APRIL 1987

COMMISSION DECISIONS

ADMINISTRATIVE LAW JUDGE DECISIONS

APRIL 1987

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

Harlan L. Thurman v. Queen Anne Coal Company, Docket No. SE 86-121-D. (Judge Weisberger, March 5, 1987)

Secretary of Labor on behalf of Bobby G. Keene v. S & M Coal Company, Prestige Coal Co. & Tolbert Mullins, Docket No. VA 86-34-D. (Judge Melick, March 2, 1987)

Rushton Mining Company v. Secretary of Labor, MSHA, Docket Nos. PENN 86-44-R, PENN 86-92. (Judge Broderick, March 19, 1987)

Review was denied in the following cases during the month of April:

Secretary of Labor, MSHA v. Texas Utilities Generating Company, Docket No. CENT 86-119. (Petition for Interlocutory Review of Judge Weisberger's February 4, and March 19, 1987 Orders.)

Alfred Cox v. Pammlid Coal Company, Docket No. WEVA 86-73-D. (Judge Koutras, March 5, 1987)

Secretary of Labor on behalf of Andy Brackner v. Jim Walter Resources, Inc., Docket No. SE 86-69-D. (Motion for Reconsideration of Commission Decision, March 20, 1987)

Rushton Mining Company v. Secretary of Labor, MSHA, Docket Nos. PENN 85-253-R, 86-1. (Motion for Clarification of Commission Order, March 30, 1987)

COMMISSION DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

April 7, 1987

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. PENN 85-201
CANON COAL COMPANY	:	

BY: Ford, Chairman; Backley, Doyle, Lastowka and Nelson, Commissioners

DECISION

BY THE COMMISSION:

This civil penalty proceeding involving Canon Coal Company ("Canon") arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982). Commission Administrative Law Judge Roy J. Maurer issued a decision that in relevant part vacated a withdrawal order alleging a violation of 30 C.F.R. § 75.200. 8 FMSHRC 696, 705-10 (May 1986) (ALJ). 1/ The Commission directed review on its own motion (30 U.S.C. § 823(d)(2)(B)), limiting review solely to the legal question of whether the judge properly had construed section 75.200. For the reasons that follow, we conclude that the essence of the judge's decision is consistent with the appropriate construction of this important standard and we affirm.

On October 9, 1984, a fatal roof fall accident occurred in Canon's Pitt Gas Mine, an underground coal mine located in Clarksville,

---

1/ In pertinent part, section 75.200 provides:

> Each operator shall undertake to carry out on a continuing basis a program to improve the roof control system of each coal mine and the means and measures to accomplish such system. The roof and ribs of all active underground roadways, travelways, and working places shall be supported or otherwise controlled adequately to protect persons from falls of the roof or ribs.

(Emphasis supplied.)

Pennsylvania. Following its accident investigation, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued to Canon several citations and orders, all alleging violations of section 75.200. In his decision, Judge Maurer, in relevant part, vacated the order that is the subject of the present proceeding. In reaching this conclusion, the judge stated, among other things, that "[w]hile ... it is not necessary to prove a violation of the roof control plan in order to sustain a violation of [section] 75.200, the evidence must show that the operator knew or should have known that a condition existed that required additional support and yet it was not provided." 8 FMSHRC at 709. Focusing on this language, the Commission on its own motion directed review of that portion of the judge's decision vacating the order. (The Secretary did not seek review of the judge's decision.)

Section 75.200, which reflects section 302(a) of the Mine Act, 30 U.S.C. § 862(a), is a mandatory safety standard of central importance in the crucial regulatory area of roof control in underground coal mines. With respect to the requirement in section 75.200 that roof and ribs "be supported or otherwise controlled adequately," this standard is expressed in general terms so that it is adaptable to myriad roof condition and control situations. See generally Kerr-McGee Corp., 3 FMSHRC 2496, 2497 (November 1981). Questions of liability for alleged violations of this broad aspect of this standard are to be resolved by reference to whether a reasonably prudent person, familiar with the mining industry and the protective purpose of the standard, would have recognized the hazardous condition that the standard seeks to prevent. Cf. Ozark-Mahoning Co., 8 FMSHRC 190, 191-92 (February 1986); Great Western Electric Co., 5 FMSHRC 840, 841-42 (May 1983); U.S. Steel Corp., 5 FMSHRC 3, 5 (January 1983); Alabama By-Products Corp., 4 FMSHRC 2128, 2129 (December 1982). Specifically, the adequacy of particular roof support or other control must be measured against the test of whether the support or control is what a reasonably prudent person, familiar with the mining industry and protective purpose of the standard, would have provided in order to meet the protection intended by the standard. We emphasize that the reasonably prudent person test contemplates an objective -- not subjective -- analysis of all the surrounding circumstances, factors, and considerations bearing on the inquiry in issue. See, e.g., Great Western, supra, 5 FMSHRC at 842-43; U.S. Steel, supra, 5 FMSHRC at 5-6.

While the judge's decision contains some language not completely congruent with the wording of the reasonably prudent person test consistently applied by this Commission in determining the applicability of broad standards to particular factual circumstances, we are satisfied that the judge applied that construction in essence and that his decision is consistent with it. In its post-hearing brief, Canon expressly had urged upon the judge the reasonably prudent person construction of this standard. The judge proceeded to examine all the objective circumstances surrounding the roof fall. 8 FMSHRC at 700-10. He concluded, in essence, that the Secretary had failed to produce evidence that objective signs existed prior to the roof fall that would have alerted a reasonably prudent person to install additional roof support beyond the support that actually had been provided by the operator. 8 FMSHRC at 710. Therefore, because the judge's application

of the standard is consistent with the appropriate interpretative approach and this was the limited concern of our direction for review, we find no reason to disturb the judge's holding.

Accordingly, the judge's decision is affirmed insofar as it is consistent with this decision.

Ford B. Ford, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

Distribution

Joseph Mack, III, Esquire
Thorp, Reed & Armstrong
One Riverfront Center
Pittsburgh, Pennsylvania 15222

Jerald S. Feingold, Esquire
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Boulevard
Arlington, Virginia 22203

Administrative Law Judge Roy J. Maurer
Federal Mine Safety and Health Review Commission
5203 Leesburg Pike, Suite 1000
Falls Church, Virginia 22041

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

April 14, 19[illegible]

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of ANDY BRACKNER	:	
v.	:	Docket No. SE 86-69-D
JIM WALTER RESOURCES, INC.	:	

BEFORE: Ford, Chairman; Backley, Doyle, Lastowka and Nelson, Commissioners

ORDER

BY THE COMMISSION:

Jim Walter Resources, Inc. ("JWR"), has filed a Motion for Reconsideration requesting that the Commission reconsider its March 20, 1987 order denying JWR's previously filed petition for discretionary review in this matter. Upon consideration of the motion and the Commission's previous order, the motion for reconsideration is denied.

Ford B. Ford, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

Distribution

David M. Smith, Esq.
Maynard, Cooper, Frierson & Gale, P.C.
12th Floor, Watts Bldg.
Birmingham, AL 35203

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

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

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

April 30, 1987

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. LAKE 84-98
YOUGHIOGHENY & OHIO COAL COMPANY	:	

BEFORE: Ford, Chairman; Backley, Doyle, Lastowka and Nelson, Commissioners

DECISION

BY THE COMMISSION:

In this civil penalty proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982)(the "Mine Act"), the issues are whether a Commission administrative law judge erred in holding Youghiogheny & Ohio Coal Co. ("Y&O") in default; whether two violations of a mandatory safety standard were "significant and substantial" within the meaning of section 104(d)(1) of the Mine Act, 30 U.S.C. § 814(d)(1); and whether the procedure followed in assessing civil penalties for the violations was proper. For the reasons that follow, we conclude that, to the extent that the judge characterized his disposition as a default, he erred. Further, we affirm the judge's findings that the violations were significant and substantial and his civil penalty assessments.

Y&O's Nelms No. 2 Mine, an underground coal mine, is located in Harrison County, Ohio. On March 14, 1984, Robert Cerana, an inspector/ventilation specialist of the Department of Labor's Mine Safety and Health Administration ("MSHA"), conducted a ventilation inspection of the 013 section of the mine. In the "C" entry the inspector observed coal dust filtering through the man doors in the stopping line between the "C" and "D" entries. The inspector had detected recirculation of air on the 013 section twice during the two months prior to March 1984. The coal dust indicated to the inspector that the section again might be experiencing recirculation of air. Utilizing a smoke tube, the inspector determined that return air in the "D" entry was recirculating into the "C" entry and was traveling from the "C" entry to the face. The inspector believed that the recirculation was caused by an auxiliary fan on the section. The inspector found .1% to .2% of methane in the

section. (The mine liberates methane at a rate of approximately 1.5 million cubic feet per minute.)

The inspector issued a citation alleging a violation of 30 C.F.R. § 75.302-4. 1/ Although the inspector estimated that the violation could be corrected in about one hour, he allowed approximately two hours for abatement. During that time the section foreman tried unsuccessfully to abate the violation. The inspector did not extend the abatement period and issued a withdrawal order pursuant to section 104(b) of the Mine Act. 30 U.S.C. § 814(b).

Subsequent to the issuance of the withdrawal order, the mine superintendent was summoned to the area. The superintendent ordered the installation of three canvas-type baffle curtains behind the auxiliary fan. Installation of the baffle curtains stopped the recirculation of air.

On April 5, 1984, the inspector conducted another inspection at the mine. When he arrived at the 021 section he observed three miners working and several pieces of electrical equipment in operation, including an auxiliary fan, a roof bolting machine, and a continuous mining machine. The inspector took a mean entry air velocity reading at the continuous mining machine. The reading indicated a mean entry air velocity of 30 feet a minute. 30 C.F.R. § 75.301-4(a) requires a minimum mean entry air velocity of 60 feet a minute. (A citation was issued for this violation but it is not before us). To increase the air velocity, the tail tube was removed from the back of the auxiliary fan.

Approximately fifteen minutes later the inspector observed coal dust suspended in the atmosphere in the "B" entry. The inspector determined that air was recirculating on the section between the "A" and "B" entries. The inspector also detected methane in the section, .5% at the face of the "A" entry and between .2% and .3% in the "B" entry. The inspector issued a citation alleging a violation of section 75.302-4(a) and found that the violation was significant and substantial.

The violation was abated when the foreman installed three baffle curtains behind the auxiliary fan. This procedure was suggested to the foreman by the inspector after the foreman indicated that he did not know how to abate the violation.

1/ 30 C.F.R. § 75.302-4(a) provides in part:

> In the event that auxiliary fans and tubing are used in lieu of or in conjunction with a line brattice system to provide ventilation of the working face:
>
> (a) The fan shall be a of permissible type, maintained in permissible condition, so located and operated to avoid any recirculation of air at any time, and inspected frequently by a certified person when in use.

Because the inspector's supervisor believed that the recirculation problem "reoccurs consistently" (Exh. M-5), the supervisor recommended that MSHA specially assess both violations under 30 C.F.R. § 100.5. 2/ Consequently, the Secretary proposed specially assessed civil penalties of $850 and $950 for the violations.

At the conclusion of an evidentiary hearing, former Commission Administrative Law Judge Joseph B. Kennedy issued a bench decision in which he found that the violations of section 75.302-4(a) occurred and that they were significant and substantial. The judge assessed civil penalties of $1,000 and $950. Later, the judge confirmed his bench decision in writing (7 FMSHRC 1185 (August 1985)(ALJ)) but on review, the Commission concluded that the content of the written decision failed to conform to the requirements of Commission Procedural Rule 65(a), 29 C.F.R. § 2700.65(a). The Commission remanded the case to the judge for the entry of a decision in accordance with the Commission's Rules of Procedure. 7 FMSHRC 1335-36 (September 1985).

On remand, the judge ordered both parties to file briefs with proposed findings of fact and conclusions of law. One day before Y&O's submission was due, it petitioned the Commission for interlocutory review, requesting relief from the judge's order and asserting that a submission would be futile in view of the judge's prior rulings. The Commission denied Y&O's petition. The judge next ordered Y&O to show cause why it should not be deemed to be in default for failing to make any submission. Y&O did not respond and the judge issued his final decision in part purporting to default Y&O and ordering the payment of the same penalties he had previously assessed. 3/ 8 FMSHRC 121 (January 1986)(ALJ). In addition, the judge set forth reasons and bases for his finding the violations significant and substantial and for his penalty assessments. In response to Y&O's argument that the Secretary had not complied with his Part 100 regulations in proposing penalties for the violations and that therefore MSHA should reassess the penalties, the judge held that the Commission exercises independent judgment in civil penalty assessments, is not bound by the manner in which MSHA arrives at civil penalty proposals, and that therefore reassessment by MSHA was unnecessary. 8 FMSHRC at 134.

On review Y&O argues that the judge erred in finding it in default. Y&O also challenges the judge's findings that the violations were significant and substantial, as inconsistent with the Commission's

---

2/ 30 C.F.R. Part 100 sets forth the criteria and the procedures by which the Secretary of Labor, through MSHA, proposes the assessment of civil penalties under sections 105 and 110 of the Mine Act. 30 U.S.C. §§ 815 and 820. Under 30 C.F.R. § 100.5 of these procedures, MSHA may elect to waive its regular penalty assessment formula (30 C.F.R. § 100.3) or single penalty assessment provision (30 C.F.R. § 100.4) and instead specially assess penalties for violations.

3/ Y&O's failure to respond to the judge's order was the subject of a disciplinary referral by the judge and has been addressed previously by the Commission. Disciplinary Proceeding, 8 FMSHRC 663 (May 1986).

decision in Cement Division, National Gypsum Co., 3 FMSHRC 822 (April 1981). Finally, Y&O asserts that the judge erred in refusing to require the Secretary to reassess his proposed penalties under Part 100.3 or 100.4.

We hold that the judge's purported "default" of Y&O was in name only, and had no practical adverse impact on Y&O or upon the substance of the decision. Commission Procedural Rule 62, 29 C.F.R. § 2700.62, empowers a Commission judge to require the submission "of proposed findings of fact, conclusions of law, and orders, together with supporting briefs." 4/ Commission Procedural Rule 63(a) authorizes a Commission judge to enter an order of default "[w]hen a party fails to comply with an order of a judge after an issuance of an order to show cause...." 29 C.F.R. § 2700.63(a). However, Commission Procedural Rule 63(b), 29 C.F.R. § 63(b), states that in a civil penalty proceeding the judge, after finding a party in default, is required to "also enter a summary order assessing the [Secretary's] proposed penalties as final...." (Emphasis added). 5/ One of the purposes of these rules is to provide for the Commission's assessment of civil penalties in those instances where, because of a party's default, there is an inadequate record upon which to base a judge's independent penalty determination. Here, the judge did not assess the Secretary's proposed penalties as final, rather he assessed the penalties de novo, based upon the complete record developed at the hearing before him and in accordance with the statutory penalty criteria. In essence, therefore, the judge's disposition was on the merits, it was not a "default."

We now address Y&O's challenge to the significant and substantial findings and the other penalty aspects of this case. In concluding that

---

4/ 29 C.F.R. § 2700.62, titled "Proposed findings, conclusions and orders," states:

> The Judge may require the submission of proposed findings of fact, conclusions of law, and orders, together with supporting briefs. The proposals shall be served upon all parties, and shall contain adequate references to the record and authorities relied upon.

5/ 29 C.F.R. § 2700.63, titled "Summary disposition of proceedings," states:

> (a) Generally. When a party fails to comply with an order of a judge or these rules, an order to show cause shall be directed to the party before the entry of any order of default or dismissal.
>
> (b) Penalty proceedings. When the Judge finds the respondent in default in a civil penalty proceeding, the Judge shall also enter a summary order assessing the proposed penalties as final, and directing that such penalties be paid.

the first violation of section 75.302-4(a) was significant and substantial, the judge found that there existed a reasonable likelihood that the hazard contributed to by the violation could result in a serious or extremely serious injury. 8 FMSHRC at 131-132. 6/

We have previously held that a violation is properly designated significant and substantial "if, based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." National Gypsum, 3 FMSHRC at 825. In Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984), we explained:

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

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

Y&O admits that air was recirculating on the 013 section. The evidence establishes that the discrete safety hazard contributed to by the violation was the accumulation of methane and coal dust and a resulting danger of explosion or fire. The key issue is whether there was a reasonable likelihood that the hazard contributed to would result in an event in which there is an injury.

We conclude that substantial evidence supports the judge's finding that such a reasonable likelihood existed. As the judge properly recognized, the violation must be evaluated in terms of continued normal

---

6/ We recognize that the judge, sua sponte, made a finding that the violation was significant and substantial, where no such charge was alleged by the Secretary. In its petition for discretionary review, Y&O did not challenge the judge's authority to make such a finding, nor did we sua sponte direct review of the issue. Thus, we leave for another day the question of whether a Commission judge may make findings that a violation is significant and substantial absent a Secretarial allegation to that effect. 30 U.S.C. §§ 823(d)(2)(A)(iii), 823(d)(2)(B); 29 C.F.R. §§ 2700.70(f), 2700.71.

mining operations. U.S. Steel Mining Co., 6 FMSHRC 1573, 1574 (July 1984). The air on the section was recirculating and coal was being mined. Although the concentration of methane was low at the point in time that the violation was cited, the mine liberates large quantities of methane and the inspector testified without contradiction that sudden releases of methane can occur at any time. In fact, as the judge noted, due to the amount of methane liberated at the mine it is on the frequent inspection cycle mandated by section 103(i) of the Act, 30 U.S.C. § 813(i). Thus, had normal mining operations continued, methane could have accumulated in unsafe concentrations. See U.S. Steel Mining Co., 7 FMSHRC 1125, 1130 (August 1985). Further, several potential ignition sources were present on the section in the form of an electrically powered ram car, a roof bolting machine, a scoop and an auxiliary ventilation fan.

In order to establish the significant and substantial nature of the violation, the Secretary need not prove that the hazard contributed to actually will result in an injury causing event. The Commission has consistently held that proof that the injury-causing event is reasonably likely to occur is what is required. See, e.g., U.S. Steel Mining Co., 7 FMSHRC at 1125; U.S. Steel Mining Co., 7 FMSHRC 327, 329 (March 1985).

Y&O's challenge to the judge's significant and substantial designation of the second violation of section 75.302-4(a) must also be rejected in light of the substantial evidence supporting the judge's decision.

Here, the inspector testified that at the time of the violation he found .5% methane at the face. He further testified that a sudden release or outburst of methane had occurred recently at the mine, which resulted in a concentration of 1.8%. (As noted above the mine is on a section 103(i) inspection cycle.) The presence of the electrically powered continuous mining machine constituted a possible ignition source. Accordingly, the judge's findings of significant and substantial violations must be affirmed.

Finally, we turn to the penalty aspects of this case, and to Y&O's assertion that the judge erred in failing to require the Secretary to redetermine his proposed penalties under the Secretary's regular penalty assessment procedure of section 100.3 or his single penalty procedure of section 100.4.

At the outset, we acknowledge that the argument raised by Y&O here differs somewhat from that presented in other cases addressing the separate roles of the Secretary and the Commission under the Mine Act's bifurcated penalty assessment scheme. In the prior cases cited by the parties the central issue has concerned whether in assessing penalties in contested cases the Commission and its judges are bound by the penalty assessment regulations adopted by the Secretary in Part 100. We have consistently rejected assertions that, in serving our separate and distinct function of assessing appropriate penalties based on a record developed in adjudicatory proceedings before the Commission, we are bound by the Secretary's regulations, which are intended to assist him in proposing appropriate penalties. See, e.g., Sellersburg Stone Co., 5

FMSHRC 287 (March 1983), aff'd, 737 F.2d 1147 (7th Cir. 1984); Black Diamond Coal Mining Co., 7 FMSHRC 1117 (August 1986); U.S. Steel Mining Co., 6 FMSHRC 1148 (May 1984).

In the present case, however, Y&O makes it clear that it is not arguing that the Commission is required to adhere to the Secretary's penalty regulations. Rather, it argues that when the Secretary fails to conform to his own regulations in proposing penalties, the Commission must require the Secretary to re-propose a penalty in a manner consistent with his regulations. We have carefully considered Y&O's argument. For the reasons that follow, we conclude that the Commission's independent penalty assessment authority under the Mine Act's bifurcated penalty assessment scheme serves to provide the necessary and appropriate relief in the vast majority of instances where the Secretary fails to follow his penalty assessment regulations in proposing penalties. We further hold, however, that in certain limited circumstances the Commission may require the Secretary to re-propose his penalties in a manner consistent with his regulations.

As has been stated, "[i]t is axiomatic that an agency must adhere to its own regulations." Brock v. Cathedral Bluffs Shale Oil Co., 796 F.2d 533 (D.C. Cir. 1986)(Scalia, J.), citing Accardi v. Shaughnessy, 347 U.S. 260, 265-67 (1954). The Secretary's Part 100 penalty regulations were formally promulgated and are published in the Federal Register. Therefore, if the regulations were to be considered in isolation they would appear to fall within the purview of the referenced axiom and fidelity by the Secretary to his regulations would be essential to assessment of an appropriate penalty. Id. Viewing the Secretary's regulations in their proper context in the Mine Act's overall penalty assessment scheme, however, we conclude that it generally is neither required nor desirable to require the Secretary to re-propose a penalty. The Commission possesses explicit, statutory authority to independently assess an appropriate penalty based on the record evidence pertaining to the statutory criteria specified in section 110(i), 30 U.S.C. § 820(i), developed before it. The record developed in an adversarial proceeding concerning the statutory penalty criteria invariably will be more complete, current and fairly balanced than the information that is normally available to the Secretary at the pre-hearing stage when he must unilaterally determine and propose a penalty. Further, because the Commission is itself bound by proper consideration of the statutory criteria and its penalty assessments are themselves subject to judicial review under an abuse of discretion standard, no compelling legal or practical purpose would be served by requiring the Secretary to undertake again to propose a penalty where a preferable record already has been developed before the Commission. Therefore, we hold that, once a hearing has been held, a determination by the Commission or one of its judges that the Secretary failed to comply with Part 100 in proposing a penalty does not require affording the Secretary a further opportunity to propose a penalty. Rather, in such circumstances the appropriate course is for the Commission or its judges to assess an appropriate penalty based on the record.

We further conclude, however, that it would not be inappropriate for a mine operator prior to a hearing to raise and, if appropriate, be

given an opportunity to establish that in proposing a penalty the Secretary failed to comply with his Part 100 penalty regulations. If the manner of the Secretary's proceeding under Part 100 is a legitimate concern to a mine operator, and the Secretary's departure from his regulations can be proven by the operator, then intercession by the Commission at an early stage of the litigation could seek to secure Secretarial fidelity to his regulations and possible avoidance of full adversarial proceedings. However, given that the Secretary need only defend on the ground that he did not arbitrarily proceed under a particular provision of his penalty regulations, and given the Commission's independent penalty assessment authority, the scope of the inquiry into the Secretary's actions at this juncture necessarily would be limited.

We recognize that in the present case Y&O did attempt to raise this issue at an early stage of the proceedings, but was rebuffed by the judge who failed to distinguish Y&O's argument from those that had been previously considered by the Commission. On this record, however, the judge's error was harmless. Y&O has not established that the special penalty assessments proposed by the Secretary were arbitrarily made. 30 C.F.R. § 100.5 provides that "MSHA may elect to waive the regular assessment formula (§ 100.5) or the single assessment provisions (§ 100.4) if the Agency determines that conditions surrounding the violation warrant special assessment." It further states, "[S]ome types of violations may be of such a nature or seriousness that it is not possible to determine an appropriate penalty [by using the regular or the single penalty assessment provisions]." The regulation provides that "[a]ccordingly, the following categories [of violations] will be individually reviewed to determine whether a special assessment is appropriate:

* * *

> (h) Violations involving an extraordinarily high degree of negligence or gravity or other unique aggravating circumstances."

30 C.F.R. § 100.5(h). MSHA's supervisory mining engineer who reviewed the citations at issue and recommended that they be specially assessed testified that he made the recommendations, among other reasons, because recirculation was a continuing problem at the mine, because he believed Y&O exhibited a high degree of negligence in permitting the violations to exist, and because of the seriousness of the hazard posed by the violations. These considerations all fall within the purview of section 100.5(h) as a basis for a special assessment, and we cannot conclude that in proposing the special assessments under section 100.5 the Secretary acted arbitrarily. Therefore, it was proper for the judge to assess penalties based on the record developed at the hearing.

Although Y&O further challenges the judge's penalty assessments as they relate to the negligence and gravity criteria, we hold that substantial evidence supports the judge's negligence and gravity findings regarding both violations. It is not disputed that recirculation previously occurred at the mine. Approximately one month

before the first violation was cited the mine superintendent discussed the mine's recirculation problems with MSHA district personnel. During these discussions the superintendent was told that the use of baffle curtains offered a possible solution. When the second recirculation violation here was cited, three weeks after the first, the section foreman apparently still was not aware that the use of baffle curtains could prevent the recirculation problem encountered. Regarding the gravity of the violations, the mine liberates large amounts of methane, some methane was present in the sections at the time each violation was cited, and ignition sources were also present. In view of these factors, the judge properly evaluated the gravity of the violations as being serious. We further find that the amount of the penalties assessed by the judge are supported by the record, are consistent with the statutory penalty criteria, and will not be disturbed. Shamrock Coal Co., 1 FMSHRC 469 (June 1979).

Accordingly, the decision of the administrative law judge is affirmed insofar as it is consistent with this decision.

Ford B. Ford, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

Distribution

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

Robert C. Kota, Esq.
Youghiogheny & Ohio Coal Company
P.O. Box 1000
St. Clairsville, Ohio 43950

Gerald P. Duff, Esq.
Hanlon, Duff, Paleudis Co., LPA
46770 National Road West
St. Clairsville, Ohio 43950

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

April 30, 1987

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. LAKE 85-47
WILMOT MINING COMPANY	:	

BEFORE: Ford, Chairman; Backley, Doyle, Lastowka and Nelson, Commissioners

DECISION

BY THE COMMISSION:

In this civil penalty proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982), the following issues are presented on review: (1) whether the Commission administrative law judge below abused his discretion in rejecting a proposed settlement between the parties; (2) whether the cited operator, Wilmot Mining Company ("Wilmot"), violated 30 C.F.R. § 48.28(a), a miner training regulation; (3) whether Wilmot was negligent in connection with the use of a front-end loader without a rollover protective structure ("ROPS"); and (4) whether Wilmot violated 30 C.F.R. § 77.1605(b) by failing to equip a front-end loader with adequate brakes and, if so, whether Wilmot was negligent in connection with that violation. For the reasons that follow, we reverse the judge's conclusion that a violation of 30 C.F.R. § 48.28(a) was established, but otherwise affirm the judge's decision.

At about 2:00 p.m. on May 25, 1984, John Schrock, Stripping Superintendent in charge of Wilmot's North Mine, a surface coal mine located in Navarre, Ohio, was leaving the 001-0 pit driving a Terex 72-41 front-end loader ("Terex"). As Schrock was exiting the pit, he stopped about 100 feet from the bottom and backed down the road to make room for a descending coal truck. Schrock's Terex began to roll backwards, went off the road, struck the face of the highwall and rolled over. The cab was crushed and Schrock was killed.

Not long before the accident, Harold Bain, Wilmot's General Manager, observed Schrock with the Terex planting trees near the road leading into the pit area. Bain gave Schrock paychecks to deliver to the miners working in the pit. Just before the accident, Schrock drove

the Terex to the equipment parking lot near the pit entrance and told a mechanic that he had "lost" his brakes. Before the mechanic could inspect the brakes, however, Schrock drove the Terex into the pit area where the fatal accident occurred.

An inspector of the Department of Labor's Mine Safety and Health Administration ("MSHA") investigated the accident. He found that the Terex did not have a ROPS and cited Wilmot for a violation of 30 C.F.R. § 77.403a(a), a mandatory safety standard requiring loaders and certain other specified types of heavy mobile equipment to "be provided with ... ROPS." The inspector also checked the Terex's brake system after the Terex was removed from the pit. The inspector found that the brake lines and cylinders were intact but that the brake fluid was low. When the brakes were tested on level ground, at a "reasonably slow speed," the Terex took 36 feet to stop. The inspector opined that the Terex's normal stopping distance in such a test should have been five to ten feet. Consequently, he cited Wilmot for a violation of 30 C.F.R. § 77.1605(b), a mandatory safety standard requiring mobile equipment to be "equipped with adequate brakes."

The inspector also reviewed Wilmot's training records and his review indicated that the last training at the mine had been given in 1980 and that Wilmot had provided no annual refresher training in 1982 or 1983. 30 C.F.R. § 48.28(a) provides: "Each miner shall receive a minimum of 8 hours of annual refresher training as prescribed in this section." The inspector cited Wilmot for violating section 48.28(a) by failing to provide eight hours of annual refresher training in 1982 or 1983 to the fourteen miners employed at the mine at the time of citation.

Commission Judge William Fauver scheduled a hearing in this proceeding for August 20, 1985, and directed the parties to explore settlement. On August 15, 1985, the Secretary of Labor requested the judge to approve a proposed settlement including stipulated civil penalties totalling $2,300. The judge continued the hearing until August 27, 1985, and the hearing went forward on that date. The judge issued no order stating that settlement was rejected and provided no notation or explanation on the record addressing the proposed settlement.

In his decision, the judge concluded that the Secretary had established a prima facie case of a violation of the annual refresher training regulation. 8 FMSHRC 509, 512-13 (April 1986)(ALJ). The judge stated: "The Secretary ... show[ed] that 14 miners were employed at the time of the inspection [in May 1984], 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." 8 FMSHRC at 512. In sustaining the ROPS citation, the judge found that Schrock operated the Terex front-end loader without a ROPS and that, consequently, the standard was violated. 8 FMSHRC at 513. In assessing a civil penalty, the judge determined that Wilmot was grossly negligent in allowing Schrock to operate the Terex in the pit. The judge concluded that Bain knew that Schrock was operating the Terex without the ROPS when he gave Schrock the paychecks and that Bain knew or should have known that Schrock would drive the

Terex into the pit to deliver the paychecks. 8 FMSHRC at 510, 514. In addition, the judge found Schrock grossly negligent in driving the Terex into the pit and imputed that negligence to Wilmot. 8 FMSHRC at 514. The judge also sustained the brake citation finding that the brakes were defective. Underlying this conclusion were the judge's findings that the cylinders were very low in brake fluid and that when the Terex was tested on level ground it took 36 feet to stop and that on a steep road such as the pit road the loader "would have virtually no brakes at all." 8 FMSHRC at 515. In assessing a civil penalty, the judge emphasized that Schrock's conduct in driving with brakes known to be defective was gross negligence, which was imputed to Wilmot. 8 FMSHRC at 515. The judge assessed civil penalties totalling $7,500 for the three violations.

Wilmot argues as a threshold issue that the judge, without explanation, improperly rejected the settlement agreement. Settlement of contested issues and Commission oversight of that process are integral parts of dispute resolution under the Mine Act. 30 U.S.C. § 820(k); see Pontiki Coal Corp., 8 FMSHRC 668, 674 (May 1986). The Commission has held repeatedly that if a judge disagrees with a penalty proposed in a settlement he is free to reject the settlement and direct the matter for hearing. See, e.g., Knox County Stone Co., 3 FMSHRC 2478, 2480-81 (November 1981). A judge's oversight of the settlement process "is an adjudicative function that necessarily involves wide discretion." Knox County, 3 FMSHRC at 2479.

On the present record, we cannot conclude that the judge committed error. Wilmot apparently never objected to the judge's procedure in going forward with the hearing. It did not object at the hearing or argue this point to him in its post-hearing brief. Failure to object in a timely manner to an alleged procedural error ordinarily waives the right to complain of the error on appeal, and the Mine Act prohibits, except for good cause shown, the raising of matters not first presented to the judge. 30 U.S.C. § 823(d)(2)(iii); 29 C.F.R. § 2700.70(d). Wilmot has not shown good cause for its failure to raise this objection before the judge and consequently we cannot consider it. 1/

With respect to the alleged violation of section 48.28(a), Wilmot argues that the Secretary failed to show that any of the fourteen employees at issue were miners who required annual refresher training during 1982 and 1983 and did not receive it. We agree.

The requirement for miner annual refresher training is contained in section 115(a)(3) of the Mine Act, 30 U.S.C. § 825(a)(3), and is implemented by the Secretary's training regulations at 30 C.F.R. Part 48. The requirement for annual refresher training means that an operator must provide each covered miner in its employ with refresher

---

1/ In general, however, we believe that better practice requires that if a judge rejects a written settlement proposal he issue an order to that effect. Specifying the reasons for the rejection might sharpen the issues for trial and even possibly encourage an acceptable settlement proposal.

training within twelve months of his last training. Emery Mining Corp., 5 FMSHRC 1400, 1401-03 (August 1983), aff'd, 744 F.2d 1411 (10th Cir. 1984)(construing section 115(a)(3) of the Mine Act and 30 C.F.R. § 48.8(a), a regulation identical to section 48.28(a) providing for refresher training for underground miners). The Secretary's evidence as to the alleged training violation here is insufficient. The Secretary showed that the last training was given in 1980; that no records reflected that the operator had provided annual refresher training for the years 1982 and 1983; and that fourteen employees were on Wilmot's payroll at the time of the citation in May 1984. These facts alone, however, do not prove that any of the employees in question needed refresher training during any twelve month period ending in the cited time frame of 1982-83 and were not provided such training. In sum, we find lacking any relevant proof as to the employment and training histories of the fourteen employees in question. Significantly, in Emery, supra, the Secretary proved the violation by showing that five miners had received refresher training in June 1980 and that fifteen months had elapsed since their last training. 5 FMSHRC at 1401. Thus, we conclude that in the present case the Secretary did not establish a violation of section 48.28(a) as to any of the fourteen individuals during the time period to which the citation refers and that there is not substantial evidence supporting the judge's finding of a violation.

Turning to the issue of the operator's failure to provide a ROPS on the loader, Wilmot does not contest the judge's finding of a violation of section 77.403a(a) but argues that it was not negligent in connection with that violation. Wilmot submits that it was unforeseeable that Schrock would drive the Terex into the pit without a ROPS and that his negligence in doing so should not be imputed to the company. We disagree.

It is well established that the negligent actions of an operator's foremen, supervisors, and managers may be imputed to the operator in determining the amount of a civil penalty. See, e.g., Southern Ohio Coal Co., 4 FMSHRC 1459, 1463-64 (August 1982). In Nacco Mining Co., 3 FMSHRC 848 (April 1981), the Commission recognized a narrow and limited exception to this principle. The Commission held that the negligent misconduct of a supervisor will not be imputed to an operator if: (1) the operator has taken reasonable steps to avoid the particular class of accident involved in the violation; and (2) the supervisor's erring conduct was unforeseeable and exposed only himself to risk. 3 FMSHRC at 850. The Commission emphasized, however, that even a supervisory agent's unexpected, unpredictable misconduct may result in a negligence finding where his lack of care exposed others to risk or harm or the operator was otherwise blameworthy in hire, training, general safety procedures, or the accident or dangerous condition in question. 3 FMSHRC at 851. We reject Wilmot's assertion that a Nacco defense was established.

With regard to the foreseeability of Schrock's conduct, substantial evidence supports the judge's finding that Bain, as general manager, knew or should have known that Schrock would drive to the pit in the Terex loader when he gave Schrock the paychecks to deliver to the miners in the pit. 8 FMSHRC at 514. At the time Bain gave the pay-

checks to Schrock, the superintendent of the pit, Schrock was working with the Terex near the access road to the pit. It was or should have been foreseeable to Bain that Schrock would use the Terex for delivery of the paychecks in the pit area. Also, Wilmot has not established that it took reasonable steps to avoid the particular class of violation involved here, specifically, it has not shown that it took effective steps to prevent a loader without a ROPS from being operated in the pit area.

We emphasize that managers, such as Schrock, who was superintendent and overall supervisor of the pit operation, must be held to a demanding standard of care in safety matters. Managers and supervisors in high positions must set an example for all supervisory and non-supervisory miners working under their direction. Such responsibility not only affirms management's commitment to safety but also, because of the authority of the manager, discourages other personnel from exercising less than reasonable care.

Wilmot contests the judge's findings of a violation of section 77.1605(b) and associated negligence. Concerning the violation, Wilmot argues essentially that the record evidence does not support the judge's finding as to the cause of the inadequacy of the brakes. To prove a violation of this standard, however, the Secretary is not required to elaborate a complete mechanical explanation of the inadequacy of the brakes. A demonstrated inadequacy itself may be sufficient. The inspector checked the Terex's brake fluid levels and found them to be below normal. He detected no leaks in the braking system and found the major components of the system to be undamaged by the accident. When the Terex was tested at a reasonably slow speed, thirty-six feet and successively greater distances were required to stop the vehicle. His testimony that at normal "operating capacity" during such a test the Terex should have stopped within five to ten feet was unrefuted. We note also that Bain conceded that the brakes were inadequate (Tr. 112), disputing only the cause, which, in his view, was a blown booster cylinder. Whatever the precise cause of the braking defect, the evidence amply supports the judge's finding that the Terex was not "equipped with adequate brakes," in violation of the cited standard. 2/

On the issue of negligence, Wilmot again raises a Nacco defense. There is no question that Schrock's conduct was highly negligent; he told a mechanic shortly before the accident that he had "lost" his brakes but proceeded to drive the Terex down a grade into the pit area. Whether Schrock's actions were foreseeable, the judge properly found that his conduct "greatly endangered himself and other persons who might have been injured in an accident involving the Terex." 8 FMSHRC at 515. Therefore, the Nacco defense was not established. 3 FMSHRC at 850-51.

2/ Wilmot objects to the judge's finding that "when fluid was added to the normal level, it took only five to ten feet to stop." 8 FMSHRC at 515. There is no evidence that the inspector added braking fluid in testing the Terex. The evidence summarized above, however, independently supports the finding of violation.

Finally, Wilmot's argument that the penalties proposed by the Secretary and assessed by the judge are excessive is rejected, with respect to the 30 C.F.R. § 77.403a(a) and § 77.1605(b) violations. The penalties assessed are supported by the record and reflect proper consideration of the statutory penalty criteria. We will not disturb them on review. Shamrock Coal Co., 1 FMSHRC 469 (June 1979).

Accordingly, we reverse the judge's finding that Wilmot violated 30 C.F.R. § 48.28(a) and vacate the penalty assessed for that violation. We affirm the judge's decision as to the other violations and civil penalties.

Ford B. Ford, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

Distribution

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

Thomas G. Eddy, Esq.
Eddy & Osterman
1430 Grant Bldg.
Pittsburgh, Pennsylvania 15219

Administrative Law Judge William Fauver
Federal Mine Safety & Health Review Commission
5203 Leesburg Pike, Suite 1000
Falls Church, Virginia 22041

ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

APR 2 1987

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. WEST 84-145-M
	:	A.C. No. 05-03695-05511
v.	:	
	:	Iron Clad Mine and Mill
SILVER STATE MINING CORP., Respondent	:	

DECISION

Appearances: James H. Barkley, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
Randy L. Parcel, Esq., Parcel & Mauro, Denver, Colorado, 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," charging the Silver State Mining Corporation (Silver State) with four violations of regulatory standards.[1/] The general issues before me are whether Silver State violated the cited regulatory standards and, where alleged, whether those violations were 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 violations were "significant and substantial." If violations are found, it will also be necessary to determine the appropriate civil penalty to be assessed in accordance with section 110(i) of the Act.

1/ Three days of hearings were held in this case before Judge John Carlson in Denver, Colorado, commencing August 21, 1985. On October 21, 1986, the case was referred to the undersigned following the untimely death of Judge Carlson. The parties requested that a decision be rendered on the existing record without further hearings and filed supplemental briefs.

Background

During relevant times, Silver State operated the subject gold mine and mill in Cripple Creek, Colorado. In the milling process, gold is leached from gold ore using a sodium cyanide solution. After a period of usage, the pipes and vats in the system become clogged with a mineral build-up known as scale. Silver State decided to use a hydrochloric acid (HCl) wash to remove the scale even though it had never used this procedure before.

The HCl could not safely be added directly to the leaching system since the resulting chemical reaction would produce highly toxic cyanide gas (hydrogen cyanide or HCN) if combined with sodium cyanide. To avoid this dangerous situation, as much of the cyanide leaching solution as possible was first removed from the tanks. Inasmuch as drain valves were located 10 inches from the bottom of the tanks, however, not all of the cyanide solution could be removed. Accordingly, approximately 700 gallons of the cyanide solution remained in each of the 2 smaller tanks and approximately 2,300 gallons remained in each of the 3 larger tanks.

During the evening of December 2, 1983, 5,000 gallons of sodium hypochlorite (hypochlorite) was added to neutralize the cyanide in the remaining solution and in the scale. If sodium cyanide is not neutralized, the highly toxic cyanide gas is produced as soon as the cyanide is mixed with HCl. After the hypochlorite had been pumped through the system, the remaining solution was discharged into an outside waste holding pond.

Eight hundred gallons of a 30 percent solution of HCl, in fourteen 40 and 50 gallon barrels was to be placed in the system on December 3, 1983, by a number of employees, including Bill Richter, George Swank, Loren Rice, J.W. Brumley and Doug Holley. Swank, Rice and Richter wore safety glasses (not goggles) and Wilson respirators with R-25 cartridges during the acid wash process. The Wilson R-25 cartridges protected against 10 parts per million (ppm) chlorine and 50 ppm hydrogen chloride. Three full-face respirators were also available at the work site. One was apparently worn at least part of the time by Tom Stone, a control room operator, another by Burt Bielz, the Supervisor in charge of the acid pouring operation and present for a disputed period of time, and the third was available on the control room wall but, for reasons never made clear, was never used.

During a safety meeting the previous month, the operation of the Wilson half-face respirators was explained to the employees and they were told that replacement cartridges would be available during the acid wash operation. There is a dispute as to whether the R-25 replacement cartridges actually did arrive, but the employees apparently believed that the only replacement cartridges available were Wilson R-15's affording inadequate protection from the anticipated gases. The respirators were also tested for proper seal and no one involved in the process had facial hair that would affect the seal. As a half-face respirator, the Wilson did not cover or protect the eyes.

The acid was introduced into the system by manually dumping the barrels through a grate on top of one of the tanks into the liquid 5 feet below. The tank was approximately one-half full of the sodium cyanide-hypochlorite solution. The acid barrels were first placed on top of the tank with an electric lift. Swank and Rice then tipped the barrels over allowing the acid to splash through the grate and into the tank. What happened next is in dispute.

Swank and Rice maintain that within seconds of dumping the first barrel of acid they were enveloped with fumes and that within 10 seconds the fumes penetrated their respirators. They experienced burning in their eyes and throats, and had difficulty breathing. The acid purportedly ate holes in Swank's coat and peeled the paint off the walls and pumps where it splashed. Rice says that he was also nauseous by the time the third barrel was dumped. At the same time, Swank was coughing and gagging and had a runny nose and chest pain. The inside of the building became enveloped in a yellowish-brown cloud and, after dumping 8 of the 14 barrels they reportedly could no longer tolerate the fumes. Rice was disoriented and had difficulty moving. Later he was overcome, fell to the floor and had to be helped from the building by a co-worker, Doug Holley. Swank and Richter later struggled out of the building to the parking lot where they began vomiting. Swank and Rice both suffered a skin irritation that looked like a sunburn.

The dumping of the 8 barrels of acid took about 30 minutes. All of the men inside the building were exposed to the fumes and some apparently had similar symptoms. After the dumping began, the building was evacuated. After the acid was dumped into the system, the solution was routed through the pipes and vats of the leaching system for approximately 6 hours. During this period, the men would stay outside as long as possible, then hold their breath,

return to check on the system, and then return outside. The yellow-brown cloud continued to linger in the building. Bielz left the mill after the acid dumping and was not present for the acid wash which took place between December 3 and December 6. Even Bielz, who was wearing a full-face, self-contained respirator, acknowledged that he detected fumes through his respirator that smelled like "chlorox" and that he saw HCl mist during the acid dumping operation. 2/

When Swank awoke the morning after the acid dumping, he could not open his eyes. After his wife helped him wash them, he was eventually able to open them, but still could not read the numbers on a digital clock next to his bed. His doctor prescribed ointment for his eyes and cream for the burns on his face. Swank also experienced chest pain, coughing and breathing problems. Swank's diagnosis, was severe conjunctivitis (an inflammation of the mucous lining under the eyelid and on the eyeball itself) and dermatitis (an inflammation of the skin) caused by chemical exposure. Swank continued to experience shortness of breath and blurred vision.

Rice worked intermittently between December third and the eighth. Some 4 hours after the incident, Rice's nose began to bleed and bled for almost 11 days. Rice experienced continued coughing for a number of days. By the eighth of December, Rice had developed difficulty in breathing and was coughing up greenish/blackish sputum. His eyes were badly burned and some skin on his arms was peeling. On December eighth, Rice visited his doctor.

Hydrogen chloride is a gas. When mixed in an aqueous (water) solution it becomes hydrochloric acid . Harmful exposure to the acid can result from splashing of mist or from the gas contacting a moist surface, such as a nasal membrane. Hydrogen chloride may be slightly yellow in color, and has a sharp, pungent, irritating odor. At a

2/ To the extent that Bielz's testimony conflicts with that of Swank and Rice, I find it to be less credible. Bielz has a compelling interest in the outcome of this case as he is the subject of related proceedings under section 110(c) of the Act. Moreover, the testimony of Rice and Swank provides significant cross-corroboration which is further supported in important respects by the medical evidence. Finally, I find that Bielz had falsely represented to MSHA Inspector James Atwood during his investigation of this incident that all of the employees had been issued and were wearing full-face respirators during the acid wash process.

concentration of one part per million (ppm) it can be detected by smell and its smell becomes disagreeable at 5 to 10 ppm. It begins to cause throat irritation at 35 ppm and work becomes barely tolerable between 50 and 100 ppm. The threshold limit value (TLV) is 5 ppm.

Chemical respirators may be used for disagreeable, but relatively harmless, concentrations of this gas, however, cartridge respirators are not recommended where toxic quantities may be encountered. Contact with the eyes rapidly causes severe irritation of the eyes and eyelids, and if not quickly removed, can cause permanent and total sight loss. Inhalation of excessive concentrations causes severe irritation of the upper respiratory tract resulting in coughing, burning of the throat, and a choking sensation. If inhaled deeply, edema of the lungs (the potentially fatal outpouring of body fluid into the lungs) may occur.

The NIOSH/OSHA Occupational Health Guidelines for Chemical Hazards sets forth the minimum respiratory protection required above 5 ppm of hydrogen chloride. Between 5 ppm and 50 ppm a chemical cartridge is allowed; over 50 ppm but less than 100 ppm the same type of respirator is allowed but with a full-face piece; over 100 ppm, or in unknown concentrations, a self-contained breathing apparatus with full-face piece is required.

The properties of chlorine are also set out in the NIOSH/OSHA Occupational Health Guidelines for Chemical Hazards and are noted as follows:

> Chlorine gas may cause severe irritation of the eyes and respiratory tract with tearing, runny nose, sneezing, coughing, choking and chest pains. Severe breathing difficulties may occur which may be delayed at the onset. Pneumonia may result. Severe exposure may be fatal.

The TLV for chlorine is 1 ppm. Concentrations of 1 to 3 ppm result in slight irritation, but work is possible without interruption. Concentrations of 3 to 6 parts per million of chlorine cause burning of the eyes, nose, throat, lachrymation, sneezing, coughing, bleeding nose or blood-tinged sputum. For concentrations of chlorine above 1 ppm, but less than 25 ppm, the NIOSH minimum respiratory protection requires a chemical cartridge respirator with a full-face piece or air-supplied respirator. For concentrations over 26 ppm, NIOSH requires a self-contained breathing apparatus.

The Alleged Violations

Citation No. 2099742, as amended, alleges a "significant and substantial" violation of the regulatory standard at 30 C.F.R. § 55.5 (presently 30 C.F.R. § 56.5005) and charges as follows:

> Between December 3, 1983 and December 6, 1983, while performing an inherently hazardous maintenance operation, miners were exposed to airborne contaminants exceeding permissible levels and were not provided appropriate respiratory protective equipment. Several employees were exposed to gas concentrations that had a reasonable potential to cause death.

The cited standard reads as follows:

> Control of employee exposure to harmful airborne contaminants shall be, insofar as feasible, by prevention of contamination, removal by exhaust ventilation, or by dilution with uncontaminated air. However, where accepted engineering control measures have not been developed or when necessary by the nature of work involved (for example, while establishing controls or occasional entry into hazardous atmospheres to perform maintenance or investigation), employees may work for reasonable periods of time in concentrations of airborne contaminants exceeding permissible levels if they are protected by appropriate respiratory protective equipment. Whenever respiratory protective equipment is used, a program for selection, maintenance, training, fitting, supervision, cleaning, and use shall meet the following minimum requirements:
>
> (a) Mine Safety and Health Administration approved respirators which are applicable and suitable for the purpose intended shall be furnished, and employees shall use the protective equipment in accordance with training and instruction.
>
> (b) A respirator program consistent with the requirements of ANSI Z88.2-1969, published by the American National Standards Institute and entitled "American National Standards Practices for Respiratory Protection ANSI Z88 2-1969," approved August 11, 1969, which is hereby incorporated by reference and made a part hereof. This publication

may be obtained from the American National Standards Institute, Inc., 1430 Broadway, New York, New York 10018, or may be examined in any Metal and Nonmetal Mine Safety and Health District or Subdistrict Office of the Mine Safety and Health Administration.

It is not disputed that MSHA's respirator selection and approval procedure referred to in the above regulation is found in 30 C.F.R. Part 11. Under section 11.2-1 entitled "Selection, fit, use and maintenance of approved respirators," respirator selection is to be made in accordance with ANSI Standard Z88.2. ANSI Standard Z88.2 (1969) does not, however, set forth the specific types of respirators to be used for specific concentrations of air contaminants. Rather, in Part 6, it sets forth only the criteria for the selection of a respirator.

The Secretary argues that the Wilson respirators with R-25 cartridges selected by Respondent were not appropriate and were in violation of the cited standard under two theories: (1) since the respirators were overcome and penetrated by gas fumes, they were not appropriate, and (2) the selection criteria under ANSI Standard Z88.2 was violated. In support of the first theory, the Secretary observes that two of the men directly involved in the acid dumping, i.e., Rice and Swank, testified that their Wilson respirators became ineffectual almost immediately after the acid dumping began. They experienced coughing, runny noses, gagging, burning throats, burning eyes, and difficulty breathing--symptoms consistent with exposure to hydrochloric acid mist, hydrogen chloride gas, and chlorine gas. The Secretary argues that if the respiratory protection had been appropriate, then Swank and Rice would have been able to work for at least 35 minutes in a concentration of 500 ppm chlorine, and for 50 minutes in a concentration of 500 ppm of HCl (Table 11, Ex. P-5), without experiencing discomfort. The Secretary further argues that since Rice was overcome within minutes and later had to be helped from the building, and that since both men once outside began vomiting, the respirator protection was demonstrably inadequate.

Respondent argues, on the other hand, that Mssrs. Swank and Rice are not credible and, presumably, that they therefore really did not suffer the severe discomfort and injuries they allege or that they failed to properly fit their respirators, thereby causing their own discomfort and injuries. I find, however, adequate corroboration in the medical evidence and undisputed physical manifestations of injury, to conclude that Swank at least suffered severe

conjunctivities and dermatitis and most likely suffered chemical pneumonitis from short-term exposure to a hydrochloric acid mist (Exs. P-8 and R-6). In addition, the medical evidence clearly supports a finding that Rice at least sufferred chemical pneumonitis and chemical conjunctivities from exposure to hydrochloric acid mist. (Ex. R-12). It is also undisputed that acute chemical pneumonitis, when severe, can be disabling or fatal (Ex. R-12) and that exposure of the eyes to hydrochloric acid can cause permanent and total sight loss.

Under the circumstances it may reasonably be inferred that at least two miners were exposed to airborne contaminants exceeding permissible levels and were not provided appropriate respiratory protective equipment. It is also clear therefore, that the violation was serious and "significant and substantial." Secretary v. Mathies Coal Co., 6 FMSHRC 1 (1984).

In reaching these conclusions I have not disregarded Respondent's allegations that the employees failed to properly fit the respirators provided and that it had a full-face, self-contained, air-supplied respirator available. There is no affirmative evidence, however, that the respirators were not properly fit. The employees had previously been instructed in the proper use of the respirators and it is unlikely that all of the affected employees would have had ill-fitting respirators. In addition, the chemical over-exposure is corroborated by the medical evidence of dermatitis and conjunctivitis. Moreover, the one remaining full-face, self-contained, air-supplied respirator was insufficient for the number of employees involved in the acid dumping operation. Finally, since the credible evidence is that the respirators actually worn by Swank and Rice were penetrated almost immediately, it is immaterial whether or not replacement R-25 cartridges were available. The Respondent's allegations herein are accordingly rejected.

I further find that the violation was the result of operator negligence in failing to provide appropriate respirators in sufficient quantity for contaminants reasonably expected from the acid wash operation. Bielz was admittedly concerned that hydrochloric acid mist, cyanide, and chlorine gas could be generated by the acid dumping process and he knew that exposure to such gasses without adequate protection could lead to serious and even fatal injuries.

I further find that the violation is established under the Secretary's alternative theory, i.e., that the selection criteria set forth in ANSI Standard Z88.2 was violated. The Secretary argues in this regard that the selection criteria was violated based on what Silver State knew and expected before the acid dumping and also based on what actually occurred. There were three air contaminants that could have or did develop from the acid wash, i.e., HCl gas and HCl acid mist generated by pouring the acid, cyanide gas if the remaining leaching solution had not been sufficiently neutralized when the HCl was added, and chlorine gas if the remaining leaching solution had too much neutralizing agent when the HCl was added.

Under Part 2 of ANSI Standard Z88.2, the phrase "immediately dangerous to life and health" is defined as follows:

> Included are conditions that pose an immediate threat to life or health and conditions that pose an immediate threat of severe exposure to contaminants such as radioactive materials which are likely to have adverse delayed effects on health.

In addition, each of the three gases cited (HCN, HCl,and chlorine) is classified as a gas or vapor contaminant in Table 1. Under the heading "Combinations of Gas, Vapor, and Particulate Contaminants" and Note 2 of Table 1 the hazards are described as follows:

> Conbinations of contaminants may occur simultaneously in the atmosphere. Contaminants may be entirely different substances (dusts and gases from blasting) or the particulate and vapor forms of the same substance. Synergistic effects (joint action of two or more agents that result in an effect which is greater than the sum of their individual effects) may occur. Such effects may require extraordinary protective measures.
>
> NOTE 2: CONDITIONS IMMEDIATELY DANGEROUS TO LIFE OR HEALTH (see Section 2, Definitions) may result from most of the above hazards with the probable exception of nuisance or low toxicity dusts. Such conditions constitute atmospheres that would rapidly lead to death or to injury that would eventually impair health. For example, a ten-minute exposure to 120 parts per million (ppm) of phosgene may be fatal, and exposure to very high

concentrations of radioactive material such as plutonium 239 could present a danger to health from delayed effects of radiation damage to body tissues.

From Note 2 of Table 1, it is clear that HCN, HCl and chlorine are considered to be immediately dangerous to life and health since they are not nuisance or low toxicity dusts. The table also describes the synergistic effect of the combined agents and the necessity for extraordinary protective measures under those conditions. The credible evidence in this case is that the gases may indeed have had a synergistic effect thereby requiring extraordinary protective measures. In any event, because the gases herein individually posed an immediate danger to life or health, and because the synergistic effect was even more dangerous, the use of half-face chemical cartridge respirators was in violation of the standard. See Parts 6.3.2.1 and 6.3.2.2.

Accordingly, considering the gases that were anticipated by Silver State before the acid dumping, ANSI Standard Z88.2 required air supplied respirators. Alternatively, considering by reasonable inference the gases that did in fact develop, the standard also required air supplied respirators. These findings are further corroborated by the health professionals, who testified for the government, who found that the Wilson respirators with R-25 cartridges were inappropriate. Significantly, this testimony was not rebutted by Respondent's experts, Drs. Repsher and Kornberg.

The cited standard may also be interpreted to require respiratory protection consistent with safe industry practice. In this regard, chemical cartridge respirators as opposed to a self-contained breathing apparatus are not recommended for protection where toxic quantities of hydrochloric acid or hydrogen chloride may be encountered (see Ex. P-6 ¶ 5.3.3(e)). Similarly, where unknown concentrations of chlorine may be encountered a self-contained breathing apparatus with a full-face piece is required. (See Ex. P-4 p. 5).

In this case, Silver State knew or had reason to believe of the potential exposure to its employees from unknown quantities of cyanide, chlorine, hydrochloric acid and hydrogen chloride resulting from the acid dumping process yet did not provide a sufficient number of self-contained breathing devices with full-face coverage to protect these employees. Accordingly, for this additional reason, I find the "significant and substantial" violation to be proven as charged.

Citation No. 2099741 alleges "significant and substantial" violation of the standard at 30 C.F.R.§ 55.5-2 and reads as follows:

> On December 3, 1983, miners began performing an inherently hazardous maintenance operation that did result in the the liberation of toxic gases. This operation continued until December 6, 1983. During this time gas, mist or fumes surveys were not conducted as frequently as necessary to determine gas concentrations. Several employees working in the mine were exposed to this noxious gas resulting in injuries which had a reasonable potential to cause death.
>
> The cited standard then in effect provided that "dust, gas, mist, and fumes survey shall be conducted as frequently as necessary to determine the adequacy of control measures."

Burt Bielz, Silver State's processing and laboratory supervisor during relevant times and the supervisor in charge of the acid wash process at issue herein acknowledged his concern about the potential for employee exposure to cyanide, hydrochloric acid mist and chlorine during the acid dumping and wash process. Bielz also acknowledged that he had testing devices available during this process only to detect the presence of cyanide. Moreover, the available cyanide detection tubes were rendered ineffective because of the mixture of gases present. Under the circumstances, fume surveys could not be made for any of the three anticipated gases. Accordingly, the violation herein is proven as charged.

I find that the violation was also serious and "significant and substantial." Had Silver State provided adequate fume surveys during the acid dumping process, it may reasonably be inferred that the injuries suffered by its employees could have been reduced or avoided by speedy evacuation. Conversely, it is reasonably likely that the failure to provide these tests led to the serious injuries herein. Inasmuch as Bielz was also concerned with potential exposure to hydrogen cyanide, hydrogen chloride, and chlorine gas during the acid dumping process, yet failed to provide fume any surveys for the latter two gases, it is clear that the violation was the result of operator negligence.

Citation No. 2099579 alleges a violation of the standard at 30 C.F.R. § 50.10 and charges as follows:

Evidence indicates that MSHA was not immediately contacted when an accident occurred at this mine from December 3, 1983 through December 6, 1983. On those dates an unplanned inundation of gas occurred at the mine. This inundation of noxious gas caused illness and injuries which had a reasonable potential to cause death.

The cited standard requires in essence that if an accident (as defined in 30 C.F.R. § 50.2) occurs, the mine operator shall immediately contact MSHA. Under 30 C.F.R. § 50.2 the term "accident" includes "an injury to an individual at a mine which has a reasonable potential to cause death" and "an unplanned inundation of a mine by a liquid or gas."

Even accepting Respondent's medical evidence from Drs. Repsher and Kornberg that neither Rice nor Swank suffered an injury which had a reasonable potential to cause death, there is sufficient evidence to find that there was an unplanned inundation of a mine by hydrogen chloride and/or hydrochloric acid mist. There is persuasive credible evidence that the interior of Respondent's mill contained a dense yellow-brown cloud following the commencement of the acid dumping process and even Respondent's own witness acknowledged the presence of a visible hydrochloric acid mist during the acid dumping process. In addition, the medically documented injuries and discomfort suffered by Swank and Rice are clearly consistent with a serious exposure to at least hydrogen chloride or hydrochloric acid mist. Within this framework of evidence, I am satisified that the Secretary has met his burden of proving that a reportable accident occurred.

The evidence further shows that the "unplanned inundation" occurred on December 3, 1983, and that MSHA did not learn of the accident until January 5, 1984, by way of an anonymous phone call. Accident reports purportedly prepared by the operator on December 29, 1983, had not been received by MSHA as of the date of the anonymous phone call and there is no evidence as to when the accident reports were actually received. In any event, it is clear that the reporting on January 5, 1984, of an accident that occurred on December 3, 1983, was not an immediate contact within the meaning of the cited standard. The violation is accordingly proven as charged. I also find that the violation was the result of operator negligence. Even assuming, arguendo, that its employees delayed a full day in informing management of the injuries sustained during the acid dumping process, there is no valid reason why management could not have contacted MSHA

immediately thereafter. There is simply no excuse for its failure to file a report or contact MSHA for almost a month after the inundation.

Citation No. 2099580 alleges a violation of the standard at 30 C.F.R. § 50.12 and charges as follows:

> Evidence indicates that an accident involving an unplanned inundation of gas occurred from December 3, 1983 through December 6, 1983. The accident site was altered by the mine operator shortly after the accident without permission from MSHA.

The cited standard then in effect reads as follows:

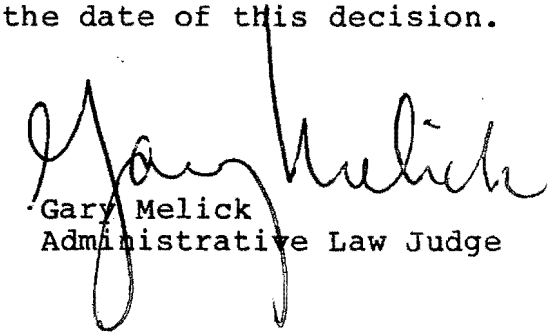
> Unless granted permission by an MSHA district manager or subdistrict manager, no operator may alter an accident site or an accident related area until completion of all investigations pertaining to the accident except to the extent necessary to rescue or recover an individual, prevent or eliminate an imminent danger, or prevent destruction of mining equipment.

The Secretary argues in his posthearing brief that once the acid had been removed and the fumes disbursed from the acid wash process Respondent should not have altered the site by resuming production. The Secretary fails to show however, how the accident site was indeed "altered" following the removal and disbursal of the fumes. It is apparent moreover, as Respondent observes in its brief, that the Secretary is confusing the standard here at issue with the requirements for the immediate reporting of an accident. The thrust of this standard is the "alteration" of an accident scene, a matter that has simply not been proven by the Secretary. Accordingly, Citation No. 2099580 is dismissed and vacated.

In determining the appropriate civil penalties to be assessed in this case I have also considered the evidence that the operator was not large had a relatively modest history of violations. It also appears that the violative conditions were abated in compliance with the Secretary's directions. Under the circumstances, I find the following civil penalties to be appropriate: Citation No. 2099742 - $5,000, Citation No. 2099741 - $1,000 and Citation No. 2099579 - $ 100.

ORDER

Citation No. 2099580 is vacated. The Silver State Mining Corporation is directed to pay civil penalties of $6,100 within 30 days of the date of this decision.



Gary Melick
Administrative Law Judge

Distribution:

James H. Barkley, Esq., Office of the Solicitor, U.S. Department of Labor, 1585 Federal Building, 1961 Stout Street, Denver, CO 80204 (Certified Mail)

Randy L. Parcel, Esq., Parcel & Mauro, Suite 3600, 1801 California Street, Denver, CO 80202 (Certified Mail)

rbg/slk

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

APR 3 1987

LARRY B. ANDERSON, Complainant	:	DISCRIMINATION PROCEEDING
	:	Docket No. PENN 86-221-D
v.	:	
CONSOL PENNSYLVANIA COAL COMPANY, Respondent	:	

SUPPLEMENTAL DECISION

Appearances: Michael J. Healey, Esq., Healey & Davidson, Pittsburgh, Pennsylvania, for Complainant; Michael R. Peelish, Esq., Pittsburgh, Pennsylvania, for Respondent.

Before: Judge Broderick

On March 5, 1987, I issued my decision in this proceeding in which I determined that Respondent violated section 105(c) of the Act when it removed Complainant's application from consideration for employment at the subject mine.

I ordered Respondent to reinstate Complainant's application and consider it in good faith for openings for which he is qualified without regard to his alleged absentee record at Consol mines and without regard to his alleged reporting of his supervisor's safety violations. I also ordered Respondent to reimburse Complainant for his reasonable attorney fees and costs of litigation.

On March 23, 1987, counsel for Respondent submitted a copy of a memorandum from counsel to the Industrial and Employee Relations Supervisor at the subject mine directing him to reinstate Complainant's application and consider it in good faith for openings for which he is qualified. Counsel stated that the application has been reinstated. Counsel for Respondent further stated that he agreed with Complainant's counsel on the attorney fees and costs of litigation and would pay the agreed amount to Complainant's attorney.

Complainant's attorney has not responded to Respondent's submission.

Premises considered, IT IS ORDERED:

(1) The decision issued March 5, 1987, is reaffirmed.

(2) Respondent has complied with order (1) and (3) in said decision.

(3) Respondent shall reimburse Complainant for his attorney fees in the amount agreed upon by counsel.

(4) This decision is final.

James A. Broderick

James A. Broderick
Administrative Law Judge

Distribution:

Michael J. Healey, Esq., Healey & Davidson, 1906 Law and Finance Bldg., Pittsburgh, PA 15219 (Certified Mail)

Michael R. Peelish, Esq., Consolidation Coal Company, 1800 Washington Rd., Pittsburgh, PA 15241 (Certified Mail)

slk

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

APR 6 1987

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. PENN 86-275
	:	A.C. No. 36-01966-03519
v.	:	
	:	New St. Nicholas Breaker
READING ANTHRACITE COMPANY, Respondent	:	

DECISION APPROVING SETTLEMENT

Before: Judge Weisberger

This case is before me upon a petition for assessment of civil penalty under Section 105(d) of the Federal Mine Safety and Health Act of 1977 (the Act). Petitioner has filed a motion to approve a settlement agreement and to dismiss the case. Respondent has agreed to pay the proposed penalty of $3,600 in full. I have considered the representations and documentation submitted in this case, and I conclude that the proffered settlement is appropriate under the criteria set forth in Section 110(i) of the Act.

WHEREFORE, the motion for approval of settlement is GRANTED, and it is ORDERED that Respondent pay a penalty of $3,600 within 30 days of this order.

Avram Weisberger
Administrative Law Judge

Distribution:

Susan M. Jordan, Esq., Office of the Solicitor, U. S. Department of Labor, Room 14480-Gateway Building, 3535 Market Street, Philadelphia, PA 19104 (Certified Mail)

Edward E. Kopko, Esq., 200 Mahantongo Street, Pottsville, PA 17901 (Certified Mail)

dcp

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

APR 6 1987

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. PENN 86-300 A.C. No. 36-00856-03569
v.	:	Rushton Mine
RUSHTON MINING COMPANY, Respondent	:	
RUSHTON MINING COMPANY, Contestant	:	CONTEST PROCEEDINGS
v.	:	Docket No. PENN 86-114-R Order No. 2692920; 3/13/86
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Docket No. PENN 86-128-R Order No. 2690105; 3/20/86 Rushton Mine

DECISION APPROVING SETTLEMENT

Before: Judge Fauver

This case is before me upon a petition for assessment of civil penalties under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801, et seq. Petitioner has filed a motion to approve a settlement agreement and to dismiss the case. I have considered the representations and documentation submitted and I conclude that the proffered settlement is consistent with the criteria in section 110(i) of the Act.

ORDER

WHEREFORE IT IS ORDERED that the motion for approval of settlement is GRANTED. Order No. 2690105 is VACATED. Order No. 2692920, Respondent shall pay the approved penalty of $100.00 within 30 days of this Decision. Upon such payment this proceeding is DISMISSED. Pursuant to the settlement, Docket Nos. PENN 86-114-R and PENN 86-128-R are DISMISSED.

William Fauver
William Fauver
Administrative Law Judge

Distribution:

Therese I. Salus, Esq., Office of the Solicitor, U.S. Department of Labor, Room 14480 Gateway Building, 3535 Market Street, Philadelphia, PA 19104 (Certified Mail)

Joseph T. Kosek, Jr., Esq., Greenwich Collieries, P.O. Box 367, Ebensburg, PA 15931 (Certified Mail)

kg

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

April 7, 1987

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. LAKE 87-36
	:	A. C. No. 12-01979-03503
v.	:	
	:	Black Mountain Pit Mine
UNITED MINERALS, INC., Respondent	:	

DECISION APPROVING SETTLEMENTS

Before: Judge Merlin

The Solicitor has filed a motion to approve settlements of the eight violations involved in this case. The total of the originally assessed penalties was $469 and the total of the proposed settlements is $405.

The Solicitor's motion discusses the violations in light of the six statutory criteria set forth in section 110(i) of the Federal Mine Safety and Health Act of 1977. The Solicitor represents that a reduction from the original assessments is warranted because the size of the mine was incorrectly stated by the Office of Assessments at the time of the original assessment. An estimated figure of 200,000 tons of coal for the year 1986 was used by the Office of Assessments to compute the penalties involved in the case. Reports submitted by the operator, however, show that the production of coal for its mine in 1986 did not exceed 80,000 tons of coal. The Solicitor accepts this information and represents that proposed settlements reflect the actual size of the operator.

The proposed settlements represent modest reductions from the original assessments. In light of new data regarding the operator's correct size and the other criteria set forth in section 110(i), I accept the Solicitor's representations and approved recommended settlements.

Accordingly, the motion to approve settlements is GRANTED and the operator is ORDERED TO PAY $405 within 30 days of the date of this decision.

Paul Merlin
Chief Administrative Law Judge

Distribution:

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

Mr. Greg Olinger, President, United Minerals, Inc., P.O. Box 239, Huntingburg, IN 47542 (Certified Mail)

/gl

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

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

APR 7 1987

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. WEST 86-84
	:	A.C. No. 42-00121-03598
v.	:	Deer Creek Mine
EMERY MINING CORPORATION, Respondent	:	

DECISION

Before: Judge Morris

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

Prior to a hearing on the merits the parties submitted the case on stipulated facts.

The two citations involved here allege respondent violated 30 C.F.R. § 75.200 which mandates roof control programs and plans.

Issues

The issues concern the appropriate civil penalties for the violations.

Stipulation

The parties stipulated as follows:

1. The citations at issue in this penalty proceeding were at issue in the contest cases docketed as WEST 86-35-R and WEST 86-36-R, which were fully tried on March 5, 1986. A decision in the cases was rendered on June 10, 1986.

* 2. A full record was developed by the parties on the issues of violation and unwarrantable failure and the decision of the presiding judge on those issues was not reviewed by the Commission.

3. Having been decided in the contest proceedings, the issue of violation in this penalty proceeding is res judicata. Thus, the only issues in this penalty proceeding involve application of the six statutory factors required under § 110(i) for determination of an appropriate civil penalty to be assessed against Emery for the violation.

*see an amended page 1 of this decision on page 716 of this issue

4. The Secretary and Emery believe the record in WEST 86-35-R and WEST 86-36-R can be used by the presiding judge to evaluate the gravity and negligence connected with the violation and stipulate, without further argument, to the use of that record for such purpose.

5. The Secretary and Emery stipulate that the violations which were the subject of WEST 86-35-R and WEST 86-36-R were abated in good faith.

6. The Secretary and Emery further stipulate that Emery was a large mine operator and assessment of a penalty in this case will not affect its ability to continue in business.

7. To permit the presiding judge to evaluate Emery's history of violations, the Secretary has submitted a computer listing of violations issued at Emery's Deer Creek Mine for the two-year period terminating on October 21, 1985. Emery stipulates to the accuracy of such a list.

8. The parties request that the presiding judge render a decision assessing appropriate civil penalties in this case.

Discussion

The statutory mandate to access civil penalties is contained in § 110(i) of the Act, now codified at 30 U.S.C.A. § 820(i).

In considering the record I find that these violations occurred as a result of an inspection on October 22, 1985. The computer printout indicates that the operator was assessed 518 violations in the two-year period ending October 21, 1985. The evidence accordingly establishes that the operator has a high adverse prior history. However, the number of violations has decreased considerably from the 1210 violations that were assessed before October 22, 1983.

Inasmuch as Emery is a large operator, it appears that the penalty is appropriate in relation to the size of the company. In addition, the penalties will not affect the company's ability to continue in business.

In connection with WEST 86-35-R, the company should have known of the violative condition because supervisors traveled through the area where the deteriorated roof was located. Further, the violative condition existed for at least a week, possibly months. These factors establish the operator's negligence.

In connection with WEST 86-36-R, the violative condition of the large loose rib in the switching area existed over a period of months. The area itself should have been examined by a preshift examiner. On balance, the operator was negligent in failing to remedy the obvious violative condition.

The gravity in each case is apparent. In WEST 86-35-R the areaway was used daily by over 200 miners. If the roof failed in the immediate area, miners could have been killed or injured. In addition, miners could have been trapped inby any fallen rock. On balance, I conclude the gravity of the violation is relatively high.

In connection with WEST 86-36-R, the gravity is likewise high. If the large rib came down it could crush any miners in the immediate area.

It is to the operator's credit that it immediately abated the violative condition.

In view of the statutory criteria, I deem the penalties set forth in the order of this decision are appropriate civil penalties for the violations.

Conclusions of Law

Based on the record and the stipulation of the parties, the following conclusions of law are entered:

1. The Commission has jurisdiction to decide this case.

2. A civil penalty should be assessed for the violation of Citation 2503818.

3. A civil penalty should be assessed for the violation of Citation 2503819.

ORDER

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

1. A civil penalty of $1500 is assessed for the violative condition alleged in Citation 2503818.

2. A civil penalty of $500 is assessed for the violative condition alleged in Citation 2503819.

John J. Morris
Administrative Law Judge

Distribution:

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

Timothy M. Biddle, Esq., Crowell & Moring, 1001 Pennsylvania Ave., N.W., Washington, D.C. 20004-2505 (Certified Mail)

/ot

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

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

MAY 5 1987

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEST 86-84 A.C. No. 42-00121-03598
v.	:	Deer Creek Mine
EMERY MINING CORPORATION, Respondent	:	

AMENDED DECISION

Before: Judge Morris

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

Prior to a hearing on the merits the parties submitted the case on stipulated facts.

The two citations involved here allege respondent violated 30 C.F.R. § 75.200 which mandates roof control programs and plans.

Issues

The issues concern the appropriate civil penalties for the violations.

Stipulation

The parties stipulated as follows:

1. The citations at issue in this penalty proceeding were at issue in the contest cases docketed as WEST 86-35-R and WEST 86-36-R, which were fully tried on March 5, 1986. A decision in the cases was rendered on June 10, 1986.

2. A full record was developed by the parties on the issue of violation and the decision of the presiding judge was not reviewed by the Commission.

3. Having been decided in the contest proceedings, the issue of violation in this penalty proceeding is res judicata. Thus, the only issues in this penalty proceeding involve application of the six statutory factors required under § 110(i) for determination of an appropriate civil penalty to be assessed against Emery for the violation.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

APR 8 1987

CONSOLIDATION COAL COMPANY, Contestant	:	CONTEST PROCEEDINGS
	:	Docket No. WEVA 86-215-R
v.	:	Order No. 2711104; 2/27/86
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	Docket No. WEVA 86-239-R
	:	Order No. 2713431; 3/14/86
Respondent	:	Docket No. WEVA 86-240-R
	:	Order No. 2711566; 3/20/86
	:	
	:	Humphrey No. 7 Mine
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	CIVIL PENALTY PROCEEDINGS
	:	
Petitioner	:	Docket No. WEVA 86-328
	:	A.C. No. 46-01453-03701
v.	:	Docket No. WEVA 86-329
	:	A.C. No. 46-01453-03702
CONSOLIDATION COAL COMPANY, Respondent	:	Humphrey No. 7 Mine

CORRECTED DECISION APPROVING SETTLEMENT AND DISMISSING PROCEEDINGS

Before: Judge Broderick

The Secretary's Motion to Approve Settlement in the above cases stated that an agreed settlement had been reached between the parties in the amount of $1325. This was in error, and the error was repeated in my decision. The decision issued March 5, 1987, is CORRECTED to read as follows:

On February 19, 1987, the Secretary filed a motion for an order approving a settlement agreement in the two civil penalty cases listed above. Three violations are involved originally assesed at a total of $2000. The parties propose to settle for a total payment of $1075.

Order 2711566 was issued alleging a violation of 30 C.F.R. § 75.1725 because a feeder wire cut off switch handle was missing. The motion states that the violation should not have been deemed unwarrantable and the action has been modified from a

section 104(d)(2) order to a section 104(a) citation. Because the negligence factor has been reduced, the parties propose a reduction in the penalty from $650 to $150. Order 2713431 alleged a violation of 30 C.F.R. § 75.1725(d) because a junction box on a portal bus motor was open. The bus had not been operated for a week, and the operator has a practice of checking buses before putting them to use. For that reason the motion proposes a reduction in the penalty from $650 to $450. Order No. 2711104 charged a violation of 30 C.F.R. § 75.1403-8(d) because the clearance space on the side at the underground shop switch had sloughage and dirt on the bottom. The parties propose a reduction in the penalty from $700 to $475 because the sloughage was on the tight side of the track and not on the side with the walkway.

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.

Acordingly, the settlement is APPROVED and, Respondent having paid, the case is DISMISSED.

IT IS FURTHER ORDERED that the contest proceedings, Docket Nos. WEVA 86-215-R, WEVA 86-239-R, and WEVA 86-240-R are with the consent of the parties DISMISSED.

James A Broderick

James A. Broderick
Administrative Law Judge

Distribution:

Michael Peelish, Esq., Consolidation Coal Co., 1800 Washington Road, Pittsburgh, PA 15241 (Certified Mail)

Linda M. Henry, Esq., U.S. Department of Labor, Office of the Solicitor, 3535 Market Street, Philadelphia, PA 19104 (Certified Mail)

slk

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

APR 9 1987

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS Docket No. KENT 86-32-M A.C. No. 15-14035-05502
v.	:	Docket No. KENT 86-39-M A.C. No. 15-14035-05501
SULPHUR SPRINGS STONE COMPANY, Respondent	:	No. 1 Mine

DECISION

Appearances: Joseph Luckett, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for Petitioner;
There was no appearance for Respondent.

Before: Judge Broderick

STATEMENT OF THE CASE

In these proceedings, the Secretary seeks civil penalties for a total of 26 alleged violations of mandatory health and safety standards, all being issued during an inspection on October 8, 1985. Respondent by Bill J. Morse, President, filed answers to the petitions. I issued a notice of hearing on January 7, 1987, scheduling the cases for hearing in Owensboro, Kentucky on March 3, 1987. According to the postal return receipt in the file, the notice was received by Bill J. Morse on January 9, 1987. When the case was called for hearing on March 3, 1987, no one appeared for Respondent. An attempt was made by Petitioner's representative to contact Mr. Morse by telephone but was unsuccessful. I found Respondent in default, and directed the Secretary to submit evidence concerning the alleged violations, and concerning the questions of gravity and negligence. Eric Shanholtz testified on behalf of the Secretary. Posthearing briefs were not filed. On the basis of the entire record, I make the following decision.

FINDINGS OF FACT AND CONCLUSIONS OF LAW COMMON TO ALL ALLEGED VIOLATIONS

1. In 1985, Respondent was the owner and operator of a stone mine in Ohio County, Kentucky, known as the No. 1 Mine. Respondent was subject to the provisions of the Federal Mine Safety and Health Act (the Act) in the operation of the mine.

2. In 1985, Respondent produced 13,557 tons of stone for a gross dollar amount of $33,892. Five people were employed at the mine. This was the only mine operated by Respondent. Respondent was a small operator.

3. No citations were issued by MSHA to Respondent in the two years prior to October 8, 1985.

4. The mine is no longer in operation. Respondent submitted by mail a copy of what purports to be a 1984 federal income tax return, showing a loss of $62,680 on gross receipts of $43,893.

5. The Secretary has stipulated that Respondent made reasonable efforts to achieve compliance after the citations were issued.

FINDINGS AND CONCLUSIONS RELATED TO EACH CITATION DOCKET NO. KENT 86-39-M

CITATION 2657202

The citation charged a violation of 30 C.F.R. § 56.13021 because safety chains were not being used on the 2 inch hose going from a compressor to a track drill. The drill was in operation with 90 pounds air pressure. The violation was established, was moderately serious, in that it could have injured employees in the area. The violation was obvious and therefore resulted from Respondent's negligence. I conclude that an appropriate penalty for the violation is $100.

CITATION 2657221

This citation charged a violation of 30 C.F.R. § 56.14001 because the V-Belt drive to the discharge conveyor was not guarded. The mill was in operation. The exposed belt was approximately 4 feet from ground level. The violation was established, and was moderately serious, in that it could have resulted in an injury to an employee. The violation was evident and therefore resulted from Respondent's negligence. I conclude that an appropriate penalty for the violation is $100.

CITATION 2657222

This citation charged a violation of 30 C.F.R. § 56.12032 because a make up box cover was not provided for the drive motor to the discharge conveyor of the hammer mill. The violation was established. It was not serious but resulted from negligence since it was evident. I conclude that an appropriate penalty for the violation is $20.

CITATION 2657223

This citation charged a violation of 30 C.F.R. § 56.14003 because the head pulley for the feed conveyor to the secondary screen was inadequately guarded. The conveyor was in operation. There was a walkway adjacent. The pinch point was approximately 30 inches from floor level. The violation was established. It was not serious because of low employee exposure. The operator should have known of the violation. Therefore, it resulted from negligence. I conclude that an appropriate penalty for the violation is $30.

CITATION 2657224

This citation charged a violation of 30 C.F.R. § 56.1203 because a 110 volt energized receptacle in the electrical shack had a broken face, exposing energized parts. The receptacle was approximately 3 feet from floor level. The violation was established. It was serious because employees could have touched the energized parts. It was evident and, therefore resulted from Respondent's negligence. I conclude that an appropriate penalty for the violation is $100.

CITATION 2657225

This citation charged a violation of 30 C.F.R. § 56.14001 because three stacking conveyor tail pulleys were not guarded. They were accessible to employees and were at ground level. The violation was established. It was moderately serious because of the possibility of serious injury. Respondent should have been aware of the condition. I conclude that an appropriate penalty for the violation is $100.

CITATION 2657226

This citation charged a violation of 30 C.F.R. § 56.14035 because a V-belt drive to a conveyor was inadequately guarded. Pinch points, 3 feet from ground level, were accessible to employees. The belt was in operation. The violation was established. It was moderately serious because serious injury could occur. The operator should have been aware of the

condition. I conclude that an appropriate penalty for the violation is $100.

CITATION 2657228

This citation charged a violation of 30 C.F.R. § 56.14001 because the take-up pulley to a rock conveyor was not guarded. There was an exposed pinch point approximately 3 feet from ground level. The violation was established. It was moderately serious because of the likelihood of injury. The condition was evident. I conclude that an appropriate penalty for the violation is $100.

CITATION 2657227

This citation charged a violation of 30 C.F.R. § 56.12032 because a drive motor for a rock conveyor was not provided with a makeup box cover. The motor was 6 to 8 feet high and there was low employee exposure. The violation was established. It was not serious. I conclude that an appropriate penalty for the violation is $20.

CITATION 2657229

This citation charged a violation of 30 C.F.R. § 56.12032 because a drive motor for another rock conveyor was not provided with a makeup box cover. There was low employee exposure. The violation was established. It was not serious. I conclude that an appropriate penalty for the violation is $20.

DOCKET NO. KENT 86-32-M

CITATION 2657203

This citation charged a violation of 30 C.F.R. § 56.5003 because an employer was drilling without using the water system thus exposing him to dust. The possibility of injury or disease resulting was not high. The violation was not serious. I conclude that $20 is an appropriate penalty for this violation.

CITATION 2657204

This citation charged a violation of 30 C.F.R. § 56.15002 because employees were working in the pit and crusher area without hard hats. Hazards in the form of falling rock and flyrock existed in the area. The practice was likely to result in injury. The operator should have been aware of the practice. The violation was established and was moderately serious. I conclude that $75 is an appropriate penalty for this violation.

CITATION 2657205

This citation charged a violation of 30 C.F.R. § 56.15003 because an employee was observed drilling without adequate foot protection. The practice was likely to result in injury. the operator should have been aware of the practice. The violation was established and was moderately serious. I conclude that $75 is an appropriate penalty for this violation.

CITATION 2657206

This citation charged a violation of 30 C.F.R. § 56.9002 because berms were not provided along the upper bench of the pit, the elevated road leading from the upper bench, and the elevated ramp leading to the crusher charging bin. Front end loaders and dump trucks were operating in these areas. The condition was reasonably likely to result in serious injury. The operator was aware or should have been aware of the condition. The violation was established and was serious. I conclude that $125 is an appropriate penalty for this violation.

CITATION 2657207

This citation charged a violation of 30 C.F.R. § 56.4230(a)(1) because three diesel powered pieces of equipment were not provided with fire extinguishers. The violation was established. It was not serious. I conclude that $20 is an appropriate penalty for this violation.

CITATION 2657209

This citation charged a violation of 30 C.F.R. § 56.6005 because dry grass about two feet high surrounded the powder magazine. The condition was not deemed likely to result in injury because of little employee exposure. The violation was established but was not serious. I conclude that $20 is an appropriate penalty for this violation.

CITATION 2657210

This citation charged a violation of 30 C.F.R. § 56.6020(i) because suitable danger signs were not posted at the magazine. The condition was unlikely to result in injury. The violation was established and was not serious. I conclude that $20 is an appropriate penalty.

CITATION 2657211

This citation charged a violation of 30 C.F.R. § 56.9002 because an outside mirror was missing from a haul truck. The

absence of the mirror was unlikely to result in injury. The violation was established and was not serious. I conclude that $20 is an appropriate penalty.

CITATION 2657212

This citation charged a violation of 30 C.F.R. § 56.9087 because two haul trucks were not provided with back-up alarms, although the operator's view to the rear was obstructed. Foot traffic in the area was low. The violation was established and was not serious. I conclude that $20 is an appropriate penalty.

CITATION 2657213

This citation charged a violation of 30 C.F.R. § 56.14001 because the main shaft for the crusher protruded and provided a pinch point accessible to employees. The crusher was operating. There was a walkway beside the crusher. The condition could result in serious injury. It was evident and the operator should have been aware of it. The violation was established and was moderately serious. I conclude that $100 is an appropriate penalty.

CITATION 2657214

This citation charged a violation of 30 C.F.R. § 56.14001 because several V-belt drives on the impact crusher were unguarded. They were 4 to 5 feet from ground level and were accessible to employees. There was foot traffic in the area. The condition was likely to result in serious injury and should have been known to the operator. The violation was established and was moderately serious. I conclude that $100 is an appropriate penalty.

CITATION 2657215

This citation charged a violation of 30 C.F.R. § 56.11012 because of an unguarded opening in the bin by the impact crusher. The bin was about 8 feet deep and was empty. There was foot traffic in the area. The condition was likely to result in injury and the operator should have been aware of it. The violation was established and was moderately serious. I conclude that $75 is an appropriate penalty.

CITATION 2657217

This citation charged a violation of 30 C.F.R. § 56.14001 because a V-belt drive to the primary shaker screen was unguarded. The inspector deemed an injury unlikely because of low employee exposure. The condition was evident. The violation was

established. It was not serious. I conclude that $30 is an appropriate penalty.

CITATION 2657218

This citation charged a violation of 30 C.F.R. § 56.14001 because the tail pulley to the waste rock conveyor was unguarded. A walkway made the exposed pulley accessible to employees. It was approximately 2 feet from floor level. The inspector deemed an injury unlikely because of low employee exposure. The operator should have been aware of the condition. The violation was established and was not serious. I conclude that $30 is an appropriate penalty.

CITATION 2657219

This citation charged a violation of 30 C.F.R. § 56.14007 because of an inadequate guard on the V-belt drive to the crusher-hammer mill. Two pinch points existed above 30 inches from the floor. The inspector deemed an injury unlikely. The operator should have been aware of the condition. The violation was established but was not serious. I conclude that $30 is an appropriate penalty.

CITATION 2657220

The citation charged a violation of 30 C.F.R. § 56.11001 because three conveyors were not adequately provided with handrails. The conveyors were approximately 20 feet from ground level and were used as access to service the head pulleys. The condition was reasonably likely to result in injury and should have been known to Respondent. The violation was established and was moderately serious. I conclude that $80 is an appropriate penalty.

ORDER

Based on the above findings of fact and conclusions of law IT IS ORDERED:

1. The citations are AFFIRMED.

2. Respondent shall, within 30 days of the date of this decision, pay the following civil penalties for violations found herein.

CITATION	PENALTY
2657202	$ 100
2657221	100

2657222	20
2657223	30
2657224	100
2657225	100
2657226	100
2657228	100
2657227	20
2657229	20
2657203	20
2657204	75
2657205	75
2657206	125
2657207	20
2657209	20
2657210	20
2657211	20
2657212	20
2657213	100
2657214	100
2657215	75
2657217	30
2657218	30
2657219	30
2657220	80
Total	$1530

James A. Broderick
Administrative Law Judge

Distribution:

Joseph B. Luckett, Esq., U.S. Department of Labor, Office of the Solicitor, 280 U.S. Courthouse, 801 Broadway, Nashville, TN 37203 (Certified Mail)

Bill J. Morse, Esq., P.O. Box 193, Hartford, KY 42347 (Certified Mail)

slk

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

April 9, 1987

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS Docket No. WEVA 87-2 A. C. No. 46-01867-03692
v.	:	Blacksville No. 1 Mine
CONSOLIDATION COAL COMPANY, Respondent	:	Docket No. WEVA 87-4 A. C. No. 46-01968-03684
	:	Blacksville No. 2 Mine
	:	Docket No. WEVA 86-457 A. C. No. 46-01867-03687
	:	Blacksville No. 1 Mine

DECISION APPROVING SETTLEMENTS

Before: Judge Merlin

These cases are petitions for the assessment of civil penalties filed by the Secretary of Labor against Consolidation Coal Company for violations of Part 50 of the Secretary's regulations. Part 50 imposes upon mine operators subject to the Act the requirements, inter alia, immediately to notify the Mine Safety and Health Administration (MSHA) of accidents, to investigate accidents, and to file reports pertaining to accidents, occupational injuries and occupational illnesses.

By prehearing order dated January 6, 1987, the parties were directed to discuss possible settlement and advise me of the results of their discussion by February 17, 1987. By further order dated January 29, 1987, the parties were directed that if they were unable to reach settlement, pretrial statements would be due on March 10, 1987, and the cases would be heard on March 31, 1987.

The parties informed me that they were unable to reach settlement and on February 27, 1987, the operator filed a motion to dismiss on the ground that Part 50 was invalid, to which the Solicitor responded with a memorandum of law in opposition. The Solicitor and the operator filed prehearing statements on March 11 and 12, 1987, respectively.

Thereafter, on March 23, 1987, counsel for both parties contacted me by means of a conference telephone call, stating that they now had reached an agreement to settle these cases. The terms of the settlement were explained. The original assessments for the four violations were $350 and the proposed settlements were for $2,000. I indicated my tentative approval and directed the Solicitor to file an appropriate motion by March 25, 1987, which he did. The scheduled hearing was cancelled.

Section 110(k) of the Act sets forth the settlement authority of the Commission and its Judges as follows:

> (k) No proposed penalty which has been contested before the Commission under section 105(a) shall be compromised, mitigated, or settled except with the approval of the Commission. * * *

The purposes of section 110(k) is explained in the legislative history as follows:

> In addition to the delay in assessing and collecting penalties, another factor which reduces the effectiveness of the civil penalty as an enforcement tool under the Coal Act is the compromising of the amounts of penalties actually paid. In its investigation of the penalty collection system under the Coal Act, the Committee learned that to a great extent the compromising of assessed penalties does not come under public scrutiny. Negotiations between operators and Conference Officers of MESA are not on the record. Even after a Petition for Civil Penalty Assessment has been filed by the Solicitor with the Office of Hearings and Appeals, settlement efforts between the operator and the Solicitor are not on the record, and a settlement need not be approved by the Administrative Law Judge. Similarly, there is considerable opportunity for off-the-record settlement negotiations with representatives of the Department of Justice while cases are pending in the district courts.
>
> While the reduction of litigation and collection expenses may be a reason for the compromise of assessed penalties, the Committee strongly feels that since the penalty system is not for the purpose of raising revenues for the Government, and is indeed for the purpose of encouraging operator compliance with the Act's requirements, the need to save litigation and

> collection expenses should play no role in determining settlement amounts. The Committee strongly feels that the purpose of civil penalties, convincing operators to comply with the Act's requirements, is best served when the process by which these penalties are assessed and collected is carried out in public, where miners and their representatives, as well as the Congress and other interested parties, can fully observe the process.
>
> To remedy this situation, Section 111(1) provides that a penalty once proposed and contested before the Commission may not be compromised except with the approval of the Commission. Similarly, under Section 111(1) a penalty assessment which has become the final order of the Commission may not be compromised except with the approval of the Court. By imposing these requirements, the Committee intends to assure that the abuses involved in the unwarranted lowering of penalties as a result of off-the-record negotiations are avoided. It is intended that the Commission and the Courts will assure that the public interest is adequately protected before approval of any reduction in penalties.
>
> The Committee recognizes that settlement of penalties often serves a valid enforcement purpose. The provisions of Section 111(1) only require that such settlements be a matter of public record and approved by the Commission or Court.

S. Rep. No. 95-181, 95th Cong., 1st Sess. 41-5 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 632-633 (1978).

In compliance with the mandate of section 110(k), the circumstances of these cases and the terms of the proposed settlements are set forth as follows.

Part 50, finally published on December 30, 1977, became effective on January 1, 1978. 42 Fed. Reg. 65534 (1977). This was, of course, between November 9, 1977, the enactment date of the Mine Act, and March 9, 1978, its effective date. Section 301(b) of the 1977 Amendments, provided for the transfer to the Mine Act of all mandatory health and safety standards in effect on November 9, 1977. However, it has always been the Secretary's position that the reporting and other requirements, both as they now exist in Part 50 and as they were contained in prior versions, are mandatory regulations and not mandatory health and

safety standards. There are conceptual and practical justifications for the Secretary's stance. Mandatory standards relate to actual practices inherent in the process of mining itself, whereas Part 50 deals with recording, reporting, and investigating certain events which arise out of mining activity, e.g., accidents and injuries. Considerable deference is due to the longstanding and established views of the Secretary in light of his enforcement responsibilities. Brock v. Cathedral Bluffs Shale Oil Co., et al., 796 F.2d 533, 538 (D.C. Cir. 1986). As a mandatory regulation, there is no question that Part 50 was properly adopted. And as such there is no question that it was properly transferred to the Mine Act pursuant to section 301(c)(2) of the 1977 Amendments which provided that all orders, decisions and regulations issued, or allowed to become effective in the exercise of functions transferred under the law and which were in effect on March 9, 1978, should continue in effect until modified, terminated or set aside. The Commission, taking specific note of the procedures pursuant to which Part 50 was adopted, held Part 50 consistent with and reasonably related to the statutory provisions under which it was issued. Freeman United Coal Mining Company, 6 FMSHRC 1577 (1984). Accordingly, a violation of Part 50 constitutes a violation of its parent statutory provisions, including section 103(a), 103(b), 103(d), and 103(j). Finally, in Helca Mining Company, 1 FMSHRC 1872 (1979), Administative Law Judge Koutras upheld the validity of Part 50. Nothing I am aware of would justify a departure from Judge Koutras's decision.

The subject cases involve four violations of 30 C.F.R. § 50.20(a) which requires inter alia, that an operator report to MSHA accidents and occupational injuries which occur in its mine within 10 working days.

In Docket No. WEVA 87-2, Citation No. 2713196, dated June 12, 1986, sets forth that the operator failed to submit an accident-injury report on 7000-1 form to MSHA within 10 production days after an injury occurred to Mr. Kenneth Fox. On January 29, 1986, Mr. Fox, who was an underground mechanic, injured his back while attempting to lift a continuous miner pot. Mr. Fox went to the doctor on January 30, 1986, and was diagnosed as having a sprain to his back-spine area. The doctor wrote on a slip that Mr. Fox should be on light duty for two weeks. Mr. Fox returned to work on January 30, 1986, but for the next two weeks he merely sat in the bathhouse and lay on the benches there when his back hurt him. During the second week he was told to check permissibility on light sockets, but not to climb any ladders. During this period he was not scheduled for Saturday work whereas almost everyone else performed their Saturday shift as usual. Based upon the foregoing, the inspector determined that Mr. Fox did not return to his regular job as underground section mechanic, because he was unable to do so and that he remained in a restricted capacity status for approximately two weeks. The inspector further stated that due to the type of assignment and

location of this assignment it appeared the operator was aware of the situation.

Citation No. 2713197, dated June 16, 1986, sets forth that the operator failed to submit an accident-injury report on the specified 7000-1 form to MSHA after an injury occurred to Mr. Richard E. Leighty. Mr. Leighty injured his back picking up two wooden crib blocks. This work was being done on March 31, 1986, at approximately 7 p.m. on the afternoon shift. Shortly thereafter, Mr. Leighty went to the hospital by ambulance. The doctor prescribed a muscle relaxer and pain killer and instructed him to return if his back was not better in seven days. The doctor also instructed Mr. Leighty to take it easy for the next week. Mr. Leighty resumed work on April 8, 1986. Accordingly, the inspector found that there were at least 5 days away from the mine which constituted time lost due to injury. And the inspector determined, therefore, that the operator failed to meet the requirement of 30 C.F.R. §50.20(a) by not submitting a 7000-1 form indicating at least 5 lost work days due to the injury sustained by Mr. Leighty.

In Docket No. WEVA 87-4, Citation No. 2713199, dated July 16, 1986, sets forth that the operator failed to submit an accident and injury report on the 7000-1 form after an injury occurred to Mr. Roy Watson. On November 4, 1985, Mr. Watson fractured his right wrist in two places while attempting to cross over the continuous mining machine. He was a classified roof bolt operator and was roof bolting at the time of injury. On return from the hospital his right wrist was immobilized by a leather brace and placed in a cast four days later. The next shift he worked was on November 5, 1985, as a dispatcher on the surface. It further appeared that during the period Mr. Watson was a dispatcher, he underwent autroscopic surgery on his wrist to assist in healing and that it was projected he would have additional surgery. In light of the foregoing, the inspector concluded that during the time Mr. Watson was a dispatcher he was unable to perform his usual job as roof bolter and was on restricted duty. Accordingly, the inspector determined that the operator should have submitted a 7000-1 form indicating a reportable injury and the number of days of restricted duty.

In Docket No. WEVA 86-157, Citation No. 2713193, dated June 4, 1986, sets forth that the operator failed to submit an accident report on the 7000-1 form after an injury to Mr. Kenneth Fox. On April 28, 1986, at approximately 6:30 p.m. Mr. Fox was injured while removing a fuse from a panel of a roof bolting machine. The injury was to Mr. Fox's eyes due to a flash that occurred. Mr. Fox went to the doctor on the same evening of his injury and the doctor gave him medication for his eyes. The doctor told Mr. Fox that he should take the medication when he got home and that it should relieve much of the sand-in-the-eye feeling and irritation that might occur in the following 12 or so hours. The doctor indicated that Mr. Fox should be able to re-

turn to work on April 30, 1986. Mr. Fox remained at home. According to the Citation, on April 29, 1986, Mr. Gross, the operator's safety supervisor, visited Mr. Fox who was in his garage at the time and asked him if he was coming to work. Mr. Fox said no and that he was going to follow the doctor's orders and return on the 30th. Mr. Gross followed up the visit with a phone call at approximately 3:30 p.m. and again asked Mr. Fox if he was coming to work and indicated to Mr. Fox that if he did not, it would be a lost-time day for the mine. Mr. Gross asked Mr. Fox to take a vacation day to prevent this record. Mr. Fox took the vacation day and returned to work on the afternoon shift of April 30, 1986. When the inspector asked Mr. Fox if he used the medication in his eyes, Mr. Fox said he did as soon as he got home and that it helped him a lot. When the inspector asked if he could have returned to work on the afternoon shift April 29, 1986, Mr. Fox said maybe, but with the sand-in-the-eye irritation he would have been afraid to return, because he might hurt himself further as well as other miners. His main concern was that he did not inflict further damage to his eyes while they were still irritated, with other types of mine dust. Mr. Fox said that upon returning to work he did not have to turn in a doctor's slip. On June 3, 1986, the inspector told the operator it should submit a lost-time injury report under Part 50, but the operator declined, alleging that because Mr. Fox had been working in his garage when the operator's safety supervisor visited him, he should have returned to work without any shift interruption. Relying upon the medical evidence and Mr. Fox's statements, the inspector required the operator to comply with Part 50 by submitting the appropriate 7000-1 form for the injury, indicating days away from work due to his injury and any days of restricted duty.

The motion for approval of settlements submitted by the Solicitor on March 25, 1987, is as follows:

> Now comes the Secretary of Labor (Secretary), by his undersigned attorney, and hereby moves for approval of a settlement which is acceptable to the Secretary. The parties agree that the voluntary civil penalty payment of $500.00 for each of the four violations of 30 C.F.R. Part 50 involved in these proceedings for a total penalty payment of $2,000.00 is an appropriate resolution of this matter. The four violations were originally assessed penalties totaling $350.00.
>
> These cases were set for hearing on March 31. On March 6, 1987, the parties entered into a motion to stay other similar cases pending the resolution of these proceedings. The January 14, 1987, prehearing order in these proceedings required the parties to file a response on

> March 10, 1987. The Respondent had filed a motion to dismiss on procedural grounds and the Secretary had filed a response in opposition to that motion.
>
> After the parties reviewed their respective legal positions and the facts set forth in the files of these proceedings, discussions related to the hearing of these and other cases began on March 19, 1987. Extensive negotiations began on March 20, and on March 23, the parties agreed to settle these particular cases. A conference call was held with the presiding judge to advise him of the settlement.
>
> The Secretary submits that the Respondent is a large operator. The Secretary further submits that each of the violations involved a high degree of both negligence and seriousness. The files include information related to the fact that the violations were abated after issuance in good faith and that the payment of the agreed to penalties will not adversely effect the Respondent's ability to remain in business. Respondent has an average history of prior violations for a mine operator of its size.

Thereafter by letter filed March 31, 1987 the operator stated that the parties had agreed to include the following language in the settlement motion which had been submitted:

> The Respondent takes the position that for purposes of actions other than actions or proceedings under the Federal Mine Safety and Health Act, nothing contained herein shall be deemed an admission that Respondent violated the Mine Act's regulations or standards.

Each of the violations in Docket Nos. WEVA 87-4 and WEVA 86-457 was originally assessed at $75 and each of the two violations in Docket No. WEVA 87-2 was originally assessed at $100 for total original assessments of $350. The proposed settlements of $500 for each of the four violations constitute very substantial increases from the original amounts. I have carefully reviewed the entire record to determine if they are justified. Upon such review, it is clear that the settlement motion is on strong ground in asserting the violations involved a high degree of seriousness and negligence. Gravity cannot be doubted in view of the fact that Part 50 is the cornerstone of enforcement under the Act. Since Part 50 statistics provide the basis for planning, training and inspection activities, accurate reporting is essential. Moreover, failure accurately to report could have extremely dangerous consequences by concealing problem

areas in a mine which should be investigated by MSHA inspectors. In short, without proper compliance by the operator under Part 50, the Secretary could not know what is going on in the mines and, deprived of such information, he would be unable to decide how best to meet his enforcement responsibilities. The citations which are unusually detailed, further disclose an extraordinary degree of negligence and fault on the operator's part. The Solicitor's representations concerning size, history, ability to continue, and good faith abatement are accepted. In light of the statutory criteria set forth in section 110(i) of the Act, I determine the proposed settlements are appropriate and proper. As set forth in the legislative history of section 110(k), quoted supra, these penalties are intended to encourage the operator's compliance with the Act's requirements.

Accordingly, it is ORDERED the recommended settlements be APPROVED.

It is further ORDERED the operator pay $2,000 within 30 days from the date of this decision.

Paul Merlin
Chief Administrative Law Judge

Distribution:

Edward H. Fitch, Esq., Office of the Solicitor, U. S. Department of Labor, 4015 Wilson Boulevard, Arlington, VA 22203 (Certified Mail)

Michael R. Peelish, Esq., Consolidation Coal Company, 1800 Washington Road, Pittsburgh, PA 15241 (Certified Mail)

Donzel E. Ammons, Vice President, Consolidation Coal Company, P. O. Box 24, Wana, WV 26590 (Certified Mail)

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

/gl

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

April 14, 1987

HARLEY M. SMITH, Complainant	:	DISCRIMINATION PROCEEDINGS
v.	:	Docket No. KENT 86-23-D
BOW VALLEY COAL RESOURCES INC.,	:	BARB CD 85-69
Respondent	:	Docket No. KENT 86-84-D
	:	BARB CD 86-7
	:	Oxford No. 5 Mine

DECISION

Appearances: David M. Taylor, Esq., Harlan, Kentucky, for the Complainant;
Joshua E. Santana, Esq., Lexington, Kentucky, for the Respondent.

Before: Judge Weisberger

STATEMENT OF THE CASE

On or about September 18, 1985, Complainant filed a Complaint with the Federal Mine Safety and Health Administration alleging that after making safety complaints to Respondent, commencing on December 13, 1984, he was required to work both as a miner's helper and also as a ventilation man. He also alleged that he was discriminated against unlawfully in that he did not receive benefits "while I was off." On October 21, 1985, Complainant was advised that the Mine Safety and Health Administration determined that a violation of § 105(c) had not occurred. On or about November 18, 1985, Complainant filed his Complaint with the Commission.

On or about November 15, 1985, Complainant filed another complaint with the Mine Safety and Health Administration alleging that he was served a letter, on November 12, 1985, terminating his employment and that the termination was related to his discrimination complaint that he filed on September 18, 1985. On February 24, 1986, the Mine Safety and Health Administration

advised Complainant that it determined that a violation of § 105(c) had not occurred. On or about March 7, 1986, Complainant filed his Complaint with the Commission.

Subsequent to notice, these cases were scheduled and heard in Harlan, Kentucky, on November 18 and 19, 1986. After the hearing, based upon a joint request from the Parties, the time to file briefs was extended until February 20, 1987. Complainant filed its brief on February 13, and Respondent filed its brief on February 20, 1987. Based on a joint request by the Parties the time to file reply briefs was extended until March 20, 1987, and reply briefs were filed on March 23, 1987.

Harley Smith, Lawrence Taylor, Larry Joe Gross, and Leon Allen testified for Complainant. Clyde E. Goins, David Howard, Dewey Simpson, Isom G. Smith, Henry Saylor, Roy Chasteen, Tom Baker, Amato Hoskins, and Glen Green testified for Respondent.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Complainant and Respondent are protected by, and subject to, the provisions of the Mine Safety Act, specifically Section 105(c) of the Act. I have jurisdiction to decide this case.

The Commission, in a recent decision, Goff v. Youghiogheny & Ohio Coal Company, 8 FMSHRC 1860 (December 1986), reiterated the legal standards to be applied in a case where a miner has alleged acts of discrimination. The Commission, Goff, supra, at 1863, stated as follows:

> A complaining miner establishes a prima facie case of prohibited discrimination under the Mine Act by proving that he engaged in protected activity and that the adverse action complained of was motivated in any part by that activity. Pasula, 2 FMSHRC at 2797-2800; Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 803, 817-18 (April 1981). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was not motivated in any part by protected activity. Robinette, 3 FMSHRC at 818 n. 20. See also Donovan v. Stafford Constr. Co., 732 F.2d 954, 958-59 (D.C. Cir 1984); Boich v. FMSHRC, 719 F.2d 194, 195-96 (6th Cir. 1983) (specifically approving the Commission's Pasula-Robinette test).

Protected Activities

Harley Smith, the Complainant, who has been a mine foreman, miner operator, and scoop operator, started to work for the Respondent in 1976. In December 1984, Smith was transferred to

the Oxford No. 5 Mine as a miner's helper. In the period from March through April 1985, Smith complained to Amato Hoskins, Respondent's section mine foreman, that roof bolts were placed more than 4 feet apart. In the same period, Smith told Leon Allen, Respondent's outside foreman, of various loose rock that was hanging and also that some bolts were not secure. Also in the same time period Smith told Hoskins and Roy Chasteen, Respondent's mine superintendent, that a ventilation curtain was down. Further in the same time period, Smith told Hoskins that there were no straps in the third and forth entry. Smith also made a request of Chasteen for a canopy for the mining machine. It is clear that all these complaints made to Respondent's agents were safety related, and as such are protected activities within the purview of Section 105(c) of the Act.

Adverse Actions

At the hearing, Counsel for Complainant indicated that only two adverse actions were being alleged as a consequence of protected activities: (1) that Complainant was assigned the job of a miner operator and also that of a ventilation man in December 1984; and (2) that the Complainant was fired in November 1985.

1. Complainant was required to work simultaneously as a miner's helper and ventilation man.

Smith testified that on October 10, 1984 he was injured at Respondent's Dulcimer No. 1 Mine. Smith did not work for a 4 to 5 week period following his injury. Smith attempted to return to work and did so for 3 days and 2 hours, however, he claimed that when he returned to work he reinjured his back. Smith finally returned to work December 3, 1984, and at that time was transferred from the Dulcimer Mine to the Oxford No. 5 Mine. Ten days after his transfer to Oxford No. 5 Mine, the ventilation man, who had been assigned to Smith's section was transferred to another section at the Bow Valley Mine. Smith testified that from this time until he was forced to go back on sick leave on July 31, 1985, he was required by Hoskins to perform both his first assigned job as a miner's helper, and also the tasks of the ventilation man. Smith testified that to his knowledge he was not aware of any other employee of Bow Valley who was assigned both tasks.

However, in essence, it was the credible testimony of Clyde E. Goins, Respondent's president, David Howard, Respondent's operations manager, Leon Allen, outside foreman, and Glen Green, Respondent's personnel manager, all of whom have knowledge of the overall operations of Respondent's mine, that, in general, miners do perform two jobs at the mine. I adopted their testimony,

because their knowledge of the overall operation of the mine, makes them more competent than Smith to establish the working practices in the entire mine. Howard's uncontradicted testimony was to the effect that Smith received the higher pay rate of the two jobs that he performed. Also, Goins testified that normally if a section is short handed, the miner's helper also performs work as a ventilation man. It was the testimony of Lawrence Taylor, who operated the miner on Smith's shift, that he operated the miner 4 hours, and that the rest of the time he (Taylor) hung curtains and watched out for the cable, both of which are the functions of the ventilation man. Thus, it is clear that the requirement of Respondent for Smith to perform two jobs, was a normal practice at Respondent's mine and was not an adverse action.

2. The firing of the Complainant.

It was Smith's uncontradicted testimony that on or about November 10, 1985, he received a letter from Respondent which indicated that he was being terminated from his job with Respondent. This clearly constitutes an adverse action.

Motivation

1. Complainant's prima facie case.

The evidence is uncontradicted that between February and April 1985, Smith made at least five safety complaints to Respondent. On September 18, 1985, Smith filed a complaint of discrimination alleging, in essence, discrimination in job assignment due to safety complaints he had made. On or about November 10, 1985, Smith received a letter of termination from Respondent. This letter did not state any reasons for the termination. Accordingly, due to the coincidence of time between the safety complaints, the filing of a complaint of discrimination, and the letter of termination, and due to the fact that this letter did not state any reasons, it might reasonably be inferred that the termination was motivated in part by Smith's protected activities. Thus, it is found that Complainant has established a prima facie case.

2. Respondent's rebuttal and affirmative defense.

Facts

In the latter part of 1984, when Smith returned to work after his back injury, he worked at the Dulcimer No. 1 Mine and his section foreman was Henry Saylor. During that time Saylor had noted that Smith, while using a miner, had left cap coal in the ceiling and requested Smith to remove it. Smith refused on

the ground that it would involve, in essence, cutting the rock. Dewey Simpson, the roof bolter on Saylor's crew in the Dulcimer No. 1 Mine, indicated that he had asked Smith to remove cap coal, that Smith refused and that he (Simpson) then told Saylor about Smith's refusal. Simpson also testified that there were problems getting Smith to clean up. Saylor testified that both Isom G. Smith, a roof bolter on his crew, and Simpson complained of Smith not cleaning up and his refusing to cut cap coal. Both Tom Baker, Respondent's safety director, and Leon Allen, Respondent's outside foreman, testified that they had received complaints, from the bolters in Dulcimer No. 1 Mine, that Smith had left cap coal and had not cleaned up before the bolters. David Howard, Respondent's operations manager, testified, in general, that he was aware of complaints that Smith had not been cleaning up before the bolters and had left cap coal. He also testified that Saylor had told him that Smith was making complaints about the other employees in the section and that there were lots of disruptions. He said, in essence, that Saylor had stated that he (Saylor) would rather quit than work with Complainant. (This was corroborated by Saylor.) Subsequently, Howard and Chasteen met with Green concerning the difficulty that the roof bolters had with complaints from Smith, and with the latter not cleaning up. It was determined that Smith be transferred to the Oxford No. 5 Mine as the foreman there, Amato Hoskins, had more experience.

Hoskins testified that, after Smith was assigned to Oxford No. 5 Mine, in general, there were no problems with Smith operating the miner, that he never left cap coal, and that he was "pretty good" at cleaning up. (Tr. II, 170.)

Hoskins further testified that Smith complained to him that the bolters "....were leaving the bolts too wide, not strapping the rocks, stuff like that." (Tr. II, 173.) Hoskins indicated that two of the bolters told him that Smith told them that they were not performing their job properly. However, Hoskins indicated that Smith was not a disruptive influence in the section.

Lawrence Taylor, who ran the miner at Oxford No. 5 Mine on Smith's shift, testified, in essence, that Smith complained to him about the face boss not having the straps and bolts put in properly. Taylor indicated initially upon direct examination that Smith did not make any complaints to him about Hoskins. However, upon cross examination he indicated that Smith did tell him that Hoskins was not doing his job. I observed the witness' demeanor and find the latter version testified to upon cross examination to be credible. In addition, Taylor testified that several times Smith said that the repairman should help with the curtains.

Smith, in rebuttal, indicated that he did not make any complaints to the bolting crew at Oxford No. 5 Mine, but that he did show Hoskins where the bolting crew missed kettle bottoms. He also told both Chasteen and Howard that hill seams were not being strapped.

Howard indicated that after Smith was transferred to Oxford No. 5 Mine, he complained that the bolters were not doing their job and that, in general, Smith was disruptive. Chasteen also characterized Smith as being disruptive in Oxford No. 5 Mine. Green testified that after being told by Chasteen, Ditty, and primarily Howard, that Smith was complaining about problems with the bolters not doing their job properly, he had a meeting with the miners in the section to prevent friction between the miners. According to Howard, he consulted with Goins three or four times in June 1985, concerning, in general, Smith's complaints about the work performance of others. In June or July 1985, Howard, Chasteen, and Ditty met with Green and discussed whether they should take any action or make any recommendation with regard to Smith. No action was taken at that time. On or about July 31, 1985, Smith injured his back and went out on sick leave. He did not receive any benefits while on sick leave.

In a follow up meeting called by Green in August 1985, with Howard, Chasteen, and Ditty it was decided that the Smith was disruptive and that termination was the only solution. Hoskins was not consulted with regard to the firing of Smith.

Green testified that he was not aware of the nature or the numbers of Smith's safety complaints. Green discussed with Goins the decision to terminate, and the latter agreed.

Goins testified that in August 1985, he made the decision to dismiss Smith, effective when Smith would be able to return to work from sick leave, so that Smith would be able to get sick leave benefits in the interim. Goins testified that he did not have any knowledge of the safety complaints made by Smith.

On or about November 7, 1985, Smith's physician released him to go back to work effective November 11, 1985. Smith took the doctor's statement to Green, who would not accept it. The latter explained that he would have to have a doctor's report. Subsequently, on or about November 10, Smith received notification that he was terminated, but the notification did not contain any reason. Prior to receiving the letter of termination Complainant had never been reprimanded or suspended.

Discussion

I conclude that the Respondent has not rebutted Complainant's prima facie case, nor has it established an affirmative defense. It has not adduced sufficient evidence to rebut the credible testimony of Smith that he engaged in protected activities in making safety related complaints. Nor has Respondent presented sufficient evidence to establish either that its action, in terminating Smith, was in no part motivated by Smith's protected activities, or that it would have terminated Smith based only on unprotected activities.

Respondent, in essence, argues that Smith was terminated because of disruptive behavior in criticizing co-workers, and because of his poor performance in not cleaning the mine floor properly, not cutting cap coal, cutting roof bolts, and operating a miner in high tram. The record establishes that there were conflicts between Smith and the roof bolters at Dulcimer No. 1 Mine with regard to Smith's performance. The weight of the testimony establishes that after Smith was transferred to Oxford No. 5 Mine, he continued to complain about the performance of the roof bolters. The only testimony with regard to the specific contents of the complaints to or about the roof bolters, was from Hoskins, Smith, and Taylor. I conclude, based on their testimony, that any complaints made to or about the roof bolters or face boss had to do with alleged improper bolting and strapping. Accordingly, these complaints are safety related and are protected activities. Since these complaints were part of the reason to fire Smith, I can not conclude that Respondent was in no part motivated by the protected activities.

I further find that any allegations with regard to Smith's poor performance, related solely to the period when he worked at Dulcimer No. 1 Mine, and that there is no evidence of poor performance at Oxford No. 5 Mine. Goins testified that after Smith was transferred to Oxford No. 5 Mine, he continued to receive reports that the latter was continuing to cut out roof bolts and operate the miner in high tram. However, the balance of the testimony does not establish that there were any complaints of these alleged activities by Smith after he was transferred to Oxford No. 5 Mine. Saylor, who was Smith's foreman at Dulcimer No. 1 Mine, was the only witness to the alleged cutting of coal in high tram. There was no testimony from any witness who observed Smith performing this activity at Oxford No. 5 Mine. The only other witnesses who indicated any knowledge of any alleged high tramming was Howard. However, his knowledge was based upon what Saylor had told him about Smith's operation of the miner only at Dulcimer No. 1 Mine. Also, the only evidence concerning Smith's cutting of roof bolts and leaving cap coal or not cleaning up was testimony from Howard, Simpson, Isom Smith,

Saylor, and Baker, and related only to incidents at Dulcimer No. 1 Mine. Significantly, Hoskins, the foreman at Oxford No. 5 Mine, indicated that Smith never left cap coal and was pretty good at cleaning up. Thus, it can be seen that any alleged acts of Smith indicative of poor performance occurred only at Dulcimer No. 1 Mine. Inasmuch as Respondent allegedly decided to terminate Smith in August 1985, 8 months after he was transferred out of Dulcimer No. 1 Mine, it can not be found that the decision to terminate was motivated solely by the alleged unprotected activities of poor performance at Dulcimer No. 1 Mine.

Even if evidence of Smith's alleged improper performance at Dulcimer No. 1 Mine is considered in combination with evidence of nonsafety complaints by Smith to and about other miners, I find that it has not been established that the Respondent would have terminated Smith for the unprotected activities alone. In reaching this conclusion, I considered the fact that the decision to terminate Smith allegedly came 8 months after he was transferred from Dulcimer No. 1 Mine, where all alleged acts of poor performance occurred. Also Goins who made the final decision to terminate Smith did not specifically indicate that Smith's alleged failure to perform his job properly was one of the reasons for termination. (Tr. I, 118-119.) Further, it is significant that Hoskins, the foreman at Oxford No. 5 Mine, who had indicated that Smith was not a disruptive influence, was not consulted when Green, Howard, Ditty, and Chasteen discussed the firing of Smith. Further, it is significant that the termination notice did not indicate any of the alleged unprotected activities as the reason for the termination. Indeed, the notice did not give any reason for the termination. Goins had testified that, in essence, pursuant to customary company practice the notice of termination was sent to Smith not in August when the decision was made (when Smith was off work on sick leave), but in November (when Smith was able to return to work), in order to enable Smith to get sick leave benefits, and that Respondent continued him on benefits while he was off on sick leave. However, it was Smith's testimony that during this period he did not receive any benefits, and to his knowledge his medical bills were not paid. Based on my observations of the witness' demeanor I adopted Smith's version. Therefore, I do not find credible Goins' explanation of the time lag between the decision to terminate in August and the notification of Smith in November. It is more credible that the actual decision to terminate was taken in November 1985, on or about the date the notice to terminate was sent to Smith. It is thus significant that the termination decision was made within 2 month of Smith's filing of a complaint of discrimination with MSHA, and within a few months after he had made various safety related complaints.

Taking into the account all the above factors, it is concluded, that the Complainant has established a prima facie case that a violation by Respondent of Section 105(c) of the Act occurred when his employment was terminated. This prima facie case has not been rebutted by Respondent, nor has Respondent established an affirmative defense.

It is further concluded that the Complainant has abandoned his allegation as contained in the first Complaint that he filed in September 1985, that he was discriminated against unlawfully in not being paid benefits in 1984 when he was injured and was off from work.

ORDER

It is ORDERED that:

1. The complaint filed in November 1985, Docket No. KENT 86-23-D is DISMISSED.

2. Complainant shall file a statement within 20 days of this decision indicating the specific relief requested. This statement shall show the amount he claims as back pay, if any, and interest to be calculated in accordance with the formula in Secretary/Bailey v. Arkansas Carbona, 5 FMSHRC 2042 (1984). The statement shall also show the amount he requests for attorney's fees and necessary legal expenses if any. The statements shall be served on Respondent who shall have 20 days from the date service is attempted to reply thereto.

3. This decision is not final until a further order is issued with respect to Complainant's relief and the amount of Complainant's entitlement to back pay and attorney's fees.

Avram Weisberger
Administrative Law Judge

Distribution:

David M. Taylor, Esq., Smith & Carter Law Officers, P. O. Box 710, Harlan, KY 40831 (Certified Mail)

Joshua E. Santana, Esq., Brown, Bucalos, Santana & Bratt, P.S.C., 201 W. Short Street, Lexington, KY 40507 (Certified Mail)

dcp

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

April 14, 1987

ALVIN RITCHIE, Complainant	:	DISCRIMINATION PROCEEDING
	:	Docket No. KENT 86-138-D
v.	:	BARB CD 86-43
	:	
KODAK MINING COMPANY, INC., Respondent	:	Emmons Plant No. 1

DECISION

Appearances: Alvin Ritchie, Happy, Kentucky, pro se;
Leslie Sr. Clair, Esq., and John W. Fischer, Esq., Denlinger, Rosenthal & Greenberg, Cincinnati, Ohio, for Respondent.

Before: Judge Melick

This case is before me upon the Complaint by Alvin Ritchie 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 Kodak Mining Company, Inc. (Kodak) laid him off and offered him a lower paying job on May 7, 1986, in violation of Section 105(c)(1) of the Act because he had been injured in a truck accident and had reported health and safety complaints to agents of the mine operator. 1/

In order for the complainant to establish a prima facie violation of Section 105(c)(1) of the Act, he must prove by a preponderance of the evidence that he engaged in an activity protected by that section and that the discriminatory action taken against him was motivated in any part by that protected activity. Secretary on behalf of Pasula v. Consolidation Coal Company, 2 FMSHRC 2786 (1980), rev'd on other grounds sub nom. Consolidation Coal Company v. Marshall, 663 F.2d 1211 (3rd Cir. 1981). The respondent may rebut the prima facie

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 the operator's agent...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."

case by showing either that no protected activity occurred or that the adverse action was not motivated in any part by protected activity. Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 803 (1981).

If the respondent cannot rebut the prima facie case in this manner, it may nevertheless defend affirmatively by proving that (1) it was also motivated by the miner's unprotected activities, and (2) it would have taken the adverse action in any event for the unprotected activities alone. The respondent bears the burden of proof with regard to the affirmative defense. Haro v. Magma Copper Co., 4 FMSHRC 1935 (1982). The ultimate burden of persuasion does not shift from the complainant. Donovan v. Stafford Construction Co., 732 F.2d 954 (D.C. Cir 1984); Boich v. FMSHRC, 719 F.2d 194 (6th Cir. 1983). The Supreme Court has approved the National Labor Relations Board's virtually identical analysis for discrimination cases arising under the National Labor Relations Act. NLRB v. Transportation Management Corp., 462 U.S. 393 (1983).

Alvin Ritchie was laid off by Kodak from his position as the Emmons Preparation Plant operator on May 7, 1986, and offered a lower paying job as night watchman. Ritchie declined that job and thereafter filed this complaint of discrimination. There is no dispute that Mr. Ritchie engaged in protected activity by repeatedly complaining orally and in writing to his foreman, Oman Sandlin, about what he reasonably believed were unhealthful and unsafe conditions at the Emmons Preparation Plant. It is undisputed that Ritchie made periodic complaints about excessive coal dust at the plant from the time he was first employed as the plant operator in 1983 and that he more recently complained of broken boards on the second level walkway at the plant. 2/ Accordingly, Mr. Ritchie has established the first element of a prima facie case.

Mr. Ritchie has failed, however, to establish the second element of a prima facie case, i.e., he has not shown that the adverse action by the operator was motivated in any part by those health and safety complaints. The undisputed evidence is that Mr. Ritchie had made periodic complaints about dust for his entire period of employment as plant operator with Kodak, yet was not laid off for almost 3 years. The evidence also shows that other employees made similar complaints over

2/ Mr. Ritchie also alleged in his initial complaint that arm injuries he sustained after falling out of a company pickup truck constituted protected activity. He has failed to show, however, how those injuries come within the scope of the activities protected by Section 105(c)(1), and, accordingly, the allegation is rejected.

the years, some of whom were laid off at the same time as Ritchie, and others were not. Coworker David Spencer had also complained to Sandlin about the loose floorboards at the plant. While Spencer was also laid off with Ritchie, he was subsequently rehired. In addition, it was one of Mr. Ritchie's duties as preparation plant operator to report to his supervisor, and/or to maintenance personnel, these and other problems in the operation of the plant.

There is also credible evidence of valid business reasons for the layoff of Ritchie and 7 other employees on May 7, 1986. Thomas W. Kemp, Vice President for Finance and Processing for Kodak testified that the layoffs were dictated by the depressed coal market. According to Kemp there was significant overcapacity in production in the coal market over the previous 2 years, resulting in lowered prices and tremendous cost pressure to stay in business. As a result there had been a series of layoffs at Kodak beginning in May 1985 followed by layoffs in December 1985, February 1986, April 1986, May 1986 (the layoff in issue), and in February 1987.

Kemp testified that the May 7, 1986, layoff was dictated by loss of the night shift at the Chester Preparation Plant which in turn was dictated by their forecast for lowered coal production. The decision was made by the Executive Committee consisting of Kemp, President Bowling, Vice President Cauley, and Charlene Walker. Processing Superintendent Estell Adams determined which particular miners were to be laid off in the processing sector after consulting with his foremen, Oman Sandlin and Jack Hall.

Estell Adams testified that the selection of miners to be laid off was made in accordance with the company personnel handbook (Exhibit R-1). The handbook provides as here relevant as follows:

> Employees are selected for layoff and recall primarily on the basis of their ability to perform the work needed together with their depend ability. If these factors are equal, then preference is given to the employee with longer service.

According to Adams, using that criteria he and his foremen prepared an analysis of the processing plant employee job skills similar to that found in Exhibit R-5.

The skills noted in Exhibit R-5 are not disputed and clearly demonstrate that those employees laid off in May 1986, including Complainant Ritchie, were those with the fewer critical skills. It is clear from this evidence that the May 7, 1986, layoff of Ritchie and seven other processing plant employees had a legitimate business-related and non-protected basis. Thus even had Mr. Ritchie established a prima facie case herein, that case was clearly rebutted by the operator's evidence. Under the circumstances, the Complaint herein must be dismissed.

ORDER

The complaint of discrimination herein is dismissed.

Gary Melick
Administrative Law Judge

Distribution:

Alvin Ritchie, Box 383, Happy, KY 41746 (Certified Mail)

Leslie St. Clair, Esq., and John W. Fischer, Esq., Denlinger, Rosenthal & Greenberg, 2310 First National Bank Center, 425 Walnut Street, Cincinnati, OH 45202 (Certified Mail)

yh

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

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

APR 14 1987

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. WEST 85-148-M
	:	A.C. No. 48-00639-05515
v.	:	Docket No. WEST 86-83-M
	:	A.C. No. 48-00639-05517
TEXASGULF, INC., Respondent	:	Wyoming Soda Ash

DECISION

Appearances: Tobias F. Fritz, Esq., Office of the Solicitor, U.S. Department of Labor, Kansas City, Missouri, for Petitioner;
Thomas E. Downey, Jr., Esq., Downey & Murray, Englewood, Colorado, for Respondent.

Before: Judge Lasher

This matter arises 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 penalties for three violations which are cited in the three Citations involved in these two dockets which were consolidated for hearing and decision by Notice dated June 19, 1986. All three Citations, issued under Section 104(a) of the Act, charged Respondent with infractions of 30 C.F.R. § 57.21078, entitled "Permissible Equipment" which provides:

> "Only permissible equipment maintained in permissible condition shall be used beyond the last open crosscut or in places where dangerous quantities of flammable gases are present or may enter the air current."

The Citations were issued by MSHA Inspector Martin B. Kovick on three different inspection dates.

The descriptions of the violations shown on the three Citations are as follows:

1. Citation No. 2983339 issued April 10, 1985.

"In No. 5 miner panel there is a gap of .005 in the main control panel. The miner is in the last open crosscut. A methane check showed 0.0% with a CSE this condition could possibly create a hazard to employees in this panel."

2. Citation No. 2083401 issued April 24, 1985.

"In miner No. 4 panel there is a gap of .006 in the connection box located under the seat of miner No. 4. The miner is beyond the last open crosscut in room No. 8025. A CSE reading shows 0.0%. This condition could possibly cause a hazard to employees in this panel."

3. Citation No. 2083419 issued October 15, 1985.

"In miner No. 9 there is a gap of .011 in the right head light on miner No. 9. The miner is in the last open crosscut on the shortwall section. A CSE shows 0.0% methane in this area. This condition could possibly cause a hazard to employees in this panel."

On a five-part "Gravity" scale ("No Likelihood", "Unlikely", "Reasonably Likely", "Highly Likely", and "Occurred") provided on the face of the citation form, all three Citations were marked "Reasonably Likely".

The Citations issued under Section 104(a) of the Act, also charged that the violations were "significant and substantial" (herein "S & S").

In Secretary v. Consolidation Coal Company, 6 FMSHRC 189 (1984), this 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 initially concluded that S & S findings are properly reviewable in this penalty proceeding.

The matter came on for hearing in Rock Springs, Wyoming on August 20, 1986. Both parties were well represented.

The Respondent concedes the occurrence of the three violations but urges that such were not S & S, thus raising the major issue posed and only issue aside from the amount of appropriate penalties. The Secretary seeks a penalty of $157 for each violation.

Having carefully considered the transcript of testimony and the briefs submitted by both parties, the position of Respondent is found supported in the record and meritorious.

FINDINGS

At the outset of the hearing the parties entered the following stipulations on the record:

(a) Respondent is a large mine operator;

(b) Payment of reasonable penalties in this matter will not jeopardize Respondent's ability to continue in business;

(c) Respondent, after receiving notice of the three subject violations, proceeded in good faith to promptly abate the same;

(d) Respondent had but one violation in over 200 inspections days prior to the issuance of each of the three subject violations and I conclude therefrom that Respondent has an extremely commendable compliance history.

During the hearing it was further agreed that the permissibility requirements of 30 C.F.R. § 18.31 applied to each of the three machines found in violation and that the maximum plane flange gap permissible under 30 C.F.R. § 18.31 is .004 inch (T. 77-78).

It is further found that Respondent operates a trona mine in Sweetwater County, Wyoming, 1/ and tha such mine has, at all relevant times, been classified as "gassy" by the State of Wyoming (T. 4, 161), and is a "gassy" mine for purposes of this proceeding (T. 10, 161-164, 229).

The subject mine is one of five trona mines (T. 37, 117) located inside an area called the Trona Patch in Wyoming. Mining "beds" therein are numbered "1" through "30"; Respondent mines in Bed 20. (T. 157-160). Somewhere between 10% and 30% of the subject mine's reserves have been developed (T. 309-310). Mining is conducted approximately 1400 feet below the surface five days a week by three shifts daily (2 production and 1 maintenance)(T. 267).

Despite its designation by the State of Wyoming as "gassy", the subject mine is "considerably less" gassy than the other four mines in the Trona Patch (T. 41), and does not require frequent inspections under federal law, (T. 39-41). Under Section 103(i) of the Act extra inspections at fifteen day intervals are required if a mines produces 200,000 cubic feet of gas per day. 30 U.S.C. § 813(i). The outpit from this mine has been measured at only 50,000 to 90,000 cubic feet of methane gas per day well below the lowest trigger of Section 103(i). (T. 40, 161).

To be in permissible condition gaps in boxes housing electrical equipment, such as those involved in the three matters under discussion, shall not exceed certain tolerances. For the three pieces of equipment involved herein, as previously noted, gaps in excess of .004 inches were prohibited (T. 45, 77-78, 106-107; 30 C.F.R. § 18.31).

On April 10, 1985, Citation No. 2083339 was issued citing continuous miner No. 5, which was then located in the last open crosscut of the mine. Inspector Kovick detected a gap of .005

1/ Trona, which is incombustible, is a hard ore used to make glass (T. 156).

inches in the main control panel of this Miner. On April 24, 1985, Inspector Kovick issued Citation No. 2083401 citing a .006 inch gap in the connection box located under the seat of Miner No. 4. On October 15, 1985, Inspector Kovick issued Citation No. 2083419 after he found a gap of .011 inches in the right head - light on continuous Miner No. 9. The record is clear that the three pieces of electrical equipment involved were in impermissible condition when cited and Respondent concedes the occurrence of the violations.

The contemplated hazards to which the three violations contributed are methane ignitions and methane explosions (T. 50-51, 54-55, 85). A methane ignition is of a lesser degree than an explosion (T. 54).

The three machines (miners) involved were beyond the last open crosscut when cited (T. 47, 50) and from two to six employees would ordinarily have been exposed to the hazard (T. 94, 230-231).

At the times the three Citations were issued, both the ventilation system and methane monitoring equipment were properly functioning and adequate (T. 47-48, 57-58, 74, 80), and the methane reading taken by hand-held instrument was zero, that is 0.0% (T. 48, 84).

The methane monitors on the miners in question automatically turn off the equipment when they detect that the methane level has reached 1.5% (T. 51-52, 73-74, 196-197, 255) and such were in proper working order on the three citation issuance dates in question (T. 256, 257-261). However, a lag time of five to six seconds runs between the time the methane monitor first sniffs the methane gas and the miner shuts down (T. 262).

Methane monitors, which are checked only weekly for proper calibration, need frequent calibration, and are regularly found to be out of calibration (approximately one out of four each week), one cause of which is vibration (T. 52, 122-123, 248, 256, 262-264).

It is possible to have a methane ignition even where there is adequate ventilation where there occurs a "sudden rush" or "outburst" of liberated methane which can overpower the ventilation system (T. 51-52, 120, 134). Such possibility, however, is remote (T. 156, 199, 221, 226, 322). Ventilation systems are also subject to breakdown (T. 53, 121-122, 234) and other problems (T. 51-52, 214-220).

On the three dates pertinent herein, some 30 to 50 pieces of permissible equipment were in the mine (T. 176-177). None of the three pieces of machinery (electrical boxes) involved here were shown to be arcing or sparking (or malfunctioning) at the time the Citations were issued and there existed only the possibility of their arcing or sparking (T. 50-52, 56, 57, 81, 112-115, 128, 205, 274, 275-277, 284-286).

No method or technology exists for predicting or determining where concentrations of methane may exist or be encountered in Bed 20 where the subject mine is located (T. 54, 58, 159, 298-302, 303, 315, 327).

While there is a possibility of encountering an accumulation of methane (T. 51-54, 58, 70, 75, 89, 93, 327-328) such is highly unlikely (T. 62, 328).

The methane level where explosions can occur ranges from 5% to 15%; the methane level where ignitions can occur is 1% to 2% (T. 68-69, 168). The methane levels found by the Inspector on the three occasions in question were not sufficient to permit ignitions (T. 69, 79, 84).

Over the eight years that Inspector Kovick had inspected the mine, he had never detected explosive levels of methane in the mine, had never found methane in excess of 1%, (T. 39, 62), and had never detected ignitable or explosive levels of methane (T. 62, 75, 86). Inspector Kovick conceded that methane must be at an explosive or ignitable level before it is reasonably likely to cause injury (T. 75, 80, 84-85). Over the mine's 10-year (approximate) history, methane emission levels have remained fairly constant (T. 165), i.e., negligible to non-existent (T. 166). The mine has no history of fires or explosions (T. 197, 227).

The possibility that methane would reach either ignition or explosion levels was remote (T. 89-90, 156, 161-165, 166, 169-174, 194-195, 197, 202, 205-206, 230, 242, 251).

Both the magnitude and the probability of an ignition of methane in a trona mine are less than a methane ignition in a coal mine due to the fact there would be no involvement of flammable coal dust in a trona mine. Where only methane is ignited, injuries and fatalities will result only to those in the area where the methane exists or within the area affected by the concussion or pressure from such ignition (T. 120, 163-165).

DISCUSSION

While characterizing violations in the abbreviated "serious and substantial" mode is convenient for general reference it is misleading as to the actual substantive meaning articulated by Congress and resort to the entire phrase from which such was taken is more, but not entirely, helpful. Thus, so stated, the the main question here is whether the subject section 104(a) Citations cited violations which were "of such nature as could significantly and substantially contribute to the cause and effect of a ... mine safety or health hazard" as that phrase (1) is used in Sections 104(d)(1) and 104(e)(1) the Act and (2) has been fleshed out by the Federal Mine Safety and Health Review Commission.

More fully, Section 104(d)(1) of the Act, in which the full S & S clause originates provides:

> 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 healty or safety standards, he shall include such finding in any citation given to the operator under this Act....

30 U.S.C. § 814(d)(1)(emphasis added). As previously noted, Section 104(e) of the Act, 30 U.S.C. § 814(e), relating to "pattern" violations, contains similar S & S language.

A. Background

The S & S clause in mine safety law has been in the past and has newly become a term of art having separate and special meaning apart from the normal dictionary meanings of the various words themselves, necessitated no doubt by the fact that the pertinent language of the Act is not itself artfully worded. The history of the development of the S & S clause offers some perspective for the practical application of what I refer to herein as the National Gypsum/Mathies formula which is further discussed subsequently. Briefly, the roots of the S & S concept were bound up with the first use of withdrawal orders which first showed up in the 1952 Act. Later, under the 1965 Amendments Act, the entire S & S concept was fleshed out in terms quite similar to those in the 1977 Amendments to the 1969 Act, and such terminology was largely incorporated into Section 104(c)(1) of the 1969 Act. Strangely enough, such S & S language as words of art primarily addressed the nature of the accidents or events contemplated, more specifically those of a great or disastrous potential.

Many Citations now specify alleged violations as S & S even though they are issued under section 104(a) of the Act-rather than under the section which originally contained the S & S language, 104(d)(1), as a prerequisite to issuance of unwarrantable failure withdrawal orders. The apparent purpose of this practice stems from the value of a 104(a) Citation with S & S designation in section 104(e) "pattern" enforcement with its potential and forceful withdrawal order sanction.

The history of withdrawal orders and S & S terminology are intertwined.

The use of withdrawal orders as an enforcement tool was first implemented by Congress in its passage of Title II of the Federal Coal Mine Safety Act, Public Law 552 (July 16, 1952) 66 Stat. 294, 30 U.S.C. § 473. Most significantly, the purpose, as announced in the heading of this 1952 legislation, was the prevention of "Major Disasters" in mines. Thus, Section 203(a)(1) of the 1952 Act provided for the issuance of a withdrawal order upon the inspector's finding of a "danger that a mine explosion, mine fire, mine inundation, or man-trip or man-hoist accident will occur ***". Section 203(b) provided for the issuance of a notice (a Citation in current jargon) where the inspector found a violation which did not create the dangers listed in section 203(a). Section 203(c) provided for withdrawal orders if the violations found in the section 203(b) notice were not abated within a reasonable time. The 1952 Act did not provide for so-called "unwarrantable failure" orders.

The 1952 Act as above noted, was amended by the Federal Coal Mine Safety Act Amendments of 1965, 80 Stat. 85 (1966), hereinafter referred to as the 1965 amendments. Specifically, Section 203 of the 1952 Federal Coal Mine Safety Act was amended by adding a new subsection (d) and a new subsection (e), which provided that when an inspector found on an inspection that, (1) a violation existed, (2) the conditions created by such violation did not cause danger that a mine explosion, mine fire, mine inundation, or man-trip or man-hoist accident would occur immediately or before the imminence of the danger could be eliminated, (3) such violation was of "such nature as could significantly and substantially contribute to the cause or effect of a mine explosion, mine fire, mine inundation, or man-trip or man-hoist accident", and (4) such violation was caused by an unwarrantable failure of the operator to comply, he should issue a notice of violation and make such findings in the notice. Subsection (d)(1) went on to provide that the Bureau should reinspect the mine within 90 days after the issuance of the notice to determine if any similar violation existed in the mine, and if so, to issue a withdrawal order provided such violation was also found to be caused by an unwarrantable failure of the operator to comply. Section 203(d)(2) of the 1965 Amendments then provided that thereafter a withdrawal order should be issued by an inspector who found upon any subsequent inspection violations "similar to those that resulted in the issuance of the withdrawal order issued under paragraph (1)" of subsection (d) until such time as an inspection of such mine disclosed no similar violations.

It is thus seen that the 1965 Amendments were, in structure and concept, almost identical to section 104(c), subsections (1) and (2) of the Federal Coal Mine Health and Safety Act of 1969, and to Section 104(d) of the 1977 Act. The 1965 Amendments set forth a four-part foundation for the issuance of the "unwarrant-

able failure" notice requiring: (1) a violation (2) no imminent danger [2], (3) that the violation, while not involving imminent danger, be of a nature that could significantly and substantially contribute to a disaster type accident, [3] and (4) that such violation be caused by an unwarrantable failure of the operator to comply with the safety requirements of the Act.

Under the 1952 Act and the 1965 Amendments, the nature of the conditions targeted by the legislation were those that might lead to major disasters. The Legislative History (Sen. Rep. 1055, 89th Cong. 2d Sess., 3 U.S. Code and Cong. News 2072) of the 1965 Amendments contains this explanation of the pertinent section in its reference to "Major Provisions of the Bill" at page 2074:

> *** The proposal amends the "Findings and orders" section of the act by adding a provision that, if a violation of the safety requirements of section 209 is found, not involving imminent danger, but of a nature that could significantly and substantially contribute to a disaster-type accident, and if such violation was caused by an unwarrantable failure of the operator to comply with the safety requirements of the act, a reasonable time for abatement shall be fixed." (Emphasis supplied.)

There is no question but that the authors of the 1969 Act used the S & S phraseology of the 1965 Act Amendments as their frame of reference in drawing up the provisions of section 104(c) relating to issuance of "unwarrantable failure" withdrawal orders. The 1977 Act, in turn, followed the 1969 language. The 1965 Amendments thus became the principal source of interpretive aid for the 1969 Act. The ambiguity in the 1969 Act resulting from the use of the phrase "similar, etc." in section 104(c)(2) would be nonexistent had the phrase "similar, etc." been first used in the section authorizing the underlying (104(c)(1)) withdrawal order, as was the case in the 1965 Amendments where the "underlying order" violation was required to be similar to the "notice" violation, and the reinspection "order" violation had to be similar to "those" two. Under the 1965 Amendments, it is clear that the phrase "similar, etc." referred back to the "nature" of the violation mentioned in preceding sentences authorizing issuance of the underlying notice, and that the "nature" of the underlying conditions was that as could cause a disaster, i.e., "as could significantly and substantially contribute to the cause and effect of a mine explosion, mine

---

2/ The concept of "imminent danger" under both statutes was the same, although the language differs.

3/ The high-magnitude accident aspect of this concept was abandoned in the subsequent administration of both the 1969 Mine Act and the 1977 amendments thereto.

fire, mine inundation, or man-trip or man-hoist accident, * * *." The meaning of the phrase "similar, etc." in the 1965 Amendments is ascertainable because the line was clearly drawn between the phrase "similar, etc." and the phrase unwarrantable failure of such operator to comply"-- both phrases being set forth as separate prerequisites for the issuance of the underlying withdrawal order. By contrast, in the 1969 Act, the phrase "similar, etc." was not invoked in connection with issuance of the underlying withdrawal order, but first appeared in section 104(c)(2) permitting issuance of unwarrantable failure withdrawal orders upon subsequent inspections provided there have been no intervening inspections disclosing "no similar violations". Thus, the ambiguity. While it can be maintained that the omission of the phrase in question from sections 104(c)(1) was intended to accomplish the excision of the "substantial and significant" requirement, for the various reasons stated herein, I believe there was no such intention. To begin with, having just used the phrase "unwarrantable failure etc." in the two parts of section 104(c)(1), Congress abandoned it in 104(c)(2) and opted in favor of "similar etc." -- words of art already possessing specific meaning.

Comparison of the 1965 Amendments with the 1969 Act reveals various other instances where, for brevity, the authors of the 1969 Act made omissions or placed labels on contrived concepts. It appears that the enumeration of the major disasters, which were the targets of the 1965 Amendments, was shortened in the 1969 Act to the phrase "mine safety or health hazard". A significant example of an omission is that in drafting the second part of section 104(c)(1) authorizing issuance of the underlying order, the authors of the 1969 Act did not see fit to reiterate the requirement set forth in the first part that the conditions constituting the prerequisite violation not result in an "imminent danger". 4/ By implication, therefore, one must read into the pertinent language, the requirement that if the inspector did find "imminent danger", he would not order withdrawal pursuant to the provisions of 104(c)(1), but rather would proceed under section 104(a). The omission of the requirement in the 1969 Act that the violation involved in the issuance of the underlying 104(c)(1) order be of such nature as could significantly and substantially contribute to a hazard appears to have been left out in the same manner, but this point is not crucial to the ultimate conclusion reached that "similar etc." referred not only to unwarrantable failure but also to the "nature" of the underlying violations as specified by Congress. It is clear that

4/ It seems that the intent of Congress in promulgating the 1969 Act was that if an inspector, upon his inspection of a mine should determine that imminent danger existed, he should issue an order of withdrawal on that basis. Imminent danger orders under section 104(a) thus overrode the other two types, i.e., "failure to abate" orders issued under 104(b), and "unwarrantable failure to comply" orders under 104(c).

under the 1965 Amendments: (1) the legislative scheme involved in the pertinent provision was the utilization of withdrawal orders as a means of eliminating the occurrence of serious, or disaster-type, accidents; and (2) the nature of violations which might cause such accidents was expressly described as those that would create the danger of a mine explosion, mine fire, mine inundation, etc. Then during the administration of the 1969 Act, the extraordinary meaning previously given S & S terminology disappeared (See discussion of Alabama By-Products, Inc., 7 IBMA 85, in National Gypsum). It is unknown if the question whether Congress, in enacting the 1969 Act (or the 1977 Act) intended to carry through the meaning previously attributed to this phrase was ever litigated.

Had S & S in its early idiom been deemed to have been revitalized by succeeding mine safety legislation, the current shaping of various enforcement procedures would have been significantly affected. Had the original "Major Disaster" objective of Congress been sustained through the 1977 Amendments, the panoply of enforcement devices, in an abstract sense, would have taken on a certain logic in fitting. In such scenario, the essence of an imminent danger violation would be the possibility of its occurrence "at any time", i.e., its imminence or immediacy; the essence of an S & S violation would be its potential for harm posed-- both qualitatively and quantitatively, i.e., its magnitude, 5/; and the essence of an "unwarrantable failure" violation would be a combination of (1) the negligence (recklessness and wilfulness) involved in its commission, i.e. culpability, and (2) magnitude. We turn now to prevailing S & S precedents.

B. Governing Precedents

The Federal Mine Safety and Health Review Commission has in several opinions crafted a special meaning to the S & S language contained in the 1977 Mine Act. Thus, the Commission's first and landmark interpretation of this language appeared in Cement Division, National Gypsum Co., 3 FMSHRC 822 (April 1981), in which it held:

> ...[A] violation is of such a nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard if, based on the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature.

5/ This is contrasted with the emphasis of the National/Gypsum Mathies formula, which governs the S & S determination in this proceeding, which is on the probability of the violation's occurrence - not the magnitude of the accident envisioned.

3 FMSHRC at 825 (emphasis added). In Mathies Coal Company, 6 FMSHRC 1 (January 1984), the Commission reaffirmed the analytical approach set forth in National Gypsum, and stated:

> 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.

6 FMSHRC at 3-4 (footnote omitted). Accord Consolidation Coal Company, 6 FMSHRC 189, 193 (February 1984).

Additional aspects of the Mathies decision must be considered here. As to the four elements set forth in Mathies, the Commission, in Secretary v. U.S. Steel Mining Corp., 6 FMSHRC 1834 (1984), noted that the reference to "hazard" in the second element was simply a recognition that the violation must be more than a mere technical violation -- i.e., that the violation present a measure of danger. See National Gypsum, supra, 3 FMSHRC at 827. It also noted that the reference to "hazard" in the third element in Mathies contemplates the possibility of a subsequent event: that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury. The fourth element in Mathies requires that the potential injury be of a reasonably serious nature. Finally, in U.S. Steel Mining Co., Inc., 6 MSHRC 1573, 1574 (1984), the Commission re-emphasized its holding in National Gypsum that the contribution of the violation to the cause and effect of a mine safety hazard is what must be significant and substantial. Thus, in National Gypsum, supra, at page 827 the Commission held:

"The interpretation we have placed upon the significant and substantial provisions is, we believe, consonant with the statutory language and with the overall enforcement scheme. The provision involved applies to violations that "could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." Although the Act does not define the key terms "hazard" or "significantly and substantially", in this context we understand the word "hazard" to denote a measure of danger to safety or health, and that a violation "significantly and substantially" contributes to the cause and effect of a hazard if the violation could be a major cause of a danger to safety or health. In other words, the contribution to cause and effect must be significant and substantial." (emphasis supplied).

Under the above Commission precedents, the words "significant and substantial" once again became words of art, different than in the past, and this phrase now modifies the word "contributes" (as part of a literal interpretation of the Act) and does not jump over the word "contributes" to modify and enlarge the magnitude of the hazardous event contemplated.

The four-element test set forth in Mathies involves a major conceptual expansion of the S & S language of the Act itself as well as to part of the Commission's landmark discussion of the subject in National Gypsum. Thus, the requirement in the third element of Mathies (itself derived from National Gypsum) that the Secretary estabish a "reasonable likelihood" that the hazard contributed to "will" result in an event in which there is an injury is additional to the literal S & S language of Section 104(d)(1). Secondly, a linkage is created from the violation to the occurrence of an injury - rather than to the violation's "contribution" to the cause and effect of a hazard. Stretching it, it seems maintainable that the "linkage" expansion is covered by a violation's "contribution" to the "effect" of a hazard.

These two independent proof requirements ("likelihood" and "contribution"), which do not qualify each other, were positioned together in United States Steel Mining Company, Inc., 7 FMSHRC 1125, 1129, as follows:

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

Thus, while the evidence in this matter clearly shows, in the language of the Act, there exists a significant and substantial contribution to the cause and effect of a hazard, the Secretary even so must additionally show that there is a reasonable likelihood that such hazard "will" (not "may" or "could") result in an event (here, an ignition or explosion) in which there is an injury of a reasonably serious nature.

C. Reasonable Likelihood and Imminent Danger

In the context of this case, it is manifest that for the hazard, in the words of Mathies, "to result in an injury", the hazard must come to fruition, that is, an ignition or explosion must occur. As recognized by the parties, the question becomes in this matter, and I believe in most S & S cases, whether there is a reasonable likelihood that the hazard will actually come about. If the occurrence of such event is reasonably likely,

does such mine condition, as so defined, constitute an "imminent danger" - a situation the existence of which is expressly prohibited by Section 104(d)(1) of the Act as a prerequisite to the validity of an "unwarrantable failure - not S & S - enforcement paper? This is so, because both the ordinary dictionary meaning and the legal meaning of the phrase "reasonable likelihood" (and the corollary phrase "reasonably likely") is synonymous with "probability" - not "possibility". In this connection, the question must be asked: are not the vast majority of safety and health standards directed against substantial hazards and perils, that is, are they not designed to prevent, or in some cases alleviate, mine conditions or practices which could result in serious physical injuries or health problems?

D. Reasonable Likelihood

Under existing Commission precedent the phrase "significant and substantial" has no generic relationship to the phrase "reasonable likelihood", and its usage runs literally, as it is used in Section 104(d), as a modifier of the contribution a violation makes to the cause and effect of a hazard. The key is no longer the mother phrase, S & S, but "reasonable likelihood".

"Likelihood" is defined in Webster's New Collegiate Dictionary (1979, G & C Merriam Co.) as "probability" and in the Random House College Dictionary (Rev. ed., 1980) as "the state of being likely or probable; probability." Again, in Webster's Third New International Dictionary (Unabridged ed., 1976, G & C Merriam Co.) its primary definition is "probability".

Review of Words and Phrases and other texts and precedents again reveals that "likely" means "probably" and "likelihood" means "probability." It also appears that the adjective "reasonably" used to modify the subject word imparts no significant change of meaning to the base word. For example, in connection with a similar phrase, "reasonably to be expected", the Interior Department's Board of Mine of Mine Operations Appeals has held that use of the word "reasonably" in the 1969 Mine Act's Section 3(j) definition of "imminent danger" simply meant that the test of imminence was objective and that the government inspector's subjective opinion need not be taken at face value. Freeman Coal Mining Corporation, 2 IBMA 197 (1973).

In General Adjustment Bureau, Inc. v. General Ins. Adjust. Co., 381 F.2D 991 (10th Cir., 1967) the court affirmed the nearly universal meaning given the term:

> "It is argued there is a difference between the "likely" test and the "probably" test. We do not agree. "Likely" means "probably". The Random House Dictionary of the English Language, 830 (Unabridged ed. 1966). The Oklahoma Supreme Court used both the "likely" language and "probably" language, without distinction, in Stillwater Milling Company v. Eddie, 108 P.2D 126, 128-129 (Okla. 1940). Since the adoption of the Oklahoma Business

Corporation Act in 1947 the Oklahoma court has continued to consider the tests as synonymous."

Again, in U.S. v. Powell, 761 F.2d 1227, at 1233 (8th Cir., 1985), the same result ws reached:

> "The issue here is the meaning of the word "likely" in the statute. We believe the word should be read in its ordinary sense, as referring to something that is more likely to happen than not.
>
> If one asks whether a horse is likely to win a race, and the answer is yes, the person who asked the question naturally understands that the chances of the horse's winning are greater than those of its losing. He would not ordinarily believe that a "yes" answer meant only that the horse had a greater than negligible (in the legal context, nonfrivolous) chance of winning."

In this proceeding for purposes of determining if the three violations are S & S, the National Gypsum/Mathies phrase "reasonable likelihood" will be deemed synonymous with "probability."[6/]

6/ As an aside, it is of some interest that the subject of possibilities and probabilities is placed, under the Plan of Classification in Roget's Thesaurus (New ed., St. Martin"s Press, 1965), under the broad class "Intellect", under the Division "Formation of Ideas" and under the subsection thereof pertaining to "Materials for Reasoning." Considered then as "degrees of evidence" are the concepts of Possibility, Impossibility, Probability, Improbability, Certainty and Uncertainty.

In common and legal reasoning the general ideas of possibility and probability seem to require clear distinction in their application to situations and in their use as guides to future conduct. Both probability and possibility have ranges- "probability" can bump against certainty at the top end of the scale, and "possibility" can nudge "impossibility" at the bottom end of its range. In reviewing various mine safety cases, one finds that "reasonable likelihood" is sometimes applied to what appears to be mid-range possibilities rather than to any degree of probability. A clear line of demarcation between the concepts appears useful and necessary for S & S application to mine safety conditions. The question must be asked, was any range of probability actually intended in National Gypsum and Mathies? The conclusion has been reached here that use of the frequently-used phrase "reasonable likelihood" mandates a finding of at least some level of probability. Speaking in the abstract or vernacular without reference to this record or mine safety matters generally, my impression is that there prevails in both common and legal reasoning (1) three levels of possibility, remote (low-level), substantial (mid-level), and strong (high-level); and (2) two levels of probability, ordinary and strong-- with impossibility and certainty at either end of the spectrum.

E. Imminent Danger

In delineating the actual test for determining whether the three subject violations are S & S violations, the question arises whether the third element of Mathies does not approximate the current formula for determining imminent danger. As will be noted, the phraseology is now closely analogous. If indeed, in practical application in a given matter, there is no distinction between the S & S and imminent danger formulas as a matter of theory and concept, then a problem arises; Should the National Gypsum/Mathies test for pure S & S cases be carried over to "unwarrantable failure" matters arising under Section 104(d)(1) of the Act, then an impossibility of 104(d)(1) enforcement is created. This is so because "unwarrantable failure" Citations and Orders issued under 104(d)(1) must involve violations which are not only S & S but which also "do not cause imminent danger." To avoid this direct contradiction of terms in unwarrantable failure situations, there must, as a matter of logic, be some major conceptual difference or differences between S & S and imminent danger. What then is the prevailing approach for determining imminent danger?

The term "imminent danger" is found in both the Federal Coal Mine Health and Safety Act of 1969 and the Amendments thereto which comprise the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., and the definition thereof currently found in section 3(j) of the 1977 Act is for all intents and purposes identical in both Acts, to wit:

> "the existence of any condition or practice in a coal or other mine 7/ which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated." (emphasis added).

The United States Court of Appeals for the 7th Circuit in Freeman Coal Mining Company v. Interior Board of Mine Operations Appeals, et al., 504 F.2d 741 (1974), gave this definition of "imminent danger":

> An imminent threat is one which does not necessarily come to fruition but the reasonable likelihood that it may, particularly when the result could well be disastrous, is sufficient to make the impending threat virtually an immediate one. (Emphasis supplied).

During the enactment of the 1977 Act, the Senate Committee on Human Resources, made this statement:

> "The Committee disavows any notion that imminent danger can be defined in terms of a percentage of probability that an accident will happen; rather the concept of im-

7/ By virture of Section 102(b)(4) of the 1977 Mine Act the phrase "or other" was added after the word "coal" to expand the Act's coverage to all mines.

minent danger requires an examination of the potential of the risk to cause serious physical harm at any time. It is the Committee's view that the authority under this section is essential to the protection of miners and should be construed expansively by inspectors and the Commission." (Leg. Hist. of the Federal Mine Safety & Health Act of 1977, 95th Cong., 1st Sess. (hereinafter Leg. Hist. 1977 Act) at 38.) (emphasis added).

Under the 1977 Act, decisional emphasis seems to be on the individual factual configurations involved rather than on discrete tests and formulas for determining imminent danger. See, for example, Secretary of Labor v. U.S. Steel Corporation, 4 FMSHRC 163 (1982). At this time, the Act's section 3(j) definition appears to be the primary legal touchstone. See National Gypsum, supra, at page 828. Evaluating the dangerous condition or practice - whether or not a violation-in the perspective of continued mining operations, as is required with S & S violations, also appears to be a prerequisite in determining the validity of an imminent danger order. There also is a case for treating these as prerequisites: (1) that the hazard (risk) foreseen must be one reasonably likely to induce fatalities or injuries of a reasonably serious nature, and (2) that such hazard or risk have an immediacy to it, that is, it could come to realization "at any time." See C.D. Livingston, 8 FMSHRC 1006, 1013-1016 (1986).

In summary, it is concluded that in practice the formulas for determining S & S and imminent danger presently coincide in all respects except for "immediacy."[8]/ If, as I have previously determined, the Mathies/National Gypsum "reasonable likelihood" concept is synonymous with "probability", the potential hazard contemplated in S & S violations in many cases, for all practical purposes may be perceived to be susceptible of occurring "at any time," or in Section 3(j) terminology "before such condition or practice can be abated".

Finally, it should be noted that in National Gypsum, supra, at part 828, it was recognized that imminent danger "contains elements of likelihood and gravity" - as now does S & S.

8/ In Secretary v. Halfway, Inc., 8 FMSHRC 8 (1986), the Commission made the following point in connection with the timing of an S & S Citation:

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

(footnote continued on page 17)

We turn now to the conclusions to be drawn from the factual factors established in the perspective of the foregoing delineation of the National Gypsum/Mathies test and with the understanding that when the Citations were issued there was no significant presence of methane, the ventilation system and methane monitors were working properly, and there was no arcing or malfunction inside the three electrical boxes involved.

F. Factual Conclusions

From the process of relating the various factual findings with the legal interpretations set forth above, it is concluded that with respect to all three violations there was but a remote possibility that a release of methane would occur, and that there was more than a remote possibility but less than a strong possibility, that is, a substantial possibility, that the methane monitoring devices might malfunction or otherwise fail in the context of continuing mining operations. As to Respondent's ventilation system, I also conclude that there was both a realistic and substantial possibility that such would fail to prevent methane from reaching the three pieces of electrical equipment in question should, in the context of continued mining, a release of methane have occurred. Finally, on the basis of this record, I find it only a remote possibility that arcing or sparking would have occurred at the time any of the subject equipment was in impermissible condition.

Based on the above findings, I conclude that there existed but a very remote possibility that some or all of the various factors mentioned (methane release, inadequate ventilation, methane monitor failure, arcing, and impermissible conditions) would occur simultaneously or otherwise coincide in such manner as to result in an ignition (or explosion). Thus, I ultimately conclude that there did not exist a reasonable likelihood, or probability, that the hazard the three violations contributed to would result in an injury, although such violations in the language of National Gypsum, "could" each be a "major cause" of a danger to safety ..." and did, in fact, contribute "a measure of danger" to safety.

It having been determined that one of the required elements of the National Gypsum/Mathies formula was not established, the designation of the three violations as being "of such nature as could significantly and substantially contribute to the cause and effect of a ... mine safety ... hazard" is found unsubstantiated and subject to deletion.

---

fn 8 continued -

Nevertheless, it would seem that in the reality of most mining situations that if a violative condition will probably result in a serious injury, the happening of the contemplated accident or event will often be imminent, that is, capable of occurring "at any time." The theoretical line between S & S and imminent danger seems very thin.

G. Ultimate Conclusions

The three permissibility violations in this matter each significantly and substantially contributed to the cause-and effect-of a mine safety hazard.

However, in terms of the third element of the National Gypsum/Mathies formula, there was not a reasonable likelihood that the hazard contributed to would result in an event in which there is an injury, that is, it was not reasonably likely (probable) that the hazard would happen, or stated another way, that the contemplated event (a methane ignition or explosion) would occur so as to cause serious injuries or fatalities.

PENALTY ASSESSMENT

The regulation involved here, in setting tolerance (gap) limits for electrical boxes, works as a fail-safe or "last resort" (T. 53, 75, 85) procedure to prevent ignitions and explosions if methane should escape during mining and a potent percentage thereof reach machinery with potential ignition sources. Aside from innate mine design, two other means -ventilation and methane monitoring devices-- are the other links in a chain of preventive measures which can serve to block methane from contacting arcing inside control panels and electrical boxes. While ventilation systems and methane monitors, like electrical box tolerances, can be controlled by safety regulation, the escape of methane itself, being an event which ordinarily, and in terms of this record, can't be anticipated or pinpointed as to time or place (T. 298-320, 303) is not susceptible to certain prevention by regulation. In terms of the causal chain described in this matter, the premium is best placed on the causal link subject to the most effective control and regulation-- on this record, excessive tolerances. The three violations made clear contributions to the creation of serious safety hazards. While it was not reasonably likely that such hazards would come to fruition and result in an injury to the several miners exposed thereto, had an ignition (or explosion) occurred serious injuries or fatalities would have resulted. While I have found the violations were not S & S, I do conclude that such were of a relatively high degree of seriousness.

It has not been contended, and there is no probative evidence that the Respondent was negligent with respect to the three violations (T. 94, 95). The Respondent, a large mine operator with a commendable compliance history, also has been found to have proceeded in good faith to promptly abate the three violations upon notification thereof. A penalty of $150.00 for each violation is found appropriate.

ORDER

The three subject Citations, numbered 2983339, 2083401, and 2083419, are modified to delete the "S & S" designations therein and are otherwise affirmed.

Respondent shall pay the Secretary of Labor the total sum of $450.00 ($150.00 for each violation) as and for civil penalties on or before 30 days from the date of this decision.

Michael A. Lasher, Jr.
Administrative Law Judge

Distribution:

Tobias B. Fritz, Esq., Office of the Solicitor, U.S. Department of Labor, 911 Walnut Street, Room 2106, Kansas City, MO 64106 (Certified Mail)

Thomas E. Downey, Jr., Esq., Downey & Murray, Boettcher Building, Suite 400, 8400 East Prentice Avenue, Englewood, CO 80111 (Certified Mail)

/bls

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

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

APR 17 1987

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEST 85-148-M A.C. No. 48-00639-05515
v.	:	Docket No. WEST 86-83-M A.C. No. 48-00639-05517
TEXASGULF, INC., Respondent	:	Wyoming Soda Ash

ERRATA

At page 5 of my Decision in this matter issued approximately April 10, 1987, in the first sentence following the heading "Discussion" the quoted phrase "serious and substantial" is amended to read "significant and substantial" to correct the author's error.

Michael A. Lasher, Jr.
Administrative Law Judge

Distribution:

Tobias B. Fritz, Esq., Office of the Solicitor, U.S. Department of Labor, 911 Walnut Street, Room 2106, Kansas City, MO 64106 (Certified Mail)

Thomas E. Downey, Jr., Esq., Downey & Murray, Boettcher Building, Suite 400, 8400 East Prentice Avenue, Englewood, CO 80111 (Certified Mail)

/ot

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
333 W. COLFAX AVENUE, SUITE 400
DENVER, COLORADO 80204

April 14, 1987

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEST 87-2-M A.C. No. 26-01527-05503
v.	:	Tonopah Divide Mine
FALCON EXPLORATIONS, Respondent	:	

DECISION

Appearances: Marshall P. Salzman, Esq., Office of the Solicitor, U.S. Department of Labor, San Francisco, California, for Petitioner;
Mr. Everett Berg, Falcon Explorations, Emeryville, California, pro se.

Before: Judge Cetti

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., (the "Mine Act"). After notice to the parties, a hearing on the merits was held before me at Oakland, California, on January 15, 1987. The parties presented oral and documentary evidence, and submitted the matter for decision, without exercising their right to file post-trial briefs. The mine operator admits the violations charged occurred but questions the appropriateness of MSHA's administrative penalty assessments.

ISSUE

The single issue presented is what penalty is appropriate for each of the admitted violations.

STIPULATIONS

The parties stipulated as follows:

1. The history of previous violations is good.

2. The size of the mining operation was small.

3. The penalty would not affect the ability of the operator to continue in business.

4. The mine operator demonstrated good faith in attempting to achieve rapid compliance after notification of the violations.

SUMMARY OF EVIDENCE

Background

A small three-man heap leaching operation was the only activity at the mine site at any time relevant to this proceeding. The operation consisted of using a weak solution of cyanide, water, and lime in an attempt to extract what minimal gold and silver might remain in the heap leach pad. The mine had been reopened for this limited purpose two months before the inspection. This limited operation was completed and the mine closed six months after it opened.

The only persons employed in this operation was the manager, Mr. Waterson, and his two adult sons. Each of these miners had a mobile trailer home at the site.

On May 20th and 21st of 1986, Federal Mine Inspector Earl McGarrah made a routine inspection of this three-man heap leaching operation and issued three citations charging the operator with violations of Title 30 C.F.R. § 56.12068, 56.12028, and 56.15001. Thereafter this proceeding was initiated by the filing of a proposal for assessment of a civil penalty by the Secretary of Labor on behalf of the Mine Safety and Health Administration pursuant to Section 110(a) of the Mine Act. The operator filed a timely appeal.

Citation No. 2673962 - Transformer Enclosures

This citation charges a violation of 30 C.F.R. § 56.12068 which in its entirety provides:

> "Transformer enclosures shall be kept locked against unauthorized entry."

The citation charges that three enclosures of energized transformers were not locked and that one person was affected by the violation.

The mine inspector and the mine manager Mr. Waterson drove up to the three transformers to check them out. The transformers were located in an area between the three trailer houses and the small mill building. Each of the two smaller transformers (440 volts) had a factory manufactured enclosure (housing). Each enclosure had an access door which was closed but not locked. When the manager opened the access door for inspection the energized terminals inside the housing enclosure were exposed. The mine inspector testified if a person were to come in contact with the energized terminal he could be very seriously injured or killed.

The mine inspector testified that the violations were abated by the manager within 30 minutes.

The third transformer (4160 volt) was enclosed by a fence which had a gate that was closed but unlocked. A person would have to open the closed gate to get to the transformer.

The mine manager promptly abated the violations by taking three locks from his trailer home and immediately locking each of the enclosures.

The mine inspector stated that when he asked the manager why the transformer enclosures were not locked the manager told him that he was busy and "just forgot."

On cross examination the mine inspector testified that he made an earlier inspection of the mine site and at that time the three transformer enclosures were "probably" locked since he did look at them and did not issue a citation.

DISCUSSION AND FINDINGS

The mine operator admitted the violation and it is taken here as established fact.

The only issue is what penalty is appropriate under the facts of this case.

In determining the appropriate penalty Section 110(i) of the Mine Act requires the Commission and its Judges to consider the mine operators size, its negligence, its good faith in attempting to achieve rapid compliance after notification of a violation, its history of prior violations, the effect of the monetary penalty on its ability to continue in business and the gravity of the violation.

This was a very small three man operation consisting of a father and his two adult sons. The parties stipulated that the size of the operation was small.

Evidence was presented that the access doors and gate to the transformer enclosures were closed but were not locked at the time of the inspection No evidence whatsoever was presented as to how long the doors or gate had been unlocked. Appropriate locks were provided by the operator and were readily available. The only evidence we have as to why the doors were unlocked is the hearsay statement that Mr. Waterson "forgot". Accepting this statement as true this constitutes ordinary simple negligence.

The parties stipulated to the operator's good faith in achieving rapid compliance. This was based no doubt on the fact the access doors and the gate to the transformer enclosures were locked within 30 minutes after the violation was first noted.

With respect to the gravity of the violation we are not dealing in this case with a concealed or hidden danger or a trap for the unwary. The danger is an obvious one. Miners are aware of the inherent danger of exposing themselves to the energized electrical parts inside a transformer.

The only way one could be exposed to this hazard is to deliberately and intentionally open the closed access door of the transformer enclosure. It is most unlikely that a miner could accidentally or inadvertently be exposed to the hazard.

While these considerations may be irrelevant as to the existence of the violation they are valid considerations in determining the gravity of the violation for purposes of setting the appropriate penalty.

In this case there was no evidence of actual exposure to the hazard. There was only a possibility that if an unauthorized person were to open the closed door or closed gate of one of the enclosures that the unauthorized person could be exposed to the hazard of contacting one of the energized parts. There was no evidence that any of the three miners who had potential access to the transformers were or were not authorized or qualified persons.

The parties stipulated with respect to four of the six mandatory statutory criteria set forth in Section 110(i) of the Mine Act. The parties in addition to stipulating to the small size of the mining operation and its good history, also stipulated to the operators good faith and to the fact that the penalty would not affect the operator's ability to continue in business. All four stipulations are accepted and adopted as my finding of fact.

After due consideration of the six statutory criteria I conclude that the appropriate penalty for the violation in this case is $30.

Citation 2673963 - Grounding Systems Test Record

This citation alleges a violation of 30 C.F.R. § 56.12028. This section not only requires testing of grounding systems for continuity and resistance immediately after installation but also requires a record of the resistance measured be made available on request by a Federal mine inspector.

Evidence was presented that two months before the inspection the mine was reopened for a small temporary milling operation. It was a small, three-persons, six-months long, operation to attempt to extract what minimal gold and silver might remain in

the heap-leach pad. Just before the reopening the mill was rewired by Logan Electric for the new Merilcro mill that was installed specifically for this temporary leach pad operation. The grounding system was installed in compliance with all relevant safety regulations. Tests performed after the inspection revealed all measurements and test results were in compliance with the National Electric Code and the relevant safety regulations.

The mine inspector testified that at the time of the inspection Mr. Waterson did not know whether the electrical contractor had "run these tests or not". Mr. Waterson looked for the record but he could not find it.

The mine inspector testified that the purpose of testing the grounding system was to make sure that it was working properly. He stated that if it wasn't working properly its "possible" somebody could be electrocuted.

DISCUSSION AND FINDINGS

30 C.F.R. § 56.12028 not only requires testing of the grounding system immediately after installation but also requires a record of the resistance measured during the most recent test be made available on request by a federal mine inspector.

The record clearly shows that the mine manager was not able to make available to the mine inspector a record of the resistance measured. His failure to make sure that the required record be made and kept available on request constitutes ordinary negligence.

Since the grounding system was installed in compliance with the National Electricity Code and with the relevant safety regulations, the violation did not result in any potential hazard. The gravity, therefor, is considered minimal.

The parties stipulated to four of the six statutory criteria mandated by section 110(i) of the Mine Act. The parties stipulated that the history of previous violations was good, that the size of the three man mining operation was small, that a penalty would not affect the operator's ability to continue in business, and that good faith was demonstrated in attempting to achieve prompt abatement of the violation. The stipulations are accepted and adopted as my finding of fact.

In the light of my finding on the six statutory penalty criteria I can conclude the appropriate penalty for the violation in this case is $10.

Citation 2673964 - First Aid Material

The citation charges that "adequate first aid materials were not provided at the mine. A cyanide kit was not at the property". The operator admits that these allegations are true.

When the mine inspector asked why there was no first aid kit at the mine, Mr. Waterson told him that before commending the temporary heap leaching operation the mine had been shut down. Since they did not plan on reopening, they sold the first aid and the cyanide kit. Since reopening for the small three-man heap leaching operation he has been so busy he had neglected to purchase a first aid kit or a cyanide kit.

When asked by the Solicitor what was the danger of failing to provide a first aid kit the mine inspector replied "they do have eye washes and things like that in it along with band aids, to aspirin." Asked as to what was the danger of not having a cyanide kit with amyl nitrate, the mine inspector stated that the miners were using cyanide in the heap-leaching operation and the cyanide kit would be used in the event that an employee was overcome by cyanide. He explained that in order to revive such a person you need to immediately get him to fresh air, break open a amyl nitrate capsule, and get him breathing. He stated "its possible" that not having a first aid and a cyanide kit could result in death.

Mr. Berg, the mine owner, testified that the miners used a very weak solution of cynaide mixed with water and lime in the heap leaching operation but that the solution was so very weak and that it was "very unlikely that anybody even drinking the solution would die."

DISCUSSION AND FINDINGS

The operator has admitted the violation of § 56.15001 as alleged in the citation and it is accepted here as established fact. 30 C.F.R. § 56.15001 mandates that "adequate first-aid materials" shall be provided at places convenient to all working areas.

The purpose of this safety standard is to enable those at the work site to provide needed emergency treatment until such time as professional help can be obtained. When there is a sudden serious injury or illness first aid is an attempt to keep the victim alive and in the best condition possible until medical help arrives. In certain cases there is a critical period in which the availability of adequate first aid materials can mean the difference between life and death for the victim. However, in many other cases the lack of adequate first aid material is not critical. On balance I would evaluate the gravity of the violation in this case as moderate.

The only evidence we have as to negligence is the hearsay statement that the mine manager was busy and forgot. I conclude that this was plain ordinary negligence.

The parties stipulated with respect to four of the six statutory criteria set forth in section 110(i) of the Mine Act. The parties stipulated that the history of previous violations was good, that the mining operation was small, that the penalty

would not affect the operator's ability to continue in business, that the operator demonstrated good faith in attempting to achieve prompt abatement of the violation. These stipulations are accepted and adopted as my finding of fact on four of the six statutory criteria.

With respect to the two remaining statutory criteria it is found that the violation was caused by ordinary negligence of the mine manager (which is properly imputed to the operator) and that the gravity of the violation was moderate.

Based upon my consideration of the six statutory penalty criteria, I conclude that $60.00 is the appropriate penalty in this case for the admitted violation of 30 C.F.R. § 56.15001.

CONCLUSIONS OF LAW

Based upon the entire record and the findings made in the narrative portion of this decision, the following conlcusions of law are entered:

1. The Commission has jurisdiction to decide this case.

2. Respondent violated 30 C.F.R. § 56.12068, Citation 2673962 should be affirmed, and a civil penalty of $30 assessed.

3. Respondent violated 30 C.F.R. § 56.12028, Citation 2673963 should be affirmed, and a civil penalty of $10 assessed.

4. Respondent violated 30 C.F.R. § 56.15001, Citation 2673964 should be affirmed, and a civil penalty of $60 assessed.

ORDER

Accordingly each of the citations herein is ordered affirmed; and Falcon Explorations is ordered to pay a civil penalty totaling $100.00 within 30 days of the date of this decision.

August F. Cetti
Administrative Law Judge

Distribution:

Marshall P. Salzman, Esq., Office of the Solicitor, U.S. Department of Labor, 11071 Federal Building, 450 Golden Gate Avenue, San Francisco, CA 94102 (Certified Mail)

Falcon Explorations, Mr. Everett E. Berg, 1900 Powell Street, Suite 460, Emeryville, CA 94608 (Certified Mail)

/bls

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

April 14, 1987

SOUTHERN OHIO COAL COMPANY, Contestant	:	CONTEST PROCEEDINGS
	:	Docket No. WEVA 86-186-R
v.	:	Order No. 2713975; 2/10/86
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Docket No. WEVA 86-189-R
	:	Order No. 2713980; 2/14/86
	:	Docket No. WEVA 86-193-R
	:	Order No. 2705919; 2/24/86
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. WEVA 86-235
	:	A. C. No. 46-03805-03719
v.	:	Docket No. WEVA 86-284
	:	A. C. No. 46-03805-03725
SOUTHERN OHIO COAL COMPANY, Respondent	:	Martinka No. 1 Mine

DECISION

Appearances: David M. Cohen, Esq., American Electric Power Service Corporation, Lancaster, Ohio, for Contestant/Respondent;
James H. Swain, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Respondent/Petitioner.

Before: Judge Maurer

STATEMENT OF THE CASE

Contestant, Southern Ohio Coal Company (SOCCO), has filed notices of contest challenging the issuance of Order No. 2713975 (Docket No. WEVA 86-186-R), Order No. 2713980 (Docket No. WEVA 86-189-R), and Order No. 2705919 (Docket No. WEVA 86-193-R) at its Martinka No. 1 Mine. The Secretary of Labor (Secretary) has filed petitions seeking civil penalties concerning these alleged violations in the total amount of $2,200.

At the commencement of the hearing on these cases, which was held on December 30, 1986, in Morgantown, West Virginia, the parties jointly moved for approval of their settlement of

Docket No. WEVA 86-284 and that portion of Docket No. WEVA 86-235 that pertains to Order No. 2713975. I approved a reduction in civil penalty from $700 to $500 in Docket No. WEVA 86-284 (Tr. 5) and similarly approved a reduction from $850 to $500 concerning Order No. 2713975 (Tr. 8). This action had the effect of mooting Docket Nos. WEVA 86-186-R and WEVA 86-193-R.

Therefore, the case left to be tried and which was tried concerned only Order No. 2713980 (Docket No. WEVA 86-189-R) and so much of Docket No. WEVA 86-235 as pertains to that particular order.

Both parties have filed post-hearing proposed findings of fact and conclusions of law, which I have considered along with the entire record herein. I make the following decision.

STIPULATIONS

The parties have agreed to the following stipulations, which I accept (Tr. 8-9):

1. The Southern Ohio Coal Company is the owner and operator of the Martinka No. 1 Mine.

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

3. The presiding Administrative Law Judge has jurisdiction over this proceeding.

4. The inspector who issued the subject order was a duly authorized representative of the Secretary of Labor.

5. A true and correct copy of the subject order was properly served upon the operator.

6. The imposition of any penalties in this proceeding will not affect the operator's ability to continue in business.

7. The operator is to be considered large in size for penalty assessment purposes.

8. The conditions set forth in the order, Order No. 2713980, constituted a violation of the cited mandatory standard, 30 C.F.R. § 75.518.

The issues remaining before me for decision then are whether the admitted violation of the cited standard was "significant and substantial" and caused by the "unwarrantable

failure" of the mine operator to comply with that standard as well as the appropriate civil penalty to be assessed for the violation, should any be found.

Order No. 2713980, issued pursuant to section 104(d)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (the Act) alleges a violation of the regulatory standard at 30 C.F.R. § 75.518 1/ and charges as follows:

> There was inadequate short circuit protection for the belt take up motor for 2 East B belt. The motor was a 25 horsepower, 575volt, 26.2 full load amps and was protected by a 400 amp circuit breaker with a trip range of 800 to 1600 amperes.

MSHA Inspector John Paul Phillips issued the order at bar at the Martinka No. 1 Mine on February 14, 1986. On that date, he went to a location in the mine that was variously described in the record as being either the 2 East B Section or the 2 East C Section. In any event, he found that the short circuit protection for the belt take-up motor there was provided by a 400 amp circuit breaker with a magnetic trip range from 800 to 1600 amperes. This motor is a 25 horsepower, 575 volt motor which has a continuous rated capacity of 26.2 full load amps. The regulations require short circuit protection for this motor to be in accordance with the National Electric Code of 1968, and the maximum allowable short circuit protection for this motor is 700 percent of the full load current of the motor, 183.4 amps in this case. The parties have stipulated that this amounts to a violation of 30 C.F.R. § 75.518.

SOCCO contends, however, that the order was improperly designated a "significant and substantial" violation.

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

1/ 30 C.F.R. § 75.518 provides as follows:

> Automatic circuit-breaking devices or fuses of the correct type and capacity shall be installed so as to protect all electric equipment and circuits against short circuit and overloads. Three-phase motors on all electric equipment shall be provided with overload protection that will deenergize all three phases in the event that any phase is overloaded.

> 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).

In the instant case, it is stipulated that a violation of the cited standard occurred. Therefore, we may use that fact as a starting point for an examination of the other relevant factors.

Inspector Phillips testified that the hazard presented in his opinion by this lack of short circuit protection would be fire and smoke with the resulting possibility of lost work days or restricted duty at the least.

Mr. Shriver, an electrical engineer employed by MSHA, was called as an expert witness. He stated that the most probable situation in which a motor such as the one involved in this case would develop a short circuit of less than 800 amps would be where a motor bearing went bad. This would permit the cylindrical rotor of the motor to get cocked somewhat inside the stator windings. There is an extremely close clearance maintained between the rotor and stator and it would, therefore, be conceivable that a short could occur from phase to phase contact within the motor without making contact with ground. The impedance of the windings would then reduce the current flow below the 800 ampere range. Mr. Shriver went on to opine that in the absence of short circuit protection for less than the 800 amps, the short would be capable of eroding a hole completely through the motor to the outside very rapidly. If there were coal dust present, that could be ignited and generate smoke.

On cross-examination, the witness conceded that there was about an equal chance that a bearing failure that would cause a short by phase to phase contact would also contact ground. In that event, the ground protection devices would work to shut off the circuit. There was testimony to the effect that the ground phase protection was operating properly.

James Lunden, a staff electrical engineer employed by SOCCO, was also called as an expert witness. He testified that the belt take-up motor at issue here is only in operation once or twice a day and only operates 10 to 20 seconds at a time. The point being that if only because of the limited use of the motor, the chances of a short circuit occurring in the motor are highly unlikely.

The Secretary's witness referred to the potential problem of the rotor touching the power wires inside the motor because of a failed bearing. Given that scenario, Mr. Lunden opined that the rotor would contact ground. A short circuit would exist, but it would be a phase-to-ground fault condition. In that case, the ground fault relay, which is used to deenergize a circuit in the event of a phase-to-ground short condition, would cut the circuit off instantaneously. I note that there is no contention that the ground fault relay was not operational at the time the instant order was written.

To summarize Mr. Lunden's testimony concerning the probability of a hazard resulting from the stipulated violation of the standard, he stated that if a phase to phase short circuit condition were to exist, it would almost certainly contact ground, resulting in a grounded phase condition which would cause the circuit breaker to trip instantaneously. Secondly, even in the unlikely case where a phase to phase short circuit condition were to occur that did not contact ground, the circuit breaker as set would have a very good probability of switching off the circuit. Finally, as a third protection, there is an overload relay, although it takes time to operate, which would nevertheless deenergize the circuit in time. For example, in a short circuit of 340 amps, the overload protection device would operate after five seconds. With greater amperage, the time required for the overload relay device to operate would be less.

With regard to any potential shock hazard, Mr. Lunden explained that the shock hazard protection is supplied by the ground wire which connects the frame of the take-up motor to the belt power center. That equipment was functional on the day of the inspection. There is also the neutral grounding resistor which is located in the belt power center. It works in conjunction with the ground wire, the ground monitor relay and the ground fault relay so that if an electrical phase to ground short circuit were to occur, the maximum voltage that would appear on the frame of the take up motor would be limited to a safe value. All this equipment was likewise functional at the time the order was written.

The inspector alleged that the violation at bar was "significant and substantial" because a rotor bearing could fail, causing the rotor to damage the inner windings of the motor which would in turn result in a short circuit that could melt through to the outside of the motor and ignite coal and/or coal dust, thereby creating a smoke and fire hazard in the area.

I find that it is established that the stipulated violation contributed to a discrete safety hazard that could contribute to an injury if there was an uncontrollable short circuit of less than 800 amps coexistent with an accumulation of coal or coal dust in the immediate area of the motor. If such a short circuit should develop, it would instantaneously create intense heat sufficient to melt steel and clearly capable of burning a hole through the motor to the outside where it could ignite accumulated coal or coal dust, if there were any such accumulations. However, I also find that the Secretary has failed to establish that there is any reasonable likelihood that an uncontrollable short circuit of less than 800 amps would ever actually occur, given the design of the motor and the other circuit protection devices installed. Also, the only evidence in this record as to the existence of any coal or coal dust accumulations in the area of the motor was to the effect that there were none. The unrebutted evidence demonstrates the area was well rock dusted and clean. Accordingly, I find that the Secretary has not established that there was a reasonable likelihood that an accident or injury would occur. Therefore, the inspector's "significant and substantial" finding is vacated and the order is modified to reflect a "non-S&S" violation.

Nonetheless, I find that the violation was caused by the "unwarrantable failure" of the operator to comply with the standard.

In Zeigler Coal Company, 7 IBMA 280 (1977), the Interior Board of Mine Operations Appeals interpreted the term "unwarrantable failure" as follows:

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

The Commission has concurred with this definition to the extent that an unwarrantable failure to comply may be

proven by a showing that the violative condition or practice was not corrected or remedied prior to the issuance of a citation or order, because of indifference, willful intent, or serious lack of reasonable care. United States Steel Corp. v. Secretary of Labor, 6 FMSHRC 1423 at 1437 (1984).

The testimony from the operator's own witnesses establishes that the wrong part was placed on the motor approximately two months prior to the order being written. I therefore find SOCCO's failure to locate this violative condition in spite of frequent electrical equipment inspections to be a serious lack of reasonable care to see that the said condition was abated in a timely fashion.

Based on the criteria in section 110(i) of the Act, I conclude that an appropriate penalty for the violation is $250.

ORDER

Based on the above findings of fact and conclusions of law, IT IS ORDERED:

1. Order No. 2713980, contested in Docket No. WEVA 86-189-R, IS AFFIRMED as a non-S&S violation of 30 C.F.R. § 75.518. Further, the order properly concluded that the said violation resulted from SOCCO's unwarrantable failure to comply with the standard involved.

2. The motion for approval of settlement with regard to Order Nos. 2713975 and 2705919, contested in Docket Nos. WEVA 86-186-R and WEVA 86-193-R, respectively, IS GRANTED and therefore those two contest cases are now moot and are hereby DISMISSED.

3. The respondent IS HEREBY ORDERED TO PAY a civil penalty of $1,250 within 30 days of the date of this decision. Upon payment, the civil penalty proceedings ARE DISMISSED.

Roy J. Maurer
Administrative Law Judge

Distribution:

David M. Cohen, Esq., American Electric Power Service Corp., P. O. Box 700, Lancaster, OH 43130 (Certified Mail)

James H. Swain, Esq., Office of the Solicitor, U. S. Department of Labor, 3535 Market St., Philadelphia, PA 19104 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

April 14, 1987

CONSOLIDATION COAL COMPANY, Contestant	:	CONTEST PROCEEDING
v.	:	Docket No. WEVA 86-210-R Order No. 2713402; 3/10/86
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Osage No. 3 Mine
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEVA 86-481 A.C. No. 46-01455-03640
v.	:	Osage No. 3 Mine
CONSOLIDATION COAL COMPANY, Respondent	:	

DECISION

Appearances: William T. Salzer, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for the Secretary of Labor; Michael R. Peelish, Esq., Consolidation Coal Co., Pittsburgh, Pennsylvania, for Consolidation Coal Company.

Before: Judge Melick

These consolidated cases are before me pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, et. seq., the "Act" to challenge a withdrawal order issued under Section 104(d)(1) of the Act and charging a violation of the standard at 30 C.F.R. § 75.1105. 1/ The general

1/ Section 104(d)(1) provides as follows:
"If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such
(continued on page 2)

issue before me is whether Consolidation Coal Company (Consol) violated the cited regulatory standard, and, if so, whether the violation was the result of "unwarrantable failure" and whether the violation was of such a nature as could significantly and substantially contribute to the cause and effect of a mine safety and 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 § 110(i) of the Act.

The order at bar, No. 2713401, reads as follows:

> The 7 West belt drive power center was not adequately ventilated to the return. When chemical smoke was released at the front of, 3 feet back, and 6 feet back, over the electrical box the smoke was carried out into the track entry and no smoke could be seen traveling toward the 8 inch by 8 inch vent hole.

The cited standard, 30 C.F.R. § 75.1105, provides in relevant part that "air currents used to ventilate structures or areas enclosing electrical installations shall be coursed directly into the return."

The essential facts in this case are not in dispute. Lynn Workley, an experienced inspector for the Mine Safety and Health Administration (MSHA), was performing a regular inspection of the 7 West section of the Osage No. 3 Mine on March 10, 1986, when he noticed warm air coming out of a crosscut containing an energized power center. There is no dispute that the power center was an "electrical installation" within the meaning of the cited standard. Workley observed that there were no stoppings or ventilation curtains to direct the air ventilating the power center through the small vent hole leading to the return. He also observed little air movement through that vent hole. Under the circumstances, he considered it necessary to conduct further tests by releasing smoke from a smoke tube.

Thereafter, in the presence of John Morrison, the Consol safety escort, and Joseph Jimmie, the Union escort, Workley released smoke at four locations over the power center (Ex. G-3, p. 2, positions A, B, C and X). It is not disputed that when the smoke was released from positions A, B, and C, it proceeded

---

(Footnote 1 continued)
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, the shall include such finding in any citation given to the operator under this Act."

toward the haulage or track entry (depicted as position R-2, Ex. G-3) and away from the vent hole ventilating the power center into the return. Workley acknowledged that he did not see any of the smoke actually move into the haulage entry but saw the smoke pass in that direction through the cap light beams of Morrison and Jimmie. Both Jimmie and Morrison told Workley that none of the smoke passed into the haulage and Morrison so testified at hearing. Both Morrison and Workley agreed that the smoke dissipated and neither was able to ascertain whether it thereafter passed back over the power center and through the vent hole. 2/

Within this framework of evidence, I have no difficulty in finding that the violation is proven as charged. The definition of the word "directly" taken from Webster's Third New International Dictionary, (1981 Edition Unabridged), is not contested. "Directly" is therein defined as "in a straight line without deviation of course; by the shortest way." Using this definition, it is clear from the undisputed evidence that the air currents being used to ventilate the power center at issue were not coursed directly through the vent hole and into the return.

According to Inspector Workley, the violation was "significant and substantial" because of the danger of fire and smoke from the power center to employees operating in the haulage entry. It is not disputed that should smoke exit the power center into the haulage entry it would travel approximately 300 feet over the track area before exiting into the bleeder system. It is also undisputed that the track was used to transport workers, inspection parties, and supplies several times a shift thereby exposing those persons to serious and potentially fatal injuries from smoke (carbon monoxide) inhalation. Accordingly, I find the violation to be serious and "significant and substantial." Secretary v. Mathies Coal Company, 6 FMSHRC 1 (1984).

2/ While Inspector Workley "inferred" that the smoke continued into the haulage entry based on his observation that the smoke was passing in the direction of Morrison and Jimmie, I do not find that inference to be reasonable under the circumstances. Jimmie and Morrison were certainly in a better position (at the mouth of the crosscut where it joined the haulage entry) to observe whether the smoke passed into the haulage entry and both told Workley that it did not. Morrison testified at hearing, moreover, that the smoke did not pass into haulage entry.

I also conclude that the violation was the result of "unwarrantable failure" and operator negligence. I observe initially that it is the operator's contention that so long as the power center was eventually ventilated to the return there was no violation even though it was not "directly" ventilated into the return. This interpretation is clearly contrary to the plain language of the cited regulation yet the operator allowed these violative conditions to continue. Accordingly, I find that the operator violated the standard because of indifference, willful intent, or a serious lack of reasonable care. United States Steel Corp. v. Secretary, 6 FMSHRC 1423 (1984); Zeigler Coal Co., 7 IBMA 280 (1977).

In determining an appropriate civil penalty to be assessed in this case, I have also considered that the operator is large in size and has a substantial history of violations. I have also considered that the cited condition was promptly abated within time set forth by the Secretary.

ORDER

Order No. 2713402 is affirmed and the Contest Proceeding Docket No. WEVA 86-210-R is denied. The Consolidation Coal Company is directed to pay a civil penalty of $700 within 30 days of the date of this decision.

Gary Melick
Administrative Law Judge

Distribution:

William T. Salzer, Esq., U.S. Department of Labor, Office of the Solicitor, 3535 Market Street, Philadelphia, PA 19104 (Certified Mail)

Michael R. Peelish, Esq., Consolidation Coal Company, 1800 Washington Road, Pittsburgh, PA 15241 (Certified Mail)

slk

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

APR 14 1987

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. WEVA 86-482
	:	A.C. No. 46-01867-03691
v.	:	
	:	Blacksville No. 1 Mine
CONSOLIDATION COAL COMPANY, Respondent	:	

DECISION APPROVING SETTLEMENT

Before: Judge Koutras

Statement of the Case

This is a civil penalty proceeding 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 a civil penalty assessment in the amount of $168 for an alleged violation of mandatory safety standard 30 C.F.R. § 75.200, as stated in a section 104(a) Citation No. 2712924, issued at the mine on August 5, 1986.

The respondent filed a timely answer and contest, and the case was scheduled for hearing in Morgantown, West Virginia, on April 21, 1987. However, the petitioner has filed a motion pursuant to Commission Rule 30, 29 C.F.R. § 2700.30, seeking approval of a settlement of the case. The proposed settlement agreement requires the respondent to pay a civil penalty assessment in the amount of $30 for the violation in question.

Discussion

In support of the proposed settlement disposition of this case, the petitioner has submitted information pertaining to the six statutory civil penalty criteria found in section 110(i) of the Act. In addition, the petitioner has submitted a full discussion and disclosure as to the facts and circumstances surrounding the issuance of the citation in question, and a reasonable justification for the reduction of the original proposed civil penalty assessment.

In support of its argument with respect to the reduction of the initial civil penalty assessment, petitioner states that the citation was issued when the inspector found that the approved roof-control plan was not being complied with on the P-3 section. The approved roof-control plan requires maximum 60-inch spacing under normal roof conditions and 48-inch spacing when there are exposed roof conditions. The inspector observed four rows of bolts in the No. 2 entry spaced 58 to 66 inches apart, and the bolts had been incorrectly installed on the previous midnight shift. However, the respondent was in the process of repairing the cited condition at the time the inspector issued the violation. When the day shift came on the section that morning, the continuous miner operators observed the bolt spacing problems and alerted the section foreman, and initial steps had already been taken to rebolt the area. The continuous miner had been moved back and supplies brought to the immediate area.

The petitioner asserts that while the roof-control plan required 60-inch bolt spacing for non-exposed roof and 40-inch spacing for exposed roof, it was the inspector's opinion that the roof was exposed in this area and, therefore, subject to the 48 inch spacing requirement. The respondent, on the other hand, was of the opinion that not all of the areas cited by the inspector constituted exposed roof, thus, making two of the areas within the 60-inch spacing requirement. The respondent would present evidence by way of extensive testimony that not all of the roof was exposed and, therefore, the violation was not as extensive as cited by the inspector.

The petitioner states that the reduced civil penalty assessment properly considers the gravity and probability of harm associated with the violation. Recognizing the fact that inadequate roof bolting exposed miners working in the area to the hazards of a roof fall, petitioner asserts that the fact that the violation came into existence during the end of the last shift and actions were taken to correct the condition would reduce the likelihood of such an occurrence. Further, the petitioner points out that the respondent clearly demonstrated a good faith effort to abate the violative condition in that roof bolters were about to install additional bolts, and in fact, four additional rows of bolts were installed to reduce the spacing within 1 hour that the condition was cited.

Conclusion

After careful review and consideration of the pleadings, arguments, and submissions in support of the motion to approve the proposed settlement of this case, I conclude and find that the proposed settlement disposition is reasonable and in the public interest. Accordingly, pursuant to 29 C.F.R. § 2700.30, the motion IS GRANTED, and the settlement IS APPROVED.

ORDER

Respondent IS ORDERED to pay a civil penalty in the amount of $30 in satisfaction of the citation in question within thirty (30) days of the date of this decision and order, and upon receipt of payment by the petitioner, this proceeding is dismissed.

George A. Koutras
Administrative Law Judge

Distribution:

Susan M. Jordan, Esq., Office of the Solicitor, U.S. Department of Labor, Room 14480 Gateway Building, 3535 Market Street, Philadelphia, PA 19104 (Certified Mail)

Michael R. Peelish, Esq., Consolidation Coal Company, 1800 Washington Road, Pittsburgh, PA 15241 (Certified Mail)

/fb

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

APR 15 1987

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), ON BEHALF OF YALE E. HENNESSEE, Complainant	:	DISCRIMINATION PROCEEDINGS
	:	Docket No. CENT 86-151-DM
	:	MSHA Case No. MD 86-35
v.	:	Docket No. CENT 87-16-DM
	:	MSHA Case No. MD 86-35
ALAMO CEMENT COMPANY, Respondent	:	1604 Quarry & Plant
ALAMO CEMENT COMPANY, Contestant	:	CONTEST PROCEEDINGS
v.	:	Docket No. CENT 87-17-RM
	:	Citation No. 2661516; 11/19/86
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Docket No. CENT 87-18-RM
	:	Order No. 2661517; 11/19/86
	:	Docket No. CENT 87-19-RM
	:	Citation No. 2661518; 11/19/86
	:	1604 Quarry & Plant
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. CENT 87-43-M
	:	A.C. No. 41-03019-05507
v.	:	Docket No. CENT 87-44-M
ALAMO CEMENT COMPANY, Respondent	:	A.C. No. 41-03019-05508
	:	1604 Quarry & Plant

DECISIONS APPROVING SETTLEMENTS
AND
ORDER OF DISMISSAL

Before: Judge Koutras

Statement of the Proceedings

The captioned proceedings were initiated by a discrimination complaint filed by MSHA on behalf of Yale E. Hennessee (complainant) against the respondent pursuant to section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(1). The complainant was discharged by the respondent on April 22, 1986, for insubordination because of his alleged refusal to perform a work assignment. The complainant claimed that his refusal to perform the work in question was based on his belief that the work could not be done safely, and that his work refusal was protected activity under the Act.

Docket No. CENT 86-151-DM concerns an Application for Temporary Reinstatement filed by MSHA on September 10, 1986, seeking the complainant's temporary reinstatement pending the adjudication of the merits of his complaint. Docket No. CENT 87-16-DM is the discrimination complaint filed by MSHA on November 18, 1986. As part of its relief, MSHA proposed a $1,600 civil penalty assessment against the respondent for the alleged violation of section 105(c) of the Act.

A hearing on MSHA's Application for Temporary Reinstatement was held in San Antonio, Texas, on October 23, 1986, and on November 6, 1986, I issued a decision ordering the complainant's temporary reinstatement pending further adjudication of the merits of his complaint, 8 FMSHRC 1649 (November 1986). The respondent appealed my temporary reinstatement order to the Commission, and while the appeal was pending, filed a request with me for modification of my order. Since the matter was on appeal, no dispositive ruling was made with respect in the request.

On December 8, 1986, the Commission issued an order affirming my temporary reinstatement order, and remanded the matter for further adjudication, 8 FMSHRC 1857 (December 1986). Subsequently, on December 30, 1986, I issued an order denying the respondent's request for modification of my November 6, 1986, temporary reinstatement order, and the respondent was again ordered to reinstate the complainant pending the adjudication of his complaint. The respondent filed a petition with the Commission seeking review of my denial of its request for modification, and on February 2, 1987, the Commission issued an order denying the respondent's request for further review, and ordered the respondent to comply forthwith with my previously issued temporary reinstatement order. Thereafter, on February 18, 1987, I issued a Notice of Hearing advising the parties that a hearing would be held during April 21-23, 1987, in San Antonio, Texas, on all matters then pending before me in these proceedings.

The captioned contests concern two section 104(a) citations and one section 104(b) order served on the respondent because of its alleged failure to comply with my temporary reinstatement order of November 6, 1986. The captioned civil penalty proceedings are the companion civil penalty proposals filed by MSHA in connection with the contested citations and order.

By motion filed with me on April 7, 1987, MSHA seeks my approval of a proposed settlement agreement executed by the parties, including the complainant Yale E. Hennessee, with respect to the discrimination and civil penalty proceedings. Upon approval of the proposed settlement, MSHA requests that all of the captioned proceedings be dismissed. A copy of a Release in Full executed by Mr. Hennessee, and a Memorandum of Understanding between MSHA and the respondent, setting forth the complete terms of the settlement agreement are included as part of MSHA's motion.

Discussion

In support of its proposed settlement disposition of these matters, MSHA states that they have been settled to the mutual satisfaction of the parties, including Mr. Hennessee. With regard to the discrimination cases, CENT 86-151-DM and CENT 87-16-DM, MSHA states that they were resolved by agreement of the parties whereby Mr. Hennessee received a payment of $21,000 (less withholdings) in full payment of all claims arising from his discharge and his agreement to foresake his claim for reinstatement. In agreeing to the settlement of Mr. Hennessee's discrimination claims, MSHA agrees to waive the civil penalty assessment requested in the complaint.

As further consideration for the settlement of Mr. Hennessee's discrimination claims, MSHA agrees to waive its proposed civil penalty assessment of $500 for Citation No. 2661516 (CENT 87-43-M), and to accept a civil penalty payment of $1,000 by the respondent in compromise of section 104(b) Order No. 2661518, a daily assessment of $1,000 for which a total assessment of $2,000 was proposed (CENT 87-44-M).

MSHA states that the settlement disposition of the civil penalty proceedings is primarily based on the fact that they are derivative of and inextricably bound to the discrimination proceeding. MSHA points out that while Citation No. 2661516 was issued to enforce compliance with the ordered reinstatement of Mr. Hennessee, he has relinquished any right to reinstatement for value received. With regard to Order No. 2661518, MSHA states that it was issued in further enforcement of Mr. Hennessee's ordered reinstatement. However, as a result of the issuance of the order, the respondent entered into negotiations resolving all claims of Mr. Hennessee.

MSHA submits that the purpose of the Mine Act's requirement of assessment of civil penalties have been satisfied by the respondent's prompt settlement of the discrimination claims and by MSHA's agreement to compromise the proposed assessment and accept payment of $1,000.

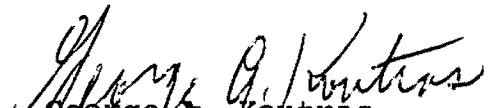
Conclusion

After careful review and consideration of the settlement, including the terms and conditions agreed to and executed by the parties, I conclude and find that it reflects a reasonable resolution of the complaint and that it is in the public interest. Since it seems clear to me that the parties, including Mr. Hennessee, have mutually agreed to settle their dispute, I see no reason why it should not be approved.

ORDER

In view of the foregoing, MSHA's motion IS GRANTED, and the settlement IS APPROVED. If it has not already done so, the respondent IS ORDERED to fully comply forthwith with the terms of the settlement agreement, and upon such compliance, the discrimination proceedings are dismissed.

Respondent IS FURTHER ORDERED to remit forthwith to MSHA the sum of $1,000, in full satisfaction of MSHA's initial proposed civil penalty assessments, and the payment thereof shall be deemed to be dispositive of the captioned civil penalty matters. Upon receipt of payment by MSHA, those proceedings are dismissed. In view of the settlement, the captioned contests ARE DISMISSED.



George A. Koutras
Administrative Law Judge

Distribution:

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

Bobbie J. Gannaway, Esq., Office of the Solicitor, U.S. Department of Labor, 525 Griffin Street, Suite 501, Dallas, TX 75202 (Certified Mail)

David M. Thomas, Esq., Fulbright & Jaworski, 1301 McKinney Street, Houston, TX 77010 (Certified Mail)

/fb

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

APR 15 1987

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. KENT 86-6
	:	A.C. No. 15-13881-03572
v.	:	
	:	Docket No. KENT 86-40
PYRO MINING COMPANY, Respondent	:	A.C. No. 15-13881-03576
	:	Pyro No. 9 Slope
	:	
	:	Docket No. KENT 86-68
	:	A.C. No. 15-14492-03518
	:	
	:	Palco Mine

DECISIONS APPROVING SETTLEMENTS

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 eight alleged violations of certain mandatory safety standards found in Part 75, Title 30, Code of Federal Regulations. The respondent filed timely answers, and the cases were scheduled for hearings in Evansville, Indiana, on March 31, 1987. However, the hearings were cancelled after the parties advised me of their proposed settlements. They have now filed a joint motion pursuant to 29 C.F.R. § 2700.30, seeking approval of the proposed settlements. The violations, initial assessments, and the proposed settlement amounts are as follows:

Docket No. KENT 86-6

Citation/ Order No.	Date	30 C.F.R. Section	Assessment	Settlement
2508753	05/07/85	75.511	$ 5,000	$ 5,000
2508757	05/09/85	75.509	$ 5,000	$ 5,000

Docket No. KENT 86-40

Citation/ Order No.	Date	30 C.F.R. Section	Assessment	Settlement
2513115	08/22/85	50.12	$ 500	$ 500
2513126	08/22/85	75.313	$ 1,000	$ 1,000
2513127	08/22/85	75.503	$ 1,000	$ 1,000
2513116	08/28/85	75.307-1	$ 1,000	$ 500
2513117	08/28/85	75.301	$ 2,000	$ 2,000

Docket No. KENT 86-68

Citation No.	Date	30 C.F.R. Section	Assessment	Settlement
2837603	10/22/85	75.200	$ 800	$ 400

Discussion

The petitioner's initial proposed civil penalty assessments for the violations amounted to $16,300. The proposed settlements require the respondent to pay civil penalties in the amount of $15,000. In support of the proposed settlement dispositions, the parties have submitted information pertaining to the six statutory civil penalty criteria found in section 110(i) of the Act. In addition, they have submitted a full disclosure as to the facts and circumstances surrounding the issuance of the violations, including copies of MSHA's reports of investigation.

Conclusion

After careful review and consideration of the pleadings, arguments, and submissions in support of the joint motion to approve the proposed settlements, I conclude and find that the proposed settlement dispositions are reasonable and in the public interest. Accordingly, pursuant to 29 C.F.R. § 2700.30, the motion IS GRANTED, and the settlements ARE APPROVED.

ORDER

The respondent IS ORDERED to pay civil penalty assessments in the settlement amounts shown above in satisfaction of the violations in question, and payment is to be made to MSHA within thirty (30) days of the date of these decisions and order. Upon receipt of payment, these proceedings are dismissed.

George A. Koutras
Administrative Law Judge

Distribution:

Thomas A. Grooms, Esq., Office of the Solicitor, U.S. Department of Labor, 280 U.S. Courthouse, 801 Broadway, Nashville, TN 37203 (Certified Mail)

Mr. Bruce Hill, Pyro Mining Company, Post Office Box 267, Sturgis, KY 42459 (Certified Mail)

/fb

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

APR 22 1987

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 86-40
Petitioner	:	A.C. No. 15-13881-03576
v.	:	
	:	Pyro No. 9 Slope
PYRO MINING COMPANY,	:	
Respondent	:	

ORDER CORRECTING DECISION

Before: Judge Koutras

On April 15, 1987, I issued a decision approving a settlement in this case. Page 2 of the decision reflects that the parties agreed to settle Order No. 2513117, August 28, 1985, 30 C.F.R. § 75.301, for the full amount of MSHA's $2,000 proposed civil penalty assessment. However, in a subsequent telephone conference held on April 20, 1987, counsel for the parties informed me that the decision is in error in that the parties agreed to settle the alleged violation for $1,600.

After review of the official Commission file in this matter, including the settlement motion filed by the parties, I find that the parties are correct, and that my decision with respect to the settlement approval for the violation in question is in error. Accordingly, IT IS ORDERED that my decision of April 15, 1987, be corrected by striking the figure $2,000 under the column labeled "Settlement" on page 2, and inserting the correct figure of $1,600 as the approved settlement amount for Order No. 2513117.

George A. Koutras
Administrative Law Judge

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

APR 15 1987

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. LAKE 86-101-M A.C. No. 33-00646-05503-A
v.	:	
	:	Somerset Lime & Stone
EUGENE C. MCPHERSON, Respondent	:	

DECISION APPROVING SETTLEMENT

Before: Judge Koutras

Statement of the Case

This is a civil penalty proceeding under section 110(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(c), brought by the petitioner against the respondent Eugene C. McPherson, mine manager at the Somerset Lime and Stone Mine, operated by Somerset Lime and Stone, Inc., near Somerset in Perry County, Ohio. Respondent is charged as an agent of the corporate mine operator with knowingly authorizing, ordering, or carrying out said operator's violation of mandatory safety standard 30 C.F.R. § 56.9003 cited in a section 107(a) - 104(a) Order No. 2513572 issued to the corporate mine operator on May 13, 1985. The order states as follows: "The brakes were inoperative on the Hough No. 90 serial number 1037. This front end loader is used in the stone storage yard to load customer trucks."

The petitioner states that pursuant to section 110(a) of the Act, the mine operator was assessed a civil penalty of $500 for its violation cited in the order, and that it became a final order of the Commission on September 17, 1985, under MSHA Assessment Office Case No. 33-00646-05502.

In this proceeding, a civil penalty of $250 was proposed by the petitioner against respondent McPherson for his alleged violation under section 110(c) of the Act. Respondent now

advises that he no longer wishes to contest this violation and has tendered to the petitioner a money order in the amount of $100 in full settlement of this proceeding.

This case was scheduled for hearing in Zanesville, Ohio, on May 7, 1987. However, the petitioner has now filed a motion pursuant to 29 C.F.R. § 2700.30, seeking approval of the proposed settlement.

Discussion

The petitioner submits that the alleged violation was serious and that the respondent was grossly negligent in authorizing the cited end loader to be operated with inadequate brakes. However, in mitigation, the petitioner states that the respondent advises that he is now 73 years old, has a heart problem, is unemployed, and is living off of social security. Under these special circumstances, and in full consideration of the civil penalty criteria under section 110(i) of the Act, the petitioner submits that the settlement of $100 is reasonable and in the public interest.

Conclusion

After careful review and consideration of the pleadings, arguments, and submissions in support of the motion to approve the proposed settlement of this case, I conclude and find that the proposed settlement disposition is reasonable and in the public interest. Accordingly, pursuant to 29 C.F.R. § 2700.30, the motion IS GRANTED, and the settlement IS APPROVED.

ORDER

The respondent IS ORDERED to pay a civil penalty in the amount of $100 in full satisfaction of the alleged violation in question. Since it appears that the petitioner is in receipt of said payment, this matter IS DISMISSED.

George A. Koutras
Administrative Law Judge

Distribution:

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

Mr. Eugene C. McPherson, 131 East Highland Drive, Zanesville, OH 43701 (Certified Mail)

/fb

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

APR 16 1987

LARRY D. SCROGGINS, Complainant	:	DISCRIMINATION PROCEEDING
	:	Docket No. LAKE 87-28-D
v.	:	
	:	VINC CD 87-02
PEABODY COAL COMPANY, Respondent	:	

ORDER OF DISMISSAL

For good cause shown, it is ORDERED that complainant's motion to withdraw his complaint be, and hereby is, GRANTED and the case DISMISSED.

Roy J. Maurer
Administrative Law Judge

Distribution:

Larry D. Scroggins, 1136 Highlands Drive, Naples, FL 33940 (Certified Mail)

Michael O. McKown, Esq., Peabody Coal Co., P. O. Box 1990, Henderson, KY 42420 (Certified Mail)

yh

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

APR 22 1987

RUSHTON MINING COMPANY, Contestant	:	CONTEST PROCEEDING
	:	Docket No. PENN 86-100-R
v.	:	Order No. 2692910; 2/7/86
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Rushton Mine
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. PENN 86-167
	:	A.C. No. 36-00856-03560
v.	:	Rushton Mine
RUSHTON MINING COMPANY, Respondent	:	

DECISION

Appearances: Edward H. Fitch, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia for the Secretary of Labor (Secretary); Joseph T. Kosek, Jr., Esq., Ebensburg, Pennsylvania, for Rushton Mining Company (Rushton).

Before: Judge Broderick

STATEMENT OF THE CASE

Rushton is contesting an order of withdrawal issued February 7, 1986, under section 104(d)(2) of the Federal Mine Safety and Health Act (the Act) charging a violation of Rushton's approved roof control plan. In the civil penalty proceeding, the Secretary seeks a penalty for the violation charged in the order. Because both proceedings involve the same order and the violation charged in the order, they were consolidated for the purposes of hearing and decision. Pursuant to notice, the case was heard in State College, Pennsylvania, on November 20, 1986.
Donald J. Klemick testified on behalf of the Secretary.
Raymond G. Roeder, William Phillip Southard, Lemuel Hollen, Jr., Donald Lee Baker, and Andrew John Dunlap testified on behalf of

Rushton. Both parties have filed posthearing briefs. I have considered the entire record and the contentions of the parties, in making the following decision.

FINDINGS OF FACT

PRELIMINARY FINDINGS

Rushton is the owner and operator of an underground bituminous coal mine in Centre County, Pennsylvania, known as the Rushton Mine. Rushton is a "moderate-to-a-large size operator." In the two years prior to the violation we are concerned with here, the subject mine had 293 paid violations, 19 of which were violations of the roof control plan. This history is not such that penalties otherwise appropriate should be increased because of it. The violation involved here was abated in good faith.

THE 104(d) ORDER

On February 7, 1986, Federal Mine Inspector Donald Klemick arrived at the subject mine at about 7:45 a.m., to perform a regular ("AAA") inspection. When he arrived at the mine, he was informed by Rushton officials that an unintentional roof fall had occurred at about 5:10 a.m. in the H-Butt section. Klemick notified his supervisor by telephone and was instructed to conduct a noninjury accident ("AFC") investigation. Inspector Klemick briefly talked on the surface to some members of the crew including the operator of the continuous miner which had been struck by the fall. He then proceeded underground to the H-Butt section to continue the investigation. He determined that the pillar between entries oneand two had been entirely mined through and one lift had been taken from the pillar between entries two and three when the roof fall occurred, and partially covered the continuous miner. Breaker posts were not set in the crosscut between entries two and three. Inspector Klemick determined that this constituted an unwarrantable failure violation of the approved roof control plan and issued a withdrawal order at 10:20 a.m. under section 104(d)(2) of the Act.

ROOF CONTROL PLAN

Drawing No. 8 of the Plan shows the sequence of pillaring when bolting is required. "B" option on the Drawing was being followed by Rushton here. Following this option, two pillars can be mined by taking Cut "A" from one, "B" from the second, "C" from the first and "D" from the second. The pillars are to be mined from separate entries and not from the crosscut, since breaker posts are required in the crosscut between the two entries.

Safety Precaution 37 of the Plan requires that a minimum of two rows of breaker posts be installed on not more than 4 foot centers across each opening leading to pillared areas, "and such posts shall be installed before production from the split to be protected is started. Such posts shall be installed between the lift being started and the expected breakline. . ." Safety precaution 46 of the Plan provides that the width of a roadway leading from the solid pillars to a final stumpshall not exceed 14 feet. At least two rows of posts must be set on each side of the roadway, and only one open roadway leading to a final pushout stump is permitted.

PRIOR INSPECTIONS

The method of pillar mining cited here (mining two pillars from a single roadway) had been followed by Rushton for more than one and a half years. Rushton had never been cited by MSHA previously for this procedure.

The entire mine with the exception of the W-4 section had been regularly inspected by MSHA since the previous section 104(d) order with no similar violations being cited. There were seven days in November and December 1985, when MSHA inspectors were in the W-4 section. These inspections were apparently conducted by specialists and not as part of a regular inspection.

ISSUES

1. Did Rushton violate its approved roof control plan by mining two pillars from a single roadway?

2. If so, would the alternative procedure result in a diminution of safety to the miners?

3. If a violation is established, was it properly cited in an order issued under section 104(d)?

   a. Was it issued as a result of an investigation rather than an inspection?

   b. Is the Secretary precluded from asserting its position on this issue by collateral estoppel?

   c. Does the evidence show an intervening clean inspection?

4. If a violation is established, was it caused by Rushton's unwarrantable failure to comply?

5. If a violation is established, was it significant and substantial?

6. If a violation is established, what is the appropriate penalty?

CONCLUSIONS OF LAW

VIOLATION

Rushton concedes that it was not complying with the provisions of the roof control plan set out in Option "B" of Drawing No. 8, but argues that the double row of posts in the drawing was not intended to define "where the timbers were going to be, but the point at which they would end." (Tr. 102.) Whatever Rushton's intention, it seems clear to me that the drawing contemplates mining the two pillars from separate entries in alternate cuts, and not from the crosscut. If the breaker posts were installed in accordance with the drawing it would not be possible to mine the two pillars from the crosscut. Neither safety precaution No. 37 nor safety precaution No. 46 is inconsistent with this interpretation of Drawing No. 8. On the contrary, safety precaution 37 requires two rows of breaker posts "across each opening leading to pillared areas, and such posts shall be installed before production from the split to be protected is started." I would interpret this to prohibit mining two pillars from a single roadway which would require the continuous miner to pass an opening in a pillar. I conclude that the mining method followed by Rushton and cited here was violative of the approved roof control plan.

DIMINUTION OF SAFETY DEFENSE

Rushton argues that compliance with the Inspector's interpretation of the roof control plan would result in a diminution of safety for the miners involved. Both the section foreman and the miner operator testified that it would be less safe to approach the pillar from the entry than it was from the crosscut. The miner operator stated that his vision was better approaching from the crosscut. Rushton did not, however, rebut the Inspector's testimony that the miner approaching from the crosscut would be passing an opening in the second pillar, where the roof is weakened, to take the final cut in the first pillar. In the inspector's opinion, this practice poses a serioius hazard to the miner operator. I accept the inspector's judgment on this question, and conclude that this hazard outweighs any hazard occasioned by approaching each pillar from the entry. I conclude that Respondent has failed to establish a diminution of safety defense.

INVESTIGATION/INSPECTION

COLLATERAL ESTOPPEL-ISSUE PRECLUSION

Rushton asserts that the section 104(d)(2) order was improperly issued because it resulted from an investigation rather than an inspection. It further asserts that this issue has been previously litigated by the parties and determined by a Commission administrative law judge in Greenwich Collieries v. Secretary, 8 FMSHRC 1105. In Greenwich, Judge Maurer granted a partial summary judgment to the operator on the ground that the contested 104(d)(1) orders were issued following an accident investigation, and did not result from an inspection. The case is presently before the Commission on interlocutory appeal by the Secretary. Although counsel has stated that Rushton and Greenwich are operating entities of the Pennsylvania Mines Corporation, there is little or no evidence in the record from which I could determine if they are identical parties for the purpose of collateral estoppel. More importantly the facts in the two cases are significantly different: In Greenwich, the contested orders were issued on March 29, 1985, following an investigation of a mine explosion which occurred on February 16, 1984. The underground portion of the investigation began on February 25, 1984, and was concluded on April 5, 1984. Sworn statements were taken from March 27, 1984, until April 27, 1984. The final investigation report was issued September 6, 1985. In the present case the contested order was issued on the day the alleged violation occurred following the inspector's visit to the area where the violation occurred. As my analysis will show hereafter, these factual differences may be decisive. Therefore, whether or not Greenwich and Rushton are identical parties, doctrine of issue preclusion does not apply here.

INVESTIGATION

Rushton argues that the issuance of a section 104(d)(2) order charging an unwarrantable failure violation is improper when it results from an investigation rather than an inspection. Seven decisions or orders of Commission judges so held. Four of the cases are pending on appeal before the review Commission. The other cases were apparently settled.

THE MINE ACT

Section 104(a) of the Mine Act provides in part:

> If, upon inspection or investigation, the Secretary . . . believes that an operator . . . has violated this Act, or any mandatory . . . standard, . . . he shall, with

reasonable promptness, issue a citation to the operator. [Emphasis added]

Section 104(b) provides for the issuance of a withdrawal order "if, upon any follow-up inspection," an authorized representative of the Secretary finds that the operator failed to abate a citation issued under section 104(a).

Section 104(d)(1) of the Mine Act provides in part:

> If, upon any inspection of a . . . mine, an authorized representative of the Secretary finds that there has been a violation . . ., and if he also finds that . . . such violation is of such nature as could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure . . . to comply . . ., he shall include such finding in any citation given to the operator . . .. If, during the same inspection or any subsequent inspection of such mine within 90 days . . ., an authorized representative . . . finds another violation . . . and finds such violation to be also caused by an unwarrantable failure . . . to comply . . ., he shall forthwith issue an order . . .." [Emphasis added]

Section 104(d)(2) provides in part:

> If a withdrawal order . . . has been issued pursuant to paragraph (1), a withdrawal order shall promptly be issued by an authorized representative . . . who finds upon any subsequent inspection the existence . . . of violations similar to those that resulted in the issuance of a withdrawal order under paragraph (1) until such time as an inspection . . . discloses no similar violations. [Emphasis added]

Section 104(e) involving a pattern of violations refers to inspection. Section 104(g)(1) providing for orders withdrawing miners who have not received the requisite safety training who are discovered "upon any inspection or investigation pursuant to section 103 of this Act." Section 103 requires the Secretary to make frequent inspections and investigations of mines, to investigate accidents, to inspect at the request of representatives of miners or of miners.

Section 107(a) provides that "[i]f, upon any inspection or investigation . . . an authorized representative . . . finds . . . an imminent danger . . . [he] shall . . . issue an order [of withdrawal] . . . ."

THE COAL ACT

Section 104(a) of the Coal Act provides for the issuance of a withdrawal order "if, upon any inspection of a coal mine," an imminent danger is found.

Section 104(b) of the Coal Act corresponds to Section 104(a) of the Mine Act, but it provides for issuance of notices of violation (rather than citations) "if, upon any inspection of a coal mine," a violation is found. Section 104(c)(1) of the Coal Act corresponds to section 104(d)(1) of the Mine Act and is virtually identical to it. Similarly, section 104(c)(2) of the Coal Act is virtually identical to section 104(d)(2) of the Mine Act. The Secretary cites two cases under the coal act for the proposition that unwarrantable failure notices and orders were upheld in cases where the inspector did not observe the violation. Rushton Mining Co., 6 IBMA 329 (1976) and Roscoe Page v. Valley Camp Coal Co., 6 IBMA 1 (1976). However, the Rushton case was a penalty case and Valley Camp case a compensation proceeding. In neither case was the order itself directly challenged by the mine operator.

Neither the Mine Act nor the Coal Act defines "inspection" or "investigation." Nor can I determine any basis in the language of either Act for concluding that they were intended to mean essentially the same thing or that a variance in meaning was intended.

The Coal Act uses the term investigation (and the terms "inspections and investigations") in section 103. Investigation seems to be used with reference to obtaining information relating to health and safety conditions, and determining the causes of accidents and illnesses in mines. Section 104 which provides for issuance of notices of violation (citations under the Mine Act) and closure orders for imminent danger and unwarrantable failure to comply uses only the term inspection. However, it is clear that under the Coal Act, notices and orders could be issued without the inspector actually observing the cited condition or conduct. Sewell Coal Company, 2 IBMA 80 (1975); Rushton Mining Company, 6 IBMA 329 (1976); Peabody Coal Company, 1 FMSHRC 1785 (1979).

The 1977 Act uses the terms "inspection or investigation" in referring to citations (section 104(a)) and imminent danger withdrawal orders (107(a)). It uses only the term "inspection" in referring to 104(b) closure orders for failure to abate a citation, and in referring to 104(d) citations and orders. Judge Steffey in Westmoreland Coal Company, discussed hereafter, contends that the Mine Act inserted the term investigation in

104(a) and 107(a), because such citations and orders could be issued based upon an inspector's belief that a violation occurred; it did not insert the term in 104(d) which required citations and orders to be based on findings.

However, the legislative history of the Mine Act indicates that Congress did not intend to change the unwarrantable failure provisions of the Coal Act: after referring to certain decisions of the Board of Mine Operations Appeals, the Senate Committee Report in discussing unwarrantable failure closure orders states:

> These decisions have considerably restored the unwarrantable failure closure order as an effective and viable enforcement sanction, and it is for that reason that S. 717 retains this sanction in essentially the same form . . .

S. Rep. No. 95-181, 95th Cong., 1st Sess., 32 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 620 (1978).

The "findings" required in a 104(d) citation or order (unwarrantable failure; significant and substantial) by their nature seem not susceptible to inspector observation. In most cases they must be based upon circumstances, prior history, knowledge of the operator's management personnel, etc. For example, an the ispector ordinarily cannot determine whether a violation was caused by willful intent or a serious lack of reasonable care merely by observing the violation itself.

It may be helpful to briefly review the administrative law judge decisions which concluded that it was improper for MSHA to issue a section 104(d) order on the basis of an investigation. The first of these decisions was issued by Judge Steffey in Westmoreland Coal Company, Docket No. WEVA 82-340-R, et. al., Order Granting in Part Motion for Summary Decision (May 4, 1983). The case before Judge Steffey involved thirteen section 104(d)(2) orders issued July 15, 1982, based on an investigation conducted in December 1980, which followed a mine explosion which occurred November 7, 1980. Judge Steffey concluded on the basis of his analysis of the legislative history of the 1969 Act that an inspection was thought to be capable of being conducted in a single day, and an investigation could take weeks or months. He thought it significant that the 1977 Mine Act permitted a citation or an imminent danger closure order to be issued "upon inspection or investigation," whereas the Coal Act requirement that unwarrantable failure orders be issued "upon any inspection" was continued in the Mine Act. Judge Steffey stated that his review of the legislative history convinced him "that Congress

did not intend for unwarrantable failure provisions of section 104(d) to be based on lengthy investigations" or upon "a belief" that a violation occurred. The orders before him were based not "upon an inspection but upon sworn statements taken during an accident investigation made 19 months prior to the time the orders were issued." Judge Steffey's order vacating the withdrawal orders was based on the facts that they resulted from subsequent investigations and not from an inspection and that they were not issued "promptly" as required by section 104(d)(2).

A similar issue was considered by Judge Lasher in Emery Mining Company v. Secretary, 7 FMSHRC 1908 (1985). There the contested order was issued April 17, 1985, five days after the alleged violation occurred, and was based on statements made by miners to the inspector. The violative condition was not observed by the inspector. Judge Lasher agreed with Judge Steffey and concluded that "the Act does not permit a section 104(d)(2) order to be based on an investigation . . . but . . . the order must be based on and it must have been a product of an inspection of the site." Southwestern Portland Cement Company, et. al. v. Secretary, 7 FMSHRC 2283 (1985) involved citations and orders issued on April 3, 1985, under Section 104(d) for alleged violations occurring on January 10, 1985. The citations and orders resulted from an investigation which followed employee complaints on February 7, 1985. Judge Morris held that the Act does not permit a section 104(d) order to be based on an investigation. "Where an inspector does not inspect the site but only learns of the alleged violation from the statements of miners a section 104(d) order may not be issued." In Nacco Mining Company v. Secretary, et. al., 8 FMSHRC 59 (1986), Chief Judge Merlin, following the decisions above referred to, held that a section 104(d)(1) citation was improperly issued following an investigation of a section 103(g)(1) complaint. The citation was dated June 5, 1985, and alleged a violation occurring May 30, 1985, consisting of a miner operator going inby permanent roof supports. Emerald Mines Corporation v. Secretary, 8 FMSHRC 324 (1986), also involved a section 104(d)(1) citation which was issued following a section 103(g)(1) investigation. The alleged violation occurred on July 29, 1985; the section 103(g) complaint was received on July 30, 1986. The investigation began July 31, and continued through August 1. The citation was written on August 8, 1985, as a section 104(a) citation and modified on August 23, 1985, to a section 104(d)(1) citation. Judge Melick held that these facts established that the section 104(d)(1) citation was not based upon an inspection of the mine but upon an investigation through interviews and examination of records. He therefore held it improper, following the other administrative law judge decisions. Finally, Judge Maurer in Greenwich Collieries v. Secretary, 8 FMSHRC 1105, held invalid section 104(d)(1) orders issued on

March 29, 1985, following an investigation of a mine explosion which occurred on February 16, 1984.

All of the above cases involve orders and citations issued days, weeks, or months after the alleged violations occurred. The orders and citations were based (at least in major part) on interviews of miners conducted by the inspector and not upon the inspector's observing the site of the violation. In the case before me, the Inspector saw evidence of the practice which he believed was violative of the roof control plan. Joint Exhibit 1 shows what he saw: the miner is approaching the pillar between No. 1 and No. 2 entries from the crosscut in front of the pillar between No. 2 and No. 3 entries from which a cut had been taken. Breaker posts had not been set in the crosscut. The fact that the inspector was directed, after he arrived at the mine, to conduct an "investigation" of the roof fall seems irrelevant to me. Although he obviously did not witness the violation when it occurred, he saw physical evidence of the violation which was cited. Therefore, whether the inspector was in the mine conducting an investigation or an inspection, he found the violation "upon [an] inspection" of the mine. This case is distinguishable from each of the above cases cited. Whether a 104(d) citation or order can be issued when evidence of the violation is not observed by the inspector is not a question presented here.

I conclude that it was not improper under the facts of this case, to issue a section 104(d)(1) order on the basis that it resulted from an investigation rather than an inspection.

INTERVENING CLEAN INSPECTION

The Secretary must establish that a "clean inspection" has not occurred between the underlying section 104(d)(1) order and the contested section 104(d)(2) order. Kitt Energy Corporation, 6 FMSHRC 1596 (1984), aff'd sub nom. UMWA v. FMSHRC, 768 F.2d 1477 (1985). The evidence in this case shows that all areas of the mine received a clean regular inspection except the W-4 section. However, the evidence further shows that inspectors were in the W-4 section, an inactive section, on seven occasions conducting technical inspections. Whether they inspected it "for all hazards during the time period in question," UMWA v. Kitt Energy, supra, at p. 1480, is not clear from the record. Since the burden is on the Secretary, I conclude he has not established that there was no intervening clean inspection.

UNWARRANTABLE FAILURE

Although I have concluded that the contested order was not improper because it followed an investigation of an unintentional

roof fall, I still must determine whether the evidence establishes that the violation (whether properly charged in an order or a citation) was caused by Rushton's unwarrantable failure to comply with the mandatory standard. The Commission has held that an unwarrantable failure to comply may be established by a showing that the violation resulted from indifference, willful intent, or a serious lack of reasonable care. United States Steel Corporation, 6 FMSHRC 1423 (1984).

Rushton's witnesses (including the section foreman and members of the crew involved) testified that in their opinion the cited practice was not violative of the roof control plan, and was, in fact, safer than the alternative. There was also some general testimony that other MSHA inspectors had observed this practice in the past without citing it. The practice of taking two pillars from a single roadway, however, was only followed when mining the first two pillars in a row. Other testimony indicated that it was done between 25 and 40 percent of the time. I cannot conclude from this testimony that other MSHA inspectors approved or condoned the practice. I am of the opinion that the practice was a clear violation of Drawing No. 8 of the approved roof control plan. Rushton should have been aware of that. If Rushton felt, as it apparently did and does, that some other method was safer or otherwise preferable, it should have sought to modify the plan. It did not seek to do so. I conclude that the violation resulted from a serious lack of reasonable care, and was therefore properly charged as an unwarrantable failure violation.

SIGNIFICANT AND SUBSTANTIAL

The cited practice required the continuous miner to pass an open or mined area in the pillar between entries 2 and 3 to take the final cut in the pillar between entries 1 and 2. This exposes the miner operator to a weakened roof area. Whether the violation contributed to the roof fall which occurred here or not (the evidence is unclear), the violation contributed to a hazard (weakened roof, potential fall). There was a reasonable likelihood that the hazard contributed to would result in a serious injury. See Cement Division, National Gypsum Co., 3 FMSHRC 822 (1981). Therefore, the violation was significant and substantial. The fact that an injury did not occur here is hardly evidence that the violative practice did not contribute to a hazard likely to result in injury.

PENALTY

The violation was serious. It resulted from Rushton's negligence. I have previously found that Rushton is a moderate-to-large operator, and has a favorable history of prior

violations. The violation here was abated timely and in good faith. Based on the criteria in section 110(i) of the Act, I conclude that an appropriate penalty for the violation is $750.

ORDER

Based on the above findings of fact and conclusions of law, IT IS ORDERED:

1. Order No. 2692910 is MODIFIED to a citation under section 104(d)(1) of the Act charging a significant and substantial violation of 30 C.F.R. § 75.200 caused by Rushton's unwarrantable failure to comply. As modified, the citation is AFFIRMED. The contest is thus GRANTED IN PART and DENIED IN PART.

2. Rushton shall within 30 days of the date of this decision pay the sum of $750 as a civil penalty for the violation found herein.

3. Upon payment of the civil penalty, these proceedings are DISMISSED.

James A. Broderick
James A. Broderick
Administrative Law Judge

Distribution:

Joseph T. Kosek, Jr., Esq., P.O. Box 367, Ebensburg, PA 15931 (Certified Mail)

Edward H. Fitch, Esq., U.S. Department of Labor, Office of the Solicitor, 4015 Wilson Blvd., Arlington, VA 22203 (Certified Mail)

slk

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

APR 22 1987

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. PENN 87-11 A.C. No. 36-02628-03529
v.	:	Bear Run #1
MEARS ENTERPRISES, INC., Respondent	:	

DECISION

Before: Judge Fauver

On March 27, 1987, because of Respondent's failure to comply with a prehearing order, a show cause order was issued allowing Respondent until April 9, 1987, to explain, in writing, why it should not be deemed to have waived its right to a hearing and the Secretary's proposed penalties should not become the final order of the Commission.

Respondent has failed to file a response to the show cause order, and is hereby deemed to be in default and to have waived its right to a hearing. The proposed civil penalties shall therefore be made the final order of the Commission.

WHEREFORE IT IS ORDERED that Respondent shall pay the Secretary's proposed civil penalties in the amount of $3,500.00 within 39 days of this decision.

William Fauver
William Fauver
Administrative Law Judge

Distribution:

Joseph T. Crawford, Esq., Office of the Solicitor, U.S. Department of Labor, Room 14480 Gateway Building, 3535 Market Street, Philadelphia, PA 19104 (Certified Mail)

Kerry L, Mears, President, Mears Enterprises, Inc., P.O. Box 157, Clymer, PA 15728 (Certified Mail)

kg

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

April 22, 1987

JIM WALTER RESOURCES, INC., Contestant	:	CONTEST PROCEEDING
	:	Docket No. SE 87-35-R
v.	:	Citation No. 2811378; 12/10/86
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	No. 7 Mine

DECISION

Appearances: R. Stanley Morrow, Esq., and Harold D. Rice, Esq., Birmingham, Alabama for Contestant; William Lawson, Esq., Office of the Solicitor, U. S. Department of Labor, Birmingham, Alabama, for Respondent.

Before: Judge Merlin

This case is a notice of contest filed by Jim Walter Resources, Inc., seeking review of a citation issued under section 104(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., for a violation of 30 C.F.R. § 75.503.

Citation No. 2811378, dated December 10, 1986, sets forth the condition, or practice in question, as follows:

> "The #49 ram car located on the No. 8 section (008-0) was not maintained in a permissible condition in that the battery compartment, which contains 120 cells, had one cell "jumped out" or "bypassed" decreasing the nominal voltage of the batteries by 2 volts."

30 C.F.R. § 75.503, which restates section 305(a)(3) of the Act, 30 U.S.C. § 865(a)(3), provides 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."

"Permissibility" is defined in 30 C.F.R. § 75.2(i) as follows:

> "Permissible" as applied to electric face equipment means all electrically operated equipment taken into or used inby the last open crosscut of an entry or a room of any coal mine the electrical parts of which, including, but not limited to, associated electrical equipment, components, and accessories, are designed, constructed, and installed, in accordance with the specifications of the Secretary, to assure that such equipment will not cause a mine explosion or mine fire, and the other features of which are designed and constructed, in accordance with the specifications of the Secretary, to prevent, to the greatest extent possible, other accidents in the use of such equipment; and the regulations of the Secretary or the Director of the Bureau of Mines in effect on March 30, 1970, relating to the requirements for investigation, testing, approval, certification, and acceptance of such equipment as permissible shall continue in effect until modified or superseded by the Secretary, except that the Secretary shall provide procedures, including where feasible, testing, approval, certification, and acceptance in the field by an authorized representative of the Secretary, to facilitate compliance by an operator with the requirements of § 75.500 within the periods prescribed therein."

The maintenance requirements for electronic face equipment are found at 30 C.F.R. § 75.506-1(a) and provide, in pertinent part:

> "* * * electronic face equipment which meets the requirements for permissibility set forth in § 75.506 will be considered to be in permissible condition only if it is maintained so as to meet the requirements for permissibility set forth in the Bureau of Mines schedule under which such electric face equipment was initially approved, or, if the equipment has been modified, it is maintained so as to meet the requirements of the schedule under which such modification was approved" (emphasis added).

30 C.F.R. § 18.15 provides the procedures in which an operator must follow in order to modify any feature of approved or certified equipment. That section states:

> "If an applicant desires to change any feature of approved equipment or a certified component, he shall first obtain MSHA's concurrence pursuant to the following procedure."

The parties agreed to the following stipulations: (1) the operator is the owner and the operator of the subject mine; (2) the operator 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 of this case; (4) the inspector who issued the subject citation was a duly authorized representative of the Secretary; (5) a true and correct copy of the subject citation was properly served upon the operator; (6) a copy of the subject citation at issue in this proceeding is authentic and may be admitted into evidence for purposes of establishing its issuance, but not for the purpose of establishing the truthfulness or relevancy of any statements asserted therein; (7) the operator admits that one cell on the battery of the ram car referred to in the subject citation was "jumped out" or "bypassed" (Tr. 5-6).

The instant matter is a notice of contest, but in order to avoid duplicative litigation the parties agreed to the following additional stipulations which would be relevant to a potential penalty case: (8) the operator's size is medium; (9) imposition of a penalty will not affect the operator's ability to continue in the business; (10) the alleged violation was abated in good faith; (11) the operator's history of prior violations is average for its size; (12) injury was unlikely (Tr. 7).

A letter dated February 27, 1987 to the Solicitor from Carol M. Boring, Chief, Electrical Power Systems Branch of the Mine Safety and Health Administration states, as follows:

> "This is in reply to Mr. George D. Palmer's letter dated Feburary 13, 1987 and our telecon of February 26, 1987."
>
> "I am Chief of the Electrical Power Systems Branch, Division of Electrical Safety. This branch has the responsibility of approving electric motor driven equipment for use in gassy mines, under Part 18 of Title 30 Code of Federal Regulations. I have reviewed the records for Approval No. 2G-2275-10. This approval was issued for a Jeffrey Mining Machinery Division, Type 404 Battery-Powered RAMCAR. The RAMCAR is approved with 120

cells giving a total machine voltage of 240 volts." (Government Exhibit 2).

The facts of this case are not in dispute. The cited ram car is a piece of electrical face equipment which transports coal back and forth from the face to the feeder (Tr. 12). It was in service when the inspector cited it (Tr. 14). The ram car was originally approved as permissible by MSHA with 120 cells and a voltage of 240 (Tr. 16, 39-40, 57, 124; Government Exhibit 2). One cell on the ram car's battery had been bypassed or jumped out (Tr. 13-14, 16; Stipulation 7). The cell had been bypassed with a welded electrical connection (Tr. 54, 110, 132; Operator Exhibit 6). The effect of bypassing was to reduce the number of cells from 120 to 119 and decrease voltage from 240 to 238 (Tr. 24, 36, 62, 124). Bypassing one cell does not create a hazard and poses no immediate threat of injury (Tr. 64, 95; Stipulation 12). However, when multiple cells are bypassed, the temperature of the battery increases and at some point, heat could cause other cells to short out and create arcing or sparking (Tr. 67, 72, 74, 114-117).

I conclude a violation existed. The terms on which the ram car was initially approved as permissible are explicit: 120 cells and 240 volts. Bypassing is a deviation from the approved wiring diagram that cannot be allowed because there is no provision for it. As suggested at the hearing, it may be that through a field change modification submitted to MSHA, the operator can obtain permission to bypass a cell, but that inquiry is beyond the scope of these proceedings (Tr. 17). In Mesa v. Amoco Steel Corporation, (Docket No. HOPE 76X487-P) dated May 9, 1977 (unpublished) Administrative Law Judge Broderick concluded:

> "* * * bridging cells in a battery-powered ram car used as face equipment substantially alters the characteristics of the equipment and therefore destroys its permissibility. I conclude that bridging cells in the battery compartment is a violation of 30 C.F.R. § 75.503."

I agree with Judge Broderick and follow his decision.

The operator's argument that the battery can be separated from the ram car for purposes of permissibility, cannot be accepted. As all witnesses agreed, the battery is an integral part of the ram car (Tr. 16-17, 76, 78, 124). Further, the operator's assertion that the requirement of 240 volts can be disregarded because voltage decreases to 204 during the shift, also must be rejected. If the ram car begins the shift with less than 240 volts, it will decrease below 204 during the shift (Tr. 92-93). I accept the electrical inspector's testimony that during the shift the voltage should not go below 204 (Tr. 90-91).

Admittedly, bypassing one cell is not serious. But gravity is not the test of whether a violation exists. Rather, it is one of the six criteria to be evaluated in determining the amount of civil penalty to be assessed. Care must be taken not to confuse the various concepts encountered when interpreting the Act. Indeed, acceptance of the operator's position would take enforcement of the Act down an uncertain road where a violation would originate at some imperceptible and undefined point. Thus, if bypassing one cell is allowed, what of two, six, ten, or twenty? Conceptually, and practically, such an approach cannot work.

The post-hearing briefs of the parties have been reviewed. To the extent they are inconsistent with this decision, they are rejected.

In light of the foregoing, it is ORDERED that the citation be AFFIRMED and that the operator's notice of contest be DISMISSED.

Paul Merlin
Chief Administrative Law Judge

Distribution:

R. Stanley Morrow, Esq., Harold D. Rice, Esq., Jim Walter Resources, Inc., Post Office Box C-79, Birmingham, AL 35283 (Certified Mail)

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

Michael Clements, President, UMWA, Local 7918, Route 3, Box 118, Dora, AL 35405 (Certified Mail)

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

Lawrence Beeman, Director, Office of Assessments, U. S. Department of Labor, 4015 Wilson Boulevard, Arlington, VA 22203 (Certified Mail)

/gl

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

APR 22 1987

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. VA 86-36
	:	A. C. No. 44-04856-03502 A6R
v.	:	
	:	Buchanan No. 1 Mine
WESTERN AVELLA CONTRACTORS, INC., Respondent	:	

ORDER OF DEFAULT

On June 26, 1986, the Secretary of Labor filed a Petition to Assess Civil Penalties for alleged violations of the Federal Mine Safety and Health Act of 1977. Respondent filed its Answer on August 25, 1986. On October 14, 1986, I entered an Order directing the Parties to discuss settlement and stipulate as to matters not in dispute. In a telephone conservation, on February 26, 1987, between Counsel for both Parties and myself, Counsel for Respondent advised that due to financial considerations Respondent could neither enter into a settlement or further defend this matter.

On April 16, 1987, Petitioner filed a Motion for a Default Judgment. In this Motion, Respondent has consented to a default order assessing a civil penalty of $15,770.

Accordingly, it is ORDERED that Respondent is in default. It is further ORDERED that the civil penalties of $15,770 proposed in the Secretary's Petition, be imposed as the final order of the Commission. It is therefore ORDERED that the Respondent shall pay such penalties in the amount of $15,770 within 30 days of the date of this Order.

Avram Weisberger
Administrative Law Judge
(703) 756-6210

Distribution:

Page H. Jackson, Esq., Office of the Solicitor, U. S. Department of Labor, 4015 Wilson Boulevard, Room 1237A, Arlington, VA 22203 (Certified Mail)

Mr. David Rosenberg, Western Avella Contractors, Inc., P. O. Box 481, Washington, PA 15301 (Certified Mail)

dcp

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

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

APR 22 1987

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner/Respondent	:	CIVIL PENALTY PROCEEDINGS CONTEST PROCEEDINGS Docket No. WEST 86-217 A.C. No. 42-00121-03604 Docket No. WEST 86-197-R Order 2835167; 5/28/86 Docket No. WEST 86-218 A.C. No. 42-00121-03605 Docket No. WEST 86-239 A.C. No. 42-00121-03609 Docket No. WEST 86-123-R Order 2835108; 4/8/86 Docket No. WEST 86-136-R Order 2835417; 4/2/86 Docket No. WEST 86-152-R Order 2835133; 4/8/86
v.	:	Docket No. WEST 86-169-R Order 2835132; 4/9/86 Docket No. WEST 86-240 A.C. No. 42-00121-03610 Docket No. WEST 86-159-R Order 2834579; 4/16/86 Docket No. WEST 86-241 A.C. No. 42-00121-03611 Docket No. WEST 86-160-R Order 2834610; 4/16/86 Deer Creek Mine

	:	Docket No. WEST 86-236
	:	A.C. No. 42-00988-03546
	:	
EMERY MINING COMPANY,	:	Docket No. WEST 86-89-R
Respondent/Contestant	:	Citation 2834441; 2/5/86
UTAH POWER AND LIGHT COMPANY,	:	
Mining Division,	:	Docket No. WEST 86-237
Respondent/Contestant	:	A.C. No. 42-00988-03547
	:	
	:	Docket No. WEST 86-87-R
	:	Citation 2834444; 2/5/86
	:	
	:	Deseret Mine

DECISION APPROVING SETTLEMENT

Before: Judge Lasher

The parties have reached an overall resolution of the above 16 dockets which involve a total of 14 Citations and Orders. The settlement calls for the vacation of two withdrawal orders in Docket WEST 86-240, the payment of total penalties in the sum of $3,024.00 (MSHA's initial administrative assessments totalled $4,221.00), the modification of five withdrawal orders from issuance under Section 104(d)(1) to issuance under Section 104(a), and the withdrawal by Respondent of all nine of its notices of contest in the nine contest dockets related to the pertinent penalty proceedings.

A summary of the settlement reached appears below:

Docket No.	Citation/Order No.	Initial Assessment	Agreed Settlement
WEST 86-217	2835167	$500	$300 modify to 104(a)
WEST 86-218	2834501	192	50
WEST 86-236	2834441	600	600
	2834499	400	200 modify to 104(a)
WEST 86-237	2834444	79	79
WEST 86-239	2835417	700	700
	2835108	400	400
	2835132	150	75 modify to 104(a)
	2835133	300	20 modify to 104(a)
WEST 86-240 (Partial settlement)	2835140	Vacated	
	2834563	Vacated	
	2834575	Pending review by Commission in Docket WEST 86-126-R	
	2834579	400	400
WEST 86-241	2834610	500	200 modify to 104(a)
		$4,221	$3,024

The motion for approval of the settlement points out that the settlement was achieved after counsel for both parties had fully reviewed the merits of the other party's anticipated evidence and fully and frankly analyzed the potential outcome of the litigation issues had the matter proceeded to hearing. It also appears that Respondent/Contestant a "moderate to large" mine operator, has an average history of compliance and proceeded in good faith to abate the subject violations upon notification thereof.

Upon evaluation of this settlement, information contained in the motion for approval and the various case files, it is concluded that the amicable agreement reached effectuates the purposes of the Mine Safety Act and should be approved.

ORDER

Respondent/Contestant, if it has not previously done so, shall pay the Secretary of Labor the sum of $3,024.00, as and for the civil penalties hereinabove specified, on or before 30 days from the date of this decision.

In Docket No. WEST 86-240, Orders Nos. 2835140 and 2834563, are vacated. 1/

Orders Nos. 2834610, 2835167, 2835132, 2834499, and 2835133 are modified to change their issuance from under Section 104(d)(1) of the Act to issuance as Citations under Section 104(a) of the Act and are otherwise affirmed in all respects including their designation as significant and substantial violations.

Contest dockets Nos. WEST 86-197-R, 89-R, 87-R, 136-R, 123-R, 169-R, 152-R, 159-R, and 160-R, relating to the penalty dockets which are the subject hereof, have been withdrawn by Respondent/Contestant, and such withdrawals are approved as part of the settlement and these nine proceedings are dismissed.

Michael A. Lasher, Jr.
Administrative Law Judge

1/ A separate "Decision Approving Partial Settlement" has been issued with respect to Docket WEST 86-240 since one of the four enforcement papers therein (Citation No. 2834575) remains viable and is presently before the Commission on review. The related contest docket, WEST 86-159-R, has, however, been withdrawn by Respondent/Contestant and such withdrawal is being approved herein.

Distribution:

Edward H. Fitch, Esq., Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Boulevard, Arlington, VA 22203 (Certified Mail)

John T. Scott, III, Esq., Crowell & Moring, 1001 Pennsylvania, NW, Washington, D.C. 20004 (Certified Mail)

Mr. Frank Fitzek, Representative, Deer Creek Mine, P.O. Box 310, Huntington, UT 84528 (Certified Mail)

/bls

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
333 W. COLFAX AVENUE, SUITE 400
DENVER, COLORADO 80204

APR 22 1987

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEST 86-240 A.C. No. 42-00121-03610
v.	:	Deer Creek Mine
UTAH POWER & LIGHT COMPANY, (EMERY MINING), Respondent	:	

DECISION APPROVING PARTIAL SETTLEMENT

Before: Judge Lasher

The parties, as part of an overall settlement involving 16 dockets, have reached a partial settlement of the four enforcement papers (three withdrawal orders and one Citation) involved herein. As part of the motion for settlement approval dated April 1, 1987, the Secretary has vacated Orders Nos. 2835140 and 2834563, and the Respondent has agreed to the full amount of MSHA's initial assessment of $400.00 for Order No. 2834579. The remaining enforcement paper, Citation No. 2834575, is in the process of litigation and is being reviewed in a separate contest matter before the Commission, Docket No. WEST 86-126-R.

I have approved the above settlement in this docket as part of the 16-docket resolution urged by the parties which is being simultaneously approved by me. Such approval is here affirmed.

Counsel for both parties are requested to advise me, with appropriate recommendations as to disposition, of remaining Citation No. 2834575, as soon as possible following the Commission's determination in Docket No. WEST 86-126-M.

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

Distribution:

Edward H. Fitch, Esq., Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Boulevard, Arlington, VA 22203 (Certified Mail)

John T. Scott, III, Esq., Crowell & Moring, 1001 Pennsylvania Avenue, NW, Washington, D.C. 20004 (Certified Mail)

Mr. Frank Fitzek, Representative, Deer Creek Mine, P.O. Box 310, Huntington, VA 84528 (Certified Mail)

/bls

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

APR 27 1987

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. VA 86-49 A.C. No. 44-00749-03526
v.	:	No. 8 Mine
STREET & WHITED COAL CO., INC., Respondent	:	

DECISION APPROVING SETTLEMENT

Before: Judge Broderick

On April 23, 1987, the Secretary of Labor filed a motion for approval of a settlement reached by the parties in this case. The violations were originally assessed at $10,300 and the parties propose to settle for $6300.

Four violations are cited in this docket, all growing out of a fatal roof fall on February 19, 1986. With respect to three of the violations - for altering the accident scene before the inspector arrived ($200); for failure to notify MSHA immediately after the accident occurred ($100); for failure to give a new miner the required 40 hours training ($2000) - the settlement agreement proposes that the operator pay the amount originally assessed. With respect to the fourth violation, failure to follow the approved roof control plan, the settlement proposes payment of $4000, rather than the $8000 originally assessed. There were no eye witnesses to the accident and there is some doubt as to whether the miner was installing temporary roof supports when the fall occurred, which would have been permissible under the roof control plan, rather than installing permanent supports. Respondent is a small operator, had a total of 81 violations in the 24 months prior to the violations cited here including 6 violations of 30 C.F.R. § 75.200.

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 $6300 within 30 days of the date of this order.

James A. Broderick
James A. Broderick
Administrative Law Judge

Distribution:

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

Michael McGlothlin, Esq., McGlothlin & Wife, P.O. Drawer 810, Grundy, VA 24614 (Certified Mail)

slk

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

April 28, 1987

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEVA 86-432 A. C. No. 46-06816-03508
v.	:	
	:	No. 1 Mine
TRIPLE D COAL COMPANY, Respondent	:	

ORDER OF DEFAULT

Before: Judge Weisberger

Petitioner on August 8, 1986, filed its Petition of Assessment of Civil Penalty proposing a penalty of $306 and an Answer was filed by Respondent on February 18, 1987.

On February 25, 1987, I issued a Prehearing Order directing the parties on or before March 10, 1987, to confer for the purpose of discussing settlement, and if settlement was not agreed upon by March 17, 1987, to serve each other and me lists of witnesses who may testify, exhibits which may be introduced, and matters which can be stipulating at the hearing. The Order further stated that failure to comply will subject the defaulting party to a show cause order and possible default decision.

On March 27, 1987, Petitioner filed a statement with me indicating that it had not received any response, from Respondent, to its letter and telephone request asking Respondent's representative, Jack L. Kinder, to contact Petitioner. Prior to April 2, 1987, I had not received, from Respondent, any response to my Prehearing Order of February 25, 1987.

On April 2, 1987, I issued a Show Cause Order ordering Respondent as follows: "...to, within 10 days, confer with Petitioner for the purpose of discussing settlement, and if settlement is not reached within 20 days to serve Petitioner and me with all items referred to in paragraph 2 of my Prehearing Order or show good reason for your failure to comply with this Order." Respondent was advised that if it did not comply with the Show Cause Order it will be placed in default.

On April 8, 1987, a letter was received by me from Respondent in which Respondent's President, Jack L. Kinder, indicated, in essence, that Respondent had "shut down" on September 17, 1985. Mr. Kinder also described, in general, his financial plight. However, the terms of the Prehearing Order were not complied with.

Therefore, it is ORDERED that Respondent is in DEFAULT. It is further ORDERED that the penalties proposed in the Assessment Order, attached as Exhibit A to the petitioner, in the total amount of $306 are imposed as the final order of the Commission. It is further ORDERED that Respondent shall pay such penalties in the of amount of $306 within 30 days of the date of this order.

Avram Weisberger
Administrative Law Judge

1 Attachment

Distribution:

Patricia L. Larkin, Esq., Office of the Solicitor, U. S. Department of Labor, 4015 Wilson Boulevard, Room 1237A, Arlington, VA 22203 (Certified Mail)

Mr. Jack L. Kinder, President, Triple D Coal Company of West Virginia, Inc., Box 4, Nellis, WV 25142 (Certified Mail)

dcp

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

APR 29 1987

JOHN ERVIN PAUGH, Complainant	:	DISCRIMINATION PROCEEDING
v.	:	Docket No. YORK 86-9-D
	:	MSHA Case MORG CD 86-14
METTIKI COAL CORPORATION, Respondent	:	C-Mine

DECISION

Appearances: W. Bryan Hall, Esq., Cumberland, Maryland, for the Complainant;
Thomas P. Gies and Susan E. Chetlin, Esqs., Crowell & Moring, Washington, D.C., for the Respondent.

Before: Judge Koutras

Statement of the Case

This proceeding concerns a discrimination complaint filed by the complainant John Ervin Paugh against the respondent pursuant to section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. Mr. Paugh filed his initial complaint with MSHA on May 5, 1986. Following an investigation of his complaint, MSHA determined that a violation of section 105(c) had not occurred, and notified Mr. Paugh of this finding by letter of June 27, 1986. Mr. Paugh then filed a timely complaint with the Commission pro se, but subsequently retained counsel to represent him.

Mr. Paugh alleges that the respondent harassed him because of his concern for safety and because of his insistence on following safe work procedures, particularly with respect to the amount of air over his roof bolting machine and the spacing of roof bolts. Mr. Paugh contends that his discharge on March 10, 1986, was in retaliation for his safety concerns and complaints.

The respondent filed a timely answer to the complaint, and as an affirmative defense asserts that Mr. Paugh was discharged for fighting underground with another miner. A

hearing was held in Cumberland, Maryland, and the parties have filed briefs and proposed findings and conclusions. I have considered these arguments in the course of my adjudication of this matter.

Issue

The critical issue in this case is whether Mr. Paugh's discharge by the respondent was prompted in any way by his engaging in protected activity, or whether it was the result of fighting in violation of company policy as claimed by the respondent. Additional issues raised by the parties are identified and disposed of in the course of this decision.

Applicable Statutory and Regulatory Provisions

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

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

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

Complainant's Testimony and Evidence

Ronald W. Smith, confirmed that he worked as a temporary roof bolter with Mr. Paugh and Mr. Beckman on foreman Randy Johnson's section until October, 1985, when he was laid off. He considered Mr. Paugh to be a good and fast roof bolter who was safety conscious and insisted on "doing things by the book" (Tr. 29, 52). Mr. Smith stated that Mr. Paugh insisted on maintaining the ventilation curtains to provide air over his roof-bolting machine, that he was "real strict on air" and complained to Mr. Johnson about the lack of air "at least once a day" (Tr. 29-32).

Mr. Smith confirmed that the scoop and feeder operators were responsible for maintaining the ventilation curtains to insure enough air on the section, and that air for the bolter was provided by a fan and tubing which had to be moved as the bolting cycle advanced. He estimated that the moving of the fan resulted in approximately 20 to 25 minutes down time for the bolter (Tr. 34).

Mr. Smith confirmed that he attended safety classes every Monday morning, and received instructions in roof and rib control, ventilation, and methane detection procedures (Tr. 39). When methane was detected, Mr. Johnson would

instruct someone to tighten up the curtain or wash down the methane detectors on the mining machines (Tr. 39). Mr. Smith stated that he once complained to Mr. Johnson about "smoke from a diesel scoop," and that in 1982, he operated a scoop in cuts where the roof had not been bolted, sometimes on his own, and sometimes at the direction of mine superintendent Paul Tenney (Tr. 44-47). Mr. Smith also stated that Mr. Johnson instructed him to clean up some coal spillage or debris in an unbolted roof area, and that this was a "common practice to save time" (Tr. 48-51).

On cross-examination, Mr. Smith confirmed that when he had occasion to go under unsupported roof with his scoop, it was equipped with an overhead canopy which shielded him from any falls, and that the roof bolters were equipped with temporary roof support systems (TRS), which is considered to be equivalent to a supported top (Tr. 54). Mr. Smith further confirmed that on those occasions when Mr. Johnson asked him to work under unsupported roof, he refused, and Mr. Johnson would do the work himself (Tr. 59).

Mr. Smith conceded that he was aware of his right not to work in an area where there may be an imminent danger, and that he was aware of the respondent's "open door policy" to speak with mine management if he were not satisfied with his foreman's response to his safety concerns (Tr. 65). Mr. Smith confirmed that he stopped operating the smoking diesel scoop until it was repaired. However, when he complained to Mr. Johnson about the smoke, and he too "grouched" about it, but did not have the scoop repaired until 2-months passed and another scoop was brought in to the section (Tr. 69). He confirmed that the smoking scoop conditions prevailed "somewhere in 1984" for about 2 months, but after a new one was brought in, Mr. Johnson's section "was the cleanest and best section in the mine" (Tr. 72). Mr. Smith confirmed that he had no gripe against Mr. Johnson, and had no complaints about his safety procedures (Tr. 74). He also confirmed that Mr. Paugh was never disciplined because of his frequent complaints about the air (Tr. 75).

In response to further questions, Mr. Smith stated that Mr. Johnson was "quick tempered," that they sometimes argued over safety matters, and one argument over a cable splice resulted in Mr. Johnson's suspension for 2 weeks after Mr. Smith and another miner complained to management (Tr. 77). They also argued about the air, but Mr. Smith conceded that this was not entirely Mr. Johnson's fault because "the headings and things like that wasn't right" (Tr. 77). Mr. Smith explained that since Mr. Johnson was the section boss, he was

the recipient of the complaints, and that he sometimes took care of the problems (Tr. 78). However, he could not recall any instances when Mr. Johnson totally ignored or did absolutely nothing about Mr. Paugh's safety complaints (Tr. 84).

Mr. Smith stated that Mr. Paugh and Mr. Johnson did not get along and "grouched" at each other (Tr. 85). In Mr. Smith's opinion, Mr. Paugh was right "90 percent" of the time with regard to his safety complaints to Mr. Johnson, and he recalled an incident in 1984, 2-years before Mr. Paugh's discharge, when Mr. Paugh bolted for a shift without an operative TRS, and then refused to continue bolting after arguing with Mr. Johnson (Tr. 88). On another occasion when Mr. Johnson and Mr. Smith would knock down curtains with their machines, Mr. Paugh would put them back up, and he and Mr. Johnson would argue over this (Tr. 89-91).

John Prinkey, rib bolter, confirmed that he has worked with Mr. Paugh on Mr. Johnson's section, but was not working on March 5, 1986, because he was off with a back injury (Tr. 96). He worked with Mr. Paugh and Mr. Beckman on the roof bolter, and Mr. Paugh would shut the bolter down and refuse to bolt while the ventilation fan was being advanced and there was no air over the bolter. When Mr. Paugh advised Mr. Johnson that he would not bolt without air, Mr. Johnson responded "well, you know, I can't force you" (Tr. 98).

Mr. Prinkey stated that Mr. Beckman spent time "prying and picking" down ribs which he believed were unsafe, and that this slowed the bolting crew down to the point where Mr. Prinkey complained to Mr. Johnson and to superintendent Steve Polce. Mr. Paugh and Mr. Beckman also argued about the situation, and Mr. Paugh told Mr. Johnson that Mr. Beckman was "goofing off" (Tr. 100). Mr. Prinkey and Mr. Paugh complained because they did not like to work overtime, and if they did not work fast enough to prepare the area for the next shift, they would have to stay to finish the bolting.

Mr. Prinkey considered Mr. Paugh to be a good roof bolter, and he knew of no instances where Mr. Paugh would put in extra roof bolts just to slow down (Tr. 101). Mr. Prinkey stated that Mr. Johnson never instructed his crew to bolt without air, but there were times when the fan would be moved, without notifying the crew, and this would result in an interruption to the air (Tr. 102).

Mr. Prinkey stated that after Mr. Paugh's discharge, Mr. Johnson stated that he "despised" Mr. Paugh (Tr. 103). Mr. Prinkey confirmed that Mr. Paugh tried to follow all

safety rules, but conceded that "a lot of times, he probably did things wrong. I do things wrong" (Tr. 104).

On cross-examination, Mr. Prinkey explained the duties of his roof bolting crew. He conceded that at times Mr. Beckman was slowed down by water or when prying down a rib and numerous times he taunted Mr. Beckman and made fun of him for being slow, and they argued a lot over it (Tr. 106). Mr. Prinkey stated that no one in management ever forced Mr. Paugh to work when there was no air over the bolter (Tr. 106).

In response to further questions, Mr. Prinkey confirmed that Mr. Paugh's reluctance to work with no air over the bolter occurred during the interval when the fan was shut off and advanced, and that Mr. Johnson was upset because Mr. Paugh would not bolt without air (Tr. 110). However, Mr. Johnson never insisted that Mr. Paugh continue to bolt with no air, but generally griped about Mr. Paugh's unwillingness to do so (Tr. 110).

Mr. Prinkey stated that Mr. Beckman liked to work overtime, and it was his opinion that most of the time Mr. Beckman would "pick and pry" at the ribs deliberately to slow down the crew so he could work overtime. This resulted in arguments between Mr. Paugh, Mr. Prinkey, and Mr. Beckman (Tr. 111-112).

Jimmie K. Wolfe, confirmed that he had at one time worked with Mr. Paugh on Mr. Johnson's section as a bolter, and was aware of "discussions" between Mr. Paugh and Mr. Johnson over the lack of air over the bolter while the ventilation fan was being advanced. However, Mr. Wolfe was not aware that Mr. Johnson ever ordered Mr. Paugh to continue bolting without air (Tr. 116).

Mr. Wolfe stated that sometime in 1984 or 1985 Mr. Paugh and Mr. Johnson were involved in a dispute over a bolter which needed repairs, and Mr. Johnson lost his temper and he and Mr. Paugh exchanged heated words and foul language (Tr. 118). As a result of that encounter, Mr. Paugh advised Mr. Johnson that he would insist that he have air over his bolter, and that the relationship between the two changed and "they was sort of pretty much on edge with each other" (Tr. 120).

On cross-examination, Mr. Wolfe conceded that he was not assigned with Mr. Paugh on Mr. Johnson's section when the March, 1986, suspension and discharge of Mr. Paugh occurred, and since he was not on the section since the spring or summer

of 1985, he had no opportunity to observe their relationship during the period in question (Tr. 122).

Mr. Wolfe stated that while riding home from the mine with Mr. Johnson after Mr. Paugh's discharge he stated to Mr. Johnson that "You will never convince me that you people did not take advantage of this to get rid of a guy that has caused you a hassle because of safety," and that Mr. Johnson responded, "Well, I will have to admit that it is a lot easier since he's gone" (Tr. 130). Mr. Wolfe stated that when he worked as a bolter, he continued to bolt while the fan was being moved, and did so because of "pressure from supervisors." Mr. Wolfe was of the opinion that anyone who inhibited production by complaining about safety was considered a "bawl baby," "complainer" or "troublemaker" (Tr. 131).

Mr. Wolfe stated that on those occasions when he was requested to continue to bolt with no air while the fan was being advanced, and refused, he was assigned to help move the fan. He also confirmed that when he complained to his section foreman about safety, his concerns "were taken care of more or less after the horse got out of the barn" (Tr. 134). As an example, he cited an instance when complaints were made about the remote control devices on a continuous-mining machine, and although mine management changed some parts in an attempt to find out why the device was malfunctioning, the miner was not taken out of service until after the miner operator Donnie Bray was injured when the malfunctioning device resulted in his being pinned against the rib and injured (Tr. 135-137).

Mr. Wolfe stated that he has been reassigned from one section to another, and found this unusual because most transfers involve the whole crew, and not just one individual. He conceded that management has the right to make such reassignments, and while he concluded that his transfer came about because he was "a complainer, concerned about safety," he did not complain because his reassignments placed him in a better working environment (Tr. 139).

Mr. Wolfe confirmed that he has been "a rank and file" miner since June 1979, but that he served as a foreman on the midnight construction shift for approximately 7-months prior to that time, and was taken off that job because management did not believe he was getting the job done. He denied that he holds any grudges against the respondent because of this, or because of the prior miner lay-offs, and confirmed that the company treats him well. However, when asked whether he "has an axe to grind" with the company, he responded "I

ground it a long time ago" (Tr. 141). When asked whether he held his removal as a foreman against the company, he responded "I did for a while, but it was the best thing that ever happened to me" (Tr. 142). Mr. Wolfe also confirmed that even though he has been safety conscious and has filed safety complaints over the past 7 years, he has not been disciplined and still has a job (Tr. 146).

Donald W. Bray, continuous-miner operator, confirmed that he worked on Mr. Johnson's section with Mr. Paugh and Mr. Beckman. Mr. Bray confirmed that he was injured during the summer of 1985 when he was pinned against a rib when the miner remote control device malfunctioned. He also confirmed that he had experienced problems with tramming the machine and the remote control device prior to the incident, reported it to the head mechanic Tom Scott, and that Mr. Scott "did the best he could" in troubleshooting the problems and in his attempts to repair the devices. He considers Mr. Scott to be a good mechanic, and did not believe that he ignored his complaints, and that he attempted to find the problem and make the necessary repairs (Tr. 156).

Mr. Bray confirmed that the problems with the machine occurred over an extended period of time, but they "would come and go," and he believed the problems were being addressed, and that Mr. Scott was making an effort to find the problem. Once the accident occurred, the machine was immediately removed from service, dismantled, and thoroughly checked out (Tr. 164). Mr. Scott subsequently advised him that a short had been found in the machine boom wiring (Tr. 159).

Mr. Bray stated that he had no complaints about Mr. Johnson as a foreman, and considered him to be "fairly conscious safety wise." He confirmed that Mr. Johnson has never ordered or asked him to do anything that was unsafe, and stated "I don't think he would do that" (Tr. 157). He further stated that "sometimes maybe I've done stuff on my own that might not have been unsafe" but he never really told me, you know, to really put myself in danger or something like that" (Tr. 157).

Complainant's counsel proffered the testimony of Blaine Fike, and stated that if called to testify, Mr. Fike would testify that he was working on Mr. Johnson's section on March 5, 1986, and would confirm that Mr. Paugh would stop the bolter when there was no air while the fan was stopped and being moved, and that Mr. Johnson was suspended because of the faulty cable repair incident. Counsel also proffered

the testimony of Terry Lucas, who was likewise working on Mr. Johnson's section on March 5, 1986. Mr. Lucas would testify that Mr. Paugh "made complaints about or said he would not work without air" (Tr. 165).

Respondent's Testimony and Evidence

Terry W. Lucas, testified that in 1980 he was working as a laborer on the same shift with Mr. Paugh and Mr. Harry Beckman. Mr. Lucas stated that while in the process of moving a cable, he and Mr. Paugh got into a dispute which resulted in a fight between them. He stated that Mr. Paugh hit him, and that he held Mr. Paugh down on the ground. Mr. Lucas stated that he "told John to behave, calm down . . . and after that, everything was all right." Mr. Lucas confirmed that he and Mr. Paugh were rolling around on the ground, and that Mr. Beckman had to separate them. The incident was never reported to the foreman, and Mr. Lucas never discussed it with him. Mr. Lucas further confirmed that he was aware of the company rule on fighting, and that it is an offense for which one may be fired (Tr. 178-179). Since that time, he has had no further disagreements with Mr. Paugh, and has since worked with him many times (Tr. 186).

Mr. Lucas confirmed that he was present during the shift when the incident of March 5, 1986, between Mr. Paugh and Mr. Beckman occurred, but that he did not personally observe what occurred. He found out about it when he learned that foreman Randy Johnson had taken them out of the mine. He asked Mr. Johnson what had happened, and Mr. Johnson replied "It's went too far this time. I've got to take them outside." When Mr. Lucas tried to talk Mr. Johnson out of taking them outside, Mr. Johnson replied "No, I've got to do my job. I've got to take them outside" (Tr. 187).

Mr. Lucas stated that after Mr. Johnson took Mr. Paugh and Mr. Beckman outside, he asked roof bolter Earl Sisler about the incident, and that Mr. Sisler told him that while he did not observe Mr. Paugh "go across the bolter," he heard "the ruckus," looked up alongside the bolter, and observed that Mr. Beckman had Mr. Paugh up against the rib "slugging him" (Tr. 187). Mr. Lucas reiterated that he did not personally observe the incident, and simply stated what Mr. Sisler told him about the incident (Tr. 187-189).

Complainant John Paugh was called as an adverse witness by the respondent. Mr. Paugh confirmed that general mine foreman Steve Polce telephoned him on March 10, 1986, and informed him that he was fired for fighting. Mr. Paugh also

confirmed that he was aware of the company rule prohibiting fighting, and that if he engaged in fighting, it would be a reason for discharging him (Tr. 191).

Mr. Paugh confirmed that he does not like to work overtime, and that he began work on a new section of the mine on the Monday before his discharge. He also confirmed that he lives 32 miles from the mine, and prior to this time he had been car pooling "off and on," and that Mr. Polce informed him that in view of the fact that he might have to stay and work overtime if his roof bolting crew did not keep within two and one-half cuts ahead of the continuous miner, that he was to drive his own car to work (Tr. 192). Mr. Paugh stated that Mr. Polce's instructions was nothing new to him because he drove himself to work many times, and that he understood Mr. Polce to mean that he should not have to depend on a car pool if he had to work overtime (Tr. 193).

Mr. Paugh denied that he ever made any statements to Mr. Sisler about having to buy extra gasoline because of the necessity of driving his own car to work, but admitted that he told Mr. Sisler that "I wasn't crazy about working overtime" (Tr. 195). Mr. Paugh also denied telling Mr. Sisler that if he were required to work overtime he would make sure that he got more overtime (Tr. 195).

Mr. Paugh confirmed that he received a 40-hour safety training course when he was first hired, and that he participated in periodic safety meetings held every Monday morning before work (Tr. 195). He also confirmed that he was aware of his rights under the Act, and understood that he was not required to work under any unsafe conditions, and that there were several occasions when he turned off his roof-bolting machine as necessary, and did not work when he believed there was insufficient ventilation. On these occasions, while he did not continue to bolt, he performed other work.

Mr. Paugh stated that he refused to continue bolting a dozen times during the 2 or 3-years prior to his discharge, and that he worked on the bolting machine about 90 percent of the time during this period. His refusal to continue bolting was limited to those occasions when he did not believe that the ventilation over his bolting machine was adequate. Although he believed that the lack of ventilation was "always serious," he confirmed that with the exception of the dozen occurrences when he refused to operate the bolter, the ventilation was not such a serious problem as to cause him to discontinue bolting (Tr. 198).

Mr. Paugh confirmed that he operated a roof bolter for 6 years, and that he was aware of the respondent's "open door" policy, and that if he had any problem with his foreman, he could talk to someone else in management (Tr. 198). He confirmed that as part of his safety training, he was told that the company wanted him to always be careful and look out for safety, and that as an underground miner, the company was concerned about his safety (Tr. 199).

Mr. Paugh confirmed that he was an experienced roof bolter, and he stated that under good conditions he was able to complete five cuts of coal a day during his bolting cycle, installing approximately four to six rows of bolts in each cut, with four bolts in each row, and that this is usually considered to be a good day's work (Tr. 199-200).

Mr. Paugh stated that he has complained about the lack of ventilation over his bolter, and has discussed the matter with general mine foreman Polce several times, and with superintendent Tenney a couple of times. He stated that over a period of 18 months, he discussed this with Mr. Polce three or four times in his office, and six or seven times underground (Tr. 202). On one occasion after speaking with Mr. Polce, Mr. Polce informed him that there were problems with the air, and said "If you can get it, get it, and if you can't, you can't." Mr. Paugh stated that he then "got the best air I could, . . . and later on, the air was down, and I complained to him again" (Tr. 201). Mr. Polce also told him that "we was having trouble getting enough air on the section" and that "it was hard to get enough air to the face. But it could be done" (Tr. 202).

Mr. Paugh stated that Mr. Polce told him that he wanted him to continue bolting even if he (Paugh) believed there was inadequate ventilation. Mr. Paugh stated that this occurred underground approximately a month before he was discharged. Mr. Paugh explained that on one occasion when the fan was down, he shut the bolter off, and proceeded to determine why the fan was down. Mr. Polce was there and advised him to keep bolting and that there was "plenty of air." Mr. Paugh stated that "I told him there couldn't be enough air there if the fan wasn't running." Mr. Polce took out his anemometer, and held it up, and Mr. Paugh stated that "it just barely turned." Mr. Polce then said "Yeah, there's plenty of air, get to bolting." However, the fan came back on, and Mr. Paugh started bolting again (Tr. 204).

Mr. Paugh stated that on occasions when the ventilation curtain was down in the roadways where the buggies and ram

cars operated, air was cut off from the face or the bolter, and Mr. Polce expected him to continue to bolt. Mr. Polce stated to him "Bolt, or you're going to be taken off the bolter or find another job," and Mr. Paugh informed Mr. Polce that he would not bolt without air. Mr. Paugh explained further that he and Mr. Polce would continue the argument, but that he did not bolt without air, and eventually Mr. Polce "would get around to getting the air" (Tr. 205).

Mr. Paugh stated that on another occasion in 1984 or 1985, after complaining to Mr. Polce, he was taken off Mr. Johnson's section for 7 months "to keep me and Randy Johnson apart" (Tr. 207). Mr. Paugh stated that when he complained to Mr. Johnson about the ventilation, "he would get in an uproar about it" (Tr. 208).

Mr. Paugh conceded that he had never been disciplined prior to his discharge, and he confirmed that he worked for Mr. Johnson for 3 to 4 years "off and on," and their relationship was not good for 2 years. Mr. Paugh stated that while Mr. Johnson never disciplined him during this time, he made him "do extra things," and because of his complaints, tried to limit his lunch hours to 10 to 15 minutes, rather than the usual half-hour. Mr. Paugh conceded that lunch hours may be shorter if work was required, and he also conceded that the "extra work" entailed other work assignments by Mr. Johnson when the roof bolter was down (Tr. 210). Mr. Paugh also conceded that other crew members were sometimes given other things to do. He also stated that Mr. Johnson would assign him to stack tubing, advance curtain, rock dust, and shovel the feeder while the bolter was down, while the other two crew members "were standing there watching the mechanic fix it." He asserted that this happened 8 to 12 times during the last year. He also conceded that at times when he and Mr. Prinkey were ahead of Mr. Beckman in their work, they would sit and drink coffee waiting for him to catch up, if there was nothing else to do (Tr. 212).

With regard to the altercation with Mr. Lucas in 1980, Mr. Paugh denied that he threw a punch at Mr. Lucas, but that "we wrestled." Mr. Paugh described the incident as "horseplay," and stated that he had forgotten the incident and could supply no details (Tr. 215). Mr. Paugh conceded that he failed to include in his complaint to MSHA that he was fired for fighting, and he did so "because I didn't think it would have anything to do with it" (Tr. 222). He conceded that Mr. Polce told him that he was being fired for fighting underground, but supplied him with no details. Mr. Paugh also stated that when Mr. Johnson took him out of the mine on

March 5, he gave him no explanation or reason for doing so other than "he was just tired of the things that's being going on. He took us outside to discuss it" (Tr. 224). After Mr. Polce called him to inform him of his discharge, Mr. Paugh called Mr. Gearhart and advised him that he put his hand on Mr. Beckman's shoulder (Tr. 226). Mr. Paugh conceded that he said nothing to Mr. Gearhart about being fired for making any safety complaints (Tr. 228).

Mr. Paugh denied that Mr. Beckman had him against the rib "pounding" on him, and the only explanation he could give with regard to Mr. Sisler's testimony in this regard was that Mr. Beckman "knocked me against the rib when he went out past me" (Tr. 225). Mr. Paugh explained that he went around to Mr. Beckman's side of the bolter, and placed his hand on Mr. Beckman's shoulder to talk to him about the spacing of the roof bolts, and that Mr. Beckman "tore out past me and knocked me up against the rib" (Tr. 225).

Mr. Paugh further explained his encounter with Mr. Beckman as follows (Tr. 234-236):

> Q. In fact, you were in a hurry to go over and talk to Mr. Beckman; weren't you? Because right after Randy had left -- it was right after Randy had told you to go back to work; wasn't it?
>
> A. Yes.
>
> Q. And it was right after you said to Mr. Beckman, "I'm going to get you, you son of a bitch"; wasn't it?
>
> A. I don't recall.
>
> Q. What do you recall saying, Mr. Paugh, at that point?
>
> A. I think I called Harry a cry baby at that point.
>
> Q. And you don't think you called him a cry baby, son of a bitch?
>
> A. I don't remember.
>
> Q. You might have; right?

A. That's possible.

Q. All right. Now, then, Mr. Sisler was at the back of the machine; was he not?

A. Yes, he was.

Q. And isn't it a fact that you walked right by Mr. Sisler on your way to get to Harry Beckman?

A. Yes.

Q. And isn't it a fact that, as you walked by Mr. Sisler, you said something like, "Harry is a cry baby?" "Harry is crazy?"

A. Yes; probably did.

Mr. Paugh confirmed that immediately prior to his encounter with Mr. Beckman, he and Mr. Johnson discussed the spacing of the roof bolts, and that he told Mr. Johnson "You cover your ass; I'll cover mine" (Tr. 255). Mr. Paugh confirmed that he and Mr. Johnson were angry, and that Mr. Johnson told him to put the bolts in "skin to skin," and to "Put as many as you want up, as long as you are safe" (Tr. 246-247). Mr. Paugh denied that he was upset with Mr. Beckman about "ratting on him" to Mr. Johnson, but admitted that he stated to Mr. Johnson "what's the problem? Is this cry baby complaining about me" (Tr. 237). Mr. Paugh denied that he pushed Mr. Beckman, and stated that he touched him hard enough so that he knew someone was behind him, and that he did so to get his attention over the noise of the machine (Tr. 244). Mr. Paugh stated further that he went over to Mr. Beckman's side of the machine simply to have "a business conversation" with him, and he confirmed that in a prior statement to MSHA he stated that he wanted to discuss the spacing of the bolts with Mr. Beckman (Tr. 250).

Mr. Paugh stated that after the incident with Mr. Beckman, Mr. Johnson and Mr. Beckman returned to the area where he had resumed working, and that Mr. Johnson asked him "what's going on." Mr. Johnson also asked Mr. Beckman whether he had told him the truth, and Mr. Paugh denied that Mr. Johnson asked him whether he had hit Mr. Beckman, but admitted that it was possible he told Mr. Johnson that he placed his hand on Mr. Beckman (Tr. 252-253).

Mr. Paugh denied that he and Mr. Prinkey had ever taunted or made fun of Mr. Beckman in the past, and denied that they ever threw grease over the machine at him while having coffee while Mr. Beckman was working (Tr. 256-257). Mr. Paugh confirmed that the day before he was suspended, his bolting crew had to stay and work overtime because they were not caught up with the continuous-mining machine (Tr. 257).

Mr. Paugh testified as to his efforts to obtain employment since his discharge, and he also testified as to the incident concerning the broken down roof bolter. He denied that Mr. Johnson had asked him to tell the mechanic to fix the machine, and stated that Mr. Johnson asked him to tell Mr. Wolfe to tell the mechanic to fix it (Tr. 259-265).

On cross-examination, Mr. Paugh conceded that management's "open door policy" was a good one, but "sometimes it never worked." He stated that "I've seen guys go out to higher authorities before and complain, and come back to the mine site, and they would get transferred off of the section or put on dead work" (Tr. 266-267). He explained the roof bolting sequence he was following on March 5, 1986, confirmed that he argued with Mr. Beckman over the roof bolting pattern on that day, and stated that he went around the machine to speak with Mr. Beckman about it (Tr. 269).

In response to further questions, Mr. Paugh confirmed that he and Mr. Johnson had been at odds with each other "off and on" from 1984 until he was discharged, and that their arguments concerned the lack of air over the bolter and short dinner breaks, and that his complaints to Mr. Polce about Mr. Johnson resulted in Mr. Polce's transferring him to another section (Tr. 270, 272). Mr. Paugh denied any prior altercations with Mr. Johnson, except for disagreements and misunderstandings, and it was his impression that Mr. Johnson's work assignments were deliberately made to punish his bolting crew, and this is why Mr. Polce took him off the crew the first time (Tr. 274). Mr. Paugh confirmed that he and Mr. Johnson had exchanged strong words more than once, and when asked whether or not Mr. Johnson ever invited him to hit him, Mr. Paugh responded. "He could have. He's a pretty good instigator" (Tr. 274). Mr. Paugh denied that he "despised" Mr. Johnson, but he believes that Mr. Johnson "had a big part to do" with his discharge because he complained to the mine foreman and superintendent about him several times (Tr. 277).

Harry L. Beckman, roof bolter, confirmed that on Wednesday, March 5, 1986, he was working on a crew with

Mr. Paugh and Mr. Earl Sisler, and that Mr. Johnson was their foreman. He recalled a meeting held on Monday, March 3, when work in the new section began, and confirmed that mine foreman Polce told the crew that they would have to drive their own cars to work and would have to stay and work overtime if they were more than 2-1/2 cuts behind the continuous miner. Mr. Beckman stated that Mr. Paugh later commented to him that he wanted more than an hour of overtime (Tr. 280).

Mr. Beckman confirmed that he had worked with Mr. Paugh since October, 1985, up to the time of his discharge, and he confirmed that Mr. Paugh drilled faster than he did and that he had trouble keeping up with him at times (Tr. 282-283). Mr. Beckman stated that on one occasion when he was behind, Mr. Paugh and Mr. Prinkey threw grease at him while he was working, but they stopped after it hit him in the face and he warned them that he would leave the mine if the grease hit him in the eye (Tr. 283).

Mr. Beckman confirmed that Mr. Paugh was a fast worker "when he wanted to be," and he explained the roof bolting procedures and Mr. Paugh's work (Tr. 285-287). Mr. Beckman stated that during the week in question, Mr. Paugh was "holding him up" and was "standing around and talking" rather than installing test holes. Mr. Beckman stated that Mr. Paugh told him that since he had to drive to work himself, "he wanted to fool around and get the overtime." Mr. Beckman complained to Mr. Polce and told him what Mr. Paugh had said, and Mr. Polce advised him that "he would keep an eye on us" (Tr. 288). Mr. Beckman stated that the crew had to stay and work an hour overtime on Tuesday, March 4, and that he told Mr. Johnson about it on Wednesday, March 5. He testified further as to the subsequent sequence of events (Tr. 292-295):

> And then, Randy came up and I says -- he said we was getting behind. I said, "Yeah, I know. John's over there fooling around." I said, "Now he's putting three (3) pins in where he only needs two (2)." And I said, "He's going to end up making us have to stay again today."
>
> So, then, Randy went over and talked to him or something, and he shut the bolter off and said he would measure them, and then John -- when he went up there, John said, "What's the problem? Who's holding me up; who's holding me up now?" And started hollering.

And he says, "Is he the problem over there, that cry baby, son of a bitch?"

Q. Who was he referring to when he said that?

A. To me.

Q. All right.

A. And Randy said -- after he measured it and stuff, Randy said, "You guys do whatever you think is safe. I don't care how many bolts you put in to make it safe, but get back to work." And he said, "You guys think you can work together?"

* * * * * * *

A. Well, then, Randy left, and I started the bolter up, and then I went back to the controls, and John said something about -- it sounded to me like, over the noise -- like, "I'll get you, you son of a bitch," or something like that.

Q. Did you say anything back to him?

A. No. I just went, "Yeah," or something like that (indicating). I just started letting the TRS down and started tramming the bolter up, and then John came over and pushed --

Q. Let me stop you there. When he said, "I'm going to get you, you son of a bitch," where was he? Was he over on his side of the machine?

A. Yeah. He was up at his. He was just starting.

Q. I think your testimony was that you started to move the TRS.

A. Yes.

Q. Then, what happened after that?

A. Well, I was getting ready -- I was starting to tram the bolter, and the next thing I knew, he said "You cry baby, son of a bitch," and hit me in the back and pushed me into the bolter and knocked my hat off. And I turned around, and I pushed him back like this (indicating), and the ribs ain't that wide (indicating), and I turned around real quick, and he started to lift his arms, and I grabbed his arms, because I thought he might be trying to hit me or something.

I just grabbed his arms and moved him aside, and I said "Get out." I said, "Get out of here," or something, and moved him to the side, and I went and got Randy Johnson.

Q. Okay. Did Mr. Paugh say anything to you as you were leaving to get Mr. Johnson?

A. No. I just took off.

Q. When did your hard hat fall off?

A. When he pushed me into the bolter.

Q. What part of your body hit the bolter?

A. It would have been my chest.

Mr. Beckman stated that he found Mr. Johnson within 5 minutes, and "I told him that John pushed me into the bolter, come over there and pushed me into the bolter; knocked my hat off." Mr. Johnson then proceeded with him to the bolter, shut it off, and told him and Mr. Paugh "I'm taking you outside. I can't put up with this stuff underground" (Tr. 296). Mr. Beckman stated that later, while he and Mr. Paugh were in the shower room, Mr. Paugh said to him "You had better tell no lies, or they will fire us both" (Tr. 297). Mr. Johnson later informed them that he had called Mr. Polce and informed them that they were both suspended pending an investigation and that he would escort them off the property (Tr. 297). Mr. Beckman confirmed that he and Mr. Paugh left the mine in their vehicles, and that Mr. Johnson followed them both off the mine property in his own vehicle (Tr. 298).

Mr. Beckman confirmed that after he was suspended, he was directed to appear at the mine on Friday, March 7, and he

met that day with management representatives Mr. Gearhart, Mr. Polce, Mr. Tenney, and Mr. Bill Pritt. Mr. Beckman stated that after telling them what had occurred, he was told to go back to work that same day, and he did (Tr. 299).

Mr. Beckman confirmed that Mr. Paugh was in a fight with Mr. Terry Lucas in 1980, and he explained that while moving a belt, they exchanged words and Mr. Paugh jumped on Mr. Lucas and threw him to the ground, and they wrestled around until someone broke it up and told them to "straighten up or you're going to get fired." Nothing further was said about the incident, and it was not reported to the foreman because they would have been fired (Tr. 300).

Mr. Beckman confirmed that he has never been harassed by Mr. Johnson, that Mr. Paugh has never complained to him about being harassed by Mr. Johnson, and he could not recall Mr. Paugh raising any safety complaints during any of the Monday safety meetings (Tr. 301).

On cross-examination, Mr. Beckman confirmed that Mr. Sisler was filling in for Mr. Prinkey on the crew during the week in question, and he explained the work procedures and confirmed that for the 3 days during the week in question, Mr. Paugh seemed to be working slower than him (Tr. 301-306). He also explained the procedure for "spotting" and checking the bolting pattern, and confirmed that he wasn't too happy with the manner in which Mr. Paugh was helping him on the day in question (Tr. 308, 309-312).

Mr. Beckman confirmed that he complained a lot to Mr. Johnson and Mr. Polce about Mr. Paugh (Tr. 314). Mr. Beckman confirmed that he told Mr. Johnson that Mr. Paugh had pushed him against the bolter, but that he could have said that a "big hit on the back pushed me in" (Tr. 316). He also confirmed that he told the management team at the Friday meeting that Mr. Paugh "either hit me or pushed me in the back or something and knocked me into the bolter" (Tr. 318). Mr. Beckman confirmed that Mr. Paugh did not "strike him" and that they did not exchange blows. When asked whether they were in "a fight," he responded "No. I turned around and grabbed his hands because I didn't know if he was going to or not. I just grabbed his hands to try and protect myself" (Tr. 323).

Mr. Beckman stated that after he was suspended, Mr. Prinkey and other miners told him that he too would end up being fired, and that they harassed him because "I went and told on him for pushing me into the bolter." He stated

further that the other miners "thought I ought to try to handle it underground and just left it go, . . . and a lot of them was . . . angry about it, and they gave me a rough time over it" (Tr. 320-321). As a result of this, he spoke with Mr. Gearhart a week or so later about it, and Mr. Gearhart stated to his (Beckman's) wife that "they can tell us who to hire, but they can't tell us who to fire," and that Mr. Beckman then told Mr. Prinkey about Mr. Gearhart's comment (Tr. 322).

Earl R. Sisler, confirmed that on March 5, 1986, he was working as a rib bolter installing rib boards on the same crew with Mr. Paugh and Mr. Beckman. Mr. Sisler confirmed that Mr. Polce advised the crew at the start of work on the new section that they would have to drive their own cars to work if they had to work overtime. Mr. Sisler said that Mr. Paugh stated to him on Monday or Tuesday evening of the week in question that "if he had to drive the car by himself, that he would work the overtime to get gas money" (Tr. 329-330). Mr. Sisler confirmed that the crew had to work overtime on Tuesday, March 4, because "things slowed down," but he did not complain to Mr. Johnson (Tr. 332). He confirmed that a few times, Mr. Beckman had his bolting work done, and the crew had to wait for Mr. Paugh to finish his bolting (Tr. 331). Mr. Sisler confirmed that Mr. Beckman complained to Mr. Johnson about Mr. Paugh's bolting, and he observed the three of them in a conversation on the day in question, but he could not hear what was said. After Mr. Johnson left the area, Mr. Paugh came around to Mr. Beckman's side of the machine, past Mr. Sisler at a pace "more than normal," and commented to him that "Harry's a damn cry baby" (Tr. 335). Mr. Sisler further explained (Tr. 335-336):

> JUDGE KOUTRAS: But when Mr. Paugh came around the back of the machine and made the comment to you about Harry being a cry baby, what was his demeanor? I mean, was he angry; was he mad? Was he running towards Mr. --
>
> THE WITNESS: He was upset.
>
> JUDGE KOUTRAS: He was upset. What made you believe he was upset?
>
> THE WITNESS: Well, just prior to that, when they were up at the front of the bolter, the talking -- like I say, you could look up there

and see -- like John was talking back to the boss.

Mr. Sisler stated that he saw no punches thrown, and that he could only see Mr. Paugh and Mr. Beckman from the waist up over the machine, and that there was approximately 3 feet between the machine and the rib. Mr. Sisler confirmed that he did not see Mr. Paugh push Mr. Beckman, and when asked to account for Mr. Beckman's hat flying off, Mr. Sisler responded "he had to be pushed into the controls or Harry flinched." Mr. Sisler did not see Mr. Beckman go against the machine, and stated "all I saw was his hat came off, and then Harry turned and tried to secure John's arms," and he saw that Mr. Beckman had Mr. Paugh by the wrists against the rib (Tr. 337-341).

Mr. Sisler believed that Mr. Paugh had no reason to go to Mr. Beckman's side of the machine, and that if he wished to speak with him over the noise, he could have shut the machine off, or talked across the machine (Tr. 343). Mr. Sisler confirmed that he made no attempt to stop Mr. Paugh as he proceeded by him, because he didn't want to get involved, and he stated that "there was an indication . . . that something was going to happen" (Tr. 344). Mr. Johnson returned with Mr. Beckman within 3 or 4 minutes, and took them both out of the section (Tr. 345).

Mr. Sisler confirmed that he had worked for Mr. Johnson about 3 months, and had no safety complaints about him. He never previously observed Mr. Johnson harass Mr. Paugh, nor had he observed them arguing or exchanging words (Tr. 346). Mr. Sisler confirmed that he was interviewed by Mr. Gearhart, Mr. Polce, and Mr. Pritt about the incident in question, and told them his version of the event as testified to during the instant hearing (Tr. 349).

On cross-examination, Mr. Sisler explained the work performed during the period in question, and confirmed that the crew worked an hour overtime on Tuesday because they were behind and within one row of bolts of finishing the cut. He also explained the measuring of the cuts, and the bolting sequence which was followed (Tr. 353-359).

Mr. Sisler confirmed that while he initiated no discussion with Mr. Terry Lucas over the fighting incident because he did not believe it was any of his business, Mr. Lucas "might have mentioned it." When Mr. Lucas asked him whether any punches had been thrown, Mr. Sisler said "I just said yeah, because I didn't, you know, want to get involved."

Mr. Sisler confirmed that he did not actually see Mr. Beckman punching Mr. Paugh (Tr. 361). When asked why Mr. Lucas would testify that he did make such a statement, Mr. Sisler said "He probably really thought I meant it; . . . There was nothing to it. It was just more or less a joke, you know. I didn't want to get involved in it. I didn't want to say nothing in the respect that it would get anybody else in trouble" (Tr. 363).

When asked what he meant by the term "flinched," Mr. Sisler explained as follows (Tr. 364):

> A. Well, if you get your back to someone and somebody comes up on you that you don't know is about (indicating), it would scare you, you know. It's out of the blue, you know; you're not ready for it.
>
> Q. Are you saying you saw Mr. Beckman move and his hat fly of, and then you saw him turn around?
>
> A. True.
>
> Q. And then, you saw him get Mr. Paugh's arms?
>
> A. True.

Section Foreman Carl Randall Johnson confirmed that he was suspended 2 or 3 years ago without pay for a week for making a temporary splice on a shuttle car cable, and for allowing men to roof bolt without a TRS system on the bolter (Tr. 6). Mr. Johnson confirmed that he was the section foreman on March 5, 1986, and that Mr. Paugh and Mr. Beckman were the roof bolters, and Mr. Sisler was the rib bolter. The crew was advised by mine foreman Steve Polce on Monday, March 3, that they would have to drive their own cars to work if they were behind more than 2-1/2 cuts in their work and had to stay and work overtime (Tr. 9). Mr. Johnson confirmed that the crew worked 1 hour overtime on Tuesday, March 2, because it got behind (Tr. 10). Mr. Beckman told him that overtime resulted from Mr. Paugh's "dragging his feet," and Mr. Johnson took this to mean that Mr. Paugh was slowing up in putting in roof bolts (Tr. 12).

Mr. Johnson stated that on Wednesday, March 5, Mr. Polce told him that Mr. Beckman had complained to him about Mr. Paugh's "foot dragging," and instructed him to "keep an

eye on the bolters." Mr. Johnson went underground to tell Mr. Paugh that he was going to move the fan, and while he was there Mr. Beckman informed him that Mr. Paugh was putting in too many bolts and "dragging his feet." Mr. Johnson observed that Mr. Paugh was installing bolts in a three-bolt pattern, rather than the normal two-bolt pattern and asked him about it. Mr. Paugh responded to Mr. Johnson "You cover your ass, and I will cover mine." Mr. Johnson then told Mr. Paugh "if you need to put them in skin to skin, put them in skin to skin." Mr. Paugh told Mr. Johnson that the place he was bolting was too wide and needed an extra bolt, and Mr. Johnson took measurements and found that it was 1 foot wider than the customary 16 foot width. Mr. Johnson sensed there was friction between Mr. Paugh and Mr. Beckman, and left to move the fan (Tr. 14-18). Mr. Paugh accused Mr. Johnson of holding up the crew and stated "It ain't none of us" (Tr. 14-18, 21).

Mr. Johnson stated that while he was moving the fan, Mr. Beckman appeared and said "John hit me," and he "was emotionally shook up" and was "near to crying" (Tr. 19). Mr. Johnson took Mr. Beckman back to the bolter and asked Mr. Paugh whether he had hit Mr. Beckman and whether he had been on his side of the bolter. Mr. Paugh admitted that he went around the bolter to speak with Mr. Beckman, but denied that he had hit him, and gave no further explanation. Based on Mr. Beckman's account of the incident, Mr. Johnson concluded that he and Mr. Paugh had been fighting (Tr. 21). Mr. Johnson took them out of the mine and telephoned foreman Polce and informed him that they had been fighting underground. Mr. Polce instructed Mr. Johnson to inform them that they were both suspended, and to escort them off the mine, and that a company representative would contact them. Mr. Johnson informed Mr. Paugh and Mr. Beckman that they were suspended and he escorted them off the property in their vehicles (Tr. 22-26).

Mr. Johnson confirmed that he was interviewed about the fighting incident by mine management officials Gearhart, Pritt, and Tenney on Friday, March 7, 1986, and that he told them that Mr. Beckman and Mr. Paugh had been fighting underground. Mr. Paugh and Mr. Beckman were not present during the interview, and Mr. Johnson did not discuss whether or not they should be discharged (Tr. 28). Mr. Johnson did not know who made the discharge decision, but speculated that it was Mr. Polce or the other officials (Tr. 41).

Mr. Johnson confirmed that Mr. Paugh was a good worker, and that he did his work on his own without being told. Mr. Johnson denied that he ever harassed Mr. Paugh or asked

him or any other crew members to return to work before their normal 30-minute lunch break ended. Mr. Johnson also denied assigning Mr. Paugh anymore work than anyone else was required to perform (Tr. 29).

Mr. Johnson confirmed that Mr. Paugh was concerned about maintaining the ventilation over his roof bolter, but denied that Mr. Paugh had ever made any safety complaints or that he had ever disciplined him for raising the ventilation issue (Tr. 33). Mr. Johnson stated that on one occasion Mr. Paugh became angry and threatened to hit him, and "I told him, if he wanted to hit me, to go ahead and hit me" (Tr. 34). Mr. Johnson could not recall any details of the incident. Mr. Johnson stated that on another occasion, he was angry with Mr. Paugh because of his failure to advise him that his bolter needed repairing before going to lunch (Tr. 30-31).

Mr. Johnson stated that while it was possible that he made a statement to Mr. Wolfe that his job was easier since Mr. Paugh's departure, he could not recall making the statement. Mr. Johnson stated further that during the conversation with Mr. Wolfe, Mr. Wolfe made the statement that the issue concerning Mr. Paugh's discharge "was not over yet," and that "If you are going to get the company, you've got to get them on a safety violation. This is the way you've got to get them" (Tr. 35).

Mr. Johnson denied that he has ever ordered anyone to work under unsupported roof. He confirmed that he has observed men doing this but has called them back. If any place needed to be scooped out under unsupported roof, he would do the job himself rather than have someone else do it (Tr. 40).

On cross-examination, Mr. Johnson confirmed that his prior suspension occurred in approximately March, 1984, and he did not know who had reported him to management. He also confirmed that the incident concerning Mr. Paugh's failure to notify him that his bolter needed repairs, and Mr. Paugh's threats to hit him occurred prior to his suspension. With regards to Mr. Paugh's prior threat, Mr. Johnson confirmed that he could tell by Mr. Paugh's demeanor that he was angry, and that his threat was only verbal. Mr. Johnson stated that he is larger in statute (5 foot 9 and weighs 260) than Mr. Paugh and could take care of himself, but denied that he was afraid of Mr. Paugh or would strike back if Mr. Paugh attempted to strike him (Tr. 41-48).

Mr. Johnson confirmed that during the time Mr. Paugh worked on his section he was transferred off several times during pillaring work when the bolters were assigned to other sections where bolting was required to be done. Mr. Johnson denied that Mr. Paugh was ever transferred off his section by Mr. Polce because he and Mr. Paugh could not get along (Tr. 48-49). Mr. Johnson denied that he had ever ordered Mr. Paugh to rock dust, shovel the feeder, or hang ventilation curtain before his lunch break was over (Tr. 49-52).

Mr. Johnson stated that he was not aware of any complaints made about him to Mr. Polce by Mr. Paugh. However, he was aware of an incident when the bolter was down, and Mr. Polce discussed it with Mr. Paugh and Mr. Beckman (Tr. 53-54). Mr. Johnson stated that Mr. Beckman and Mr. Sisler complained to him on Tuesday, March 4, about Mr. Paugh's "foot dragging," and that Mr. Beckman complained to Mr. Polce about it (Tr. 58-61).

Mr. Johnson stated that when Mr. Beckman told him that Mr. Paugh had hit him, he did not state that Mr. Paugh had pushed him into the bolter. Mr. Johnson conceded that at that time he knew that there was a company policy against fighting, and that it was an offense for which one could be discharged. However, he denied that the incident in question presented him with "a golden opportunity" to get Mr. Paugh fired (Tr. 75). Mr. Johnson could not recall whether he told the management disciplinary committee that Mr. Paugh denied hitting Mr. Beckman. He did tell them that Mr. Beckman stated that Mr. Paugh had hit him, and that Mr. Paugh claimed he laid his hand on his shoulder (Tr. 87).

In response to further questions, Mr. Johnson stated that Mr. Paugh "was a quiet person," but he has seen him upset. He denied that he and Mr. Paugh were constantly bickering or arguing over the lack of air over the bolter. He denied that Mr. Paugh complained about this, but admitted that he knew it was "a sore spot" with him because he had trouble with Mr. Paugh because he would not help move the fan. The fan weighed 600 pounds, and it was everyone's job to maintain the ventilation. However, there were times when Mr. Paugh was bolting and was not aware that the fan was down or being moved, and in such instances Mr. Johnson did not expect Mr. Paugh to continue bolting, but did expect him to help move the fan and restore the ventilation. Mr. Johnson stated that Mr. Paugh would know when its time to move the fan "when I let him know" (Tr. 99).

Mr. Johnson denied that he harassed Mr. Paugh, or that he assigned him other work when he was through bolting as a means of harassing him (Tr. 100). Mr. Johnson confirmed that on occasion when Mr. Paugh's bolting crew was caught up with its work, he would assign all of the crew to rock dust or whatever needed to be done, and he treated all of them equally (Tr. 106). Mr. Paugh did what was asked of him, and did not complain (Tr. 101).

Mr. Johnson confirmed that when Mr. Beckman told him that he had been hit by Mr. Paugh, he did not ask him where he was hit, and while he saw no physical evidence or bruises, Mr. Beckman was "emotionally upset" (Tr. 103).

Mr. Johnson stated that during the 2 or 3 years that Mr. Paugh worked for him, they "got along fairly well," and he considered Mr. Paugh to be "a better than decent worker who never said much" (Tr. 104). If Mr. Paugh complained about not being advised that the fan was being moved, or the lack of air over the fan, he complained to the "hourly men" and not to him (Tr. 105). Mr. Johnson had no knowledge of any complaints by Mr. Paugh to any MSHA inspectors (Tr. 105).

General Mine Foreman Steven B. Polce confirmed that on March 5, 1986, Mr. Johnson was Mr. Paugh's section foreman. Mr. Polce also confirmed that as mine foreman, his duties included taking care of personnel problems, and that Mr. Johnson and the other section foremen reported to him and reported any problems with their men to him (Tr. 107-110).

Mr. Polce confirmed that he met with the roof bolters and section foremen when the new K-8 section was begun during the week of March 3, 1986, and advised them that they had to arrange their own individual transportation to work because of the work requirements on the section (Tr. 110-111). Mr. Polce confirmed Mr. Johnson's shift worked 1 hour overtime on Tuesday, March 4, and that on Wednesday, March 5, Mr. Beckman told him that Mr. Paugh was intentionally "dragging his feet" and slowing down the roof bolting so that he would be "getting overtime for riding by himself." Mr. Polce stated that he then called Mr. Johnson to his office and instructed him to keep an eye on the bolting crew, and if there was a problem to try and straighten it out (Tr. 112).

Mr. Polce stated that he received a telephone call at his home on March 5, after arriving from work, and Mr. Johnson informed him that he had a problem with Mr. Paugh and Mr. Beckman in that they were fighting underground. Since fighting underground is against company policy for safety

reasons, Mr. Polce instructed Mr. Johnson to suspend Mr. Paugh and Mr. Beckman until further notice and to escort them off the property (Tr. 113). The next day, Mr. Polce informed personnel manager Gearhart and mine superintendent Pritt about what had happened, and Mr. Polce went underground to the area which had been mined the evening before, and measured the widths of the places and found them to be 17 feet wide with good top. Mr. Polce confirmed that he told Mr. Pritt and Mr. Tenney that Mr. Paugh and Mr. Beckman were fighting underground, and a meeting was arranged for Friday, March 7, "to get to the root of the problem" (Tr. 115).

Mr. Polce stated that he and Mr. Gearhart, Mr. Pritt, and Mr. Tenney met on Friday, and interviewed Mr. Johnson, Mr. Paugh, Mr. Beckman, and Mr. Sisler individually and out of each other's presence. The decision to discharge Mr. Paugh for fighting underground was a collective decision made on Friday by all of the management officials who did the interviewing, and Mr. Polce informed Mr. Paugh of the decision the following Monday, March 10, 1986 (Tr. 116-118).

Mr. Polce stated that he could not recall what was said during the interviews because Mr. Gearhart was taking notes, and he (Polce) made no notes. Mr. Polce could not recall what Mr. Paugh said in his defense, and that "the one that sticks out in my mind the most was Earl Sisler." Mr. Polce stated that Mr. Sisler's version of the incident was as follows (Tr. 116-117):

> A. He told me about John Paugh leaving the right-hand side of his bolting machine and coming around the back of the bolter, and he said he was tired of the cry baby, bastard, or something, referring to Harry Beckman, and went on Harry Beckman's side of the bolter.
>
> And Earl said whenever he looked up, that Harry's hat was knocked off, and he seen Harry turn around and, like, stop John Paugh from further attacking him, or whatever. And he seen Harry leave the roof bolting machine and go get Randy Johnson.

Mr. Polce stated that the only other reported fight at the mine which he was aware of concerned an argument which resulted in one miner swinging his dinner bucket at another miner, but the matter was resolved without further action after the miner who swung the bucket resigned his job (Tr. 118). Mr. Polce confirmed that in the event of a fight, only

the aggressor would be fired, even if its the first offense, and the punishment for fighting is dismissal rather than a warning or a suspension (Tr. 120).

Mr. Polce stated that Mr. Paugh was a good worker "when he didn't want to drag his feet for certain reasons or take his time when it wasn't needed to be taken." He denied that Mr. Paugh had ever made complaints to him, or that he discussed the matter of lack of air over his bolter numerous times. On one occasion when he was underground and found that the bolter was shutdown, he asked Mr. Paugh about it, and Mr. Paugh informed him that the fan was down. When Mr. Polce proceeded to test the air with his anemometer, Mr. Paugh remarked "What are you getting all huffy about." However, the fan came on again, and that ended the matter (Tr. 121-122).

Mr. Polce confirmed that Mr. Paugh has been transferred from and back to Mr. Johnson's section, and that it is a normal practice to reassign bolters to other crews. Mr. Polce denied that he ever transferred Mr. Paugh because he could not get along with Mr. Johnson (Tr. 123, 125).

Mr. Polce stated that he has worked with Mr. Johnson for 8 years, visits his section every day if possible, and he considers him to be one of his best foreman in terms of safety, production, and cleanup of his section (Tr. 126). Mr. Polce has no knowledge of Mr. Johnson ever harassing Mr. Paugh, and confirmed that Mr. Paugh never discussed Mr. Johnson with him (Tr. 127).

On cross-examination, Mr. Polce confirmed that he was aware of Mr. Johnson's prior suspension, had no knowledge that he ever scooped under unsupported roof, and notwithstanding his prior suspension for a safety infraction, he still considers Mr. Johnson "one of my best foremen all around for his performance of what he does" (Tr. 128).

Mr. Polce confirmed that he was aware of the two prior incidents concerning Mr. Johnson and Mr. Paugh with regard to the bolter which needed repairs and Mr. Paugh's reported threat to hit Mr. Johnson. Mr. Polce also confirmed that he was aware of the prior discussions between Mr. Paugh and Mr. Johnson concerning Mr. Paugh's insistence for air over his bolter, and while he could not state whether they had more than one discussion, Mr. Polce stated "I remember the talk that there was a problem there" (Tr. 129). Mr. Polce

also confirmed that he had heard that Mr. Paugh made a statement during the week of March 3, that if he had to work overtime, he would make sure he got enough to pay for his gas, because of having to drive by himself to work (Tr. 131).

Mr. Polce confirmed that the collective decision to discharge Mr. Paugh was made after an open discussion by those in attendance at the meeting, and the collective conclusion was "that it was in the handbooks that for fighting underground it's a discharge" (Tr. 136). Mr. Polce stated that at the time of the decision, he was aware of the different versions of the incident, including the assertion that Mr. Paugh hit Mr. Beckman, that Mr. Paugh had pushed Mr. Beckman into the bolter, and Mr. Paugh's denial that he hit Mr. Beckman, and simply went around the bolter to talk to him and placed his hand on Mr. Beckman's shoulder. He also recalled Mr. Beckman's statement that Mr. Paugh pushed him into the bolting machine while he was tramming it and that it knocked his hard hat off, and Mr. Sisler's statement that Mr. Beckman's hat was knocked off, and that he more or less turned around to protect himself by grabbing Mr. Paugh's arms. Mr. Polce stated that he saw no difference "if you're hit from the back or pushed from the back (Tr. 137-139), and that "If he was the aggressor, come around behind the man and pushed him in the back into a bolting machine, as far as I am concerned, that's it" (Tr. 150).

Mr. Polce stated that Mr. Beckman was not discharged because it was concluded that he was not the aggressor, and he denied that Mr. Beckman's complaint that Mr. Paugh was "dragging his feet" influenced his decision in this regard (Tr. 142). Mr. Polce admitted that he was aware that Mr. Paugh had in the past drilled more test holes than were necessary or installed additional support into good top that was unnecessary, and that he confirmed this during his visits to the section. He conceded that it is the roof bolter's responsibility to make sure the roof where he is working is safe and that he installs enough bolts to make it safe (Tr. 144). He also confirmed that Mr. Johnson "probably" told him that Mr. Paugh may have gotten behind in his work at times, and Mr. Polce has observed that Mr. Paugh would at times get behind the other bolter, and at other times, he would be ahead of the other bolter. However, Mr. Polce could not recall discussing this with Mr. Paugh (Tr. 154).

Mr. Polce confirmed that at the time the decision was made to discharge Mr. Paugh, he was unaware of any prior fight between Mr. Paugh and Mr. Lucas, and he learned of that incident during the week of the instant hearing (Tr. 146).

Mr. Polce also confirmed that Mr. Paugh's prior "encounters" with Mr. Johnson never came up during the meeting of March 7, but that he was aware of them (Tr. 147-148).

Personnel Director Thomas Gearhart confirmed that the respondent's investigation of the incident which resulted in Mr. Paugh's discharge was accomplished through interviews on Friday, March 7, 1986, conducted by a "management team" consisting of himself, Mr. Polce, Mr. Pritt, and Mr. Tenney. The team interviewed Mr. Johnson, Mr. Beckman, Mr. Sisler, and Mr. Paugh separately in order to determine the facts, and while the question of the spacing of the roof bolts was discussed, Mr. Gearhart confirmed that he was only concerned about the fighting incident (Tr. 20-23;167-168).

Mr. Gearhart stated that Mr. Paugh's version of the incident was that he simply walked around the bolter, past Mr. Sisler, laid his hand on Mr. Beckman's shoulder and asked him "Why are you mad?" Mr. Beckman's version was that while at the controls of the bolter which he was tramming, "I was either pushed or hit from the back. I don't know. It was behind me. And the next thing I knew, I was into the bolter, and I turned around and grabbed John Paugh's hands to restrain him. I grabbed his arms, went by him, and got the foreman" (Tr. 169).

Mr. Gearhart stated that Mr. Johnson stated that prior to the incident Mr. Beckman had complained to him "about John dragging his feet and the bolt spacing, the test holes," and that Mr. Johnson spoke with them and told them they would have to get along and to get back to work. Mr. Johnson then left the area, and Mr. Beckman came to find him and informed Mr. Johnson that Mr. Paugh had hit him. Mr. Johnson returned to the bolter with Mr. Beckman, and Mr. Paugh admitted that he had been on Mr. Beckman's side of the bolter, but denied hitting him (Tr. 170-171). Mr. Gearhart stated that after the interviews were completed, the decision was made to discharge Mr. Paugh, and he stated as follows (Tr. 171):

> A. Okay. Then, we, in turn, decided if, in fact there was a fight, based on the information that we had gathered from the people that we interviewed. And we established the fact that, yes, there was a fight; John Paugh was the aggressor; and Harry Beckman had handled it the way he should, to go get the foreman and didn't return any blows -- went to get the foreman, reported it.

Mr. Gearhart confirmed that Mr. Polce called Mr. Paugh on March 10, 1986, and informed him of the decision to discharge him. Mr. Gearhart also confirmed that Mr. Paugh called him after he was informed of his discharge, and said that he had simply laid his hand on Mr. Beckman's shoulder, and that he told him this again when he came to the mine to pick up his belongings. Mr. Gearhart stated that he informed Mr. Paugh that the matter had already been investigated and that he did not wish to rehash or discuss it further (Tr. 172). Mr. Paugh made no mention of any complaints (Tr. 173).

Mr. Gearhart confirmed that Mr. Johnson had been suspended for a safety violation, but that Mr. Paugh was not on his roof bolting crew when this occurred, and raised no concerns about Mr. Johnson (Tr. 181).

On cross-examination, Mr. Gearhart denied that Mr. Paugh was discharged for making safety complaints (Tr. 188). He confirmed that during the investigation of the fighting incident in question, he believed Mr. Beckman to be more credible than Mr. Paugh, and believed that Mr. Paugh lied when he said he went around the bolter simply to speak with Mr. Beckman (Tr. 191). He considered Mr. Beckman's statement that he did not know whether he was pushed or hit from behind by Mr. Paugh, and that he "was either hit or pushed" into the bolter (Tr. 194).

Mr. Gearhart confirmed that he was contacted by a state unemployment representative concerning the reason for Mr. Paugh's discharge, but denied that the representative made any statement to him that the incident as he described it did not sound like a fight. Mr. Gearhart stated that he told the representative that he did not intend to appear with witnesses at any unemployment benefits determination proceeding (Tr. 195). He earlier testified that he could not recall the exact words he used in describing the fight, nor could he recall stating to the representative that Mr. Paugh "had pushed another worker" or that he "had put his hand on another worker" (Tr. 24-25).

Mr. Gearhart confirmed that at the time the decision was made to discharge Mr. Paugh, the management team was not aware of the prior fight between Mr. Paugh and Mr. Lucas, and that this information was provided by Mr. Beckman after Mr. Paugh's discharge (Tr. 197-198). Mr. Gearhart also confirmed that Mr. Paugh never mentioned anything to management about any ventilation problems during his interview, and that he was not aware of any complaints made by Mr. Paugh, or any problems between Mr. Paugh and Mr. Johnson (Tr. 198, 200).

Mr. Gearhart stated that the only statement made by Mr. Paugh during the interview was that he went around the bolter to talk to Mr. Beckman and laid his hand on his shoulder, and Mr. Gearhart did not believe him (Tr. 202-203). Mr. Gearhart confirmed that the management team discussed Mr. Paugh's version of the incident, and did not believe him. The team believed Mr. Sisler and Mr. Beckman, and considering all of the circumstances, including the fact that Mr. Paugh was angry, called Mr. Beckman "cry baby, son of a bitch, or bastard, or whatever expletive," and Mr. Beckman's hat flying off, the team concluded that a fight had taken place (Tr. 204-206).

John Paugh was recalled by the Court, and he confirmed that he was not working on Mr. Johnson's section at the time he was suspended for a safety infraction, but that Mr. Johnson's suspension was common knowledge at the mine (Tr. 213). Mr. Paugh confirmed that he never complained to Mr. Gearhart about any problems with Mr. Johnson, but that he did inform Mr. Polce that he could not get along with Mr. Johnson because he expected him to bolt when the line curtain or fan were down. On that occasion, Mr. Polce took him off Mr. Johnson's section for awhile, and then put him back after a layoff, and this was the only time that he was reassigned for complaining about Mr. Johnson (Tr. 214).

With regard to Mr. Johnson assigning him other work to do, Mr. Paugh stated as follows (Tr. 216-218):

> Q. Well, let me ask you this. Now, if you complained to him or if you would tell him that you were not going to do any more bolting and you shut your bolter down until they move the fan -- let's assume it took a half hour to move the fan. Okay? And while your bolter is down and while they are moving the fan up, he tells you to go over and do something else. "Keep occupied until we get the air back." Do you see anything wrong with that?
>
> A. No, not a thing wrong with that.
>
> Q. Is that the way it happened?
>
> A. No. I usually helped with moving the fan when he didn't tell me to do something else.
>
> Q. Well, can you give me an example of when you complained to him that you didn't want to

work, for example, in something that you thought was unsafe and he put you someplace else? Give me a for-instance.

A. Well, just the one thing, you know, when we was on line curtain. They would take the curtain down across the heading so the buggies could run that way. They would take the bolter's air away.

Q. That took your air away from where you bolted?

A. That's right.

Q. Then, what would happen?

A. He would say, "Well, if you don't want to bolt," he says, "go do this and do that." And I said, "Okay."

Q. Okay. So, that situation, you felt that you were exposed to some unsafe conditions; in other words, not enough air on the bolting section? Is that right?

A. Yes. It's unsafe.

Q. In other words, if the ventilation curtain is down to accommodate the buggy operators, that is going to affect the air where you are working on bolting; is that correct?

A. Yes.

Q. And you would tell him that?

A. Yes.

Q. And he would say, "Okay. You don't have to work there; I'm going to put you doing something else." Is that correct?

A. That's what he would do, yes.

Q. Now, is it possible that he assigned you to do this other work because he didn't want you working there in that dusty atmosphere where there wasn't enough air and because you

didn't want to, or he assigned you to do something else because he was punishing you for complaining?

A. Yes, I would use harassment, not punishment.

Q. You say it's harassment?

A. Yes.

Mr. Paugh conceded that other times when the ventilation curtain was down and his bolting machine was off during lunch break, Mr. Johnson would tell him "Go eat something" (Tr. 218). Mr. Paugh stated that over a period of 2 or 2-1/2 years, Mr. Johnson cut his lunch break short on three or four occasions and assigned him to "unnecessary things" such as rock dusting and shoveling the feeder (Tr. 220). When asked whether he believed that Mr. Johnson was "deliberately doing this to make it tough on you," Mr. Paugh responded "somewhat, yes." When asked whether Mr. Johnson would treat other miners the same way, Mr. Paugh responded "Just if they would give him a hard time on the same thing" (Tr. 220). He testified further as follows (Tr. 220-221):

Q. Could you relate these three (3) or four (4) instances to a hard time that you had given Randy Johnson? In other words, was there a hard time directly connected to him cutting your lunch break short to do what you have described as unnecessary work?

A. Yes. A lot of times when the bolter was down or there wouldn't be air to it, he would --

Q. If the bolter is down and this is your regular shift, you would expect to do other work; is that right?

A. That's true.

Q. I'm talking about lunch break, your lunch break being cut short.

A. I've seen him before walk past the curtain that was down and come up and get me off the tool car at lunch time to go put the curtain back up.

Q. All right. Any other incidents where he got you off your lunch break to do something?

A. A lot of times, if he was wanting the section rock dusted quick, yes, he would.

Q. You say, "A lot of times." You earlier said three or four (4) occasions this happened.

A. Well, yeah. At lunch time, it would be a couple of times.

Complainant's Arguments

During oral arguments on the record at the hearing in opposition to the respondent's motion to dismiss the complaint (which was denied), and in support of his argument that a prima facie case of discrimination has been established, Mr. Paugh's counsel asserted that while there is no evidence that Mr. Paugh consistently insisted on doing his job safely during the entire 6 years of his employment with the respondent, he has established this fact for at least the 2 years immediately preceding his suspension and subsequent discharge on March 10, 1986 (Tr. 172-173). Counsel argued further that during this 2-year period, there were "bad feelings" and hostility between Mr. Paugh and his foreman Randy Johnson, probably rooted in the incident concerning a roof bolter which had not been repaired and the failure to promptly report this to Mr. Johnson. Counsel argued further that during this time Mr. Paugh had insisted on complying with safety regulations, particularly with respect to the amount of available air ventilation over his roof-bolting machine, and that there were many "discussions and arguments" between Mr. Paugh and Mr. Johnson over this issue (Tr. 170).

Counsel conceded that apart from the arguments with his foreman over the lack of air for the roof-bolting machine, there is no evidence of any harassment against Mr. Paugh. However, given the hostility by Mr. Johnson as evidenced by the "shouting matches" which resulted from Mr. Paugh's insistence that he have adequate ventilation, and coupled with the fact that Mr. Johnson "despised" Mr. Paugh, and stated to Mr. Wolfe that "things go a lot easier" after Mr. Paugh's discharge, counsel concluded that he has established a prima facie case of a discriminatory discharge (Tr. 175).

In his posthearing brief, counsel asserts that Mr. Paugh's protected activity was his compliance with safety

regulations; namely, his refusal to continue bolting when there was insufficient air over his bolter, his insistence on installing a sufficient number of roof bolts to secure the roof in his work area, and his refusal to work under unsupported roof. Counsel maintains that all of these safety concerns were communication by Mr. Paugh to his foreman Randy Johnson.

Counsel concludes that considering all of the evidence in this case, it is clear that the respondent seized upon the appearance of an altercation between Mr. Paugh and Mr. Beckman on March 5, 1986, as an excuse for discharging Mr. Paugh. In support of this suggested pretexual discharge, counsel relies on a statement filed by Personnel Director Gearhart with the MSHA investigator who investigated Mr. Paugh's complaint, in which Mr. Gearhart makes reference to "a credible allegation" by Mr. Beckman that Mr. Paugh "had also started a fight with another employee four or five years ago" (exhibit C-4; the Lucas incident). Since that prior incident was not known to the management team when it made its decision to discharge Mr. Paugh, counsel concludes that the respondent made it appear that Mr. Paugh had a history of fighting, and that it did so to support its pretexual decision to discharge Mr. Paugh for purportedly fighting underground with Mr. Beckman.

Counsel maintains that the preponderance of the evidence in this case proves that Mr. Paugh had engaged in protected activity, and that his discharge was motivated by that activity. Counsel further concludes that the evidence does not demonstrate that the respondent would have taken any adverse action against Mr. Paugh in any event for his unprotected activities alone.

Respondent's Arguments

The respondent argues that Mr. Paugh has failed to establish a prima facie case of discrimination because he did not engage in protected activity and, in any event, could not link that protected activity to any improper motive by the respondent. Respondent suggests that Mr. Paugh's entire case rests on nothing more than "fantastical allegations" of harassment, insufficient to sustain his ultimate burden of proof. Moreover, even if Mr. Paugh's testimony were credited such that he were able to prove a prima facie case of discrimination, respondent argues that it could successfully defend against such a prima facie case because substantial evidence in the record shows that Mr. Paugh was fired for one reason

wholly unrelated to any protected activity -- fighting underground in contravention of company rules. Respondent concludes that firing an employee for a severe infraction of the company rules does not amount to illegal discrimination under the Act.

Respondent asserts that despite the vague allegations in his complaint, the record shows that Mr. Paugh did not make any protected safety complaints. With regard to Mr. Paugh's alleged ongoing complaints of insufficient ventilation at the working face, respondent maintains that the record demonstrates that he failed to make these complaints to the respondent's personnel, and never mentioned any safety related issues to personnel director Gearhart. And, despite Mr. Paugh's allegations that he constantly complained about safety, he never made safety complaints at the weekly safety meetings. Respondent, therefore, concludes that uncommunicated safety complaints do not constitute activity protected under the Act.

Respondent maintains that Mr. Paugh's March 5, 1986, comment to foreman Randy Johnson about spacing between the roof bolts did not constitute a protected safety complaint in that Mr. Paugh made the comment solely to "justify" the dilatory escapade in which he engaged, not to ensure a safe roof, but rather to ensure that he would be asked to work overtime for which he would be handsomely compensated. Respondent concludes that the Act was not meant to protect such pretextual and malicious conduct.

With regard to Mr. Paugh's asserted work refusal for safety reasons, respondent asserts that the Act only protects miners who refuse to work under conditions which they reasonably believe in good faith to be unsafe or unhealthful. Although recognizing that a miner may engage in affirmative self-help and refuse to work, respondent maintains that this may only be justified where the refusal is based on a reasonable, good faith belief that such affirmative action is necessary.

Respondent maintains that Mr. Paugh's action in first shutting off the bolter and subsequently protesting to mine foreman Polce that ventilation had subsided constitutes the kind of unreasonable affirmative self-help against which the Act was not meant to protect. Respondent asserts that Mr. Paugh's belief in the existence of a hazard -- lack of ventilation -- was not reasonable. Even though the fan shut down for a short time, Mr. Polce measured the air current over the bolter as well over the minimum requirement of

3,000 cfm. The mere fact that the fan did not operate for several minutes did not render Mr. Paugh's belief a reasonable one, because the required air current of 3,000 cfm could still have been maintained even though the fan on the section was not working.

Respondent asserts that Mr. Paugh's self-help in shutting off the bolter was an unreasonable and excessive approach to the hazard he perceived because it prevented the other roof bolter and the rib bolter from performing their work even though the area was well-ventilated. Respondent believes that Mr. Paugh would have behaved reasonably if he had alerted the foreman to the ventilation problem he perceived and asked to be reassigned to other duties without preventing others from proceeding with their work. Under circumstances where mere communication and subsequent reassignment would have solved the perceived problem, respondent concludes that Mr. Paugh's defiant self-help was completely unwarranted.

Respondent maintains that Mr. Paugh has failed to establish by any credible evidence that he was harassed by the respondent because he made numerous safety complaints and that his testimony in this regard is fraught with inconsistencies, contradicts the testimony of other credible witnesses, and should not be credited. Respondent maintains that no one connected with the respondent was aware of any safety complaints, and section foreman Johnson and personnel director Gearhart testified that Mr. Paugh never approached them with complaints of any kind. Conceding that Mr. Paugh did discuss one perceived ventilation problem with mine foreman Polce when Mr. Paugh shut down his bolter, respondent asserts that Mr. Paugh's testimony of numerous ventilation complaints to Mr. Polce in his office during the 18-months prior to his discharge was contradicted by Mr. Polce who testified that he never even had an office, and that he was not in his current capacity for 18-months prior to Mr. Paugh's discharge.

Respondent denies that Mr. Johnson harassed Mr. Paugh by cutting his lunch hours, or that Mr. Paugh was transferred to alleviate any friction between them. Respondent believes that if Mr. Paugh were truly harassed, he would have complained to Mr. Gearhart, or at least brought it to management's attention during its investigation of the fighting incident. Since Mr. Johnson played no role in the discharge decision, and was in no position to retaliate, respondent cannot reconcile Mr. Paugh's silence with regard to his claims of harassment.

Respondent maintains that the only reason for Mr. Paugh's discharge was his fighting underground on mine property in

violation of company rules, and that management's investigation revealed that Mr. Paugh had been the aggressor. Respondent points out that fighting is an offense for which discharge is an appropriate penalty, and that Mr. Paugh was fully aware of this fact. Respondent takes the position that there is no evidence of any discriminatory motive on its part, but acknowledges that indirect circumstantial evidence such as knowledge of the protected activity, hostility toward the miner because of the protected activity, coincidence in time between the protected activity and the adverse action, and disparate treatment of the complaining miner can be used to establish discriminatory intent.

As to the first factor noted above, respondent argues that it had no knowledge of Mr. Paugh's asserted protected activities. Despite Mr. Paugh's contentions that he routinely complained about safety matters, respondent asserts that its witnesses categorically denied that Mr. Paugh ever approached them directly with safety complaints.

With regard to the one instance where Mr. Paugh shut down the bolter and discussed the ventilation with Mr. Polce, respondent points out that even assuming that the shutting down of the bolter was protected activity, Mr. Polce was the only member of management's investigation team aware of this incident, and that at the time the decision was made to discharge Mr. Paugh the incident was not discussed and played no part in the discharge decision. Respondent suggests that the only arguable "safety complaint" of which management was aware, was Mr. Paugh's "self serving" statement on March 5, that the top needed additional bolts, even though everyone else believed that the top was sound.

Respondent views Mr. Paugh's allegations of management hostility towards him because of his safety concerns or protected activities as "incredible." Respondent argues that Mr. Johnson flatly denied any harassment of Mr. Paugh, and that other management and hourly personnel saw no evidence of any such harassment. Respondent concedes that Mr. Paugh was asked to perform other tasks while he was not bolting, but maintains that he was treated no differently than any other roof bolter. As for any transfers of Mr. Paugh to ease the alleged hostility between him and his foreman, respondent relies on the testimony of Mr. Polce and Mr. Gearhart that company policy dictates against such reassignments for personal disputes.

Respondent argues that even if Mr. Paugh did make safety complaints, management dealt with them in a responsible

manner. Mr. Paugh's "complaint" about the spacing of the bolts on March 5, was answered by Mr. Johnson telling him to do what he thought was safe. Mr. Polce's response to Mr. Paugh's shutting off the bolter and questioning the ventilation with Mr. Polce, was immediately addressed by Mr. Polce when he investigated the problem by testing the air. With regard to Mr. Paugh's prior encounters with Mr. Johnson when he threatened Mr. Johnson, and Mr. Johnson took him to task for not promptly reporting the condition of a roof bolter which needed repair, respondent points out that Mr. Johnson handled these situations responsibly. Finally, respondent points out that Mr. Paugh admitted that prior to his discharge, he was never disciplined by the respondent or by Mr. Johnson during the time that he worked for him.

Respondent concedes that the "coincidence of time" factor is satisfied in this case only with regard to the roof spacing incident on March 5, 1986, which occurred 5-days prior to Mr. Paugh's discharge. Respondent suggests that there is no coincidence in time, however, between Mr. Paugh's discharge and his other alleged safety complaints.

Finally, respondent argues that there is no evidence of any disparate treatment in the manner in which it handled Mr. Paugh's fight with Mr. Beckman. To the contrary, respondent maintains that in making its determination in Mr. Paugh's case, it followed the same procedure it had previously used to investigate the only other reported case of fighting. In that instance, respondent points out that the individual believed to be the aggressor was suspended pending the outcome of a management investigation, and after a determination was made that no fight had occurred, the individual was reinstated. With regard to Mr. Paugh's purported prior fight with Mr. Lucas, respondent points out that since that incident was not reported to management, no investigative or disciplinary action was taken.

Summarizing the aforementioned four indicia of discriminatory intent, respondent takes the position that there is little, if any, indirect evidence that it discharged Mr. Paugh for engaging in protected activity, and that in view of the lack of any nexus between Mr. Paugh's claimed protected activity and the adverse action of discharge, respondent concludes that his claim must fail, McClain v. Westmont Coal Co., 3 FMSHRC 2603 (November 1981) (ALJ Melick).

Respondent argues that even if Mr. Paugh's discharge were motivated in part by any protected activity on his part,

his unprotected activity was the preeminent cause of his discharge, and the fact uppermost in the minds of management was that Mr. Paugh instigated a fight underground. Upon reaching this conclusion after investigation, respondent maintains that management referred to the company handbook which stated that fighting underground is a dischargeable offense, and that it was on that basis alone that respondent discharged Mr. Paugh. Respondent concludes that since such a "proffered business justification is not plainly incredible or implausible, [therefore,] a finding of pretext is inappropriate." Chacon, supra, 3 FMSHRC at 2516, and that, terminating a miner who subjects others to needless risk of serious injury as a result of fighting underground represents a sound business practice, not a pretext for discrimination. See, e.g., McClain, supra., 3 FMSHRC at 2606.

Respondent asserts further that regardless of Mr. Paugh's protected activity, it would have discharged him anyway for violating company rules against fighting, and that such disciplinary actions have been affirmed in instances where it was established that a mine operator had "personnel rules or practices forbidding the conduct in question." Bradley v. Belva Coal Co., supra, at 4 FMSHRC 982, 993 (1983); Hollis v. Consolidation Coal Company, 6 FMSHRC 21 (January 1981); Dickey v. United States Steel Mining Co., 3 FMSHRC 519 (March 1983).

Findings and Conclusions

In order to establish a prima facie case of discrimination under section 105(c) of the Mine Act, a complaining miner bears the burden of production and proof to establish (1) that he engaged in protected activity and (2) that the adverse action complained of was motivated in any part by that activity. Secretary on behalf of Pasula v. Consolidation Coal Company, 2 FMSHRC 2768 (1980), rev'd on other grounds sub. nom. Consolidation Coal Company v. Marshall, 663 F.2d 1211 (3d Cir. 1981); Secretary on behalf of Robinette v. United Castle Coal Company, 3 FMSHRC 803 (1981); Secretary on behalf of Jenkins v. Hecla-Day Mines Corporation, 6 FMSHRC 1842 (1984); Secretary on behalf of Chacon v. Phelps Dodge Corp., 3 FMSHRC 2508, 2510-2511 (November 1981), rev'd on other grounds sub. nom. Donovan v. Phelps Dodge Corp., 709 F.2d 86 (D.C. Cir. 1983). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no way motivated by protected activity. If an operator cannot rebut the prima facie case in this manner it may nevertheless affirmatively defend by proving that (1) it was also motivated by the miner's unprotected activities alone. The operator bears the burden of proof with regard to

the affirmative defense. Haro v. Magma Copper Company, 4 FMSHRC 1935 (1982). The ultimate burden of persuasion does not shift from the complainant. Robinette, supra. See also Boich v. FMSHRC, 719 F.2d 194 (6th Cir. 1983); and Donovan v. Stafford Construction Company, No. 83-1566 D.C. Cir. (April 20, 1984) (specifically-approving the Commission's Pasula-Robinette test). See also NLRB v. Transportation Management Corporation, ___ U.S. ___, 76 L.ed.2d 667 (1983), where the Supreme Court approved the NLRB's virtually identical analysis for discrimination cases arising under the National Labor Relations Act.

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

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

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

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

> As we emphasized in Pasula, and recently re-emphasized in Chacon, the operator must prove that it would have disciplined the miner anyway for the unprotected activity alone.

> Ordinarily, an operator can attempt to demonstrate this by showing, for example, past discipline consistent with that meted out to the alleged discriminate, the miner's unsatisfactory past work record, prior warnings to the miner, or personnel rules or practices forbidding the conduct in question. Our function is not to pass on the wisdom or fairness of such asserted business justifications, but rather only to determine whether they are credible and, if so, whether they would have motivated the particular operator as claimed. (Emphasis added).

Mr. Paugh's Protected Activity

It is clear that Mr. Paugh had an absolute right to make safety complaints about mine conditions which he believed presented a hazard to his health or well-being, and that under the Act, these complaints are protected activities which may not be the motivation by mine management for any adverse personnel action against him; Secretary of Labor ex rel. Pasula v. Consolidation Coal Co., 2 FMSHRC 2786 (October 1980), rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3d Cir. 1981), and Secretary of Labor ex rel. Robinette v. United Castle Coal Co., 3 FMSHRC 803 (April 1981). Safety complaints to mine management or to a section foreman constitutes protected activity, Baker v. Interior Board of Mine Operations Appeals, 595 F.2d 746 (D.C. Cir. 1978); Chacon, supra. However, the miner's safety complaints must be made with reasonable promptness and in good faith, and be communicated to mine management, MSHA ex rel. Michael J. Dunmire and James Estle v. Northern Coal Company, 4 FMSHRC 126 (February 1982); Miller v. FMSHRC, 687 F.2d 194, 195-96 (7th Cir. 1982); Sammons v. Mine Services Co., 6 FMSHRC 1391 (June 1984).

The fact that a mine operator addresses a miner's safety concerns or complaints, and which are later determined not constitute violations, or the fact that the complaining miner filed no safety complaints with any governmental enforcement agencies, does not remove the Act's protection from any preceding complaints, Sammons v. Mine Services Company, supra, at 6 FMSHRC 1396-97.

In this case, there is no evidence that Mr. Paugh has ever made any verbal or written safety complaints to any MSHA or state mine inspectors. Respondent's assertions that Mr. Paugh has not established that he made safety complaints

to mine management are not well taken, and they are rejected. While it may be true that Mr. Paugh may not have articulated any safety complaints to his foreman Randy Johnson in any formalized way, it seems clear to me that his concern over the lack of adequate ventilation when the fan was being moved resulted in Mr. Paugh's refusal to continue bolting until the air was restored, and that this was communicated to Mr. Johnson. Notwithstanding Mr. Johnson's denials that Mr. Paugh ever complained to him, Mr. Johnson admitted that Mr. Paugh was concerned about the lack of adequate air coursing over his bolting machine while the fan was being moved, and knew that this subject "was a sore spot" with Mr. Paugh.

Mr. Smith, Mr. Prinkey, and Mr. Wolfe all corroborated the fact that Mr. Paugh was concerned about the lack of air over his bolting machine, communicated his concern to Mr. Johnson, and refused to continue bolting until the air was restored. Mr. Smith testified that Mr. Paugh complained often to Mr. Johnson about this matter, and Mr. Prinkey testified that Mr. Johnson became upset over Mr. Paugh's reluctance to bolt with no air over his bolter. Although mine foreman Polce denied any frequent complaints by Mr. Paugh with regard to the lack of air over his bolter, he did admit to one encounter with Mr. Paugh when he found that Mr. Paugh had shut down his bolter because of what he believed to be a lack of adequate ventilation, and this incident resulted in a discussion between the two of them over this issue. Although the matter may have been quickly resolved after Mr. Polce tested the air and the fan came back on immediately, the fact is that Mr. Paugh made it known to Mr. Polce at that time that he would not continue bolting while the fan was down and there was inadequate air over his bolter.

In view of the foregoing, I find Mr. Paugh's testimony concerning his encounters and discussions with his section foreman Johnson and mine foreman Polce over the lack of adequate ventilation over his roof bolter when the fan was down and being moved to be credible. I conclude that these discussions constituted "safety complaints" communicated verbally to mine management, and were therefore protected activity. I also conclude and find that Mr. Paugh's insistence on having adequate air over his bolting machine was communicated to both Mr. Johnson and Mr. Polce, and also constituted protected activity.

Although Mr. Paugh's original complaint asserts that he made safety complaints about the spacing of the roof bolts, I find no credible evidence or testimony to support this conclusion. The only credible testimony of record in this regard

is the discussion which took place between Mr. Johnson and Mr. Paugh on March 5, 1986, shortly before the incident involving Mr. Beckman. Mr. Paugh believed that the width of the entry required him to install more bolts, and Mr. Johnson questioned this contention when Mr. Beckman accused Mr. Paugh of deliberately installing more bolts so that he could earn overtime. Mr. Johnson measured the width of the entry, and while he may not have been happy, he did agree that it may have been a foot too wide, and instructed Mr. Paugh to do what he had to do to make the place safe. In this particular instance, while it may have provoked Mr. Johnson, I do not believe that this incident escalated to the level of a "safety complaint" by Mr. Paugh.

With regard to Mr. Paugh's assertions made during the course of the hearing that he often complained to Mr. Johnson about the ventilation curtains being down while the equipment moved through the area where he was working, the record establishes that Mr. Johnson addressed these complaints. Mr. Paugh admitted that in each instance Mr. Johnson responded by assigning him to do other work until such time as the air was restored and specifically told him that he need not continue to bolt (Tr. 216-218).

It is well settled that the refusal by a miner to perform work is protected under section 105(c)(1) of the Act if it results from a good faith belief that the work involves safety hazards, and if the belief is a reasonable one. Secretary of Labor/Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2 BNA MSHC 1001 (1980), rev'd on other grounds, sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3d Cir. 1981); Secretary of Labor/Robinette v. United Castle Coal Co., 3 FMSHRC 803, 2 BNA MSHC 1213 (1981); Bradley v. Belva Coal Co., 4 FMSHRC 982 (1982). Secretary of Labor v. Metric Constructors, Inc., 6 FMSHRC 226 (February 1984), aff'd sub nom., Brock v. Metric Constructors, Inc., 3 MSHC 1865 (11th Cir. 1985). The reason for the refusal to work must be communicated to the mine operator. Secretary of Labor/Dunmire and Estle v. Northern Coal Co., 4 FMSHRC 126 (1982).

In this case, the evidence establishes that Mr. Paugh refused to continue to operate his roof-bolting machine when he believed that the ventilation air over the bolter was inadequate because of the fan being shutdown and moved. Further, Mr. Paugh has also established through his own unrebutted credible testimony that he also discontinued bolting when the ventilation curtains were down because of the movement of equipment through his work area. Assuming that Mr. Paugh's work refusals in these instances were reasonable, it seems

clear to me that they constituted protected activity under the Act.

With regard to Mr. Paugh's refusal to continue bolting while the fan was down and being moved, respondent argues that Mr. Paugh acted unreasonably by discontinuing bolting, and that his shutting down of his bolter was unwarranted. On the facts of this case, I disagree. It seems clear to me that the purpose of the ventilation fan was to provide an uninterrupted flow of air to the work area when Mr. Paugh was bolting. Mr. Johnson conceded that there were times when Mr. Paugh was not aware of the fact that the fan was down while it was being moved. Absent any evidence to the contrary, I believe one can reasonably conclude that during the time the fan was down while it was being advanced, the air coursing over Mr. Paugh's bolting machine was interrupted, thus affecting both the quantity and quality of air passing over the bolter. Under the circumstances, there is a strong inference that in those instances where Mr. Paugh complained to Mr. Johnson about the lack of adequate ventilation over his bolter, Mr. Paugh's working environment was inadequately ventilated, and the respondent has produced no credible evidence to the contrary. Accordingly, I find that Mr. Paugh's refusal to continue bolting while the fan was down was reasonable, and constitutes protected activity.

Respondent's Alleged Hostility and Harassment of Mr. Paugh

During the course of the hearing in this case, Mr. Paugh's counsel asserted that with the exception of Mr. Paugh's discussions with Mr. Johnson concerning the issue of inadequate air ventilation over the roof-bolting machine, there is no evidence of any harassment of Mr. Paugh on the part of the respondent. Further, Mr. Paugh has conceded that at no time prior to his suspension and discharge was he ever disciplined by mine management because of his asserted safety complaints or other reasons.

Mr. Paugh initially testified that during a time span of 2 to 3-years prior to his discharge while working under Mr. Johnson's supervision, he complained to Mr. Johnson about the lack of adequate air over his bolting machine at least 12 times. As a result of these complaints, Mr. Paugh contended that Mr. Johnson "would get in an uproar about it," and would assign him "extra things" to do, e.g., rock dusting, shoveling at the feeder, stacking ventilation tubing, and advancing the ventilation curtain, while other members of the bolting crew were not assigned such work. Mr. Paugh also contended that Mr. Johnson tried to curtail his normal lunch

break to 10 to 15 minutes as a means of harassing him, and that the extra work assignments were made to punish the roof bolting crew. In addition, Mr. Paugh contended that on at least one occasion, Mr. Polce transferred him off Mr. Johnson's section because of his "conflict" with Mr. Johnson.

When recalled later in the hearing, Mr. Paugh conceded that he never complained to Mr. Gearhart about his allegations of harassment by Mr. Johnson and that never told Mr. Gearhart about his "conflicts" with Mr. Johnson. While it is true that Mr. Paugh spoke with Mr. Gearhart after his discharge when he returned to the mine to pick up his personal belongings, and may have attempted to explain the matter further, and Mr. Gearhart would not listen, there is no evidence that Mr. Paugh communicated his allegations of harassment to Mr. Gearhart, or to Mr. Pritt or Mr. Tenney during management's investigation of the fighting incident.

With regard to his prior transfer from Mr. Johnson's supervision, Mr. Paugh testified that it came about as a result of his disputes with Mr. Johnson over the lack of air over the roof-bolting machine, and Mr. Paugh did not indicate that he complained to Mr. Polce that Mr. Johnson assigned him extra work or curtailed his lunch hours as a means of harassment or punishment.

When specifically questioned about his contention that Mr. Johnson curtailed his lunch break "a lot of times," and his implication that this occurred at least 12 times over the course of 2 to 3 years, Mr. Paugh conceded that it occurred 3 or 4 times. When pressed further, he stated that "it would be a couple of times." When asked whether he believed Mr. Johnson assigned him extra work to deliberately "make it tough on him," Mr. Paugh responded "somewhat." When asked whether he considered the extra work assignments as "punishment" for his complaints, Mr. Paugh responded "I would use harassment, not punishment." The only specific instances cited by Mr. Paugh in terms of curtailment of his lunch break were "a couple of times" when he was asked to re-hang a ventilation curtain and to rock dust.

I take note of the fact that in his initial complaint, as well as the statements made to MSHA's special investigator during the investigation of his complaint, while Mr. Paugh alluded to some extra work assignments, he did not allege that his lunch hours were curtailed. Ronald Smith, a friendly witness, testified that he was not aware that Mr. Paugh was ever disciplined for complaining to Mr. Johnson about the lack of air over his bolter, and he made no mention of any acts of

alleged harassment of Mr. Paugh. Another friendly witness, Jimmie Wolfe, who testified that Mr. Paugh and Mr. Johnson were constantly at odds with each other over the issue of inadequate air over the bolting machine, made no mention of any acts of harassment on the part of Mr. Johnson. As a matter of fact, Mr. Wolfe confirmed that while he himself made many safety complaints to management, he was never subjected to any disciplinary action because of this. Further, the testimony of Mr. Sisler, Mr. Beckman, and Mr. Prinkey, all of whom served on Mr. Paugh's bolting crew under Mr. Johnson's supervision, is devoid of any indication of any harassment or extra work assignments by Mr. Johnson as a means of punishing the crew.

I find Mr. Paugh's contentions that his lunch hours were curtailed by Mr. Johnson to harass or punish him for his complaints to be equivocal and contradictory, and lacking in credibility. Mr. Paugh conceded that his regular lunch breaks may have been shortened at times because of normal work requirements, and that the "extra work" assignments were made during those periods when the roof bolter was down. Further, there is no evidence that Mr. Paugh was ever taken off the roof bolter and assigned other job tasks except for those occasions when the bolter was down for maintenance or because of Mr. Paugh's refusal to operate it while the fan was being advanced and the air was interrupted.

Although roof bolter and scoop operator Ronald Smith contended that Mr. Johnson expected him to work and clean up debris under unsupported roof, he conceded that when he refused, Mr. Johnson did the work himself, and Mr. Smith admitted that he sometimes worked under unsupported roof on his own. Further, Mr. Smith confirmed that after a new scoop was brought into the section in 1984 to cure a "diesel smoke" problem with an older machine, Mr. Johnson's section was the cleanest and best section in the mine. Mr. Smith also confirmed that he had no "safety gripes" against Mr. Johnson, and was not aware that Mr. Paugh was ever disciplined because of his safety complaints about the lack of air over his bolter (Tr. 72, 74-75). Mr. Smith also conceded that the lack of air was not entirely Mr. Johnson's fault, and he could recall no instances when Mr. Johnson totally ignored Mr. Paugh's complaints (Tr. 77, 84).

Rib bolter John Prinkey, who worked on Mr. Paugh's bolting crew, confirmed that while there were times when the crew was not aware of the fact that the fan was being moved, thereby interrupting the ventilation, Mr. Johnson never instructed the crew to continue bolting without air (Tr. 102).

Roof bolter Jimmie Wolfe, who at one time had worked with Mr. Paugh on foreman Johnson's crew, testified that he was not aware that Mr. Johnson ever ordered Mr. Paugh to continue bolting without air (Tr. 116). Further, Mr. Wolfe, who at one time had been a foreman himself, confirmed that during his 7 years of employment with the respondent, he made safety complaints, but was never disciplined because of this and still has his job (Tr. 146).

Continuous-miner operator Donald Bray, who was injured when pinned against a rib in an accident caused by a defective remote control device on his machine, confirmed that Mr. Johnson never asked him to do any task which was unsafe or which would place him in danger, and in referring to Mr. Johnson stated "I don't think he would do that" (Tr. 157).

During his cross-examination of Mr. Johnson, Mr. Paugh's counsel stated as follows (Tr. 106-107):

BY MR. HALL:

Q. Mr. Johnson, everybody I have talked to in this case says that above ground you're one of the nicest and finest guys they have ever met.

A. How's that again? I didn't hear you.

Q. I said everybody I have talked to in this case says that above ground you're one of the nicest and finest people they have ever met, including John. And they also say that you run the best section; you've got the cleanest section underground. But when you go underground, you change. Is there a lot of pressure on you for production?

A. I won't say there's a lot of pressure. There is pressure. You know that is your job; that is one of your responsibilities, is the production. So, I'm sure that there is a lot of pressure.

Mr. Paugh conceded that other members of his crew were sometimes assigned other job tasks, and he confirmed that when his bolter or the ventilation were down, Mr. Johnson would invite him "to go eat something." He also confirmed that when he or Mr. Prinkey were caught up with their work and had nothing else to do, they would sit and drink coffee while waiting

for Mr. Beckman to catch up with them. Mr. Paugh also conceded that he would expect to do other work while his bolter or fan were down, and did not consider it wrong to be assigned other work. He also conceded that in those instances when the ventilation curtains and fan were down, thereby reducing the available air over the bolting machine, Mr. Johnson agreed that he did not have to remain in the affected areas and would assign him other work to do until such time as the air was restored. Rib and roof bolters Prinkey and Wolfe testified that Mr. Johnson never instructed the bolting crew to continue bolting without air.

After careful consideration of all of the credible testimony and evidence presented in this case on the issue of the curtailment of Mr. Paugh's lunch hours as a means of harassment, I cannot conclude that this was in fact the case. I cannot conclude that Mr. Paugh was singled out by Mr. Johnson for extra work assignments or "special treatment" as a means of punishment or harassment for his safety complaints. I conclude and find that Mr. Johnson's work assignments with respect to Mr. Paugh constituted a reasonable exercise of Mr. Johnson's supervisory authority and discretion to assign other work while Mr. Paugh's bolting machine was idle, and that these work assignments were not discriminatory or made to punish or harass Mr. Paugh for any safety complaints.

In his initial complaint, Mr. Paugh alleged that his discharge resulted from a "conflict of interest" and "conflicts" with Mr. Johnson, and that certain unidentified "other persons," acting in concert with Mr. Johnson, retaliated against him because of his safety concerns and his insistence on following safety regulations.

There is no evidence in this case that Mr. Johnson was involved in the management decision to discharge Mr. Paugh, or that he had any input into that decision. Although Mr. Johnson suspended Mr. Paugh, he did so at the direction of Mr. Polce pending an investigation of Mr. Paugh's encounter with Mr. Beckman. In addition, the evidence establishes that Mr. Paugh had no connection with management's prior disciplinary action and suspension of Mr. Johnson for a safety violation, and there is no basis for concluding that Mr. Johnson harbored any ill will toward Mr. Paugh because of his suspension.

Two members of the management team that made the collective decision to discharge Mr. Paugh (Pritt and Tenney), did not testify in this case, and there is no evidence that they harbored any resentment or hostility toward Mr. Paugh.

Personnel Director Gearhart, who has known Mr. Paugh since he first hired him, testified that at the time the decision was made to discharge Mr. Paugh, he was not aware of any prior safety complaints by Mr. Paugh, and was not aware of any differences between Mr. Paugh and Mr. Johnson. This testimony stands unrebutted, and there is no evidence that Mr. Gearhart harbored any hostility or ill will toward Mr. Paugh.

With regard to Mr. Polce, the fourth member of the management team that made the decision to discharge Mr. Paugh, the record suggests that Mr. Paugh and Mr. Polce have had their differences with respect to the lack of adequate air ventilation over the roof-bolting machine while the fan was down. I take note of the fact that Mr. Paugh's initial complaint does not allege that Mr. Polce harassed him or was hostile toward him. However, during the hearing, Mr. Paugh testified to several encounters he had with Mr. Polce with respect to the lack of adequate ventilation over the bolting machine while the fan was down, and Mr. Paugh contended that Mr. Polce insisted that he continue bolting without air, and that on one occasion, Mr. Polce told him that if he refused to continue bolting he would either be taken off the bolter or he could find another job. In addition, Mr. Paugh contended that on least one occasion Mr. Polce transferred him off Mr. Johnson's section in order to keep them apart and because of their personal differences.

Mr. Polce denied that he had numerous conversations with Mr. Paugh about the lack of adequate air over the bolting machine, or that Mr. Paugh complained to him about this. Mr. Polce also denied that Mr. Paugh was transferred from Mr. Johnson's section because of their differences, and maintained that the transfer of bolters was a "normal practice" dictated by regular work requirements. Mr. Polce admitted to one incident where Mr. Paugh shutdown the bolting machine because he believed the air was inadequate. Although the record suggests that this encounter may not have been cordial, the matter was resolved when Mr. Polce measured the air and the fan came back on and Mr. Paugh resumed bolting.

Mr. Polce conceded that at the time of the decision to discharge Mr. Paugh, he was aware of prior problems and conflicts between Mr. Johnson and Mr. Paugh, and knew of their prior encounters over the failure by Mr. Paugh to advise Mr. Johnson that his roof bolter needed repair, and Mr. Paugh's purported threat to hit Mr. Johnson. Mr. Polce was also aware of Mr. Paugh's reluctance to continue bolting with insufficient air, and that this issue was a "problem" between Mr. Johnson and Mr. Paugh.

Although Mr. Polce stated that he considered Mr. Paugh to be a good worker, he qualified his assessment of his work when he stated that this was true only when Mr. Paugh did not "drag his feet" or "take his time when it wasn't needed to be taken." Mr. Polce confirmed that there were times when he personally observed that Mr. Paugh would drill unnecessary test holes and install more bolts than were necessary, that Mr. Beckman had complained to him about this, and that Mr. Johnson "probably" told him that Mr. Paugh at times got behind in his work. Mr. Polce also admitted that he had heard about Mr. Paugh's purported statement that if he had to work overtime he would make sure that he got enough to pay for gas. As a matter of fact, Mr. Polce admitted that as a result of Mr. Beckman's complaints that Mr. Paugh was slowing his work down on purpose to earn overtime, he instructed Mr. Johnson to "keep an eye" on the bolting crew on March 5, in order to address any problems that may arise in this regard.

It would appear from all of the evidence in this case that Mr. Polce was the only member of the management team that made the decision to discharge Mr. Paugh who was aware of Mr. Paugh's prior encounters with Mr. Johnson, and the fact that Mr. Paugh may have been a "problem employee" in terms of his safety concerns. Based on this prior knowledge, one may speculate as to whether it influenced Mr. Polce's input into the decision to discharge Mr. Paugh. Assuming that it did, I find no evidence of any harassment of Mr. Paugh by Mr. Polce because of any past conduct or actions by Mr. Paugh. Mr. Paugh could not establish any instances or acts of harassment on the part of Mr. Polce. I conclude that Mr. Paugh's testimony that Mr. Polce threatened to take him off the bolter and suggested that he find another job if he did not wish to continue bolting with inadequate air is less than credible and self serving. There is no evidence that Mr. Polce ever carried out these purported threats, and Mr. Paugh admitted that notwithstanding his differences with Mr. Polce over the lack of adequate air over his bolter, Mr. Polce would eventually see to it that the air was restored. Further, in each instance when Mr. Paugh saw fit to discontinue bolting when the fan was down, he was always assigned other work to do, and there is no evidence that he ever continued to bolt against his will or was forced to do so when he believed the air was inadequate. This fact was corroborated by the testimony of members of his own bolting crew and others who were aware of Mr. Paugh's reluctance to continue bolting with insufficient air.

Although I conclude that Mr. Paugh's assertion that he was at one time transferred off Mr. Johnson's section because of friction between the two of them has a ring of truth about it, and find Mr. Polce's denials to be less than candid, I nonetheless cannot conclude that such a transfer constituted harassment. In my view, if Mr. Polce wanted to harass or punish Mr. Paugh for his reluctance to continue bolting with inadequate air, Mr. Polce would have kept Mr. Paugh under Mr. Johnson's supervision or permanently transferred him to less desirable work.

With regard to any hostility on the part of management towards Mr. Paugh, I find no credible evidence to support any conclusion that Mr. Gearhart, Mr. Pritt, Mr. Tenney, or Mr. Polce were hostile towards Mr. Paugh, and there is no evidence that Mr. Paugh's prior encounters with Mr. Polce and Mr. Johnson were considered or discussed by management at the time the decision was made to discharge him. In my view, the only evidence of any hostility against Mr. Paugh by management focuses on Mr. Johnson.

Notwithstanding Mr. Johnson's assertions that he and Mr. Johnson "got along fairly well" together, I conclude and find that the record supports a reasonable inference that there was open hostility between Mr. Johnson and Mr. Paugh at least during the last 2 or 3 years that Mr. Paugh worked under Mr. Johnson's supervision. As for Mr. Johnson, he admitted that at one time he invited Mr. Paugh to hit him after Mr. Paugh purportedly threatened to do so. On another occasion, Mr. Johnson admitted that he became angry at Mr. Paugh when he failed to advise him that his bolter needed repair. On yet another occasion on March 5, 1986, when Mr. Johnson confronted Mr. Paugh after he shutdown his bolter, an angry exchange occurred between the two of them, and I believe that Mr. Johnson's statement to Mr. Paugh to install the roof bolts "skin to skin" if he so desired was the result of Mr. Johnson's anger and frustration over what he obviously believed was a deliberate work slowdown by Mr. Paugh. This particular exchange was witnessed by Mr. Sisler who testified that it appeared that Mr. Paugh "was talking back" to Mr. Johnson. In addition, members of Mr. Paugh's bolting crew and others who have worked with him and Mr. Johnson corroborated the fact that Mr. Paugh and Mr. Johnson often argued about Mr. Paugh's reluctance to bolt with inadequate air.

With regard to Mr. Paugh, although Mr. Johnson described him as a "quiet" individual, the record supports an equally strong inference that he too had a temper and was hostile towards Mr. Johnson. In his initial complaint, Mr. Paugh

attributed his discharge to his "conflicts" and "conflict of interest" with Mr. Johnson. Mr. Paugh admitted that "he had been at odds with Mr. Johnson" since 1984. He admitted that when Mr. Johnson confronted him about shutting down the bolter on March 5, he told Mr. Johnson "you cover your ass, I'll cover mine." When asked whether Mr. Johnson had ever invited him to hit him, Mr. Paugh stated "He could have have. He's a good instigator." Mr. Paugh also admitted to referring to Mr. Beckman as "a cry baby," and that it was possible that he referred to him as "a cry baby son of a bitch." Mr. Polce testified that during his discussion with Mr. Paugh when his bolter was shut off, Mr. Paugh remarked to him "what are you getting all huffy about." Mr. Lucas testified to a prior fight he had with Mr. Paugh, and that although Mr. Paugh described the incident as "horseplay," he admitted that they "wrestled." Taken as a whole, all of these prior incidents and encounters lead me to conclude that Mr. Paugh had a temper equally as volatile as Mr. Johnson, and that a serious personality conflict existed between the two of them.

Although I have concluded that a state of hostility existed between Mr. Paugh and Mr. Johnson prior to Mr. Paugh's discharge, as stated earlier, there is no evidence that Mr. Johnson participated in the management decision to discharge Mr. Paugh. While it is true that Mr. Johnson initially informed Mr. Polce that Mr. Beckman had told him that Mr. Paugh hit him, and repeated Mr. Beckman's allegation when he was subsequently interviewed by the management team during its investigation of the incident, but may not have informed them of Mr. Paugh's denials, I cannot conclude that Mr. Johnson exercised any prejudicial influence on the management team during its deliberations. In short, I find no evidence to establish any nexus between Mr. Johnson's hostility towards Mr. Paugh and his subsequent discharge.

Mr. Polce and Mr. Gearhart confirmed that the collective decision to discharge Mr. Paugh for fighting was made after consideration of all of the information provided by the principals, as well as the witnesses to the altercation, and that all versions of the incident were considered, including Mr. Paugh's. I find Mr. Polce's testimony that Mr. Paugh's prior encounters with Mr. Johnson were not discussed by management when it made the decision to discharge Mr. Paugh to be credible. Mr. Gearhart's unrebutted credible testimony reflects that at the time the decision was made to discharge Mr. Paugh, management was unaware of Mr. Paugh's prior fight with Mr. Lucas, and Mr. Gearhart had no knowledge of any safety complaints by Mr. Paugh or his prior encounters with Mr. Johnson. Under the circumstances, I find no credible

basis for concluding that Mr. Johnson's hostility had any impact on the decision to discharge Mr. Paugh, and find no evidence to establish any nexus between Mr. Johnson's hostility and Mr. Paugh's discharge.

Respondent's Motivation for Discharging Mr. Paugh

The crux of Mr. Paugh's case is his claim that respondent's mine management seized upon the appearance of a fight between him and Mr. Beckman on March 5, 1986, as an excuse for discharging him because of his protected activities in insisting on compliance with the ventilation and roof support requirements of the law, his complaints in this regard, and his reluctance or refusal to continue roof bolting when he believed that the air over his bolter was inadequate. In short, Mr. Paugh views management's conclusion that he engaged in a fight with Mr. Beckman as a pretexual excuse to get rid of him because of his safety concerns.

In support of his pretexual discharge argument, Mr. Paugh relies on a statement by personnel director Gearhart to MSHA's special investigator during the post-discharge investigation of Mr. Paugh's complaint in which Mr. Gearhart states that Mr. Paugh "had also started a fight with another employee four or five years ago," (Exhibit C-4; Exhibit 5-1). Conceding that neither Mr. Gearhart or the management team which made the decision to discharge him were aware of this prior incident at the time the decision was made to discharge him, Mr. Paugh nonetheless argues that Mr. Gearhart made the statement to make it appear that Mr. Paugh had a history of fighting, thereby lending credibility to management's discharge decision. Further, during the course of the hearing, Mr. Paugh's counsel took issue with Mr. Gearhart's further statement to MSHA that "Both Earl Sisler and Harry Beckman have proved in Mettiki's experience, to be among the most credible members of it's hourly work force." Counsel suggested that this statement by Mr. Gearhart was a self-serving after-the-fact declaration to support management's belief that Mr. Sisler's and Mr. Beckman's version of the altercation which took place between Mr. Paugh and Mr. Beckman was true, while Mr. Paugh's version was a lie.

It seems absolutely clear to me from the evidence in this case that at the time management made the decision to discharge Mr. Paugh, none of the participants in that decision had any knowledge of Mr. Paugh's prior purported fight with Mr. Lucas. Under the circumstances, I find no basis for concluding that Mr. Gearhart's post-discharge statement to MSHA prejudiced Mr. Paugh or adversely impacted in any way on

management's decision to discharge him. It would appear that Mr. Gearhart's statement was solicited by the special investigator during his fact-finding investigation. While it may be true that Mr. Gearhart's statement concerning Mr. Paugh's involvement in a prior fight may have in some way impacted on MSHA's determination not to pursue his case further, I find no basis for concluding that management relied on that prior incident to support its discharge decision. Mr. Paugh's complaint before this Commission and me has been adjudicated de novo, without regard as to what may have motivated MSHA not to initially pursue Mr. Paugh's complaint further.

Since the merits of Mr. Paugh's complaint is before me de novo, the respondent is free to introduce relevant and material evidence of Mr. Paugh's alleged propensity for fighting in further support of any conclusion that a fight more than likely took place on March 5, 1986. The respondent has done this through the testimony of Mr. Lucas, and as the trier of fact, I am free to assess Mr. Lucas' credibility, and to make my own independent judgment on this issue. The same can be said of the testimony of Mr. Sisler and Mr. Beckman. Having viewed them during their testimony at the hearing, I am free to assess their credibility independent of Mr. Gearhart's views as to their credibility and veracity. However, management was free to assess the credibility of Mr. Beckman and Mr. Sisler during its investigation of the March 5, 1986, fight in question, and as confirmed by Mr. Gearhart, management chose to believe Mr. Beckman's and Mr. Sisler's version of that incident, and rejected Mr. Paugh's version that he simply placed his hand on Mr. Beckman's shoulder while attempting to get his attention in order to engage him in a conversation.

The pivotal issue in this case is whether or not the respondent has established through a preponderance of the credible evidence and testimony that at the time management made the decision to discharge Mr. Paugh, it had reasonable grounds to believe that Mr. Paugh and Mr. Beckman engaged in a fight on March 5, 1986, and if so, whether or not its conclusion that Mr. Paugh was the aggressor, thus warranting his discharge for violating a company rule against fighting, is likewise reasonably supportable by a preponderance of the credible testimony and evidence.

Respondent's Employee Handbook Exhibit C-4, 9-2), at page 26, states that "No horseplay, fighting or other unsafe physical acts will be tolerated on Company property." Page 18 of the handbook, which explains in part major employee offenses that may result in a potential discharge of an

employee specifically provides for discharge for "Violating safety rules or special hazard procedures, fighting or other acts which may have a serious affect on safety or continuity of the operation" (emphasis added).

The record establishes that the decision to discharge Mr. Paugh was made by management after an investigation of the fighting incident. The investigation consisted of interviews conducted by four members of an ad hoc management team consisting of mine foreman Polce, personnel director Gearhart, general mine superintendent Billy Pritt, and mine superintendent Paul Tenney. The team conducted interviews on Friday, March 7, 1986, and they interviewed Mr. Paugh, Mr. Johnson, Mr. Beckman, and Mr. Sisler, separately and out of each other's presence. Mr. Polce and Mr. Gearhart, were the only members of the management team who testified in this case. They confirmed that the decision to discharge Mr. Paugh was a collective decision made by the team. On the basis of the information developed during the interviews, the team concluded that Mr. Paugh and Mr. Beckman got into a fight on March 5, 1986, and that Mr. Paugh precipitated the fight and was the aggressor. Since fighting is contrary to company policy and is an offense which may result in the discharge of the offending employee, the decision was made to discharge Mr. Paugh for violating this policy, and Mr. Polce informed Mr. Paugh of the decision on Monday, March 10, 1986.

Mr. Beckman testified that as he started to tram his bolting machine, Mr. Paugh approached him from behind, called him "a cry baby son of a bitch," and either hit or pushed him from behind into the moving machine. Mr. Beckman further testified that when he was pushed into the machine, his hat flew off his head, and his chest hit the machine. Although Mr. Beckman confirmed that no blows were exchanged, and responded "No" when asked whether he and Mr. Paugh engaged in a "fight," he confirmed that he defended himself by grabbing Mr. Paugh's arms as he started to lift them, and that he did so because he believed that Mr. Paugh would try to hit him.

Mr. Sisler, who was eye witness to the encounter between Mr. Paugh and Mr. Beckman, testified that as Mr. Paugh passed by him on his way to where Mr. Beckman was working at more than a normal pace, Mr. Paugh appeared to be upset and stated to Mr. Sisler as he passed him that Mr. Beckman was "a damn cry baby." Mr. Sisler testified that from his vantage point, his view was partially blocked by the machine, and he could only see Mr. Paugh and Mr. Beckman from the waist up. Although he observed no punches being exchanged, and did not actually see Mr. Paugh push Mr. Beckman, he did see Mr. Beckman's hat

fly off his head, and he concluded that Mr. Beckman had either been pushed into the machine by Mr. Paugh or that he "flinched," as if being caught by surprise by Mr. Paugh. After Mr. Beckman's hat flew off, Mr. Sisler saw Mr. Beckman grab Mr. Paugh by the wrists and hold him against the rib.

Mr. Lucas, who was present during the shift when the encounter between Mr. Paugh and Mr. Beckman took place, was not interviewed by the management team. Mr. Lucas confirmed that while he did not observe the incident, after learning that Mr. Johnson had taken Mr. Beckman and Mr. Paugh out of the mine, he asked Mr. Johnson for an explanation, and Mr. Johnson informed him that "It's went too far this time," and that he had taken them out of the mine because he was doing his job.

Mr. Lucas testified that after Mr. Johnson took Mr. Paugh and Mr. Beckman out of the mine, he asked Mr. Sisler about the incident, and Mr. Sisler told him that he observed that Mr. Beckman had Mr. Paugh against the rib "slugging him." When asked to explain Mr. Lucas' statement, Mr. Sisler stated that in reply to a question by Mr. Lucas as to whether any punches had been thrown, he replied in the affirmative, but did so more or less as a joke because Mr. Lucas initiated the conversation, and Mr. Sisler did not believe it was any of his business. Mr. Sisler further explained that he meant nothing by the remark and did not wish to see anyone get into any trouble. He reiterated that he saw no punches thrown between Mr. Paugh and Mr. Beckman.

Mr. Beckman and Mr. Sisler confirmed that when they were interviewed by the management team during its investigation of the incident in question, the information they gave with respect to what happened during the encounter between Mr. Paugh and Mr. Beckman was consistent with their testimony in this case. Having viewed them on the stand during their testimony in this case, I find Mr. Beckman and Mr. Sisler to be credible witnesses.

Mr. Polce testified that while he took no notes during the management interviews conducted as part of the investigation of the fighting incident, he specifically recalled Mr. Sisler's statements that Mr. Paugh had referred to Mr. Beckman as a "cry baby, bastard, or something" and that he saw Mr. Beckman's hat fly off and observed Mr. Beckman turn around to protect himself by grabbing Mr. Paugh's arms. Mr. Polce also recalled Mr. Beckman's statements that Mr. Paugh had pushed him into the bolting machine while he was tramming it and that his hat was knocked off. Mr. Polce

testified that it made no difference to him whether Mr. Paugh "hit" Mr. Beckman from the back or "pushed" him from the back. As far as he was concerned, if Mr. Paugh was the aggressor and came around behind Mr. Beckman and pushed him into the machine "that's it" (Tr. 150). Mr. Polce confirmed that all versions of the incident including Mr. Paugh's, were considered by management during its investigation, and it was concluded that Mr. Beckman was not the aggressor.

Mr. Gearhart confirmed that management considered all versions of the incident, including Mr. Paugh's, but accepted Mr. Beckman's and Mr. Sisler's version of the event. Mr. Gearhart testified that considering all of the circumstances, including the fact that Mr. Beckman's hat flew off, that he was either hit or pushed into the bolter, the fact that Mr. Paugh was angry and cursed Mr. Beckman, and the fact that Mr. Beckman grabbed Mr. Paugh to restrain him, management concluded that a fight had taken place between Mr. Paugh and Mr. Beckman, and that Mr. Paugh was the aggressor. It was also concluded that Mr. Beckman had acted properly by not returning any blows and by seeking out his foreman to report the matter. Mr. Gearhart further confirmed that he personally found Mr. Beckman's version of the incident to be more credible than Mr. Paugh's, and he believed that Mr. Paugh lied when he stated during his interview that he went around to Mr. Beckman's side of the bolting machine simply to speak with him, and that he merely placed his hand on Mr. Beckman's shoulder.

In his posthearing brief filed on Mr. Paugh's behalf, counsel asserts that the respondent seized upon the appearance of a fight between Mr. Paugh and Mr. Beckman to support the discharge of Mr. Paugh. This suggests that either a fight did not take place, or that the respondent has made it appear that an otherwise innocuous disagreement between Mr. Beckman and Mr. Paugh was a fight in order to conceal its true motive in discharging Mr. Paugh because of his protected safety activities. In this regard, during the course of the hearing, Mr. Paugh's counsel made reference to a finding by the State of Maryland Department of Unemployment Insurance in connection with Mr. Paugh's unemployment benefits claim that the information provided by the respondent during the course of the processing of Mr. Paugh's claim was insufficient to substantiate the alleged fight. That "finding" is stated on a Notice of Benefit Determination form dated March 20, 1986 (Exhibit C-4, 8-1).

Mr. Gearhart conceded that he was contacted by a state unemployment agency representative, and confirmed that the

respondent declined to appear at any state proceeding challenging Mr. Paugh's unemployment claim. Mr. Gearhart confirmed that he spoke with the representative over the telephone, but denied that the representative expressed any opinion that the incident, as described by Mr. Gearhart over the telephone, "did not sound like a fight." Since the representative did not testify in this case, Mr. Gearhart's testimony stands unrebutted. With regard to the state unemployment compensation "finding," aside from the fact that it is not binding on me, I find no evidentiary support for the conclusion reached by the state representative and have given it no weight. Further, I find no basis for drawing any adverse inferences against the respondent simply because it declined to participate in the unemployment proceeding.

The evidence in this case establishes that immediately prior to the confrontation between Mr. Paugh and Mr. Beckman, Mr. Paugh and his section foreman Johnson engaged in a heated discussion over the spacing of the roof bolts, and Mr. Paugh was angry at Mr. Beckman for complaining to Mr. Johnson about his work. During his conversation with Mr. Johnson, Mr. Paugh referred to Mr. Beckman as "a damn cry baby." As soon as Mr. Johnson departed, Mr. Paugh lost no time in getting to Mr. Beckman, and Mr. Paugh admitted that he "was in a hurry" to get to Mr. Beckman. Although Mr. Paugh could not recall stating to Mr. Beckman "I'm going to get you, you son of a bitch," Mr. Paugh admitted that it was possible that he did make the statement, and that it was also possible that he referred to Mr. Beckman as "a cry baby" or "crazy." Mr. Paugh further admitted that in his earlier discussion with Mr. Johnson and in reference to Mr. Beckman, he stated to Mr. Johnson "what's the problem? Is this cry baby complaining about me?" Taking all of this into consideration, I conclude and find that Mr. Paugh was angry with Mr. Beckman, and that when he went over to Mr. Beckman's side of the bolting machine he acted as the aggressor, and did so with the specific intent to confront Mr. Beckman about his complaints to Mr. Johnson. I do not believe Mr. Paugh's assertion that he went around to Mr. Beckman's side of the bolter simply to engage him in a conversation over the spacing of the roof bolts or the positioning of the roof-bolting machine.

As stated earlier, the issue regarding the encounter between Mr. Paugh and Mr. Beckman, is whether or not the management team which concluded that a fight had taken place had a reasonable basis for making that conclusion. I take note of the fact that during the course of the hearing, Mr. Paugh's counsel observed and seemingly agreed with the testimony that Mr. Paugh went around to Mr. Beckman's side of the bolter;

that "something happened between Mr. Paugh and Mr. Beckman;" that "there was a scuffle;" and that "some sort of altercation took place" (Tr. 71). Counsel's observations are consistent with the testimony of Mr. Beckman and Mr. Sisler, which I find credible, and inconsistent with Mr. Paugh's assertion that he merely laid his hand on Mr. Beckman's shoulder to get his attention, which I find less than credible.

The respondent's employee handbook does not define the term "fight" or "fighting." However, Webster's New Collegiate Dictionary defines the noun "fight" in part as "a hostile encounter," "a verbal disagreement," "argument." Black's Law Dictionary, 1968 Edition, defines the term "fight" in part as follows: "An encounter, with blows or other personal violence, between two persons . . . . The term does not necessarily imply that both parties should give and take blows. It is sufficient that they voluntarily put their bodies in position with that intent."

I take note of the fact that the respondent's safety rules and employee rules of conduct prohibits fighting or other unsafe physical acts or other acts which may have a serious affect on safety. The parties do not dispute the fact that fighting in an underground mine, particularly around moving machinery and equipment, could reasonably be expected to result in serious consequences to miners who engage in such conduct. In my view, the fact that the participants do not draw blood or strike or exchange blows with each other is irrelevant. I conclude that any encounters of the kind which has been described in this case, in which one party acts as the aggressor with the intent to inflict harm on the other party by either intentionally or unintentionally pushing him into a piece of moving equipment, or aggressively accosts him by placing his hands on him in such a manner as to cause him to fall against a piece of moving equipment, or exposes him to that potential hazard, constitutes an act of fighting, as well as an unsafe physical act affecting the safety of the miner who is on the receiving end of such an act and who did not act as the aggressor or otherwise initiate the encounter.

In view of the foregoing findings and conclusions, and after careful consideration of all of the evidence adduced in this case, I conclude and find that the respondent's decision to discharge Mr. Paugh, as articulated by the management team that made that decision on the basis of the information developed during the course of its investigation, was based solely on management's reasonable and plausible belief that Mr. Paugh had acted as the aggressor and had engaged Mr. Beckman in a fight. I find no credible basis for concluding that at the

time management made the decision to discharge Mr. Paugh, it was otherwise predisposed to discharge Mr. Paugh because of his safety concerns, or because of any protected safety activities on his part. To the contrary, I conclude that the respondent has established a believable and plausible legitimate reason and cause to support the discharge, that it was justified in taking the disciplinary action as a reasonable exercise of its legitimate interests in disciplining its own work force, and that in doing so it was not motivated by Mr. Paugh's protected safety activities.

CONCLUSION AND ORDER

In view of the foregoing findings and conclusions, and after careful consideration of all of the credible evidence and testimony adduced in this case, I conclude and find that the complainant has failed to establish a prima facie case of discrimination on the part of the respondent. Accordingly, the complaint IS DISMISSED, and the complainant's claims for relief ARE DENIED.

The respondent's counterclaim for costs and attorneys fees incurred in its defense of Mr. Paugh's complaint on the ground that Mr. Paugh intentionally and willfully omitted from his original complaint the fact that he had been discharged by the respondent IS DENIED.

George A. Koutras
Administrative Law Judge

Distribution:

W. Bryan Hall, Esq., 201 Fayette Street, Cumberland, MD 21502 (Certified Mail)

Thomas P. Gies, Esq., Susan E. Chetlin, Esq., Crowell & Moring, 1001 Pennsylvania Avenue, N.W., Washington, DC 20004-2505 (Certified Mail)

/fb

☆ U.S. GOVERNMENT PRINTING OFFICE: 1987—181-224/63004