator. Inasmuch as negligence is one of the six statutory criteria for a civil penalty, the absence of negligence warrants a major reduction in my original penalty of $5,000 for this violation. In full consideration of the other five statutory criteria, including my original finding of high gravity of this violation, which contributed to a fatality, I find that a penalty of $1,000 is appropriate for this violation,

In summary, on remand I ASSESS Respondent the following civil penalties:

Citation	Civil Penalty
2075924	$1,000
2075231	7,000
2075232	5,000
2075233	200
	$13,200

ORDER

WHEREFORE IT IS ORDERED that Respondent shall pay the above-assessed civil penalties in the total amount of $13,200 within 30 days of this Decision.

William Fauver
William Fauver
Administrative Law Judge

Distribution:

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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

April 4, 1986

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEST 85-45-M A.C. No. 42-01760-05504
v.	:	Anderson Milling
ANDERSON MILLING COMPANY, Respondent	:	

DECISION

Appearances: James H. Barkley, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
Mr. J.L. Anderson, Anderson Milling Company, Woods Cross, Utah, pro se.

Before: Judge Morris

This case, heard under the provisions of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., (the Act), arose from an inspection of respondent's lime processing plant on September 7, 1984. On that date a federal mine inspector issued a citation for the violation of a safety regulation promulgated by the Secretary of Labor pursuant to the Act. The respondent, Anderson Milling Company, contested the Secretary's petition for the imposition of a civil penalty.

The case was heard in Salt Lake City, Utah on February 12, 1986 with both sides presenting evidence. Neither parties desired to file post-trial or other post-hearing submissions.

Issues

The issues are whether respondent violated the regulation; is so, what penalty is appropriate.

Citation 2358836

The above citation alleges respondent violated 30 C.F.R. § 56.14-1. The cited regulation provides as follows:

> § 56.14 Use of Equipment
>
> Guards
>
> 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.

Summary of the Case

On the day of his visit to the worksite Edward Cordovo Soto, a federal mine inspector, found that the head pulley of respondent's elevated conveyor should have been guarded. Pinch points were formed where the conveyor belt goes over the roller (Tr. 13-15). The pinch points were an arm's length, about 18 inches, from an adjacent platform that provided access to the area (Tr. 14, 15). The operator's employees indicated there had been some spills; in addition, wire and wood could have become entangled in the machinery (Tr. 14). Maintenance would also be performed in the area of the pinch points (Tr. 15, 16).

Witness Anderson, citing his answer filed in the case, testified that other federal inspectors had not considered the pinch points to be a problem (Tr. 30). In addition, this particular item had been previously approved for safety (Answer).

The company has been accident free.

This particular conveyor only runs six minutes out of 24 (Tr. 28, 31).

Discussion

The evidence establishes that the pinch points were exposed moving parts. Further, a workman doing maintenance would be within 18 inches of this hazard. He could become entangled in the pinch points. The potential for a fatality or serious injury existed in these circumstances.

Respondent also asserts that a previous MSHA inspector approved the lack of a guard at this location. In short, respondent invokes the doctrine of collateral estoppel against MSHA.

I have previously refused to apply the doctrine in similar circumstances. MSHA inspectors have different areas of ex-

pertise; another inspector may not believe this condition was a violation of the regulation. The doctrine of collateral estoppel cannot be invoked to deny miners the protection of the Mine Safety Act. Servtex Materials Company, 5 FMSHRC 1359 (1983); Kennecott Minerals Company, 6 FMSHRC 2023, 2028 (1984). See also the Commission decision concerning estoppel in King Knob Coal Company, Inc., 3 FMSHRC 1417 (1981).

The citation should be affirmed.

Determination of an Appropriate Penalty

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 shows that respondent is quite small with only one or two employees. It further shows that the operator's negligence is low inasmuch as the photographs indicates this location is not open and obvious. The operator established good faith in that it rapidly abated the violative condition. The company had four prior violations in the two-year period before September 6, 1984. The evidence further indicates that the company discontinued operations for a two month period beginning the week before the hearing. This was an annual downturn. The gravity of the violation is severe if an accident should occur.

On balance, I deem that a penalty of $25 is appropriate.

Conclusions of Law

Based on the entire record and the factual findings made in the narrative portion of this decision, the following conclusions of law are entered:

1. The Commission has jurisdiction to decide this case.

2. Respondent violated 30 C.F.R. § 56.14-1.

3. The contested citation should be affirmed and a penalty assessed therefor.

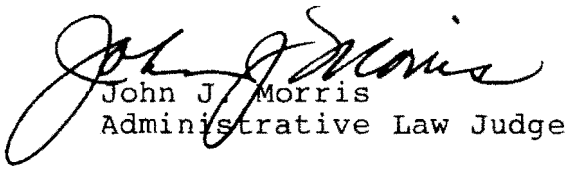
ORDER

Based on the foregoing facts and conclusions of law I enter the following order:

1. Citation 2358836 is affirmed.

2. A civil penalty of $25 is assessed.

3. Respondent is ordered to pay the sum of $25 to MSHA within 40 days of the date of this decision.



John J. Morris
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

April 7, 1986

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. PENN 86-43 A. C. No. 36-00917-03607
v.	:	Lucerne No. 6
HELVETIA COAL COMPANY, Respondent	:	

DECISION APPROVING SETTLEMENT

Before: Judge Merlin

The Secretary of Labor has moved for an approval of the settlement reached in this case with the operator. The original assessed penalty was for $900. The proposed settlement is for $600.

One violation is involved. On August 26, 1985, a Mine Safety and Health Administration inspector discovered that there were no self-rescuer devices stored in the No. 4 intake entry, the designated intake escapeway for this mine. The inspector issued Citation No. 2406371, charging a violation of 30 C.F.R. § 75.1101-23. Section 75.1101-23 provides, in part, that an operator submit a plan for emergency evacuation procedures with its local MSHA District Manager. Section 75.1714-2(e) provides that this plan for emergency evacuation procedures may assign an area where the self-rescuer devices are to be stored. This section applies when the self-rescuers are to be stored more than 25 feet away from where the miners are working. In this case the assigned area was the No. 4 intake entry. The self-rescuers had been stored, instead, in an area known as the "kitchen," where the miners took their breaks and stored their personal items. After the citation was issued, the self-rescuers were immediately moved to the proper intake escapeway.

The violation was serious. In an emergency, the miners might have difficulty locating their self-rescuers. However, the Solicitor advises that in this case the miners were aware that the self-rescuers were stored in the kitchen. The kitchen was in an air-intake area and it was the designated gathering point for miners in case of emergency before entering the intake escapeway. Accordingly, gravity is somewhat less than originally thought and the recommended settlement remains a substantial amount which accords with the statutory purposes. I also determine that the settlement is proper in light of the rest of the criteria in section 110(i) as represented by the Solicitor.

Accordingly, the proposed settlement is Approved and the operator is ORDERED TO PAY $600 within 30 days of this decision.

Paul Merlin
Chief Administrative Law Judge

Distribution:

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Michael H. Holland, Esq., UMWA, 900 15th Street, N.W., Washington, DC 20005 (Certified Mail)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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April 7, 1986

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), ON BEHALF OF EARL KENNEDY, LARRY COLLINS, Complainants	:	DISCRIMINATION PROCEEDING Docket No. VA 85-32-D MSHA Case No. NORT CD 84-7 Mine No. 1
v.	:	
RAVEN RED ASH COAL CORPORATION, Respondent	:	

DECISION

Appearances: Sheila K. Cronan, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for the Complainants;
Daniel R. Bieger, Esq., Copeland, Molinary & Bieger, Abingdon, Virginia, for the Respondent.

Before: Judge Koutras

Statement of the Case

This proceeding concerns a discrimination complaint filed by the complainants against the respondent pursuant to section 105(c) of the Federal Mine Safety and Health Act of 1977. The complainants contend that they were discharged from their employment with the respondent because of their purported refusal to work under unsupported roof. The respondent maintains that the complainants voluntarily quit their jobs and were not discharged for refusing to work under the alleged unsafe roof conditions. A hearing was held in Abingdon, Virginia, and while MSHA filed a posthearing brief, the respondent did not. I have considered MSHA's arguments, as well as the arguments made by the respondent's counsel during the hearing.

Issues

The issue presented in this case is whether or not the complainants were in fact discharged for refusing to work under unsafe conditions. Assuming a finding of a violation of section 105(c) of the Act, an additional issue is the amount of the civil penalty which should be imposed on the respondent for the violation.

Applicable Statutory and Regulatory Provisions

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

2. Sections 105(c)(1), (2) and (3) and 110(a) and (d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815(c)(1), (2) and (3).

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

Stipulations

The parties stipulated to the following:

1. The respondent was the owner and operator of the mine in question.

2. The respondent was a corporation under laws of the State of Virginia, and the mine was subject to the Act.

3. The complainant Larry Collins was employed by the respondent as a scoop operator from August 13 to August 23, 1984, and was a "miner" as that term is used in the Act.

4. The complainant Earl Kennedy was employed by the respondent as a scoop operator from August 14 to August 23, 1984, and was a "miner" as that term is used in the Act.

5. As of August 23, 1984, the daily coal production at the subject mine was 250 tons.

6. The mine is a non-union mine.

Complainants' Testimony and Evidence

Roger Lee Clevenger testified that he is employed by MSHA as a mine inspector and roof control specialist working out of the Grundy field office. He testified as to his background, experience, and duties and confirmed that he has

inspected the mine. He identified the mine as a drift mine with one working section, and stated that mining is done by the continuous miner method (Tr. 8-11).

Mr. Clevenger identified exhibit C-1 as the approved mine roof-control plan and he confirmed that he assisted the respondent in the formulation of the plan. He confirmed that an initial plan providing for full roof bolting for a full pillar recovery was first formulated for the mine in question in approximately April, 1983, and at that time the mine was operated by the Virginia-West Virginia Mining Company. The August, 1984, plan is fully applicable to the present owner-respondent, and the prior plan simply reflected ownership by Virginia-West Virginia. He confirmed that he updated the plan to reflect ownership by Raven Red Ash Coal Corporation, and that he conducted a mine inspection in connection with the plan on August 3, 1984, at which time the mine was operating with a continuous miner engaged in retreat mining (Tr. 11-14).

Mr. Clevenger explained the procedures involved in retreat pillar extraction, and he stated that once the mine is advanced on either 60 or 70 foot centers, the pillars are extracted on the retreat cycle in an effort to remove all of the coal. He identified exhibit C-2 as the applicable full pillar recovery portion of the current plan (Tr. 16). He explained the mining sequence required by the plan, and confirmed that Plan A, Number 1 is the applicable plan provision relevant to this case. He also confirmed that the different plan provisions which may be used depend on the direction the operator determines to use when approaching the pillars for removal (Tr. 14-20).

Mr. Clevenger explained the roof bolting procedures and sequences while cutting the pillar blocks and splits, and he confirmed that for each 16 feet of coal which is removed, at least 15 36-inch roof bolts on 4-foot centers should be installed, not exceeding 4 feet from the rib. The roof bolts are required to be installed in the areas marked 1, 2, 3, and 4 pursuant to the roof bolting patterns shown on page 12 of the plan and pillary recovery plan No. 3 (Tr. 20-23). He confirmed that roof support posts are not used because of the dimensions of the mining machine operating in the pillar splits (Tr. 23-23). He stated that no miners are ever permitted to advance inby the last permanent roof supports except to install temporary support (Tr. 24). He also confirmed that at no time are scoop operators ever permitted to work inby

permanent roof support (Tr. 25). If they do, they would expose themselves to the dangers and hazards of a roof fall since they would be under unsupported roof (Tr. 25).

Mr. Clevenger stated that in the course of a regular mine inspection, an inspector will check to determine whether or not roof bolts are installed in the pillar splits (Tr. 26). However, if the entire row of pillars have been removed, the top begins to fall and an inspector would not venture beyond the permanent supports to ascertain whether the bolts were installed. The roof would fall to the breaker posts, and an inspector could not readily observe from a safe distance whether or not the pillars had been bolted (Tr. 27).

On cross-examination, Mr. Clevenger testified that he last visited the mine on August 13, 1984, when the roof plan was changed from one mine company to the present one, and that he issued no citations. At the time of his prior visit in April, 1983, the mine was operated under the name of Virginia-West Virginia Mining Company (Tr. 28).

Mr. Clevenger stated that if pillar recovery work were taking place on August 23, 1984, the roof would be subject to fall at any time, and its likely that it would fall at any time, including the next day. However, he had no knowledge that the roof fell between August 23 and 24, and he did not know whether or not MSHA Inspector Ron Matney found any roof violations if he were at the mine on August 24 (Tr. 30-31).

Mr. Clevenger stated that in the event coal is removed from a pillar split without the installation of temporary roof support, a violation would occur. Temporary supports would include timbers or jacks, and if the coal is removed, either temporary or permanent roof support should be installed. If the coal which has been removed is more than 4 feet from the face back to the permanent roof support, the support should be installed to within 4 feet of the working face of the pillar split. If the pillar split is mined all the way through, at least 32 bolts should be installed in the pillar split to support the two cuts of coal (Tr. 34).

Mr. Clevenger stated that if additional cuts are to be taken in a pillar split after the temporary supports are installed, permanent supports must then be installed. If the cut is more than 5 feet inby the permanent support, it would be a violation not to install additional permanent support (Tr. 35). Mr. Clevenger confirmed that in pillar recovery work, planned roof falls are expected, and it is not unusual for a row of pillars to be removed one day, and for the roof

to fall the next (Tr. 35). He also confirmed that under the plan, temporary roof support must be installed within 5 minutes after a cut of coal has been removed, and the temporary support remains in place until such time as the permanent support is installed. In such a case, the only time anyone is permitted inby the temporary support would be to install permanent support (Tr. 36-37). Mr. Clevenger confirmed that he has no personal knowledge of the facts surrounding the complaints filed in this case (Tr. 37).

Larry Collins testified that he has been a miner since 1979, and that prior to August, 1984, he worked as a scoop operator at the Jewell Ridge Coal Company, but was laid off in 1983. He was hired by the respondent on August 14, 1984, and mine superintendent William Brewster hired him. He initially worked on the first shift, but then worked the second shift from 2:30 p.m. to 11:00 p.m. He was paid $70 a day, and his supervisor was section foreman Hubert Sweeney.

Mr. Collins stated that he received no training regarding roof control plans. He confirmed that he was employed by the respondent as a scoop operator and that the mine was engaged in pillar recovery when he was employed there. Referring to exhibit C-2, a part of the roof-control plan, he explained that "Plan A" was being followed and that the pillar split shown as 1, 3, 5 was mined all the way through without any roof bolting taking place. The miner would then mine all of the numbered wing cuts as shown by numbers 6-13 without any roof bolting taking place.

Mr. Collins stated that during his 2 weeks of employment with the respondent, or a total of 8 shifts, no roof bolts were ever installed on the pillar split where he was working, and he never observed the roof-bolting machine in operation. He explained that the continuous-mining machine was remotely controlled, and that as the scoop operator it was his job to follow the continuous miner in order to load out the coal and take it to the belt for transportation out of the mine. During this process he was required to be under unsupported roof, and at times he would be 12 to 8 feet inby and under unsupported roof, and that this was true for the entire 2 weeks of his employment with the respondent.

Mr. Collins stated that during his employment with the respondent some rocks fell on his scoop from some roof bolts and that he received "a few scratches." He reported this to Mr. Sweeney and Mr. Sweeney stated that "it don't look that bad."

Mr. Collins stated that on one occasion during his employment with the respondent, the lights on his scoop went out. He reported this to Mr. Sweeney and suggested to Mr. Sweeney that the scoop be taken out of service and repaired. Mr. Sweeney directed him to operate the scoop anyway, and that if he didn't, he would fire him. Although Mr. Collins' believed that operating the scoop without lights posed a hazard to the miners because he would be unable to see them, he followed Mr. Sweeney's order and continued to operate the scoop without lights.

Mr. Collins stated that on August 23, 1984, he and Mr. Earl Kennedy were working under bad top and that they were required to work beyond permanent supports where the roof had not been bolted. The roof was cracking and popping, and he told Mr. Kennedy that he was not going to take his scoop under the unsupported roof. He and Mr. Kennedy then spoke to Mr. Sweeney and informed him that they would no longer work under unsupported roof. Mr. Sweeney informed them that if they refused to continue to work they were no longer needed. At that point, Mr. Collins and Mr. Kennedy left the mine.

Mr. Collins stated that when he and Mr. Kennedy returned to the mine the next day to pick up their pay, an MSHA inspector who he did not know was at the mine office with mine superintendent William Brewster, and after discussing the matter with him, he and Mr. Kennedy decided to file a complaint the next day.

Mr. Collins stated that after he and Mr. Kennedy left the mine on August 23, 1984, the mine continued to operate until April, 1985, when it was closed. Mr. Collins confirmed that after he was fired by Mr. Sweeney, he attempted to find other employment, but could not find a job until April, 1985, when he went to work with the Coon Branch Construction Company where he is now employed and earning $80 a shift (Tr. 38-60).

On cross-examination, Mr. Collins stated that he previously worked at the mine in 1983 when it was operated by Mr. Dave Jordan under the corporate name of Virginia-West Virginia Coal Company. He was employed for 3 or 4 weeks as a scoop operator but voluntarily quit.

Mr. Collins confirmed that he never saw or read the respondent's roof-control plan. He also confirmed that while operating his scoop behind the continuous-mining machine his

scoop batteries would be under unsupported roof, and since he was positioned ahead of the batteries, he too would be under unsupported roof.

Mr. Collins stated that he was not aware of any roof falls in the mine on August 23 or August 24, 1984, and that the incident concerning the lack of lights on his scoop occurred on the third day of his employment at the mine.

In response to further questions, Mr. Collins stated that prior to his present employment with Coon Branch Construction, he worked for 2 weeks with the Bartlett Tree Trimming Company earing $4 an hour. He confirmed that he received no state unemployment benefits because he had used up all of his eligibility prior to his employment with the respondent.

Mr. Collins reiterated that during his employment with the respondent the entire coal pillars would be mined without any roof bolts being installed, and it was his view that this was a common practice. He confirmed that he never filed any safety complaints concerning this practice (Tr. 60-80).

Earl Kennedy testified that he was hired to work at the respondent's mine by Mr. William Brewster, the mine superintendent. He was hired on August 13, 1984, as a second shift scoop operator, and was paid $70 a shift. His supervisor was foreman Hubert Sweeney, and his last day of employment was August 23, 1984.

Mr. Kennedy stated that during his employment with the respondent he was engaged in pillar retrieval work splitting pillar blocks of low coal. He identified exhibit C-2 as the applicable roof-control plan for pillar extraction, and he confirmed that "Plan A" as shown on the plan was being followed.

Mr. Kennedy stated that during his work shifts at the mine he never observed any roof bolts installed while the pillar splits were being mined. Although a roof-bolting machine was in the area, it was backed out of the way and he never saw it used to bolt the roof.

Mr. Kennedy stated that he operated a scoop and was required to follow the remotely controlled continuous miner while the pillar was being mined. He would maneuver the scoop under the miner boom in order to load out the coal to the tail piece. He operated the scoop while lying on his

back, and there were occasions when he would make three or four trips following the miner under unsupported roof.

Mr. Kennedy stated that during his work shift on August 23, 1984, he observed a roof bolt which had dislodged along the last row of roof bolts and a large rock approximately 30 feet long had slipped down with the bolt. He pointed out this condition to Mr. Sweeney, and he "shimmed out the roof bolt" and instructed him to continue working. Mr. Sweeney instructed him to take his scoop and pull it in beyond the bolt and up to the miner, and when he refused, Mr. Sweeney told him "to pick up my bucket and go home." Mr. Kennedy and Mr. Collins then left the mine, but returned the next day to pick up their pay.

Mr. Kennedy stated that when he and Mr. Collins returned to the mine on August 24, 1984, an MSHA inspector was at the office speaking with mine superintendent Bill Brewster. Mr. Kennedy advised the inspector that he and Mr. Collins had been fired the previous day for refusing to work under unsupported roof. When the inspector asked Mr. Brewster about the matter, he told the inspector to speak with Mr. Sweeney about the matter. After the inspector left, Mr. Brewster told Mr. Kennedy that he and Mr. Collins "had no leg to stand on because they had always worked the mine that way." Mr. Kennedy returned to the mine a week later, and he discussed the matter further with Mr. Brewster and advised him that he was afraid of the roof conditions. Mr. Kennedy and Mr. Collins then filed their complaints with MSHA.

Mr. Kennedy stated that after he was fired by the respondent he was unemployed for approximately a month and a half, but then found a job with the Cumberland Coal Company earning $80 per shift. He worked for Cumberland for 5 weeks and then went to work for the Tripple G Coal Company earning $70 to $110 per shift. He was subsequently laid off and has been unemployed since September 1, 1985 (Tr. 81-94).

On cross-examination, Mr. Kennedy testified that while operating his scoop behind the continuous-mining machine he would be positioned approximately 2 to 3 feet from the machine dipper, and the pillar which was being split was approximately 40 to 50 feet deep.

With regard to the rock which had broken loose between two roof bolts at the last row of roof bolts, Mr. Kennedy stated that the continuous-mining machine ripper head was causing the rock to vibrate.

Mr. Kennedy stated that as the scoop operator he was expected to follow behind the continuous-mining machine for a distance of some 12 feet in order to load out the coal being cut by the miner. The dipper of his scoop would be under the miner boom. He confirmed that under the roof-control plan the continuous miner can only legally proceed for a distance of 20 feet under unsupported roof (Tr. 95-108).

William Brewster testified that he was employed by the respondent as the mine superintendent until the last week of March, 1985, when the mine was "worked out" and closed. He confirmed that Mr. Dave Jordan was then the owner of the mine and that he also owned and operated several other mines.

Mr. Brewster identified exhibit C-3 as a copy of a statement that he made to MSHA special investigator Dewey Rife during his investigation of the complaints filed by Mr. Kennedy and Mr. Collins. Mr. Brewster confirmed that Mr. Sweeney told him that he fired Mr. Kennedy because "he did not want to pull coal" and that Mr. Collins simply quit.

Mr. Brewster stated that Mr. Sweeney denied that Mr. Kennedy and Mr. Collins were ever required to work under unsupported roof. Mr. Brewster stated further that he was in the mine daily and that he never observed any pillars split when the roof in the area had not been roof bolted (Tr. 109-112).

On cross-examination, Mr. Brewster testified that he has 23 years of underground mining experience. He confirmed that Mr. Kennedy and Mr. Collins returned to the mine the day after they were fired and informed him that Mr. Sweeney had fired them because he wanted them "to run coal" and they refused. Mr. Brewster stated that he offered to rehire Mr. Kennedy and Mr. Collins but they refused his offer and stated that "they would find another excuse to fire them."

Mr. Brewster stated that on August 24, 1984, MSHA Inspector Ronald Matney was at the mine and had conducted an inspection that day. Mr. Brewster stated that he could recall no roof citations being issued that day by Mr. Matney, nor could he recall any roof falls in the mine.

Mr. Brewster stated that at all times while he was underground on the first shift the 40 foot long pillar splits were always bolted and he has never instructed anyone to work under unsupported roof. He also stated that during the period August 14 through August 23, 1984, the roof bolter was being used on the day first shift. He confirmed that one of his

sons worked during that shift as a scoop operator, and that another son worked as a mechanic's helper. Mr. Brewster stated that he would not jeopardize their safety, or any other miners safety, by requiring them to work under unsupported roof.

Mr. Brewster stated that he subsequently offered Mr. Kennedy his job back a second time but that he refused. He also stated that Mr. Kennedy asked him for a lay-off slip so that he could draw unemployment, but he refused to give it to him.

In response to further questions, Mr. Brewster identified exhibits C-4 through C-8 as citations issued by Inspector Matney on August 23, 24, and 29, 1984, and he confirmed that he was with Mr. Matney during his inspections and that the citations were served on him.

Mr. Brewster stated that the continuous-mining machine is 35-1/2 feet long, and the scoop is 25 feet long. Under the circumstances, he did not believe that it was possible for the scoop operator to be under unsupported roof since the pillar splits were 40 feet long (Tr. 121-128).

In response to further questions, Mr. Brewster reviewed copies of several citations issued at the mine by Inspector Matney (exhibits C-4 through C-8) and he stated that he could not remember all of them. However, he confirmed that he knows Inspector Matney, has observed Federal mine inspectors in the mine, has received citations from them, and is familiar with the citation forms (Tr. 138-139). He identified his name on the citation forms, and he specifically recalled a citation issued on August 24, 1985, and confirmed that he was present when it was issued. The citation was issued because the wing that was left in the pillar split was too narrow and extra support posts had to be installed (Tr. 141). He also conceded that he had personal knowledge of at least some of the other citations issued by Mr. Matney, including one which was issued for 15 dislodged roof bolts in a return hallway (Tr. 142). However, he explained that it is not unusual for roof bolts to be dislodged in a hallway because of the low coal, and that a hallway is not located on an active working pillar (Tr. 146).

In response to a question as to whether it was possible for a scoop operator to be under unsupported roof, Mr. Brewster responded as follows (Tr. 147-148):

> JUDGE KOUTRAS: Mr. Brewster, I've just got a couple of questions and then we'll let you go.

In response to a question by Mr. Bieger, he asked you how long the continuous-mining machine was and you said approximately thirty two and a half feet and he asked you about the scoop and you said twenty five feet. Then he said, well under those circumstances then would it be possible for one to be under unsupported roof for a distance of thirty five feet and your answer was that's true. So I assume that -- what about for a distance of sixty feet, or fifty feet? Let's assume that under your mining plan your mining cycle that they mined for a distance of forty five, fifty, sixty feet without bolting, without roof bolting. Okay.

A. Alright.

JUDGE KOUTRAS: Of any kind. Is it possible that either the scoop operator or the continuous-mining machine operator would be under unsupported roof at any time when they go back in the mine?

A. Let's see. The miner would have to go inby the - the miner would have to go inby back to the controls is twenty foot where the deck is, okay. And from there on back to the deck is about six more foot, twenty six. Okay. And the scoop operator sits about, approximately twelve foot from the end of the scoop. So that gives you twenty six, thirty six, he'd have to go thirty eight foot before he would be inby the roof supports.

JUDGE KOUTRAS: Okay.

A. The miner would have to go at least thirty eight foot deep.

JUDGE KOUTRAS. So if it mined a sixty foot distance, with absolutely no roof bolts, then he would be under unsupported roof wouldn't he?

A. Right.

And at (Tr. 158):

BY MR. BIEGER:

Q. The Judge asked you what if they were mining for sixty feet would somebody be under that many feet of unsupported roof and you said well, yes, but how big were the -- the blocks were only forty to forty five feet, right?

A. Approximately, yeah.

Q. So when you're pulling pillars and the pillar is forty to forty five feet, you don't have a situation where they are mining sixty feet, is that right?

A. Right.

Mr. Brewster stated that normally the continuous miner would not go beyond the end of the pillar being extracted because the roof could fall on the miner. He denied that he was under any pressure to produce coal, and confirmed that in pillar extraction on his section the maximum distance that is mined would be 40 feet (Tr. 160).

Mr. Brewster confirmed that he worked the day shift and would not be in the mine during the afternoon or night shift when the complainants were working. He stated that he would not be underground with the complainants, and he would not be aware of any instances where the pillars were not bolted. He confirmed that his testimony concerning the bolting of pillars would only apply to his day shift, and that he had no knowledge about the night shift. When asked whether it was possible that the night shift was mining pillar splits without roof bolting, he replied "It's possible" (Tr. 150).

Mr. Brewster stated that when the complainants returned to the mine the day after their termination, he discussed the matter with them and offered them their jobs back, and the inspector was present when this occurred (Tr. 151). He specifically recalled the complainants telling him (Brewster) that Mr. Sweeney expected or directed them to work under unsupported roof and when they refused to do so he told them to "pick up their buckets and go on down the road," or words to that effect (Tr. 151). Mr. Brewster stated that his reaction to these statements by the complainants was that Mr. Sweeney could not lay them off for refusing to work under unsupported roof (Tr. 152). Mr. Brewster stated further that he discussed the matter with Mr. Sweeney, and his testimony

regarding the discussions which took place is as follows (Tr. 152-154):

JUDGE KOUTRAS: Did you discuss it with Mr. Sweeney?

A. Yes.

JUDGE KOUTRAS: Well, what did he tell you about it?

A. Well, he told me that they was sitting down at the mouth of the break talking and the best I can remember, he told me he hollered at them and I believe the Kennedy boy come on up there and he got on to him and he told him if he wasn't going to pull coal to go on to the house. And they went on.

JUDGE KOUTRAS: Well, what's that mean. I mean, there's a lot -- I don't understand why Mr. Sweeney would just tell them -- what were they doing? Goofing off or not working or what?

A. That's the way I understood it, just a goofing off.

JUDGE KOUTRAS: And, Mr. Sweeney told them if they weren't going to pull coal, just to go on home and you -- why would you offer them their jobs back then? After they told you their side of the story?

A. Well, if Hubert wronged them, I mean that's the right thing to do.

JUDGE KOUTRAS: Which one -- well, if Mr. Sweeney tells you that he told them to go home because they were goofing off and didn't want to work, and the two men told you that that's not true, that Mr. Sweeney expected them to work under unsupported roof, and that's why he told them to go home, who would you tend to believe? Or, how would you resolve that obvious conflict?

A. Rephrase that again.

JUDGE KOUTRAS: Well, what I'm saying is Mr. Sweeney told you one thing and the two men told you something else, right?

A. Uh-hum.

JUDGE KOUTRAS: So, without even talking to Mr. Sweeney, you told the two men to come back to work.

A. I said if that's the way it was, come on back out to work. When they come to work, I would have had to have talked it over with Hubert, you know.

JUDGE KOUTRAS: Okay. And by that time you had talked it over with Mr. Sweeney?

A. No. I didn't even know nothing about it until they come and told me.

JUDGE KOUTRAS: After the two men left, did you then talk to Mr. Sweeney?

A. Right.

JUDGE KOUTRAS: And Mr. Sweeney told you that they just didn't want to work or what?

A. That's what he told me. He said they was down there at the mouth of the breaker talking and he hollered at them and one of them, I believe Kennedy, come on up there and he told him if they wasn't going to pull coal, to go on to the house. Now, that's what he told me happened.

JUDGE KOUTRAS: Okay. Did you ask Mr. Sweeney about what Mr. Kennedy and Mr. Collins had told you? That he expected them to work under unsupported roof?

A. No, he didn't tell me anything like that.

JUDGE KOUTRAS: Did you mention it. Did you ask Mr. Sweeney whether there was any truth in what these two men told you?

A. Yeah. I told him what they said and he said it wasn't true.

Mr. Brewster stated that neither the complainants or their crew ever complained to him about any lack of roof bolting or unsafe conditions, and he was not aware of any rock ever falling on Mr. Collins' machine. He confirmed that Mr. Sweeney never complained about the complainant's work, and that he (Brewster) hired Mr. Kennedy because he had the reputation of being a good scoop man (Tr. 156).

Hubert Sweeney, testified that he was employed by the respondent as an underground section foreman on the second shift and that he was laid off on March 15, 1985, when the mine "worked out" and was closed. Prior to this time he worked at the mine in 1982 when it was operated as the Virginia-West Virginia Coal Mine, and it was owned by Mr. Dave Jordan, the respondent's owner.

Mr. Sweeney confirmed that Mr. Kennedy and Mr. Collins worked for him as scoop operators on the second shift. He denied that he directed them to work under unsupported roof or that he fired them for refusing to do so. He stated that during the shift on August 23, 1984, he observed Mr. Kennedy and Mr. Collins sitting in their equipment talking and he told them that if they did not want to "pull coal" to go home. He stated that he fired them for "goofing off."

Mr. Sweeney confirmed that he was interviewed by MSHA special investigator Dewey Rife on September 20, 1984, during his investigation of the complaints and he admitted telling Mr. Rife that Mr. Collins and Mr. Kennedy quit their jobs and that he did not know what happened to cause them to quit (Tr. 160-165).

Mr. Sweeney testified as follows with respect to the circumstances under which the complainants left their jobs (Tr. 166-170):

JUDGE KOUTRAS: Why did these two men quit, Mr. Sweeney?

A. Sir, I don't know why they quit. They were down at the break a talking. They didn't want to pull no coal and I told them if they couldn't do no better than that they might as well go home. One got to preaching that I fired him and the other one, he didn't -- I

don't know why, he jut walked on out of the mines.

JUDGE KOUTRAS: Tell me about this. What were they doing, talking? What are you talking about. Were they taking their break or what?

A. I couldn't hear them. Yes, they was sitting on the scoop. You have to crawl on your knees and hands and I hollered down to where I could hear them and they was -- seen them a sitting down there in the break a talking.

JUDGE KOUTRAS: Just chit-chatting?

A. Just chit-chatting, right.

JUDGE KOUTRAS: And you told them what now?

A. If they couldn't do no better than that they might as well get their buckets and go on home.

JUDGE KOUTRAS: What did they tell you?

A. They didn't tell me nothing. They just got in the scoop. I crawled right back towards the face and I asked the other scoop man where he was at and said why, they've done gone home. And when I come outside they had done went home. Or otherwise they was still outside a waiting on a ride but they quit.

JUDGE KOUTRAS: That was the last you saw of them?

A. Yeah, that's the last I saw after they crawled on the outside.

JUDGE KOUTRAS: Did you tell anybody that the two men had quit?

A. Sir?

JUDGE KOUTRAS: Did you tell anybody at the mine that these two men had quit?

A. Yes, I told the others.

JUDGE KOUTRAS: Who did you tell?

A. I don't -- a fellar by the name of Bill Asbury. He's not here, him and the miner operator.

JUDGE KOUTRAS: Did you tell the mine superintendent, Mr. Brewster?

A. Yes, the next day.

JUDGE KOUTRAS: What did you tell him the next day?

A. I told him they quit and I said I don't know why. They was no reason, they gave me no reason.

JUDGE KOUTRAS: Did you tell Mr. Brewster you fired them?

A. Yes, sir. I told him that I told them if they couldn't do no better than what they was doing, laying on the scoop, to get their bucket and go.

JUDGE KOUTRAS: Well, did you fire them or did they quit?

A. Well, I guess you'd call it firing them. They just took off going on outside. I guess you'd call it firing them.

JUDGE KOUTRAS: Have you ever had any miners in your experience leave a job under similar circumstances?

A. No, sir, I haven't.

JUDGE KOUTRAS: Isn't that a little unusual?

A. Unless they'd be sick or something.

JUDGE KOUTRAS: I mean it's a little unusual for two men to just up and quit because the supervisor told them to get on with working, to stop talking?

A. Well, I guess they got the impression that I fired them.

* * * * * * *

JUDGE KOUTRAS: Does it seem kind of unusual to you for them to just get up and take off?

A. It seemed to me like they don't want to work. They tried to get me to get them a cut-off slip the night before that. I got the impression they don't want to work.

JUDGE KOUTRAS: What's a cut-off slip?

A. That's a slip where you could draw unemployment.

JUDGE KOUTRAS: The night before?

A. The night before, sir.

JUDGE KOUTRAS: Well, tell me about that? How did they expect you to give them a slip the night before?

A. They just wanted me to lay them off.

JUDGE KOUTRAS: Well, now if you laid them off or fired them, were they eligible for unemployment?

A. I don't know, sir.

JUDGE KOUTRAS: You mean the night before these two men come up to you and asked you for an unemployment slip? They got tired of working and they wanted to draw unemployment?

A. Yes, sir. They wanted to draw unemployment. Didn't want to work.

JUDGE KOUTRAS: The story I'm hearing is these two men didn't want to work under unsupported roof and you kind of suggested that if they didn't want to work under unsupported roof pulling coal, they might as well go on home?

A. I've never sent nobody out, sir, out from under roof supports.

JUDGE KOUTRAS: Did you ever suggest or say anything to them that would lead them to believe that?

A. No, sir. While you're in the mine, I ain't going to put nobody's life in danger. I've never had no problem with men all my life except these two. I don't know why. I treated them right. Didn't cuss them out or nothing.

JUDGE KOUTRAS: Had you known these two men before they came to work?

A. No, sir. The first time.

JUDGE KOUTRAS: And they had worked for you how long? A couple of days or what?

A. Yeah, a couple of days, or maybe three.

Mr. Sweeney denied that roof bolting was never done on his section, and he stated that he always followed the roof-control plan. He explained the bolting process and denied that his crew ever cut all the way through a pillar or worked under unsupported roof while cutting coal (Tr. 172). He conceded that he was not always present while the continuous miner was operating, and that when he was present he would always position himself next to the continuous miner (Tr. 174).

Terry Kennedy testified that he is Earl Kennedy's brother and that he has been employed with the Island Creek Coal Company for 7 years. He stated that while he was laid off from that job he worked for the respondent as a scoop operator and timber man on the second shift for 2 days on August 13 and 14, 1984, and that Hubert Sweeney was the shift foreman.

Mr. Kennedy stated that during the 2 days he worked on the second shift the coal pillars were split down the middle straight through and that the continuous miner would then pull out and mine the right and left wings. During this time he never saw any roof bolts installed on the mined pillar splits and the roof-bolting machine was never used. Although he was never required to work under unsupported roof while pulling the pillars he did so anyway in order "to keep his job." He stated that Mr. Sweeney knew he was working under unsupported roof.

Mr. Kennedy stated that he discussed the roof conditions with Mr. Sweeney and informed him that he was jeopardizing the safety of the miners by not roof bolting the pillars. He stated that Mr. Sweeney informed him that since the mine was a "small truck mine" they could "get by with just about anything" (Tr. 174-182).

Jerry Kennedy testified that he is currently unemployed and has 11 years of mining experience. He stated that he is not related to the complainant and that he was employed by the respondent from August 13, 1984 to August 23, 1984, as a second shift scoop operator and timber man, and he confirmed that shift foreman Hubert Sweeney was his supervisor.

Mr. Kennedy stated that during his employment with the respondent he was engaged in pillar work and he indicated that after the pillar was "timbered up" the continuous-mining machine would go in and cut the pillar split until it was mined through to the end. As the timber man he would be in and out of the pillar while it being mined and at no time did he ever observe roof bolts being installed in the pillar. Although a roof bolter was on the section, he never observed it being used to pin the roof.

Mr. Kennedy stated that during his shift on August 23, 1984, he overheard Mr. Sweeney tell Mr. Earl Kennedy that "if you can't do that I don't need you after this shift." He heard Mr. Kennedy reply "if you don't need me than you don't need me now." Mr. Kennedy stated that he had no idea what Mr. Sweeney and Earl Kennedy were discussing. He stated that he observed scoop operators working under unsupported roof and that this was a common occurrence on the second shift during his employment at the mine (Tr. 184-188).

On cross-examination, Mr. Kennedy stated that he first met Mr. Earl Kennedy and Mr. Collins when he went to work for the respondent. He confirmed that he quit his job on August 23, 1984, because he didn't like the pay and the height of the coal. He stated that he never complained about the roof conditions or the lack of roof bolting. He also confirmed that Hubert Sweeney was married to his cousin (Tr. 188-198).

Bobby Mullins testified that he is employed by the Rocking-R Coal Company and that he has 12 years of underground mining experience. He confirmed that he was employed by the respondent for 3 weeks during August, 1984. He worked on the first shift as a miner and pinner helper. He stated that

Mr. Brewster was the mine superintendent and that he was underground every day during the day shift.

Mr. Mullins stated that he worked at the faces pulling pillars, and that during his employment at the mine he never saw the roof bolter used to install roof bolts on the pillars (Tr. 199-202).

On cross-examination, Mr. Mullins confirmed that he grew up with Earl Kennedy. He stated that he quit his job with the respondent after Mr. Brewster threatened to fire him. He explained that he and several other miners were pulling a miner cable with a scoop and it separated. Since he was the "cable man," Mr. Brewster held him responsible for the cable separating and when he informed him that he would be fired, he quit before Mr. Brewster could fire him (Tr. 202-206).

Respondent's Testimony

David B. Jordan, testified that he was the President and part-owner of the Raven Red Ash Coal Corporation and he confirmed that the mine was closed down in March of 1985. He stated that he usually goes underground in his mines every 2 or 3 months. He stated that he has personally never fired any of his employees and that he has never directed anyone to fire any employee.

Mr. Jordan confirmed that he was at the mine in question on August 24, 1984, delivering the payroll and he learned at that time that Mr. Sweeney had fired Mr. Kennedy and Mr. Collins for "refusing to pull coal." Mr. Jordan stated that MSHA Inspector Ronald Matney was at the mine on August 24, 1984, and that he discussed the matter with him. Mr. Matney had conducted an inspection that day and except for some loose roof bolts on the haulage road Mr. Matney assured him that "everything looked fine" underground.

Mr. Jordan stated that no one had ever complained to him about unsafe working conditions underground. He confirmed that he has not paid any of the civil penalty assessments reflected in MSHA's computer print-out, exhibit C-9, because he could not afford it. He also confirmed that he was in the process of working out a "settlement" with the Department of Justice to pay those penalties (Tr. 219-224, 226).

Mr. Jordan stated that the No. 1 Mine where the complainants were employed is mined out and that it closed in March, 1985. He confirmed that he just opened a new mine, and when asked about the financial condition of his company, he

responded "I guess we're in no worse or no better shape than half the coal companies in Buchanan County" (Tr. 227). Mr. Jordan was of the opinion that the complainants quit their jobs, and he alluded to a prior proposed settlement offer by MSHA to compensate one of the complainants, and that if he agreed, the case would be dropped. He stated that had he believed the complainants were fired for working under unsafe conditions, he would have not contested the complaints (Tr. 229).

Mr. Jordan confirmed that since he was not underground from day to day, he would not know how Mr. Sweeney operated his section, and while he believed that it was possible that the complainants were terminated for reasons which they have testified to in this case, he would have no knowledge of this one way or the other (Tr. 231). He stated that he chose to believe Mr. Sweeney, Mr. Brewster, and Inspector Matney (Tr. 231). He disclaimed any knowledge as to the complainants' motives in claiming that they were fired for refusing to work under unsupported roof (Tr. 235).

Mr. Clevenger was recalled as the court's witness, and he stated that assuming the two complainant's were engaged in mining an entire 40-foot block of coal continuously while in their scoops, they could be 4 to 6 feet past permanent roof supports. If the entire coal block is mined without pulling out and bolting after cutting 20 feet, a violation of the roof-control plan would result because the plan stipulates that the maximum depth of the coal being mined should not exceed 20 feet without bolting. In addition, the remote controls for the miner may not advance beyond permanent roof support (Tr. 251-252).

Mr. Clevenger stated that he has been in the mine several times and has never received any complaints with respect to the mining procedures (Tr. 253). In response to questions from respondent's counsel, Mr. Clevenger stated as follows (Tr. 254-255):

> Q. Do you remember before when I asked you when you're pulling timbers, if you pull one is it likely that they have a roof fall the very next day and you said it's quite possible that the could have a roof fall at anytime?
>
> A. Yes, sir. I said that.
>
> Q. Well, doesn't that seem -- doesn't it surprise you that not only -- that if you can go

and mine backwards and forwards in all these pillars for nine days and never put the first bolt in and never have a major roof fall? Isn't that pretty much impossible?

A. It'd be according to the type of strata that you've got.

Q. Yeah, I know it would be, but if it's quite possible that it would fall the next day --

A. I don't know that this has been done.

Q. Well, I'm just asking you a hypothetical question.

A. Right, you're asking a theory.

Q. Isn't it unusual, if as you say, that the roof could fall the very next day, isn't it unusual that you would mine all of these pillars right and left for two weeks and never put the first bolt in and never have a roof fall? Isn't that pretty incredible?

A. If it's being done, yes.

Q. Okay.

A. There's no set time when a pillar fall would come because you have to put additional support, timbers, until you get enough weight to override these timbers --

Q. Right. I understand that.

A. -- it's pretty well hold itself.

Mr. Clevenger explained the roof bolting pattern and sequence for the mine, and he indicated that if no roof bolts were installed in certain areas during the period from August 13 to 23, it was possible that Inspector Matney did not see the areas because of the roof falls and he would not venture inby the breaker posts (Tr. 257-259). In the event one cut of coal was taken when Mr. Matney was in the mine, temporary supports would have been installed, but no bolting was required until that cut was completed and a second one begun. If Mr. Matney was there the entire day, he would have

been aware of what the mining procedures were and what work was being done (Tr. 262).

MSHA Inspector Ronald C. Matney did not testify at the November 13, 1985, hearing in this case. However, by agreement of the parties, his deposition was taken on November 14, 1985, and it has been filed and made a part of the record in this case.

Mr. Matney stated that he has been employed by MSHA as a coal mine inspector since October 1, 1978. He testified as to his background, training, and experience, and confirmed that he is familiar with the respondent's mine. He stated that Mr. David Jordan was the president and owner of the Raven Red Ash Coal Company, and that the mine at one time operated under the corporate name of Virginia-West Virginia Coal Corporation. He confirmed that Mr. Jordan was the president and owner of both corporations, and that during his inspections at the mine when they were under both corporate names he observed Mr. Jordan there. He also observed Mr. Bill Brewster and Mr. Hubert Sweeney at the mine when it operated under the name of Virginia-West Virginia Coal Corporation (Tr. 3-6).

Mr. Matney stated that he inspected the respondent's No. 1 Mine four times a year, and that depending on the conditions of the mine, the inspection takes from 3 to 5 days to complete. He confirmed that he began an inspection of the mine on August 24, 1984, and that he was accompanied by Mr. Brewster. Mr. Matney stated that he arrived at the working face area of the mine at approximately 9:20 a.m., and day shift personnel were at work. Work had started approximately 2 hours earlier, and after checking the face area he proceeded to the area where employees were working removing coal. He observed that a split or pillar block of coal approximately 20 feet had been removed and the crew had moved back to the next line of crosscuts to begin a new phase of mining across the working faces. He confirmed that he issued a violation on the cut of coal that had been taken because the respondent was not complying with its roof-control plan for pillar extraction. The plan required that a 10-foot block of coal be left on each side of the pillar split as a means of roof support, and he found that instead of leaving a 10-foot wing for support, the wing of coal which was left was between 4 and 8 feet. Under the circumstances, Mr. Matney issued a section 104(a) "significant and substantial" citation charging the respondent with a violation of mandatory section 75.200, for failure to comply with the roof-control plan. Mr. Matney stated that the respondent did not contest the citation (Tr. 7-12).

Mr. Matney stated that during his inspection he looked at the pillar areas which had been mined on previous shifts and from his position at the pillar breaker line he shined his light back into the area in an attempt to observe what had been done. He did not venture beyond the pillar breaker line because of the "danger of the conditions of the roof." However, from his vantage point at the breaker line he could not see anything because the roof had collapsed "up next to the breaker line," and he could not determine whether the previous shift had installed roof bolts in the pillar splits. The coal had been mined out and the "roof was collapsed solid" up to the breaker line (Tr. 13).

Mr. Matney stated that after completing his underground inspection on August 24, he returned to the surface at approximately 12:00 to 1:00 p.m., in the company of Mr. Brewster and they proceeded to the mine office. While standing in the office doorway, Mr. Collins and Mr. Kennedy came by and Mr. Matney asked them "how they were doing." Mr. Kennedy responded "not so good," and when asked why by Mr. Matney, Mr. Kennedy informed him that Mr. Sweeney had fired them the previous evening "for not hauling coal out from unsupported roof that was broke." Mr. Matney stated that he commented to Mr. Brewster that he could not fire anyone "for unsafe work practices," and that there was a possibility that Mr. Kennedy and Mr. Collins could file discrimination charges against the respondent. Mr. Matney also stated that he informed Mr. Kennedy and Mr. Collins that he had inspected the faces and found "no violations that they had done" (Tr. 14-15).

Mr. Matney stated that when he mentioned the fact that Mr. Kennedy and Mr. Collins could file a discrimination charge, Mr. Brewster attempted to contact Mr. Sweeney underground and stated to Mr. Kennedy and Mr. Collins "if its like you say it is, you'll get your jobs back." At that point in time, Mr. Matney left the mine office to return to his own office, and he did not know whether Mr. Brewster contacted Mr. Sweeney. Mr. Kennedy and Mr. Collins were still at the office when Mr. Matney left. Mr. Matney stated that Mr. Jordan was not at the mine that day, and that at no time has he had any conversations with Mr. Jordan about the incident (Tr. 16).

On cross-examination, Mr. Matney stated that there was no doubt in his mind that he did not speak with Mr. Jordan on August 24 while at the mine. He stated that according to the legal identity files maintained in his MSHA office, Mr. Jordan was the president of both the Virginia-West Virginia Coal Company and the Raven Red Ash Coal Company, and that when he

filed his reports Mr. Jordan was listed as the corporate president of both companies (Tr. 16-18).

Mr. Matney stated that a remote controlled miner was used to cut the pillar block of coal which he observed on August 24. One cut of coal approximately 20-feet wide by 20-feet deep had been taken out of the pillar and jacks had been set and a roof bolter was present and was about to begin the roof bolting cycle. He issued the citation because additional roof supports were required to be installed due to the subnormal roof conditions which resulted from not leaving enough coal for roof support. He drew a diagram of the block of coal being mined, and he explained how the pillar was cut and split and bolted and timbered (deposition exhibit-A; Tr. 22-26).

Mr. Matney stated that the respondent had no advance knowledge that he would inspect the mine on August 24, and that it is illegal for anyone to advise an operator of a scheduled inspection. He stated that at the time he observed the pillar which had been cut, no roof bolting had actually taken place, but the safety jacks had been set and the roof bolting machine was in place ready to bolt the roof (Tr. 27).

Mr. Matney stated that the last previous inspection of the mine was probably conducted 2 months prior to August 24, but he could not recall whether pillar work had been done at that time. Although he issued a citation for dislodged roof bolts during his August inspection, he could not recall issuing any citations during his previous inspection (Tr. 29). The dislodged bolts in question were in a crosscut hallway, and he explained that they are usually dislodged because the miner is too big for the low coal being mined (Tr. 30).

Mr. Matney stated that he did not discuss the respondent's pillar extraction procedures with Mr. Brewster, and he confirmed that because of the roof falls he could not determine whether roof bolting had been done during prior shifts. He stated that such falls are normal in pillar retrieval mining and that the roof is supposed to fall (Tr. 32). Mr. Matney reiterated that he heard Mr. Brewster state that if Mr. Sweeney fired Mr. Collins and Mr. Kennedy because of their refusal to work under unsupported roof, they would get their jobs back (Tr. 33).

Mr. Matney stated that a wing of coal could be mined in 25 minutes, and that it would take approximately 2 to 3 hours to mine a pillar. Two working shifts could probably extract five pillars of coal. He explained that the roof is falling

behind the areas where the coal has been extracted. Timbers are a means of temporary support for the roof, and after the coal is extracted roof bolts and timbers will not support the weight of the roof, and any resulting roof falls are "controlled falls" (Tr. 37). He believed it was possible or probable to pull a number of pillars over a period of time without installing roof bolts, but he would not recommend it (Tr. 38).

Findings and Conclusions

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

The issue in this case is whether or not the complainants were discharged by the respondent because of their reluctance or refusal to perform work as scoop operators under unsupported roof. MSHA's position is that the complainants were fired for refusing to work under unsafe roof conditions (Tr. 248 and posthearing brief). Although the respondent did not file any posthearing arguments, I assume from the arguments made by counsel on the record during the course of the hearing in this case that its position is that the complainants either quit their jobs voluntarily or they were discharged by second shift foreman Hubert Sweeney because of their "goofing off" on the job or refusing "to pull coal."

The respondent produced no mine records documenting the separation of the two complainants. Mr. Jordan testified that Mr. Brewster told him that the two had quit, and that Inspector Matney told him that they were fired by Mr. Sweeney "for refusing to pull coal" (Tr. 220-221). Mr. Jordan was also of the opinion that the two men quit (Tr. 229).

During his direct testimony, Mr. Brewster testified that Mr. Sweeney told him that he fired Mr. Kennedy because "he did not want to pull coal," and that Mr. Collins simply quit. On cross-examination, Mr. Brewster stated that Mr. Sweeney told him that he told Mr. Collins and Mr. Kennedy to "go on to the house," and that he (Brewster) was led to believe that Mr. Kennedy and Mr. Collins did not want to pull coal and that Mr. Sweeney told them to go home because they were "goofing off."

Mr. Sweeney's testimony as to whether he fired Mr. Collins and Mr. Kennedy, or whether they quit is inconsistent. Mr. Sweeney first testified that he fired the two for "goofing off" after he observed them sitting in their equipment talking. He then testified that he told at least one other man on the shift that the two had quit and that he told Mr. Brewster that they had quit and that he had fired them. When specifically asked whether he had fired them or whether they quit, Mr. Sweeney responded "Well, I guess you'd call it firing them. They just took off going on outside. I guess you'd call it firing them" (Tr. 168).

Mr. Sweeney admitted that when he was interviewed by an MSHA inspector on September 20, 1984, during the investigation of the discrimination complaints, he told the inspector that Mr. Collins and Mr. Kennedy quit their jobs, and that he (Sweeney) had no knowledge as to why they quit. Mr. Sweeney's prior denials of any knowledge as to why the two complainants left their jobs raises a question in my mind as to his credibility. If Mr. Sweeney had just cause to discharge the complainants, it seems to me that he would have told the investigating inspector his side of the story as to why the two men left their jobs rather than denying any knowledge of the incident.

Both Mr. Kennedy and Mr. Collins were consistent in their assertions that they had been fired by Mr. Sweeney. The statements to this effect, made to Inspector Matney and Mr. Brewster the day following their termination, are consistent, and both Mr. Brewster and Mr. Matney confirmed that Mr. Kennedy and Mr. Collins told them that Mr. Sweeney fired them. Further,

their testimony during the hearing that they had been fired by Mr. Sweeney is likewise consistent.

After careful consideration of all of the testimony in this case, I conclude and find that on August 23, 1984, Mr. Collins and Mr. Kennedy were fired from their jobs as scoop operators by Mr. Hubert Sweeney, respondent's second shift foreman, and that their termination was not the result of voluntary quits on their part.

Mr. Brewster confirmed that he had never received any complaints about the complainants' work performance. He confirmed that he initially hired Mr. Kennedy because of his reputation as a good scoop man, and that Mr. Collins was hired because he had worked at the mine in a previous occasion and Mr. Brewster believed that he could operate a scoop (Tr. 156). Mr. Sweeney testified that the complainants had only worked for him for 2 or 3 days before they were terminated, and he was under the impression that they did not want to work (Tr. 169). Other than this opinion by Mr. Sweeney, there is no evidence that the complainants were other than good employees, nor is there any evidence that they had ever complained to mine management or to any MSHA inspectors about any hazardous job conditions or safety infractions.

During the course of the hearing, mine operator Jordan suggested that since Inspector Matney had just been underground and assured him that "everything looked fine," the assertions by the complainants that they were asked or required to work under unsupported roof is incorrect. However, I take note of the fact that Mr. Sweeney did not advise management that he terminated the complainants until the next day. Significantly, after Mr. Jordan and Mr. Brewster were made aware of the terminations, and after Inspector Matney advised Mr. Brewster of the possible ramifications of the terminations, including a possible discrimination complaint by the complainants, Mr. Jordan and Mr. Brewster did not go underground to ascertain the facts or to determine or attempt to determine whether the area where the two individuals were working was in fact roof bolted. Mr. Brewster and Mr. Jordan apparently opted to believe Mr. Sweeney's explanation that he fired the complainants because they did not want to work. I find it rather strange that mine management, once alerted by a Federal inspector on the scene of the possible ramifications of the discharge, would not immediately ascertain all of the facts so as to protect itself from any possible discrimination claims.

Mr. Brewster worked the day shift and he would not be in a position to observe the working conditions during the evening shift which was supervised by Mr. Sweeney (Tr. 149-150). Mr. Brewster conceded that it was possible that the night shift could have been mining and splitting pillars without roof bolting (Tr. 150). However, since he was not underground during the night shift, he would have no way of personally knowing that this was the case, and he stated that no one on the night shift, including Mr. Collins or Mr. Kennedy, ever complained to him about the lack of roof bolting or hazardous conditions (Tr. 154-155).

Mr. Jordan testified that he may have been underground once every 3 or 4 months in response to calls from the superintendent concerning adverse mining conditions (Tr. 219). He confirmed that due to his absence from the underground mine on a day-to-day basis, he would have no way of knowing how Mr. Sweeney operated the section. While it was possible that Mr. Collins and Mr. Kennedy are correct in their assertions that pillars were pulled without roof support, Mr. Jordan stated that he had no personal knowledge that this was the case (Tr. 230-231).

Mr. Brewster asserted that during the period from August 14 to 23, 1984, the roof bolter was used on the first day shift. He also asserted that his two sons worked on that shift as a scoop operator and mechanic's helper, and that he would not jeopardize their safety by requiring them to work under unsupported roof. While these assertions may be true, the fact is that Mr. Collins and Mr. Kennedy worked the evening shift under Mr. Sweeney's supervision, and Mr. Brewster had no knowledge as to how Mr. Sweeney worked his shift. Under the circumstances, I find Mr. Brewster's assertions as to what may have transpired during his day shift to be irrelevant to the question concerning what Mr. Sweeney expected his shift to do, or whether or not the claims by Mr. Collins or Mr. Kennedy that they were expected to work under unsupported roof are supportable by credible evidence.

Mr. Jordan claimed that he spoke with Mr. Matney after discussing the matter with Mr. Brewster, and that Mr. Brewster informed him that the two men were going to file a complaint. Mr. Jordan also stated that Mr. Brewster advised him that Mr. Sweeney had fired Mr. Collins and Mr. Kennedy for "refusing to pull coal." Given these circumstances, I find it rather peculiar that Mr. Jordan did not go underground to ascertain precisely what had happened. If all of the principals were readily available a day after the discharge, it occurs to me that the natural thing for Mr. Jordan to have

done was to go underground with the inspector while the events were fresh in everyone's mind in order to view the areas which had been mined on the second shift the day before in order to ascertain all of the facts. Further, since Mr. Collins and Mr. Kennedy were readily available at the mine on August 24, I also find it rather peculiar that Mr. Jordan did not speak with them to ascertain their side of the events leading to their termination. I also find it rather strange that neither Mr. Jordan or Mr. Brewster spoke with any other members of Mr. Sweeney's shift to ascertain all of the facts. None of these individuals were called to testify on behalf of the respondent.

Mr. Jordan explained that he made no further inquiry because he assumed that Inspector Matney's comments that his inspection on August 24 detected nothing wrong with the conditions underground led him to believe that everything "had to be right" (Tr. 263). Mr. Matney denied speaking to Mr. Jordan when he encountered Mr. Collins and Mr. Kennedy at the mine office the day following the discharge. During their testimony, Mr. Brewster, Mr. Collins, and Mr. Kennedy did not mention that Mr. Jordan was present at the mine office on August 14, when Inspector Matney encountered the two men, and Mr. Brewster stated that he spoke with Mr. Sweeney after Mr. Collins and Mr. Kennedy left (Tr. 153). Mr. Matney testified that there was no doubt in his mind that he did not speak to Mr. Jordan on August 24, 1984.

Mr. Jordan stated that he could ascertain from the mine map and work shift records the mine areas which had been mined during the period August 3 to 24, 1984. I assume that those records would reflect the mine conditions in those areas, and that they would also possibly reflect whether or not certain areas had been bolted as the mining sequence took place. However, the respondent produced no records in this regard, nor did it call any witnesses for testimony in this case. All of the witnesses were either subpoenaed or called by MSHA, and Mr. Jordan, who was present at the hearing, was called as the court's witness. Although Mr. Sweeney mentioned that two other miners were present on the shift when he fired Mr. Collins and Mr. Kennedy, they were not called as witnesses, and the respondent produced no testimony or evidence from any other miners who may have also worked on the evening shift when Mr. Collins and Mr. Kennedy were fired.

In view of the foregoing, I have given little consideration to Mr. Jordan's defense that Inspector Matney assured him that everything was in order underground on the morning after the terminations. While it is true that Mr. Matney was

underground on the morning after the terminations of Mr. Collins and Mr. Kennedy, he testified that he could not tell whether any roof bolting had been done because pillar work had begun in a new area and he could not safely observe what had been done on prior shifts because the roof had fallen in up to the pillar break line.

I have also given little weight to the testimony by Mr. Jordan and Mr. Brewster with regard to the roof bolting practices or other conditions which may have existed on the second shift during the periods when the complainants were working on that shift. For the reasons stated earlier, I conclude and find that Mr. Brewster and Mr. Jordan had little or no presence underground during the second working shift and were in no position to personally observe any of the prevailing working or mine conditions during that shift.

Complainant Larry Collins testified that during his employment on the second shift, entire coal pillars were mined without any roof bolts ever being installed, and that this was a common practice. Complainant Earl Kennedy testified that during his employment on the second shift a roof bolter was present on the section but it was backed up out of the way and he never observed it being used to install roof bolts while the pillar splits were being mined.

Terry Kennedy, Earl's brother, testified that for the 2 days he worked on the second shift on August 13 and 14, 1984, no roof bolts were ever installed and the roof bolting mahine was never used. Terry Kennedy testified further that while no one ever directed him to work under unsupported roof, he did so anyway "to keep his job." He also asserted that he told Mr. Sweeney that the safety of the miners was being jeopardized by not roof bolting, and that Mr. Sweeney replied that since the mine was a small operation they "could get by with just about anything."

Jerry Kennedy, who is unrelated to the complainant, testified that during his employment on the second shift from August 13 to 23, 1984, he never observed the roof bolter in use or the roof being bolted. He testified that the pillars would be mined through to the end without any pillar roof bolting taking place, and that he observed scoop operators go under unsupported roof, and that this was a "common occurrence."

Bobby Mullins, who work the day shift as a pinner helper, testified that during his employment underground for 3 weeks

in August, 1984, he never observed the roof bolter in use installing roof bolts on the pillars.

The only testimony which directly contradicts the testimony of the complainants and the two corroborating witnesses who worked the same shift as the complainants with respect to whether or not roof bolting was ever done during the retreat pillar extraction process on the second shift is that of second shift foreman Hubert Sweeney. Mr. Sweeney testified that the roof was always bolted in accordance with the roof plan.

Mr. Sweeney confirmed that during MSHA's investigation of the complainants, he told MSHA special investigator Dewey Rife that Mr. Collins and Mr. Kennedy quit their jobs and that he (Sweeney) did not know why they had quit. At the hearing, Mr. Sweeney testified that he did not know why the complainants had quit and later admitted that he fired them for "goofing off" or not wanting to work. I find Mr. Sweeney's testimony to be inconsistent, and his failure to fully disclose to the special investigator all of the relevant facts concerning the terminations leads me to conclude that his testimony in this case is less than credible. Further, Mr. Sweeney was the second shift foreman and the safety of his crew was his responsibility. In these circumstances, I believe it is reasonable to conclude that any testimony by Mr. Sweeney must be viewed in light of a natural interest on his part not to put himself in a position of being held personally accountable for any adverse results which may flow from exposing miners to hazardous mining conditions or practices, or from any claims of discriminatory discharges.

After careful consideration of all of the testimony regarding the asserted absence of any roof bolting on the second shift during the complainants employment with the respondent, I find the testimony of the complainants and the corroborating witnesses to be credible and it supports a conclusion that roof bolting was not being accomplished on the second shift during all times relevant to the complaint.

During their employment at the mine on the second shift the complainants were working in low coal and were engaged in retreat coal pillar extraction. Such pillar extraction is in itself potentially more hazardous than normal mining because it includes self-induced roof falls behind the areas from which the coal has been removed, and the full natural roof support of the coal pillar which at one time served to support the roof has been removed or lessened because of the removal of the coal.

Mr. Kennedy testified that while operating his scoop he would be lying on his back, and Mr. Sweeney stated that after speaking with Mr. Collins and Mr. Kennedy underground about their "chit-chatting," he had to "crawl" out of the area on his hands and knees. Mr. Brewster testified that because of the low coal it was not unusual for roof bolts to become dislodged. Under all of these circumstances, I believe it is reasonable to conclude that the low coal heights posed an additional potential hazard to the complainants who were expected to work in these areas. Coupled with my finding that roof bolting was not being done during the pillar extraction process on the second shift, I conclude that during their employment on the second shift, the complainants were exposed to a serious hazard of a potential unplanned roof fall with resulting serious injuries.

Since I have concluded that the pillar splits were not roof bolted on the second shift during the complainants' employment on that shift, I also conclude and find that as scoop operators, Mr. Kennedy and Mr. Collins were necessarily required to work under unsupported roof and that section foreman Sweeney expected them to. In addition to the testimony of Mr. Collins and Mr. Kennedy that they were under unsupported roof when they operated their scoops, Mr. Brewster confirmed that assuming the pillars were not bolted, the scoop operators would be operating under unsupported roof. During his explanation of the respondent's roof-control plan and the procedures for pillar extraction, Inspector Clevenger stated that the cutting of a pillar for a distance of 20 feet without pulling out and bolting would violate the respondent's roof-control plan, and if the scoop operators worked the entire 40-foot pillar continuously with no bolting taking place, they would be 4 to 6 feet past permanent roof supports. Scoop operator Jerry Kennedy (not related to Earl), testified that it was a common occurrence for scoop operators to work under unsupported roof on the second shift.

It is well settled that the refusal by a miner to perform work is protected under section 105(c)(1) of the Act if it results from a good faith belief that the work involves safety hazards, and if the belief is a reasonable one. Secretary of Labor/Pasula v. Consolidation Coal Company, 2 FMSHRC 2786, 2 BNA MSHC 1001 (1980), rev'd on other grounds, sub nom Consolidation Coal Company v. Marshall, 663 F.2d 1211 (3rd Cir. 1981); Secretary of Labor/Robinette v. United Castle Coal Company, 3 FMSHRC 803, 2 BNA MSHC 1213 (1981); Bradley v. Belva Coal Company, 4 FMSHRC 982 (1982). Secretary of Labor v. Metric Constructors, Inc., 6 FMSHRC 226 (Feb. 1984), aff'd sub

nom., Brock v. Metric Constructors, Inc., 3 MSHC 1865 (11th Cir. 1985). Further, the reason for the refusal to work must be communicated to the mine operator. Secretary of Labor/Dunmire and Estle v. Northern Coal Company, 4 FMSHRC 126 (1982).

I find the testimony of the complainants that they informed shift foreman Sweeney on August 23, 1984, that they would not continue to work under unsupported roof to be credible. Mr. Collins testified that at the time of the refusal, the roof was cracking and popping. Mr. Kennedy stated that prior to his work refusal, he observed a dislodged roof bolt and a large rock approximately 30 feet long which had slipped down with the bolt. After Mr. Sweeney "shimmed out the roof bolt," he instructed Mr. Kennedy to continue working his scoop beyond the slipped rock and up to the miner, but Mr. Kennedy refused. Mr. Collins testified that after discussing the situation further, he informed Mr. Kennedy that he would no longer work under unsupported roof, and that he and Mr. Kennedy so informed Mr. Sweeney.

Mr. Sweeney confirmed that he observed Mr. Kennedy and Mr. Collins sitting in their scoops at the pillar break carrying on a discussion. He then confronted them, and after some discussion, the two men left the mine. Mr. Sweeney subsequently first testified that he informed Mr. Brewster that the two had quit for no reason. He then testified that he informed Mr. Brewster that he had fired them for "goofing off." Mr. Brewster's subsequent offers to Mr. Kennedy and Mr. Collins to come back to work raises a strong inference in my mind that Mr. Brewster had some doubts about their termination, and that their contention that they were fired for refusing to work under unsupported roof has a ring of truth about it.

As discussed earlier, at the time of the discharges, the conditions which existed while the complainants were engaged in pillar extraction work presented a serious hazard of a potential unplanned roof fall. Further, Mr. Collins testified that he previously experienced rock falling on his scoop, that he was required to operate the scoop with malfunctioning lights, and that the roof was cracking and popping. Mr. Kennedy testified that a large rock had slipped out of the roof at the point where the roof had been bolted at the pillar break, and Terry Kennedy testified that he had previously informed Mr. Sweeney that the lack of roof bolting on the pillars was jeoparadizing the safety of the miners. Given all of these circumstances, I

conclude and find that the complainants refusal to continue to work under unsupported roof on August 23, 1984, was justified. I further conclude and find that the complainants had a good faith, reasonable belief that continuing to work inby permanent roof support was hazardous.

The record in this case establishes that the complainants were satisfactory employees and had never been disciplined about their work. As a matter of fact Mr. Brewster confirmed that he hired them because of their reputation as good scoop operators. Further, there is no evidence that the complainants ever filed any safety complaints with MSHA or with mine management, or that they were considered troublemakers or malingerers.

The testimony and statements of Mr. Sweeney and Mr. Brewster concerning the termination of the complainants is inconsistent, and I have given it little weight. As indicated earlier, Mr. Sweeney's testimony that the two men quit, and his later statement that he fired them casts doubts as to his credibility. Likewise, Mr. Brewster's prior statements to the MSHA investigator, and his testimony at the hearing, indicates an inconsistency as to his understanding of whether the complainants were fired for cause or voluntarily quit their jobs. Contrasted with this testimony, is the consistent statements of the complainants, both during the hearing, and in their prior contacts with the MSHA investigator, Inspector Matney, and mine management, that they were fired by Mr. Sweeney because they refused to work under unsupported roof.

I conclude and find that the preponderance of the evidence and testimony adduced in this proceeding establishes that Mr. Kennedy and Mr. Collins were fired by shift foreman Sweeney because of their refusal to continue to work as scoop operators under unsupported roof. I further conclude and find that the work refusal by the two complainants was protected activity under the Act, and that their discharge by the respondent for this reason constitutes a violation of section 105(c)(1) of the Act.

The Relief Due the Complainants

Mr. Kennedy testified that after his discharge by the respondent on August 23, 1984, he was unemployed for approximately a month and a half. He then found a job with the Cumberland Coal Company earning $80 a shift, and worked there for 5 weeks. He then went to work for the Tripple G Coal Company earning $70 to $110, but was subsequently laid off

and has been unemployed since September 1, 1985 (Tr. 81-94). He worked continuously for Cumberland and Tripple G, until his lay off from the latter company, and then worked for approximately a month and a half at the Rookie Coal Company until his lay-off on September 1, 1985 (Tr. 94).

Mr. Collins testified that after his discharge by the respondent on August 23, 1984, he attempted to find other employment but could not find a job until April, 1985. He confirmed that he received no unemployment benefits because he had used up all of his eligibility for such benefits. He stated that he found a job in April, 1985, with the Coon Branch Construction Company where he is presently employed earning $80 per shift. Prior to this current employment, he worked for 2 weeks with the Bartlett Tree Trimming Company earning $4 an hour, but was laid off (Tr. 68-69).

The respondent opted not to file any posthearing arguments or to otherwise file any arguments mitigating its liability in these proceedings. In its posthearing brief, MSHA asserts that the remedial goal of section 105(c) is "to restore the [victim of illegal discrimination] to the situation he would have occupied but for the discrimination." Bailey v. Arkansas-Carbon Co. & Walker, 3 MSHC 1145, 1150 (1983); Secretary on behalf of Dunmire and Estle v. Northern Coal Co., 2 MSHC 1585, 1595 (1982). MSHA states that unless compelling reasons point to the contrary, the full measure of relief should be granted to an improperly discharged employee, including back pay with interest. Bailey v. Arkansas-Carbona Co. & Walker, at 1150-1151. Since in this case the complainants were fired for engaging in protected activity, MSHA asserts that they must be made whole for any loss they suffered as a result of the discrimination, including full back pay. MSHA points out that the respondent bears the burden of proof with regard to any allegation of willful loss of pay. Secretary v. Metric Constructors, Inc., 3 MSHC 1259, 1265 (1984), aff'd sub nom. Brock on behalf of Parker v. Metric Constructors, Inc., 3 MSHC 1865 (11th Cir. 1985).

MSHA points out that at the time Mr. Brewster offered the complainants their jobs back, they rejected the offer because they believed Mr. Sweeney would again require them to work under unsupported roof. Mr. Collins testified that when Mr. Brewster offered to take them back, he stated "We'll forget this ever happened." When Mr. Collins questioned whether they would again be required to work under unsupported roof,

Mr. Brewster responded "that's the way we do it" (Tr. 57), and when Mr. Collins asked for another work assignment, Mr. Brewster refused.

Mr. Kennedy testified that he and Mr. Collins advised Mr. Brewster that they would take their jobs back as long as they were not required to work under unsupported roof. He stated that Mr. Brewster replied "that's the way we always work," and that if they did not return to work they did not have a "leg to stand on" (Tr. 91).

I take note of the fact that at the time Mr. Brewster made the offer to the complainants to return to work, he did so in the presence of an MSHA inspector and after an inquiry by the inspector as to whether the complainants had in fact been fired for refusing to work under unsupported roof. Mr. Brewster testified that when he made the offer, the complainants refused and commented that the company would find another excuse to fire them. Mr. Brewster also testified that when he made the offer, it was contingent on his speaking with Mr. Sweeney to ascertain why he had fired the complainants. He subsequently was told by Mr. Sweeney that the complainants were fired for "goofing off," and he obviously believed Mr. Sweeney's version of the incident.

In view of the foregoing, I agree with MSHA's arguments that the reluctance of the complainants to accept Mr. Brewster's conditional offer to return to work, in the circumstances then presented, did not constitute a willful loss of pay on their part. I also agree with MSHA that the respondent has not established a willful loss or pay which would entitle it to mitigate its liability or obligation to make the complainants whole.

Mine operator Jordan testified that the No. 1 Mine was completely mined out and closed in March, 1985 (Tr. 227-228). He confirmed that his company reopened a new mine on October 15, 1985, but he was not aware that any employees who worked at the old No. 1 Mine are now employed at his new operation (Tr. 237). The hiring of new employees is left to the mine superintendent Leeland Hess, and he identified the mine foremen as Jim Cook and Gerald Hess (Tr. 237).

Mr. Sweeney testified that he is unemployed, and that he left his employment with the respondent on March 15, 1985 (Tr. 161). Mr. Brewster testified that he is currently employed by the Vesta Mining Company, and that he left the respondent's employ during the last week of March, 1985, because the No. 1 Mine "was mining out" (Tr. 110-112).

The back pay provisions of section 105(c), like the corresponding provisions of Title VII of the Civil Rights Act, appear to be modeled on section 10(c) of the National Labor Relations Act, 29 U.S.C. § 160(c). Cf. Albemarle Paper Co. v. Moody, 422 U.S. 405, 419 (1985). Questions arising under it should therefore be resolved by reference to NLRB precedent. Id. The general rule is that back pay is the difference between what the employee would have earned but for the wrongful discharge and his actual interim earnings. OCAW v. NLRB, 547 F.2d 598 (D.C. Cir. 1976). In practice, this means gross pay minus net interim earning equals the award. Respondent, of course, is responsible for complying with applicable state and Federal laws on withholding. Cf. Social Security Board v. Nierotko, 327 U.S. 358 (1946).

MSHA asserts that since the respondent did not present any evidence that the complainants would have been discharged prior to the closing of the mine for non-discriminatory reasons, it has not met its burden of proof, and that back pay should be awarded to the complainants at the rate of $70 per day for the period from August 23, 1984 until the March 31, 1985. Taking into account the testimony of Mr. Collins and Mr. Kennedy with respect to their periods or unemployment and employment subsequent to their discharge, MSHA states that Mr. Kennedy is entitled to back-pay compensation in the amount of $2,170, with interest, which includes pay for Friday, August 24, 1984, and $350 per week for the next 6 weeks. With regard to the compensation for Mr. Collins, MSHA states that he is entitled to back-pay in the amount of $10,600, with interest, which includes pay for Friday, August 24, 1984, and $350 per week for the next 31 weeks with a deduction of $320 for his earnings with the tree trimming company. MSHA states that interest for both complainants should be determined in accordance with the Commission approved formula set out in Secretary, ex rel Bailey v. Arkansas-Carbona Co. & Walker, 3 MSHC 1145 (1983); 5 FMSHRC 2042, 2050.

ORDER

The respondent IS ORDERED to pay to the complainant Earl Kennedy the sum of $2,170, less any amounts normally withheld

pursuant to state and Federal law, with interest to the net back-pay award at a rate of 9 percent until it is paid.[1]/

The respondent IS ORDERED to pay to the complainant Larry Collins the sum of $10,600, less any amounts normally withheld pursuant to state and Federal law, with interest to the net back-pay award at a rate of 9 percent until it is paid.[1]/

Payment is to be made to both complainants within thirty (30) days of the date of this decision and order.

Civil Penalty Assessment

On the basis of my prior findings and conclusions, the respondent's discharge of the complainants was in violation of section 105(c)(1), and a civil penalty assessment may be levied against the respondent for the violations.

MSHA argues that the violation was very serious, and it requests a civil penalty assessment in the range of $1,000 to $1,200. I agree that the violations were serious. The respondent's discharge of the complainants for refusing to work under unsupported roof constitutes a negligent disregard for their safety, and the respondent has advanced no arguments in mitigation of the violations.

The record reflects that the respondent is a small mine operator, and the No. 1 Mine is now closed. However, mine operator Jordan is still in business and operates other mines. The respondent has not established that the payment of a civil penalty in the amounts suggested by MSHA will adversely affect its ability to continue in business, and I conclude that it will not.

[1]/ This is the current adjusted prime rate used by the Internal Revenue Service for underpayments and overpayments of tax. Rev. Ruling 79-366. The NLRB also uses this figure to compute interest on back pay awards. Florida Steel Corp., 231 N.L.R.B. No. 117, 1977-78 CCH NLRB Para. 18,484; North Cambria Fuel Co., Inc., v. N.L.R.B., 645 F.2d 177 (3rd Cir. 1981); Secretary ex rel Bailey v. Arkansas Carbona Coal & Walker, 5 FMSHRC 2042, 2050 (Dec. 1983).

MSHA has submitted exhibits C-9 and C-10, two computer print-outs listing the assessed violation history for the Raven Red Ash Coal Corporation No. 1 Mine for the period August 23, 1982, to August 22, 1984 (C-9), and the violations history for all mines controlled by Mr. David Jordan for the period August 23, 1982, to August 22, 1984, (C-10). Exhibit C-9 reflects 42 section 104(a) citations and one section 104(a)-107(a) order for which the respondent was assessed $3,130, and has paid nothing. Exhibit C-10 reflects 157 section 104(a) citations and three orders for which the respondent was assessed $7,069, and has paid $1,255.

During the course of the hearing, the respondent objected to any consideration of violations issued prior to August 1984, on the ground that the mine was owned by a different corporation, the Virginia and West Virginia Coal Corporation, and that Mr. Jordan was not the owner of that company. MSHA submitted information to the contrary by letter and enclosures of January 9, 1986, and the respondent filed nothing in response to that information and has not rebutted MSHA's assertion that Mr. Jordan was the owner and controller of both corporations. In an order issued by me on February 13, 1986, the respondent's objections were overruled, and I concluded that the compliance history of the Raven Red Ash Coal Corporation, as well as the prior corporate entity for the No. 1 Mine, both of which were owned and operated by Mr. Jordan, are relevant to any civil penalty assessment levied in this proceeding. My interlocutory ruling in this regard is herein REAFFIRMED. The respondent has had ample opportunity to challenge the accuracy of the information contained in the computer print-outs, but it has not done so.

I take note of the fact that while the respondent has been assessed civil penalties for its prior infractions of the mandatory safety standards promulgated by MSHA under the Act in Part 75, Title 30, Code of Federal Regulations, it has made few payments. According to the computer codes reflected on the print-outs, most of the assessments have been the subject of MSHA demand letters for payment, and many have ended up as default judgments filed in the United States district court. Although Mr. Jordan is still in business and operating other mines, he has apparently failed to meet his obligations in paying civil penalties, and I have considered this in the civil penalty assessed for the violation in question. I have also considered the fact that the respondent has not previously been the subject of discrimination complaints or violations of section 105(c)(1) of the Act.

In view of the foregoing, and after consideration of the civil penalty criteria found in section 110(i) of the Act, I conclude and find that a civil penalty assessment of $1,000 is reasonable and appropriate for the violations which are the subject of these proceedings.

ORDER

The respondent IS ORDERED to pay a civil penalty in the amount of $1,000 for the violations in question, and payment is to be made to MSHA within thirty (30) days of the date of this decision and order.

George A. Koutras
Administrative Law Judge

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/fb

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

April 8, 1986

JIM WALTER RESOURCES, INC., Contestant	:	CONTEST PROCEEDING
v.	:	Docket No. SE 85-36-R
	:	Order No. 2482922; 12/4/84
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	No. 4 Mine
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. SE 85-62
	:	A.C. No. 01-01247-03641
v.	:	
	:	Docket No. SE 85-123
	:	A.C. No. 01-01247-03664
	:	No. 4 Mine
JIM WALTER RESOURCES, INC., Respondent	:	Docket No. SE 85-109
	:	A.C. No. 01-01401-03597
	:	Docket No. SE 85-124
	:	A.C. No. 01-01401-03607
	:	No. 7 Mine

DECISIONS

Appearances: Robert Stanley Morrow and Harold D. Rice, Esqs., Jim Walter Resources, Inc., Birmingham, Alabama, for Contestant/Respondent; George D. Palmer, Esq., Office of the Solicitor, U.S. Department of Labor, Birmingham, Alabama, for Respondent/Petitioner.

Before: Judge Koutras

Statement of the Proceedings

These proceedings concern civil penalty proposals filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a), seeking civil penalty assessments for four alleged violations of certain mandatory safety standards found in Part 75, Title 30, Code of Federal Regulations. Docket No. SE 85-36-R is a contest filed by Jim Walter Resources, Inc., challenging the legality of section 104(d)(2) Order No. 2482922, which is the subject of civil penalty Docket No. SE 85-62.

The respondent filed timely answers contesting the proposed civil penalties and hearings were held in Birmingham, Alabama. The parties waived the filing of posthearing proposed findings and conclusions. However, all oral arguments made by counsel on the record during the course of the hearings have been considered by me in the adjudication of these cases.

Issues

The critical issue presented in these proceedings is whether or not the respondent is obliged to maintain its ventilation line curtains within 10 feet of all faces, or only the working faces from which coal is being extracted or was most recently extracted.

In determining the amount of a civil penalty assessment, section 110(i) of the Act requires consideration of the following criteria: (1) the operator's history of previous violations, (2) the appropriateness of such penalty to the size of the business of the operator, (3) whether the operator was negligent, (4) the effect on the operator's ability to continue in business, (5) the gravity of the violation, and (6) the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of the violations.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, Pub. L. 95-164, 30 U.S.C. § 801 et seq.

2. Section 110(i) of the 1977 Act, 30 U.S.C. § 820(i).

3. 30 C.F.R. § 75.316.

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

Stipulations

The parties stipulated to the following:

1. The respondent is the owner and operator of the subject mine.

2. The respondent and the mine are subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977.

3. The Administrative Law Judge has jurisdiction in these cases.

4. The MSHA Inspectors who issued the subject orders or citations were authorized representatives of the Secretary.

5. A true and correct copy of the subject orders or citations were properly served upon the respondent.

6. Copies of the subject orders or citations and determinations of violations at issue are authentic and may be admitted into evidence for purpose of establishing their issuance, but not for the purpose of establishing the truthfulness or relevance of any statements asserted therein.

7. The imposition of civil penalties in these cases will not affect the respondent's ability to continue in business.

8. The alleged violations were abated in good faith.

9. The respondent's history of prior violations is average.

10. The respondent is a medium-size mine operator.

The violations in issue in these proceedings are as follows:

Docket Nos. SE 85-62 and SE 85-36-R

Section 104(d)(2) "S&S" Order No. 2482922, was issued at 2:10 p.m., on December 4, 1984, and it cites a violation of mandatory safety standard 30 C.F.R. § 75.316. The condition or practice is described as follows:

> The companies (sic) approved ventilation plan was not being complied with in that the curtain line in No. 2 entry on the No. 13 section measured 24 feet from the face. They had turned a crosscut from the No. 2 entry toward the No. 1 entry on the curtain line side leaving the No. 2 entry 24 feet from the deepest penetration. The companies (sic) approved ventilation plan states that the line brattice shall be maintained within 10 feet of the area of deepest penetration of all faces in all working places inby the last open crosscut at all times, except while roof bolting and servicing as stated in the plan.

Docket No. SE 85-109

Section 104(d)(2) "S&S" Order No. 2481092, was issued at 11:02 a.m., on April 8, 1985, and it cites a violation of mandatory safety standard 30 C.F.R. § 75.316. The cited condition or practice is described as follows:

> The current approved ventilation methane and dust control plan was not being complied with on the No. 11 section (011-0) in that the line curtain was 19 feet from the point of deepest penetration of the face of the No. 2 entry. The plan requires line curtain be maintained within 10 feet of all working places inby the last open crosscut at all times.

Docket No. SE 85-124

Section 104(a) "S&S" Citation No. 2347351, was issued at 2:20 p.m., on April 13, 1985, and it cites a violation of mandatory safety standard 30 C.F.R. § 75.503. The condition or practice is described as follows:

> The Joy model 12, S/N 3524 and approval No. 2G-33344A-00 being operated in the faces of the No. 6 active section to cut and load coal from these faces was not being maintained

in permissible condition in that an opening in excess of .004 inches was observed in the lid of the control box.

Section 104(d)(2) "S&S" Order No. 2482911, was issued at 6:00 a.m., April 13, 1985, and it cites a violation of mandatory safety standard 30 C.F.R. § 75.316. The condition or practice is described as follows:

> The current approved ventilation and methane and dust control plan was not being complied with in the No. 3 entry on the No. 6 section. The line brattice was measured to be 34 feet from the face of the No. 3 entry. The plan states that line brattice shall be maintained to within 10 feet of the area of deepest penetration of all faces in all working places inby the last open crosscut at all times except while roof bolting. Roof bolting was not being performed in the entry and a distance greater than 10 feet has not been granted by the MSHA District Manager.

Docket No. SE 85-123

Section 104(d)(2) "S&S" Order No. 2346556, was issued at 9:40 a.m., on April 15, 1985, and it cites a violation of mandatory safety standard 30 C.F.R. § 75.316. The cited condition or practice is described as follows: "The approved ventilation methane and dust-control plan was not being complied with in the No. 5 entry crosscut right in that the line brattice was 17 feet from the face. The approved plan requires that line brattice be maintained to within 10 feet of all working places."

The parties stipulated that the issue concerning the alleged violations of mandatory safety standard 30 C.F.R. § 75.316, and the contestant/respondent's approved ventilation and methane and dust-control plan are identical to the issue presented in the case of MSHA v. Jim Walter Resources, Inc., Docket No. SE 85-42, decided by Judge Broderick on September 27, 1985, 7 FMSHRC 1471. The parties agreed that the issue presented is that stated by Judge Broderick at 7 FMSHRC 1474, as follows: "Whether respondent is obliged to maintain line curtain within 10 feet of all faces, or only the face from which coal is being extracted or was most recently extracted?"

The parties also stipulated and agreed that the "face" issues with respect to the ventilation plans in all of these cases are identical and that my dispositive determination of this issue in Docket No. SE 85-109, is dispositive of all of the subject cases. The parties also agreed and stipulated that the alleged violations are accurately described and evaluated in the appropriate sections of the respective orders and that the preconditions of the respective orders (unwarrantable failure, no "clean" inspection, etc.) are met if the "face" issue determination is made in favor of MSHA's position.

In the prior decision by Judge Broderick, he concluded that the respondent was in violation of its approved ventilation plan by failing to maintain line curtain within 10 feet of the face in the No. 3 entry on the No. 4 section in the No. 4 Mine. His dispositive ruling (conclusion of law) is stated as follows at 7 FMSHRC 1474-1475:

> 3. The approved ventilation, methane and dust control plan in effect at the subject mine on November 13, 1984 required that line curtains be maintained within 10 feet of all faces in all working places. A "coal face" is defined in A Dictionary of Mining, Mineral and Related Terms, U.S. Department of the Interior (1968) as
>
> > a. The mining face from which coal is extracted by longwall, room, or narrow stall system. Nelson. b. A working place in a colliery where coal is hewn, won, got, gotten from the exposed face of a seam by face workers. Pryor, 3.
>
> This definition obviously is not limited to the time during which coal is actually being extracted. It includes working faces as well as faces from which coal has been or will be extracted. The language of the approved plan is all inclusive and clearly includes entry No. 3 cited in this case. The obvious purpose of the changes made in 1972 was to go beyond the requirement of 30 C.F.R § 75.302-1(a) that line brattice be installed no more than 10 feet from active working faces. All faces, including idle faces, are covered by the plan. The reason for their inclusions is the unusually

high methane liberation in the mine. Respondent argues that the requirement is onerous and that it has not been enforced by MSHA prior to 1984. Neither of these arguments can affect the interpretation of the wording of the plan, and I reject them.

MSHA's Testimony and Evidence

With regard to Order No. 2482922, issued in civil penalty Docket No. SE 85-62 and contest Docket No. SE 85-36-R, Order No. 2482911 issued in civil penalty Docket No. SE 85-124, and Order No. 2346556, issued in SE 85-123, the parties agreed that MSHA need not present testimony from the inspectors who issued those orders since their testimony would be the same as the inspector who issued Order No. 2481092 in civil penalty Docket No. SE 85-109. The parties agreed that all of these orders present common issues of the application and enforcement of mandatory standard section 75.316, and the respondent's ventilation plan (Tr. 90-92; 256-258).

MSHA Inspector Judy McCormick confirmed that she inspected the No. 7 Mine on April 8, 1985, and issued Order No. 2481092, (Docket No. SE 85-109). She identified exhibit G-3 as a sketch of the underground scene and confirmed that it accurately portrays the condition she cited. She stated that coal was being mined at the point shown by an "X" on the sketch and that the violation occurred at point "Y" where the face had been penetrated. The line curtain depicted by the dotted line was located 19 feet outby that "Y" face, and since the ventilation plan required that the curtain be maintained to within 10 feet of all faces, she issued the violation (Tr. 96).

Ms. McCormick stated that the hazard presented in not having the curtain to within 10 feet of a face is the possibility of methane accumulations at the "Y" face, and she noted the direction of the air ventilating the entry by the arrows shown on the sketch (Tr. 98). She confirmed that the ventilation plan, exhibit G-1, at page 10, requires that a minimum of 17,000 cubic feet of air reach the end of the line brattice where coal is being cut. Since coal was not being cut at the "Y" face, only 7,000 cubic feet of air was required at that location (Tr. 98-99).

On cross-examination, Ms. McCormick stated that she made a methane test and found less than one percent of methane at the "Y" face, and she confirmed that her interpretation of the plan was made to prevent a potential buildup of methane,

and that was the reason why she believed the line curtain should have been installed to within 10 feet of the face in question (Tr. 101). She confirmed that all of the area shown on the sketch was idle at the time of her inspection, and that the most recently mined area was at the point marked "X". She estimated that the respondent had turned away from the point marked "Y" and began mining toward the point marked "X" several days earlier than the day of her inspection (Tr. 101-102).

Ms. McCormick defined a "working face" as an area from which coal is extracted on the mining cycle. She stated that the law does not provide a legal definition of the term "face," and she would "guess" that it means an area from which coal is to be extracted or is being extracted (Tr. 102). She stated that since the area shown as "Y" had been penetrated, she would consider it a "face" requiring line brattice to within 10 feet. Had the area not been penetrated, and although respondent defines it as a "rib," she would still "theoretically" consider it to be a "face" because coal will in the future be extracted from that location. She confirmed that anywhere that coal is planned to be extracted would be a "face" subject to the ventilation plan requirement for line brattice (Tr. 104-106).

Ms. McCormick confirmed that she made no smoke tube test in the "Y" face area to determine the amount of ventilation or air circulation in that area (Tr. 110). She explained that the violation was issued for failure to maintain the line brattice to within the required distance of that face, and not for a failure to maintain proper air velocity (Tr. 112-113).

Ms. McCormick stated that the areas marked "X" and "Y" on the sketch are both working places. She indicated that the area marked "X" is penetrated for approximately 50 feet, and that area "Y" is penetrated for some 8 feet. In both instances, "X" and "Y" would both be the deepest penetration working faces of working places (Tr. 117).

Ms. McCormick stated that while "X" and "Y" are both working places, mining could not take place simultaneously at those locations because two miners would be operating on one split of air, and that is not permissible. She considers both "X" and "Y" to be "working places," but not "working faces," and since the ventilation plan addresses "faces of working places," she considers both locations to be "faces of working places" (Tr. 120).

Ms. McCormick confirmed that at the time of the inspection, a brattice curtain was within the required 10 feet of the "X" working face where coal had last been cut (Tr. 121). Although she could test for air movement at location "Y," and the total air intake into the No. 2 entry, she would have no way of determining the amount of air flowing into area "Y" (Tr. 122). She confirmed that abatement was achieved by advancing the curtain at an angle as shown on the sketch, (Tr. 126), and she conceded that this presented a possible hazard because there would be a visibility problem between the mining machine and shuttle car, and to some extent the respondent would be forced to operate through the curtain. However, she explained that this problem was created by turning the crosscut as depicted on the sketch, and that had it been turned from the side to the left of the "Y" area the problem would not exist (Tr. 124).

William H. Meadows, MSHA supervisory mining engineer, testified that he is a graduate professional mining engineer, and that he has engaged in the review and approval of mine ventilation plans since 1969. He stated that the ventilation plan changes concerning the respondent's No. 4 and No. 7 Mines occurred in 1972 after a frictional methane ignition occurred in the No. 3 Mine. The ignition occurred when a continuous-mining machine was scraping the bottom after a line curtain was taken down after the working face was mined. A citation was issued for a violation of section 75.316, but after a determination was made that coal was not being mined and that the line brattice was within 10 feet of the working face, the violation was voided and the case was dismissed. He confirmed that he was called upon to furnish his expert opinion in that case, and on the basis of the facts of that case, he concurred in the decision that a violation could not be supported.

Mr. Meadows stated that as a result of the prior litigation, the language of the ventilation plan for the No. 3 Mine was changed, and the words "working faces" were changed to reflect a requirement that "all faces" would in the future be required to have line curtains installed to within 10 feet. The requirement that line curtains "be maintained to within 10 feet of the area of deepest penetration of all faces in all working places inby the last open crosscut except while roof bolting and servicing as stated in the plan" was also included in all subsequent plans approved by MSHA for the No. 4 and No. 7 Mines.

Mr. Meadows confirmed that the term "faces" is not defined by MSHA's regulations. In his opinion, one has to assume from the history and literature on the subject of mine

ventilation that the requirement for maintaining line brattices to within 10 feet of the face implies that they be so maintained at all mine faces, including idle faces.

Mr. Meadows pointed out that the respondent's old ventilation plan simply paraphrased the requirements of section 75.302-1(a), which required that line brattices be maintained to within 10 feet of the area of deepest penetration of the working face. The purpose in adding the new language was to distinguish between "working faces" as it existed in the law and plan at that time and "all faces in all working places" (Tr. 140).

Mr. Meadows also pointed out that section 75.308 makes reference to methane accumulations in face areas of working places, and line brattices are not specifically mentioned. While there are regulatory definitions for the terms "working places" and "working faces," there is no definition of a face. However, he believes that one must assume a definition from past experience, enforcement, and research. "Faces" would result after one has "worked a face." Once a "working face" has been cut, mined, and loaded, the dropping of the word "working" means "it's no longer being worked, it now becomes a face" (Tr. 141).

Mr. Meadows referred to a February 1969 Bureau of Mines pamphlet, Exhibit ALJ-1, and pointed out that the term "working face" is not used. He described the ventilation tests covered by the publication, and he indicated that when a continuous miner penetrates a coalbed, it extracts coal from a working face. When the miner ceases operation, that working face becomes a face, and if he were to conduct a study similar to the one covered in the publication, he would refer to the "working face" simply as a "face" similar to the reference made in the publication (Tr. 142-143).

Mr. Meadows stated that the respondent's mines freely liberate methane at all faces, including idle faces, and that the mines are among the top 10 percent of all mines nationally with respect to methane liberation (Tr. 144-145).

Referring to the sketch of the No. 2 entry of the No. 7 Mine, exhibit G-3, Mr. Meadows stated that he would consider the areas marked "X" and "Y" as faces. If coal were being cut at "X" and not at "Y," he would consider the former a working face, and the latter an idle face. He explained that the reason the language "all faces" was included in the MSHA approval letters accompanying the respondent's ventilation

plan is to take into account the fact that in a working place there may be more than one face (Tr. 146).

On cross-examination, Mr. Meadows stated that at the time an initial cut of coal is taken, that area becomes a working face. If no coal cuts are made, the area remains a rib until such time as a coal cut is taken. He further explained that if he observed coal being cut, he would consider it a working face, and if work stopped after the initial cut, he would consider it simply as a face (Tr. 151). When asked whether such a cut would remain a working face between shifts when no production is taking place, he replied "To me, a working face is only when you cut it, mine it, or load it, or the district manager specifies some other operation such as roof bolting, blasting, clean-up" (Tr. 52).

Mr. Meadows confirmed that the respondent's ventilation plan is one of the most stringent plans in the country. He agreed that while theoretically possible, due to the manner in which the crosscuts in question were turned, the respondent would have difficulty in maintaining a line curtain to within 10 feet of "Y" while cutting coal at face "X" (Tr. 154-155).

Mr. Meadows stated that the terms "working face" and "face" have different meanings to him, but he conceded that during his testimony in a prior case before Judge Broderick with respect to the term "face" he testified that "Our intention was that the line curtain would be maintained to all faces. You can pick the word 'working faces' or 'face'; it's all faces" (Tr. 159). He conceded that he did not differentiate the terms in his prior testimony, but pointed out that the word "working" brings a new meaning to the term "faces" because of the use of that term in the regulation. He further conceded that the regulation does not use the term "faces" by itself (Tr. 160).

Mr. Meadows conceded that the requirement for line brattice to be maintained to within 10 feet of all faces is not specifically stated in the respondent's plan in clear language, and he alluded to the plan provisions at pages 10 through 13 where the term face is used, and indicated that "A face, if you want to call it a working face or a face. They're one in the same" (Tr. 165-167).

Mr. Meadows confirmed that were it not for the plan provision in this case, an inspector could not cite a violation of section 75.302-1, at locations "X" and "Y" because there was no mining activity taking place at those locations and

they would not be considered "working faces" at the time of the inspection. If mining was taking place, then an inspector could cite section 75.302-1, but at location "Y" no citation could be issued unless the district manager had designated it as another "working face" used for bolting, servicing, or it was designated as an idle face. Rather than doing this, the district manager elected to drop the word "working" from the plan, and used the phrase "all faces" (Tr. 178).

Mr. Meadows stated that the area "Y" was mined and developed in the No. 2 entry, and while it was being mined it was a "working face." When mining ceased, it became a "face" which was required under the plan to have line brattice to within 10 feet. There is no plan provision to remove that brattice from the "Y" area. Had "Y" not been cut for a distance of 8 feet it would still technically be considered a "face" because it was developed as the face of the No. 2 entry. In the event the respondent does not consider it a face, he suggested that it file a supplemental ventilation plan requesting approval not to maintain the line curtain at that location (Tr. 180).

Mr. Meadows stated that a face in any mine in any place where future mining is planned is a potential face, but that he would not require a brattice at the area to the right of the sketch off entry No. 2 which has not actually been mined or cut unless it had actually been developed as a face up to that point (Tr. 182). He conceded that his prior testimony in the earlier litigation indicated that even if the respondent intended to turn right, he would still consider it a "face" (Tr. 183).

With regard to the method of abatement in the instant case, Mr. Meadows confirmed that a potential hazard is created by installing the line curtain to within 10 feet of the "Y" area as was done in this case. The hazards concern a possible short circuiting of the air and a visibility problem in that equipment will run through the curtain. Some mines use clear curtains so that miners can see through it (Tr. 184). However, he believed that such problems would not occur if the respondent had cut through from the "non-curtain side," or if the crosscuts had been mined from left to right (Tr. 185). In the instant case, the violation was issued because the inspector found that the line curtain was not maintained to within 10 feet of "Y," which was the point of deepest penetration in the No. 2 entry (Tr. 189).

Daryl Dewberry testified that he is the president of the local union, a member of the mine safety committee, and is

employed by the respondent as a continuous miner operator at the No. 7 Mine. He is familiar with the violation issued by Inspector McCormick, and in his opinion, because of the equipment operating in the area, it would be impossible to maintain a line curtain to within 10 feet of face "Y" without taking it down. He stated that the respondent's No. 7 Mine ranks number two nationwide in incidents of methane ignition, and that the No. 3 Mine ranks number one (Tr. 191-196).

On cross-examination, Mr. Dewberry stated that he believed the 8-foot cut into the "Y" face was a mistake and that the spads were simply overcut. Normally, the rib would come straight across at that point. He also believed that it would have been more practical to turn right off the No. 2 entry and cut from the off-curtain side because the ventilation curtain could then be maintained to within 10 feet of the face in all penetration areas (Tr. 202-204).

Respondent's Testimony and Evidence

Thomas E. McNider testified that he is the respondent's deputy manager for ventilation, and he confirmed that his duties include the development of mine ventilation plans. He stated that the applicable mine ventilation plans for the respondent's No. 3 and No. 7 Mines all make reference to working faces where actual work is being performed. He believed that the mine faces referred to in the plans must necessarily be interpreted as working faces, and that the use of the language all faces as referred to in MSHA's covering letters approving the plans must be construed to mean working faces in order to be consistent with the actual plans submitted by the respondent.

Referring to the sketch of the No. 2 entry in question, exhibit G-3, Mr. McNider was of the opinion that the area marked "X" on the sketch is a working face, but that the cited area marked "Y" is a rib. He also believed that the area to the right of the developed crosscut as shown on the sketch, even though a potential crosscut, is in fact a rib. He believes there is but one working face in a working place.

Mr. McNider stated that advancing the ventilation brattice to within 10 feet of the purported face designated "Y" on the sketch to achieve abatement in this case constituted a hazard in that the brattice curtain would short circuit the air moving along that location. The brattice would also cut down on the visibility and would subject the brattice to being torn down by equipment moving through the area (Tr. 216).

Mr. McNider stated that as faces are advanced, there are four working places and four working faces. Working faces are turned to establish new crosscuts. As a crosscut is established to the left and then advances to the right, at that point in time the right "rib" becomes a face and the previously mined "face" becomes a rib (Tr. 216). Holing through the crosscut as was done in this case is proper because the "X" area becomes the working face and the line curtain would be maintained to within 10 feet of that face, or the point of deepest penetration, and machines would not be running through the curtain (Tr. 218).

On cross-examination, Mr. McNider confirmed that the respondent's No. 3 and No. 7 Mines were opened in the 1970's. He believed that the crux of the issue presented in these proceedings turns on the definition of the term "face." It is his position that the positioning of the ventilation brattice devices as referred to in the mine ventilation plans refer to working faces where coal is actually being cut and mined, and that MSHA's position is that the requirements apply to all faces, including those which are idle and not being actively or currently mined.

Mr. McNider stated that any methane present at point "Y" on the sketch would be under 1 percent, and if any is detected it would be cleared up. He also indicated that the majority of the methane at the respondent's mines is generated while coal is actually mined at the cutting face, and that any methane generated at the ribs is of a lesser degree and magnitude. He also pointed out that the majority of methane ignitions occur at the working face when a continuous miner is scraping bottom, and he could think of none which have occurred at an idle face. Although an ignition could ocur at an idle face, some work activity has to be taking place, and if this were the case, the face would no longer be an idle face (Tr. 227).

Mr. Meadows was called in rebuttal, and he stated that there is a potential for methane build-up at an idle face area, and that potential ignition hazards are presented when work is performed in the area, or equipment and cables are present. He confirmed that a ventilation survey he supervised indicated that there were 15 methane ignitions in the No. 7 Mine in fiscal year 1985. Assuming that the mine did not liberate methane freely, he was of the view that the term "all faces" would probably not be part of the mine ventilation plan (Tr. 242). He believed that the respondent is the only mine operator that has the "all faces" provision as part of its plan, with the possible exception of U.S. Steel (Tr. 243).

On cross-examination, Mr. Meadows stated that methane tests are required to be made in all working places inby the last open crosscut before any equipment is brought in. He stated that if methane is detected and not taken care of it presents a potential ignition source. He stated that in the State of Alabama the average methane liberation in the active working faces while coal is being cut is 25 cubic feet per minute, but at the respondent's mines, the methane liberation at an active working face ranges from 300 to 500 cubic feet a minute, and under 300 cubic feet a minute at an idle face (Tr. 248). He conceded that he did not know how many of the 15 ignitions that he referred to occurred at the longwall or whether they occurred in situations similar to the facts presented in this case. He also conceded that the 15 ignitions in question are not relevant to the instant case (Tr. 250).

Discussion

30 C.F.R. § 75.316 provides as follows:

> A ventilation system and methane and dust control plan and revisions thereof suitable to the conditions and the mining system of the coal mine and approved by the Secretary shall be adopted by the operator and set out in printed form on or before June 28, 1970. The plan shall show the type and location of mechanical ventilation equipment installed and operated in the mine, such additional or improved equipment as the Secretary may require, the quantity and velocity of air reaching each working face, and such other information as the Secretary may require. Such plan shall be reviewed by the operator and the Secretary at least every 6 months.

30 C.F.R. § 75.2(g) provides as follows:

> (g)(1) "working face" means any place in a coal mine in which work of extracting coal from its natural deposit in the earth is performed during the mining cycle,
>
> (2) "Working place" means the area of a coal mine inby the last open crosscut,

(3) "Working section" means all areas of the coal mine from the loading point of the section to and including the working faces,

(4) "Active workings" means any place in a coal mine where miners are normally required to work or travel;

30 C.F.R. § 75.302, provides in part as follows:

(a) Properly installed and adequately maintained line brattice or other approved devices shall be continuously used from the last open crosscut of an entry or room of each working section to provide adequate ventilation to the working faces for the miners and to remove flammable, explosive, and other noxious gases, dust, and explosive fumes, * * *. (Emphasis added.)

30 C.F.R. § 75.302-1(a) provides as follows:

(a) Line brattice or any other approved device used to provide ventilation to the working face from which coal is being cut, mined or loaded and other working faces so designated by the coal Mine Safety Manager, in the approved ventilation plan, shall be installed at a distance no greater than 10 feet from the area of deepest penetration to which any portion of the face has been advanced unless a greater distance is approved by the Coal Mine Safety District Manager of the area in which the mine is located. (Emphasis added.)

In Docket No. SE 85-109, Inspector McCormick issued Order No. 2481092 after finding that a ventilation brattice curtain installed 19 feet from the point of deepest penetration in the No. 2 entry (location "Y" as shown on sketch exhibit G-3). The inspector considered that location to be a face in the working place which requires the curtain to be installed within 10 feet as stated in the respondent's ventilation plan. The facts show that a curtain was installed within 10 feet of the working face (location "X" on exhibit G-2), where the crosscut had been mined in the direction of that face. The parties agreed that any dispositive decision based on these facts would be controlling in the remaining dockets, and I assume that the violations in the remaining dockets were issued after the inspectors found line curtains

installed at faces in the working places in excess of the 10 feet provided for the plan.

The parties are in agreement that prior to 1984, no citations were issued at the subject mines for violations similar to the ones involved here; that is, for failure to maintain line brattices to within 10 feet of an entry face, after a crosscut was turned.

The requirements for installing section and face ventilation line brattice are found at page 10, paragraph 1, of the respondent's ventilation plan (exhibit G-1). The pertinent plan provision in question provides as follows: "See page 11 for typical section and face ventilation systems for three, four, five and six entry sections. Line brattice shall be installed at a distance no greater than ten (10) feet from the deepest point of penetration."

The requirement for maintaining line brattice to within 10 feet of all faces was not included as part of the ventilation plan submitted by the respondent to MSHA for approval. This provision was included in a June 7, 1984, letter from MSHA's acting district manager at the time the plan was approved, and it provides as follows: "Line brattice shall be maintained to within 10 feet of the area of deepest penetration of all faces in all working places inby the last open crosscut at all times except while roof bolting as shown in Sketches 11, 12 and 13."

During the course of the hearing, the respondent asserted that MSHA's intent in requiring line brattice to within 10 feet of all faces, including idle faces, is based on MSHA's belief that turning a crosscut from the line brattice side of the entry is not a good mining practice because the line curtain can never be maintained to within 10 feet of the working face of the crosscut while it is being mined during the curtain-side turn.

Respondent also pointed out that its ventilation plans do not require that brattices be maintained to within 10 feet of all faces, and that this requirement has been imposed on the respondent by means of the ventilation plan approval letters containing the language "all faces."

Respondent's counsel confirmed that the respondent is at present regularly contesting all violations which are based on MSHA's definition of a "face," and the application of the 10-foot line curtain requirements to that definition. Counsel also confirmed that the respondent has met with MSHA

to discuss its enforcement position, but no resolution has been reached short of issuing violations (Tr. 118).

MSHA's counsel stated that the "all faces" language has been inserted by MSHA's district office consistently since 1972 (Tr. 170-173). Respondent's counsel stated that the respondent has no choice in the matter when the plan is approved with the "all faces" proviso in it (Tr. 174). However, he also indicated that while the respondent has not in fact accepted this definition of a "face," it does not wish to risk a mine closure for non-compliance. He also indicated that the issue has never been raised until these cases were litigated, and it is now contesting all cases in which this issue is presented (Tr. 173-174).

Respondent's counsel took the position that there is no intended distinction between the terms "face" and "working face" and that they mean the same thing. He pointed out that for approximately 13 years no one thought that there was a distinction in the terms or that the terms had different meanings, and that the distinctions have been made by MSHA when it began issuing citations and orders at its mines. Counsel stated that "MSHA is determined that we should not turn into the curtain on making crosscuts," and he insisted that continued compliance with the requirement that curtains be located within 10 feet of all faces would result in unsafe mining practices (Tr. 208-211).

MSHA's counsel conceded that while the point of deepest penetration where the alleged violation took place was not a working face because no coal extraction was taking place, the other face where the curtain was installed was a working face, and that both locations were working places because they were inby the last open crosscut (Tr. 125-126). Counsel also conceded that in the absence of the phrase "all faces," the failure by the respondent to maintain line brattice to within 10 feet of a working face would constitute a violation of section 75.302-1(a), and any inspector who found such a condition would have to cite that specific standard as a violation rather than the plan.

MSHA's counsel confirmed that the "all faces" requirement was placed in the respondent's ventilation plan because of the high liberation of methane. Counsel confirmed that the respondent's mines operate under the most stringent ventilation plans, and that the respondent is the only mine operator with such a plan provision. He conceded that the plan provision is there because MSHA put it there by the "cover sheet" or approval letter accompanying the plan (Tr. 227-228).

MSHA's counsel asserted that the "all faces" requirements of the plan in question would apply in these cases regardless of the amount of penetration made at the No. 2 entry face identified as "Y". He pointed out that the facts before Judge Broderick in the prior case indicated that there had been no penetration at a similar "Y" location, and very little at a similar "X" location, but that Judge Broderick nonetheless ruled that both locations were faces which required brattice curtains within 10 feet. Counsel also pointed out that Judge Broderick rejected any notion that the face which had not been penetrated was simply a rib (Tr. 130). In support of his position in all of these cases, counsel relies on the dictionary definition of the term "face" relied on by Judge Broderick (Tr. 130-131). Counsel conceded that if the plan had used the words "all working faces in all working places" instead of "all faces in all working places," the violations would not have issued in these cases (Tr. 128).

Respondent's counsel agreed that at the point in time when the location "Y" was penetrated, it was in fact the face of the No. 2 entry. However, aside from the fact that he believed the cutting machine had simply "overcut" by 2 feet and that the penetration was a "mistake," he took the position that once the machine turned away from that location and starting driving and cutting the crosscut, location "Y" was not a working face because it was not being mined and had not been mined for at least several days before inspector McCormick arrived on the scene. In counsel's view, at the time the inspector was there, location "Y" was simply a rib, but that eventually the crosscut would have been turned to the right off the entry, and the "rib" at location "Y" would have been mined through at some future time (Tr. 206-208).

In the prior decision by Judge Broderick, he relied on the definition of a "coal face" as found in A Dictionary of Mining, Mineral and Related Terms, to support his conclusion that the term is not limited to the time during which coal is actually extracted, and that the term includes working faces as well as faces from which coal has been or will be extracted. If one were to use the definition of the term "face" as found in the same dictionary, one could come to the opposite conclusion. The term "face" is there defined in part as follows:

> * * * A point at which coal is being worked away, in a breast or heading; also working face. * * * The exposed surface of coal or other mineral deposit in the working place

> where mining, winning, or getting is proceeding. * * * The principal frontal surface presenting the greatest area such as the face of a pile of material, the point at which material is being mined. * * *

In the case of United States Steel Corporation v. Secretary of Labor, 1 FMSHRC 1024, decided August 10, 1979 by former Commission Judge Forrest E. Stewart, he vacated two alleged violations of 30 C.F.R. § 75.316, which charged that the operator had violated a provision of its ventilation plan which required line brattice to be maintained to within 10 feet of the deepest penetration of all working faces. In that case, the evidence established that no coal was actually being cut, mined or loaded when the inspector observed the alleged violative conditions. Judge Stewart ruled that line brattice was required to be maintained to within 10 feet of the area of deepest penetration of all working faces only when coal was actually being cut, mined or loaded.

Judge Stewart took note of the fact that mandatory standard section 75.302-1(a), specifically requires line brattice at the 10-foot distance only when coal is being cut, mined or loaded. Since this provision clearly designated the working face as that place at which brattice is to be maintained, Judge Stewart ruled that the modifying phrase "from which coal is being cut, mined or loaded" specified the time at which brattice is to be maintained, and he concluded that all working faces must be provided with line brattice meeting the 10-foot criteria during that time period.

Judge Stewart held that the language "all working faces" as contained in the operator's ventilation plan clearly did not mean that brattice be maintained at all times in all working faces. Although the ventilation plan was silent as to the time when the 10-foot line brattice was required during advance mining, he observed that this silence could not be construed as adding additional requirements to those found in section 75.302-1(a). He ruled that in order for the operator to be penalized for failure to maintain 10-foot line brattice at times other than those specified in the regulation, the approved plan should clearly have stated the additional requirements in such a way that clearly informed the operator of its obligations.

Judge Stewart also observed that it was obvious that the operator did not intend that brattice must be maintained within 10 feet of the working face at all times when it submitted its plan to MSHA for approval. He also observed that

to construe the plan in a manner which would require 10-foot line brattice at all times, even when coal was not being cut, mined or loaded, would create a conflict with the roof-control plan which contained a specific exemption. He noted that the inspector testified that there were times when the line brattice did not have to be maintained to within 10 feet of the face since the roof-control plan allowed the removal of line brattice during roof bolting operations. This provision was included in the roof plan because the line brattice presented a hazardous obstruction during bolting. The inspector mentioned one occasion on which this obstruction resulted in the severe injury to a miner's arm.

Findings and Conclusions

MSHA's position for insisting that line brattices be installed within 10 feet of all faces is premised on the theory that methane can accumulate at idle faces, as well as working faces, and the fact that the respondent's mines have a history of liberating high amounts of methane. However, MSHA presented no credible testimony or evidence to establish that hazardous methane accumulations had occurred at the face areas cited by the inspectors in these cases. As a matter of fact, although MSHA introduced evidence of a number of prior methane igntions at the respondent's mines, ventilation specialist Meadows did not know how many of these involved idle face ignitions, nor could he supply the facts and circumstances under which these purported ignitions occurred.

Mr. Meadows conceded that the law requires that all faces in all working places be tested for methane, and that if the tests were not made, a potentially hazardous condition would be present (Tr. 246-247). If a test were made and no methane were detected, there would be no hazard. Further, if methane were detected within 5 to 15 minutes after a test indicated none present, the respondent would have to be given an opportunity to dispel the methane (Tr. 248). Mr. Meadows had no knowledge as to how many of the 15 methane ignitions occurred at the longwall, and assuming they all occurred at the longwall, he conceded that the fact that they occurred would not be relevant to the facts presented in these cases (Tr. 250).

Respondent's ventilation manager McNider testified that the majority of methane ignitions which have occurred in the respondent's mines have occurred at the working face where a continuous miner was operating and scraping the mine bottom. He pointed out that such ignitions would not occur at an idle face unless some work was going on at that location, and

since no work is taking place at an idle face, an ignition is not likely to take place there. In his opinion, an "idle face" is by definition one which has been abandoned and no work is taking place there (Tr. 225-227).

Mr. Meadows confirmed that the ventilation plan change which occurred in 1972 was the result of litigation arising from a methane ignition which occurred while a mining machine was scraping bottom after a line curtain was taken down from a working face which had been mined. The respondent was charged with a violation of section 75.316, but the case was dismissed after it was determined that coal was not being mined at the face and that the line curtain was within 10 feet of the face. Mr. Meadows confirmed that he testified in that case and agreed that the violation could not be supported.

I believe it is reasonable to conclude that MSHA's "all faces" requirement, which applies only to the respondent's mines, and no other mine operators nationwide, was added to the plan to cover a situation where a potential methane accumulation is presented at an idle face which had been mined and which no longer fits the definition of "working face" as defined by MSHA's regulations. If it is true that methane accumulates at idle faces as well as working faces, MSHA's adoption of this plan provision only for the respondent's mines, and not for other mines, appears to be discriminatory. While it is true that the respondent's mines have a history of high methane liberation, I cannot conclude that in those mines which liberate less methane, accumulations of methane at idle or non-working faces do not present the same potential for methane ignitions. All mines liberate methane, and it seems to me that if MSHA wishes to impose an "all faces" interpretation of the ventilation requirements of sections 75.316 and 75.302-1(a), it should do so through proper rule making rather than imposing them on a mine operator through the ventilation plan review process, or by adding such a requirement in a transmittal letter.

I also believe it is reasonable to conclude that MSHA is not too enchanted with the mining methods utilized by the respondent while driving and turning its crosscuts, and that its insistence on maintaining line brattices to within 10-feet of all faces in the working places is a subtle attempt to force the respondent to change its mining methods. During the course of the hearing, MSHA's counsel denied that this was the case, and he simply took the position that since the all-faces requirement was a part of the respondent's approved plan, it must be followed, and he implied that the respondent "was stuck with the plan provision."

I take note of the fact that the 10 foot "all faces" line brattice requirement contains an exception for roof bolting accomplished in accordance with plan sketches 11, 12, 13. Although this exception may cure an otherwise contradictory conflict with the "all faces" requirement, the same cannot be said for other parts of the plan which I find to be in conflict with MSHA's asserted "all faces" requirements. These plan provisions specifically use the term "working faces." Since that term is specifically defined by regulation, requiring the respondent to maintain its brattice to within 10 feet of "all faces," a term not defined by the regulation, creates a confusing conflict in the application of the plan as a whole.

The plan provision for installing section and face ventilation line brattice does not specifically state that a line brattice must be within 10 feet of a face or working face, and Mr. Meadows conceded that the plan itself "is not written specifically in the King's English that way" (Tr. 163). When asked for an explanation, Mr. Meadows cited paragraph 2 at page 10, which states in pertinent part that "A minimum of 17,000 cubic of air shall reach the end of the line brattice where coal is cut, mined or loaded," and that by definition this means the working face (Tr. 164). He stated that the sketches found on page 11 depict the line curtain installation methods in all working places, and that the optional face ventilation system plan provisions found on page 12 depict "blowing curtains" requirements when roof and rib bolting and servicing take place, and that the reference to a 10 feet maximum distance from a face as shown on sketch 11, page 13, is from a face "no matter if you want to define it as a working face or a face," (Tr. 165). He stated that the face curtain requirements for use when bolting takes place depicts "10 feet of a face, a face, if you want to call it a working face or a face. They're one and the same" (Tr. 165).

In further explanation of Mr. Meadows' testimony, MSHA's counsel stated that "I think the witness would construe it to mean at least to be consistent with his approach that what they really meant to say "all faces in all working places," and the District Manager simply set that out clearly in the approval" (Tr. 169).

It seems clear to me that in that portion of the ventilation plan dealing with the installation of blowing brattice curtains while bolting or servicing the roof and rib, the use of the term "face" is clearly intended to mean working face. In fixing the maximum distances that a brattice curtain may

be installed, numbered paragraphs 2, 9, and 10 of the plan specifically use the term working face, and paragraph 10 states that "the entire blowing curtain may be taken down after the permanent exhaust line curtain has been extended to within 10 feet of the working face." Under the circumstances, I conclude that all "face" references in the plan provisions for roof/rib bolting and servicing found at page 12, including the sketches found at page 13, are intended to apply only to the working faces.

The respondent's ventilation and methane and dust-control plan contains several additional requirements for maintaining proper air ventilation in the mines, and in each instance, the plan refers to working faces. The plan requirements for dust control at the respondent's longwall, page 18, paragraph F, provides that a minimum of 18,000 C.F.M.'s of air shall reach the working face where coal is being mined. The plan requirements for mine maps found at page 19 requires a mine map reference notation for average height and air velocity, as required, at each working face. Page 4, paragraph 11, makes reference to a November 21, 1980, approved section 101(c) modification petition permitting the respondent to use belt air entries for coursing intake air to active working faces.

Inspector McCormick defined a "working face" as "an area from which coal is being extracted on the mining cycle." She stated that there is no legal definition of the term "face," but she guessed that it would be "the area from which coal is to be extracted or is being extracted." When asked whether a "planned" cut would be considered a "face," she answered in the affirmative. When asked whether a line curtain would be required within 10 feet of that "planned" cut, she replied "no." When asked to explain her answer, she replied "theoretically, this is a rib." She explained that the fact that a "rib" had been penetrated, yet not "squared off" would make it "a face" (Tr. 102-103). She confirmed that her understanding of MSHA's position is that a "face" is any location where an operator plans to extract coal (Tr. 104). If this is true, then the inspector's belief that a planned cut does not require line brattice to within 10 feet, and MSHA's position that it does are at odds with each other and are contradictory.

Mr. Meadows believed that the terms "faces" and "working faces" mean the same thing, and he believed that the requirement for maintaining line brattices to within 10 feet of the face implies that they be so maintained to all faces, including idle faces. In support of this conclusion, Mr. Meadows relied on "the history and literature on the subject of mine ventilation." The only cited literature is a February 1969

Bureau of Mines Report of Investigations 7223 entitled Face Ventilation in Underground Bituminous Coal Mines (exhibit ALJ-1). Mr. Meadows pointed out that the term "working face" is not used in this publication, and he indicated that once a continuous miner penetrates and extracts coal from a seam, it does so from a working face. Once the miner ceases operation, the working face becomes simply a face, and he would refer to both as a "face."

MSHA's reliance on the publication cited by Mr. Meadows to support a conclusion that the phrase "all faces" includes idle faces as well working faces as defined in its regulations is rejected. I take note of the fact that the publication in question was published prior to the enactment of the 1969 Coal Act and the 1977 Mine Act. While it is true that the article does not use the term "working face," it does state that the basic objective of mine ventilation is to provide an adequate supply of uncontaminated air to the working areas, and that the volume of methane released from an active face varies throughout the bituminous coal fields and cannot be predicted with certainty (pgs. 1, 15). Although the term "active face" is not further explained, there is a strong inference that when used in conjunction with "working areas," it means" active working faces.

The practice of supplementing ventilation plans by correspondence appears to be a routine matter between MSHA and this respondent. In a case recently decided by me involving these same parties, Docket No. SE 85-48, the identical ventilation plan for the respondent's No. 4 Mine was in issue. In that case, in response to a July 14, 1984, approval letter from MSHA's acting district manager, respondent's mine manager, Ken Price, wrote a letter to the district manager requesting approval to "point feed" its underground air ventilation at necessary locations. That request was approved by a letter from the district manager, and the approved methods and procedures for "point feeding" were specifically incorporated as a supplement to the previously approved plan, and were in fact subsequently incorported as part of the plan itself when it was next reviewed. However, in the instant proceedings, the requirement for maintaining line brattices to within 10 feet of the area of deepest penetration of all faces has never been specifically made a part of the respondent's plan. It has apparently been included in the district manager's approval letters as a "proviso" to the plan. I find this method of plan review and approval to be rather strange, and it supports the respondent's contention that it never intended the all faces interpretation or application as imposed by MSHA. It seems to me that had it intended to be

covered by the "all fces" provision, respondent would have included it in the plan submitted to MSHA.

The respondent's contention that compliance with the requirement that line brattice be maintained to within 10-feet of all faces presents certain potential hazards is supported by the record. Inspector McCormick conceded that requiring a brattice curtain to be installed within 10-feet of the face which had been penetrated presented a possible hazard in that a visibility problem would be created between the shuttle cars and continuous miners, and they would have to operate through the curtain (Tr. 123).

MSHA's ventilation specialist Meadows agreed that the respondent would have difficulty maintaining line brattice to within 10 feet of the cited face while cutting coal at the working face where a brattice had been installed to within 10 feet (Tr. 154-155). Mr. Meadows also agreed that requiring the brattice within 10 feet of the cited face in question would present a hazard in that visibility would be curtailed and the air ventilation could possibly be short-circuited (Tr. 184-185). Safety committeeman Dewberry stated that because of the equipment operating in the crosscut area, it would be impossible to maintain the brattice within 10 feet of the cited face, and some of the curtain would have to be taken down (Tr 195).

I conclude and find that on the facts of these cases, requiring the respondent to adhere to the all faces requirement imposed on it by MSHA by means of ventilation plan approval letters would result in exposing the miners to hazards and accidents stemming from their inability to clearly observe men and equipment moving behind the line curtains located in places where MSHA insists they be placed in order for the respondent to avoid citations. MSHA's witnesses agree that the potential hazards are real, and I believe that the recognition of these potential hazards and the safety concerns expressed by the respondent override any subtle attempts by MSHA to "nudge" the respondent into changing its mining methods. If MSHA believes that the respondent's present mining methods are hazardous, it has an obligation to directly address such situations rather than imposing unworkable plan requirements which in the final analysis result in additional potential hazards.

I further conclude and find that MSHA's application and interpretation of the all faces requirement it imposed on the respondent is inconsistent with the overall plan, as well as

mandatory standards 75.302 and 75.302-1(a). Although I realize that the respondent is not charged with a violation of these standards, the regulatory intent for imposing these requirements for the ventilation of working faces as encompassed in those standards as well as the overall plan, is to insure a methane free working face atmosphere where active mining is taking place with miners and equipment present.

Mandatory safety standard section 75.316 requires a mine operator to adopt a suitable mine ventilation and methane and dust-control plan for its mine. Once approved by MSHA, that plan becomes the applicable plan required to be followed until such time as it is revised, revoked, or otherwise changed. A violation of the plan constitutes a violation of the requirements of section 75.316. I conclude and find that at the time the respondent submitted its plan to MSHA for approval it never intended that line brattice be required to be maintained within 10 feet of all faces. I assume that in the absence of this MSHA imposed requirement, the plan as submitted was suitable for the mines in question.

MSHA's attempt to impose further requirements for line brattices at idle "faces" or "ribs" where coal is not being mined or cut only at the respondent's mines would in my view lead to conflicting and confusing applications of the respondent's overall plan, and it would impose additional requirements on the respondent which other mine operators are not required to follow. I recognize the fact that section 75.316, provides flexibility in authorizing MSHA to require a ventilation system and methane and dust-control plan suitable to the prevailing conditions in a mine on a case-by-case basis. However, in these proceedings I am not convinced that MSHA has established that the respondent failed to follow a plan suitable to the mine conditions in question. Since the record here establishes that requiring the respondent to follow the all faces requirement for maintaining brattice curtains would result in additional hazards to miners, quite the contary is true. In my view, the resulting hazards render the plan requirements unsuitable for the mines in question. Since they are, I find no basis for concluding that the respondent is required to follow them, and I further conclude and find that MSHA has failed to establish any violations of the cited plan provision in question.

In view of the foregoing findings and conclusions, Order Nos. 2482922, 2481092, 2482911, and 2346556 ARE VACATED, and MSHA's civil penalty proposals in connection with these orders ARE DISMISSED. The contestant's contest in Docket No. SE 85-36-R (Order No. 248922) IS GRANTED.

Fact of Violation

Docket No. SE 85-124, Citation No. 2347351

In this case, the respondent is charged with the failure to maintain a continuous-mining machine in a permissible condition. The inspector found an opening in excess of .004 inches in the lid of the control box, and the machine was being used to cut and load coal from the faces.

The parties stipulated and agreed that the citation as issued accurately describes and evaluates the permissiblity violation of 30 C.F.R. § 75.503. The inspector who issued the citation was not available for testimony and the petitioner's counsel stated that he was out of state of other MSHA business.

Respondent does not dispute the fact that the conditons described on the face of the citation constitute a violation of section 75.503. Respondent presented no testimony or evidence with respect to this citation, and its counsel did not dispute the inspector's "S&S" finding. Counsel stated that he was only disputing the amount of the proposed civil penalty assessment proposed by MSHA ($850). The parties requested that I assess an appropriate civil penalty on the basis of the citation, the pleadings filed by the parties, and the statutory criteria found in section 110(i) of the case (Tr. 8).

The burden of proof in a civil penalty case with respect to the fact of violation and the proposed civil penalty assessment lies with the petitioner. In this case, the respondent has conceded that a violation occurred and that it was significant and substantial. Accordingly, the citation IS AFFIRMED.

The proposed civil penalty in this case was "specially assessed" pursuant to MSHA's civil penalty criteria and procedures found in Part 100, Title 30, Code of Federal Regulations. However, it is clear that I am not bound by these assessment regulations and have jurisdiction to assess a civil penalty for the violation de novo.

With respect to the six statutory criteria found in section 110(i) of the Act, the parties have stipulated to the following:

1. The respondent is a medium sized mine operator and the imposition of a civil penalty will not affect the respondent's ability to continue in business.

2. The violation was abated in good faith.

3. The respondent's history of prior violations is average.

I take note of the fact that abatement in this case was achieved within an hour and 10 minutes of the issuance of the violation. I also note that the inspector found that the violation was the result of moderate negligence on the part of the respondent, and that the likelihood of the occurrence of the event against which the standard is directed was "reasonably likely" and that two persons were exposed to a hazard.

In this case, the inspector found an opening between the cover plate and control box of the continuous-mining machine in excess of .004 of an inch. The machine was being operated at the face cutting and loading coal. Testimony in connection with the other violations issued at this mine in this case reflects that the mine liberally releases methane and that methane ignitions have occurred in the mine. Under the circumstances, I conclude that the violation presented a possible ignition hazard and was serious.

With regard to the respondent's history of prior violations, although the parties stipulated that the respondent has an "average" history of prior violations, I have no idea what this means. MSHA has filed no information concerning the respondent's history of prior violations, and I have no basis for determining whether an increase or decrease in the initial assessment is warranted.

Civil Penalty Assessment

In view of the foregoing findings and conclusions, and taking into account the requirements of section 110(i) of the Act, I cannot conclude that MSHA's initial assessment of $850 for the violation in question is unreasonable. Accordingly, IT IS AFFIRMED.

ORDER

The respondent IS ORDERED to pay a civil penalty in the amount of $850 for section 104(a) "S&S" Citation No. 2347351,

April 13, 1985, 30 C.F.R. § 75.503. Payment is to be made to MSHA within thirty (30) days of the date of this order, and upon receipt of payment, the case is dismissed.

George A. Koutras
Administrative Law Judge

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April 9, 1986

ANN RILEY OWENS, Complainant	:	DISCRIMINATION PROCEEDING
v.	:	Docket No. LAKE 86-33-D
MONTEREY COAL COMPANY, Respondent	:	VINC CD 85-21
	:	Monterey No. 2 Mine

ORDER

Respondent, Monterey Coal Company (Monterey), moves for dismissal or summary decision on the ground the captioned discrimination complaint fails to state a claim for which relief may be granted and therefore the Commission lacks jurisdiction over the subject matter.

Complainant, a woman miner, appears pro se. She has filed a 32 page verified, handwritten opposition. The matter is set for an evidentiary hearing in St. Louis, Missouri on April 22, 1986.

Monterey's motion is bottomed on the proposition that complainant's admitted on-the-job foot injuries were self-inflicted, not work related, and therefore the claim that such injuries created an underground safety hazard, even if true, was not a protected safety related activity. At this stage of the proceedings, I am not called upon to determine the validity of Monterey's hypothesis. Complainant maintains her injuries were work-related -- the result of her good faith attempt to comply with Monterey's metatarsal protective shoe policy. There is therefore a disputed issue of material fact.

It is well settled that on a motion to dismiss or for summary judgment all facts well pleaded must be accepted unless it is shown there is no dispute as to the material facts and that movant is entitled to judgment as a matter of law. Commission Rule 64; FRCP 12(b)(6), 56. Since both parties rely on matters outside the pleadings, Monterey's motion has been treated as one for summary decision. Carter v. Stanton, 405 U.S. 669 (1972). Verified pleadings, of

course, qualify as affidavits if, as is true of Ms. Owens opposition, they are based on the pleader's first-hand knowledge. Forts v. Malcolm, 426 F. Supp. 464, 466 (S.D.N.Y. 1977).

Except in the clearest of cases, the Commission does not look favorably on motions for summary decision as they tend to deprive litigants of their day in court. Missouri Gravel Company, 3 FMSHRC 2470 (1981). This is especially true in pro se cases where the trial judge has a duty to satisfy himself all the relevant facts have been developed. Burns v. Asarco, 5 FMSHRC 1497, 1498 n.2 (1982).

The applicable standard for review of a motion for summary decision is the same as that applicable to a motion for summary judgment under Rule 56. This is that:

> "A summary judgment is authorized only if 'there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law.' The function of the court on a summary judgment motion 'is limited to ascertaining whether any factual issue pertinent to the controversy exists; it does not extend to resolution of any such issue.' Once it is determined that material facts are in dispute 'summary judgment may not be granted,' and in 'making this determination doubts . . . are to be resolved against the granting of summary judgment.' To warrant summary judgment the record 'should show the right of the movant to a judgment with such clarity as to leave no room for controversy, and . . . should show affirmatively that the [adverse party] would not be entitled to [prevail] under any discernible circumstances . . . Summary judgment is an extreme remedy, and under the rule, should be awarded only when the truth is quite clear." Weiss v. Kay Jewelry Stores, Inc., 470 F. 2d 1259, 1261-62 (D.C. Cir. 1972).

A summary decision is particularly inappropriate in discrimination cases where "the inferences the parties seek to have drawn deal with questions of motive, intent and subjective feelings and reactions." Empire Electronics Co. v. United States, 311 F. 2d 175, 180 (2d Cir. 1962). Finally,

> "The burden on a party moving for summary judgment is affirmative: 'The party seeking summary judgment has the burden of showing there is no genuine issue of material fact, even on issues where the other party would have the burden of proof at trial, and even if the

> opponent presents no conflicting evidentiary matter.' (Citations omitted). That is, the moving party must present affirmative evidence of facts that, if true, would compel a judgment for that party . . . .
>
> In assessing whether a party moving for summary judgment has met his or her burden, a court must view all inferences to be drawn from underlying facts in the light most favorable to the party opposing the motion. (Citations omitted). McKinney v. Dole, 765 F. 2d 1129, 1134-1135 (D.C. Cir. 1985).

Under the Mine Act, unlawful reprisal occurs when (1) a miner participates in a statutorily protected activity, (2) an adverse employment action is taken against him or her, and (3) a causal connection existed between the two. Here complainant's verified opposition shows she participated in numerous acts of claimed protected activity, including the fact that on July 18, 1985 she reported, that due to the disabilities suffered to her feet while working in the No. 2 Mine during the period July 15 to 18, she had become a hazard to her own safety and to that of her co-workers. With respect to the second element, Ms. Owens pleadings and opposition set forth numerous adverse actions such as (1) Monterey's continuing refusal to classify her injuries as work-related, (2) its refusal to reimburse complainant for the legal expense she incurred in prosecuting her own workmen's compensation claim, and (3) regular and continuing acts of claimed job discrimination, vilification, retaliation, and harrassment due to an anti-women miner and safety animus.

Third, it seems clear that if complainant's injuries were, in fact, work related as well as the proximate cause and justification for her refusal to work from July 18 to 29, 1986 she has stated a claim for which relief, including injunctive relief, may be granted under the Mine Act if any of the many adverse actions alleged were motivated in any part by her safety complaints and activities. See, Secretary on behalf of Dunmire and Estle v. Northern Coal Co., 4 FMSHRC 126, 142 (1982); Rosalie Edwards v. Aaron Mining Co., 5 FMSHRC 2035 (1983); Pratt v. River Hurricane Coal Company, Inc., 5 FMSHRC 1529 (1983).

It is axiomatic that on a motion for summary decision, the trial judge cannot try issues of fact but only determine whether there are issues of fact to be tried. Once this is determined in the affirmative the motion must be rejected. This is true whether or not the case will ultimately be tried to a judge or a jury.

The Mine Act and its legislative history show that if miners are to be encouraged to be active in matters of safety and health, they must be protected against any possible discrimination which they might suffer as a result of their participation in enforcement of the Act. To further the congressional aim of making the Nation's coal mines safe places to work, the concept of protected activity must be so construed as to assure that miners will not be inhibited in any way from exercising the rights afforded them by law. Donovan v. Stafford Const. Co., 732 F. 2d 954, 960, 961 (D.C. Cir. 1984)

Based on an exhaustive review of the record, I conclude the many issues of material fact and credibility presented make the granting of Monterey's motion improper, improvident and an abuse of discretion.

Accordingly, it is ORDERED that Monterey's motion be, and hereby is, DENIED.

Joseph B. Kennedy
Administrative Law Judge

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April 9, 1986

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), ON BEHALF OF LARRY COLLINS, Complainant	:	DISCRIMINATION PROCEEDING Docket No. VA 85-5-D MSHA Case No. NORT CD 84-7 Mine No. 1
v.	:	
RAVEN RED ASH COAL CORPORATION, Respondent	:	

ORDER OF DISMISSAL

Before: Judge Koutras

This proceeding concerns a temporary reinstatement application filed by MSHA on December 26, 1984, on behalf of the complainant Larry Collins. The case was originally docketed as VA 85-5-D, and Chief Judge Merlin issued an Order on December 26, 1984, requiring the temporary reinstatement of Mr. Collins pending a hearing on the merits of his complaint. No further action was taken on the reinstatement, and MSHA never requested enforcement of Judge Merlin's order. Subsequently, on August 23, 1985, MSHA filed its discrimination complaint on behalf of Mr. Collins, as well as another miner, Earl Kennedy, and the cases were assigned Docket No. VA 85-32-D.

On April 7, 1986, I issued my dispositive decision in Docket No. VA 85-32-D. Under the circumstances, the temporary reinstatement petition filed on behalf of Mr. Collins is moot, and this matter should be dismissed. Accordingly, the case docketed as VA 85-5-D is dismissed.

George A. Koutras
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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April 10, 1986

EMERY MINING CORPORATION, Contestant	:	CONTEST PROCEEDING
	:	Docket No. WEST 86-56-R
v.	:	Citation No. 2833830; 12/20/85
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Cottonwood Mine

DECISION

Appearances: Timothy M. Biddle, Esq. and Peter K. Levine, Esq., Crowell & Moring, Washington, D.C., for the Contestant; James H. Barkley, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for the Respondent.

Before: Judge Morris

This is a contest proceeding initiated by contestant against the Secretary of Labor in accordance with the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (the Act).

A hearing on this case and related cases commenced on March 5, 1986 in Salt Lake City, Utah.

At the hearing contestant renewed its motion to withdraw its Notice of Contest. No person objected to the motion.

Pursuant to Commission Rule 11, 29 C.F.R. § 2700.11, contestant's motion is granted and the case is dismissed.

John J. Morris
Administrative Law Judge

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April 10, 1986

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), ON BEHALF OF JOHN G. KLINE, Complainant	:	DISCRIMINATION PROCEEDING
	:	Docket No. WEVA 85-226-D
	:	MORG CD 85-7
	:	Loveridge No. 22 Mine
v.	:	
CONSOLIDATION COAL COMPANY, Respondent	:	

ORDER OF DISMISSAL
DECISION APPROVING SETTLEMENT

Before: Judge Maurer

The Secretary has filed a motion explaining that pursuant to agreement between the parties, the complainant now has received or will receive all the relief sought in this case.

The Secretary further has moved for approval of a civil penalty in the amount of $200 for the violation of section 105(c) of the Act. The Secretary further has discussed the proposed settlement in light of the six statutory criteria set forth in section 110 of the Act. Based upon my review of the Secretary's motion I am satisfied that the proposed settlement is consistent with the purposes and spirit of the statute.

In light of the foregoing the proposed settlement is APPROVED and the operator is ORDERED TO PAY $200 within 30 days from the date of this decision. Further, the Secretary's motion to withdraw the complaint of discrimination is GRANTED and this matter is hereby DISMISSED.

Roy J. Maurer
Administrative Law Judge

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April 17, 1986

THE YOUGHIOGHENY AND OHIO COAL COMPANY, Contestant	:	CONTEST PROCEEDINGS
v.	:	Docket No. LAKE 85-74-R
	:	Order No. 2330533; 4/9/85
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Docket No. LAKE 85-75-R
	:	Order No. 2330535; 4/9/85
	:	Nelms No. 2 Mine

DECISION

Appearances: Robert Kota, Esq., Youghiogheny and Ohio Coal Company, St. Clairsville, Ohio, for Contestant; Patrict M. Zohn, Esq., Office of the Solicitor, U.S. Department of Labor, Cleveland, Ohio, for Respondent.

Before: Judge Melick

These consolidated proceedings are before me upon the Notices of Contest filed by Youghiogheny and Ohio Coal Company (Y&O) under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act," to challenge the issuance by the Secretary of Labor of two withdrawal orders (Nos. 2330533 and 2330535) under the provisions of section 104(d)(2) of the Act.[1/]

[1/] Section 104(d)(2) provides as follows:

"If a withdrawal order with respect to any area in a coal or other mine has been issued pursuant to paragraph (1), a withdrawal order shall promptly be issued by an authorized representative of the Secretary who finds upon any subsequent inspection the existence in such mine of violations similar to those that resulted in the issuance of the withdrawal order under paragraph (1) until such time as an inspection of such mine discloses no similar violations. Following an inspection of such mine which discloses no similar violations, the provisions of paragrpah (1) shall again be applicable to that mine."

Section 104(d)(1) provides as follows:

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

Hearings were held concerning the merits of these orders on September 25, 1985, but a final decision was deferred pending decisions by other judges concerning the validity of the underlying section 104(d)(1) citation and order that were conditions precedent to the validity of the orders at bar. A determination upholding the violations cited in the instant orders and a finding that the violations were caused by the "unwarrantable failure" of the mine operator were previously made by decision of the undersigned dated October 29, 1985 (Secretary v. Youghiogheny and Ohio Coal Company, Docket No. LAKE 85-90, Appendix A).

The underlying citation (No. 2331148) and order (No. 2328954) were subsequently upheld respectively by decisions of Commission Judges in Youghiogheny and Ohio Coal Company v. Secretary of Labor, Docket No. LAKE 85-76-R (March 7, 1986, Judge Maurer), and Secretary of Labor v. Youghiogheny and Ohio Coal Company, Docket No. LAKE 85-63 (February 4, 1986, Judge Broderick). Accordingly the section 104(d)(2) orders at bar (Orders Nos. 2330533 and 2330535) are affirmed and the contests of those orders are dismissed.

Gary Melick
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

DEC 19 1985

APPENDIX A

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. LAKE 85-90
	:	A.C. No. 33-00968-03605
v.	:	
	:	Nelms No. 2 Mine
YOUGHIOGHENY & OHIO COAL CO., Respondent	:	

DECISION

Before: Judge Melick

This case is before me on remand by the Commission on December 12, 1985, to "enter the necessary findings as to each of the six statutory penalty criteria supporting" the $750 penalty assessment for the violation of the regulatory standard at 30 C.F.R. § 75.305.[1]

The violation as charged in Order No. 2330535 reads as follows:

> The absence of dates, times and initials indicates that the weekly examinations of the left and right return air courses were not being conducted. There was [sic] no entries made in the approved book on the surface that the return air courses had ever been examined on a weekly basis.

Youghiogheny & Ohio Coal Company (Y&O) does not dispute that the cited standard requires weekly examinations to be performed in the left and right return air courses as alleged and that the person making such examinations is required to place his initials and the date and time at the place

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[1]The penalty criteria are as follows:

"The operator's history of previous violations, the appropriateness of such penalty to the size of business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation." 30 U.S.C. § 820(i).

examined. Y&O maintains that except for the period between March 13, 1985 and April 9, 1985, proper examinations had been made. It is not disputed however that during an underground inspection of the Nelms No. 2 Mine conducted by MSHA Inspector James Jeffers on April 9, 1985, neither Jeffers nor Y&O Safety Director Don Statler were able to locate any dates, times or initials of mine examiners or any other evidence that any part of the 1,300 feet of the right and left air courses had ever been examined in accordance with the cited standard.[2]

Jeffers and Statler returned to the surface and examined the books in which the examinations of the cited air courses were required to be recorded. Assistant Mine Safety Director Robert Oszust joined in the examination. At that time neither Don Statler nor Robert Oszust was able to show Jeffers any evidence of entries corresponding to inspections of the cited air courses. Indeed Y&O continued to admit as recently as when it filed its Answer in these proceedings on September 12, 1985, that the examinations had not been recorded. At the hearings in this case however, only 13 days later, Statler testified that entries in the record book did exist and that they corresponded to examinations of the air courses on February 6, 1985, February 16, 1985, February 21, 1985, February 27, 1985, March 6, 1985 and March 13, 1985.

The entries are not however so unambiguous as to permit the unquestioned acceptance of this testimony. Moreover the one person who could have clarified this matter and answered the more important question of whether the air courses were actually inspected was not called as a witness by the mine operator and his absence was not explained. This person was Bill Dennis, the fire boss who it is now purported conducted the first five of the examinations. Under the circumstances Statler's testimony in this regard is without a credible foundation.

Within this framework I conclude that, with one exception, the required weekly examinations of the air courses had not been made from February 6, 1985 to April 9, 1985. The one exception is based upon Statler's testimony that he saw substitute Fire Boss Roy Kohler perform an examination of the air courses on March 13, 1985. Statler also admits however that he does not know whether any weekly examinations were performed between March 13 and April 9, 1985, and concedes that there were no entries in the record book corresponding to any examination between those dates.

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[2]Statler testified that he found one notation pad on the outby side of the A Entry return regulator but there is no indication that there were any entries on that pad.

According to the undisputed testimony of Inspector Jeffers, the failure to conduct weekly examinations could lead to the accumulation of float coal dust in the cited air courses. Indeed it is undisputed that float coal dust was in fact present throughout at least 500 to 600 feet of the right return air course at the time of this inspection and was admittedly an unsafe condition and a violation of the standard at 30 C.F.R. § 75.400.

According to Jeffers areas of the mine containing ignition sources such as electrical equipment including ventilation fans, a battery charger and a rock dusting machine, were vented directly into the air courses. He opined that the accumulations of float coal dust in the air courses could propagate fire or explosions from those areas exposing the seven miners working inby to serious injuries. Jeffers also observed that there had been a prior ignition at this mine of hydrogen gas from one of the battery chargers. Statler testified that he was not aware of such ignition sources but did not contravene Jeffer's testimony in this regard. Under the circumstances I find that the violation herein was quite serious. The hazard was particularly aggravated by the lengthy period during which the examinations had not been performed. Indeed each failure to conduct a weekly examination at each required location could have properly been charged as a separate violation subject to a separate civil penalty.

The violation was also the result of operator negligence. The fact that proper examinations were not being performed should have been obvious from the absence of required notations in the air courses. In addition the existence of admittedly violative amounts of float coal dust over 500 to 600 feet of the right return air course in an area frequented by supervisory personnel should have led to the discovery of this violation. Indeed Safety Director Statler conceded that a section foreman should have discovered the float coal dust in the air course and was "surprised" that it had not been found.

In addition since both the Mine Safety Director and his assistant were apparently unable to determine (until the Safety Director testified at hearing) from the ambiguous entries in the record book that proper examinations of the air courses were being made it is apparent that at the very least the entries were not adequate to clearly show to management that the examinations were in fact being made. For this additional reason the mine operator should have been alerted to the problem and seen to it that the examinations were being made and were clearly recorded as having been made. The admitted absence of any entries in the record book for the period subsequent to March 13, 1985, should also have

been known to management in light of the requirement for supervisors to countersign those entries.

In assessing the penalty in the decision below I also considered the undisputed evidence concerning the remaining 4 criteria. It was stipulated that the mine operator was of "moderate" size and that the proposed penalties would have no affect on its ability to continue in business (Tr. 5). The undisputed history report of violations (Ex. G-11) shows that overall the operator had a record preceding the date of the order at bar of 3,592 paid violations including 12 paid violations of the regulatory standard at issue. For the 2 years preceding the order at bar there were 515 paid violations including 4 paid violations of the standard at issue. This is not a good record.

I also gave credit in assessing a $750 penalty for the operators demonstrated good faith in attempting to achieve rapid compliance after notification of the violation. The order in this case indicates on its face that both the left and right return air courses were subsequently examined by a representative of the mine operator and the results were recorded in the approved book.

Gary Melick
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

April 21, 1986

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEST 85-169 A.C. No. 42-00079-03525
v.	:	Emery Mine
CONSOLIDATION COAL COMPANY, Respondent	:	

DECISION

Appearances: James H. Barkley, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
Hal Pos, Esq., Parsons, Behle & Latimer, Salt Lake City, Utah, for Respondent.

Before: Judge Morris

The Secretary of Labor, on behalf of the Mine Safety and Health Administration, charges respondent with violating a safety regulation promulgated under the Federal Mine Safety and Health Act, 30 U.S.C. § 801 et seq., (the Act).

After notice to the parties a hearing on the merits took place in Salt Lake City, Utah on February 13, 1986.

The parties waived their right to file post-trial briefs and, in lieu thereof, orally argued their cases.

Issue

The issue is whether there was an unwarrantable failure on the part of the operator to comply with a ventilation regulation.

Citation

Citation 2503093 charges respondent with violating 30 C.F.R. § 75.316. The cited regulation provides as follows:

STATUTORY PROVISIONS

A ventilation system and methane and dust control plan and revisions thereof suitable to the conditions and the

mining system of the coal mine and approved by the Secretary shall be adopted by the operator and set out in printed form on or before June 28, 1970. The plan shall show the type and location of mechanical ventilation equipment installed and operated in the mine, such additional or improved equipment as the Secretary may require, the quantity and velocity of air reaching each working face, and such other information as the Secretary may require. Such plan shall be reviewed by the operator and the Secretary at least every 6 months.

Stipulation

At the commencement of the hearing the parties stipulated as follows: the air velocity at the working face was not maintained at the required 6000 cubic feet per minute (CFM). Respondent thereby violated its ventilation plan and the regulation. In addition, there had been no intervening clean inspection between a prior (d)(1) citation issued February 26, 1985 and the (d)(1) citation in the instant case. Finally, the parties agreed that the proposed penalty of $255 is appropriate if the violation was due to the unwarrantable failure of the operator to comply; if not, then the penalty should be for a lesser amount (Tr. 5-7).

Summary of the Case
The Secretary's Evidence

Robert Lee Heggins, an MSHA inspector experienced in mining, inspected respondent on May 13, 1985 (Tr. 8-11). On this occasion he was accompanied by Steve Behling, the company's safety director (Tr. 11). When the men walked into the No. 5 entry of 2 West Main the inspector observed that the curtain was partly blown in at crosscut 29 (Tr. 12, 13). As they proceeded further the inspector also saw that the mine curtain was sagging at several locations (Tr. 11, 13). Continuing on, the inspector noticed that a trailing cable had pulled the curtain against the rib causing a restriction of the air flow to the working face (Tr. 15).

When he approached the face the inspector saw dust in the air as the shuttle car in crosscut 30 was being loaded. In his position he did not feel the free flow of air that one would normally expect (Tr. 16). The absence of the air flow and the condition of the curtain convinced the inspector that there was a failure of the air flow at the face (Tr. 16).

After he observed the coal being loaded into the shuttle car the inspector attempted to take an anometer reading; the device would not turn. He also tested with smoke but it went up against the roof and did not move. He also tested at the line curtain and found 3990 CFM; it should have been 6000 CFM (Tr. 17).

In the inspector's opinion the placement of the curtain at crosscut 29 was abnormal, improper and significant because it disrupted the normal flow of air (Tr. 12, 13). Further, the curtain was sagging from the roof. This caused the air to leak. The curtain shouldn't have been hung in this fashion (Tr. 13, 14, 18). The third problem contributing to the air flow restriction was caused by the trailing cable as the equipment made a sharp right turn into the working face (Tr. 32). It would be natural to expect a trailing cable to contact a brandish curtain in these circumstances. In the inspector's view the cable had been pulling against the curtain since this shift began, for about an hour to an hour and a half (Tr. 33, 34).

The inspector watched the shuttle car being loaded for two to three minutes before issuing his order. In this period neither foreman Petty nor anyone else attempted to reestablish ventilation (Tr. 24). Supervisor Petty, who was in the middle of the dust, should have sensed a lack of air sweeping over his body. He should have realized there was a failure of the ventilation (Tr. 23).

The violative conditions were abated by straightening the curtain at crosscut 29; by fixing the sagging curtain in the entry and by placing an object to keep the curtain from contacting the rib (Tr. 33-35).

Consolidation Coal's Evidence

Horace Petty (section foreman), David Day (miner operator), Richard Childs (continuous miner operator) and Steve Behling (safety supervisor) testified for respondent.

The section foreman, Horace Petty, indicated that at crosscut 29 they had spadded the curtain to the floor two or three feet toward the direction of entry 6 (Joint Exhibit No. 1 illustrates the placement of the curtain). This placement was to prevent any shuttle cars from snagging it as they turned the corner. Placement of the curtain in this fashion had never caused a ventilation problem. The fire boss had a reading of 17,000 CFM before the shift started mining that morning (Tr. 38, 39, 46, 47).

If there had been any gaps in the curtain Petty would have noticed them. The top is not perfectly level and there may have been an inch or two spacing at the top. Such openings do not cause much loss of air (Tr. 51, 52, 64).

The curtain had not been pushed against the rib when Petty went up the entry that morning at about 7:20. The curtain was spadded to the top, as well as the floor, along all entry No. 5 (Tr. 39). He went up the entry an additional three or four times before the violation occurred.

At about 10:00 or 10:30 a.m. Petty walked to the working face from behind the line curtain. He frequently took this approach. As he proceeded toward the face he found the curtain had pulled loose from the spads; it was against the rib. There wasn't much ventilation coming through and Petty knew he had a problem. He immediately came through the curtain. The miners were loading the shuttle car and Petty signaled them to stop (Tr. 41, 42, 80). Since the shuttle car was loaded he directed them to back it away from the face. It took the operator about ten seconds to stop (Tr. 41, 42). As the miner was backed out MSHA inspector Heggins stopped them (Tr. 42). About 10 to 15 seconds had elapsed (Tr. 43). Petty had stopped the mining operation before he knew the MSHA inspector was present (Tr. 63).

In order to reestablish ventilation after the miner was shut down, the employees pulled the curtain out and spadded it back to the floor (Tr. 52, 53). They started from the face and walked the whole curtain line, tightening all gaps, checking all spads and cracks (Tr. 55). After the gaps were fixed, after the restriction was removed at the corner and after the curtain was moved at crosscut 29 there was sufficient ventilation (Tr. 57).

According to witness Petty the curtain, as it hung from the ceiling, was properly installed in the first place. They re-tightened it after the citation was issued in order to get the maximum amount of air to the face (Tr. 58).

In Petty's opinion, changing the position of the brandish curtain at crosscut 29 did not contribute to an increase in the air flow (Tr. 61).

Closing the gaps along the curtain from the working face to crosscut 29 contributed an additional two or three thousand cubic feet of air flow (Tr. 61). The trailing cable pinching the curtain was the main problem. Petty had stopped to take care of it (Tr. 62). This particular condition was abated by moving the curtain back from the rib and spadding it to the floor (Tr. 62).

David Day, a miner operator, described his activities on this day as well as the inspections made by the section foreman (Tr. 65-67).

Shortly prior to the inspection the water line had to be repaired. After the line was repaired it took about 15 or 20 seconds to finish loading the car (Tr. 68, 70). As they finished loading Petty came through the curtain and signaled them with his light to stop mining. They stopped and backed the shuttle car away from the continuous miner. As they were backing up Behling and inspector Heggins told them to stop (Tr. 68, 71). In Day's opinion, before the water line was fixed, the three-inch trailing

cable had not been pressing against the rib. He believed that after the line was fixed and as he started around the corner the cable snapped tight and pulled out the bottom of the curtain (Tr. 69). At the time the citation was issued the miner was 50 to 60 feet into crosscut 30 from entry 5 (Tr. 76-79).

This portion of the mine is a very dry and dusty section. The ventilation seemed okay (Tr. 71, 76). There was no gas at this face (Tr. 78). Day estimates 50 to 70 trips were made that day by the shuttle car (Tr. 74).

At the time of the incident witness Richard Childs had been absent from 2 Main West for approximately 30 minutes. Upon returning he found the water line had been repaired and the shuttle car was 1/2 to 3/4 full. He then replaced Day as the operator and moved the miner back into the face and started cutting. They had already mined about 60 feet into crosscut 30. Childs completed filling the car in 20 to 30 seconds (Tr. 84-87, 94).

Day motioned to Childs that the car was filled. Childs then saw Horace Petty shaking his light directing them to stop mining. He then started to back away from the face. At that point the MSHA inspector appeared and directed him to shut down the miner, which he did. There was no dust because the miner hadn't been operating (Tr. 87-89, 93). Childs did not notice the lack of air flow across his body nor did he notice any air problem (Tr. 92, 96).

Other than spadding the curtain, no other precaution had been taken to keep the trailing cable from collapsing on the curtain. Spadding is usually sufficient but a temporary post or jack had not been used to block the curtain from moving against the rib (Tr. 94, 95). Childs estimated that the trailing cable was 1 1/2 inches thick (Tr. 99).

Steve Behling, Consolidated's safety supervisor, accompanied MSHA inspector Heggins during the inspection. Behling took the inspector to 2 Main West because that section was probably one of the best in the mine (Tr. 100, 101).

When the two men approached entry 5 no comment was made concerning the curtain at crosscut 29. The men saw the cable against the curtain and Behling knew there was a problem. Coming around the corner, Behling saw Petty waving his light to shut down the miner operator (Tr. 101-106). Inspector Heggins continued on and got out his anometer. It wouldn't turn and Heggins said the company was under an order situation (Tr. 103).

After the mining activity was discontinued the curtain was picked up and pulled out. Behling rechecked and found they still had no air (Tr. 105). They then started pushing the curtain out. At that point Heggins got an air reading of about 6100 (Tr. 105).

When Behling and Heggins got to the surface the inspector said he was issuing a 104(d)(1) Order. He stated that Petty should have known about the ventilation problem (Tr. 106, 107).

Behling conducted his own investigation by interviewing the miners as well as the foreman. Behling concluded that the water line breakdown, the movement of the shuttle car into the crosscut, the almost full shuttle car, the fact that equipment is always backed away from the face and the actions of Petty, caused him to believe that there were two ways of viewing the situation (Tr. 109-113). He also believed that Heggins and Petty were on opposite sides of the curtain as they approached the face (Tr. 111).

As soon as Petty recognized the problem he properly shut down the mining operation (Tr. 111, 122).

Even though the shuttle car cable and the obstruction had been removed the air was insufficient; the curtain doesn't fall all the way back into position (Tr. 116, 117). After the cable was pulled out it wasn't immediately spadded to the floor.

To reestablish the ventilation the miners started at the face and went out from there. As they progressed they pushed, spadded down and laid chunks of coal on the curtain. Activity of that type would cause a lower air reading (Tr. 118, 119).

In Behling's opinion when the shuttle car started up the cable moved against the curtain and pulled the spad out. The time interval was about 15 seconds (Tr. 121, 122).

Discussion

The Commission has defined the statutory term of "unwarrantable failure" to mean a violation resulting from indifference, willful intent or serious lack of reasonable care, Section 104(d)(1); Westmoreland Coal Company, 7 FMSHRC 1338 (September 1985); U.S. Steel Corp., 6 FMSHRC 1423, 1437 (June 1984).

In this case I find that the respondent's evidence is credible. In short, the MSHA inspector and the company's section foreman arrived at the ventilation problem from different sides of the brandish curtain at approximately the same time. While the presence of a section foreman is not necessary to establish an unwarrantable failure I find the violative events occurred in the short period of approximately 20 seconds as claimed by the operator.

The Secretary argues extensively (Tr. 124-131) that his evidence is credible and the operator's is fatally flawed.

I am not persuaded. The Secretary's evidence relies on three factors to establish an unwarrantable failure. These factors consist of the placement of the curtain at crosscut 29, the gaps and sagging curtain from crosscut 29 to the working face, and, finally, the restriction of the air flow caused by the cable pushing the curtain against the rib.

Concerning crosscut 29: Joint Exhibit No. 1 illustrates the placement of the curtain. I am unable to see how the position of the curtain as shown on the exhibit could interfere with the air flow. The witnesses referred extensively to the exhibit throughout the hearing. I agree with section foreman Petty that the curtain placement at crosscut 29 did not affect the air flow. The operator had moved the curtain to that position to prevent the shuttle cars from snagging it as they turned at the crosscut.

The second facet concerns the gaps or sags in the curtain. MSHA's evidence is not precise on this point. I credit the operator's evidence that the minimal spacing at the top caused the loss of no more than 3000 to 4000 CFM from the measured air flow of 17,000 CFM.

The final asserted defect is that the curtain had been pushed against the rib by the trailing cable. Everyone recognized that this condition effectively restricted the air flow. I do not find it credible that this restriction could have existed for an hour to an hour and a half as the inspector asserts. I credit witness Day's contrary opinion that the cable snapped tight and pulled out the bottom of the curtain as the miner went around the corner after the water line had been fixed. The time involved was less than 30 seconds.

A credibility issue also arises as to whether the inspector watched the mining of the coal for two or three minutes or whether the shuttle car was filled in 10 to 15 seconds. Petty, Day and Childs all confirmed the short period of time involved. Inasmuch as Day and Childs loaded the car they would be in the best position to know the extent to which it had been filled and, conversely, the amount of time necessary to finish loading it.

For the foregoing reasons, I conclude that the conduct of the operator did not constitute an unwarrantable failure to comply with the ventilation regulation. Accordingly, the allegations of unwarrantable failure should be stricken.

The facts and the stipulation of the parties confirm that the operator violated 30 C.F.R. § 75.316. Accordingly, the citation should be affirmed.

Further, based on the stipulation, the evidence and the statutory criteria pertaining to the assessment of civil penalties, 30 U.S.C. § 820(i), I deem that a penalty of $100 is appropriate.

Conclusions of Law

Based on the entire record and the factual findings made in the narrative portion of this decision, the following conclusions of law are entered:

1. The Commission has jurisdiction to decide this case.

2. Respondent violated 30 C.F.R. § 75.316.

3. The conduct of respondent did not constitute an unwarrantable failure to comply with the above regulation.

4. Citation 2503093 should be affirmed and a civil penalty assessed therefor.

ORDER

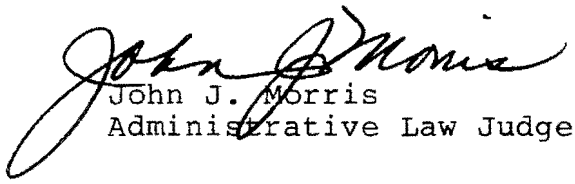
Based on the foregoing facts and conclusions of law, I enter the following order:

1. The allegation that respondent's conduct constituted an unwarrantable failure to comply with the regulation is stricken.

2. Citation 2503093 is affirmed.

3. A civil penalty of $100 is assessed.

4. Respondent is ordered to pay to the Secretary the sum of $100 within 40 days of the date of this decision.



John J. Morris
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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April 21, 1986

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEVA 85-278 A.C. No. 46-01433-03501 B70
v.	:	Loveridge Mine
OTIS ELEVATOR COMPANY, Respondent	:	

ORDER APPROVING SETTLEMENT AGREEMENT

Appearances: Howard K. Agran, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Petitioner; W. Scott Railton, Esq., Reed, Smith, Shaw & McClay, Washington, D.C., for Respondent.

Before: Judge Broderick

When the above case was called for hearing in Pittsburgh, Pennsylvania on March 18, 1986, Petitioner made a motion on the record for approval of a settlement agreement reached by the parties to this proceeding.

The case involves a single citation, charging a violation of 30 C.F.R. § 75.511 because an unqualified person was performing electrical repairs on an automatic elevator. MSHA contended that the violation contributed to an injury, because the repairman did not notify mine management that he was going to work on the elevator, and a miner was injured while attempting to board it. The violation was originally assessed at $500.

In his motion counsel states that the repairman in question had not taken the West Virginia examination for the mine electrical work, but the government does not contend that he is not technically qualified to do electrical repairs. The government is not able to state that the violation contributed to the injury. The government does not allege that the work performed by the repairman violated any mandatory safety standard. Respondent is a large company, has a history of one prior violation, and abated the instant violation promptly, by giving MSHA a written statement that the mine operator would furnish a "qualified person" to to accompany Respondent's mechanics when electrical work is performed on mine elevators. The parties agree to settle the case by payment of a penalty of $375.

I have considered the motion in the light of the criteria in section 110(i) of the Act, and conclude that it should be approved.

Accordingly, the settlement is APPROVED, and Respondent is ORDERED to pay the sum of $375 within 30 days of the date of this order.

James A. Broderick
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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April 22, 1986

DON KEEN, WILLIAM HENSLEY, HUBERT D. ROWE, ARVIL ARWOOD, JERRY BARRETT, KERMIT BARNART, and JACK COLE, Complainants	:	DISCRIMINATION PROCEEDINGS Docket No. VA 86-4-D MSHA Case No. NORT CD 85-2
v.	:	
GARDEN CREEK POCAHONTAS COMPANY, Respondent	:	Virginia Pocahontas No. 6 Mine

DECISION

Appearances: Gerald F. Sharp, Esq., Castlewood, Virginia, for Complainants;
Thornton L. Newlon, Esq., Campbell & Newlon, P.C., Tazewell, Virginia, for Respondent.

Before: Judge Melick

This case is before me upon the complaints by the named individual miners under section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et. seq., the "Act," alleging that each was laid-off from the Garden Creek Pocahontas Company (Garden Creek) on October 22, 1984, in violation of section 105(c)(1) of the Act.[1]/ They are each seeking back-pay from that date until they returned to work on January 2, 1985, with accrued benefits and interest.

1/ Section 105(c)(1) of the Act provides in part as follows:
"No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, . . . in any coal or other mine subject to this Act because such miner, . . . has filed or made a complaint under or related to this Act, including a complaint notifying the operator or operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine, . . . or because of the exercise by such miner, . . . on behalf of himself or others of any statutory right afforded by this Act."

In order for the Complainants to establish a prima facie violation of section 105(c)(1) of the Act, they must prove by a preponderance of the evidence that they engaged in an activity protected by that section and that the lay-off or discharge they suffered was motivated in any part by the protected activity. Secretary ex. rel. David Pasula v. Consolidation Coal Company, 2 FMSHRC 2686 (1980), rev'd on other grounds sub. nom. Consolidation Coal Company v. Marshall, 663 F.2d 1211 (3rd Cir. 1981). See also Boitch v. FMSHRC, 719 F.2d 194 (6th Cir. 1983) and NLRB v. Transportation Management Corp., 462 U.S. 393 (1983), affirming burden of proof allocations similar to those in the Pasula case.

The Complainants specifically allege that officials of Garden Creek threatened to lay them off and in fact subsequently laid them off for the failure of the union local, of which they were members, to waive as a condition of employment the "requirements of [a] safeguard and grievance settlement concerning a 'dispatcher' to control traffic on idle days".[2/] They claim that their refusal to work without a full-time "dispatcher" was a protected activity and that their lay-off based on that work refusal was therefore in violation of the Act.

It is indeed well established that a miner's exercise of the right to refuse work is a protected activity under the Act so long as the miner entertains a good faith and reasonable belief that to work under the conditions presented would be hazardous. Miller v. FMSHRC, 687 F.2d 194, (7th Cir. 1982); Robinette v. United Castle Coal Company, 3 FMSHRC 803 (1981). For the reasons set forth in this decision however, I do not find that the miners' work refusal in this case was based on such a belief. Accordingly whether or not their lay-off or discharge was motivated by that work refusal, their complaint herein must fail.

According to Kenneth Lester, vice-president of Local 2421 of the United Mine Workers of America (UMWA) and chairman of the mine committee, he was called into a meeting on October 19, 1984, by mine superintendant Vern Reynolds. Reynolds called the meeting to announce a lay-off and to advise the union of the company's plans for an impending idle period in a non-producing status. Reynolds reportedly stated that the company intended to lay-off everyone except 14 of the union miners and that 7 of the 14 would be assigned to underground work during this period.

2/ Although the duties of a "dispatcher" were never precisely defined in this case it appears that a "dispatcher" coordinates rail traffic in the mine.

Lester says that he then asked Reynolds who would be employed as the "dispatcher". Reynolds said there would be no "dispatcher" and that if they insisted on having a "dispatcher" there would be no undergound work at all. Lester then indicated that he wanted to have a union meeting to discuss the subject and would get back to Reynolds. A union meeting followed on October 21, at which the membership voted to insist upon the employment of a full-time "dispatcher" as a pre-condition for their continued underground work during the contemplated idle period.

On October 22, there was another meeting with Reynolds. According to Lester, Local 2421 president Donny Lowe told Reynolds at this meeting that the union wanted a "dispatcher" to control the underground traffic and Reynolds responded that under the circumstances he would then lay-off the seven underground men. Lester testified that Reynolds then telephoned his superior, Rufus Fox. He overheard Reynolds state on the phone that the union was asking for a "dispatcher". Reynolds then hung-up and said he would lay-off the seven men.

The testimony of Lester is corroborated in essential respects by other witnesses called by the Complainants including the then general mine foreman George King. King testified that sometime during the meeting on October 22, someone said there would be no one working underground without a "dispatcher" and Reynolds responded that there would then be no one working underground. In his post-hearing deposition Reynolds also acknowledged that he told the union representatives that "we would work seven men underground with no dispatcher or we would work no men underground." The Complainants' allegations in this regard are therefore accepted as an accurate accounting of events.

The Complainants argue that their work refusal under the circumstances was based on a "reasonable, good faith belief" that for seven miners to work underground without a full-time dispatcher during the idle period would have been hazardous. This argument is based on their purported reliance upon a safeguard notice that had been issued by Inspector Charlie Wahles of the Federal Mine Safety and Health Administration (MSHA) on April 13, 1982. They maintain that it would have violated that safeguard to have continued working without the additional employment of a full-time dispatcher and that a violation of the safeguard would constitute per se a dangerous condition justifying a work refusal under the Act.

I do not find however that the Complainants could reasonably have believed that the safeguard would have been violated under the circumstances. The safeguard notice,

issued by virtue of the regulatory standard at 30 C.F.R. § 75.1403 and directed to the Virginia Pocahontas No. 6 Mine, reads as follows:

> The mine traffic at this mine has been under the direction of a dispatcher in the past, however since the mine has been in a non-producing status, the dispatcher has been eliminated. Several persons are still employed on each shift in different areas of the mine (approximately 35). Man trips and other mine traffic have been operating to and from the sections and other work areas with no assurance that they have a clear road. This is a notice to provide safeguards requiring that man trips or other mine traffic be under the direction of a dispatcher or other competent person designated be the operator and that man trips or other mine traffic shall not be permitted to proceed until the operator of the man trip or other mine traffic is assured by the dispatcher or other competent person that he/she has a clear road.

The safeguard on its face does not limit the mine operator to the use of only a full-time "dispatcher" but allows him to use any "competent person," full-time or part-time, to perform the same function. In addition, in the case of Secretary v. Southern Ohio Coal Company, 7 FMSHRC 509 (1985) this Commission held 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. The Commission further held that in interpreting a safeguard notice a narrow construction of the terms of the safeguard and its intended reach is required. 7 FMSHRC at 512. In this regard, by its own specific terms the safeguard herein was applicable only when 35 miners were employed underground. In this case it is not disputed that no more than seven union miners and perhaps up to three supervisors were to be employed underground. For this additional reason there clearly would not have been any violation of the safeguard to have continued operating the subject mine in a non-producing status with seven union miners and three supervisory personnel as contemplated.

In addition the apparent failure of the Complainants to have consulted with the MSHA inspector who issued the safeguard as to whether the contemplated work conditions would have violated the safeguard demonstrates a lack of good faith on their part. Significantly the Complainants also failed to call that inspector as a witness in these proceedings. It is reasonable to infer from the absence of that key witness that his testimony would not have been supportive of the Complainants position herein and that they knew it.

The Complainants also demonstrated a lack of good faith by exercising their work refusal before determining what alternative safety procedures were planned for the impending idle period in the absence of a full-time "dispatcher". The evidence at hearing showed that other procedures could have been followed for the safe control of rail traffic but there is no evidence that the Complainants even considered these alternatives. It is apparent from this that they were more interested in preserving another job rather than exercising a sincere concern for safety.

I also note from the undisputed evidence that other mines in the region similar to the Virginia Pocahontas No. 6 mine and with a similar single track system do not generally use, and are not required to employ, a "dispatcher". The evidence shows for example that each of the Island Creek Coal Company mines in the area has established its own policy in this regard. For example at its Beatrice Mine no "dispatcher" is used unless a supervisor decides it is necessary in a particular circumstance. At the Virginia Pocahontas No. 1 Mine a "dispatcher" is used only when more than 12 union miners are employed underground. At the Virginia Pocahontas No. 2 Mine a "dispatcher" is used only when at least 25 union employees are working underground. At the Virginia Pocahontas No. 3 Mine a "dispatcher" is employed only if more than two pieces of track equipment are being used on one side of the mine and at the Virginia Pocahontas No. 5 Mine a "dispatcher" is employed only if two or more pieces of equipment are being used. The evidence shows that other Virginia mine operators including Westmoreland Coal Company have also operated without "dispatchers".

In addition former superintendant Reynolds said in his deposition placed in evidence that he checked with federal mine inspector Jack Burnette and a state mine inspector concerning the procedures he intended to use during the idle period at issue and that both agreed that it would not have been unsafe to operate the mine in the proposed manner.[3/]

Under the circumstances I find that the Complainants have failed in their burden of proving that they entertained a good faith and reasonable belief that their refusal to work

[3/] The Complainant's objection to this testimony at the posthearing deposition on the grounds that it was hearsay is denied.

without a "dispatcher" under the described conditions would have been hazardous. Accordingly, the Complaint herein must be, and is, dismissed.

Gary Melick
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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April 23, 1986

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. VA 85-26
	:	A.C. No. 44-04614-03505
v.	:	
	:	No. 1 Plant
BANNER COAL COMPANY, INC., Respondent	:	

DECISION

Appearances: Craig W. Hukill, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Petitioner; Joe Douglas Kilgore, Banner Coal Company, Inc., Coeburn, Virginia for Respondent.

Before: Judge Melick

This case is before me upon the petition for civil penalty filed by the Secretary of Labor pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act," for an alleged violation of the regulatory standard at 30 C.F.R. § 77.807-3. The general issues before me are whether Banner Coal Company, Inc., (Banner) has violated the cited regulatory standard and, if so, whether that violation was of such a nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard i.e., whether the violation was "significant and substantial". If a violation is found it will also be necessary to determine the appropriate civil penalty to be assessed in accordance with section 110(i) of the Act.

The citation at bar, No. 2277631, alleges a "significant and substantial" violation of the regulatory standard at 30 C.F.R. § 77.807-3 and charges as follows:

> "The energized high voltage power lines (12,440 volts) passing over the stock pile area ranges in hight [sic] from 26 feet to 34 feet. The front-end loader measures 18 feet high when the bucket is extended to its full hight [sic]. The coal trucks, dumping under the high voltage lines, are 27 feet

high. Both the front-end loader and the coal trucks can reach within the 10 feet minimum distance clearance required to be maintained from high voltage power lines."

It is not disputed that the cited standard requires that when any part of any equipment operated on the surface of any coal mine is required to pass under or by any energized high-voltage powerline and the clearance between such equipment and powerline is less than 10 feet such powerlines must be deenergized or other precautions taken.

On February 28, 1985, Bruce Dial, an inspector for the Federal Mine Safety and Health Administration (MSHA) was performing an inspection at Banner's No. 1 Plant. It is undisputed that energized power lines carrying 12,440 volts passed over a portion of the coal stockpile at the plant. In addition a Hough 100 model front-end loader was then operating beneath the power lines with its bucket extended to its full height of 18 feet from the ground. Both tandem and tractor-trailer coal trucks were also dumping on the stockpile in close proximity to the power line and the larger trailers, when extended to the full dumping position, measured 27 feet from the ground.

Inspector Dial measured the height of the high voltage power line using a Warren-Knight Abney Level. It was 26 feet at the lowest point he was able to measure i.e. a location 10 feet horizontally from the lower support pole. Dial observed that as coal was being added to the stockpile the distance between the top of the stockpile where the equipment was operating and the high voltage power line was decreasing thereby increasing the potential hazard.

Banner disputes only the accuracy of Dial's measurement of the height of the power lines using the Abney Level. Banner President, Joe Douglas Kilgore, telephoned a civil enginer and a land surveyer who purportedly informed him that a 20% error is possible using the Abney Level and that the instrument would not be accurate. Kilgore did not however take his own measurements or seek to have any more accurate measurements made even though the cited area remained roped off for more than 3 months. Accordingly, there is no affirmative evidence contradicting the measurements taken by Inspector Dial. In any event even had the measurements been in error by as much as 20% there would nevertheless have been a violation of the cited standard.

According to Dial, electrocution of a truck driver was likely under the circumstances since the extended bed of the tractor-trailer reached 27 feet and the power line was then only 26 feet above stockpile. Under the circumstances it would be reasonable to expect that the truck bed could strike

the low power line causing serious injuries or electrocution to the operator. Another MSHA inspector, Daniel Graybeal also observed that there had been 4 fatalities within the MSHA district over the previous 6 years from mining equipment contacting high voltage power lines. Within this framework of evidence it is clear that the violation herein was serious and "significant and substantial." See Secretary v. Mathies Coal Co., 6 FMSHRC 1 (1984).

Inspector Graybeal had also previously inspected the Banner No. 1 plant in September 1984. Graybeal did not cite Banner for any violation of the standard at issue because he saw no equipment operating in close proximity to the power line. It is not disputed however that Graybeal discussed the potential problem with Banner president Kilgore warning him that he was required to maintain a 10 foot clearance from the power line. Kilgore was further warned not to stockpile coal beneath the power line to the point where a 10 feet clearance could not be maintained. Under the circumstances I find that Kilgore was negligent in permitting the build-up of the coal stockpile beneath the power lines to the point where the minimum clearance was not maintained.

In assessing a civil penalty in this case I have also considered that the mine operator is small in size, has a limited history of violations and abated the cited condition in a good faith and timely manner. Indeed the evidence shows that Banner expended $1,705 to have the Old Dominion Power Company raise the level of the power lines. Considering these factors I find that a civil penalty of $250 is appropriate.

ORDER

Banner Coal Company, Inc. is ordered to pay a civil penalty of $250 within 30 days of the date of this decision.

Gary Melick
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

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April 23, 1986

FMC CORPORATION, Contestant	:	CONTEST PROCEEDING
	:	Docket No. WEST 84-117-RM
v.	:	Citation No. 2009928; 6/20/84
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	FMC Trona Mine

DECISION

Appearances: John A. Snow, Esq., James A. Holtkamp, Esq., and Matthew F. McNulty, III., Esq., Salt Lake City, Utah, for Contestant; James H. Barkley, Esq., and Margaret Miller, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Respondent.

Before: Judge Lasher

This proceeding arose upon the filing of a notice of contest on July 10, 1984, pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977 (30 U.S.C. § 815(d)(1977)), herein the Act.

By its initiation of the proceeding the Contestant (herein FMC) sought to obtain review of Part "a" 1/ Citation No. 2009928, issued June 20, 1984, charging it with a violation of 30 C.F.R. § 57.21-78 2/ to wit:

"The Marietta Bore Miner No. 7426 approval No. 2G-2431A-2, was not maintained in permissible condition because:

> (a) On 3-29-84 the short circuit protective relays at the remote starter were found to be set for 1200 amperes fault current.

1/ Part "b" of the citation was vacated by my written order herein dated July 23, 1985, after the Secretary moved for vacation at hearing (See separate transcript dated March 8, 1985).

2/ This regulation provides: "Only permissible equipment maintained in permissible condition shall be used beyond the last open crosscut or in places where dangerous quantities of flammable gasses are present or may enter the air current."

A short-circuit analysis indicated that the minimum expected phase-to-phase fault current was 1005 amperes. Therefore, the machine and trailing cable were not properly protected against short-circuit faults. Ref 30 C.F.R. 18.35(a)(4) and 18.35(a)(5)(ii). The protective relay settings were reduced to 800 amperes 5-1-84.

Although the manufacturers MSHA approved design specification Ref. 2G-2431A-2 3/ stipulates maximum relay settings of 1200 amperes the specification also stipulates maximum trailing cable length as follows: "Cable from power source to sled input is less than 100 feet. Total length from power source to machine not to exceed 700 feet. Protection at power source is provided by a circuit breaker with an instantaneous trip setting of 1500 amperes.

It was found that the 4160 volt Bore Miner branch circuit was far in excess of these specifications."

FMC operates a large underground trona mine (Tr. 46, 62). It liberates approximately 1,500,000 cubic feet of methane each 24 hour period (Tr. 46). It is an extremely gassy mine (Tr. 47), and, as conceded by Contestant, the mine's face equipment is required to comply with the permissibility regulations (Tr. 47; FMC Brief, p. 1).

The pertinent permissibility regulation mentioned in the Citation is 30 C.F.R. 18.35(a)(5)(ii), 4/ under the rubric: "Portable (trailing) cables and cords", which provides:

3/ As will be explained further subsequently, this reference number refers to the second approval (Ex. C-2) of the miner by appropriate government regulatory agency. The first approval for the miner/starter sled (Ex. C-1) was by the Bureau of Mines and was shown on the original specifications (C-1) which presumably accompanied the miner and sled when such were received by FMC on July 5, 1974. (Tr. 259). The second approval dated July 30, 1974, was sent to the manufacturer of the miner/sled and not to FMC. A third approval (Ex. C-3) which was made a part of this record applied to another miner and has no impact on the resolution of this matter (Tr. 89, 90, 108, 114).

4/ A general statement of the purposes of the regulations with which Section 35(a)(5)(ii) is grouped is set forth in 30 C.F.R. 18.1, to wit:

> "The regulations in this part set forth the requirements to obtain MSHA: (a) Approval of electrically operated machines and accessories intended for use in gassy mines or tunnels, (b) certification of components intended for use on or with approved machines, (c) permission to modify the design of an approved machine or certified component, (d) acceptance of flame-resistant cables, hoses, and conveyor belts, (e) sanction for use of experimental machines and accessories in gassy mines or tunnels; also, procedures for applying for such approval certification, acceptance for listing; and fees."

"(a) Portable cables and cords used to conduct electrical energy to face equipment shall conform to the following:

X X X X X X X

(5) Ordinarily the length of a portable (trailing) cable shall not exceed 500 feet. Where the method of mining requires the length of a portable (trailing) cable to be more than 500 feet, such length of cable shall be permitted only under the following prescribed conditions:

X X X X X X X

(ii) Short-circuit protection shall be provided by a protective device with an instantaneous trip setting as near as practicable to the maximum starting-current-inrush value, but the setting shall not exceed the trip value specified in MSHA approval for the equipment for which the portable (trailing) cable furnishes electric power."

CONTENTIONS OF THE PARTIES

The evidence and arguments in this matter are difficult to marshal. A preliminary birds-eye view of the dispute is helpful.

The Secretary's contentions, evidenced at hearing and in its post-hearing brief, consider Part "a" of the Citation to have alleged two infractions. First, that the trip setting on the short-circuit protection device required by the cited regulation, 30 C.F.R. 18.35(a)(5)(ii), was set too high at 1200 amperes. Secondly, the Secretary alleges that FMC was in violation by operating the miner contrary to the manufacturer's specifications as to the lengths of trailing cable between the miner and (1) the sled, and (2) the "power source", as set forth in the second government approval, Ex. C-2, at page 8, which FMC denies receiving or of having any knowledge.

FMC, in addition to denying any knowledge of the requirements of the second approval ("revising" the manufacturer's specifications for the miner and sled), contends that it faithfully conformed to the requirements of the first approval (Ex. C-1, Tr. 91) which authorized a trip setting of 1200 amperes and that it had no knowledge of the second approval which set forth maximum trailing cable lengths between the miner and sled and power source and wherein the only reference to the term "power source" is used. FMC contends that the term "power source" in any event is vague and that the wording of 30 C.F.R. 18.35, "when reviewed in context with the specific 1200 amp setting requirement, is difficult to interpret and follow" and fails to afford FMC of fair notice as what is required and expected. As an alternative argument, should it be charged with notice of the second approval containing the cable length requirements, FMC

argues that the "power source" was the remote starter sled, and that the 700-foot trailing cable length between the miner and the sled was proper. In this connection, the Secretary contends that the "power source" referred to in the second approval (Ex. C-2) is a transformer located 10,300 feet from the miner and which is the point of origination of the 4160 volt power upon which the miner runs.

PRELIMINARY FINDINGS

The preponderant reliable and probative evidence of record establishes the following.

On March 29, 1984, a federal mine inspector inspected the mine, including Marietta Bore Miner No. 7426 (herein the miner) (Tr. 47, 83). The purpose of the miner is to mine the product; the miner thus operates at the face past the last open crosscut (Tr. 47). It is electrically powered (Tr. 47) and as an electrically powered piece of face equipment it is required to comply with all permissibility regulations.

The miner was ordered by FMC by purchase order dated May 7, 1973, and the miner was received by FMC on July 5, 1974 (Tr. 42, 259). National Mine Service Company was the manufacturer of the miner and its accompanying power sled (Tr. 258). The 1200 ampere relay setting on the power sled for the miner was set by FMC in accordance with the schematic diagram prepared by National Mine Service Company (Tr. 258; Ex. C-1). The schematic drawing or print contains the following admonition: "This drawing is not to be changed without approval of the Bureau of Mines." (Tr. 259). This first certification approval for the miner was subsequently revised in a July 30, 1974 transmittal from Joseph J. Seman, of the Mining Enforcement and Safety Administration, to National Mine Service Company (Ex. C-2), herein referred to as the "second approval." FMC was never apprised of the revision contained in the second approval and continued to operate the miner in accordance with the schematic print requirements that were delivered with the machinery in question (Tr. 259-261). The Secretary failed to establish FMC's knowledge or awareness of the second approval, actually or constructively. (Tr. 232, 233, 288-290). FMC had no knowledge of the second approval prior to or at the time of inspection (Tr. 264, 288-290, 320, 330, 354-355).

On the day of the inspection the miner derived its power as generally shown in Exhibit R-1. Thus, the initial source of all mine power was a surface generator connected to a surface transformer delivering 13,800 volts (Tr. 48). From this surface generator a power cable transmitted the power to a second transformer located underground (Tr. 48). At the second transformer the power was reduced to 4,160 volts (Tr. 48, 49,) and this electric current (4160 volts) by which the miner was powered (Tr. 64) traveled from the second transformer 10,300 feet through a

starter sled to the miner (Tr. 48-56, 59, 100). The starter (remote control) sled was downstream some 9,600 feet from the transformer and 700 feet upstream of the miner (Tr. 48, 51, 104-106, 109, 144, 269, 331; Ex. C-1). The miner's remote starter sled contained the on-and-off switch for the miner and its short circuit protective device (Tr. 48, 50) the trip setting for which was set at 1,200 amps (Tr. 48, 56) which is arrived at by COMPUTATION (Tr. 261).

A relay (protective device) setting is the predetermined amount of fault current required to deenergize a machine (Tr. 128-130, 282). Fault current is the amount of current (amps) which will flow through a wire in the event of a fault (short circuit)(Tr. 129, 146, 147, 340).

The power source of the 4,160 volts to the miner was the 4,160 volt transformer (Tr. 49, 59, 60, 64-67, 80, 92-95, 131-133, 140a, 160-161, 193, 199, 311-313, 344, 363; Ex. R-2).

In evaluating FMC's contention that the starter sled, rather than the transformer, was the "power source", it is first noted that the purpose for the remote control sled is to comply with regulations which prohibit high voltage switching devices on miners (Tr. 50). Therefore, a high voltage on/off switch must be placed in a remote location away from the face and in fresh air (Tr. 51). This on and off switch does not produce power as a source, but simply "interrupts" it (Tr. 59). Under FMC's arrangement, had there been a short-circuit in the miner, the power would have been interrupted 700 feet away at the started sled (Tr. 50). It is also noted (1) that IEEE 5/ Greenbook (Ex. R-2) mentions only generators or transformers as power sources and (2) that the 4160 voltage upon which the miner was powered originated at the second (underground) transformer 10,300 feet distant (Tr. 135-138).

The maximum starting "inrush" current of the miner was 613 amps (Tr. 146, 208). "Maximum starting current inrush Value" is the amount of current expressed in amperes required to start the miner (Tr. 129, 318-319, 338-339). Once the miner is started even less current is required to keep it running (Tr. 129).

As previously noted, on the day of the inspection (March 29, 1984), the trip setting on the short circuit device for the miner (located on the sled) was set at 1200 amperes (Tr. 48, 56, 267). Such 1200-ampere setting was specified by the first government approved manufacturer's specification for the miner (Ex. C-1) and was not specified to be either a "maximum," "ceiling"" or "minimum" setting, or otherwise characterized (Ex. C-1, Tr. 207, 210).

5/ Institute of Electrical and Electronic Engineers.

At the time of the March 29, 1984 inspection, both parties present (MSHA and FMC) agreed that resetting the switch to a lower setting "would put FMC out of compliance with the specifications in the print" (Tr. 268). The MSHA inspectors were unwilling to see the setting reduced for fear of violating the specifications contained in the schematic print (Tr. 268-270). Only after a second inspection was undertaken on May 1, 1984, and presumbly further contemplation, was FMC authorized to reduce the setting (Tr. 268).

Subsequent to March 29, 1984, a fault current (short-circuit) analysis was conducted by MSHA electrical engineer Terrance D. Dinkel which indicated that the minimum phase fault current, in the event a fault occurred in a cable at the miner, to be 1005 amperes. Had such a fault occurred with the trip setting on the protective device on the sled set at 1200 amperes, the circuit would not have been interrupted (Tr. 149, 150, 166). Thus, the miner was not adequately protected against short-circuit faults (Tr. 155-156). To make the short-circuit protection effective, the maximum inrush current being 613 amps and the low fault current being 1005 amps, the trip setting should have been set as close to the 613 ampere setting as possible (Tr. 151, 152, 164) in approximately the 650-700 ampere range. Qualified electrical engineers are able to make such adjustments to the trip setting (Tr. 154-155, 179, 201, 219).

The only trailing cable outby the miner (upstream from the miner toward the surface transformer) was the 700-foot length of cable between the miner and the starter sled (Ex. R-1; Tr. 41, 62a, 63, 110, 270). The 9600-foot length of cable between the sled and the second (4160 volt) transformer-found to be the "power source" herein-was "feeder" cable or power cable, and was not trailing (portable) cable for the miner within the meaning of 30 C.F.R. 35.18(a)(5)(ii) (Tr. 60, 63, 68, 77, 110, 116, 278-281).

The longer the cable, the greater amount of current is lost as it travels through the cable (Tr. 148, 156, 160-164, 192) because of "resistance" in the conduction of the current (Tr. 160). Loss of fault current as it travels through excessive cable thus can result in a circuit breaker not tripping (Tr. 148-150, 151-161, 175).

The safety standard (Section 35.18(a)(5)) relied on by the Secretary contains no reference to the term "power source." Nor is this term found in the original schematic print (Ex. C-1) for the miner's electrical set-up. It appears, from the standpoint of the documentary evidence herein, only in MSHA's subsequent second approval (Ex. C-2, p.8) since the provisions of Ex. C-3, p. 5 do not apply to the miner in question (Tr. 108, 114).

The applicable "power source" language in toto-relied upon by the Secretary relating to the excessive cable length issue - found in the second approval dated July 30, 1974, (Ex. C-2, p. 8) reads as follows:

> TRAILING CABLE
> 3 Conductor, No. 2, SHD-GC, 5 kv, 2.09" O.D., flame-resistant between miner and remote skid-mounted (open-type) sled containing starter and Femco ground monitor chopper receiver. Power input and output of sled unit is made through quick disconnect plugs. Cable from power source to sled input is less than 100 feet. Total length from power source to machine not to exceed 700 feet. Protection at power source is provided by a circuit breaker with an instantaneous trip setting of 1500 amperes. (Emphasis added)

DISCUSSION, ULTIMATE FINDINGS, AND CONCLUSIONS

Taking up the first alleged infraction mentioned in the Citation, that relating to the 1200 ampere trip setting, FMC's primary contention is set forth at page 6 of its Brief, to wit:

> "MSHA suggests that the specifications regarding short-circuit protection provided by the manufacturer should have been modified by FMC in accordance with the regulations found at 30 C.F.R. § 18.35 . . . . With this suggestion MSHA asserts that FMC was under a duty to ignore the specific 1200 amp setting and to operate the equipment at an ". . . inferred setting, which should be lower than the ceiling level." Apparently MSHA believes that the 1200 amp setting is the ceiling level. MSHA advances this position in spite of the fact that the manufacturer's specification level of 1200 amps is nowhere referred to as a ceiling level.
>
> In relying upon § 18.35 to support its contention of violation, MSHA requires a tortured and unnatural reading of the regulation in question. By MSHA's own admission, such a reading would require the operator to ignore a specifically authorized level and adjust the equipment to an "inferred setting".

I disagree that the regulation, i.e., subparagraph ii, requires the mine operator to ignore a specifically authorized level per se. FMC's argument completely ignores the "excessive cable length" consideration which triggers the applicability of Subparagraph" ii). This contention and FMC's claim that it did not have "a fair indication" of what was required by the regulation-require further examination of the standard.

Analysis of section 18.35(a)(5)(ii) reveals that it consists of two phrases separated by a comma-each embodying a distinct concept. The regulation's essence is in the first phrase: that the short-circuit protection shall be provided by a protective device with an instantaneous trip setting as near as practicable to the maximum starting-current-inrush value. The second phrase is a limitation on the first phrase--not a setting independently authorized by the regulation as FMC contends. The second phrase in effect says, that in no event shall the setting required by the first phrase exceed the trip value specified in an MSHA approval.

Applying the requirements of the regulation to FMC's electrical arrangement shown in the record, it is concluded that FMC was required by the regulation to set the instantaneous trip setting "as near as practicable to" 700 amps, which was the approximate starting current inrush value. Since this amperage number was well below the MSHA approved trip value--the second phrase of the regulation clearly and simply had no application to the miner in the circumstances involved here. To illustrate, had the starting current inrush value for some reason been higher, say 1250 amperes, the secondary protective limitation of the second clause of the regulation would have become applicable because the trip value shown in the approved specification was 1200 amperes.

The critical focus must be on what set of circumstances trip the applicability of the standard. Quite simply, a mine operator must comply with the provisions of subparagraph ii of section 35.18(a)(5) where, as here, the miner's trailing cable exceeds 500 feet. Thus, contrary to FMC's argument, its awareness of the second approval (Ex. C-2) was not a prerequisite to its obligation to comply with the standard (Tr. 322) and its alleged difficulty with the term "power source" has no bearing on this question.

Reading the regulation in the manner the Secretary urges requires no strained or tortured interpretation as FMC contends. It clearly states "Where the method of mining requires the length of a portable trailing cable to be more than 500 feet, such length of cable shall be permitted only" under the conditions prescribed in subparagraph "ii". At the time of the inspection, and at all other times pertinent herein, FMC knew the miner's trailing cable length was 700 feet and in excess of the 500-foot length permitted without compliance with Subparagraph "ii". The standard, whether viewed in the abstract-or in the context of FMC's mining and electrical arrangement for the miner--was not ambiguous, vague, or uncertain. It is concluded that men of common intelligence would not have to guess at its meaning. Accordingly, FMC's contest as to this facet of part "a" of the Citation is found to lack merit and FMC is found in violation of 30 C.F.R. 57.21-78.

Turning now to the second infraction charged to FMC in part (a) of the subject Citation, that involving excessive cable length, it is clear that the Secretary solely relies on the second approval to provide the standard with which FMC must be in compliance. As previously noted, the second approval limits the length of the trailing cable from the power source to the sled input to be "less than 100 feet," and limits the "total length" from the power source to the miner to not exceed 700 feet. This regulation obviously contemplates that the cable from the power source (hereinabove found to be the 4160 volt transformer some 10,300 feet distant from the miner) be of the "trailing" or "portable" variety. This, of course, simply does not fit the electrical cable scheme which FMC had in place at the time of the alleged violation since the only trailing cable involved was the 700-foot length from the miner to the sled. Nevertheless, it is clear that FMC's electrical power scheme contravened the requirements of the second approval as to both the 100-foot and 700-foot provisions. But this is not the decisive question posed. FMC aptly points out that as of July 30, 1974, MSHA (actually MSHA's successor, MESA - the Mining Enforcement Safety and Health Administration, a division of the Department of the Interior), in extending approval for the miner, had modified the certification requirement to restrict the cable length from the power source to the miner to 700 feet, but not apprised FMC of such modification (Tr. 288-290, 330). There is no specification of pertinent cable lengths in the first approval (Ex. C-1; Tr. 262). FMC's contention and evidence that it first learned of the second approval during the second inspection tour on May 1, 1984, was not challenged or rebutted by the Secretary. On the basis of this record, it would appear that the only way a mine operator would learn of such a modification as that contained in the second approval would be, as FMC contends, as a result of the issuance of a citation. In a case involving analogous circumstances, Secretary v. U.S. Steel Mining Company, 6 FMSHRC 1369, 1371 (1984), Judge Gary Melick made the following determination:

> "MSHA Inspector James Potiseck conceded that he could not verify that the mine operator had received notice of the necessary modification either from MSHA or from the Service Machine Company prior to the issuance of his citation. Indeed, Potiseck admitted that the letter in evidence (Government Exhibit No. 9) supposedly informing U.S. Steel of the required changes was sent to the wrong address. The district electrical engineer for U.S. Steel, Gary Stevenson, testified that after receiving the citation, he had been unable to locate anyone who had received the noted letter.
>
> Within this framework of evidence, it is clear that U.S. Steel did not receive notice of the change in the permissibility requirements for the cited longwall mining unit. Without such prior notice, there can be no violation. Accordingly, the citation is vacated."

In Grayned v. City of Rockford, 408 U.S. 102, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972), the Supreme Court pointed out various reasons for withholding enforcement of vague laws, all of which I discern have applicability here:

> "It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibily delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statute "abut(s) upon sensitive areas of basic First Amendment freedoms," it "operates to inhibit the exercise of [those] freedoms." Uncertain meanings inevitably lead citizens to "'steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked."

On this record, it must be found that FMC had no warning of what constituted the conduct the Secretary contends was prohibited; FMC's contest of that aspect of the Citation charging improper, excessive cable length is found meritorious.

ORDER

Based on the foregoing findings and conclusions, FMC's contest is found to be meritorious in part. That part of Part "a" Citation No. 2009928 alleging an infraction of the manufacturer's approved design specification No. 2G2431A-2 because of excessive trailing cable lengths is vacated. That part of Part "a" of the Citation alleging non-compliance with 30 C.F.R. 18.35-(a)(5)(ii) and a resultant violation of 30 C.F.R. 57.21-78, consisting of the first 3 paragraphs of the Citation and pertaining to the trip setting of the miner's short-circuit protection device, is affirmed.

Michael A. Lasher, Jr.
Administrative Law Judge

Distribution:

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

John A. Snow, Esq., James A. Holtkamp, Esq., and Matthew F. McNulty, III, Esq., VanCott, Bagley, Cornwall and McCarthy, 50 S. Main Street, Suite 1600, Salt Lake City, UT 84110 (Certified Mail)

/blc

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

April 24, 1986

A. D. BRACKEN, Complainant	:	DISCRIMINATION PROCEEDING
	:	Docket No. CENT 85-132-D
v.	:	
	:	MADI CD 85-10
ALPINE CONSTRUCTION COMPANY, Respondent	:	

ORDER OF DISMISSAL

Before: Judge Merlin

The Complainant has sent a letter to the Commission, dated March 18, 1986, stating that unless an impartial special investigator can be assigned to the case, who does not know him or the other parties, he does not want to pursue this matter any further.

This Commission has no authority to assign a special investigator to this case or to undertake its own initial investigations of discrimination complaints. This responsibility is the Secretary of Labor's.

In accordance with the Complainant's letter therefore, this case is DISMISSED.

Paul Merlin
Chief Administrative Law Judge

Distribution:

A. D. Bracken, Box 89, Stigler, OK 74462 (Certified Mail)

Mr. Leon Burns, Alpine Construction Co., P. O. Box 339, Stigler, OK 74462 (Certified Mail)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041 April 28, 1986

DAVID RATLIFF, Complainant	:	DISCRIMINATION PROCEEDING
	:	Docket No. KENT 85-108-D
v.	:	
	:	PIKE CD 85-05
BETHENERGY MINES, INC., Respondent	:	

DECISION

Before: Judge Fauver

This proceeding has been docketed as a claim for relief under the discrimination provisions (section 105(c)) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, et seq.

On March 25, 1986, Respondent moved to dismiss the Complaint on the grounds (1) that Complainant has not stated a claim for relief which can be granted under the Act, and (2) that Complainant has failed to comply with the prehearing requirements of the notice of hearing.

The complaint alleges that Respondent failed to grant Complainant a second exercise of super-seniority rights, to return from layoff, under a collective bargaining agreement between Respondent and the United Mine Workers of America.

Complainant has not responded to the motion to dismiss nor has Complainant filed a prehearing submission, which was due on March 26, 1986.

On April 3, 1986, a Show Cause Order was issued to Complainant, allowing him until April 21, 1986, to show cause, in writing, why this case should not be dismissed:

(1) for failure to state a claim for which relief can be granted under the Act; and

(2) for failure to comply with the prehearing requirements of the Notice of Hearing (Hearing Term dated January 15, 1986).

Complainant has not responded to the Show Cause Order.

I conclude that the Motion to Dismiss should be granted, on the ground that the Complainant fails to state a claim for which relief can be granted under section 105(c) of the Act.

ORDER

WHEREFORE IT IS ORDERED that the Motion to Dismiss is GRANTED, and this proceeding is DISMISSED.

William Fauver
Administrative Law Judge

Distribution:

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Beth Elkhorn Corporation, Box 232, Jenkins, KY 41537 (Certified Mail)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

April 28, 1986

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	Docket No. WEVA 82-152-R WEVA 82-369
v.	:	
WESTMORELAND COAL COMPANY	:	

PETITION FOR RECONSIDERATION

The recent decision of this Commission to reduce the civil penalty in the captioned case is based on an erroneous interpretation of the intent of the undersigned in use of the words "gross negligence" and "negligence". Accordingly the Commission's legal conclusion that the undersigned thereby believed that the operator's negligence was somehow lessened is totally erroneous and reconsideration under the circumstances would be appropriate.

Although this Commission reversed the "unwarrantable failure" findings in the original decision of the undersigned the factual findings underlying the operator's negligence were not modified in any way. The use of the words "gross negligence" in that decision, 5 FMSHRC 132 (January 1983) (ALJ), and the use of the word "negligence" in the decision following remand, 7 FMSHRC 1647 (October 1985) (ALJ), concerning the same factual circumstances did not in any way reflect on my part a belief that there was any lesser negligence. The facts remain the same and had I known the Commission would have drawn any inference from the noted terminology I would have again used the phrase "gross negligence" to characterize the high degree of negligence found in this case, for indeed it is my firm belief that the facts of this case demonstrate the highest degree of negligence. This Commission of course has the authority to reduce the civil penalty in this case but such a reduction cannot be based upon any finding of lesser negligence by the undersigned because no such finding has ever been made.

Gary Melick
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

April 28, 1986

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), ON BEHALF OF KEVIN L. SMITH, Complainant	:	DISCRIMINATION PROCEEDING
	:	Docket No. WEVA 86-69-D
	:	MORG CD 85-20
v.	:	Loveridge No. 22 Mine
CONSOLIDATION COAL COMPANY, Respondent	:	

ORDER OF DISMISSAL

Before: Judge Kennedy

Complainant having failed to file his complaint as allowed by the order of March 11, 1986, it is ORDERED that the captioned matter be, and hereby is, DISMISSED.

Joseph B. Kennedy
Administrative Law Judge

Distribution:

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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

April 30, 1986

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. WEST 85-34
	:	A.C. No. 05-00469-03550
v.	:	Dutch Creek No. 2 Mine
MID-CONTINENT RESOURCES, INC., Respondent	:	

DECISION

Appearances: James H. Barkley, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
Edward Mulhall, Jr., Esq., Delaney & Balcomb, Glenwood Springs, Colorado, for Respondent.

Before: Judge Carlson

This case, heard under the provisions of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (the Act), arose out of an inspection at an underground coal mine operated by respondent Mid-Continent Resources, Inc. (Mid-Continent) near Redstone, Colorado. On August 23, 1984, Larry Ganser, a coal mine inspector employed by the Secretary of Labor, issued two citations to Mid-Continent in which he alleged violations of mine safety standards promulgated by the Secretary under the Act. In the present proceeding the Secretary seeks to collect substantial civil penalties as the result of the alleged violations. At the evidentiary hearing held in Denver, Colorado, both parties presented evidence. The parties waived the filing of briefs or other post-hearing submissions.

REVIEW AND DISCUSSION OF THE EVIDENCE

Citation No. 2213222

On the morning of August 23, 1984, Larry Ganser, a federal coal mine inspector, inspected the 204 headgate section of Mid-Continent's Dutch Creek No. 2 Mine. While there, he observed a continuous mining machine inby the last open crosscut. The machine was withdrawn from the face and was not engaged in mining. A 550-volt trailing cable furnished power to the machine. When the inspector looked at the cable he noted that its outer jacket had been cut away where it entered the "stuffing box" and was connected to the machine. According to the inspector, the absence of the outer jacket diminished the circumference of the cable to the extent that air could freely enter and exit the box in which energized wires in the cable were connected to the machine.

This condition, the inspector believed, violated the mandatory safety standard published at 29 C.F.R. § 75.503. That standard, at the time of the alleged violation, provided as follows:

> The operator of each coal mine shall maintain in permissible condition all electric face equipment required by §§ 75.500, 75.501, 75.504 to be permissible which is taken into or used inby the last open crosscut of any such mine.

The machine was not in "permissible" condition, the inspector maintained, because the opening around the cable allowed the free exchange of atmosphere between the inside and outside of the box. A "permissible box," he testified, must be able to contain any explosion of a gassy atmosphere within the confines of the box.

Through its answer, Mid-Continent confessed the existence of the violation. It contested, however, the Secretary's characterization of the violation as "significant and substantial," and disputed the reasonableness of the proposed penalty of $900.00.

In penalty assessments, Section 110(i) of the Act requires the Commission 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 parties stipulated that Mid-Continent's mines in the Redstone, Colorado area produced a total of 743,844 tons of coal in the year in question, of which 463,504 tons came from Dutch Creek No. 2. They further stipulated that Dutch Creek No. 2 employed approximately 135 miners, with all mines employing about 350. From these facts I must conclude that the size of the mining enterprise was large.

The parties further stipulated that Mid-Continent abated the violation in good faith, and that payment of the proposed penalty would not impair its ability to continue in business.

The evidence shows that Mid-Continent knew or should have known that the violative condition existed. The cut-away portion of the cable was clearly visible to anyone who approached the box and looked. Moreover, Mid-Continent's face boss at the area in question acknowledged that the cable was an inch larger than was customary. Therefore, someone had to "trim it down" to get it into the box (Tr. 137). In other words, the defective condition was not the result of an unnoticed accident or of a gradual deterioration which could perhaps have been overlooked.

The record contains exhaustive evidence of Mid-Continent's history of prior violations under the Act. Through its safety director, Mid-Continent introduced a series of computerized lists of citations grouped in various ways (respondent's exhibits 5 through 18-a). The accuracy of these records was not challenged. No useful purpose would be served in summarizing the many pages of these records here. It is enough to say that during the two years prior to the instant citation, Mid-Continent received numerous citations. On the other hand, one must recognize that the Dutch Creek No. 2 operation is classified as a gassy mine; it therefore undergoes nearly constant federal inspection. This fact, coupled with the mine's large size, tends to mitigate the impact of the mere numbers of violations.

We now consider the gravity of the violation. Mid-Continent acknowledges that Dutch Creek No. 2 is properly classified as a "gassy mine" under the numerous regulations that deal with that concept. Nor is it disputed that the opening around the trimmed trailing cable where it entered the box on the mining machine caused the box to lose its "explosion-proof" character and thus rob the machine of its "permissible" approval. Inspector Ganser testified that should an explosion occur because of the unprotected electrical connection, three miners would have been endangered at the time of inspection: the miner operator, his helper, and a shuttle car operator. Five or six miners would have been in the vicinity had mining actually been in progress, he testified.

The inspector tested for methane presence at the face. He found a concentration of four-tenths of one percent. Under the standards, mining may take place at levels under one percent. The inspector testified without contradiction that the mine atmosphere becomes explosive when the methane concentration reaches five percent.

He acknowledged that the continuous mining machine was equipped with a methane monitor designed to alarm when the concentration reached one percent. The device also automatically deactivates the machine when the methane level reaches two percent. The inspector maintained that the shutdown mechanism would not affect the hazard created by the lack of an explosion-proof box, however, because he did not believe that it would de-energize the cable itself. John Jerome, the face boss, testified to the contrary, however. He asserted that the shutdown device de-energized the machine totally, all the way back to the power center. I find that Jerome was familiar with the machine and credit his testimony on this issue. Donald E. Ford, the mine's safety director, testified that gas studies in the double entry in question here showed relatively low rates of methane liberation for a gassy mine. Readings, he declared, had generally varied from three-tenths to five-tenths of one percent. Occasionally, readings were as high as eight-tenths of one percent. Immediately after natural shifts in the mine strata, described as "bumps" and "bounces," levels as high as one or two percent were recorded.

Mid-Continent suggests that the presence of the alarm made the possibility of a methane-fueled explosion and fire unlikely, and that the $900.00 penalty proposal is excessive.

The Secretary's position is that violations such as the present one, which increase the risk of an unconfined electrical spark in a gassy mine, are always serious. Whatever the immediate level of methane, the known possibility of methane releases, together with the inevitable presence of some amounts of coal dust (excessive or not), makes for a potentially lethal situation. This is so, the Secretary contends, even with the presence of methane alarms or automatic shutdown devices.

The inspector's assessment of the danger took into account that his reading of air flow near the face was only about half of what was required by the mine's ventilation plan when mining was in progress. Although mining had ceased by the time he arrived, he inferred that the insufficient flows existed when mining was in progress. He reasoned that the diminished flows allowed greater concentrations of methane and coal dust near the face, since the gas and dust generated there would not be diluted by the required large volumes of moving air.

The ventilation issue was directly raised by the inspector in the second citation tried in this case, number 2213223. As will be seen in the discussion of that citation, I found that no violation of the mine's ventilation plan was proved. It follows that a lack of proper ventilation should not considered as an aggravating factor in determining the gravity of the present violation.

Moreover, I must conclude that the presence of a methane alarm and shutdown device did tend to reduce the possibility of an explosion. The safety director's recitation of the history of low levels of methane release for the face in question is less impressive. It is scarcely prudent to assume that greater amounts of methane will not be released with the next mining advance. Moreover, that witness admitted that bumps and bounces sometimes occur in the mine, causing release of methane to a two-percent level. The witness did not claim, of course, that he was able to forecast the times when these phenomena may occur.

Overall, I must also conclude that the evidence establishes the gravity of the violation to be moderate-to-high. No condition which deprives a piece of electric face equipment of its permissibility in a gassy mine can be taken lightly. The standards insist upon multiple precautions in underground coal mines - particularly gassy mines - because of the potentially disasterous consequences of fire or explosion. One simply cannot reason, for example, that if methane control and coal dust suppression measures are well maintained, that one can be casual about safeguards against ignition sources. The standards and common sense demand that all mandatory precautions against explosions and fire be scrupulously observed.

Having weighed all the statutory penalty elements discussed above, I conclude that $600.00 is the appropriate civil penalty.

The Secretary's citation characterized the violation as "significant and substantial" under section 104(d) of the Act. In Cement Division, National Gypsum Company, 3 FMSHRC 822 (1981), the Commission defined such a violation as one where " ... there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." Doubtless, had an explosion or fire occurred, the likely injuries to miners would have been severe. That an explosion would occur was not probable, certainly, but was reasonably possible. The violation furnished a ready ignition source. Had this been combined with an untimely failure of face ventilation or some other failure in coal dust or methane control, the basic ingredients for a disaster would have been at hand. In this regard, the facts discussed in connection with the other citation in this case are instructive. Those facts were insufficient to establish the violation charged because the unplanned disruption in ventilation which occurred was not proved to have happened during mining. (As mentioned earlier, mining generates coal dust and may liberate methane.) They were sufficient to illustrate, however, that accidental disruption of ventilation can take place in the mine in question. That the accident took place when no mining was in progress was mere fortuity. The Secretary correctly classified the present violation as "significant and substantial."

Citation No. 2213223

This citation was written by Inspector Ganser in the 204 headgate section on the same morning as the permissible face equipment citation. 1/ It is undisputed that the inspector took a measurement of air flow at the face which showed 11,190 cubic feet per minute. It is also undisputed that Mid-Continent's approved ventilation plan called for minimum quantity of 20,000 cubic feet per minute of air in development sections during the cutting, mining or loading of coal (respondent's exhibit 1, section 6.2). The inspector believed that his reading showed that Mid-Continent was violating this provision. He therefore cited the operator for violation of the mandatory standard published at 30 C.F.R. § 75.316, which provides:

> A ventilation system and methane and dust control plan and revisions thereof suitable to the conditions and the mining system of the coal mine and approved by the Secretary shall be adopted by the operator and set out in printed form on or before June 28, 1970. The plan shall show the type and location of mechanical ventilation equipment installed

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1/ Midway through the hearing Mid-Continent was allowed to amend its answer to show that it contested the alleged violation. Its intention to oppose the violation was plain, and the Secretary did not appear prejudiced by the amendment.

> and operated in the mine, such additional or improved equipment as the Secretary may require, the quantity and velocity of air reaching each working face, and such other information as the Secretary may require. Such plan shall be reviewed by the operator and the Secretary at least every six months.

The inspector admitted that at the time he made his inspection and took his reading, coal was being neither cut, mined, nor loaded. The real issue to be decided, then, is whether the evidence justifies a reasonable inference that the air flow was below 20,000 cubic feet per minute earlier on the morning of the inspection when mining was admittedly in progress. For the reasons which follow I conclude that the established facts do not adequately support such an inference.

The inspector testified that he arrived at the area in question at about 10:05 a.m. or 10:10 a.m. and wrote the ventilation citation at about 10:45 a.m. (Tr. 45, 73, 95). He acknowledged that the next step in the mining cycle would have been roof bolting. For roof bolting, the record shows, the ventilation plan requires but 3,000 cubic feet per minute of air (Tr. 96-99, respondent's exhibit 1, section 6.8).

The inspector assumed, without being certain, that the morning shift had reported to work at 8:00 a.m. He professed a certainty that the mining had ceased only a short time after he had arrived. He found coal dust in the air, he said, and the area was still wet from the spray emanating from the continuous mining machine during cutting. Beyond that, and most important, he maintained that the air flow volume present at inspection could not have decreased from the 20,000 cfm level to 10,190 cfm in the short time since mining had ceased. He did not claim firsthand knowledge of the cause of the decrease in air, but reasoned that since it took from 10:45 a.m. to 12:15 p.m. to bring the volume back up to the 20,000 level, the problem was a major one. He admitted having been told by a management official that the problem was caused by a check curtain having been knocked down elsewhere in the air course. The inspector rejected that explanation, however, because in his opinion a section of curtain could have been replaced in 15 minutes; it would not have taken an hour and a half.

Mid-Continent's principal witness disagreed with most of the inspector's premises. Mr. Jerome, the face boss, testified that the shift had started at 7:00 a.m., not 8:00 a.m. He agreed that the face had been advanced about 15 feet that morning, but he insisted he had done the required pre-shift readings and found the air-flow to have been 23,000 cfm. He estimated that mining had ceased at least 15 minutes before the inspector arrived. (More time - at least a half an hour - elapsed before the inspector took his air flow reading.)

According to Jerome, he sent a crew of three men to check out the stoppings along the entryway. At about 1500 feet outby the inspection area they found that an airlock curtain had been knocked down by a trailer carrying longwall shields to a separate area of the mine. Jerome ordered a second curtain hung there to repair the leak. Restoration of the airlock returned full ventilation to the face, the witness testified.

I find Mid-Continent's explanation of the reduced air at the face plausible. A large diversion of air from the prescribed air course would likely cause a fairly rapid decline in air flow at the face. Clearly, displacement of the airlock would tend to create a large diversion. The evidence does not disclose the time at which the trailer knocked down the curtain. Under proper circumstances, one may indeed infer a present condition existed at a time past. In this case, however, the inspector's conclusions are simply too speculative to constitute a convincing set of proofs. The burden of proof on the issue of violation rests upon the Secretary. He did not sustain that burden because he did not effectively negate the possibility that the air at the face remained at the prescribed volume until after mining had ceased.

One more matter deserves comment. The inspector and the face boss differed rather heatedly over whether the crew at the face had set a timber and extended the line curtain to it after the face was advanced. Mr. Jerome insisted that this was done, and that it is significant because he took a satisfactory air reading at the place where the curtain was "winged out" to better sweep the face with air. It was undisputed that the timber could not have been set until mining and loading had ceased because the timber would have interfered with the use of the face equipment (Tr. 133-135). Inspector Ganser, however, was certain that the line curtain was not extended when he took his own readings (Tr. 199). He was certain, he said, because the change in the configuration of the curtain would have yielded different measurements than those he got when he calculated the area at the mouth of the line curtain - an integral step in determining the air flow.

I find no reason to question the fundamental truthfulness of either witness, despite the irreconcilable difference in their testimony. I must therefore attribute that difference to a failure in accurate recall on the part of one witness or the other. I have not attempted to resolve the matter because if Jerome were declared wrong and the inspector correct, the result would not be changed. If, indeed, a reading showing a 20,000 cfm flow was taken by Mid-Continent after the mining ceased, it would be compelling evidence that there was no violation. If, on the other hand, such a measurement was not taken, or if it was taken and found to be less than 20,000 cfm, such facts would not add substantial weight to the Secretary's case. They do not bear directly on the essential question: the level of air flow during cutting, mining or loading.

The citation will be vacated.

CONCLUSIONS OF LAW

Based upon the entire record herein, and in accordance with the factual determinations contained in the narrative portion of this decision, the following conclusions of law are made:

(1) The Commission has jurisdiction to decide this matter.

(2) The respondent, Mid-Continent, admits violation of the mandatory safety standard published at 30 C.F.R. § 75.503, as alleged in citation number 2213222.

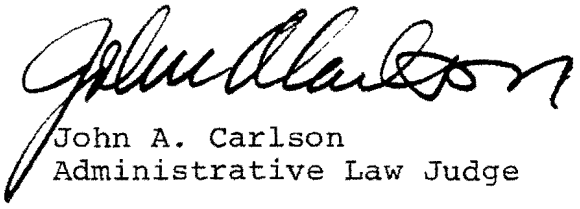
(3) The violation was "significant and substantial" within the meaning of section 104(d) of the Act.

(4) The appropriate civil penalty for the violation is $600.00.

(5) Mid-Continent did not violate the mandatory safety standard published at 30 C.F.R. § 75.316, as alleged in citation number 2213223.

ORDER

Accordingly, citation number 2213222 is ORDERED affirmed; a civil penalty of $600.00 is ORDERED assessed therefor, to be paid within 30 days of the date of this decision; and citation number 2213223 is ORDERED vacated.



John A. Carlson
Administrative Law Judge

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