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APRIL 1991

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

Secretary of Labor, MSHA v. Mar-Land Industrial Contractor, Inc., Docket No. SE 90-117-M. (Judge Weisberger, March 6, 1991)

Secretary of Labor, MSHA v. Drummond Company, Inc., Docket Nos. SE 90-125, etc. (Judge Merlin, March 6, 1991)

Secretary of Labor, MSHA v. Drummond Company, Inc., Docket No. SE 90-126. (Judge Merlin, March 6, 1991)

Secretary of Labor, MSHA v. Ideal Cement Company, Docket No. WEST 88-202-M. (Judge Morris, March 6, 1991)

Gatliff Coal Company v. Secretary of Labor, MSHA, Docket No. KENT 89-242-R, etc. (Judge Melick, March 8, 1991)

Secretary of Labor, MSHA v. Zeigler Coal Company, Docket No. LAKE 91-2. (Judge Merlin, March 12, 1991)

Secretary of Labor, MSHA v. Texas Utilities Mining Company, Docket No. CENT 91-26. (Judge Merlin, March 12, 1991)

Secretary of Labor, MSHA v. Utah Power & Light Company, Mining Division, Docket Nos. WEST 90-320, etc. (Interlocutory Review of Judge Lasher's March 20, 1991 Order)

Secretary of Labor, MSHA v. Hobet Mining, Inc., Docket No. WEVA 91-65. (Interlocutory Ruling of Judge Fauver's April 4, 1991 Order)

Secretary of Labor, MSHA v. James Roger Bell, Robert V. Swindall and Marion Eugene Rowland, Docket Nos. VA 90-53, etc. (Interlocutory Review of Judge Broderick's February 7, 1991 Order)

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

Arnold Sharp v. Big Elk Creek Coal Company, Docket No. KENT 89-147-D. (Judge Melick, March 19, 1991)

COMMISSION DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

April 1, 1991

AMOS HICKS	:	
	:	
v.	:	
	:	
COBRA MINING, INC.,	:	Docket No. VA 89-72-D
JERRY K. LESTER, and	:	
CARTER MESSER	:	

BEFORE: Backley, Acting Chairman; Doyle, Holen and Nelson, Commissioners

DECISION

BY THE COMMISSION:

This discrimination proceeding arises from a complaint of retaliatory discharge by Amos Hicks against Cobra Mining, Inc. and certain of its officers filed pursuant to section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (the "Mine Act"). Hicks alleges that he was discharged on May 11, 1989, in retaliation for numerous and various safety complaints made to his section foreman, Garnett Sutherland, at Cobra's No. 1 Mine located in Shortt Gap, Virginia. After investigation of Hicks' charges, the Secretary filed a complaint with the Commission under section 105(c)(2) of the Mine Act. [1]

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[1] Section 105(c)(2) provides as follows:

> Any miner or applicant for employment or representative of miners who believes that he has been discharged, interfered with, or otherwise discriminated against by any person in violation of this subsection may, within 60 days after such violation occurs, file a complaint with the Secretary alleging such discrimination. Upon receipt of such complaint, the Secretary shall forward a copy of the complaint to the respondent and shall cause such investigation to be made as he deems appropriate. Such investigation shall commence within 15 days of the Secretary's receipt of the complaint, and if the Secretary finds that such complaint was not frivolously brought, the Commission, on an expedited basis upon application of the Secretary, shall order the immediate reinstatement of the miner pending final order on the complaint. If upon such investigation, the Secretary determines that the provisions of this subsection have been violated, he shall immediately

After a hearing on the merits was held on January 3, 1990, Commission Administrative Law Judge Avram Weisberger issued a March 22, 1990 decision in which he found that Hicks had established a prima facie case of discrimination, but that Hicks had not overcome Cobra's affirmative defense that it would have discharged Hicks in any event for certain unprotected activity. Accordingly, the judge dismissed the complaint. The Secretary elected not to continue representing Hicks, and Hicks filed, pro se, a petition for discretionary review, which the Commission granted by order issued May 1, 1990. For the reasons that follow, we vacate and remand the judge's decision.

I. Factual and Procedural Background

Amos Hicks is a miner with 15 years experience in the coal industry. In July of 1987 he was hired by Cobra Mining Company when Cobra took over the lease of the No. 1 Mine from Far West Coal Company, Hicks' employer since 1981. Tr. 13-17. While Hicks was employed by Cobra, it was owned by Jerry Lester, Carl Messer and Charles Davis. David Payne held the position of mine superintendent. Garnett Sutherland was section foreman on the number one section where Hicks worked as a shuttle car operator on the day shift. Tr, 132-143, 305.

It is undisputed, and the judge so found, that during the nearly two years during which Hicks worked for Cobra prior to his discharge in May of 1989, he made frequent safety complaints to both Superintendent Payne and Foreman Sutherland. 12 FMSHRC 564-565. Hicks' complaints centered on four

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> file a complaint with the Commission, with service upon the alleged violator and the miner, applicant for employment, or representative of miners alleging such discrimination or interference and propose an order granting appropriate relief. The Commission shall afford an opportunity for a hearing; (in accordance with section 554 of title 5, United States Code, but without regard to subsection (a)(3) of such section) and thereafter shall issue an order, based upon findings of fact, affirming, modifying, or vacating the Secretary's proposed order, or directing other appropriate relief. Such order shall become final 30 days after its issuance. The Commission shall have authority in such proceedings to require a person committing a violation of this subsection to take such affirmative action to abate the violation as the Commission deems appropriate, including, but not limited to, the rehiring or reinstatement of the miner to his former position with back pay and interest. The complaining miner, applicant, or representative of miner may present additional evidence on his own behalf during any hearing held pursuant to this paragraph.

30 U.S.C. 815(c)(2).

specific areas:

(1) That temporary roof support was not always installed in advance of roof bolting in the No. 1 Mine. In particular Hicks complained that when the bolting crew encountered higher than usual roof not within reach of the automated temporary roof support (ATRS) system, they often proceeded to bolt rather than sending out for timbers and other shoring materials to supplement the undersized temporary roof jacks. Tr. 20, 24, 194, 250.

(2) That there was inadequate and poorly-designed ventilation in the face area resulting in section crew members being exposed to excessive levels of dust. This condition was exacerbated during a brief period in early 1989, when two continuous mining machines were being operated within the same split of air. Dust from the first continuous miner was being blown across to the crew members working on and around the second miner. Tr. 39-40, 203, 250.

(3) That when the designated mantrip (a mine car outfitted with skids and pulled by a scoop car) was unavailable, miners were transported in and out of the mine in the bucket of the scoop. Because of overcrowding, there was a danger, in the event the scoop and bucket bounced up against the roof, of being bounced out of the bucket or being pinned against the roof. Tr. 11, 33, 35, 200, 255.

(4) That loose roof existed throughout the mine, particularly along travelways, and was allowed to remain uncorrected even after Hicks' complaints. Tr. 26-30, 140, 198, 252-253.

It was Hicks' contention, supported by other testimony, that Superintendent Payne was generally responsive to his complaints but that Foreman Sutherland was not so responsive, particularly with respect to loose roof conditions. Tr. 43, 103, 227-228, 232.

On the day of his discharge, May 11, 1989, [2] Hicks and Douglas Lester were assigned to shuttle cars in the No. 1 section. At about 10:00 a.m., the continuous miner on the section broke down and Sutherland told Hicks and Lester to go to lunch while the machine was being repaired. The two miners travelled about 200 feet to the feeder area of the belt line to eat. 12

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[2] The judge's decision indicates that the discharge occurred on May 10, 1989, 12 FMSHRC 567, but it appears that Thursday, May 11, 1989 was the correct date. Tr. 18, 258. The error apparently arose from Hicks' own confusion over days and dates during the week of May 7, 1989. Tr. 50, 79.

FMSHRC 567; Tr. 51, 258.

Testimony as to the ensuing sequence and timing of events is somewhat at odds. It is agreed, however, that once the continuous miner was repaired, Sutherland walked back to the feeder area and told Hicks and Lester that they should get back to work. Hicks complained that they had not had enough time to eat, that Sutherland should be "ashamed" of himself and that Hicks hoped Sutherland "would prosper [or profit] from this." Sutherland replied that he wouldn't prosper but the "company might." Tr. 52-53, 120-121, 259.

According to Sutherland, Hicks jumped up, threw out the remainder of his coffee and said, "well, kiss my ass." Tr. 260. Hicks admits that he made the statement but not until he had returned to his shuttle car and had started driving back to the face area. Tr. 53, 352. Hicks' version is corroborated by Douglas Lester. Tr. 229. In any event, Sutherland then told Hicks to "get [his] bucket and go to the outside" and arranged for Hicks' transportation out of the mine. Tr. 54, 260.

Hicks returned to the mine the following morning, Friday, May 12, 1989, and met with Payne and Sutherland. Payne asked Sutherland why he had fired Hicks and Sutherland replied that Hicks had "bad-mouthed" him. Payne indicated that it was Sutherland's decision whether to discharge Hicks or allow him back into the mine, and Sutherland stood by his decision of the previous day. 12 FMSHRC 567; Tr. 179. Sometime later co-owner Messer arrived and spoke briefly with Payne and Hicks. He asked Hicks what had happened and Hicks told him that he'd been fired. Messer stated that he would stand behind Sutherland's decision. Tr. 58, 308. On the following day, Saturday May 13, 1989, Payne and Sutherland met with co-owner Jerry Lester, who also decided to let Sutherland's decision stand. Tr. 154, 329, 331.

Payne visited Hicks at his home that evening and informed him of Jerry Lester's decision to uphold the discharge. Hicks and Payne then prepared a list of hazardous and/or violative conditions that they alleged to exist in the No. 1 Mine, and on Monday, May 15, 1989, Hicks visited the local MSHA office and filed his section 105(c) complaint. Tr. 50, 77-81, 181-182.

The Commission has long held that a miner seeking to establish a prima facie case of discrimination under section 105(c) of the Mine Act bears the burden of persuasion that he engaged in protected activity and that the adverse action complained of was motivated in any part by that activity. Secretary o.b.o. Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2797-2800 (October 1980), rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3rd Cir. 1981); Secretary o.b.o. Robinette v. United Castle Coal Company, 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 the protected activity. Failing that, the operator may defend affirmatively against the prima facie case by proving that it was also motivated by unprotected activity and that it would have taken the adverse action in any event for the unprotected activity alone. Pasula, supra; Robinette, supra. See also, e.g., Eastern Assoc. Coal Corp. v. FMSHRC, 813 F.2d 639, 642 (4th Cir. 1987); Donovan v. Stafford Construction Co., 732 F.2d 954, 958-59 (D.C.

Cir. 1984); Boich v. FMSHRC, 719 F.2d 194, 195-96 (6th Cir. 1983)(specifically approving the Commission's Pasula-Robinette test).

Applying the Pasula-Robinette test to the instant case, the judge determined that Hicks had engaged in protected activity by complaining directly to Sutherland (and to some extent Payne) about loose rock, improper ventilation, inadequate jack supports and riding in the bucket of the scoop. The judge further found that Hicks had obviously been adversely affected by being discharged by Sutherland on May 11, 1989. 12 FMSHRC at 565.

In order to determine whether a retaliatory motive existed between the protected activity and the discharge, the judge went on to make findings regarding the proximity in time between Hicks' various complaints and the date of his discharge. With respect to Hicks' complaint about inadequate jack supports, the judge credited Hicks' "uncontradicted direct testimony that a week before his discharge, he had complained to Sutherland about the failure to use safety jacks." 12 FMSHRC at 566.

As to the other complaints, however, the judge found that "[t]he weight of evidence fails to establish that the balance of Hicks' complaints were made within close proximity to his discharge." Id. Specifically, he determined that the complaint about loose rock appeared to have occurred a month before the discharge; that Hicks' testimony that he complained about ventilation a week before his discharge was not corroborated by his responses to interrogatories; and that Hicks' testimony that he complained about riding in the scoop bucket in April or May was not corroborated by his own witnesses and was contradicted by Sutherland, who testified that the complaint was made several months before the discharge.

Nevertheless, from his findings that Hicks had complained about the safety jacks within a week before the discharge and that Sutherland "got mad on occasion" in response to Hicks' complaints, the judge concluded that "there is some evidence to support a finding that the firing of Hicks by Sutherland was based, in some part, on the safety complaints that Hicks had made." 12 FMSHRC at 567.

The judge went on to hold, however, that Cobra had affirmatively defended against Hicks' prima facia case of discrimination by proving that Sutherland (and Cobra) were motivated by Hicks' insubordinate swearing and would have discharged him for that unprotected activity alone. In arriving at that conclusion the judge determined that Messer and Jerry Lester, the co-owners who endorsed Sutherland's firing of Hicks, were not aware of Hicks' safety complaints; that Superintendent Payne expressed no displeasure with Hicks' complaints; that Hicks did not indicate that Sutherland manifested any displeasure in response to his complaints regarding loose rock in the travelway in the days preceding the discharge; [3] that there was some evidence that Hicks had made "smart remarks" to Sutherland in the months prior to his discharge when he was asked to perform tasks; and that Hicks' discharge for swearing had a precedent in that Mary Lou Ray, a member of the bolting crew,

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[3] The record does not support this finding as will be discussed infra.

had been fired by Sutherland when she swore at him during an argument underground. 12 FMSHRC at 567-568.

Based on these determinations of fact, the judge then concluded that "due to the nature of the words spoken by Hicks to Sutherland, his foreman, and the manner in which they were spoken, I find that a valid business reason existed for the firing of Hicks," and that Sutherland found Hicks "deserving of being fired ... for the manner in which he [Hicks] talked to him [Sutherland], and that he would have fired him for this action in any event." 12 FMSHRC at 568. Having found that Cobra had established an affirmative defense with respect to Hicks' unprotected activity, the judge dismissed Hicks' complaint.

II. Disposition of Issues

A. Timing of Hicks' Complaints

On review, Hicks argues essentially that substantial evidence does not support certain findings of fact that were material to the judge's ultimate holding against him. Hicks first takes issue with the judge's conclusion that, except for the complaint regarding lack of safety jacks, none of the complaints was made in close proximity to the time of Hicks' discharge. For instance, the judge found that Hicks' witnesses did not corroborate Hicks' testimony that he had complained about loose roof in the travelway two days before his discharge, but Hicks notes that Mary Lou Ray testified that Hicks did complain about loose roof while travelling in and out of the mine and that such complaints occurred two or three times a week. Tr. 198. Hicks argues that, while Ray's testimony was not precisely corroborative, it is nonetheless supportive of his testimony.

Perhaps Hicks' most significant assignment of error relates to one of the judge's findings with respect to Cobra's affirmative defense. At 12 FMSHRC at 568 the judge states:

> I find that at least a week elapsed between Hicks' complaint about jacks and loose rock, and his being fired. It is significant that Hicks did not indicate that Sutherland manifested any displeasure or anger at the complaint he (Hicks) had made about loose rock on May 8, 2 days (sic) before he was fired. [4]

Hicks points out that he did indicate in his direct testimony that

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[4] The judge's decision contains apparent inconsistencies regarding the timing of Hicks' complaints about loose roof in the travelway. The judge appears to reject Hicks' contention that he made the complaint two days before his discharge, apparently accepting Sutherland's contention that the complaint was made a month before the discharge. 12 FMSHRC at 566. However, in the passage quoted above, the judge finds that "at least a week elapsed between Hicks' complaint about jacks and loose rock, and his being fired" but then appears to credit Hicks' testimony that the complaint was made two days before the discharge.

Sutherland manifested displeasure and anger in response to Hicks' complaint about loose rock:

By Mr. Loos:

Q. Do you remember any specific instances that you complained about loose roof to anyone from Cobra management?

A. Yes, sir. I believe it was on May 8.

Q. May 8?

Judge Weisberger: Of what year, sir?

The Witness: '89

By Mr. Loos:

Q. And to whom did you complain then?

A. Garnett Sutherland.

....

Q. And what happened?

A. He told me to get out - he stopped. He flagged the man trip off, told me to get out and pull it.

Q. And then what?

A. Then I got back in the car and went on to the section. But that had been about a month I had tried to get them to stop to pull that one specific piece of rock and he wouldn't. That morning he got mad and said, "well, go ahead and pull it."

....

Q. Now, when you say Mr. Sutherland got mad when you complained, what do you mean? Could you describe his reaction?

A. He just got furious. I mean, I don't really -- I can't really describe it.

Q. How could you tell -- did he act a certain way or did he say anything?

A. Yeah. He acted a certain way. I mean, he cussed and mumbled around there a little bit, but I don't know exactly what all he said.

Tr. 27-30.

Hicks argues that the loose rock complaint and the ensuing tension between Hicks and Sutherland over its removal on May 8, 1989, were the principal motivating factors in Hicks' subsequent discharge, and that the swearing episode was invoked as a pretext for the retaliatory action taken on May 11, 1989.

Cobra argues that this case turns substantially on the judge's determinations of witness credibility, which determinations, absent clear error, should be sustained on review. Cobra cites a lack of evidence to show operator hostility toward Hicks for his safety complaints, a lack of coincidence in time between his complaints and the action taken against him, and a lack of evidence to show that Hicks was treated disparately with respect to his insubordinate swearing. In sum, Cobra argues that the judge's dismissal of the complaint is supported by the evidence and should not be reversed.

The Commission in previous rulings has acknowledged the difficulty in establishing a motivational nexus between protected activity and the adverse action that is the subject of the complaint. "Direct evidence of motivation is rarely encountered; more typically, the only available evidence is indirect ... 'Intent is subjective and in many cases the discrimination can be proven only by the use of circumstantial evidence.'" Secretary o.b.o. Chacon v. Phelps Dodge Corp., 3 FMSHRC 2508, 2510 (November 1981), rev'd on other grounds sub nom. Donovan v. Phelps Dodge Corp., 709 F.2d 86 (D.C. Cir. 1983 quoting NLRB v. Melrose Processing Co., 351 F.2d 693, 698 (8th Cir. 1965).

In Chacon, the Commission listed some of the more common circumstantial indicia of discriminatory intent: (1) knowledge of the protected activity; (2) hostility or animus towards the protected activity; (3) coincidence in time between the protected activity and the adverse action; and (4) disparate treatment of the complainant. 3 FMSHRC 2510. With respect to the first indicium, there is no dispute; Cobra and, in particular, Sutherland admit knowledge of Hicks' various safety complaints with respect to the four categories set forth above at pp. 2-3. With respect to the second indicium, the judge found that Sutherland "got mad on occasion, when presented with Hicks' complaints", 12 FMSHRC at 567. (As indicated above, however, the judge found, erroneously, that Hicks offered no testimony that Sutherland reacted with "displeasure or anger" to the specific complaint about loose rock that Hicks claimed he made on May 8, 1989. 12 FMSHRC at 568).

It is with respect to the third and fourth indicia that questions arise in this case. The judge concluded that Hicks had satisfied the elements necessary to establish a prima facie case of discrimination, but only with respect to his complaints about the safety jacks. 12 FMSHRC at 567. The judge considered the other complaints too far removed in time to have motivated Sutherland's decision to discharge Hicks. As shown in note 4, supra, however, the judge's decision regarding Hicks' complaints of loose rock in the travelway is inconsistent. He discounts those complaints as a motivational factor in one instance (12 FMSHRC at 566) but later relies on them in conjunction with the safety jacks complaint.

The judge appears to have applied an overly narrow standard for recognizing proximity between the time of a complaint and the adverse action. In Chacon, for example, complaints ranging from four days to one and one-half months before the adverse action were deemed sufficiently coincidental in time to indicate illegal motive. 3 FMSHRC at 2511. In Stafford Construction, the D.C. Circuit Court of Appeals, noting that two weeks had elapsed between the alleged protected activity and the miner's dismissal, held that "[t]he fact that the Company's adverse action against [the miner] so closely followed the protected activity is itself evidence of an illicit motive." 732 F.2d at 960. See also Everett v. Industrial Garnet Extractives, 6 FMSHRC 1306, 1310 (June 1984)(ALJ Broderick), pet. for disc. rev. denied, June 23, 1984.

The Commission applies no hard and fast criteria in determining coincidence in time between protected activity and subsequent adverse action when assessing an illegal motive. Surrounding factors and circumstances may influence the effect to be given to such coincidence in time. Nevertheless, we find that the judge erred in assessing Hicks' prima facie case by adhering to an overly restrictive time frame in deciding whether certain of Hicks' complaints were "within close proximity to his discharge." 12 FMSHRC 566-67.

Furthermore, it was error for the judge, in assessing retaliatory motives, to have considered each of the four areas of complaint (safety jacks, loose rock, ventilation and riding in the scoop bucket) in isolation, determining in each instance how proximate in time the complaint was to the May 11, 1989, discharge. Under the circumstances it would have been appropriate to consider the complaints as a whole in order to establish whether a pattern of protected conduct existed that might have provided sufficient motivation for the May 11, 1989, discharge.

Accordingly, we vacate the judge's determination that Hicks had established a prima facie case only with respect to his complaints about the safety jacks. On remand, the judge is directed to reconsider, in light of the principles expressed in Chacon and Stafford Construction, all areas of Hicks' complaints as motivating factors in Hicks' discharge. In the event that the judge continues to discount Hicks' complaints about poor ventilation, the judge is directed to explain the bases for that conclusion. The judge indicates that Hicks' hearing testimony regarding the timing of those complaints is not corroborated by his answers to interrogatories filed two and one-half months before the hearing. 12 FMSHRC at 566. Without further elaboration, however, it is unclear whether the judge was determining the weight to be given Hicks' hearing testimony or whether he was making a credibility finding adverse to Hicks.

B. Cobra's Affirmative Defense

The Commission set forth the general principles for evaluating an operator's affirmative defense under the Pasula-Robinette test in Bradley v. Belva Coal Co., 4 FMSHRC 982 (June 1983):

> 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 discriminatee, 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.

4 FMSHRC at 993.

Resolution of any factual issues according to the above principles will also bear on issues surrounding disparate treatment, the fourth indicium of discriminatory intent set forth in Chacon, supra. In Secretary o.b.o. John Cooley v. Ottawa Silica Corp., 6 FMSHRC 516, 520-21, the general principles of Bradley (set forth above) were tailored specifically to situations involving the use of profanity. In Cooley the Commission held that profanity is "opprobrious conduct" and is not protected under the Mine Act. We further held that when an operator asserts such unprotected conduct in its affirmative defense, the proper course is to envision whether the adverse action would have been taken in the absence of any protected activity. The Commission then weighed certain factors for determining whether the opprobrious conduct, in and of itself, was grounds for dismissal: Had there been previous disputes with the miner involving profanity? Had anyone ever been discharged or otherwise disciplined for profanity? Was there a company policy prohibiting swearing, either generally or at a supervisor? Finding a negative answer to each question, the Commission, in Cooley, rejected the operator's affirmative defense.

In this case there is corroborated testimony that swearing was a common occurrence in Cobra's No. 1 Mine and that some of it was directed by hourly employees at supervisors. Tr. 66-67, 155, 205-206, 261, 273. The judge found that swearing was a common practice. He credited Sutherland's testimony, however, that there was a difference between swearing in a jocular manner and swearing in a serious manner. 12 FMSHRC at 567.

The judge further found that Hicks' discharge for swearing was not pretextual because Sutherland had previously fired Ray for swearing. The judge's reliance upon the Ray discharge needs to be explained further. First, the record discloses that Ray's discharge was quickly rescinded on the instructions of Payne. [5] Second, the Ray incident could also be viewed as an aberration rather than as a precedent in support of the adverse action taken against Hicks. Given the context of widespread use of profanity in the No. 1 Mine, the severe disciplinary action taken against both Ray and Hicks could be viewed as disparate treatment insofar as swearing was neither prohibited nor,

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[5] Sutherland testified that he rescinded the Ray firing because Payne threatened to fire Sutherland if he didn't. Tr. 264-265.

apparently, discouraged. [6]

The judge does, in fact, place emphasis on the "manner" in which the fateful words were spoken -- seriously as opposed to jokingly -- but did not resolve the dispute over the context within which the exchange in question took place. Did Hicks make the statement while in the process of defying Sutherland's order to return to work, as Sutherland testified, or Did Hicks make the statement after he had already boarded his shuttle car and had started back to the face, as Hicks and Douglas Lester testified? Sutherland testified that both the swearing and Hicks' refusal to comply with the order to return to work motivated the discharge. Tr. 273. The judge did not resolve the conflicting testimonies of Hicks, Douglas Lester, and Sutherland on this factual issue and should do so on remand.

As this Commission has often stated, it is bound by the substantial evidence test when reviewing an administrative law judge's decision. 30 U.S.C. § 823(d)(2)(A)(ii)(I). This was succinctly stated in Donald F. Denu v. Amax Coal Co., 12 FMSHRC 602 (April 1980):

> "Substantial evidence means 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion'. Consolidation Edison Co v. NLRB, 305 U.S. 197, 229 (1938). Nevertheless, 'substantiality of evidence must take into account whatever in the record fairly detracts from its weight.' Universal Camera v. NLRB, 340 U.S. 474, 488 (1951)." Id. at 610.

Until the judge resolves the factual issues discussed above, we are unable to determine, at this stage, whether substantial evidence supports the judge's conclusion that Hicks' statement warranted discharge in any event. This is particularly true in view of the testimony as to widespread use of profanity in Cobra's No. 1 mine, management's general tolerance of that profanity, and the lack of discipline meted out to Hicks for an earlier incident of profanity (see n.6, supra). The judge is therefore directed to re-evaluate Cobra's affirmative defense in terms of the criteria set forth in Bradley and Cooley, and in light of the discussion above.

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[6] Although the judge did not reference it, Sutherland testified to an earlier incident when Hicks directed an obscene comment to him. Rather than disciplining Hicks, Sutherland "shrugged it off." Tr. 271-72.

III. Conclusion

Accordingly, we vacate the Judge's decision and remand this matter for further proceedings consistent with this opinion.

Richard V. Backley, Acting Chairman

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Administrative Law Judge Avram Weisberger
Federal Mine Safety & Health Review Commission
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

April 16, 1991

MICHAEL P. DAMRON	:	
	:	
v.	:	Docket No. CENT 89-131-DM
	:	
REYNOLDS METAL COMPANY	:	

BEFORE: Backley, Acting Chairman; Doyle, Holen and Nelson, Commissioners

DECISION

BY THE COMMISSION:

This discrimination proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988)("Mine Act"). The issue presented is whether substantial evidence of record supports a decision by Commission Administrative Law Judge James A. Broderick, dismissing a complaint of discrimination brought by Michael P. Damron pursuant to section 105(c)(3) of the Mine Act. In his decision, the judge concluded that Damron's work refusal on September 7, 1988, was not based on a reasonable, good faith belief that a hazard existed, and that therefore his discharge was not in violation of section 105(c)(1) of the Mine Act. 12 FMSHRC 414 (March 1990)(ALJ). [1] Damron petitioned for review asserting that the judge (1) misconstrued the testimony of a witness, (2) failed to state the basis for a credibility determination, and (3) failed to consider the testimony of another witness. The Commission granted Damron's petition for discretionary review. For the reasons that follow, we vacate the judge's decision and remand for further consideration.

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[1] Section 105(c)(1) provides in pertinent part:

> No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this [Act].

30 U.S.C. § 815(c)(1).

I.

Background

For more than nine years prior to September 1988, Michael P. Damron had been employed as a laborer at the Reynolds Metal Company ("Reynolds") Sherwin Plant, at which bauxite is processed into a derivative of aluminum called alumina. Scale, a by-product of the chemical process, is scraped from the alumina tanks and fed onto a conveyor belt to the ball mill, which crushes it into powder. The belt shuts down automatically, thus preventing damage to the mill, when a metallic object passes under a magnet affixed to the midpoint of the belt. The ball mill and belt are located outside and directly below the operating floor where the kilns are located. The operating floor is open and is approximately 30 feet above the belt and mill.

In September 1988, Damron was working as a hydrate helper. His primary duties included removing metal and other foreign objects from the scale at the location of the magnet. He was also responsible for cleaning the head and tail pulleys that drive the conveyor belt, maintaining the general area, emptying wheelbarrows filled with scale, making adjustments on the variable speed feeder, operating the portable pump in the pit area where scale is fed onto the belt, and keeping the equipment in operating order. Tr. 292-94.

In 1984, a shelter had been erected near the magnet. It was replaced by a new one about two years later. The shelters consisted of scaffolding 6 feet high and 6 feet square, covered with 2' x 12' boards with an additional piece of plywood over the boards. Although Reynolds denied that the shelters had been constructed for safety purposes, to guard against materials falling from the operating floor, the judge found:

> During the period from 1984 until September 1988, on numerous occasions large cloth filters weighing in excess of 100 pounds were dropped from the operations floor to the ground below by operations employees. Metal rods, pieces of scaffold boards, bolts, tools, and pieces of corrugated metal siding also fell or were dropped; liquid hydrate spilled from the upper floor to the ball mill area.

12 FMSHRC at 415.

On September 1, 1988, following an inspection by the Department of Labor's Mine Safety and Health Administration ("MSHA"), Reynolds removed the shelter. The MSHA inspector had pointed out that an electrical extension cord running to the shelter was not properly grounded, that the shelter area was dirty, and that the chair on which Damron sat was broken, but no citations were issued for conditions in the shelter. 12 FMSHRC at 416. Reynolds contends that the shed was removed because of numerous health and safety problems and to avoid future citations. Br. 3. Following a protest by Damron, a safety meeting between company and union representatives was

held on Friday, September 2, 1988, to discuss new protections at the work site. Reynolds agreed to erect a barrier against the handrail of the upper floor and to erect a metal shed in the area where the magnet was located in order to protect the ball mill operator. Reynolds also agreed not to operate the mill until the guardrail barrier was in place.

On Monday and Tuesday, September 5 and 6, Damron, after expressing his concern about the lack of a shelter, was assigned to other duties and was not required to run the ball mill. During that time, he discussed his concerns about operating the belt without temporary overhead protection with General Supervisor Thomas Reynolds and Foreman Arlon Boatman. Supervisor Reynolds testified that, on Monday night, September 5, he instructed Damron as follows:

> And I told him that, if he had any real safety concerns regarding the operation of the belt line, without that temporary shed, that he should go outside the building, down the tunnel, and operate the belt standing in that position. And that as metal came up the belt, he could shut the belt down and remove it. And without any further comment he left the office.

Tr. 318-19.

Boatman testified that he was unaware of the safety meeting on Friday, September 2, but that on Monday and Tuesday, he and Damron discussed his safety concerns:

> I also told Mike that ... in what he stated yesterday, that if he felt uneasy in standing at the metal detector area, that he could move to any position that he felt safe or would feel safer. And one thing that he did not say that I also told him, that should anything go through the detector, if for any reason it failed and we did get metal in the mill, that it would be my responsibility.

Tr. 351-52.

When asked if he had heard Reynolds' testimony giving him the option of working the mill from a safe distance, Damron stated:

> A. Yes, I heard what he said. It's not true, he never given [sic] me any options, just to do it or else.
>
> Q. You'd disagree with his testimony?
>
> A. Yes, I do.

Tr. 460.

When asked if anyone, other than Boatman, had ever suggested any way of operating the mill other than standing by the magnet, Damron replied:

> A. No, they didn't. Nobody but Mr. Boatman.

Tr. 460.

Damron further testified that, when he reported for the afternoon shift on Wednesday, September 7, he was ordered by foreman Boatman to run the ball mill. Damron refused, stating that "there's still no overhead protection over there, it's unsafe, I don't want to do it." Tr. 231. Boatman thereafter suspended Damron with intent to discharge. Tr. 358.

When Boatman was asked whether he would have allowed Damron to work the mill from outside the building on Wednesday, September 7, when he suspended Damron, Boatman testified:

> THE WITNESS: I would have allowed him to operate the mill as I had directed him to, which would have been under normal conditions, as we had been operating. And this would have been his direction.
>
> MS. CUNNINGHAM: (To the witness) And had he objected to working or standing at the magnet, what about that?
>
> A. No. Because the situation, as far as me as a representative of the company, and as a supervisor, that if I gave him the direct order to operate the facility under normal conditions, standing where he needed to, if he needed to stand at the metal detector, if he needed to clean conveyor belts, tail pulleys or whatever, it would be the general operation, the regular general operation of the facility.

Tr. 353.

Damron, when asked if Boatman suggested to him on Wednesday, September 7, that he run the mill from a distance, testified:

> A. He made that suggestion on that Monday when I talked to him and we walked out into the area, not on a Wednesday.
>
> Q. Okay. Do you think that....
>
> A. On Wednesday, there was no room for discussion.
>
> Q. Okay. But do you think if you'd told him that you'd run the Mill from outside the area that he

was unwilling to go along with that?

A. Well, I can't speak for Mr. Boatman, I don't know what he would say at that point in time.

Q. He was simply asking you to run the Mill, though, wasn't he?

A. He was directing me to run the Mill, yes.

Q. Okay.

A. He didn't direct me to run the Mill this way; he didn't direct me to run the Mill that way; he directed me to run the Mill.

Tr. 251.

Two days later, the metal shed was erected at the magnet site. On September 12, 1988, Damron's discharge became effective. In October 1988, Damron filed a discrimination complaint with MSHA. On June 1, 1989, MSHA determined that no violation of section 105(c) of the Mine Act had occurred. On June 28, 1989, Damron filed his complaint with the Commission pursuant to section 105(c)(3) of the Mine Act. Following arbitration under the union contract, Damron was reinstated, without back pay, on November 21, 1989. Tr. 182.

II.

Disposition of Issues

The general principles governing analysis of discrimination cases under the Mine Act are settled. 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 proof to establish that (1) he engaged in protected activity and (2) the adverse action complained of was motivated in any part by that activity. Secretary on behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2797-2800 (October 1980), rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3rd Cir. 1981); 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 in no part motivated by protected activity. If the operator cannot rebut the prima facie case, it nevertheless may defend affirmatively by proving that it also was motivated by the miner's unprotected activity and would have taken the adverse action in any event for the unprotected activity alone. Pasula, supra; Robinette, supra; see also Eastern Assoc. Coal Corp. v. FMSHRC, 813 F.2d 639, 642 (4th Cir. 1987); 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). Cf. NLRB v. Transportation Management Corp., 462 U.S. 393, 397-403 (1983)(approving nearly identical test under National Labor Relations Act).

The Commission has held that a miner's refusal to perform work is protected activity under section 105(c)(1) of the Mine Act if it is based on a reasonable, good faith belief that the work involves a hazard. Pasula, supra, 2 FMSHRC at 2789-96; Robinette, supra, 3 FMSHRC at 807-12; Secretary on behalf of Dunmire & Estle v. Northern Coal Co., 4 FMSHRC 126, 133-38 (February 1982). See also Secretary on behalf of Cameron v. Consolidation Coal Co., 7 FMSHRC 319, 321-24 (March 1985), aff'd sub nom. Consolidation Coal Co. v. FMSHRC, 795 F.2d 364, 366-68 (4th Cir. 1986); Secretary of Labor v. Metric Constructors, Inc., 6 FMSHRC 226, 229-30 (1984), aff'd sub nom. Brock v. Metric Constructors, Inc., 766 F.2d 469 (11th Cir. 1985). If an operator takes an adverse action against a miner in any part because of a protected work refusal, a prima facie case of discrimination is established. E.g., Dunmire & Estle, supra, 4 FMSHRC at 132-33; Metric Constructors, supra, 6 FMSHRC at 229-30, aff'd, 766 F.2d at 472-73.

The disposition of this case turns on the issue of whether Damron's refusal to operate the ball mill on September 7 was based on a reasonable, good faith belief that doing so involved a hazard. In his decision, the judge found that the Respondent was aware that on numerous occasions, large filters, rods, tracks, tools and other heavy objects had fallen or were dropped from the operating floor to the ground below. Accordingly, he concluded: "From the perspective of the ball mill operators, including Complainant, the hazard was real, and their perception of the hazard was reasonable." 12 FMSHRC at 420. The judge also found that Damron had communicated his safety concerns in the formal safety meeting held on September 2, 1988, and that "Respondent addressed the concerns by agreeing to put up a permanent barrier along the handrail of the operating floor above the ball mill and to erect a metal shed for the mill operator at or near the magnet." 12 FMSHRC at 420. As to Damron's concerns regarding the lack of overhead protection pending completion of the metal structure, the judge stated, "I find as a fact that Reynolds did tell Complainant that he could run the mill away from the building, 'down the tunnel.'" 12 FMSHRC at 418. Although finding Boatman's testimony "ambiguous" on the issue of whether, on September 7, he would have permitted Damron to run the belt from a safe distance, the judge concluded:

> However, he [Boatman] did not withdraw his authorization given two days before that Complainant could have operated the ball mill away from the belt. Nor did Complainant testify that he [Damron] understood that it had been withdrawn.

Id.

Having found that Respondent, through supervisors Reynolds and Boatman, had addressed Damron's reasonable fear of a safety hazard by permitting him to work outside the area of danger until the shed was erected, the judge concluded that "Damron's refusal to operate the ball mill on September 7, 1988, was not based on a reasonable, good faith belief that the work was hazardous. Respondent's action in discharging him was not in violation of section 105(c) of the Act." 12 FMSHRC at 421.

On review, Damron contends that there is not substantial evidence in the record to support the judge's finding that foreman Boatman authorized him on September 7, 1988, to operate the mill at a safe distance from the belt, in that Boatman's testimony, rather than being "ambiguous," is unequivocal to the effect that Damron was given no option but to operate the mill from the usual area. Damron further argues that the judge erred by failing to provide any basis for his credibility determination concerning the contradictory testimony of Reynolds and Damron and by failing to consider the testimony of another witness, Dalma Rogers.

This Commission has frequently addressed the standard of review to be applied in determining whether the record contains substantial evidence to support a judge's findings. In Secretary v. Michael Brunson, 10 FMSHRC 594, 598-99 (May 1988), the Commission stated:

> As we have consistently recognized, the term "substantial evidence" means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." See, e.g., Mid-Continent Resources, Inc., 6 FMSHRC 1132, 1137 (May 1984) quoting Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938). While we do not lightly overturn a judge's factual findings and credibility resolutions (e.g., Hall v. Clinchfield Coal Co., 8 FMSHRC 1624, 1629-30 (November 1986)), neither are we bound to affirm such determinations if only slight or dubious evidence is present to support them. See, e.g., Krispy Kreme Doughnut Corp. v. NLRB, 732 F.2d 1288, 1293 (6th Cir. 1984); Midwest Stock Exchange, Inc. v. NLRB, 635 F.2d 1255, 1263 (7th Cir. 1980).

Commission Procedural Rule 65(a), 29 C.F.R. § 2700.65(a), states in pertinent part that a Commission judge's decision "shall be in writing and shall include findings of fact, conclusions of law, and the reasons or bases for them, on all the material issues of fact, law or discretion presented by the record, and an order." (Emphasis added.) This is necessary, as the Commission explained in Secretary v. Anaconda Company, 3 FMSHRC 299 (February 1981) "in order to prevent arbitrary decisions and to permit meaningful review." Further, in Anaconda, the Commission stated:

> Without findings of fact and some justification for the conclusions reached by the judge, we cannot perform that function effectively. See Duane Smelser Roofing Co. v. Marshall, 617 F.2d 448, 449-450 (6th Cir. 1980); ... UAW v. NLRB, 455 F.2d 1357, 1369-1370 (D.C. Cir. 1971); Anglo-Canadian Shipping Co. Ltd. v. FMC, 310 F.2d 606, 615-617 (9th Cir. 1962); R.W. Service Systems, Inc., 235 N.L.R.B. No. 144, 99 L.R.R.M. 1281, 1282 (1978).

Id. at 300.

In this case, the judge characterized as ambiguous the testimony of foreman Boatman on the critical issue of whether he would have permitted Damron to work at a safe distance from the belt on September 7, 1988. 12 FMSHRC at 418. Notwithstanding this ambiguous testimony, the judge found that Boatman "... did not withdraw his authorization given two days before that Complainant could have operated the ball mill away from the belt." Id. If Boatman's testimony is ambiguous, we find no record support for this crucial conclusion. Moreover, the decision does not contain an explanation for the judge's apparent rejection of Damron's conflicting testimony on the substance of the same conversation on September 7, 1988, wherein Damron sets forth his understanding of Boatman's work order. Damron testified that in that conversation he received no indication that he had permission to work at a safe distance from the belt. Therefore, in accordance with Commission Procedural Rule 65(a), supra, and to ensure that effective appellate review can be performed, we remand this matter to the judge with directions that he further analyze the relevant testimony and set forth the bases for his findings.

We next address Damron's contention that the judge erred by failing to provide a basis for his credibility determination concerning the contradictory testimony of Reynolds and Damron. In his decision, after setting out supervisor Reynolds testimony that he had specifically authorized Damron to run the mill from a safe distance and Damron's denial that Reynolds had ever given such permission, the judge found, without explanation, that Reynolds had given such authorization. 12 FMSHRC at 418. If the judge's finding on this issue is based upon a credibility determination, it should be so stated.

As to Damron's third assignment of error, our review of the record convinces us that the judge did not abuse his discretion in choosing not to rely on the testimony of Dalma Rogers in reaching his decision. Fourteen witnesses testified at the hearing. It is within a judge's discretion to sift through the testimony presented and to base his decision on that which he deems to be credible, relevant and dispositive of the issues before him.

III.

Conclusion

On the foregoing bases, this case is remanded to the judge for further proceedings consistent with this opinion.

Richard V. Backley, Acting Chairman

Joyce A. Doyle, Commissioner

Arlene Holen, Commissioner

L. Clair Nelson, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

April 17, 1991

DAVID HATFIELD	:	
	:	
v.	:	Docket No. SE 90-122-D
	:	
COLQUEST ENERGY, INC.	:	

BEFORE: Backley, Acting Chairman; Doyle, Holen and Nelson, Commissioners

ORDER

BY THE COMMISSION:

Respondent Colquest Energy, Inc. ("Colquest") has filed a petition seeking interlocutory review of an Order issued by Commission Administrative Law Judge Roy J. Maurer on December 18, 1990. In that Order, the judge denied Colquest's motion for summary dismissal of a Complaint of Discrimination filed by David Hatfield with the Commission on July 11, 1990, pursuant to section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(3)(1988), ("Mine Act" or "Act"). The Order further denied Colquest's motion to strike Hatfield's amended complaint filed on November 30, 1990. For the reasons that follow, we grant the petition, stay briefing, vacate the judge's order and remand for further proceedings.

Hatfield's pro se complaint of discrimination, as filed with the Commission repeats his written complaint of discrimination filed with the Department of Labor's Mine Safety and Health Administration ("MSHA") on April 26, 1990. The Secretary of Labor ("Secretary") determined, following an investigation of Hatfield's complaint, that no violation of the statute had occurred and declined to prosecute a discrimination complaint on his behalf. Hatfield then filed the subject section 105(c)(3) complaint with the Commission.

In his complaint, Hatfield asserts that, as the result of an injury suffered while employed at Colquest's mine on November 17, 1989, he was unable to return to work until April 16, 1990. At that time, he was given a layoff slip by the company safety director, who informed him that, under a company policy effective in January 1990, "anyone being off work for more than 30 days for any reason, would be terminated." The complaint further asserts that Hatfield had not been informed of this new policy prior to his return to work on April 16.

Colquest subsequently filed with the judge a motion for summary dismissal of the complaint on the grounds that it failed to allege either protected activity or adverse action motivated at least in part by protected activity. On October 19, 1990, the judge issued an Order to Show Cause why the complaint should not be dismissed for failure to state a claim for

relief under section 105(c) of the Act. On November 1, 1990, counsel for the United Mine Workers of America ("UMWA") filed a response and amended complaint on behalf of Hatfield, alleging specific instances of protected activity that resulted in Hatfield's termination in violation of section 105(c) of the Act. The judge denied Colquest's motion to dismiss.

On November 13, 1990, Colquest filed motions to strike the amended complaint and to set aside the judge's Order of Dismissal. Colquest argued that the amended complaint was an untimely filing of a new discrimination complaint based on previously unasserted allegations of protected activity and that it constituted an attempt to circumvent the investigation by the Secretary mandated under section 105(c)(2) of the Act. Hatfield responded that the Commission, guided by the Federal Rules of Civil Procedure, should grant liberal leave to amend pleadings, particularly in the case of a pro se claimant. Hatfield also argued that the original complaint implicitly contended that the discharge resulted from protected activity and that the amended complaint merely provided specificity by describing examples of protected activity and retaliatory adverse action on the operator's part. As indicated above, the judge denied Colquest's motions.

Colquest petitioned for interlocutory review of the judge's order, pursuant to Commission Rule 74(a). 29 C.F.R. § 2700.74(a). Hatfield opposed interlocutory review on the grounds that the petition did not meet the requirements of 29 C.F.R. § 2700.74. We grant interlocutory review based on Colquest's showing that the judge's ruling involves a controlling question of law and that immediate review may materially advance the disposition of this case.

In its petition, Colquest renews its argument that the Mine Act and the regulations issued thereunder do not contemplate amendments of discrimination complaints, that the amended complaint is so substantially different from the complaint filed with MSHA that it does not relate back to the original complaint and that it represents an attempt by Hatfield to circumvent the Secretary's statutory role in investigating and determining discrimination claims in the first instance.

The statutory scheme devised by Congress for addressing a miner's complaint of discrimination provides, pursuant to section 105(c)(2) of the Mine Act, that upon receipt of such a complaint the Secretary "shall cause such investigation to be made as he deems appropriate," and that "[i]f upon such investigation, the Secretary determines that the provisions of this subsection have been violated, he shall immediately file a complaint with the Commission...." 30 U.S.C. § 815(c)(2). Section 105(c)(3) of the Mine Act provides that, if the Secretary determines that no discriminatory violation has occurred, "the complainant shall have the right, within 30 days of notice of the Secretary's determination, to file an action in his own behalf before the Commission, charging discrimination or interference in violation of [section 105(c)(1)]." 30 U.S.C. § 815(c)(3). Thus, the statutory scheme provides to miners a full administrative investigation and evaluation of an allegation of discrimination, as well as the right to private action in the event that the administrative evaluation results in a determination that no discrimination has occurred. See Gilbert v. Sandy

Fork Mining Co., Inc., 9 FMSHRC 1327 (August 1987), rev'd on other grounds, Gilbert v. FMSHRC, 866 F.2d 1433 (D.C. Cir. 1989).

The written discrimination complaint filed by Hatfield with MSHA is general in nature and alleges no specific protected activities. The present record contains no indication that the matters alleged in the amended complaint were part of the case reported to and investigated by MSHA. Nor is there evidence in the record that the Secretary's determination that the Act had not been violated was based on matters contained in the amended complaint. If the Secretary's determination was based upon an investigation that did not include consideration of the matters contained in the amended complaint, the statutory prerequisites for a complaint pursuant to § 105(c)(3) have not been met.

Accordingly, we vacate the judge's Order of December 18, 1990, and remand this matter to the judge for a determination of this issue. The complainant should be afforded an opportunity to demonstrate that the protected activities alleged in the amended complaint were part of the matter that was investigated by the Secretary in connection with Hatfield's initial discrimination complaint to MSHA.

Richard V. Backley, Acting Chairman

Joyce A. Doyle, Commissioner

Arlene Holen, Commissioner

L. Clair Nelson, Commissioner

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

April 22, 1991

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. VA 90-53
JAMES ROGER BELL	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. VA 90-54
ROBERT V. SWINDALL	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. VA 90-55
MARION EUGENE ROWLAND	:	

DIRECTION FOR REVIEW

ORDER

On March 8, 1991, Commission Administrative Law Judge James A. Broderick issued an order granting respondents' motions for certification for interlocutory review of the judge's orders issued February 7, 1991 (Robert V. Swindall, Docket No. VA 90-54) and February 8, 1991 (James Roger Bell and Marion Eugene Rowland, Docket Nos. VA 90-53, VA 90-55), denying respondents' motions for summary decision. Thereafter, respondents filed a petition for interlocutory review of the judge's order of February 7, 1991 pursuant to 29 C.F.R. § 2700.74. [1]

[1] The orders issued on February 8, 1991, expressly reference and incorporate the reasons set forth in the February 7, 1991, order issued in Docket No. VA 90-54 (Swindall).

For the reasons stated below we grant the petition for interlocutory review and stay briefing.

These civil penalty proceedings were filed pursuant to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988). In his order of February 7, 1991, the judge accurately set forth the factual and procedural history of the pending cases and correctly applied the Commission precedent construing the subject Procedural Rule 29 C.F.R. § 2700.27(a)(time period for filing penalty proposal). Salt Lake County Road Department, 3 FMSHRC 1714 (1981).

Accordingly, we affirm the judge's order and remand for further proceedings.

Richard V. Backley, Acting Chairman

Joyce A. Doyle, Commissioner

Arlene Holen, Commissioner

L. Clair Nelson, Commissioner

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ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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APR 1 1991

STENSON BEGAY,	:	DISCRIMINATION PROCEEDING
Complainant	:	
v.	:	Docket No. CENT 88-126-D
	:	DENV CD 88-09
LIGGETT INDUSTRIES, INC.,	:	
Respondent	:	McKinley Mine

DECISION UPON REMAND
ORDER GRANTING ATTORNEY FEES ON APPEAL

Before: Judge Maurer

On March 12, 1991, the Commission remanded this case to me, passing down the instructions from the United States Court of Appeals for the Tenth Circuit contained in Liggett Indus., Inc. v. FMSHRC, ____ F.2d ____, No. 89-9546 (January 9, 1991), aff'g, 11 FMSHRC 887 (May 1989) (ALJ). In its decision, the Court directed that I consider the issue of attorney fees due complainant's counsel for services rendered on the appeal of this case.

Complainant has filed an application for attorney fees and costs on appeal, which has been objected to generally and in two instances, more specifically, by respondent.

To begin with, section 105(c)(3) of the Mine Act provides in part that:

> When an order is issued sustaining the complainant's charges under this subsection, a sum equal to the aggregate amount of all costs and expenses (including attorney's fees) as determined by the Commission to have been reasonably incurred by the miner, for, or in connection with, the institution and prosecution of such proceedings shall be assessed against the person committing such violation.

The legislative history of this provision makes it clear that it was intended to make the complainant whole, or in other words, to put him in the position as nearly as possible which he would have been in had the discriminatory activity not taken place. See S. Rep. No. 95-181 at 37 (1977), reprinted in Legislative History of the Federal Mine Safety and Health Act of 1977, at 625 (1978).

The language of the Act, supported by the legislative history plainly requires the reimbursement of attorney fees reasonably incurred in appellate proceedings where such proceedings are necessary to "sustain complainant's charges." Furthermore, "appellate proceedings" consist of those proceedings subsequent to the ALJ Decision, both before the Commission and the U.S. Court of Appeals. See, e.g., Munsey v. FMSHRC, 701 F.2d 976 (D.C. Cir. 1983).

Complainant seeks an award of attorney fees for 78.1 hours of services performed during the period from June 2, 1989, through November 5, 1990, at an hourly rate of $125. He also seeks $897.84 for costs and expenses. Without further ado, I find the itemized expenses of $897.84 to be reasonable and reimbursement will be ordered herein.

Turning now to the respondent's objections to the fee petition generally, I find them to be without merit, if not outright mistaken. For example, respondent makes much of a notion that the complainant's application date entries appear out of chronological sequence. But in reality they do, in fact, appear in chronological order beginning June 2, 1989, and ending November 5, 1990.

Respondent also specifically objects to the three entries for work done before the Commission on June 2, 1989, and June 20 and 21, 1989. Respondent mistakenly believes this work was done at or for trial and should have been included in complainant's request before the ALJ Decision and Order was issued. However, this argument overlooks the fact that my decision in this case, including the award of attorney fees for the trial work was issued on May 17, 1989. The legal work objected to was of course performed subsequent to that and had to do with opposing respondent's petition for discretionary review before the Commission. This is considered appellate work and is first claimed herein. See, Munsey, supra.

Respondent also objects to the 5.5 hours of legal services performed by complainant's counsel on August 1 and 2, 1990, drafting a document entitled "Cross-application for Enforcement of Administrative Order" which was subsequently filed pursuant to Rule 15(b) of the F.R.A.P. on August 3, 1990. Respondent states that it was untimely filed. I note that it is complainant's right to do so under the rules, but I question the reasonableness of filing this document at that point in time with the appeal pending in the Court of Appeals for a year already, briefing completed and the oral argument just three months away. The Court of Appeals apparently ignored it as I can find no mention of it in the record other then noting that it was filed. Moreover, it is in large part duplicative of the complainant's earlier briefing. I will therefore sustain respondent's objection to the 5.5 hours of attorney time so expended.

Otherwise, having carefully reviewed the entire record including both the complainant's request for attorney fees and costs and the respondent's objections thereto and having found no cause to doubt the validity of the number of hours expended or with the exception noted above, the necessity or propriety of the work described, I will approve 72.6 hours of attorney time for reimbursement. Moreover, as I previously determined for the trial work in this case, I find the requested $125 per hour to be an appropriate rate of compensation.

ORDER

Based on my consideration of the nature of the issues involved, the high degree of skill with which the complainant was represented, the amount of time and work involved, and other relevant factors, it is considered that the amount of $9075 constitutes a reasonable attorney fee on appeal and is approved. Furthermore, $897.84 is hereby found to be a reasonable amount of litigation costs and expense and is likewise approved. Both are assessed against the respondent who is ordered to pay the same to complainant within 30 days of this order.

Roy J. Maurer
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
THE FEDERAL BUILDING
ROOM 280, 1244 SPEER BOULEVARD
DENVER, CO 80204

APR 1 1991

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. CENT 90-104 A.C. No. 29-00096-03536
v.	:	McKinley Mine
PITTSBURG & MIDWAY COAL MINING COMPANY, Respondent	:	

DECISION

Appearances: Mary Witherow, Esq., Margaret Terry, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas, for Petitioner;

Ray D. Gardner, Esq., John Paul, Esq., The Pittsburg & Midway Coal Mining Co., Englewood, Colorado, for Respondent.

Before: Judge Lasher

This is one of nine dockets which were consolidated for hearing, eight of which were either fully or partially settled after commencement of the hearing. The settlements were approved from the bench on the record.

This docket involves 10 Citations. Petitioner agrees that one Citation should be vacated and Respondent agrees to pay in full Petitioner's administrative level penalty assessment for eight of the Citations. The settlement as to these nine Citations--involving either payment in full of the proposed penalty or vacation of the citation--is reflected in the Order, infra. The remaining Citation, No. 3413368, was fully litigated at the hearing in Albuquerque, New Mexico, on February 12, 1991, and my decision with regard thereto follows:

Preliminary Matters

Based on stipulations (Tr. 29-30, 35), there is no issue as to the Commission's jurisdiction to adjudicate this matter and I also find that Respondent at material times conducted a large coal mining operation (surface) at its McKinley Mine (Tr. 108), that it had approximately 90 mine safety violations during the

two-year period preceding the occurrence of the instant violation in January 1990, that its ability to continue in business will not be jeopardized by payment of a penalty for this violation, and that it proceeded in good faith after notification by MSHA of the subject violation to promptly abate the same. Thus, the remaining mandatory penalty considerations are "negligence" and "gravity." Further, if the "Significant and Substantial" designation is not sustained by evidence, such will also be considered in the factual mosaic underpinning an appropriate penalty determination.

Citation No. 3413368

The condition cited as a violation of 30 C.F.R. § 77.502 by MSHA electrical inspector David L. Head on January 11, 1990, is as follows:

> The 16/3 type S.O. Power feeder to the lights on top in the back of dragline #2 was located in the walkway. The A.C. voltage is 300 volts to each light. The S.O. cable was not protected from mechanical damage. Dragline #1 in #2 pit.

30 C.F.R. § 77.502, entitled "Electric equipment; examination, testing, and maintenance," provides:

> Electric equipment shall be frequently examined, tested, and properly maintained by a qualified person to assure safe operating conditions. When a potentially dangerous condition is found on electric equipment, such equipment shall be removed from service until such condition is corrected. A record of such examination shall be kept.

The issues litigated relate primarily to whether the alleged violation occurred, and if so, whether it was significant and substantial. The testimony relating to this Citation appears in the transcript at pages 100-148.

Based on the reliable and substantial evidence in the record, the following findings are made:

1. The conditions existing on January 11, 1990, were those described in the Citation. Inspector Head, in his testimony, described the conditions he observed as follows:

> Upon going to the top of the dragline [1] and traveling to the back of the dragline, [2] I observed an SO-type cable laying in the walkway in service to a 300-watt lumination system. The cable on the bushing that entered into the lighting system had been pulled out to where there was no strain relief. The cable laying in the walkway had been damaged somewhat by sunlight or breakdown of the outer rubber jacket to the SO cable. (Tr. 109).

2. Although the Inspector's testimony mentioned cable damage, the Citation itself did not specifically allege damage to the cable. (Tr. 117). The Inspector explained the discrepancy saying, "That's probably in my notes." (Tr. 117). His notes were not produced or introduced in corroboration, however. Respondent's electrical supervisor, Floyd Bowman, who examined the cable shortly after the Citation was issued (Tr. 128), denied that the cable was damaged. (Tr. 129). This is borne out to some degree by the photos which Mr. Bowman indicated showed the same "wires" as were there when the Citation was issued. (Tr. 130). In all the circumstances, I am unable to conclude that the cable was in damaged condition on the date the citation was issued, particularly since such was not specifically alleged in the Citation. With this exception, however, the violation is found to have occurred. (Tr. 109-112, 114). Since cable damage was a factor the inspector considered in determining gravity--and presumably whether the violation was significant and substantial --such will be taken into consideration in penalty detemination.

3. Various employees had but occasional duties in the area where the violative conditions existed and they would have been exposed to hazard only infrequently. (Tr. 114, 119, 124, 131, 138-139).

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1 A dragline is a piece of equipment approximately 80-100 feet high by 80-100 feet long by 80-100 feet wide. (Tr. 110).

2 Pertinent areas of the dragline involved in this matter are depicted in three photos taken by Respondent's witness, Supervisory electrical engineer Floyd Bowman, one week before the hearing and over one year after the Citation was issued. (Tr. 129). See Exhibits R-6, 7, and 8. (Tr. 120-122).

4. The hazards created by the violation as above delineated would be electrocution, electrical shock or burn, tripping and falling over the side and off the top of the dragline and tripping and pulling the cable out of the enclosure where it terminated in the light fixture. (Tr. 110-111, 114). [3]

5. The hazards created by the violation contributed "a measure of danger to safety" as that term is employed in Secretary v. Mathies Coal Company, 6 FMSHRC 1 (January 1984).

6. An injury from occurrence of an accident resulting from the hazard would be of a reasonably serious nature.

7. It was not reasonably likely, however, that the hazard contributed to by the violation would result in any injury.

a. There was no evidence that any prior incidents, accidents, or injuries had occurred as a result of the violative conditions.

b. With respect to the hazard of an employee's tripping and falling over the side of the 80-foot high dragline, there was a waist-high railing installed in the subject area. (Tr. 119, 121-122).

c. Employees did not commonly or regularly travel or perform work in the area. Rather, they did so infrequently. (Tr. 119, 131, 132, 138).

d. The evidence overall establishes no more than a remote possibility that an injury might have occurred.

8. Based on the above findings, it is concluded that this violation was not significant and substantial.

9. The violative conditions were visible and obvious and the violation is found to have resulted from a moderate degree of negligence.

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[3] The "tripping over the cable" hazard is determined to exist whether or not the area traveled by employees performing duties on the top of the dragline is designated as a "travelway" as contended by Petitioner or an "access" (Tr. 131) as described by Respondent.

10. Although not a significant and substantial violation, the violation is nevertheless found to be serious in view of the potential, however remote, for fatal or serious injuries to the various employees who were occasionally exposed.

In view of the elimination of the significant and substantial classification of the violation, a penalty of $150 is found appropriate and is here assessed.

ORDER

1. Citation No. 3413368 is **MODIFIED** to delete the "Significant and Substantial" designation thereon and to change the "Gravity" designation in paragraph 10 A thereof from "Reasonably likely" to "Unlikely," and is otherwise **AFFIRMED.**

2. Citation No. 3413370 dated January 24, 1990 is **VACATED.**

3. Respondent (pursuant to the settlement agreement at hearing or as otherwise asessed hereinabove) **SHALL PAY** to the Secretary of Labor within 30 days from the issuance date of this decision the following penalties totaling $1,012.

Citation No.	AMOUNT
3413452	$ 20
3413453	20
3413455	20
3413456	371
3413457	20
3413458	20
3413459	371
3413460	20
3413368	150
TOTAL	$1,012

Michael A. Lasher, Jr.
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
THE FEDERAL BUILDING
ROOM 280, 1244 SPEER BOULEVARD
DENVER, CO 80204

APR 1 1991

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. CENT 90-105 A.C. No, 29-00096-03537
v.	:	McKinley Mine
PITTSBURG & MIDWAY COAL MINING COMPANY, Respondent	:	

DECISION

Appearances: Mary Witherow, Esq., Margaret Terry, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas, for Petitioner;
Ray D. Gardner, Esq., John Paul, Esq., The Pittsburg & Midway Coal Mining Co., Englewood, Colorado, for Respondent.

Before: Judge Lasher

This is one of nine docket cases which were consolidated for hearing, eight of which were either fully or partially settled after commencement of the hearing. The settlements were approved from the bench on the record.

The subject docket contains three citations. As part of the overall settlement, Respondent agrees to pay Petitioner MSHA's proposed penalty ($371) in full for each of the citations, as more specifically reflected in the Order below.

ORDER

Respondent shall pay to the Secretary of Labor within 30 days from the issuance date of this decision the following penalties.

Citation No.	Amount
3414747	$ 371
3414748	371
3414749	371
TOTAL	$1,113

Michael A. Lasher, Jr.
Administrative Law Judge

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DENVER, CO 80204

APR 1 1991

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. CENT 90-114 A.C. No. 29-00096-03540
v.	:	McKinley Mine
PITTSBURG & MIDWAY COAL MINING COMPANY, Respondent	:	

DECISION

Appearances: Mary Witherow, Esq., Margaret Terry, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas, for Petitioner;
Ray D. Gardner, Esq., John Paul, Esq., The Pittsburg & Midway Coal Mining Co., Englewood, Colorado, for Respondent.

Before: Judge Lasher

This is one of nine dockets which were consolidated for hearing, eight of which were either fully or partially settled after commencement of the hearing. The settlements were approved from the bench on the record.

The subject docket contains three citations. As part of the overall settlement, Respondent agrees to pay Petitioner MSHA's proposed penalty in full for each of the citations, as more specifically reflected in the Order below.

ORDER

Respondent shall pay to the Secretary of Labor within 30 days from the issuance date of this decision the following penalties.

Citation No.	Amount
3414826	$371
3414829	20
3414832	371
TOTAL	$762

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

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APR 1 1991

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. CENT 90-116 A.C. No. 29-00096-03538
v.	:	McKinley Mine
PITTSBURG & MIDWAY COAL MINING COMPANY, Respondent	:	

DECISION

Appearances: Mary Witherow, Esq., Margaret Terry, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas, for Petitioner;

Ray D. Gardner, Esq., John Paul, Esq., The Pittsburg & Midway Coal Mining Co., Englewood, Colorado, for Respondent.

Before: Judge Lasher

This is one of nine dockets which were consolidated for hearing, eight of which were either fully or partially settled after commencement of the hearing. The settlements were approved from the bench on the record.

This docket involves eight Citations. Petitioner agrees that one Citation should be vacated and Respondent agrees to pay in full Petitioner's administrative level penalty assessment for seven of the Citations. 1/ The settlement as to these eight Citations--involving either payment in full of the proposed penalty or vacation of the Citation--is reflected in the Order, infra.

1/ As to one of these Citations, No. 3413139, the parties concur that the "Significant and Substantial" designation thereon should be abandoned and my Order subsequently herein accomplishes the vacation of this designation.

ORDER

1. Citation No. 3413139 is **MODIFIED** to delete the "Significant and Substantial" designation thereon and is otherwise **AFFIRMED.**

2. Citation No. 3413083 is **VACATED.**

3. Respondent pursuant to the settlement agreement at hearing shall pay to the Secretary of Labor within 30 days from the issuance date of this decision the following penalties totaling $1,895.

Citation No.	AMOUNT
3413135	$ 20
3413140	371
3413085	371
3413088	371
3413094	20
3413137	371
3413139	371
TOTAL	$1,895

Michael A. Lasher, Jr.
Administrative Law Judge

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APR 1 1991

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. CENT 90-117 A.C. No. 29-00096-03539
v.	:	McKinley Mine
PITTSBURG & MIDWAY COAL MINING COMPANY, Respondent	:	

DECISION

Appearances: Mary Witherow, Esq., Margaret Terry, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas, for Petitioner;

Ray D. Gardner, Esq., John Paul, Esq., The Pittsburg & Midway Coal Mining Co., Englewood, Colorado, for Respondent.

Before: Judge Lasher

This is one of nine dockets which were consolidated for hearing, eight of which were either fully or partially settled after commencement of the hearing. The settlements were approved from the bench on the record.

This docket involves 10 Citations. Petitioner agrees that two Citations should be vacated and Respondent agrees to pay in full Petitioner's administrative level penalty assessment for eight of the Citations. The settlement as to these 10 Citations --involving either payment in full of the proposed penalty or vacation of the Citation--is reflected in the Order, infra.

ORDER

1. Citations numbered 3413501 and 3413520 are **VACATED.**

2. Respondent pursuant to the settlement agreement at hearing **SHALL PAY** to the Secretary of Labor within 30 days from the issuance date of this decision the following penalties totaling $2,917.

Citation No.	AMOUNT
3413099	$ 588
3413100	371
3413502	588
3413504	371
3413519	20
3413821	20
3413825	371
3413503	588
TOTAL	$2,917

Michael A. Lasher, Jr.
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
THE FEDERAL BUILDING
ROOM 280, 1244 SPEER BOULEVARD
DENVER, CO 80204

APR 1 1991

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. CENT 90-120 A.C. No. 29-00096-03541
v.	:	McKinley Mine
PITTSBURG AND MIDWAY COAL MINING COMPANY, Respondent	:	

DECISION

Appearances: Mary Witherow, Esq., Margaret Terry, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas, for Petitioner;

Ray D. Gardner, Esq., John Paul, Esq., The Pittsburg & Midway Coal Mining Co., Englewood, Colorado, for Respondent.

Before: Judge Lasher

This is one of nine dockets which were consolidated for hearing, eight of which were either fully or partially settled after commencement of the hearing. The settlements were approved from the bench on the record.

This docket involves two Section 104(d)(1) ("Unwarrantable Failure") Withdrawal Orders. The parties, as to Order No. 3414833, agree that the "Unwarrantable Failure" classification should be deleted and the nature and issuance authority of this enforcement document changed from a Section 104(d)(1) order to a Section 104(a) Citation with the "Significant and Substantial" designation to remain. In view of such modification, the penalty is to be reduced from $1,100 to $371.

As to Order No. 3414834, such is to be affirmed and Respondent agrees to pay in full MSHA's administrative level assessment of $1,100.

The two penalties agreed to and above indicated are here assessed.

ORDER

1. Withdrawal Order No. 3414833 is **MODIFIED** to change its nature and issuance authority from a Section 104(d)(1) "Unwarrantable Failure" Order to a Section 104(a) Citation with the "Significant and Substantial" designation to remain.

2. Withdrawal Order No. 3414834 is **AFFIRMED.**

3. Respondent **SHALL PAY** to the Secretary of Labor within 30 days from the issuance date of this decision the penalties hereinabove assessed in the total sum of $1,471.00

Michael A. Lasher, Jr.
Administrative Law Judge

Distribution:

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THE FEDERAL BUILDING
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DENVER, CO 80204

APR 1 1991

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. CENT 90-128 A.C. No. 29-00096-03543
v.	:	McKinley Mine
PITTSBURG & MIDWAY COAL MINING COMPANY, Respondent	:	

DECISION

Appearances: Mary Witherow, Esq., Margaret Terry, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas, for Petitioner;

Ray D. Gardner, Esq., John Paul, Esq., The Pittsburg & Midway Coal Mining Co., Englewood, Colorado, for Respondent.

Before: Judge Lasher

This is one of nine dockets which were consolidated for hearing, eight of which were either fully or partially settled after commencement of the hearing. The settlements were approved from the bench on the record.

This docket involves three Section 104(d)(1) Withdrawal Orders. As to Order No. 3413365, the parties agree that the "Unwarrantable Failure" character of the Order should be deleted and the nature and issuance authority of this document changed from a Section 104(d)(1) order to a Section 104(a) Citation with the "Significant and Substantial" designation to remain. In view of such modification, the penalty is to be reduced to $371.

As to Order No. 3413371, such is to be modified from a Section 104(d)(1) Order to a Section 104(d)(1) Citation and Respondent agrees to pay MSHA's administrative level of $1350 in full.

As to Order No. 3414745, there are no modifications and Respondent agrees to pay Petitioner MSHA's administrative level penalty of $1600 in full.

The three penalties agreed to and above indicated are here assessed.

ORDER

1. Withdrawal Order No. 3413365 is **MODIFIED** to change its nature and issuance authority from a Section 104(d)(1) "Unwarrantable Failure" Order to a Section 104(a) Citation with the "Significant and Substantial" designation to remain.

2. Withdrawal Order No. 3413371 is **MODIFIED** to change its nature from a Section 104(d)(1) Order to a Section 104(d)(1) Citation.

3. Respondent **SHALL PAY** to the Secretary of Labor within 30 days from the issuance date of this decision the penalties hereinabove assessed in the total sum of $3321.

Michael A. Lasher, Jr.
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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APR 1 1991

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. CENT 90-131 A.C. No. 29-00095-03557
v.	:	York Canyon Mine
PITTSBURG & MIDWAY COAL MINING COMPANY, Respondent	:	

DECISION

Appearances: Mary Witherow, Esq., Margaret Terry, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas, for Petitioner;

Ray D. Gardner, Esq., John Paul, Esq., The Pittsburg & Midway Coal Mining Co., Englewood, Colorado, for Respondent.

Before: Judge Lasher

This is one of nine dockets which were consolidated for hearing, eight of which were either fully or partially settled after commencement of the hearing. The settlements were approved from the bench on the record.

The only Citation involved in this docket, No. 3077050, was not settled, but was fully litigated at a hearing [1] in Albuquerque, New Mexico, on February 12, 1990. Both parties were well represented by counsel at this hearing.

Midway of hearing Respondent conceded the occurrence of the violation charged, narrowing the issues to whether the violation was "Significant and Substantial" as charged by the Inspector, and the appropriate amount of penalty.

Based on stipulations (Tr. 29-30, 35), there is no issue as to the Commission's jurisdiction to adjudicate this matter. Based thereon, I also find that Respondent at material times conducted a large coal mining operation (both surface and underground) at its York Canyon Mine, that it had approximately 90

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1 Tr. 44

mine safety violations during the two-year period preceding the occurrence of the instant violation in January 1990, that its ability to continue will not be jeopardized by payment of a penalty for this violation, and that it proceeded in good faith after notification by MSHA of the subject violation to promptly abate the same. Thus, the remaining mandatory penalty considerations are "negligence" and "gravity." Further, if the "Significant and Substantial" designation is not sustained by the evidence, such will also be considered in the factual mosaic underpinning an appropriate penalty determination.

Based on the preponderant reliable and substantial evidence of record, I make the following findings:

1. **Citation No. 3077050** was issued on February 8, 1990, by MSHA Inspector Melvin H. Shively (Tr. 42-45) charging a violation of 30 C.F.R. § 77.400(c) [2] as follows:

> The guard at the tail roller for the coal collecting belt main floor coal preparation plant was not extended a distance sufficient to prevent a person from coming in contact, in that the guard provided was extended only 20 inch(es) and would allow a person room to reach behind the guard.

2. The violation cited, such having been conceded by Respondent (Tr. 82-83), is found to have occurred.

3. The violation was not "Significant and Substantial."

DISCUSSION

A violation is properly designated as being of a significant and substantial nature 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

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[2] 30 C.F.R. § 77.400(c) provides:

> Guards at conveyor-drive, conveyor-head, and conveyor-tail pulleys shall extend a distance sufficient to prevent a person from reaching behind the guard and becoming caught between the belt and the pulley.

a reasonably serious nature. Cement Division, National Gypsum, 3 FMSHRC 822, 825 (April 1981); Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984). The four essential elements necessary to sustain a significant finding as stated in Mathies are: (1) the underlying violation of a mandatory standard; (2) a discrete safety hazard, i.e., 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.

Here, the first requirements has been conceded. The record is also quite clear that, because of the inadequacy of the guard, a hazard existed, in that a person could become "caught" in a pinchpoint (Tr. 45-48, 52, 60-61, 64, 77) because of the "exposure" (Tr. 46, 51, 91) to the moving machine part, the tailroller (Tr. 45, 46, 47, 55, 60). This, as the record establishes, constitutes a safety hazard. (Tr. 48, 49, 60-61).

The injury, should a person have come into contact with the pinchpoint, would have been of "a reasonably serious nature," i.e., loss of a hand or arm. (Tr. 48, 49, 50, 51). [3]

The question remains, however, whether there was "a reasonable likelihood" that the hazard contributed to by the violation would result in an injury. I find that there was not and thus that MSHA did not sustain its burden of meeting the four-prong Mathies "significant and substantial" test.

The Petitioner's witness at first indicated that the guard's insufficient extension was such that a person "could" become caught (Tr. 45) and that it did not prevent a person "from reaching behind the guard and becoming caught, for whatever reason." (Tr. 46). And again, he viewed the condition as such that it allowed a person "the opportunity to reach in there, for whatever reason." (Tr. 47, 48). The Inspector's opinions as to likelihood were not convincing. The following colloquy is illustrative:

Q. Do you have an opinion ... as to the possibility that an employee ... could be injured if the condition you described is not corrected?

---

3 It is concluded at this juncture that elements "1," "2," and "4" of Mathies, supra, have been met by MSHA.

A. I don't have an opinion, but if it's not corrected, the hazard is there, and for whatever reason, that person could get into it. (Tr. 49).

The Inspector was next asked to "rate" the likelihood of injury occurring. His response again does not fulfill MSHA's burden on the issue: "It is real likely that if it is not corrected, the potential is there." (Emphasis added). While the Inspector did here express a specific opinion on the issue using the words "reasonably likely," the mere use of this statutory phrase is not an open sesame for unlocking the door to a significant and substantial finding. When so used without supporting rationale, or as here with a simultaneous invocation of remoteness, it constitutes at best no more than the articulation of the ultimate legal conclusion urged to be drawn.

It appears that a person would actually have to reach around the guard to become exposed to being caught in the pinchpoint. (Tr. 46-48, 60, 61). The substantial evidence also supports the conclusion that it was not likely that employees would come into contact with the pinchpoint while the belt was running. (Tr. 58, 62, 84-88, 91, 92, 97). The "Significant and Substantial" classification of the violation will be stricken.

In view of the fact that a hazard did exist which, had it come to fruition, would have caused serious injuries, I find this to be a serious violation (Tr. 48, 49, 54-57, 60, 63) even though not a "significant and substantial" violation as that phrase is construed in mine safety precedent.

The Inspector's finding of a "moderate" degree of negligence on the part of Respondent was not challenged, and in view of the fact that this was a visible and obvious violative condition, such finding is found warranted.

A penalty of $40 is found appropriate and is here assessed.

ORDER

1. Citation No. 3077050 is MODIFIED to delete the "Significant and Substantial" designation thereon and to change paragraph 10 A thereof pertaining to "Gravity" from "Reasonably Likely" to "Unlikely."

2. Respondent **SHALL PAY** to the Secretary of Labor, within 30 days from the issuance date of this decision, the sum of $40 as and for the civil penalty above assessed.

Michael A. Lasher, Jr.
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
THE FEDERAL BUILDING
ROOM 280, 1244 SPEER BOULEVARD
DENVER, CO 80204

APR 1 1991

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. CENT 90-53 A.C. No. 29-00224-03556
v.	:	Cimarron Mine
PITTSBURG & MIDWAY COAL MINING COMPANY, Respondent	:	

DECISION

Appearances: Mary Witherow, Esq., Margaret Terry, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas, for Petitioner;

Ray D. Gardner, Esq., John Paul, Esq., The Pittsburg & Midway Coal Mining Co., Englewood, Colorado, for Respondent.

Before: Judge Lasher

This is one of nine cases which were consolidated for hearing, eight of which were either fully or partially settled after commencement of the hearing. The settlements were approved from the bench on the record.

The subject docket involves one Section 104(a) Citation, No. 2930777. On the basis of evidentiary considerations, the Petitioner's motion to withdraw its prosecution was granted on the record with the understanding that this Citation would be ordered vacated. Such determination is here confirmed.

ORDER

Citation No. 2930777 is **VACATED**.

Michael A. Lasher, Jr.
Administrative Law Judge

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

APR 1 1991

ROCHESTER & PITTSBURGH COAL COMPANY, Contestant	:	CONTEST PROCEEDINGS
v.	:	Docket No. PENN 88-284-R
	:	Order No. 2888902; 7/14/88
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Docket No. PENN 88-285-R
	:	Order No. 2888903; 7/14/88
	:	Greenwich Collieries No. 2 Mine
	:	Mine ID 36-02404
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. PENN 89-72
v.	:	A.C. No. 36-02404-03740
	:	Greenwich Collieries
ROCHESTER & PITTSBURGH COAL COMPANY, Respondent	:	No. 2 Mine

DECISION UPON REMAND

Before: Judge Maurer

These cases are before me upon remand by the Commission to reinstate the two originally issued section 104(d)(2) withdrawal orders that I previously modified to section 104(a) citations and to reconsider an appropriate civil penalty in light of that fact.

In my original decision, reported at 11 FMSHRC 1978 (October 1989) (ALJ), I found as a fact that the required examinations were not made and affirmed the two cited S&S violations of 30 C.F.R. § 75.305, but deleted the unwarrantable failure findings based on my holding that the intentional misconduct of the responsible employee, a rank-and-file miner, was not imputable to the mine operator. The Commission has reversed me on that point of law, holding that although he was a rank-and-file miner, he was the agent of the operator for the purpose of conducting the statutorily required examinations. And his failure to accomplish them, even though this was intentional wrongdoing on his part, is imputable to the operator for unwarrantable failure purposes, as well as for negligence findings pertinent to the assessment of civil penalties in these cases.

Accordingly, considering the entire record made in these cases, including the Commission's Decision of February 5, 1991, and taking into account the requirements of section 110(i) of the Act, I conclude and find that a civil penalty assessment of $1100 for each of the two violations found herein is appropriate.

ORDER

It is **ORDERED** that Order Nos. 2888902 and 2888903 (previously modified to § 104(a) citations in error) ARE AFFIRMED.

It is further **ORDERED** that the operator pay $2200 within 30 days from the date of this decision.

Roy J. Maurer
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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3 1991

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. KENT 90-398 A.C. No. 15-16162-03531
v.	:	
	:	Mine No. 1
BEECH FORK PROCESSING, INC., Respondent	:	

DECISION

Appearances: Thomas A. Grooms, Esq., Office of the Solicitor, U.S. Department of Labor for the Secretary of Labor (Secretary); Ted McGinnis, Vice President, Beech Fork Processing, Inc., for Respondent (Beech Fork).

Before: Judge Broderick

STATEMENT OF THE CASE

The Secretary seeks civil penalties for thirteen alleged violations of mandatory health and safety standards at the subject mine. Pursuant to notice the case was called for hearing in Prestonsburg, Kentucky, on February 12, 1991. Kellis Fields and Thomas Goodman, both Federal coal mine inspectors, testified on behalf of the Secretary. Ted McGinnis testified on behalf of Beech Fork. The parties waived their right to file post-hearing briefs. Based on the entire record and the contentions of the parties, I make the following decision.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I

PRELIMINARY FINDINGS

Beech Fork produces approximately 2,000,000 tons of coal annually, approximately 1,000,000 of which is produced at the subject mine. It employs approximately 100 persons. The subject mine had a history of 188 paid violations during the 24 month period prior to the violations involved in this proceeding. Five were violations of 30 C.F.R. § 75.400; seven are violations of § 75.1100; fourteen are violations of § 77.400. Beech Fork is a medium sized operator. Its history of prior violations is not such that penalties otherwise appropriate should be increased

because of it. Ted McGinnis testified that Beech Fork which began operation in 1985 has lost money each year. He testified that it suffered a financial loss during 1990, but no documentation was offered to show Beech Fork's financial situation. The evidence does not establish that penalties which may be assessed in this proceeding will have any effect on its ability to continue in business. The Secretary has stipulated that in the case of each violation involved herein, Beech Fork demonstrated good faith in attempting to achieve rapid compliance after notification of the violations.

The subject mine was from 9 feet to 11 feet high. It is generally dry from October to January or February and generally wet or moist in the spring. Inspector Fields testified that the No. 1 mine was a "good looking operation." He stated that he always received good cooperation from mine management. The mine has a large rock content; from 50 percent to 60 percent of its mined product is rejected as rock.

II

ACCUMULATIONS

CITATION 3364810

On April 12, 1990, Federal Coal Mine Inspector Kellis Fields issued a section 104(a) citation alleging a violation of 30 C.F.R. § 75.400 because of an accumulation of float coal dust inside a belt control box. 30 C.F.R. § 75.400 provides that coal dust including float coal dust deposited on rock dusted surfaces and loose coal shall not be permitted to accumulate in active workings or on electric equipment therein. The control box received 440 volt ac power. There were electrical connections inside the box including contactors and breakers. The evidence of the accumulations is uncontradicted. It posed a hazard of ignition or explosion, which could result in fire and smoke in the entry. Miners travel in the entry and it was adjacent to a secondary escapeway. I conclude that the violation charged is established. The dampness of the area reduces the hazard somewhat, but float coal dust can burn on water. The hazard is also reduced because of the large rock component in the mined product, thus reducing the combustibility of the dust. Nevertheless, I conclude that the violation was serious.

A violation is properly designated as significant and substantial if it is established that the hazard contributed to will be reasonably likely to result in injury to a miner. United States Steel Mining Company, 7 FMSHRC 1125 (1985). The hazard here is an ignition or explosion. Float coal dust is highly combustible and, in the presence of an ignition source, an ignition or explosion is reasonably likely to occur and to cause

serious injuries. Therefore, I conclude that the violation was properly designated as significant and substantial.

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

CITATION 3365506

On May 8, 1990, Inspector Fields issued a section 104(a) citation alleging a violation of 30 C.F.R. § 77.202 because of an accumulation of loose fine coal and coal dust, including float dust on the first floor of the preparation plant. The accumulation ranged from 1 inch to 4 inches deep. Sources of ignition present included belt rollers and conveyors which could become stuck or frozen and result in friction, and other belt drives and motors in the prep plant which could overheat or "go to ground." The violation is established by the evidence. As was the case with respect to citation 3364810, supra, I conclude that an accumulation of float coal dust in the presence of ignition sources is very hazardous and reasonably likely to result in injury. I conclude that the violation was properly designated as significant and substantial, and that an appropriate penalty for the violation is $225.

III

FIRE SUPPRESSION SYSTEMS

CITATION 3364811

On April 12, 1990, Inspector Fields issued a section 104(a) citation alleging a violation of 30 C.F.R. § 75.1100-3 because the deluge fire suppression system on the belt line was inoperative. The light and alarm were working, but water did not flow through the system. The standard requires that all firefighting equipment shall be maintained in a usable and operative condition. That the fire suppression system cited here was not maintained in an operative and usable condition was not contradicted. A violation was established. The hazard to which this violation contributes is fire and smoke which could travel inby from the belt conveyor to the section. A fire could result from stuck rollers, friction, or coal spillage including float coal dust. The inspector testified that these are common occurrences in coal mines. However, there is no evidence of any such conditions in the area of the cited violation. The evidence does not establish that the hazard contributed to is reasonably likely to result in serious injury. The citation was not properly designated as significant and substantial. See United States Steel Mining Company, supra. However, the violation was serious and resulted from Beech Fork's negligence. I conclude that an appropriate penalty for the violation is $150.

CITATION 3364813

On April 12, 1990, Inspector Fields issued a section 104(a) citation alleging a violation of 30 C.F.R. § 75.1101-2 because the deluge type fire suppression system for the 3A belt conveyor drive was inadequate in that it had only 24 feet of branch lines, whereas 50 feet is required. The evidence establishes the violation. It was not serious, and unlikely to result in injury. Twenty dollars ($20) is an appropriate penalty for the violation.

CITATION 3364621

On April 16, 1990, Inspector Fields issued a section 104(a) citation charging a violation of 30 C.F.R. § 75.1100-3 because the dry chemical type fire suppression system on a shuttle car was inoperative. The hoses going to the tank were broken off. The condition would be obvious to anyone checking the equipment. The traction motor on the shuttle car has electrical components and the cable going back to the power center carries 440 volt ac power. If the traction motor shorted out and ignited accumulations of oil, grease or coal dust, or a cut in cable caused a spark, a fire could result, which could cause smoke inhalation injuries to miners on the section. However, there is no evidence of any oil, grease or coal dust, and no evidence of any electrical problems or defects in the motor or cable. Therefore, the evidence fails to show that the hazard contributed to was reasonably likely to result in injuries to miners. The citation was not properly designated as significant and substantial. The violation was serious, however, and resulted from Beech Fork's negligence. I conclude that an appropriate penalty is $150.

IV

GUARDING VIOLATIONS

CITATION 3364812

On April 12, 1990, Inspector Fields issued a section 104(a) citation alleging a violation of 30 C.F.R. § 75.1722 because a belt conveyor drive was not adequately guarded. The guard did not extend to the discharge roller. The roller, 1-1/2 inches to 2 inches in diameter, was located in a position where a miner could reach in and be caught between the belt and the roller. Respondent does not deny that the conveyor drive was inadequately guarded. It asserts that many of the conditions cited as guarding violations were accepted by prior inspectors. This is not a defense. The United States Court of Appeals stated in Emery Mining Corp. v. Secretary of Labor, 744 F.2d 1411, 1416 (10th Cir. 1984):

> . . . as a general rule those who deal with the Government are expected to know the law and may not rely on the conduct of government agents contrary to law . . .
>
> * * *
>
> Particularly where mandatory safety standards are concerned, a mine operator must be charged with knowledge of the Act's provisions and has a duty to comply with those provisions.

Injuries commonly result from miners getting hand, arm or clothing caught in unguarded rollers. The guarding violation cited here was reasonably likely to result in a serious injury. It was properly designated significant and substantial. It was serious and resulted from Beech Fork's negligence. I conclude that an appropriate penalty based on the criteria in section 110(i) of the Act is $300.

CITATION 3364814

On April 12, 1990, Inspector Fields issued a section 104(a) citation alleging a violation of 30 C.F.R. § 75.1722 because a guard at the No. 3A belt conveyor drive was not adequate in that it did not extend out far enough to prevent a miner from reaching in and becoming caught between the belt and the discharge roller. The evidence establishes that the cited violation existed. The violation is similar to that charged in Citation 3364812. It was properly designated as significant and substantial in that the hazard contributed to was likely to result in serious injury. Based on the criteria in section 110(i) of the Act, I conclude that $300 is an appropriate penalty for the violation.

CITATION 3365508

On May 8, 1990, Inspector Fields issued a section 104(a) citation charging a violation of 30 C.F.R. § 77.400 because a guard was not provided for the discharge roller on the recovery belt. No guard had ever been provided at this point. The roller was next to a confined walkway and is required to be examined every day. A guarding violation is likely to result in a miner getting his/her hand, arm or clothing caught on moving machinery and suffering serious injury. The violation was established, and was properly designated as significant and substantial. The violation was obvious, and Beech Fork's negligence is high. An appropriate penalty for the violation under the criteria in section 110(i) is $325.

CITATION 3365509

On May 8, 1990, Inspector Fields issued a section 104(a) citation alleging a violation of 30 C.F.R. § 77.400 because of an inadequate guard at the tail roller for the stacker belt. The guard did not extend out far enough to prevent a miner from reaching in to a pinch point. The pinch point opening was from 12 inches to 14 inches. A serious violation was established. It was significant and substantial. A penalty of $300 is appropriate.

CITATION 3365511

On May 8, 1990, Inspector Fields issued a section 104(a) citation alleging a violation of 30 C.F.R. § 77.400 because a hole had been cut in the center of a guard on an air compressor pulley exposing the pulley to a miner's hand. The hole had apparently been cut in the guard to enable a miner to grease the pulley. Respondent should have been aware of it. The violation is established; it was significant and substantial since an injury was likely to result. A penalty of $250 is appropriate.

V

OTHER VIOLATIONS

CITATION 3365510

On May 8, 1990, Inspector Fields issued a section 104(a) citation charging a violation of 30 C.F.R. § 77.205 because of stumbling hazards on the concrete floors and walkways throughout the shop area of the preparation plant. The hazards included engine parts, motor blocks, electrical cords, and oil and grease covered by sweeping compound. Maintenance workers and foremen travel regularly in the area. The same violation had previously been cited in the same area. The violation is established by the preponderance of the evidence. It was reasonably likely to result in injury. Therefore it was properly designated as significant and substantial. Two hundred dollars ($200) is an appropriate penalty.

CITATION 3365512

On May 8, 1990, Inspector Fields issued a section 104(a) citation alleging a violation of 30 C.F.R. § 77.410 because of an inoperative back up alarm on a water truck which operated on haulage roadways to keep down the dust. The truck was a Mack coal truck on which a water tank had been installed. It had 10 wheels, was 7 to 8 feet wide and the driver had blind spots to his rear. There were other trucks in the area, and miners frequently worked or walked on and near the roadway. The water truck was operated 3 or 4 times per day. It had an alarm but it

was inoperative when the inspector tested it. A violation was established. Because many people were in the area, the violation was reasonably likely to result in injury and therefore was properly designated significant and substantial. I conclude that $200 is an appropriate penalty.

CITATION 3365407

On June 6, 1990, Federal Coal Mine Inspector Thomas E. Goodman issued a section 104(a) citation for a violation of 30 C.F.R. § 77.1710(d) because two employees working under a highwall installing a canopy were not wearing hard hats. The standard requires that hard hats be worn where falling objects may create a hazard. Cracks and loose rock were present in the highwall and presented a hazard of falling objects. The violation was established. A roof fall from the same highwall had occurred on May 18, 1990, entrapping and injuring 2 miners who were working in a portal under a canopy. The violation cited here was likely to result in serious injuries to the two miners. It was properly designated as significant and substantial. Two hundred dollars ($200) is an appropriate penalty for the violation.

ORDER

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

1. Citations 3364810, 3365506, 3364812, 3364814, 3365508, 3365509, 3365511, 3365510, 3365512 and 3365407 are **AFFIRMED** as issued included the designation in each citation of a significant and substantial violation.

2. Citation 3364813 is **AFFIRMED**.

3. Citations 3364811 and 3364621 are **MODIFIED** to remove the designation of a significant and substantial violation and, as modified, are **AFFIRMED.**

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

CITATION	30 CFR STANDARD	AMOUNT
3364810	75.400	$ 250
3365506	77.202	225
3364811	75.1100-3	150
3364813	75.1100-2	20
3364621	75.1100-3	150
3364812	75.1722	300
3364814	75.1722	300

3365508	77.400	325
3365509	77.400	300
3365511	77.400	250
3365510	77.202	200
3365512	77.410	200
3365407	77.1710(d)	200
		$2870

James A. Broderick
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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APR 3 1991

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. KENT 90-403
	:	A.C. No. 15-14492-03570
v.	:	
	:	Docket No. KENT 90-426
PYRO MINING COMPANY, Respondent	:	A.C. No. 15-14492-03571
	:	Baker Mine
	:	
	:	Docket No. KENT 90-404
	:	A.C. No. 15-13920-03675
	:	
	:	Docket No. KENT 90-424
	:	A. C. No. 15-13920-03677
	:	
	:	Docket No. KENT 90-425
	:	A. C. No. 15-13920-03678
	:	
	:	No. 9 Wheatcroft Mine

DECISION

Appearances: W. F. Taylor, Esq., U.S. Department of Labor, Office of the Solicitor, Nashville, Tennessee, for Petitioner;
William Craft, Safety Consultant, Madisonville, Kentucky, for Respondent.

Before: Judge Melick

These cases are before me upon petitions for civil penalties filed by the Secretary of Labor pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, of 1977, 30 U.S.C. § 801 et seq., the "Act," in which the Secretary has proposed civil penalties for alleged violations by Pyro Mining Company (Pyro) of regulatory standards. The general issue before me is whether Pyro committed the violations as alleged and, if so, the amount of civil penalty to be assessed.

Docket No. KENT 90-403

At hearings the parties submitted a proposal for settlement of the two citations at issue in this case in the amount of $156 -- a reduction in penalty of $78. The motion was granted at

hearing on the basis of the Secretary's representations supplementing the pleadings in the case. Under the circumstances the proposal for settlement is approved and the corresponding penalty will be incorporated in the order following this decision.

Docket No. KENT 90-404

Citation No. 3420686 was also the subject of a motion for settlement at hearing in which the operator agreed to pay the proposed penalty of $241 in full. This motion was also granted at hearing based on the representation submitted. Accordingly this motion for settlement is also approved and the corresponding penalty will be incorported in the order following this decision.

Citation No. 3420699 alleges a "significant and substantial" violation of Pyro's roof control plan under the standard at 30 C.F.R. § 75.220 and charges as follows:

> Brows of a roof fall on No. 2 unit had only 3 metal straps installed. Roof control plan dated December 7, 1989, shows a minimum of 4 straps when these are used. Shown in sketch on p.8. Two brows were like this.

It is not disputed that the relevant roof control plan required at least four straps for roof support in the cited areas (See Government Exhibit No. 9).

In its post hearing brief Pyro does not dispute the violation as charged but maintains that it was not a "significant and substantial" or serious violation. In its brief it states as follows:

> Government Exhibit No. 8 shows the cavity encompassing six (6) brows. Four (4) straps on each would total twenty-four (24) straps. Twenty-two (22) had been installed, or 91+ percent in addition to Mr. Pyles testimony that additional timbers had been installed in the crosscuts. The faces of the entries were inactive. Rooms were being worked as shown on the east side of the sketch, Government Exhibit No. 8. Some of the rooms being worked were outby the fall area. Two (2) intake entries were behind the permanent line of stoppings. One (No. 2) was completely open, and if necessary, could be traveled in lieu of No. 1. The law requires at least one intake escapeway (Sec. 75.1704 30 CFR). Pyro provided two (2) in this case. It is very unlikely that twelve (12) people would travel No. 1 entry, beneath the cavity at one time. According to the Commission Ruling in the Mathies decision, we respecfully question the S&S designation.

Inspector Jerrold Pyles of the Federal Mine Safety and Health Administration (MSHA) who issued the citation, testified that he found the violation to be "significant and substantial" based in part on the history of roof falls in the cited area and the concurrent existence of another serious roof control violation i.e. excessively wide areas in an area of proven unstable roof (See Citation No. 3420700 discussed infra.). These considerations in an area designated as the primary escapeway exposed not only the twelve miners who would likely use this designated and marked escapeway but also the weekly examiner to roof fall hazards. Under the circumstances the violation clearly meets the criteria for a "significant and substantial" and serious violation. See Mathies Coal Co. 6 FMSHRC 1 (1984). The inspector's designation of this violation as resulting from moderate negligence is not challenged. Under the circumstances and considering the criteria under section 110(i) of the Act I find the proposed penalty of $400 to be appropriate.

Citation No. 3420700 alleges a "significant and substantial" violation of the standard at 30 C.F.R. § 75.203 and charges as follows:

> Additional roof support was not installed where widths exceeded what is specified in roof control plans. The widths stated is [sic] 20 feet; the entry measured was found to be 24 feet over a 30 foot distance. This was in No. 2 Unit ID 002, plan in effect dated 12/7/79.

The cited standard, 30 C.F.R. § 75.203, provides in subsection (e) as follows:

> Additional roof support shall be installed where- (1) the width of the opening specified in the roof control plan is exceeded by more than 12 inches; and (2) the distance over which the excessive width exists is more than five feet.

It is undisputed that the relevant roof control plan provides that the entries shall be no more than 20 feet wide (Exhibit G-9, p.6). It is also undisputed that the cited 24 foot widths herein existed over 30 feet linear distance. This admitted violation was found in the area also cited for inadeqaute strapping and with a history of roof falls. As Inspector Pyles observed, the combination of roof control violations in this area with a history of roof falls and unstable roof in the designated escapeway with 12 miners working on the unit, warrants a finding that this violation is also "significant and substantial" and serious.

In its post hearing brief Pyro again admits the violation but maintains that the violation was neither "significant and

substantial" nor serious. It argues as follows:

> Government Exhibit No. 8 shows that the faces of the entries were inactive, and rooms on the east side of the sketch, some outby the wide places, were being worked. Also, two (2) entries in intake air were present behind the line of permanent stoppings, making it unnecessary to travel the No. 1 entry at anytime. It would be highly unlikely that twelve (12) people would be in an area, thirty (30') feet in length at the same time. We do not consider this as an S&S citation according to the Commission ruling in the Mathies Decision.

Pyro's argument does not however take into consideration the evidence that the entries could be reworked at any time and that the subject area was the designated primary escapeway and subject to weekly examinations. Since the area was marked by reflectors as the designated escapeway it is likely therefore that miners would use that route in the event of an emergency. Under the circumstances I find that the violation indeed is "significant and substantial" and quite serious. Mathies Coal Co., supra.

The inspector's findings of moderate negligence are not disputed and they are supported by the record. Inspector Pyles noted that timbers had previously been set in the excessively wide areas to bring the widths within the required dimensions however those timbers had become dislodged for unknown reasons and were lying on the mine floor. Considering all the criteria under section 110(i) of the Act I find a penalty of $400 to be appropriate.

Docket No. KENT 90-424

The one citation at issue in this case, Citation No. 3545766, alleges a "significant and substantial" violation of the standard at 30 C.F.R. § 75.503 and charges that: "the foot control switch cover (step flange) had an opening in excess of .006 of an inch measured with .007 gauge on the S-39 shuttle car located on No. 3 Unit."

The cited standard, 30 C.F.R. § 75.503, provides that: "[t]he operator of each coal mine shall maintain in permissible condition all electric face equipment required by Section 75.500, 75.501, 75.504 to be permissible which is taken into or used inby the last open cross cut of any such mine." It is not disputed in this case that the cited shuttle car was the type of equipment required to be maintained in a permissible condition so long as it is equipment which is "taken into or used inby the last open cross cut".

In its post hearing brief Pyro argues that the cited shuttle

car "was not in or inby the last open crosscut" and presumably therefore there was no violation of the cited standard. In its Answer filed in these proceedings however the operator made the following admissions:

> This is a valid citation, however, it should be non S&S. In order for there to be a likelihood of an explosion, the car would have to operate in an explosive environment. The haul roads were wet down and the only time the car was inby the last open crosscut, it was behind a loader with an operating methane detector.

The mine operator is bound by such admissions. The cited shuttle car was also energized when discovered by Inspector Pyles and there was sufficient evidence from which he could, in any event, have inferred that it was intended for use inby. See Secretary v. Solar Fuel Company, 3 FMSHRC 1384 (1981). The citation is accordingly affirmed.

I have evaluated the mitigating arguments in Pyro's post hearing brief, however I find the testimony of Inspector Pyles to be more persuasive. According to Pyles an opening in the switch cover of .007 inch would allow sparks or an arc to enter the mine atmosphere and thereby cause an explosion in the presence of certain levels of methane or coal dust. Bottle samples also demonstrated that methane is indeed liberated at this mine. The record also shows that a few months preceding the citation at bar there had been a coal dust or methane explosion at this mine.

Inspector Pyles also observed that the cited shuttle car was energized, that methane can suddenly inundate an area without warning and that even though there may have been a "methane detector" on the loading machine (which is ordinarily operated in conjunction with the shuttle car) it would not automatically de-energize the shuttle car. Considering the credible evidence I find that indeed the violation was "significant and substantial" and serious.

The inspector's findings of moderate negligence are not disputed. Considering the criteria under section 110(i) I find that the proposed penalty of $275 is indeed appropriate.

Docket No. KENT 90-425

The one citation at issue in this case, Citation No. 3420625, alleges a "significant and substantial" violation of the standard at 30 C.F.R. § 75.1316(b) and charges as follows:

> Boreholes were apparently not cleared and their depth and direction determined due to two (2) bore holes in adjacent faces had apparently drilled through

into each other due to when blasting the left x-cut the blast came through the opposite side bore hole, injuring John Parker, section foreman in the adjacent entry. No. 2 unit, ID 002. Event took place on 3-12-90. Cutting machine operator was also in same entry as Parker but not injured.

The cited standard, 30 C.F.R. § 75.1316(b), provides that "[b]efore loading bore holes with explosives, each bore hole shall be cleared and its depth and direction determined." Company representative David Sutton reported the blasting accident to Inspector Pyles on March 12, 1990, and Pyles made his inspection on the following day. According to Pyles the citation was issued on April 5, 1990, on orders from the MSHA Assistant District Manager and from his supervisor and was based upon the accident report filed by Pyro safety manager Sutton (Exhibit G-17). That report states in part that: "adjacent entry drill holes met -- employee failed to come out of place when being flagged."

Inspector Pyles acknowledged at hearing that Sutton also told him that the shot firer reported that he had indeed checked the direction and depth of the drill holes before loading the holes with explosives. Pyles also acknowledged that everything could have been done in accordance with the cited regulation and that the blow-through might nevertheless have occurred. Indeed Exhibit R-6, a diagram, shows how boreholes could have been drilled at an angle and have intersected but upon testing would not have revealed whether they were clear through. Under the circumstances I do not find that the Secretary has met her burden of proving a violation of the cited standard. Citation No. 3420625 must be accordingly vacated.

Docket No. KENT 90-426

Citation No. 3420045 alleges a "significant and substantial" violation of the standard at 30 C.F.R. § 75.400 and charges that "[c]ombustible materials such as oil cans and trash were permitted to accumulate on the No. 9 track across from the No. 2 Unit supply road."

The cited standard, 30 C.F.R. § 75.400, provides that "[c]oal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible material, shall be cleaned up and not be permitted to accumulate in active workings, or on electric equipment."

According to MSHA Inspector Cheryl McMackin, during the course of her inspection of the Baker Mine July 10, 1990, she observed, for the second day in a row, a large accumulation of paper, cardboard, wood, oil cans and other combustibles in the cited crosscut. The accumulation had increased from the day

before. When asked about the trash, foreman Qualls indicated that it had not been cleaned up because they had been busy on a construction project and were starting a new unit. Qualls also told McMackin that the trash was located at a "collection point" and that they intended to remove it. Under the circumstances I find that the credible and essentially undisputed testimony of Inspector McMackin is sufficient to prove the violation as charged.

In reaching her conclusions that the violation was also "significant and substantial", McMackin observed that there were ignition sources near the accumulations i.e. several electrical cables, an electrical junction box and rollers on the conveyor, and noted that this was near the secondary escapeway. She noted that smoke from a fire in this area would procede toward the working areas and that two miners were working in the immediate vicinity of the accumulation. Under the circumstances I find that the violation was indeed "significant and substantial" and serious. Mathies, supra.

I concur in the findings of moderate negligence. It is not disputed that the cited area was a "trash pick-up area", that the size of accumulations actually increased over the two day period observed and that it was readily visible from the adjacent track entry which virtually everyone must use passing into and out of the mine.

In reaching the conclusions herein I have not disregarded Pyro's post hearing brief. Much of the argument therein is based however upon speculation not supported by the record. In any event I find the expert testimony of Inspector McMackin, uncontradicted by other expert testimony, to be credible and fully supportive of her findings. Considering the criteria under section 110(i) of the Act I find a penalty of $150 to be appropriate.

Citation No. 3420047 alleges a "significant and substantial" violation of the standard at 30 C.F.R. § 75.503 and charges that "[t]he EIMCO scoop Company No. R-121, operating on the No. 1 unit (ID 001-0) was not maintained in a permissible condition and the head light assembly was missing." The cited standard provides that "[t]he operator of each coal mine shall maintain in permissible condition all electric face equipment required by Section 75.500, 75.501, 75.504 to be permissible which is taken into or used inby the last open crosscut of any such mine". In its post hearing brief Pyro does not dispute the testimony of Inspector McMackin but argues that because the scoop was not actually found in or inby the last open crosscut there was no violation. This argument is without merit. The undisputed testimony of Inspector McMackin is that during the course of her inspection she heard the scoop operating inby the last open crosscut. This evidence is sufficient from which it may

reasonably be inferred that the scoop was indeed operating inby the last open crosscut. Her testimony that the scoop was used regularly in the face area to clean up gob and rock is also not disputed. Finally, Inspector McMackin actually observed the scoop pulling through the curtain with the bucket in the direction of entering the last open crosscut. This evidence clearly supports the inference that the cited equipment was equipment which is taken or used inby. See Secretary v. Solar Fuel Co. supra.

The violation was clearly "significant and substantial" on the basis of the undisputed testimony of McMackin. According to McMackin the cover was missing from the headlight assembly and you could clearly see inside of the assembly. She noted that the electric light would be subject to arcing and sparking and in the atmosphere of the Baker Mine which routinely liberates methane, the violation was particularly egregious. She also noted that the scoop was energized and in operation and that the section was then producing coal. McMackin had taken methane readings and found .2 percent methane at the return. She noted that 12 men were working on the section at the time and that the missing head light cover was "obvious". Within this framework it is clear that not only was the violation quite serious and "significant and substantial" but that it also involved significant negligence. Under the circumstances I find that the Secretary's proposed penalty of $98 is clearly inadequate. Considering the criteria under section 110(i) and such a serious violation involving significant negligence, a penalty of $400 is warranted.

ORDER

Citation No. 3420625 is VACATED. The remaining citations are affirmed and Pyro Mining Company is directed to pay civil penalties of $2,022 within 30 days of the date of this decision.

Gary Melick
Administrative Law Judge

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nb

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

APR 3 1991

ISLAND CREEK COAL COMPANY, Contestant	:	CONTEST PROCEEDINGS
v.	:	Docket No. VA 91-47-R
	:	Order No. 3354742; 12/05/90
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Docket No. VA 91-48-R
	:	Citation No. 3354743; 12/05/90
and	:	Docket No. VA 91-49-R
	:	Order No. 3508496; 12/13/90
UNITED MINE WORKERS OF AMERICA (UMWA), DISTRICT 28, Local 1640, Intervenor	:	VP-3 Mine
	:	Mine ID 44-01520

DECISIONS

Appearances: Timothy C. Biddle, Robert Davis, Esqs., Crowell & Moring, Washington, D.C., for the Contestant;
Charles Jackson, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for the Respondent;
Scott Mullins, Esq., Coeburn, Virginia, for the Intervenor.
Mary Lu Jordan, Esq., United Mine Workers of America, (UMWA), Washington, D.C., for the Intervenor.

Before: Judge Koutras

Statement of the Proceedings

These consolidated proceedings concern Notice of Contests filed by the contestant (Island Creek) pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d), challenging the legality of two section 107(a) imminent danger orders, and one section 104(a) significant and substantial (S&S) citation issued by MSHA mine inspectors. Pursuant to the contestant's request, an expedited hearing was held in Abingdon, Virginia, on December 19 and 20, 1990, and the UMWA's request to intervene, made on the record at the hearing, was granted without

objection. The parties filed posthearing briefs, and I have considered the arguments made therein in the course of my adjudication of these matters.

Issues

The issues presented in these proceedings include the following: (1) whether the conditions cited in the contested imminent danger orders were in fact imminent dangers warranting the mine closure and withdrawal of miners; and (2) whether Island Creek violated the cited mandatory safety standard in issue in Docket No. VA 91-48-R, and if so, whether the violation was significant and substantial.

Applicable Statutory and Regulatory Provisions

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

2. Sections 104(a), 105(d), 107(a) of the Act.

3. Mandatory safety standard 30 C.F.R. § 75.316.

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

Stipulations

The parties stipulated to the following:

1. The subject Virginia-Pocahontas No. 3 Mine is subject to the 1977 Mine Safety and Health Act.

2. The subject proceedings are subject to the jurisdiction of the Commission and the presiding judge.

3. MSHA Inspector Arnold D. Carico was acting in his capacity as a designated representative of the Secretary of Labor when he issued the contested section 107(a) Order No. 3354742, and contested section 104(a) Citation No. 3354743.

4. MSHA Inspector Claudy J. Scammell was acting in his capacity as a designated representative of the Secretary of Labor when he issued contested section 107(a) Order No. 3508496.

5. True copies of the subject orders and citation were served on the contestant or its agent as required by the Act.

6. On December 5, 1990, Mr. C. W. Settle, Island Creek's de-gas foreman, was with MSHA Inspector Arnold D. Carico at the No. 4 entry of the No. 9 development and took a methane reading at a location 1-foot outby the stopping and 1-foot down from the top of the roof, and he recorded 3.5 percent methane at that location (Tr. 188).

Discussion

The orders and citation issued in these proceedings are as follows:

Docket No. VA 91-47-R

Section 107(a) Imminent Danger Order No. 3354742, issued at 11:25 a.m., on December 5, 1990, by MSHA Inspector Arnold D. Carico, states as follows:

> Methane concentrations were detected coming through permanent stoppings erected across the bleeder entry connectors between the gob and the South Main bleeders at the following locations and in the following concentrations (as indicted by a Riken methane indicator): No. 2 entry of No. 10 development South (sic); No. 4 entry of No. 9 development South - 8.3%; No. 4 entry of No. 8 development south - 7.6%; Citation No. 3354743 is being issued with and as contributing to this order.

The inspector ordered the withdrawal of all underground areas of the mine. The order was terminated on December 6, 1990, by MSHA Inspector Claudy Scammell, and the termination notice states as follows:

> The methane concentrations coming through the permanent stoppings erected across the bleeder entry connectors between the gob and the south main bleeders have been reduced to 3.6% of methane or less in all entries from 11 development south to 8 development south.

Docket No. VA 91-48-R

Section 104(a) "S&S" Citation No. 3354743, issued at 11:25 a.m., on December 5, 1990, by MSHA Inspector Arnold D. Carico, cites an alleged violation of mandatory safety standard 30 C.F.R. § 75.316, and the cited condition or practice is described as follows:

> The ventilation, methane, and dust-control plan approved for this mine was not being complied with.

Item 10 of the plan requires that "Bleeder entries shall be connected to those areas from which pillars have been wholly or partially extracted at strategic locations in such a way as to control air flow through such gob areas, ..." Permanent stoppings were erected across all connectors between the gob and the south main bleeders at Nos. 8, 9, and 10 development, and had been plastered to minimize leakage from the gob to the bleeders. Methane was detected at the following locations and concentrations leaking through these stoppings: No. 2 entry of 10 development - 6/2%; No. 4 entry of 9 development - 8/3%; No. 4 entry of No. 8 Dev. - 7.6%.

According to mine management, the only locations where air is being intentionally regulated from the gob area are at No. 11 development (tailgate) connectors and No. 1 development connectors to the main bleeders and main returns.

The inspector did not include an abatement time as part of the citation. However, Inspector Scammell modified the citation on December 6, 1990, and fixed the abatement time as 9:00 a.m., December 20, 1990.

Docket No. VA 91-49-R

Section 107(a) Imminent Danger Order No. 3508496, issued at 11:45 a.m., on December 13, 1990, by MSHA Inspector Claudy J. Scammell, states as follows:

Methane concentrations were detected coming through permanent stoppings erected across the bleeder entry connectors between the gob and the south mains bleeders at the following locations and in the following concentrations (as indicated by a Riken methane indicator): No. 2 entry of No. 10 development south, 6.2%; No. 4 entry of 9 development south, 6.3%; No. 3 entry of 9 development south, 6.2%; No. 2 entry of 9 development south, 6.0%; No. 1 entry of 9 development south - 5.5%; No. 4 entry of 9 development south, 6.7%; No. 3 entry of 8 development south, 5.4%; No. 2 entry of 8 development south, 6.2%; No. 1 entry of 8 development south, 7.6%; Bottle samples were collected to substantiate this order.

The inspector order the withdrawal of all underground areas of the mine.

MSHA's Testimony and Evidence

MSHA Inspector Arnold D. Carico, testified that he is a mining engineer and is familiar with the subject mine and has visited it approximately 15 times since 1978. He confirmed that he visited the mine on December 5, 1990, with three other inspectors, after his supervisor James Bowman instructed him to conduct "a quantity/quality survey" of the active south gob area. He identified exhibit G-1 as a mine map containing the partial findings made by the inspectors on December 5. He confirmed that his duties include the review of mine and ventilation maps, participating in underground inspections relating to ventilation, and reviewing and recommending approval or disapproval of ventilation plans (Tr. 13-16).

Mr. Carico stated that he used an anemometer, a Riken methane detector, and measuring tapes during his inspection, that the equipment was properly calibrated, and that the Riken detector is generally accepted as an accurate tool for testing methane (Tr. 17).

Mr. Carico stated that he began his inspection along the No. 12 development and proceeded inby the longwall face along the development entries. He found no ventilation problems or any significant degree of methane anywhere in the mine up to that point. His initial examination took place at the longwall setup entries where he determined that the air was flowing from the No. 12 development toward the No. 11 development, and that this air flow was normal and expected. He found .2 to .3% methane, which he characterized as "very small amounts of methane." He then proceeded to the No. 3 and 4 entries, where he took air measurements which he found were acceptable. He then examined the "butt-offs," or "dead-end" entries which will eventually be connected in future development, and found that they were properly ventilated. He then proceeded to the No. 11 development bleeder connectors and found no ventilation problems (Tr. 17-19).

Mr. Carico stated that he next proceeded to the No. 10 development connectors where he found four permanent brattices installed across each of the four entries. He found that air was leaking through one of the brattices, and he tested the air to determine "what was located behind that stopping or brattice." He tested the air with a Riken methane indicator, and the test reflected 6.2% methane coming through the brattice in the No. 2 heading. Based on this test, he assumed that there was "a body of methane" behind that stopping. He confirmed that methane ranging from 5 to 15% is explosive, and that "with an ignition source and a sufficient amount of methane you could have a mine explosion" (Tr. 21).

Mr. Carico stated that when he initially found the 6.2 percent methane, he was concerned, but made no firm hazard

conclusions because of the possibility that it was "a localized problem and not an indicator of a larger problem and not an indicator of a problem or even a large body of methane." He believed that the methane may have been "a small body of methane trapped behind a single brattice" (Tr. 21).

Mr. Carico confirmed that when he found the methane in question he was aware of four prior mine fires, and at least one prior methane eruption from the mine floor at the longwall face. He believed that two of the fires had possibly occurred in 1973, prior to his MSHA employment, and he learned about them from discussions with his co-workers. A third fire occurred in 1976 or 1977, and others occurred in 1983, and they could have been the same fire which was never extinguished. He confirmed that MSHA's investigations of the prior fires did not determine the source of the ignitions for these fires. He believed that two of the fires occurred in the north gob area, and two occurred in the south gob area (Tr. 23).

Mr. Carico confirmed that he had previously issued an imminent danger order in April, 1990, for explosive mixtures of methane emanating through the brattices along the south bleeders adjacent to the No. 2 and No. 3 developments. These brattices were installed because roof falls which have occurred in the connectors made it impossible to regulate overflow from the gob to the bleeders at that location (Tr. 24). Mr. Carico was also aware of two prior imminent danger orders issued by Inspector Kenneth Owens in 1987 for explosive mixtures of methane through the brattices separating the gob from the bleeder entries at the top end of the south bleeders in the No. 4 development. He believed that these conditions were identical to the conditions which prompted him to issue his order (Tr. 26). He confirmed that the south gob area is approximately 8,000 feet by 5,000 or 6,000 feet.

Mr. Carico stated that the No. 10 development brattices were plastered "to almost an air tight condition" and that a minute amount if air was passing through the brattice hole where he found 6.2 percent methane. He confirmed that larger quantities of air was escaping around the brattice perimeter, but since he is not permitted to examine an area within 1 foot of the rib, roof, or face, he did not bother to make those examinations because he realized they would be invalid. He explained that tests near the roof and rib may result in erroneously high methane readings due to liberation from the surrounding coal strata and they would not be indicative of the air stream or the body of methane (Tr. 28).

Mr. Carico stated that he attempted to take methane readings at the other three brattice locations at the No. 10 development, but he could not do so because he could find no air leaking

through the brattices. He then proceeded to the No. 9 development where he began making similar examinations, and at the No. 4 heading, which he examined first, he found 8.3 percent methane coming through the brattice. At this point in time, he was becoming more concerned because it appeared that a fairly substantial body of methane was lying against the brattices in the bleeder connectors, and although he believed that a imminent danger was "probable," he reached no conclusion at that time, and believed that he needed to go further (Tr. 29).

Mr. Carico stated that he then proceeded to the No. 8 development where he examined the air coming through the brattice in the No. 4 entry, and he found 7.5 percent methane coming through the brattice. He then concluded that there was a substantial body of methane lying up against the brattices and that there was an "associated problem" with the ventilation system because the methane was not being diluted. He then decided to issue an imminent danger order, and verbally informed foreman Settle, who was accompanying him, of his decision to issue an order, and also informed him that he was issuing a section 104(a) citation for a violation of the approved ventilation plan (Tr. 30).

Mr. Carico stated that when he issued the order and citation, he believed that a methane hazard existed, and that "when you have an explosive mixture of methane the only thing lacking for an explosion is the ignition source" (Tr. 30). He further stated that "understanding the history of this mine--knowing the history of this mine I knew that there were possibly ignition sources associated with the gob" (Tr. 31). In the event of an ignition, an explosion would result. He concluded that there was a substantial body of methane in the gob area encompassing "probably twelve entries in the form of the bleeder connectors back to the gob and most probably be associated to set-up entries" (Tr. 31).

Mr. Carico stated that one of the possible ignition sources for the prior mine fires were roof falls in the caving areas of the longwall units. He indicated that the roof contains massive sand stone with layers of quartzite, and that quartzite is "highly sparked and has been known to ignite bodies of methane" (Tr. 32). He also believed that a face ignition could possibly propagate into the gob area and ignite the methane in the gob adjacent to the longwall face.

Mr. Carico identified other possible sources of ignition as welding or cutting along the face, open flames, bolting metals which could ignite methane emanating from the mine floor, and possibly spreading to the gob. He also believed that any work connected with ventilation repairs and adjustments in the bleeder entries, and sparks created by the use of hammers on the metal brattices, would be potential sources of ignition. A mine

explosion of any proportion would involve fatalities, and he believed that the entire mine and the 85 employees who were underground would be exposed to this hazard (Tr. 34). In view of the history of unexplained mine fires, and the possible ignition sources, he concluded that it was "fairly likely" that death or serious injury would have resulted if mine operations were to continue (Tr. 35).

Mr. Carico stated that he issued the citation because he believed that the ventilation system was inadequate because of insufficient air regulation between the bleeder entries and the gob to maintain methane levels at or below the explosive limit at safely accessible areas used for examinations (Tr. 40).

Mr. Carico identified exhibit G-4, as the approved ventilation plan, and he believed that the respondent violated section 10(a) which appears on page 4 of the plan, because the brattices erected across the entries were air tight and did not induce the drainage of gob gas from all portions of the gob (Tr. 42-43). Mr. Carico stated that longwall coordinator and acting mine superintendent Bill Meade confirmed that the only other place where air was being regulated was at the No. 1 development, and he (Carico) concluded that brattices were also constructed at the remaining No. 1 through No. 7 developments. Mr. Carico confirmed that the air intake for the gob area was in the No. 12 development, and he explained how the air was coursed through the area. He confirmed that he did not measure the airflow entering the gob (Tr. 43-44).

Mr. Carico stated that the citation "helped to define the cause of the imminent danger," which in this case was a body of explosive methane lying against the cited brattices, and that the issuance of the citation would provide a means for abating the violation (Tr. 46). He confirmed that the citation has not been abated, and that a termination date of December 20, 1990, was subsequently established. He confirmed that when he visited the mine the evening before the hearing, he found no significant changes which would cause him to terminate the citation. He further confirmed that he found that additional metal brattices had been installed between the cited brattices and the bleeder entrances at all locations from the No. 10 development to the No. 6 development, but he did not believe that these additional brattices would induce the drainage of gob gas from all of the gob areas, and would only result in less leakage or less exchange from the gob to the bleeder entrance (Tr. 48).

Mr. Carico confirmed that he took methane readings at the newly constructed stoppings, and although the results were significantly less, he was unable to physically examine the original brattices behind these newly erected stoppings to determine whether the previously found explosive mixtures of methane were still present (Tr. 48-50). He did not believe that

the new stoppings reduced the danger of the methane accumulations which prompted him to issue the order, but that they may have precluded an ignition source from the bleeder side of the stopping. He also believed that the work performed to construct the new metal stoppings introduced another potential ignition source (Tr. 51).

Mr. Carico stated that the stoppings and regulators were used to ventilate the gob area and to regulate the airflow through that area. Although the stoppings are part of the approved ventilation plan, a lack of sufficient regulators causing accumulations of methane would be a violation of the plan (Tr. 54). He confirmed that the ventilation schematic which appears on page 16 of the plan reflects two stoppings and two regulators in each set of entries, and that these are typical examples of the stoppings and regulators which he found in the No. 3 and No. 4 headings (Tr. 56).

Mr. Carico confirmed that he took some air bottle samples on December 5, 1990, but that they were lost in the mail. He stated that this did not affect the issuance of his citation, and he confirmed that bottle samples taken by Inspector Scammell a week later were received and analyzed (Tr. 65).

On cross-examination, Mr. Carico stated that he reviewed the ventilation plan in August, 1987, and that subsequent reviews are required every 6 months. He confirmed that as of December 5, 1990, the mine was in compliance with the plan requirements for the bleeders and the gob. He stated that since mining is dynamic, changed conditions might require re-regulation of the air, and if this is not done, a plan violation may occur. He confirmed that the inspections conducted by the other inspectors in the south gob return and other mine areas on December 5, 1990, did not result in any violations in those areas. He also confirmed that the area between the No. 10 development and the back of the active longwall reflected no problems with the ventilation in that area (Tr. 65-69).

Mr. Carico stated that the brattice which he initially tested was constructed of concrete block and a plastered over surface. He was not surprised to find the brattice and confirmed that it was used to control the airflow in the bleeder system to the bleeder entries. He was standing in the bleeder entry, and the gob was on the other side of the stopping. He explained that he tested the stopping by running his hand across the stopping face in order to feel any escaping air. After finding areas where air was coming through small "pinhole-type areas," he placed the small tube attached to the inlet end of the Riken methane detector in the crack and took a methane reading. He agreed that this test would not indicate what was going on in the bleeder. He confirmed that if he wanted to take a methane reading in accordance with the regulations he would have tested

12 inches from the roof, face, and ribs. However, since the brattice is only a ventilation appliance, and not a roof, face, or rib, there was no restriction as to where he could take his sample (Tr. 71-72).

Mr. Carico confirmed that he did not determine the quantity of air in the bleeder at the stopping area where he found 6.2 percent methane, and that he would expect the methane bleeding through the stopping to mix with the air in the bleeder and be carried through the bleeder entries and eventually out through the exhausting fan shafts. He stated that he was measuring gob gas at the brattices, and was not concerned about the gob gas at that particular location. His concern was that his test indicated the possibility of a larger body of methane than what was indicated by his test (Tr. 74).

Mr. Carico stated that methane gas coming out of a borehole can be measured, but that he took no such measurements. He agreed that boreholes which bleed off methane out of the mine enhance the available underground ventilation. He also agreed that the gob area of the mine in question is expected to have explosive concentrations of methane in some locations, and that it is impossible to get it all out of the mine (Tr. 75-76). He explained that the methane is in an area which liberates large quantities of methane and that vertical boreholes are drilled from the surface to intercept the gob fall areas where coal has been extracted to draw out the methane with vacuum pumps or fans (Tr. 77).

Mr. Carico believed that one would not expect to find gas behind the stopping if the bleeder system is functioning properly. He confirmed that he was familiar with the functioning of the mine bleeder system, and using the mine map as a reference, he explained how and where the air is coursed through the gob. He confirmed that one cannot safely walk through the gob area because of the hazardous roof conditions. He also confirmed that while some of the air may find its way into the actual gob area, it essentially ventilates the periphery of the gob, and the methane is supposed to come out of the gob area through the edges into the bleeder system and out of the mine (Tr. 79-83). He assumed that the stoppings were constructed to regulate the gob so that it would function in a manner that would keep explosive methane levels from exiting the gob at the bleeder connectors (Tr. 83-84).

Mr. Carico confirmed that his 6.2 percent reading was made at the stopping in the No. 2 entry of the No. 10 development, but that he could not take readings at the other stoppings in that development location because the leakage around the stopping perimeter was within a foot of the mine roof or rib and no readings could be taken there because they may be artificially high and not representative (Tr. 84-86).

Mr. Carico stated that he did not test the amount of oxygen going through the pinholes in the stoppings which he tested and that he does not usually make such oxygen tests unless he has reason to believe that there might be a problem with the flow of oxygen. He agreed that oxygen is definitely a factor in determining whether there is an explosive concentration of methane, and in the absence of any measurements of the oxygen coming through a pinhole, one cannot tell if there is an explosive mixture of methane behind the stopping "with a sole finding of my methane level" (Tr. 87).

Mr. Carico confirmed that unless certain precautions are taken, welding and cutting is not permitted in the bleeders which are return air courses. He agreed that welding is not a normal daily operation which is done in a return air course, and that it is even less likely that such work would be done in a bleeder (Tr. 89).

Mr. Carico confirmed that although he believed that the stoppings prevented the drainage of gob gas, the ventilation plan does not state where such drainage has to occur. However, he indicated that the plan states that drainage has to occur at "strategic locations," but that these words are not further defined in the plan. He confirmed that Island Creek may determine the strategic locations as long as it meets the requirement for controlling the airflow through the gob. However, the ventilation has to insure that explosive gas mixtures do not reach safely accessible areas where people are normally required to work or travel (Tr. 91).

Mr. Carico conceded that although he only referred to the second sentence of the applicable ventilation plan provision in his citation, he believed that all of the language was applicable. He agreed that the first part of the second sentence was complied with and that "the bleeder entries were connected to those areas in which pillars have been wholly or partially extracted" and that the bleeders are connected at sufficient intervals to control the gob gas as it comes out. He stated the basis for his citation as follows at (Tr. 94):

> Q. And so your basis for the citation was that you found some methane in explosive concentrations coming through a pinhole, you drew the conclusion that there was some amount of methane on the other side, is that correct, of the stopping on the gob side?
>
> A. That's correct.
>
> Q. And from that you concluded that the company's bleeder system was not working properly?
>
> A. Yes.

Q. Or was not constructed properly?

A. Yes, sir.

Mr. Carico agreed that except for the gob dome and fall area, the high place in the gob area, according to the map contour lines, is in the area where he took his measurements and issued the citation and order. He also agreed that methane is lighter than air and will leak out at the highest place it can even though it is enroute out of the mine (Tr. 97).

In response to further questions, Mr. Carico confirmed that in testing the face of the brattices, he placed his Riken methane monitor in the cracks because any sampling outby the face of the brattice would not have given him "a true representation of what was actually behind the brattice" and any methane would have been diluted outby the brattice (Tr. 98). He believed any explosive methane leakage from a roof or face where coal is being cut would constitute a controlled, small body of methane, or "face ignitions or pops," as distinguished from a "substantial body of methane and apparently not controlled" behind the brattices in question (Tr. 99). He confirmed that face ignitions have occurred at the mine, but he could not state how many may have occurred or when they occurred (Tr. 99).

Although Mr. Carico stated that there was a potential for a face ignition at the longwall face, he stated that "I'm not prepared to, you know, evaluate as to what the potential is" (Tr. 100). He confirmed that the longwall working faces were "several thousand feet" from the stoppings where he found leakage, and while there are some established bleeder points for the abandoned north gob area, there are none for the cited south gob area. He further confirmed that the mine operator is required to examine the gob area and stoppings weekly by traveling the bleeder entries and examining the brattices "to see that they're still serving the purpose for which they were erected" (Tr. 103).

Mr. Carico stated that methane "face inundations" have occurred at the mine in 1985, and he explained that this occurs "where a quantity of methane is released at a rate which the available ventilation is not able to dilute it" (Tr. 104). He stated that this occurred in a new longwall panel where coal was being extracted, and the floor cracked and released several hundred thousand cubic feet of methane in a matter of minutes and "over-rode" the intake air being delivered on the longwall face and "backed the ventilation up for at least a hundred feet outby the longwall face" (Tr. 104). If there had been an ignition, he "supposed" that it could have traveled 2,000 feet (Tr. 105). He confirmed that this incident, as well as the prior mine fires, were within his "collective knowledge" when he issued the imminent danger order on December 5, 1990, and that those factors "definitely contributed to me having more concern possibly for

this mine or, in fact, for this mine that I might have for some of the other mines, you know, where no findings like that had been made, where those occurrences hadn't taken place" (Tr. 106).

Mr. Carico stated that if methane exploded next to a stopping, it would blow out the stopping and leave an open area for methane to flow out of the gob. Any resulting negative ventilation pressure would then draw uncontrolled bodies of methane out through the open bleeder entries and "involve the entire mine" (Tr. 114). Mr. Carico believed that the method he used for testing for methane in the gob on December 5, was sufficiently accurate to indicate that the condition existed. He further stated that he would have liked to have had better access to the gob area to make a better determination as to how the gob was being ventilated, and would have liked to have been able to determine exactly how large the body of methane was in order to know "the entire facts concerning it." However, he could not do this in this case because the gob area was physically blocked by cribs which were installed from rib to rib, and he would only be able to go inby for 10 or 15 feet. If he were able to travel behind the gob area, and assuming it were safe to travel there, he may have been able to determine the airflow along the set-up entries, or whether it was completely stagnant (Tr. 115). He confirmed that in all of the places where he tested the stoppings, they were all physically obstructed and he could not enter the gob areas (Tr. 116). He was aware of no other method in the ventilation plan for checking in behind the stoppings, and he did not know how Island Creek checked these areas (Tr. 117).

Mr. Carico confirmed that he did not review the preshift reports for the periods prior to December 5, to determine whether the areas had been inspected and whether any methane readings were previously taken, and he stated that this "was an omission on my part" (Tr. 117). In response to further questions, Mr. Carico explained how long it took him to perform his tests with the Riken methane detector, and he confirmed that it was his judgment that there was an approximate volume of "tens of thousands of cubic feet of methane behind the stoppings," and that his conclusion in this regard was "based on my findings of what was passing through that stopping and knowing that these areas were interconnected inby those stoppings" (Tr. 122).

MSHA Inspector Claudy J. Scammell, stated that he was familiar with the subject mine and that he conducted regular inspections there for approximately 6 months in 1987 and for approximately 9 months in 1990. He confirmed that he was with Inspector Carico on December 5, 1990, but that he went to the intake side of the longwall tail at the No. 12 development to conduct his inspection, and upon inspecting that area he found nothing out of the ordinary. He confirmed that he learned that Mr. Carico had issued his order and citation for methane accumulations at the bleeders on his way out of the mine and that he

discussed them with Mr. Carico after he had ordered the withdrawal of miners.

Mr. Scammell stated that he returned to the mine the next day on December 6, with his supervisor and went to the area where Mr. Carico had issued his December 5, order. He started his inspection at the No. 11 development, and proceeded to the No. 8 development. He detected no changes in the stoppings or the conditions previously cited by Mr. Carico, and he took methane readings with a Riken and a CD210 methane detector. The Riken detector had been calibrated that same morning, and the readings which he took included the "highest" reading of 7.6 percent methane. He did not know what the lowest reading was, but stated that "there were some below 5%." The only changes which he observed with respect to the stoppings cited by Mr. Carico "was that the stoppings had some plaster added to them, trying to seal the cracks, I presume." He confirmed that he took his methane measurements approximately an inch to a half-inch "right near the cracks where air was coming through," and that he measured the methane at each of the entries in the east development, and the highest reading he measured was 3.6 percent methane. Under the circumstances, he terminated the order previously issued by Mr. Carico on December 5 (exhibit G-2, Tr. 126-132).

Mr. Scammell stated that he next visited the mine on December 13, 1990, with his supervisor to determine whether any stopping changes had been made and to follow up on the December 5, citation issued by Mr. Carico. He confirmed that he checked the bleeder entries at the No. 11 development, and found "nothing out of the ordinary," and found no excessive or explosive levels of methane (Tr. 133). He then proceeded to the No. 10 development, where he tested the No. 4 and No. 3 entries and found methane below 5 percent. He could not recall the exact readings, but confirmed that they were below 5 percent. He then tested the No. 2 entry and found 6.2 percent methane. Although he believed that this reading warranted an imminent danger order, he decided not to issue it at that time because he wanted to make sure that this was not a pocket of methane in an isolated area, and wanted to check further.

Mr. Scammell confirmed that he was aware of the prior mine fires of unknown origin. Two of the fires occurred prior to the time he became an inspector, and at least three of them were gob fires. However, he had no idea on which development or which end of the gob the fires occurred. He believed that roof falls had occurred in the gob area, and stated that "the gob wall always has falls on it. That's the purpose of it" (Tr. 135).

Mr. Scammell stated that he then proceeded to the No. 9 development and found methane in excess of 5 percent at all four of the bleeder entries where he took methane readings at the stoppings where he detected air coming through the cracks. He

confirmed that he took his readings a half inch or an inch close to the cracks, and found 6.3 percent methane at the No. 4 entry. Although he believed at that time "that there was a methane problem again," he wanted to check across to at least the No. 8 development before making any final imminent danger decision. He then proceeded to take additional readings, and the last reading he took was in the No. 1 entry of the No. 8 development where he measured 7.6 percent methane. He confirmed that all of his readings for a row of eight entries were above 5 percent methane, and he then advised company representative Workey that there was an imminent danger and that he was to withdraw all miners (exhibit G-5, Tr. 135-138).

Mr. Scammell stated that at the time he issued the order he believed that the methane concentrations in excess of 5.0 percent leaking through the stoppings in question presented a hazard, and that the presence of an ignition source "would be all that it would take to blow up the entire mine" (Tr. 139). He believed that any sparks from a roof fall, which was possible in the gob area, would constitute an ignition source. He confirmed that one cannot really determine the kinds of falls in the gob area, but that "constant" falls are occurring where the coal is being mined. When asked about the frequency of any falls, he stated "it's quite often. I ready don't know" (Tr. 140).

Mr. Scammell stated that any methane ignition occurring at the longwall face could possibly propagate from the face line of the longwall, but that his "major concern" was a gob roof fall. He confirmed that there were no other ignition sources that posed a risk of igniting the methane which he found. He believed that any methane explosion resulting from a gob roof fall would result in fatal injuries to the 85 miners on the day shift, and that such an event was highly likely if normal mining operations were continued (Tr. 141).

On cross-examination, Mr. Scammell stated that he was concerned about "a combination" of roof falls in the bleeder and the gob on either side of the stopping, "just in that general area" (Tr. 143). He confirmed that he did not know what was behind the stoppings when he made his methane readings, and that it was possible that the roof on the gob side of the stoppings was "cave tight." He then conceded that he was not concerned about any roof falls other than behind the stoppings, and that a roof fall 100 feet away from any methane would not make any difference (Tr. 142-145). Mr. Scammell confirmed that he made no methane readings out in the bleeder entries and that any methane bleeding through the stoppings into the bleeders would be diluted (Tr. 146). He also confirmed that he took no air measurements to determine how much air was going into the gob area from the No. 12 development area, and he had no knowledge as to how much air was coming "out the other end" (Tr. 148). He conceded that he did not know what was going on in terms of ventilation in the

gob, and that he was just concerned about what he thought was on the other side of the stoppings (Tr. 148).

Mr. Scammell confirmed that he took three bottle samples "as close to where I got the original methane readings" to substantiate his order, and he identified exhibit C-1 as a phone message received from Inspector Carico communicating the result of the bottle samples (Tr. 158). Mr. Scammell confirmed that he made nine Riken methane readings to support his order, but only took three bottle samples. He confirmed that he took no bottle sample at the stopping where he found 7.6 percent methane because he had no more bottles. He confirmed that the bottle samples showed 5.4 percent, 5.09 percent, and 5.75 percent methane, but he was not sure of the locations where these samples were taken (Tr. 160-163).

Roy D. Farmer, testified that he has worked at the mine since October 1975, and that he serves as chairman of the safety committee and president of the UMWA Local 1640, which represents the miners. He stated that in his capacity as the miner's safety representative he began inspecting the bleeders in 1976, and has continued to do so to the present. He has made various methane tests in the areas in question with a Riken gas detector and confirmed that this instrument is generally accepted by the mining industry for testing methane and that the detectors are calibrated by the company's safety department. He stated that he has in the past found methane in excess of 5 percent, and if methane at that level is found at the stopping line all miners are immediately withdrawn from the mine (Tr. 166-169).

Mr. Farmer stated that beginning in 1976, each of the developments had a regulator in the No. 1 and No. 4 entry of each development. One could travel through the regulators into the set-up entries to check for methane and withdraw miners if the methane exceeded 5 percent. As the mine developed and the gob area increased there were problems with controlling the methane and the company erected permanent stoppings where the regulators used to be. Since this was done, the only method for checking the methane is to feel along the stoppings for any leakage and insert the Riken detector into the crack to check for methane. If one finds a reading above 5 percent, it was his opinion that it would be indicative of a buildup of methane behind the stopping in the set-up entry (Tr. 170).

Mr. Farmer stated that prior to the sealing of the regulators, any increased levels of methane could be dealt with by opening or closing the appropriate regulator to allow air to flow to the set-up entries to sweep out the gas. In his opinion, the sealing of the regulators has resulted in the "bottle necking" of the methane and "there's no where for it to go." Any detection of methane coming through the stopping would, in his opinion, indicate that the air is not sweeping through and is not being

properly regulated to move out the methane. Mr. Farmer did not know why the stoppings have been erected, and in his opinion, a door could be installed in a stopping to allow one to go through and check the other side with a Riken detector rather than putting it against any "pinhole" crack in the stopping itself. He believed that such a door in the stopping would solve the problem, and that the problems which have been created have resulted from the removal of the regulators and the erection of solid stopping lines over all four connecting entries in each of the developments. This prevents anyone from physically going into those areas to check them and prevents any adjustments to the air sweeping those areas (Tr. 171).

On cross-examination by Mr. Biddle, Mr. Farmer confirmed that he knew of no reason why the company would want to keep methane in the gob area behind the stoppings. He stated that the decision by mine management to eliminate the regulators began "in the eighties" when a "new management team came on board" and someone made the decision to erect the stoppings. He agreed that the decision was made for some reason, but he did not know the reason. He confirmed that prior to the erection of the stoppings, if 5 percent methane was found anywhere in the mine, including the stopping line, the set-up entries, and the bleeder connectors, the men were withdrawn from the mine. He confirmed that no one was withdrawn if 2 percent methane were found in the bleeders (Tr. 173). Mr. Farmer agreed that the purpose of bleeders is to take the methane out of the mine, and he agreed that in a "windy bleeder" with a "lot of volume of air going through," any methane which may be 80 percent will decrease in volume as it courses through the bleeder (Tr. 174).

In response to questions by Mr. Jackson, Mr. Farmer stated that the bleeder system is designed to sweep the periphery of the set-up entries. The gob "dome area," or "big fall area" however, is sealed off and supported by barrier block so that air can sweep through that area. He confirmed that high levels of methane may go through a bleeder at times due to the release of pockets of methane, and if they are in the explosive range, it would not be safe for anyone to be in the bleeder (Tr. 175-176).

Mr. Farmer stated that he is familiar with the mine ventilation plan, and that he or a member of the safety committee has reviewed the plan and expressed the union's concerns about the stoppings, but have received no response. He distinguished the gob area from the set-up entries which he believed was the periphery area where the sweeping of methane was needed. He believed that regulators at different locations in the set-up entries could be opened and closed as needed to redistribute and redirect the air, and without these devices, there is essentially no control of the air. He further believed that more regulators are required in the south bleeders to keep the methane below 5 percent (Tr. 183).

Mr. Farmer confirmed that during his inspections, both he and the company have found methane in excess of 5 percent "numerous times" in the same manner found by the inspectors, and men were withdrawn by management. Corrective action was taken by removing a stopping "sometimes," opening or closing a regulator when it was there, plastering the stopping to seal it tighter, or erecting another stopping to prevent anyone from going where the methane is. It was his understanding that the company in this case erected metal stoppings in the No. 6 through No. 10 developments and left a panel out of each side of the stopping so that air from the bleeders could course around the stopping (Tr. 185). However, the inspector cannot travel to the original stopping areas to determine whether any methane is still there because of the new metal stoppings which are barriers.

Contestant's Testimony and Evidence

Eddie G. Ball, mine manager, testified as to his duties and responsibilities and his mining experience. He stated that the mine is located in Vansant, Virginia, and that it is a shaft mine approximately 1,400 feet underground. The annual coal production for 1990 is 1.7 million tons, continuous miners are used for mine development, and the primary source of mining is the longwall system. The mine employs approximately 330 miners, including 276 hourly miners, working three shifts a day (Tr. 189-192).

Mr. Ball identified exhibit C-2 as a mine map, and he confirmed that the green markings show the intakes, and that the returns are marked in red. The red arrows at the areas across the map show the gob areas which are previously developed and mined-out longwall panels where the roof has caved in after the coal was extracted. The gob areas are ventilated by intake air which is coursed through the gob from the head and tail of the longwall and splits off the longwall, and he explained how the air travels into the bleeder system to ventilate those areas. Mr. Ball confirmed that the longwall panels from the No. 1 through No. 10 developments were 5,620 feet long, and that the last two panels have been shortened (Tr. 192-199).

Mr. Ball stated that a sealant material is used to seal the stoppings, and he confirmed that the stoppings were originally installed as the developments progressed in order to control the air. The regulators are still in place, but they are closed and sealed so that the pressure can be controlled "to make the gas flow in the way we want it to and get it to mix to come out in an acceptable manner." If the stoppings were removed, he would lose control of the air and there would be no way to direct it. This will result in a high concentration of methane coming out early into the bleeder system and he would be unable to control and push the air across the old set-up entries. The loss of pressure would result in a concentration of methane into the bleeder system and "the rest of the gob area will go dead" with no air

going through. The stagnate air will result in high concentrations of standing methane in each bleeder connector (Tr. 201).

Mr. Ball confirmed that he was familiar with the mine ventilation plan and its bleeder system provisions, and he believed that he was in compliance with the plan. He stated that the bleeder system has been previously inspected by MSHA, that three ventilation surveys were conducted by MSHA prior to Inspector Carico's inspection, and that he was informed that the ventilation system was in excellent condition. He confirmed that Mr. Carico first informed him in April, 1990, that the ventilation system was out of compliance (Tr. 202).

Referring to the applicable ventilation plan provision, Mr. Ball stated that each of the numbered developments shown on the mine map are connectors to the bleeders and that they are mined into the bleeder from each development as it is driven, and that each of the four entries in the developments are connected at strategic locations. Although stopping have been erected across the entries, he still believed that there is a connection between the gob and the bleeder even though the stoppings are there. He is satisfied that these connections are at strategic locations and that the stoppings control the air flow through the gob area in such a way as to minimize the hazard from expansion of gob gases due to atmospheric change. If the stoppings were removed, he would be out of compliance with the ventilation plan provision in question because he would be unable to control or direct the air or methane to any given location (Tr. 204-205).

Mr. Ball stated that he was familiar with the December 5, order issued by Mr. Carico, but was on vacation when it was issued. However, he returned to the mine to investigate the matter, and learned that the methane readings taken to support the order were being made in the stopping pinhole cracks and not from a distance of 1-foot where mine management makes its readings. Mr. Ball disagreed with the inspector's belief that methane readings 1-foot outby any area being tested are limited to face areas, and he believed that the 1-foot distance for taking such readings apply to all mine areas that may be tested, including stoppings (Tr. 206).

Mr. Ball disagreed with Inspector Carico's December 5, imminent danger finding because he believed that any explosive mixtures of methane are migrating out of the gob area and are mixed and diluted with the air to bring them to an acceptable level where people are expected to travel. He confirmed the existence of bore holes which are drilled into the gob to liberate the methane from the top of the gob area to the surface so that it does not get into the mine ventilation system. He was not concerned about any explosive concentrations of methane on the gob side migrating to the stoppings because he believed that the stoppings and bleeder system were intended to allow the

methane to migrate into the bleeder system at the stopping locations (Tr. 209).

Mr. Ball confirmed that he also investigated the December 13, order issued by Inspector Scammell and discussed it with the inspectors. He learned that the inspectors were "getting the methane through the cracks, the same as on December 5th. They really didn't know what to do about it." He confirmed that the inspectors had some recommendations, which he followed, but this did not cure the problem because the removal of the stoppings would have resulted in the loss of control of the air (Tr. 210). Mr. Ball confirmed that the mine liberates approximately 20 million cubic feet of methane a day from all sources, and that it is released from the mine strata as it falls behind the advancing longwall. In addition to the boreholes, the mine has an underground degasification program for removing methane before coal is mined by means of a pipeline which removes methane through negative pressure and pipes it to the surface (Tr. 211-212).

On cross-examination by Mr. Jackson, Mr. Ball stated that notwithstanding the erection of the stoppings, the bleeder entries are nonetheless still connected to the gob. He explained the air flow through the developments and gob, and confirmed that Island Creek's ventilation department has advised him of the direction and amount of air flow through the gob areas, and that he has made these determinations by observing the direction of air by throwing a hand full of rock dust in the air. He also confirmed that he can measure the air, and has done so, but that he did not know the percentage of air splitting at the face on December 5 or 13 (Tr. 213-218).

Mr. Ball did not believe that the methane tests by the inspectors in the stopping cracks were representative of the air behind the stopping or what was in the bleeder system. He did not believe that there were big pockets of methane behind the stoppings, and he suggested that methane rises to the top of the stopping because it is lighter and this would explain why some of the methane readings at the top of the stopping were higher than those made down against the floor. He believed that the air in the stopping cracks was mixing with the methane, and he pointed out that if the air were not mixing with the methane, there would be 100 percent methane behind the stoppings and not the smaller amounts found by the inspectors. He believed that the air coming through the stopping cracks where the inspectors made their tests was air coming off the longwall through the gob and bleeder system and mixing with methane behind the stoppings trying to course it into the bleeder system as it is supposed to (Tr. 226).

Mr. Ball confirmed that the regulators which have been sealed were adjustable, and that attempts were made in the past to remove some stoppings and open up some regulators to deal with

the methane problem, but that the stoppings were replaced because pressure was being lost and the air could not be controlled. This was also done in April, 1990, when the mine was down for 5 days while certain stoppings were opened up and others erected in an attempt to address the problem. He confirmed that the April order was issued "in a complete different area from where we are now," and that stoppings were erected in the area where the present orders were issued (Tr. 227-231).

On cross-examination by Mr. Mullins, Mr. Ball confirmed that some of the locations along the longwall gob areas in question have been partially blocked by the erection of stoppings, and some have not, and that the purpose of partially blocking some of the areas is to restrict airflow. He reiterated his view that opening too many entries will result in a loss of pressure and control of the air flow. He further believed that the ventilation plan "works fine for me," and that the use of the bleeder entries comply with the plan (Tr. 232-237).

Mr. Ball confirmed that metal "Kennedy" MSHA approved stoppings were recently installed in front of the cited stoppings in an attempt to address the order of December 13, and he was informed that MSHA was concerned about the migration of methane from the gob into the bleeder system and that by checking the pinholes in the stoppings they could tell there was a buildup behind the stoppings. The Kennedy stoppings were installed to prevent any buildup behind them and he was not prohibited from doing this. However, MSHA would not abate the order and took the position that the inspectors had to return to the original areas where they tested but they could not do so because of the erection of the new stoppings. He confirmed that no methane levels or any imminent dangers were found at these new areas, and Mr. Ball suggested that if he had installed the Kennedy stoppings earlier, there would have been no orders because there is no methane at those locations at the present time (Tr. 247).

In response to further questions, Mr. Ball confirmed that strategic locations of the bleeder connectors are determined by management with the assistance of professional ventilation staff people who analyze the air flow needs for the mine. He stated that he was initially informed that the inspectors were concerned about methane leaking into the bleeder entries, but that their position has changed into a concern for methane build-ups behind the stoppings (Tr. 251-252). Mr. Ball stated that while he did not doubt the methane readings taken by the inspectors, he questioned the consistency of the readings taken at the higher and lower pin hole locations where air is leaking through a stopping, and pointed out that since methane is lighter than air it will rise to the top of the stopping. He also pointed out that company mine examiners have regularly tested for methane 1-foot outby the stopping and have always used this as a reference point, and they have never been told to use the methodology

used by the inspectors in these cases. He saw no distinctions between a stopping surface and the face, rib, roof, and floor of a mine where MSHA requires methane tests 1-foot from those locations.

Mr. Ball believed that any methane tested against the stopping must have a chance to dilute, and that it was incorrect to place the methane detector tube in the pinhole itself because it does not result in a true reference of what is behind the stopping. Since gas is lighter than air, by checking higher up on the stopping there could be a small pocket of methane in one corner of the stopping which is still trying to come through the stopping by pressure which is taking it out (Tr. 254-255). Mr. Ball stated that the consistent high methane test results by the inspectors is based on the highest readings at the different developments which they tested, and that if they made five tests and received five different readings, they will record and use only the highest reading (Tr. 255).

Inspector Scammell was recalled by the court, and he confirmed that when he conducted his methane tests at the face of the stoppings and found high readings, he made several checks to make sure that they were "constant and holding." He further confirmed that he would have made three or four readings at each of the stopping pinhole locations where he could feel the air, at the top, bottom, or middle of the stopping, but would only record his highest reading as the basis for the order. He followed this same procedure at each of the bleeder entries where he tested. When asked to account for the lower readings, he responded "that could vary on the half where the crack is. I don't really know. It may be the size of the crack. I have no idea" (Tr. 258).

Mr. Scammell stated that if three or four methane readings showed less than an explosive mixture of methane behind the stopping, and one measurement indicates an explosive mixture, he would conclude that "it is all bad," and he would also conclude that the methane was being diluted at the locations where the first three samples showed less than an explosive mixture (Tr. 259). Mr. Scammell had no knowledge of the range of all of the readings which he took, but stated that "it wasn't one or six percent. It was more like maybe four to six percent" (Tr. 259).

Mr. Scammell confirmed that when he returned to the mine on December 6, to check on the December 5, order issued by Inspector Carico, he terminated the order after taking additional methane readings. When asked why he did not also terminate the December 5, citation issued by Mr. Carico, which was based on the same methane readings which served as the basis for the order, Mr. Scammell explained that while the methane readings were down and would support the termination of the order, he could not terminate the citation because he could find no changes which were made in the ventilation system, other than the replastering

of the stoppings, and he felt that Island Creek was still out of compliance with the ventilation plan because no ventilation system changes were made (Tr. 3). He believed that the reduced methane readings were the result of the mine being idled by the order and not in production, and while the imminent danger no longer existed, "the citation wasn't cleared up as far as making changes in their bleeder system for this to happen again" (Tr. 4). The miners went back to work after the order of December 5, was terminated, and he extended the abatement time for the citation to December 20, and he would normally follow up on the citation to determine whether any ventilation changes or adjustments have been made (Tr. 5). Mr. Scammell confirmed that the methane readings which he took on December 6, confirmed that the methane through the pin holes was reduced, and that the ventilation moved the methane away (Tr. 6).

Richard E. Ray, Ventilation Manager, testified that he holds a B.S. degree in mining engineering, has 11 years of experience in mine ventilation, including 7 years as a ventilation engineer with Jim Walter Resources. He explained his duties and confirmed that they include the design of ventilation systems for Island Creek's Virginia Mine Division, and directly working with the operational people at the mine in question. He confirmed that he is familiar with the mine ventilation system, the gob area, and the No. 1 through No. 12 development areas. He identified exhibit C-2, as a reproduction of a mine map which he recently prepared, and he explained the ventilation in the south gob (Tr. 7-12). He confirmed that he and a team of engineers conducted a survey of the ventilation system on December 12, 1990, and that they measured 225,962 CFM of air being directed toward the longwall face in the No. 12 development intake, 54,960 CFM of air across the longwall face, and the 170,000 CFM balance was directed toward the top end of the bleeders. He described the air (CFM) coursing through the other relevant development locations (Tr. 13-18).

Mr. Ray stated that the stoppings are installed to ensure proper airflow through the entire gob and to insure that the north end of the gob "does not go dead." He stated that positive ventilation pressure must be maintained to insure that the air is ventilating the gob, and he explained the airflows and direction of air flow at the headgate of the longwall at the No. 12 development face to the top of the No. 1 development and through the gob and set-up entries. He confirmed that the amount of air going into the bleeder system is for the purpose of diluting the methane which is being drained from the gob area. In his professional opinion, and based on his air measurements and knowledge of the system, he is satisfied that the gob is being ventilated (Tr. 18-24).

Mr. Ray believed that the stoppings in question were installed before he was employed by Island Creek in 1986. He

confirmed that several efforts were made to remove some of the stoppings when the orders of December 5 and 13, were issued and he explained what was done. He confirmed that the removal of the stoppings resulted in worse problems from the No. 9 development to the No. 1 development in terms of gas coming through the cracks in the stoppings and out of the top of the No. 1 development regulator. He also explained that holes or "windows" were knocked out in a number of stoppings to allow air flow to travel from the gob into the bleeder system, and that this resulted in higher concentrations of methane at those locations and at the outby locations at the top of the No. 1 development. After a day or so, the stoppings were resealed. Additional efforts were made to redirect the air to the south bleeders, and Kennedy stoppings were also recently installed and the methane through the stoppings has been reduced, but as of the hearing date, the December 13, order had not been terminated by MSHA (Tr. 25-36).

Mr. Ray confirmed that bore holes and vacuum pumps are used to draw methane from the mine, and he explained where the holes are located and the measured methane flows from the holes (Tr. 36-41). He did not believe that the methane readings taken by the inspectors would be an accurate indication of what was behind the stoppings at the locations where the readings were taken. As an example, he cited one bore hole location within a couple of hundred feet of where "those tens of thousands of hypothetical cubic feet of methane" were located and he confirmed that only 167 CFM of 30 percent methane was being exhausted from that hole. This reading was taken during the ventilation survey on December 12, the day before Mr. Scammell's order was issued. Readings taken on December 5, were very similar to the one taken on December 12 "within a few CFM's and within a percentage point or two of the thirty percent" methane (Tr. 42). Since methane is lighter than air and seeks the higher spots, he would expect the higher gob elevation areas to have higher concentrations of methane (Tr. 43).

Mr. Ray confirmed that he was familiar with the ventilation plan provision cited by Mr. Carico, and he was of the opinion that it was not violated because his survey pressure differentials reflect the noted airflow volumes coming out of the top and bottom of the No. 1 development, and one can deduce from these air flows that they are going through the active gob current. He further confirmed that Mr. Carico did not discuss the citation with him, and although the survey was done after the violation was issued, prior data was available, but Mr. Carico did not consult it and did not speak to anyone in the engineering or ventilation department (Tr. 46). Mr. Ray did not believe that one can tell whether a gob is being ventilated adequately by taking measurements with a Riken detector at a pinhole at a stopping or several stoppings at the top end of the gob, and that a survey similar to the one made on December 12, would be necessary to make such a determination (Tr. 50).

On cross-examination by Mr. Jackson, Mr. Ray confirmed that he did not know the methane concentrations in the set-up entries of the No. 8 development because that area is inaccessible. He did know the methane concentrations of the bore hole a few hundred feet from that location, and it was below 40 percent. Since gas flows from high pressure to low pressure, he also knew that the bore hole gas was being pulled from the south, but he could not prove the range of influence of that bore hole (Tr. 50-52).

Mr. Ray stated that it was his understanding through conversations with mine management that the inspectors wanted to open up all of the connectors, and that Mr. Carico indicated that air should be brought out of some of the connectors to the regulators rather than stopping them off (Tr. 53). Mr. Ray confirmed that work on the No. 12 development panel began in July, 1990, and that additional bore holes were established in that panel and the No. 11 panel to deal with increased methane liberation resulting from higher coal production in those areas (Tr. 54-55).

On cross-examination by Mr. Mullins, Mr. Ray stated that equal emphasis is being placed on ventilating the entire gob area, as well as the periphery of the gob. Referring to the mine map, he described the flow of air through the development panels, and he indicated that somewhere near the top of the No. 1 development panel, air comes out at a volume of 22,351 CFM. He pointed out that the first bore hole ever drilled in the gob was No. 42, and that it has "been making methane since the April ventilation change," and since it was not "making methane" for 5-prior years, he believed that this was evidence of the fact that methane is being moved across the gob, and that air is coursing down the bleeder entries (Tr. 58). Mr. Ray further reiterated that the use of regulators has not proven successful at removing methane out of the stopping pinholes, and he explained his reasons for this conclusion. He believed that there is enough air to push all the methane through the gob with the current ventilation system, and if the stoppings were opened up, the back end of the gob at the No. 1 development would be unventilated due to high resistance (Tr. 61).

Mr. Ray explained the reasons for the recent installation of the second Kennedy stoppings, and he stated that MSHA's Arlington, Virginia office was concerned that the problems with the pinholes would lead to excess concentrations and volumes of methane leaking into the bleeders. Mr. Ray stated that he wanted to insure that if there was a possibility of this happening, that the methane was being diluted before it got into the bleeder system. The second stopping will encourage the mixing of air and any methane coming out of the cracks through the connector crosscut into the bleeders (Tr. 61-62).

Donald W. Mitchell, self employed mining engineer, was accepted as an expert in mine ventilation and mine fires and explosions, and his resume reflecting his educational background, experience, and published works in those fields were made a part of the record (exhibit C-5, Tr. 71-72). Mr. Mitchell stated that he has been familiar with the subject mine "since the early '70's," has been involved in a number of ventilation studies in the mine, and was actively involved in 1984 and 1985 when he made a study of the mine gobs, including the south gob, following a mine fire. He confirmed that the study was made in his capacity as a consultant for Island Creek. He further confirmed that he has within the past week, studied the ventilation of the south gob, including an analysis of the pressure differentials and the air flows, and comparing them with the "early '80's and '70's," using a map similar to exhibit C-2, which was given to him by Mr. Ray (Tr. 73). Based on this information, and map exhibits C-2 and C-3, and since air always flows from high to low pressure, he has concluded that any air movement within the gob will be away from the face and towards the south bleeder and towards the bleeders to the far left of the areas marked on map exhibit C-3 (Tr. 76).

Mr. Mitchell stated that one would expect to find methane in the south gob, and since methane is lighter than air, it will rise towards the highest point in the gob. Depending on the air quantity and velocity, the airflow will pick up from a little to a lot of methane and dilute it and move it away to someplace where it can escape from the gob. He confirmed that methane concentrations between 5 percent and 15 percent can be expected in the gob because at the point where the methane is being liberated it is close to 100 percent, and if it is zero at the pinhole locations in the stoppings then "by definition somewhere between zero and close to a hundred it is going to be 5 to 15 percent. That's just basic logic" (Tr. 78).

Mr. Mitchell stated that the purpose of a bleeder system is to dilute and sweep away, and thus render harmless, methane that is put into the bleeder system or escapes into the bleeder system. He explained that when there is a drop in the barometric pressure there is an increase in the volume of methane, and by having a bleeder and a pressure differential the increased volume of methane will, instead of flowing into the working face in the active workings, be forced away into an area in which there are no igniting sources. Mr. Mitchell was aware of no MSHA standards that require gobs to be examined for methane. However, bleeders must be traveled at least once a week where they are safe to travel, and they are examined for methane concentrations, roof and water conditions, and to insure a flow of air through the bleeder. Methane examination in a bleeder are made where the split of air from the gob enters the bleeder, and where these two splits join, methane must not be in excess of 2 percent. Various methane detectors or bottle samples are used to test the methane

in the bleeder split, and a detector is "typically used" (Tr. 81).

Mr. Mitchell stated that if the methane readings taken by the inspectors at the stoppings in the No. 8, 9, and 10 developments were taken at the higher elevation of the stopping, where leakage through the stopping is typically greatest along the roof line, one would expect to find higher concentrations of methane than any place else. This would be true in the No. 8, 9, and 10 developments because they are at the highest elevations in the gob, which is obvious from the contour lines shown on map exhibit C-3, and there is an abnormal release of methane in the gob due to severe barometric low pressures exhibited during the month of December. Under these circumstances, abnormal releases of methane would not be unusual or uncommon, and along the roof line behind the stopping there is probably a higher layer of methane that has not been diluted and swept away. This is to be expected because it is almost impossible to dilute and remove these layers of methane (Tr. 83-84).

Mr. Mitchell stated that if the methane readings were made at mid-height in the stopping, he would be concerned that there might be more methane behind the stopping than would be normal with a thin layer. If methane was found at the bottom of the stopping "this would tell us that indeed there's a potential for a larger volume of methane. * * * as you go from top to bottom the quantity of methane likely to be found behind the stopping increases." If eight sample readings are below the explosive range, and one was above, "that would tell us that there is a potential that we might have a layer of methane, and typically these layers are relatively thin. * * * in this specific area they might be thicker than one or two inches but such layers are not uncommon in the Pocahontas seam" (Tr. 84).

Mr. Mitchell was of the opinion that the use of the Riken detector to measure the methane at the stoppings by sticking the tube in the pinhole cracks would not result in an accurate reading because the Riken is a form of methanometer which he described as an "interferometer type" which is sensitive and calibrated for specific gases. Assuming the inspectors calibrated the detector for methane, it would be influenced by other gases which are normal to gobs, and particular the south gob. If there were an oxygen deficiency, the detector would read higher than true methane, and for each percent of oxygen deficiency one can anticipate at least .2 percent methane, and if there was 4 percent methane and a 1 percent oxygen deficiency, the Riken detector would read 4.2 to 4.3 percent methane. There would also be a .2 percent difference for each excess of 1 percent nitrogen, and with the presence of ethane, which is always present with methane in the Pocahontas coal seam, there would be a difference. As an example, he stated that 1 percent ethane is equivalent to a 3 percent reading of methane, and a one-tenth percent ethane

reading would be equivalent of another .3 percent methane (Tr. 85-86).

Mr. Mitchell stated that the Bureau of Mines published a paper in 1960, advising that the Riken detector not be used where the atmosphere being tested is not a normal air with methane mixture, and that "if you don't know the atmosphere then there's no way that you can understand what the reading is." He believed that the only way to make a proper determination is with a bottle sample, and he stated that if there is a major deficiency of oxygen, which is not uncommon in gobs, a 10 percent deficiency would be the equivalent of 2 percent methane (Tr. 86).

After reviewing a copy of the December 13, order, and the Riken methane detector test results recorded by Inspector Scammell (exhibit G-5), Mr. Mitchell compared those results with the three bottle sample results taken at the No. 8, 9 and 10 developments and analyzed by MSHA's laboratory (exhibit C-1). He confirmed that the Riken reading recorded on the order for the No. 2 entry in the No. 10 development shows 6.2 percent methane, and that the bottle sample taken at that same location shows approximately 5.5 percent (5.47) methane, or a difference of .7 percent. He explained that the difference was in the oxygen deficiency and methane concentrations, and that the Riken reading would be representative if one considered the oxygen and methane concentrations. He arrived at similar conclusions with respect to the Riken reading of 6.3 percent methane for the No. 4 entry in the No. 9 development, and a bottle sample result of 5.09 percent methane at that location, and the Riken reading of 6.7 percent methane for the No. 4 entry in the No. 8 development, and a bottle sample result of 5.8 percent (5.75) methane at that location (Tr. 87-89).

Mr. Mitchell was of the opinion that methane detected coming through a pinhole in a stopping is not a reasonably accurate indication of what is on the other side of the stopping and it would not be an indication that the gob was not being ventilated. He believed that the gob is being ventilated in accordance with established ventilation guidelines, and that with the numerous bore holes in the south gob, "the evidence leaves no question that there is a flow of air from the headgate entry of Number 12 development through and across the gob to the far reaches of the gob which is the intent of proper bleeder ventilation -- of gob ventilation" (Tr. 91-92).

In response to a hypothetical question based on the testing procedures followed by the inspectors with the use of the Riken detector, intermittent detections of explosive and non-explosive mixtures of methane, and knowledge of prior mine fires, Mr. Mitchell was of the opinion that it would not be reasonable to conclude that an imminent danger existed because "for an imminent danger to exist one must put it in context -- one must

put in an igniting source in conjunction with the methane" (Tr. 94). Mr. Mitchell stated that the sole source of any ignition in the area would be at the face area and that the face area has historically been associated with the past mine fires. He would also be mainly concerned about the pressure differential between the face and the stopping points because in prior years there was a problem with methane backing out on the face because the pressure differentials were half of what they are today (Tr. 95).

Mr. Mitchell believed that it was essential that the gob stoppings in the development areas in question remain intact and that to remove them "would be terrible" because it would result in "dead space" due to lower resistance. As an example, if this were to occur at the No. 9 development, the great majority of the air now flowing through and across the gob would go out the entry, leaving the gob to the left relatively unventilated. A barometric pressure drop could result in a flow of methane into the No. 12 development panel which is an active working area and where there are sources of ignition (Tr. 97). Mr. Mitchell did not believe that it was a bad practice to install regulators, provided they do not prohibit air flow through and across the entire gob, and he explained the various regulator problems which he believed were the reasons for sealing them. Mr. Mitchell agreed that "any time you have an uncontrolled gob you've lost your control over it and you have created an unacceptable hazard" (Tr. 97-99).

On cross-examination by Mr. Jackson, Mr. Mitchell was of the opinion that since a stopping concrete block is permeable, it could, over time, accumulate methane within the block, and if a pressure differential were introduced in the atmosphere, the block would liberate methane (Tr. 100). He stated that methane would gravitate to the No. 8, 9, and 10 developments because those areas are at the highest elevation. The elevation has nothing to do with the ignition characteristics of methane which do not change because of any higher elevation, and that "methane ignition characteristics are specific characteristics no matter where it be" (Tr. 104). He confirmed that methane layers are not uncommon in the mine coal seam, and that the critical factor in disbursing or mixing any layers of methane would be the velocity of the air flow (Tr. 105). He explained that the method for determining the amount of air flow velocity necessary to disburse a layer of methane involves "a rather complex formula" which he worked out in 1983. Based on the air flowing through the area in question, he believed that "in the south bleeder there is a low probability for a layer to form. I would say that the south bleeders are well ventilated within the state of the art" (Tr. 106).

Mr. Mitchell stated that assuming the inspectors had "soda lime and dry-right" in their Riken detector scrubbers, the difference in their Riken methane readings and the laboratory

bottle sample results would be the presence of methane and oxygen, and excess nitrogen in the three samples. He confirmed that ethane gas is flammable, and while the presence of ethane does not make the gas any safer "it does raise questions as to the proper use of a Riken for circumstances that would lead to a closure of the mine" (Tr. 107). He conceded that although these differences do not detract from the fact that the methane mixtures were explosive, and makes no difference in this case, he nonetheless believed that it is improper to base an imminent danger determination solely on the use of a Riken detector unless you know what the atmosphere is where you are testing. He stated that "had these samples come back, and they could have, with much lower percent oxygen then you might have had a closure order issued without any reasonable basis" (Tr. 109).

Mr. Mitchell believed that any indication of explosive levels of methane found by an inspector with a Riken detector should trigger further inquiries on his part to determine whether or not ignition sources are readily available, and that any determination in this regard would require him to go to the working face to determine whether there are any ignition sources which would create an imminent danger. Mr. Mitchell stated that "we could fill this room with methane and there is no hazard as long as we don't flip a switch" (Tr. 110).

Mr. Mitchell confirmed that major roof falls have occurred in the south gob area from the stoppings in the set-up entries into the gob (Tr. 111-112). He also agreed that there could be falls within the gob, but he did not believe that it was reasonable to believe that such falls could by themselves be an ignition source for methane in the gob. He confirmed that the basis for this conclusion is his extensive study and expertise in frictional ignitions. He pointed out that the only experience relied on by the inspectors for any potential frictional ignitions is limited to the mine in question. Since he (Mitchell) was aware of the conditions leading to the mine ignitions in the past, he assumed that the inspectors had that same knowledge (Tr. 114).

Mr. Mitchell confirmed that he was familiar with the MSHA reports concerning the four prior mine fires, and he pointed out that with respect to two of those fires, MSHA did not "conclude" that they were caused by roof falls, and only found that roof falls were among the potential sources. He further stated that although "at one time I did not argue against that," detailed studies of the mine which he and MSHA have conducted show that the probability of a roof fall being an ignition source is so small and of relative insignificance, and that "it's not something an engineer would consider reasonable and proper today" (Tr. 115-116).

Mr. Mitchell did not believe that an inspector can make any judgment about the ventilation or methane behind the stopping based solely on methane readings, and that "a combustible atmosphere at a stopping by itself needs (sic) nothing" and indicates nothing relative to a hazard. He pointed out that there are no laws precluding concentrations of methane in a gob, and if there were, "you would shut down almost every mine in these United States." He further pointed out that the laws are specific as to the amount of methane permitted in active workings where men are working, and that in this case, there are no required methane percentages for the areas which were tested because "it is unreasonable to set a percentage there because that percentage could be anything you want it to be depending on where you are when you take the reading" (Tr. 129).

On cross-examination by Mr. Mullins, Mr. Mitchell stated that the conditions which were present on December 5 and 13, when the orders were issued complied with the ventilation plan as he interprets it, and he explained the effect of the stoppings which are in place as follows at (Tr. 142):

> What we have done is prevented the air from escaping into the south bleeder. Much of it. We have some leakage into the south bleeder and the purpose of those stoppings is to make sure that the air to control airflow through such gob area and through such gob area means (sic) from number 12 Development panel to the bleeder to the far left. That is what this says and that is what is being done. That is what I testified to. I hope.

Jack E. Tisdale, Senior Mining Engineer, MSHA Division of Safety, Arlington, Virginia, was called in rebuttal by MSHA and was accepted as an expert in mine ventilation and safety. He confirmed that he has been present during the course of the hearing, viewed the witnesses, and has reviewed the exhibits. It was his opinion that the adequacy of the ventilation of the mine gob area is "borderline to inadequate" (Tr. 152). Using the mine map of the area in question, exhibit C-2, with the ventilation readings taken by Island Creek as noted on the map during a ventilation survey made on December 12, 1990, he explained his analysis of the ventilation and methane, including the quantity and velocity of the air flow in the gob, longwall, and bleeder entries of the developments in question. He confirmed that the gob area was approximately 6,000 feet long, and that 226,000 cubic feet of air per minute was entering the longwall and gob area at the intake of the No. 12 development (Tr. 153).

Mr. Tisdale calculated that 80 percent of the air at the No. 12 intake is coursed to the bleeder entries and is separated from the gob " and does no work there," and that an additional

22,000 cubic feet a minute is isolated from the gob. He calculated that 27,000 cubic feet a minute is left to ventilate the gob area, that the air velocity would be 4-1/12 feet a minute, and that it would take 20 hours for the air to travel a mile at that velocity. He concluded that 27,000 cubic feet a minute of air for 6,000 feet of gob "is stretching it" (Tr. 154). Mr. Tisdale pointed out that the map shows 22,351 cubic feet of air per minute and 3.78 percent methane coming out at the top of the No. 1 development, and after making further calculations, he concluded that 8.9 percent methane is being delivered to the bleeder entries "which supports the inspectors efforts to probe in there through the cracks behind the samples (sic)" (Tr. 157).

Mr. Tisdale stated that the stoppings "are extremely well constructed," even though they have "hairline cracks," and he calculated that the average quantity of air pushed through the plastered stoppings by the ventilation pressure would result in an air velocity of 30 cubic feet a minute for stoppings. He would expect to find such more than 30 cubic feet a minute, and that a "rule of thumb would be one inch of pressure in a stopping would give you 100 cubic feet a minute" (Tr. 155). He believed that the system can function properly as long as the seventh entry accepts air flow. However, as the set-up entries deteriorate to the point where they become resistant, they will not accept more air flow with the available pressures, and the system becomes ineffective. He had no idea when this may have occurred, and stated that "at one time this could have been a satisfactory system" (Tr. 159).

Mr. Tisdale made further calculations with respect to the airflow through the south bleeders, and confirmed that the 2 percent methane level requirement found in the ventilation plan would apply at the junction of the south and east bleeders. He calculated that there would be 1.9 percent and 2.2 percent methane at two locations, and concluded that "this ventilation is extremely borderline with respect to meeting the 2 percent limit at this junction." He agreed that any "tinkering" which flushes out more methane, or any air regulation that reduces the quantity of air available for the total split "will take them above the 2 percent limit at this point and make the whole system no go." He believed that this was the crux of the problem, and that due to the extensive gob, the solution will be difficult (Tr. 159).

Mr. Tisdale confirmed that he was not aware of anything in these proceedings that would indicate that the mine ventilation was significantly different on December 5, and 13, 1990. Based on his analysis, and the testimony he has heard in these proceedings, it was his opinion that the longwall set-up entries contain an excessive 9 percent methane "in the major part of their length," and an accumulation of explosive methane behind the setup entries in the south gob (Tr. 162).

In response to questions concerning the adequacy of the testing procedures used by Inspectors Carico and Scammell to determine whether methane had accumulated in the gob, Mr. Tisdale stated as follows at (Tr. 163):

> A. Well, their methods I consider a bit crude, but it was the tool that they had to use to try to deduce what was behind the stoppings in the set-up entries and, if anything, their samples would have shown less methane than was on the other side of the stopping because of the difficulty to keep the sample from being contaminated by air on the bleeder side of the stopping.
>
> Q. All right. Now, you've heard that they took more than one reading at many of the locations in the entries to the south bleeders, but that they only used the higher measurement. Which measurement, of that number they took in one area -- which measurement would most accurately reflect or accurately measure the methane levels in the air behind the stopping? The highest reading or the lowest reading?
>
> A. Well, because of the potential for contamination, I would say the highest reading.

Mr. Tisdale stated that a concrete block, as manufactured, does not contain or generate any methane. He was of the opinion that methane would flow through the block, which is only a conduit, and that any methane in the block would have no effect whatsoever on the accuracy of the readings taken with a Riken detector (Tr. 164). He confirmed that since methane is lighter than air it will lay against the roof in an atmosphere of low velocity. There is broken roof where caving has taken place in the vicinity of the set-up entries, and if the methane laying against the roof is not pushed down by other methane or mixed with the air, it will seek its highest level and there could be a layer of methane. If the ventilation velocity in the set-up entries is sufficient to cause mixing of the air and methane, no further layering will take place because once mixed, methane is always mixed and will not separate. He believed as a "rule of thumb" 100 feet of air per minute was sufficient for mixing and preventing any layering of methane, and that based on his calculations, he did not believe that such velocity was present in the set-up entries (Tr. 165).

Mr. Tisdale was of the opinion that there is an ignition risk in the south gob through a roof fall that can create enough arcs and sparks to ignite any flammable mixture of methane in the air. He stated that roof falls have caused methane ignitions in the mine gob and that there have been two mine fires in the south gob. He identified copies of MSHA's reports regarding these

fires, and also identified a copy of an MSHA memorandum concerning an examination of rock specimens from the mine (exhibit G-10, Tr. 166-167). Mr. Tisdale believed that the inspectors "were justified in their actions," and based on the evidence and testimony in these proceedings, he was of the opinion that there was a reasonable likelihood of an ignition of the explosive accumulations of methane in the south gob on December 5, and 13, 1990, if mining operations were to continue with no changes in the conditions which were present (Tr. 170).

On cross-examination by Mr. Biddle, Mr. Tisdale confirmed that the stoppings between the No. 7 and No. 11 developments have effectively closed off the bleeders from the gob. In his opinion, considering the fact that not much air flow can go through the set-up entries, the ventilation plan was not being followed in ventilating the gob. He agreed that the "active words" of the ventilation plan are "connected at strategic locations," and he confirmed that there were connections between the bleeders and the gob (Tr. 171-172). He confirmed that there is a difference of opinion as to whether the connections are at "strategic locations," that the ventilation plan does not define what this means, and that neither MSHA or the company have told each other what they consider to be "strategic locations" (Tr. 172).

Mr. Tisdale confirmed his belief that the longwall set-up entries in the No. 8, 9, and 10 development area behind the stoppings probably had 9 percent or more methane from "somewhere around 8 or 9 Development, I think that's a good assumption" (Tr. 173). He agreed that there was a pressure differential between the gob side and bleeder side and that the air coming out "had to have some push." In response to a question whether one can assume that since Inspector Carico found methane coming through one stopping at the No. 8 development, but found no methane coming through the other three stoppings in that development, that 9 percent methane in the set-up rooms would only come through sometimes but not all of the time, Mr. Tisdale responded "I assume there were no cracks in the other stoppings" (Tr. 174) He denied that he ever heard the inspector testify that he took several methane readings at any given stopping hole and found only one reading over 5 percent (Tr. 174). He also confirmed that there is no standard prohibiting 9 percent methane in a gob (Tr. 175).

On cross-examination by Mr. Mullins, Mr. Tisdale stated that his estimate of 9 percent methane concentrations pertains to methane in the set-up entries adjacent to the gob and adjacent to the bleeder entries, and not in the "gob" (Tr. 176). He confirmed that the concept of "strategic locations" for stoppings will change depending on the need to induce airflow in the set-up entries. The determination of whether any stopping is at a strategic location under the ventilation plan would depend on "whether it would work or not," and one has to plan the number

and locations of openings and the amount of air regulation on those openings so that the whole system is effective (Tr. 177).

In response to further questions, Mr. Tisdale confirmed that he was not aware of any mine citations for exceeding the 2 percent methane requirements for certain mine locations. He agreed that any "tinkering" with the ventilation system may solve one problem but will create another one. He explained that reducing the amount of air by increasing the regulation to try and stimulate more air flow to the set-up entries, will jeopardize the 2 percent maximum allowable methane at other places (Tr. 179-181).

Mr. Tisdale stated that the inspectors were trying to determine what was behind the stopping by using the test procedures with the Riken detector, and he stated that "I think I've shown them, through this analysis, that there are other ways to determine what's behind." He believed that the inspectors conclusions as to what was behind the stoppings was at least what they measured on the outby side. He also believed that a bottle sample is more difficult to take properly than a Riken reading because of the increased chance of contamination. He would expect a bottle sample to show a lesser percentage of methane, but that both methods are subject to marginal errors due to certain factors. Mr. Tisdale was of the view that the ultimate solution for determining what is in the gob is to incorporate a method for evaluating the gob as part of the ventilation plan. He confirmed that this is not in the present plan (Tr. 187). He also confirmed that none of the prior mine fires involved any injuries or fatalities, and he believed that one of them occurred in the set-up entry, and that they all occurred behind an active longwall (Tr. 188).

Findings and Conclusions

Imminent Danger

Section 107(a) of the Mine Act, 30 U.S.C. § 817, provides as follows:

> If, upon any inspection or investigation of a coal or other mine which is subject to this Act, an authorized representative of the Secretary finds that an imminent danger exists, such representative shall determine the extent of the area of such mine throughout which the danger exists, and issue an order requiring the operator of such mine to cause all persons, except those referred to in section 104(c), to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such imminent danger and the conditions or practices which caused such imminent

> danger no longer exists. The issuance of an order under this subsection shall not preclude the issuance of a citation under section 104 or the proposing of a penalty under section 110.

Section 3(j) of the Mine Act, 30 U.S.C. § 802(j), defines an "imminent danger" as "the existence of any condition or practice in a coal or other mine which could reasonable be expected to cause death or serious physical harm before such condition or practice can be abated."

In Old Ben Coal Corp. v. Interior Board of Mine Operations Appeals, 523 F.2d 25, 32 (7th Cir. 1975) (quoting Freeman Coal Mining Corp., 2 IBMA 197, 212 (1973), aff'd sub nom. Freeman Coal Mining Co. v. Interior Board of Mine Operations Appeals, 504 F.2d, 741, 743 (7th Cir. 1974), the determining test of whether an imminent danger exists was stated as follows:

> [E]ach case must be decided on its own peculiar facts. The question in every case is essentially the proximity of the peril to life and limb. Put another way: Would a reasonable man, given a qualified inspector's education and experience, conclude that the facts indicate an impending accident or disaster, threatening to kill or to cause serious physical harm, likely to occur at any moment, but not necessarily immediately? The uncertainty must be of a nature that would induce a reasonable man to estimate that, if normal operations designed to extract coal in the disputed area proceeded, it is at least just as probable as not that the feared accident or disaster would occur before elimination of the danger.

In Rochester & Pittsburgh Coal Company v. Secretary of Labor, 11 FMSHRC 2159, 2163 (November 1989), the Commission adopted the position of the Fourth and Seventh Circuits in Eastern Associated Coal Corporation v. Interior Board of Mine Operations Appeals, 491 F.2d 277, 278 (4th Cir. 1974), and Old Ben Coal Corp. v. Interior Board of Mine Operations Appeals, 523 F.2d 25, 33 (7th Cir. 1975), holding that "an imminent danger exists when the condition or practice observed could reasonably be expected to cause death or serious physical harm if normal mining operations were permitted to proceed in the area before the dangerous condition is eliminated." Canterbury Coal Co., 6 IBMA 175, 178 (1976) (quoting Rochester & Pittsburgh Coal Co., 5 IBMA 51 (1975), held that "speculative potential for a remote possibility does not warrant the issuance of an imminent danger withdrawal order."

In affirming the imminent danger order issued in the 1989 Rochester & Pittsburgh Company case, supra, at 11 FMSHRC 2164, the Commission rejected an argument based on the "relative

likelihood" of injury resulting from the cited conditions, and stated as follows at 11 FMSHRC 2164:

> R&P's argument also fails to recognize the role played by MSHA inspectors in eliminating dangerous conditions. Since he must act immediately, an inspector must have considerable discretion in determining whether an imminent danger exists. The Seventh Circuit recognized the importance of the inspector's judgment:
>
> > Clearly, the inspector is in a precarious position. He is entrusted with the safety of miners' lives, and he must ensure that the statute is enforced for the protection of these lives. His total concern is the safety of life and limb. . . . We must support the findings and the decisions of the inspector unless there is evidence that he has abused his discretion or authority. (Emphasis added).
>
> Old Ben, supra, 523 F.2d at 31.

Docket No. VA 91-47-R. Section 107(a) Imminent Danger Order No. 3354742, December 5, 1990.

The evidence establishes that Inspector Carico began his inspection on December 5, 1990, at the No. 12 Development and proceeded inby the longwall face along the development entries where he found no ventilation problems and no significant methane. He determined that the air ventilation was flowing normally and as expected from the No. 12 Development toward the No. 11 Development where he checked two entries and took air readings. He found that the ventilation was acceptable, and he continued to examine the "dead-end entries" and bleeder connectors in the No. 11 Development and found that these areas were being properly ventilated. He confirmed that two other MSHA inspectors checked the ventilation in the headgate entries adjacent to the No. 12 development panel gob and the tailgate entries from the face to the mouth of the panel where it intersected the main returns, and that no violations were found by these inspectors.

Mr. Carico confirmed that after leaving the No. 11 Development he proceeded to the No. 10 Development where he found four stoppings across the four entries. Three of the stoppings were "air tight" and he found no leakage. However, he found air leaking through pinhole cracks at the stoppings in the No. 2 entry, and when he placed the tube of his methane detector in the crack where a "minute amount of air was leaking," the instrument read 6.2 percent methane. The inspector believed that the methane behind the stopping may have possibly been a "localized" problem, or "a small body of methane trapped behind a single

brattice," and he made no imminent danger decision at that point in time. He did not test the stoppings in the other three entries because the air leakage around the stopping perimeters was within a foot of the roof and ribs and any methane readings would have been "artificially high and not representative" (Tr. 86).

Mr. Carico next proceeded to the No. 9 Development where he took a methane reading at one of the stoppings in the No. 4 entry and found 8.3 percent methane when he took a reading against that stopping. He confirmed that he "did not bother" to test the other three stoppings in the other three entries in this development (Tr. 29). Although he believed that an "imminent danger was probable" at that point in time, he reached no firm conclusion, and proceeded to the No. 8 Development where he tested the stopping in the No. 4 entry and found 7.5 percent methane when he took a reading against the stopping. He did not test the other three stoppings in the other three development entries. Upon completion of the methane reading at the No. 4 entry, Mr. Carico concluded that an imminent danger existed and his conclusion in this regard was based on his belief that "there was a substantial body of methane in the gob area encompassing probably 12 entries in the form of the bleeder connectors back to the gob and most probably be associated to set-up entries" (Tr. 31).

Mr. Carico's conclusion that "there was a substantial body of explosive methane" behind all of the stoppings in the three developments in question was based on the methane readings taken with a Riken methane detector at three of the 12 stoppings located in the 12 entries, an area covering approximately 1,000 feet. The readings he obtained prompted the issuance of the order. Mr. Carico concluded that the high methane readings resulted from an inadequate bleeder ventilation system and insufficient air flow which failed to dilute the methane which he measured at the three stoppings, and this prompted him to also issue a citation at the same time. He characterized the inadequate ventilation as an "associated problem" because it was not diluting the methane, and he stated that the citation "helped to define the cause of the imminent danger."

Mr. Carico confirmed that he took some bottle samples in support of his order and citation, but that they were lost in the mail and were never received by MSHA's testing facility. He further confirmed that he made no tests to determine the oxygen content of the air leaking through the three stopping cracks where he made his methane readings. He conceded that the air oxygen content is "definitely a factor" in determining whether there is an explosive mixture of methane present, and that one cannot determine whether there is an explosive mixture of methane behind a stopping "with a sole finding of my methane level" (Tr. 87).

There is no evidence that any explosive methane was leaking through the stoppings into the bleeder entries. Mr. Carico confirmed that he made no readings outby the stoppings in the bleeder entries, and he conceded that his methane readings against the stoppings "would not indicate what was going on in the bleeder." He further confirmed that he would expect that any methane bleeding through the stoppings would mix and dilute with the ventilation air in the bleeders and be carried through the bleeder entries out of the mine through the exhausting fan shafts.

Mr. Carico confirmed that at the time he made his decision to issue the imminent danger order, he considered the explosive mixture of methane which he believed was behind the stoppings to be a hazard and that "the only thing lacking for an explosion is the ignition source" (Tr. 30). He further confirmed that based on his collective knowledge and understanding of the "history of the mine," he knew that there were possible ignition sources associated with the gob (Tr. 31). The record reflects that the "mine history" relied on by Mr. Carico includes (1) four MSHA reports covering mine fires which occurred in 1972, 1975, 1983, and 1984 (exhibits G-6 through G-9), two of which he believed were located in the south gob area (Tr. 23); (2) an MSHA memorandum report dated June 25, 1973, concerning an examination of rock specimens from the mine; and (3) a prior face "methane inundation" which Mr. Carico believed occurred sometime in 1985 (Tr. 104-106). None of these prior incidents resulted in the issuance of any violations.

Notwithstanding his testimony that the prior mine fires were of unexplained origin, and that there was no conclusive proof to establish what may have caused them (Tr. 35), Mr. Carico believed that one of the recognized possible ignition sources for the fires "was roof falls in the caving areas of the longwall units" (Tr. 32). He explained that the "roof contains massive sandstone with layers of quartzite contained in that sandstone. Quartzite is highly sparked and has been known to ignite bodies of methane" (Tr. 32).

In addition to the prior mine fires, Mr. Carico identified the following possible ignition sources which he believed could have affected the south gob area: (1) an ignition along the face area propagating into the gob and igniting methane in the gob adjacent to the longwall face, and which could have involved the body of methane behind the cited stoppings; (2) welding or cutting along the longwall face, (3) open flames and the bolting of metals which could ignite methane leaking from the mine floor, and (4) work connected with ventilation adjustments and repairs in the bleeder entries, and sparks created by the use of hammers on the metal ventilation brattices (Tr. 34). Mr. Carico confirmed that his knowledge of the prior mine fires, coupled with the possible ignition sources which he identified, led him to

conclude that "it was fairly likely" that death or serious injury would have resulted if normal mining operations were to continue on December 5, 1990 (Tr. 35).

The record reflects that the south gob area is a large inaccessible area left by 10 mined out longwall panels encompassing an area of approximately 5,600 to 6,000 feet. The gob contains roof materials and other debris left when the roof caved in after coal was extracted from the longwall panels. The caved areas may or may not be "caved tight" throughout the entire gob, and since the gob is inaccessible, the actual conditions of any remaining top area in the gob are not known.

The parties presented no evidence or testimony with respect to the actual prevailing roof conditions at the time Mr. Carico issued his order. However, the information contained in the MSHA fire reports, which appears to be consistent in each report, reflects that the immediate mine roof varies from fragile shale, interspersed with coal stringer, to sandstone, and that the main roof is sandstone and the maximum cover is 2,500 feet. The reports also indicate that the Pocahontas No. 3 coalbed is known to liberate methane freely, and that large quantities of methane is liberated when the roof caves in the mined out areas behind the longwalls.

The 1983 and 1984 MSHA reports reflect that the Pocahontas No. 3 coal is not highly susceptible to spontaneous combustion, and that the emulsion used in the hydraulic longwall roof supports is nearly 97 percent water and that its susceptibility to spontaneous combustion is low (exhibits G-9 and G-10, pgs. 9, 12). The 1984 report notes that additional analyses indicated similar results with respect to any coal spontaneous combustion.

The MSHA 1972 and 1975 reports reflect that the factors which probably confined the spread of the ignition and fire which were the subjects of those reports were (1) the mine surfaces in the face and mined out areas were wet to damp because of the large quantity of water used by the longwall spray system; (2) the bleeder entries were rock-dusted; and (3) the relatively low volatile ratio of the Pocahontas No. 3 coal (exhibits G-6 and G-7, pgs. 14, 14).

The June 25, 1973, MSHA memorandum reflecting the results of an examination of rock specimens found in the mine (exhibit G-10), which I assume was prepared in connection with the December 5, 1972, fire, indicates that the rock which fell behind the longwall face was medium grained sandstone containing quartz crystals. The concluding paragraph of the report states as follows:

> A methane ignition would be possible with this type of material. Friction occurring due to rocks

rubbing together during a massive roof fall would create sparks and/or pressure and frictional heat capable of igniting an explosive mixture of methane and air.

The Dictionary of Mining, Minerals, and Related Terms, U.S. Department of the Interior, 1986, defines sandstone as "a cemented or otherwise compacted detrital sediment composed predominately of quartz grains" (pg. 961). "Quartzite" is defined as "a quartz rock derived from sandstone, composed dominantly of quartz, . . . a very hard, dense sandstone" (pg. 885). I take note of the fact that the 1983 report, at pg. 12, reflects that the 1972 and 1975 fires were attributable to sparks created by "falls of quartzite roof." However, the 1972 and 1975 reports reflect that based on "information" and a "consensus" during the investigations of those incidents, ignition occurred as the result of "falls of sandstone roofs." Under the circumstances, it would appear that the terms "sandstone" and "quartzite" are used synonymously in these reports.

There is no evidence that Mr. Carico examined the roof conditions in the three development areas where he conducted his inspection, nor is thee any evidence that he had any knowledge of any prevailing or recent roof conditions which may have posed a potential for creating a spark or providing an ignition source. There is also no evidence of the existence of any recent roof falls in the bleeder entries which he examined, or whether Island Creek had ever been cited for roof violations in those areas. The only basis for Mr. Carico's conclusion that a roof fall in the gob area could possibly ignite the explosive mixtures of methane, which he speculated were behind the stoppings, was his knowledge and belief, gained from the MSHA reports in question, that a sandstone mine roof containing layers of quartzite was a potential ignition source because quartzite is a highly "sparking" material which has been known to ignite methane.

A close review of the 1983 and 1984 reports relied on by Mr. Carico, reflects that following the 1975 fire, Island Creek instituted a drilling program to locate any quartzite roof formations, and that it was of the opinion that in any roof areas where any quartzite was present 25 feet or more above the immediate roof, there would be less likelihood of an ignition occurring and that any longwall mining could be safely done. I assume that MSHA concurred with Island Creek's position since both reports state that "these guidelines have been followed and no further ignitions have been attributed to this source" (exhibit G-6, pg. 12, paragraph 7; G-9, pg. 9, paragraph 7).

MSHA's reports of the 1983 and 1984 fires concluded that the location of the fires could not be determined, and that there was insufficient evidence to conclusively identify the ignition

sources (exhibit G-8, pg. 14; G-9, pg. 10). Some of the "possible" ignition sources for the 1984 fire were identified as (1) spontaneous combustion, (2) cutting and/or welding, and (3) rekindling and sparks from falling roof that contained quartzite. The report, however, further concluded that the only ignition sources peculiar to the mine were the possibility of rekindling and the quartzite conglomerate found in the main roof (pg. 14). However, rekindling was discounted as "unlikely," and no conclusions were made with respect to any cutting and/or welding or spontaneous combustion, other than to discount these possibilities as not being peculiar to the mine.

With regard to the possibility of quartzite as an ignition source for the 1984 fire, MSHA's report makes reference to Island Creek's drill records which established that the roof containing quartzite was no closer than 50 feet of the coal seam in the vicinity of the No. 4 longwall panel where the fire was discovered. The report also indicates that following the 1983 fire, an MSHA geologist examined the mine roof and found no evidence of any quartzite in the gob area inby the No. 4 longwall (pg. 12). Under the circumstances, I can only conclude that MSHA discounted a roof fall containing quartzite as the source of the ignition. Coupled with MSHA's conclusions that no further ignitions have been attributable to sparks from a fall of quartzite roof since the 1975 fire, which occurred some 15-years prior to the issuance of the order by Mr. Carico in 1990, I cannot conclude that there is any credible evidentiary support for any conclusion that such occurrences are "peculiar" to the mine, or that the mine has a "history" of such incidents. Any such incidents which may have occurred prior to 1975, are in my view, too remote in time to support any reasonable conclusion that they pose a present ignition hazard or "an impending accident or disaster, threatening to kill or to cause serious physical harm, likely to occur at any moment, but not necessarily immediately."

With regard to Mr. Carico's belief that a face ignition at the longwall constituted another possible source of ignition affecting the gob behind the stoppings which he cited, he conceded that the longwall working faces on December 5, were several thousand feet from the stoppings where he made his methane readings, and he candidly admitted that he was not prepared to evaluate the potential for an ignition at the longwall face (Tr. 99-100). With regard to the prior face ignitions which he alluded to, he had no knowledge as to how many may have occurred, or when they occurred, and he agreed that any explosive mixture of methane leaking from the roof or face where coal is being cut would constitute a "controlled, small body of methane" which he characterized as a "face ignition or pop." I take note of MSHA's 1972 report which reflects that there were three reported frictional ignitions in 1972 caused by a methane-air mixture being ignited from sparks from the bite of continuous miners striking a band of shale and bone coal near the mine floor. These incidents

reportedly occurred 18 years ago, and Mr. Carico either did not remember them, or did not read the reports carefully.

The MSHA reports relied on by Mr. Carico clearly reflect that following the 1975 fire, no further ignitions have been attributable to roof falls containing quartzite, and the 1983 and 1984 reports confirm that examinations of the roof area by MSHA's geologist found no evidence of any quartzite in the gob area where those fire were located. It would appear to me from these reports that the presence of quartzite in the mine roof may be a localized condition, particularly in light of the fact that no quartzite was found in the gob area where the most recent fire of 1984, was discovered, and Island Creek's unrebutted drill studies which indicated that the quartzite formation was no closer than 50 feet of the immediate roof. Although MSHA's 1984 report concluded that the quartzite conglomerate found in the main roof is a possible ignition source peculiar to the mine, it was apparently discounted as a potential ignition source on the basis of the finding that any quartzite present was no closer than 50 feet of the immediate roof.

Island Creek's expert witness Mitchell, a recognized expert in mine fires and frictional ignitions, and who has periodically made studies of the mine since the early 1970's, including studies of the gob area following the two most recent reported fires, was of the opinion that it is not now reasonable to believe that gob falls, in and of themselves, can be a source of ignition for methane in the gob. Mr. Mitchell based his opinion on his extensive studies and expertise in frictional ignitions, including the information in MSHA's reports of the prior fires, and he concluded that the probability of a roof fall being a source of ignition "is so small and of relative insignificance" that "its not something that an engineer would consider reasonable and proper today."

MSHA's expert witness Tisdale, whose expertise lies in mine ventilation, testified that potential roof falls in a gob area, with resulting ignitions, are "localized" conditions which vary from mine-to-mine depending on the rock strata, and he believed that such conditions "seems to be peculiar to this mine" (Tr. 182-183). Mr. Tisdale was of the opinion that a roof fall which can create enough sparks and arcs to ignite a flammable mixture of methane in the air in the south gob posed an ignition risk in that area. He based this opinion on the four MSHA fire reports, and also relied on those reports for his opinion that there was a reasonable likelihood of an ignition of explosive mixtures of methane in the south gob area on December 5 and 13, 1990, if normal mining operations were to continue with no changes in the conditions which were present on those days.

As noted by MSHA in its posthearing brief, the south gob area is a rather extensive area covering over a mile square by

December 1990. However, in the absence of any evidence with respect to the existing, or more recent roof conditions in the south gob area, an area which has been mined out and where the immediate roof has already fallen, or the roof conditions in the set-up entries or other mine areas, I have difficulty understanding how one may reasonably conclude that there was a reasonable likelihood of a roof fall in the gob area which would have sparked an ignition. As noted earlier, the MSHA reports relied on by Inspector Carico and Mr. Tisdale in support of their imminent danger opinions do not, in my view, support any reasonable conclusion that the mine has a "peculiar history" of gob ignitions sparked by roof falls.

MSHA's prior reports all reflect that during the time frames when those incidents occurred, Island Creek's certified mine examiners were making the required preshift, onshift, and weekly examinations for methane and other hazardous conditions and that the results of these examinations were recorded in the required mine books. Two of the reports reflect that tests for methane were being made along the longwall faces by section foremen before the longwall was energized, and that frequent tests were made by competent employees, with approved methane detectors, during the time such equipment was operated. One of the reports reflects that methane tests were made by qualified persons before electrical equipment was taken into any working place, and that such tests were made while the equipment was being operated in the working place. The reports also reflect that methane monitors were provided on the electrical equipment as required by MSHA's regulations, and that the longwall plow was equipped with a methane monitor which was set to give a visual warning at 1 percent methane and deenergize the power at 2 percent methane. In the absence of any evidence to the contrary, I have no basis for concluding that in the normal course of continued mining operations, Island Creek's competent and certified mine examiners would not have continued to make the kinds of tests referred to in the reports.

Inspector Carico confirmed that he did not check any mine records for the working shifts immediately prior to December 5, when he issued the order, to determine whether the bleeder entries in question had been inspected or whether any methane was detected and recorded, and he candidly admitted that this was an omission on his part (Tr. 117). There is no evidence that any explosive levels of methane were present in the bleeder entries outby the stoppings tested by Mr. Carico, nor is there any evidence of any explosive levels of methane in any other working places in the mine. Mr. Carico agreed that any explosive methane leaking through the stoppings would have been diluted by the ventilation which he did not find inadequate for this purpose. More importantly, although Mr. Carico believed that there were explosive mixtures of methane behind the stoppings, he conceded that he did not test the oxygen content of the air leaking

through the stopping cracks, that such a test is critical to any determination as to the presence of an explosive mixture of methane, and that he could not make such a determination based solely on his methane readings.

Although Inspector Carico identified several other possible ignition sources which he believed could have propagated an ignition in the gob area, i.e., welding or cutting along the longwall face, open flames and bolting of materials which could ignite methane leaking from the floor, and sparks and other repair work connected with the use of hammers on the metal ventilation brattices, there is absolutely no evidence that any of these conditions were present when the order was issued, nor is there any evidence or testimony that any such work would have occurred in the normal course of mining operations. Further, Mr. Carico conceded that the stoppings where he made his methane tests were some 2,000 feet from the working faces, and he admitted that he was not prepared to evaluate the potential for an ignition at the longwall face. Under the circumstances, I find Mr. Carico's belief that these speculative ignition sources could somehow propagate a spark or ignition which would somehow find its way to the methane in the gob areas behind the stoppings to be less than credible and unsupported by any reasonably credible or probative evidence.

Based on all of the testimony and evidence adduced in this case, I believe that one may reasonably conclude that the potential for a methane explosion is dependent on several essential ingredients; namely, fuel, oxygen, and a ready ignition source. Although Inspector Carico concluded that his methane readings reflected an explosive mixture of methane behind the stoppings which were tested, he did not determine the oxygen and carbon dioxide content of the atmosphere he tested. Mr. Mitchell's unrebutted testimony reflects that any oxygen deficiency would affect the accuracy of the methane detector readings, and Mr. Tisdale considered the testing procedures followed by the inspectors to be "a bit crude," but the only then available means for deducing what was behind the stoppings, other than the analysis which he conducted.

In its posthearing brief, MSHA concedes that Mr. Carico was aware of the fact that the existence of explosive methane in the gob area, standing alone, might not be sufficient to constitute an imminent danger, and that an ignition source was necessary to establish the potential for an explosion and the existence of an imminently dangerous condition or hazard. Thus, I conclude and find that the presence of any explosive methane levels in the gob areas behind the stoppings tested by Mr. Carico, standing alone, did not present an imminently dangerous condition. However, in combination with other conditions or practices, from which one may reasonably conclude or expect an ignition to occur in the

normal course of mining operations, the presence of such explosive levels of methane may present an imminently dangerous situation.

The parties do not dispute the fact that the mine in question is an extremely gassy mine which freely liberates methane. Nor is there any serious dispute that the presence of explosive gas levels in a mine, under certain conditions, is dangerous. However, any determination as to whether an imminent danger existed must be made on the basis of the circumstances as they existed at the time the order is issued, or as they might have existed had normal mining operations continued.

On the facts of this case, and after careful review of Mr. Carico's testimony, I am convinced that after examining the stoppings for methane and finding what he believed to be explosive levels of methane in the gob areas behind the stoppings, Mr. Carico, without any further efforts to ascertain the actual prevailing mining conditions, or the conditions which might have prevailed had normal mining operations continued, simply relied on the four previous MSHA reports to support his "knowledge and understanding" of the "mine history" in support of his belief that there "were possible ignition sources associated with the gob."

In view of my previous findings and conclusions concerning the information found in these reports, I cannot conclude that Mr. Carico's reliance on the MSHA reports in question provides any credible or probative evidentiary support for any conclusion that ready ignition sources capable of propagating an explosion of the methane in the gob area in question were present when he issued the order, or were likely to be present if normal mining operations were to continue. I have no reason to believe that Mr. Carico was less than well intentioned when he issued the order, and I recognize the fact that any judgment call by an inspector with respect to the existence of an imminent danger situation, when balanced against the safety of the miners, must necessarily be made quickly and without delay. However, in any subsequent proceeding challenging the order, any imminently dangerous situation, which the inspector may have believed existed at the time he issued the order, must be proven. On the facts and evidence adduced in this case, I cannot conclude that MSHA has proven or established the existence of any ignition sources to support the inspector's imminent danger finding. I conclude and find that the inspector's speculative anticipation of a possible mine explosion, in the circumstances presented, falls short of the statutory requirement of reasonable expectation. Accordingly, the imminent danger order issued by the inspector IS VACATED.

Inspector Scammell, like Inspector Carico, believed that all that was necessary for an explosion was the presence of an ignition source. Mr. Scammell believed that roof falls and a methane ignition at the face, which could possibly propagate from the longwall face, were the only possible sources of ignition present on December 13, 1990, when he issued his order. However, he conceded that his principal concern was the possibility of a roof fall in the gob area. I find no credible evidence of any face ignition sources which may have been present at the time Mr. Scammell issued his order, nor do I find any evidence that any such ignition sources would have been present if normal mining operations were to continue. Although one may conclude that a face ignition could propagate from the face, the inspector presented no facts or evidence identifying or establishing these sources of ignition.

With regard to any roof falls as a possible source of ignition, Mr. Scammell, like Inspector Carico, relied on the same MSHA reports concerning the prior mine fires to support his conclusion that a roof fall in the gob area would result in sparks and be a source of ignition. Mr. Scammell testified that constant roof falls are occurring where the coal is being mined at the longwall, but he could not determine the kinds of falls in the gob area. Although he indicated that "frequent" roof falls had occurred in the past, aside from his references to the MSHA's reports, no further testimony or evidence was forthcoming from Mr. Scammell with respect to any such roof falls, and although he suggested that they occurred "quite often," he conceded that "I really don't know" (Tr. 140).

Mr. Scammell initially testified that he was concerned about roof falls in the bleeder entries and gob, or a "combination of falls" on either side of a stopping, "just in that general area" (Tr. 143). However, he later conceded that he had no knowledge of what was behind the stoppings, or the roof conditions on the gob side of the stoppings, and that the roof could have been caved tight. He agreed that a caved roof has already fallen, and that he did not know if it could fall any further. There is no evidence of any explosive mixtures of methane in the bleeder entries, nor is there any evidence of any adverse roof conditions in the bleeder entries, or anywhere else. Further, Mr. Scammell conceded that his concern for roof falls was limited to the areas behind the stoppings, and not with other roof falls in outby areas where there was no methane. He confirmed that he took no methane or ventilation readings in the bleeders, made no measurements of the air ventilating the gob area, and did not know what was going on in terms of ventilation of the gob (Tr. 148).

After careful review of Mr. Scammell's testimony, it seems obvious to me that instead of making any real determination as to the existence of any potential ignition sources, he relied on the previous MSHA reports concerning the prior fires which had occurred in the mine. Mr. Carico and Mr. Tisdale also relied on these same reports to support their opinions and conclusions with respect to the existence of ready sources of ignition and an imminent danger. My previous findings and conclusions with respect to these reports are herein incorporated and adopted by reference. In my view, cursory reliance on these reports provides no credible evidentiary support for any conclusion that potential roof falls in the gob area presented a ready source of ignition at the time Mr. Scammell issued his order, or that they presented a ready source of ignition if normal mining operations were to continue. In short, in the absence of any reliable and probative evidence, independent of the MSHA reports in question, I cannot conclude that MSHA has established the existence of any ignition sources to support Mr. Scammell's imminent danger order. Under the circumstances, his imminent danger finding is rejected, and the order IS VACATED.

Docket No. VA 91-48-R. Section 104(a) "S&S" Citation No. 3354743, December 5, 1990, 30 C.F.R. § 75.316.

In this case, Island Creek is charged with a failure to follow one of the provisions of its approved ventilation plan. Any violation of an approved plan provision would constitute a violation of mandatory safety standard 30 C.F.R. § 75.316, which provides as follows:

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

The applicable ventilation plan provision in question is found in paragraph 10 of Island Creek's August 20, 1987, approved plan, and it states as follows:

> Bleeder entries, bleeder systems, or equivalent means shall be used in all active pillaring areas to ventilate the mined areas from which the pillars have been wholly or partially extracted so as to control the

methane content in such areas. Bleeder entries or bleeder systems established after June 28, 1970, shall conform with the requirements of Section 75.316-2, 30 CFR 75.

(a) Bleeder entries shall be defined as special air courses developed and maintained as part of the mine ventilation system and designed to continuously move air-methane mixtures from the gob, away from active workings, and deliver such mixtures to the mine return air courses. Bleeder entries shall be connected to those areas from which pillars have been wholly or partially extracted at strategic locations in such a way to control air flow through such gob area, to induce drainage of gob gas from all portions of such gob areas, and to minimize the hazard from expansion of gob gases due to atmospheric change. (Exhibit G-4, pgs, 3-4).

Inspector Carico issued the citation in conjunction with his imminent danger order. In light of his methane readings at the stoppings in Developments No. 8 through No. 10, and his belief that there was a great body of methane trapped behind all of the stoppings in these areas, Mr. Carico concluded that the ventilation was inadequate in that there was an insufficient means of regulating the air flow between the bleeder entries and the gob areas to induce the drainage of methane from the gob area or to maintain the methane levels at or below its explosive limits. He explained that the airtight stoppings or brattices constructed across all of the connecting entries to the gob between the bleeders and the gob prevented the adequate drainage of methane from those areas as evidenced by the lack of dilution of the accumulated methane (Tr. 41-45). Under all of these circumstances, Mr. Carico concluded that there was a violation of plan provision 10(a), which required regulated and controlled air flows adequate to induce drainage and removal of gob gas from all portions of the gob areas.

Arguments Presented by the Parties

In its posthearing brief in support of the citation, MSHA asserts that Inspector Carico issued the citation because the ventilation system on December 5, 1990, did not satisfy the ventilation plan provision requiring that "bleeders entries . . be connected to those areas from which pillars have been wholly or partially extracted at strategic locations in such a way as . . . to induce drainage of gob gas from all portions of such gob areas . . . ." Recognizing the fact that there was conflicting testimony as to whether or not the removal of the stoppings would have induced drainage of gob gas from all portions of the south gob, MSHA nonetheless points out that the citation was issued

because of Island Creek's failure to induce drainage from the set-up entries and adjacent gob in the Nos. 8 through 10 developments. MSHA takes the position that the existence of a substantial body of explosive concentrations of methane behind the cited stoppings in question is sufficient to establish that Island Creek was not complying with the ventilation plan provision in question because such a finding demonstrates that drainage of the gob had not been induced from that area.

MSHA argues that because the ventilation plan permits the bleeder entries to be placed at "strategic locations" to induce the drainage of gob gas, flexibility was provided to Island Creek to determine the placement of the bleeder entries. However, since the placement of the bleeder entries failed to provide an adequate means of inducing the drainage of gob gas from all portions of the south gob, MSHA concludes that Island Creek was in violation of its ventilation plan because it was no longer being met.

MSHA further argues that the violation was significant and substantial (S&S), because an explosion of the body of methane behind the stoppings was reasonably likely to occur and result in an injury. MSHA relies on Mr. Carico's testimony that injuries from the explosion of the accumulation of explosive methane would result in a serious injury or health hazard.

In its posthearing brief, the UMWA asserts that Island Creek's failure to properly place the connections required by the ventilation plan provision in question led to the accumulation of a large body of methane behind the stoppings in the development areas cited by the inspector. In support of this conclusion, the UMWA states that Inspector Carico did not believe that enough connections were located between the bleeders entries and the gob to insure adequate drainage of all gob areas, and that the tightly sealed stoppings across the entries inhibited or almost completely stopped the air flow at those locations. The UMWA concludes that these tightly sealed stoppings were inconsistent with the ventilation plan which indicated the presence of regulators and not merely stoppings at these locations.

The UMWA further argues that in view of the dynamic nature of mining, it would be impractical for a ventilation plan to spell out where the connectors between the bleeders and gob should be placed, and as explained by Mr. Tisdale, the requirement that connections be placed at strategic locations means that they are to be located where they are needed in order to make the whole bleeder ventilation system effective. The UMWA concludes that Island Creek is responsible for placing the connectors at locations that will insure methane drainage from all areas of the gob, and that these locations may have to vary as mining progresses.

The UMWA asserts that by turning its regulators into stoppings, Island Creek limited its ability to make adjustments in the air flow over the set-up entries in the cited development areas. In response to Island Creek's position that the removal of the stoppings would result in the short circuiting of the ventilation in the south gob, the UMWA points out that no one has suggested that all of the stoppings must be completely removed, but that a proper balance, through the use of regulators, would have to be found. The UMWA relies on Mr. Tisdale's opinion that the manner in which the gob was being ventilated did not allow much air flow to go through the set-up entries, and that this was a violation of the ventilation plan. The UMWA concludes that based on the massive accumulations of explosive levels of methane found by Mr. Carico on December 5, a significant portion of the gob was not receiving adequate air as required under the ventilation plan, and that Island Creek's contention that removal of the stoppings will create a serous ventilation problem elsewhere is not an adequate defense.

In its posthearing arguments, Island Creek points out that there is no federal standard prohibiting the existence of explosive concentrations of methane except in active working areas and in return air courses, and that there is no standard prohibiting gob gas. Island Creek asserts that methane is to be expected in gob areas, and it concedes that it was likely present in some quantity behind the stoppings where Inspector Carico took his readings, but it denies the existence of any unusual quantities of methane behind the stoppings.

Island Creek maintains that a gob area always contains quantities of methane pushed there by air from the face area directed for that purpose and generated from the coal and strata in the gob itself, and that the methane in the south gob was pushed through the gob area and into the bleeders. Island Creek believes that it is not surprising that a test taken in the gob at a location where methane was moving toward its exhaust-point destination would reveal methane in some concentrations, and that given Inspector Carico's experience, he surely knew that methane would be present behind the stoppings on its way out of the gob.

Island Creek does not contend that methane is not dangerous. However, it points out that as a natural by-product of the mining process, methane cannot be avoided, but it can be controlled by dilution and movement, and it concludes that the evidence establishes that this was happening in the south gob area on the day the citation was issued. Island Creek asserts that for the methane to be moved, it must pass the Nos. 8 through 10 connector entry stoppings, and probably did pass those stoppings on the gob side in a variety of concentrations. Since the percentages measured were under 100 percent, Island Creek concludes that air had been mixed with the transient methane, and that the gob was being ventilated.

Island Creek argues that the basis for Inspector Carico's belief that it was not complying with its ventilation plan was that because concentrations of methane were measured at certain pinholes (but not all of the pinholes) at some (but not all) of the stoppings in the bleeder connector entries in the Nos. 8 through 10 development areas, the south gob was not being ventilated. Island Creek asserts that it is unrebutted that there was a strong pressure drop between the gob and the bleeder entries because gob air pressure was pushing air through the stoppings into the bleeders, and that the gas coming up through the several boreholes in the south gob could only be made to move to the bottom of the boreholes because of ventilation. Island Creek also points out that there was no evidence that any gas was backing up into the face areas in the No. 12 and 13 development panels, and that MSHA's inspectors found the ventilation in those face areas to be in compliance. It also points out that although a ventilation survey is necessary to determine gob ventilation, Inspector Carico made no survey, but that a survey by Island Creek established that a satisfactory quantity of air was moving through the south gob and its adjacent bleeder entries, and that the gob atmosphere, including methane, was leaving the south gob where intended.

Island Creek recognizes the fact that its ventilation plan requires that the bleeders be connected to the gob at "strategic locations," but it points out that while this term is undefined in the ventilation plan, its ventilation engineers explained that the bleeders were in fact connected to the gob at three locations, each of which is considered "strategic." Island Creek concludes that until Inspector Carico decided otherwise on December 5, it could be inferred that MSHA agreed that its connections were proper since the ventilation plan had been reviewed every 6 months since it was originally approved by MSHA in August, 1987, and no one from MSHA made an issue about the plan language, or alleged that the mine was not complying with it in its south gob and bleeder configuration.

Island Creek argues that MSHA's witnesses presented no evidence that it was not controlling the air flow through the south gob, but that Island Creek's evidence establishes that the south bleeders were bleeder entries which were connected to the gob at strategic locations in such a way to control air flow through the gob area, and that its witnesses confirmed that this was the case. Island Creek argues further that MSHA presented no evidence to indicate that gas was not being drained from the south gob on December 5, but that Island Creek's ventilation survey showed that air was moving in the proper direction through the gob on that day. Island Creek also argues that MSHA presented no evidence that the mine was not minimizing the hazard from expansion of gob gasses due to atmospheric change.

Island Creek concludes that the citation should be vacated because there was no evidence that the cited provision of the ventilation plan was not being complied with, and it suggests that MSHA's only evidence in this case, testing to determine a methane concentration at a location where methane is in the process of being pushed out of the gob, is good evidence that gob gas was moving as intended toward the "strategic location" where the gob was connected to the bleeders for purposes of exhausting methane.

Fact of Violation

The first sentence of the applicable ventilation plan provision 10(a) defines bleeder entries as "special air courses developed and maintained as part of the mine ventilation system and designed to continuously move air-methane mixtures from the gob, away from active workings, and deliver such mixtures to the mine return air courses." After careful review of all of the evidence and testimony adduced in this case, I find no credible or probative evidence to establish any violation of this first sentence of the plan by Island Creek.

Inspector Carico conceded that he only cited the second sentence of plan provision 10(a), and that the second sentence "was the most applicable part of that section" (Tr. 93). He agreed that the first part of the second sentence which required "the bleeder entries shall be connected to those areas from which pillars have been wholly or partially extracted" was complied with by Island Creek and that he was satisfied with this compliance (Tr. 93). With respect to that part of the second sentence requiring the bleeder connections to be made at "strategic locations," Mr. Carico confirmed that the bleeders were connected at sufficient intervals to control the gob gas as it comes out (Tr. 94). Mr. Tisdale confirmed that the question of whether or not connectors are located at "strategic locations" is basically a matter of opinion and that the MSHA approved ventilation plan does not further define the term "strategic locations."

Inspector Carico conceded that as of the evening of December 5, 1990, when he visited the mine, the mine was in compliance with the ventilation plan requirements for ventilating the gob and bleeder areas. However, he indicated that since mining is dynamic, changes are taking place all of the time which may require re-regulation of the air, and if this is not done, the failure to re-regulate the air at any given point in time may result in a violation of the plan. He confirmed that the changes which occurred, and which resulted in a violation of the plan, were those specified in the citation (Tr. 67). He explained that the basis for the citation rested on his conclusion that the mine bleeder system was not working properly, or was not properly constructed, and that this conclusion was based on the methane

which he detected coming through the cracks or pinholes in the stoppings (Tr. 94).

Mr. Mitchell testified that methane detected coming through a pinhole in a stopping is not a reasonably accurate indication of what is on the other side of the stopping and that it would not be any indication that the gob was not being ventilated. Inspector Carico, who conceded that he did not measure the oxygen level coming through the pinholes where he made his tests, also conceded that without such measurements, one cannot determine if there is an explosive mixture of methane behind the stopping based solely on his methane readings. Both Mr. Mitchell and Mr. Tisdale agreed that there are other appropriate methods for making such determinations, namely a ventilation pressure survey and analysis.

Island Creek's ventilation manager Ray and MSHA's witness Tisdale both relied on a December 12, 1990, ventilation survey conducted by Mr. Ray and a team of engineers to support their respective opinions as to the adequacy of the gob ventilation and whether or not it was in compliance with the ventilation plan. Mr. Ray believed that the gob area was being adequately ventilated, and in view of the pressure differentials with respect to the air flow coming out of the bottom of the No. 1 development, he concluded that adequate air was flowing through the gob and that there is enough air to push all of the methane through the gob with the current ventilation system. Mr. Tisdale believed that the ventilation of the gob area ranged from "borderline to inadequate." and that the amount of air available for ventilating the gob area "is stretching it."

Island Creek's expert Mitchell, who conducted studies of the ventilation in the south gob, including an analysis of pressure differentials and air flows, concluded that the ventilation of the gob was in compliance with the ventilation plan provision in question. Mr. Mitchell testified credibly that it is not unusual to find methane in the gob area and that it will gravitate to the highest elevation in the mine, such as the No. 8 through 9 developments. Inspector Carico conceded that explosive concentrations of methane in the gob area in some locations is to be expected and that it is impossible to remove it all from the mine. He confirmed that other than the dome and fall area of the gob, the No. 8 through 9 developments where he tested the stoppings and issued his citation, were the highest elevations in the mine and that the methane will go to that area even though it is enroute out of the mine (Tr. 97).

Mr. Mitchell and Mr. Ray both confirmed that since air flows from a high pressure area to a low pressure area, any air movement within the gob area will be away from the face areas and towards the south bleeders and No. 1 development area. Mr. Tisdale agreed that there was a pressure differential between

the gob and the bleeders and that the air flowing through and coming out of these areas "had to have some push" (Tr. 173-174). Inspector Carico confirmed that when he tested the stoppings there was in fact a pressure differential between the back side of the stoppings and the gob side and that this would indicate that the pressure on the bleeder side of the stopping was less than the pressure on the gob side, and that air would flow from an area of high pressure to one of lower pressure. In describing the method used by Island Creek to ventilate the gob, Mr. Carico confirmed that the stoppings were installed in order to force the air to flow to another location where it would leave the gob, and he agreed that as the air is flowing away from the stopping it would be picking up methane (Tr. 82-83). He also agreed that if the mine fan were working, and there is no evidence that it was not, the ventilation system would also be working (Tr. 123-125).

There is no evidence in this case that any explosive concentrations of methane were coursing into the bleeder entries or into any working areas of the mine where miners were expected to work or travel. The methane which concerned the inspector was behind the stoppings, and he was concerned that it was not being moved out of the gob area by the available ventilation. I take note of the fact that the ventilation plan does not prohibit the existence of methane gas in the gob areas, and the parties agree that there are no standards prohibiting methane in gob areas. Insofar as the alleged violation is concerned, the issue presented is whether or not MSHA has established by a preponderance of the credible evidence that the ventilation provided for the gob area was inadequate to induce the drainage of methane from the gob area.

After careful review of all of the evidence and testimony adduced in this case, including the posthearing arguments presented by the parties, I believe that Island Creek has the better part of the argument, and that its evidence, which I find credible, and supported in part by Inspector Carico, establishes that the gob area in question was being ventilated on December 5, 1990. I further conclude and find that the gob ventilation and air flow through the cited development areas allowed for the mixing of the methane with the air coursing through those areas and that the methane which was mixing, or being diluted by the air, was coursing through the gob areas behind the stoppings in question trying to find its way into the mine bleeder system and out of the mine. Under the circumstances, I find that MSHA has failed to establish a violation of the cited ventilation plan provision, and the citation issued by Inspector Carico is VACATED.

ORDER

On the basis of the foregoing findings and conclusions, IT IS ORDERED AS FOLLOWS:

1. Docket No. VA 91-47-R. Section 107(a) Imminent Danger Order No. 3354742, December 5, 1990, IS VACATED, and Island Creek's contest IS GRANTED.

2. Docket No. VA 91-48-R. Section 104(a) "S&S" Citation No. 3354743, December 5, 1990, citing an alleged violation of 30 C.F.R. § 75.316, IS VACATED, and Island Creek's contest IS GRANTED.

3. Docket No. VA 91-49-R. Section 107(a) Imminent Danger Order No. 3509496, December 13, 1990, IS VACATED, and Island Creek's contest IS GRANTED.

George A. Koutras
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

APR 4 1991

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. KENT 90-363
	:	A.C. No. 15-16646-03504
v.	:	
	:	Docket No. KENT 91-31
J & R COAL COMPANY, INC., Respondent	:	A.C. No. 15-16646-03506
	:	
	:	Mine No. 2

DECISION APPROVING SETTLEMENT

Appearances: Joseph B. Luckett, Esq., U.S. Department of Labor, Office of the Solicitor, Nashville, Tennessee, for the Petitioner;
Mr. Roger Bentley, President, J & R Coal Company, Inc., Kite, Kentucky, for the Respondent.

Before: Judge Maurer

These cases are before me upon a petition for assessment of civil penalty under Section 105(d) of the Federal Mine Safety and Health Act of 1977 (the Act). At the hearing, after all the testimony was in the record, the parties jointly moved to settle these cases. A reduction in penalty from $2558 to $2265 was proposed. I have considered the representations and documentation submitted in these cases, 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 $2265 within 30 days of this order. Upon payment in full, these cases are dismissed.

Roy J. Maurer
Administrative Law Judge

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
THE FEDERAL BUILDING
ROOM 280, 1244 SPEER BOULEVARD
DENVER, CO 80204

APR 9 1991

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), ON BEHALF OF RICHARD G. ROETHLE, Complainant	:	DISCRIMINATION PROCEEDING Docket No. CENT 90-124-DM SC-MD 90-04 Tyrone Mine & Mill
v.	:	
PHELPS DODGE CORPORATION, Respondent	:	

DECISION

Appearances: Michael H. Olvera, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas, for Complainant;
Charles L. Chester, Esq., RYLEY, CARLOCK & APPLEWHITE, Phoenix, Arizona, for Respondent.

Before: Judge Cetti

STATEMENT OF THE CASE

The Secretary of Labor, Mine Safety and Health Administration (MSHA) ("Complainant") commenced this proceeding on behalf of Richard G. Roethle and against Phelps Dodge Corporation ("Respondent") on June 21, 1990, by filing a complaint alleging that Respondent discriminated against Mr. Roethle in violation of Section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 (the Act) by unjustly suspending him on November 24, 1989, for refusing to work in unsafe conditions on the "B" shift at Respondent's Tyrone, New Mexico, open pit copper mine on November 19, 1989. Respondent denied the allegations.

Complainant issued no citations or orders with respect to this case alleging Respondent violated any provision of the Mine Saftey and Health Act or any mandatory health or safety standard, rule, order, or regulation promulgated pursuant to MSHA. This proceeding was commenced on the investigation of the February 6, 1990, complaint of Mr. Roethle, which stated:

> I was operating Haul Truck No. 204 on November 19, 1989. The steering tires were out of round, causing the vehicle to bounce heavily. This caused the steering wheel to jam, affecting the safe steering. I narrowly missed another truck, and I parked No. 204.

> My foreman told me I had no right to stop the truck. He and another foreman stood on the ground, looked at the truck, and said it was okay. They refused to ride with me or check the truck, and sent me home.
>
> I believe that I was discriminated against and ask to be paid for time lost and to have my record cleared.

Respondent contends (1) that Truck No. 204 (the 204 truck) was safe to operate, at least at slower speeds, (2) that Mr. Roethle knew this, (3) that Mr. Roethle was required to operate the 204 truck at slower speeds if he was concerned about his or others' safety, (4) that he refused to operate the 204 truck though it was his duty to do so, and (5) he was therefore suspended for 10 days.

Complainant seeks back wages for Richard Roethle in the amount of $1,056.20 plus interest, contending that his 10-day suspension was due to activity which was protected under the Act. In addition, the Secretary seeks an order directing the respondent to expunge the employment records of Mr. Roethle of all reference to the circumstances involved in this action. The Secretary also seeks a civil money penalty for the alleged violation of Section 105(c) of the Act.

Finally, Complainant seeks an additional but unspecified remedy as the Commission sees appropriate for Respondent's alleged ongoing violation of Section 105(c).

ISSUES

Complainant states the issues as follows:

1. Whether Respondent unlawfully discriminated against Richard Roethle by suspending him for ten days.

2. What relief, if any, the Commission should render.

3. Whether Richard Roethle failed to file a timely complaint.

FINDINGS OF FACT AND CONCLUSIONS

1. Respondent, Phelps Dodge, at all relevant times, operates a large open pit copper mine in Tyrone, New Mexico, and its operations substantially affect interstate commerce.

2. Richard G. Roethle, at all relevant times, was and is employed as a haul truck driver by Respondent at its Tyrone Mine. At all relevant times, Mr. Roethle was an experienced truck driver.

3. On November 19, 1989, on the "B" shift at the Tyrone Mine, Mr. Roethle's usual truck was not operating and the dispatcher, Johnny Poe, assigned Mr. Roethle to the 204 muck truck. The 204 truck is an older, large 170-ton unit rig haul truck used to carry mine ore. It has large tires that are 10.5 feet in diameter. The driver of the 204 truck must sit in the driver seat in the cab approximately 14 feet above the ground.

4. At the beginning of this shift, Mr. Roethle, on being assigned the 204 truck, inspected it and found a high front suspension, a 2"-3" gap in the square roller housing, oil all over the left side of the motor, a leak in the left steering ram cylinder, and "raggedy" back tires.

5. Mr. Roethle's job on the November 19, 1989, "B" shift required him to load the 204 haul truck at the No. 12 Shovel near the bottom of the mine, drive from the No. 12 Shovel up a "ramp" to the Crusher slot, through the slot, and across a flat to the Crusher, then return to the No. 12 Shovel for another load. When Mr. Roethle reached a speed of approximately 16 to 18 miles per hour, the truck became so unbearably "bouncy," that he believed he couldn't completely control the truck. The bouncing of the truck made it difficult to hold himself in his seat and resulted in trouble controlling the steering wheel and pedals.

6. Mr. Roethle stopped the truck and dumped the load he was hauling at the crusher. He then notified the dispatcher in the tower that something was wrong with the 204 truck. He asked the dispatcher to send a mechanic to determine what was wrong with the truck.

7. The dispatcher instructed Mr. Roethle to "make another load" while waiting for a mechanic to check on the truck. Mr. Roethle complied with the dispatcher's request. As Mr. Roethle was making a turn going down hill to a lower level, the steering wheel of the truck "jerked" in his hands. When he got to the shovel, Mr. Roethle radioed the dispatch tower and asked that his foreman, Victor Giacoletti, also meet him near the crusher to check out the truck. It felt to Mr. Roethle like the front tires were coming off the ground. He had never felt anything like this bouncing before.

8. Near the crusher slot, Mr. Roethle's foreman Victor Giacoletti, Tom Wilson, the acting mechanic foreman, and two tire

shop employees met Mr. Roethle and visually observed the truck. Mr. Roethle informed Mr. Giacoletti of his safety concerns, including the bouncing of the truck. All four observed the truck bouncing. Mr. Giacoletti said it had been bouncing for a couple of months.

9. At Mr. Giacoletti's request, Mr. Wilson visually checked the truck's suspension and stated he found nothing wrong except the "suspensions could possibly be a little high. One of the front suspensions was "slightly higher than the other one."

10. At Mr. Giacoletti's request, Mr. Roethle drove the 204 truck across the flat back toward the Crusher slot, so that the four could again observe the bouncing. The four followed Mr. Roethle in another vehicle. At about 16 mph, the empty 204 truck began bouncing again, but not as bad when it was loaded. At the end of the crusher slot, Mr. Roethle got off the truck and requested that one of the four observers get in the truck and ride with him, but no one did. Mr. Giacoletti stated that the problem did not look bad, and that the truck should be run until Tom Wilson could "free someone up."

11. As Mr. Roethle continued driving the truck, it started bouncing again. The shocks were "bottoming out," banging in a manner he had never heard before. At one point, the steering wheel seemed to jump, jerk and momentarily lock out. The truck was hard to control. He just missed hitting another truck.

12. Mr. Roethle called the dispatch tower and told the dispatcher he was parking the 204 truck because it was unsafe. He asked for a "ready line assignment." The dispatcher complied with the request and Mr. Roethle parked the truck.

13. When Mr. Roethle parked the truck at the ready line, Mr. Giacoletti asked Mr. Roethle if he was refusing to drive the 204 truck. Mr. Roethle responded in the affirmative. Mr. Giacoletti then told Mr. Roethle he did not have the right to refuse to drive the 204 truck. At the time Mr. Giacoletti appeared to Mr. Roethle to be agitated. Mr. Roethle told Mr. Giacoletti that he felt the truck was unsafe. As Mr. Giacoletti escorted Mr. Roethle to the office, Mr. Roethle asked Mr. Giacoletti to note his statement that the 204 truck was unsafe. Mr. Roethle was sent home, pending an investigation.

14. The foreman, Mr. Giacoletti, assigned the 204 truck to Mr. Ray Tafoya. He told Mr. Tafoya that the 204 truck "bounced a little, but it was drivable." Mr. Ray Tafoya drove the 204 truck and experienced the bouncing. He drove slowly "due to the bouncing" for the balance of the "B" shift on November 19, 1989.

15. Ray Tafoya drove the truck loaded from the ninth shovel to the 409 dump, going about four to six miles per hour. The ride was "real rough, the steering wheel had lot of play to it." He dumped his load and started back. When he got up to 16 miles per hour, the truck "started shaking and bouncing real bad all over the road." He had never experienced any bouncing like his before. He felt it was unsafe, dangerous, and testified "if I lose contol of it, I'm gone." When he slowed down to between 12 and 14 miles per hour, the bounce was not as bad and he could control the truck "a little bit."

16. Mr. Tafoya did not "park" the 204 truck because there was no available truck at the ready line and because he was new on the job, a "greenhorn."

17. Before the November 19, 1989, incident, mechanics and truck drivers, including the Complainant, had on occasion B.O.'d trucks and had never been disciplined for doing so.

18. The front suspension of the 204 truck was overcharged at the time it was driven by Mr. Roethle on November 19, 1989. The 10.5 foot diameter steering (front) tires were out of round, 1/2" and 3/8", respectively. This "out of round" condition of the front tires caused the truck to lope and bounce. Prior to Mr. Roethle's suspension on November 19, 1989, no one was aware the front tires were out of round.

19. The out of round front tires on the 204 truck were discovered sometime after the incident of November 19, 1989 which resulted in Mr. Roethle's suspension. The out of round steering tires were then taken off the truck and replaced with new tires that were not out of round. Thereafter the 204 truck did not bounce.

20. If on November 19th when at Mr. Roethle's request the truck was checked (visually) by his foreman, the acting mechanic foreman and the two tire men, it would have been found that the bouncing of the truck was caused by out of round front tires, the truck would have been BOed by management and the truck would have been sent immediately to the tire shop where the out of round tires would have been replaced. (Tr. Vol II p. 228).

21. On November 19, 1989, Richard G. Roethle refused to drive the 204 muck truck because he held a reasonable good faith belief that further driving of the truck was hazardous and unsafe.

22. On November 19, 1989, Richard G. Roethle was suspended, pending investigation for refusing to drive the 204 muck truck.

23. Mr. Roethle was suspended for a total of 10 days, beginning November 19, 1989.

24. The amount of back wages which accrued during the 10-day suspension is $1,056.20 (not including interest).

25. Richard G. Roethle filed a complaint with the Mine Safety and Health Administration in February of 1990.

26. Richard G. Roethle first became aware of his discrimination rights under MSHA in February of 1990.

27. Respondent was not prejudiced by Mr. Roethle's filing of the discrimination complaint more than 60 days after the incident, which resulted in his suspension.

DISCUSSION WITH FURTHER FINDINGS

I

Section 105(c) of the Act was enacted to ensure that miners will play an active role in the enforcement of the Act by protecting them against discrimination for exercising any of their rights under the Act. A key protection for this purpose is the prevention of retaliation against a miner who brings to an operator's attention hazardous conditions in the workplace or who refuses to perform work under unsafe conditions. It is well-settled that generally, in order to establish a prima facie case of discrimination under § 105(c) of the Mine Act, a miner must prove that (1) he or she engaged in protected activity and (2) 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 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 Pasaula-Robinette test). See also NLRB v. Transportation Management Corporation, 462 U.S. 393, (1983), where the Supreme Court approved the NLRB's virtually identical analysis for discrimination cases arising under the National Labor Relations Act. 1/

Applying these principles to this case, I find that Respondent violated § 105(c) of the Act by discriminatory adverse action, i.e., suspending Mr. Roethle without pay for 10 days, commencing November 19, 1989 for refusing to drive the 204 truck for the balance of the shift.

It is undisputed that Mr. Roethle was suspended for 10 days for his refusal to continue driving the 204 muck truck on the "B" shift on November 19, 1989. He communicated his safety concerns regarding the 204 truck to management. If Mr. Roethle's refusal to drive the 204 truck at that time was protected activity his

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1/ Section 105(c)(1) provides:

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

suspension for this refusal was in violation of Section 105(c)(1) of the Act. In this case, the question of whether Mr. Roethle's refusal was protected activity turns on whether he had a reasonable good faith belief that the continued driving of the 204 truck was hazardous. In determining whether a miner's belief is reasonable, the courts and the Commission consistently has held that the perception of a hazard must be reviewed from the miner's perspective at the time of the work refusal. The miner need not objectively prove that an actual hazard existed. Gilbert v. Federal Mine Safety and Health Review Commission, 866 F.2d 1433, 1439 (D.C. Cir. 1989).

In Robinette, 3 FMSHRC at 810, the Commission explained that "[g]ood faith belief simply means honest belief that a hazard exists." The burden of proving good faith rests with the complaining miner but he need not demonstrate an absence of bad faith. Bush v. Union Carbide Corporation, 5 FMSHRC 993 at 997.

In evaluating the evidence in this case I credited the testimony of Mr. Roethle, even though there are some inconsistencies in his testimony and the testimony of some of the other drivers and mechanics who corroborated his testimony. These inconsistencies were not of such a nature or magnitude as to defeat his claim. As stated by Tenth circuit officials, the Court in Ligget Industries, Inc. v. Stenson Begag filed January 9, 1991, "The totality of the evidence is what counts."

In this case Mr. Roethle was concerned with what he perceived to be his inability to safely control the truck. He demonstrated good faith by requesting not only a mechanic but also his foreman to meet him at the job site and check out the truck. After management made only a visual check of the truck, and could not or at least did not find out what was causing the problem, Mr. Roethle asked that one of them ride with him in the 204 truck so they could see first hand the problems he was experiencing in controlling the truck. No one complied with that request. No one even suggested that it would be alright for Mr. Roethle to drive the truck at a speed lower than that normally expected or required for this type of truck. Management did not address his safety concerns in a manner sufficient or adequate to reasonably quell his fears.

Two of Respondent's truck drivers Mr. Gomez and Mr. Tafoya and two of Respondent's mechanics including Mr. Dennis Stailey, testified on Mr. Roethle's behalf. This testimony corroborates at least in some degree Mr. Roethle's testimony.

Respondent would have the Court disbelieve Mr. Roethle and the truck drivers, and mechanics who testified in his behalf with one exception, Mr. Dennis Stailey, the truck shop mechanic who worked on and drove the 204 truck on the November 20th "C" shift. Respondent in his post hearing brief states that Mr. Stailey's candor and testimonial clarity was refreshing. In pertinent part, Mr. Stailey testified as follows. (Tr. starting at page 71 of Vol I).

Q. When did you work on that truck after Mr. Roethle had been sent home?

A. As far as I can remember, it would have been the "C" shift on the 20th.

Q. Okay. And tell me how you came about to work on this truck.

A. My foreman lined me up on that truck that night at the beginning of the shift and said we needed to go by the book on charging the front suspension because we had a problem with it.

Q. Okay. And what did you do?

A. The right suspension had already had the nitrogen charge let off; it was completely collapsed. And we bled the nitrogen off of the left cylinder, drained all the oil out, replaced the oil to the specified inches in height, and then re-charged the nitrogen.

Q. Okay. You mentioned that the right suspension had been bled off. I mean, who had bled the right suspension off?

A. I don't know. It was on "B" shift before I came on.

Q. Okay. So, they were already working on it on "B" shift by the time you got there?

A. They had started working on it and they put it back out on B.O. line. And we had to bring it back in and start on it.

* * * * *

Q. Okay. Okay. After you got the suspension filled, what did you do at that point?

A. Then Mel took the truck and got a load and drove it. And he brought it back and said it still wasn't right; there was still something wrong.

Q. Mel Marcus told you that?

A. Mel Marcus.

Q. Okay.

A. And so we checked everything, physically, and couldn't find anything wrong. And I took it up on the four leach dump and it seemed to work pretty good going up. But coming back down, when I hit the dynamics, it started really bouncing bad.

* * * * *

Q. And on the way back about how fast were you going?

A. I took it up to 18 miles an hour, which is the required speed going downhill is 18. And as soon as I hit the dynamics then that when--

Q. What is hitting the dynamics? What does that mean?

A. You have electrical braking, dynamic braking, which reverses the field in pull motors.

Q. Okay. What started happening?

A. It was like being on a roller coaster. I could feel it in my stomach, it was bouncing so bad.

Q. The whole cab was bouncing?

A. The whole truck was bouncing.

Q. Was it similar to any other kind of ride you had been on in terms of driving these trucks around?

A. About the only time that I have felt one bounce like this is when I ran over a rock. But it would just be one bounce; it wouldn't be continuous up and down.

Q. How were you able to control the vehicle through the bounce.

A. I was controlling it, yes, but it--I was a little worried about what was going to happen because I had never felt that before.

Q. All right. When it started bouncing what did you do in terms of the dynamics and the speed of the truck?

A. I backed off a little bit and it eased up a little bit until I could get it slowed down to about 12 miles an hour. That's when it stopped.

Q. Okay. You say that you were able to control the vehicle. Was it any harder to control through the bounce than just normal driving?

A. Well, yes, because you are going up and down and your foot is moving. And, yes, it was harder to control. Yes.

Q. Okay. And when Mel Marcus came back and told you that the truck was--still wasn't right, did he say anything else or did he say something is still wrong with the suspension?

A. As far as I can remember, he just said, we haven't fixed the problem yet.

Q. Did he tell you what the problem was, I mean?

A. The bounce.

Q. Okay. When you were assigned the truck he told you something about a bounce?

A. No. When he assigned me--no, he just told me we need to go through the suspensions, there is something wrong.

Q. Okay. When you said "the bounce" that's sort of in hind-sight that you realized what the problem was?

A. Yes. I didn't know what the problem was to begin with.

Q. Okay. Now, what was the suspension--when you were bouncing, did you notice anything in particular about the suspension?

A. No. I was too worried about what it was doing, where it was going to go to really. I knew the--everything was inspected on the suspension so I was trying to figure out what else might be causing it.

And it was the end of shift by then; I had worked on it eight hours. I still hadn't found what the problem was.

* * * * *

Q. Now, would you consider this bouncing motion that you encountered, would that, in your opinion, be an unsafe situation?

A. It was, as far as I was concerned. I wouldn't release the truck, and I didn't release the truck.

Q. Okay. So, at the end of your shift what did you do?

A. I told the foreman it is still B.O.; you are going to have to do some more trouble shooting to find out what the problem is.

* * * * *

Q. Okay. Do you remember anything unusual about this truck other than the fact that that night it was bouncing?

A. I can remember that it was one of the trucks that I think backed over a berm and rolled. That's about the only thing I really remember.

Q. Backed over a berm and rolled?

A. Yes.

Q. About how long ago was that?

A. It seems like it was about three years ago. I'm not sure.

Q. About three years ago. Do you recall what happened?

A. The truck went through the berm.

Q. Driver error or mechanical failure or what?

A. I don't know.

Mr. Stailey's credible testimony (correctly described by Respondent as candid and having a refreshing clarity) clearly shows that Mr. Stailey considered the 204 truck to be in an unsafe driving condition. Mr. Stailey's testimony in this respect corroborates the testimony of the complainant and that of every other driver who drove the truck at or near the time of the November 19 incident.

Respondent's argument that the truck would have been safe to operate at a slow speed and that therefore, complainant should have continued driving the 204 truck at a slow speed is not persuasive since neither his foreman or anyone else suggested to complainant prior to the hearing that he could or should drive slower than the normal expected production speed. In the absence

of evidence to the contrary, and particularly in view of the testimony of the drivers that they had been verbally reprimanded for slow driving, it appears that Mr. Roethle was subjected to the normal production pressures under which the mine operated. The slowing down of one large truck on a mine road often frustrates and slows down production traffic behind it. It is also noted that Mr. Stailey testified that the "required speed going downhill" is 18 miles an hour. (Emphasis added). It does not appear from the record that driving slowly was a viable option to Mr. Roethle. If management believed it was a viable option, Mr. Roethle's foreman should have been mentioned this option to Mr. Roethle on November 19th in conjunction with management's obligation to address the complaining miner's safety fears.

It may be that with hindsight that Mr. Roethle now feels that he might have been able to control the truck now that he knows the bouncing behavior of the truck was caused by out of round tires and that management now assures him that it would have excused driving at a speed slower than normally expected production speed. It must be kept in mind, however, that the reasonableness and honesty of his belief must be based on his perception of the unsafe driving condition of the truck at the time he refused to drive the truck and not as of the time of the hearing.

II

Section 105(c)(2) of the Act provides that a miner who believes that he has been discriminated against may, within 60 days after such violation occurs, file a complaint with the Secretary.

Mr. Roethle's written complaint was not received within 60 days after the suspension occurred and thus was not within the time limits of Section 105(c). The purpose of this time limit is to avoid stale claims, but a late filing may be excused. The time limits in Section 105(c) are not jurisdictional in nature. Christian v. South Hopkins Coal Company, 1 FMSHRC 126, 134-136 (April 1979); Bennett v. Kaiser Aluminum & Chemical Corporation, 3 FMSHRC 1539 (June 1981); Secretary v. 4-A Coal Company, Inc., 8 FMSHRC 240 (February 1989).

The Commission has indicated that dismissal of a complaint for late filing is justified only if the respondent shows material, legal prejudice attributable to the delay. Cf. Secretary/Hale v. 4-A Coal Company, Inc., supra. No such showing has been made here.

The parties stipulated that Mr. Roethle's damages for the 10-day suspension consist of lost wages in the sum of $1,056.20 plus interest to be calculated in accordance with United Mine Workers of America v. Clinchfield Coal Company, 10 FMSHRC 1943, aff'd, 895 F.2d 773 (10th Cir. 1989) (short-term federal rate applicable to underpayment of taxes).

Mr. Roethle's personnel record should be expunged of all matters relating to the incident of November 19, 1989 as requested in the discrimination complaint filed by the Secretary.

PENALTY ASSESSMENT

Section 110 (a) of the Act provides as follows:

> The operator of a coal or other mine in which a violation occurs of a mandatory health or safety standard or who violates any other provision of this Act, shall be assessed a civil penalty by the Secretary which penalty shall not be more than $10,000 for each such violation. Each occurrence of a violation of a mandatory health or safety standard may constitute a separate offense. (Emphasis added).

It is also noted that the last sentence of section 105(c)(3) of the Act states, "Violations by any person of paragraph (1) shall be subject to the provisions of sections 108 and section 110(a)." Thus it is clear that a penalty is to be assessed for discrimination in violation of section 105(c)(1) of the Act.

In a discrimination case the Secretary is required to propose a specific dollar amount supported by relevant information for assessing the appropriate penalty for the alleged violation of section 105(c) of the Act. In the case at bar the Secretary in the discrimination complaint only requested that an appropriate civil money penalty be issued. At the hearing, however, the Secretary on the record proposed that the penalty assessed be between $2,000 and $2,500, based upon MSHA's review and analysis of the case.

In addition, the Secretary in her post-hearing brief seeks to impose a monthly civil monetary penalty upon Respondent on the theory that Respondent has a policy with respect to its truck drivers that constitutes an ongoing violation of section 105(c) of the Act. In essence, complaint seems to contend that Respondent has an ongoing policy of requiring its truck drivers to continue driving a truck which Management asserts to be safe even

though the driver has a reasonable good faith belief that the condition of the truck is such that it would be hazardous to continue to drive the truck. I find no persuasive evidence that Respondent has such a policy. On the contrary, the preponderance of the evidence presented establishes that the Respondent except for its failure in this case has a policy of addressing the safety concerns of its truck drivers. There is no persuasive evidence that it has an ongoing policy of taking adverse action against a driver for work refusal based on the driver's safety concerns if it appears to Management that the driver has a reasonable good faith belief that the condition of the truck is such that it would be hazardous to continue driving it.

In this case, however, Mr. Roethle was subjected to disparate treatment for his work refusal. The foreman negligently misjudged the situation and thus management did not adequately address Mr. Roethle's safety concerns. Management may have had a sincere but nevertheless mistaken belief that Mr. Roethle did not have a reasonable good faith belief in the safety hazard involved in continuing to drive the truck. Such a sincere but mistaken belief by management is no defense to a violation of Section 105(c) of the Act. In my opinion, the sincerity and reasonableness of such a belief on the part of management is one factor that can be considered in determining the appropriate penalty, along with the statutory criteria in Section 110(c) of the Act. I do find, however, that management was negligent in sending Mr. Roethle home on November 19th before having a mechanic or supervisor drive the 204 truck or ride in the cab of the 204 truck with Mr. Roethle, as Mr. Roethle requested before taking adverse action against him. Management was negligent in failing to adequately address Mr. Roethle's safety concerns. Mere visual inspection of the 204 truck under the circumstances of this case did not adequately address Mr. Roethle's safety concerns.

With respect to history, Complainant's Exhibit C-1 is a printout of Respondent's violations from November 19, 1987, through November 18, 1989, at the Tyrone Mine and Mill. It shows a total of 88 paid violations of which 66 were of the single penalty type.

Respondent is a large operator. The Tyrone Mine includes a number of divisions. It has a concentrator, an XSEW Plant (which is another means of processing copper ore), a mechanical and electrical division, and various miscellaneous divisions such as leaching and security.

Respondent objected to the violations printout (Ex. C-1) on the basis that the exhibit does not purport to focus on the fines

or assessments relate to the mining operation which is the division in which Mr. Roethle is and was employed, nor to citations that might relate to the operation of alleged defective equipment. These objections were noted and correctly overruled.

On balance, everything considered, I concluded that a civil penalty of $500 is the appropriate civil penalty for Respondent's violation of 105(c) of the Act.

CONCLUSIONS OF LAW

1. Jurisdiction over this action is conferred upon the Federal Mine Safety and Health Review Commission under Section 105(c)(2) and Section 113 of the Act.

2. Respondent's Tyrone Mine and Mill is a mine, as defined in Section 3(b) of the Act, and the products of which affect commerce under Section 4 of the Act.

3. Respondent was an operator at all relevant times within the meaning of Section 3(d) of the Act.

4. Richard G. Roethle was a miner at all relevant times within the meaning of Section 3(g) of the Act.

5. Mr. Roethle engaged in protected activity when on November 19, 1989, he refused to drive the 204 muck truck which he believed to be unsafe. His belief was a good faith, reasonable belief.

6. Mr. Roethle's suspension was directly motivated at least to a large extent by his refusal to operate the 204 truck on November 19, 1989.

7. Mr. Roethle's claim is not barred by his failure to file a written complaint within 60 days of the November 19, 1989, incident.

ORDER

Based on the above findings of fact and conclusions of law, it is **ORDERED**:

1. Respondent shall pay to Complainant Richard G. Roethle within 30 days of the date of this decision the sum of $1,056.20 representing lost wages during the 10-day suspension beginning November 19, 1989, with interest thereon in accordance with the

Commission decision in Local Union 2274, UMWA v. Clinchfield Coal Co., 10 FMSHRC 1493 (1988) calculate proximate to the time payment is actually made.

2. Respondent shall expunge from its personnel records all references to the suspension of Richard G. Roethle that commenced on November 19, 1989.

3. Respondent shall pay a civil penalty of $500 to the Secretary of Labor for its violation of 105(c) of the Act.

August F. Cetti
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

APR 16 1991

LARRY CODY, Complainant	:	DISCRIMINATION PROCEEDING
	:	Docket No. CENT 90-167-DM
v.	:	
	:	MD 88-93
TEXAS SAND AND GRAVEL COMPANY, INCORPORATED, Respondent	:	

DECISION

Appearances: Larry Cody, Amarillo, Texas, Pro se;
Tad Fowler, Esq., Miller & Herring, Amarillo, Texas for the Respondent.

Before: Judge Melick

This case is before me upon the complaint by Larry Cody 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 unlawful discharge on September 14, 1988, by Texas Sand and Gravel Company, Inc. (Texas Sand and Gravel) in violation of section 105(c)(1) of the Act[1].

[1]Section 105(c)(1) of the Act provides as follows:

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

More particularly Mr. Cody alleges in his Complaint as follows:

> I must haul heavy equipment on a low-boy. I asked for help to load a crane. The crane had no brakes. While loading the crane, I could not see the back wheels on the right side. The wheels slipped off the low-boy and the crane turned over.
>
> I went to the doctor, and even before I was released from the doctor, Wayne Pulliam called me in and said "You're fired."
>
> About a month ago Wayne Pulliam told me to take the crane to Vega Texas for concrete plant use. I told Wayne the crane don't [sic] have brakes how do I get it off. So Wayne said he would go help me get it off all of this took place in the shop at Mansfield Plant. Their [sic] were witnesses. But when I had to go get it I asked Wayne how am I going to get it back on he said I could handle it..

Subsequently in response to a Show Cause Order Mr. Cody supplemented his Complaint by noting that he believed that he was fired due to safety related discrimination because, inter alia:

> Before my accident I had asked Wayne Pulliam [mine superintendent] for some 2 x 12 foot boards for the sides of the low-boy, so I could safely haul the wider equipment. As it was the crane had no brakes, and less than half of the tires were on the low boy, the other part hung off the bed. All I got as a reply from Wayne Pulliam (who was the main boss at Mansfield Plant), was a laugh.

The above response is deemed to constitute an Amended Complaint. In order to establish a prima facie case of discrimination the Complainanat has the burden of proving that (1) he engaged in protected activity and (2) the adverse action complained of was motivated in any part by that protected

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cont'd fn.1

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

activity. Consolidation Coal Co, 2 FMSHRC 2786, 2797-3800 (1980), rev'd on other grounds, sub nom. Consolidation Coal Co. v. Marshall 663 F.2d, 1211 (3rd Cir. 1981); Secretary on behalf of Robinette v. United Castle Coal Company, 3 FMSHRC 803, 817-818 (1981).

The mine operator may rebut a prima facie case by showing either that no protected activity occurred or that the adverse action was in no part motivated by protected activity. If the operator cannot rebut the prima facie case in this manner, it nevertheless may defend affirmatively by proving that it also was motivated by the miner's unprotected activity and would have taken the adverse action in any event for the unprotected activity alone. Pasula, supra, Robinette, supra; See also Eastern Associated Coal Corp. v. FMSHRC, 813 F.2d 6339, 642 (4th Cir. 1987); Donovan v. Stafford Construction Co., 732 F.2d 954 (D.C. Cir. 1984); Boich v. FMSHRC, 719 F.2d 194 (6th Cir. 1983) (specifically approving the Commission's Pasula-Robinette test). See NLRB v. Transportation Management Corporation, 462 U.S. 393 (1983), approving a nearly identical test under the National Labor Relations Act.

At hearing Cody testified that he was discharged by Texas Sand and Gravel on September 14, 1988, the day after the crane he was loading onto a low-boy fell off and overturned. As a result of this accident Cody was taken by a co-worker to see a doctor. Cody testified that he "couldn't walk very good--there was something wrong with something"[2]. The next morning when Cody appeared for work he met with mine superintendent Wayne Pulliam. Pulliam told Cody he had orders to let him go and in fact Cody was then fired. Cody appears to be alleging that this discharge was the result of his having the accident the day before and that this accident was the result of not having 2 by 12 outrigger boards on the low-boy that would have provided support for the wheels of the crane that overturned. According to Cody without these boards the wheels of the crane were supported by only 3 or 4 inches of the 24-inch- width tires. Cody maintains that he had complained 2 or 3 weeks before this accident to superintendent Pulliam that it would be safer to have the 2 x 12 board outriggers to support the crane on the low-boy. Pulliam purportedly only laughed in response stating that "there wasn't no way they could afford to buy them boards"

While I find therefore based upon the undisputed testimony of Cody, that he in fact did make a protected safety complaint to the Respondent I do not find that Cody has met his burden of proving that his discharge 2 or 3 weeks later was motivated in any part by that complaint. There is no evidence of any ill-will

[2]Mr. Cody subsequently received worker's compensation benefits for back injuries he sustained in this accident.

or retaliatory motive resulting from the complaint and Cody's discharge occurred only hours after he engaged in the unprotected activity of driving the crane off the low-boy causing it to overturn. Cody himself acknowledges that this accident was reason and the motivating factor for his discharge.

Under the circumstances I cannot find that Cody has established a prima facie case that his discharge was in violation of section 105(c)(1) of the Act. This discrimination proceeding must accordingly be dismissed.

Gary Melick
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

APR 19 1991

RICKY HAYS,	:	DISCRIMINATION PROCEEDING
Complainant	:	
v.	:	Docket No. KENT 90-59-D
	:	MSHA Case No. BARB CD 89-32
LEECO, INC.,	:	
Respondent	:	No. 62 Mine

DECISION

Appearances: Tony Oppegard, Esq., Stephen A. Sanders, Esq., Appalachian Research & Defense Fund of Kentucky, Inc., Lexington and Prestonsburg, Kentucky, for the Complainant;
Timothy Joe Walker, Esq., Reece, Lang & Breeding, London, Kentucky, for the Respondent.

Before: Judge Koutras

Statement of the Case

This proceeding is before me to determine the relief due the complainant, including the payment of costs and attorney's fees, based upon my decision of September 28, 1990, finding that the respondent Leeco, Inc., discriminated against the complainant in violation of section 105(c)(1) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act." Ricky Hays v. Leeco, Inc., 12 FMSHRC 1850 (September 1990).

Backpay

The parties are in agreement as to the amount of backpay owed the complainant for the period of September 8, 1989, through January 31, 1991, less any interim earnings, and this amount is $12,853.69, less interest. Backpay continues to accrue until this case becomes final and the money is paid. The parties have confirmed their preference for a backpay award with interest to be calculated later pursuant to the formula employed by the Commission.

Other Employment Benefits

Retirement Plan

The parties are in agreement that the respondent has a retirement plan which vests upon the completion of 5 years' employment, and that the respondent acknowledges its responsibility to make retirement payments into the complainant's account as if he had not been discharged.

Medical Expenses

The parties have agreed to a procedure for determining payments for any covered medical expenses incurred by the complainant during his employment with the respondent. In a letter dated January 13, 1991, complainant's counsel Oppegard summarized this procedure as follows:

> Because Mr. Hays' remedy is to file suit under Leeco's health plan if the company declines coverage of these medical expenses, and because the parties do not believe that the Court is in a position to rule on which medical bills Leeco has the responsibility to pay under its medical plan, Mr. Walker and I proposed the following: that the Court simply rule that Leeco is required to give the same consideration to Mr. Hays' submitted medical expenses as it would have done had he not been previously discharged. In other words, that Leeco review the Complainant's medical bills in a non-discriminatory manner, and grant or deny coverage accordingly. If the Complainant prevails on appeal in this matter, and Leeco then denies coverage of some of Mr. Hays' bills, the Complainant would be required to resort to the procedures provided by the Respondent's health plan in the event that insurance coverage is denied.

Attorney Fees and Litigation Expenses

Section 105(c)(3) of the Act provides in part as follows:

> Whenever an order is issued sustaining the complainant's charges under this subsection, a sum equal to the aggregate amount of all costs and expenses (including attorney's fees) as determined by the Commission to have been reasonably incurred by the miner, applicant for employment or representative of miners for, or in connection with, the institution and prosecution of such proceedings shall be assessed against the person committing such violation.

The complainant's initial submission of his statement of attorney fees and expenses is for $55,213.52, representing the following claimed expenses for the period September 15, 1989 through November 16, 1990:

1. Principal Attorney Tony Oppegard. 300.4 hours billed at $150 per hour, for a total of $45,060.

2. Co-counsel Stephen A. Sanders. 26.5 hours billed at $150 per hour ($3,975), and 34 hours billed at $75 per hour ($2,550), for a total of $6,525.

3. Other litigation expenses (itemized as mileage and lodging expenses, witness fees & mileage, telephone, expert witness fees and expenses, photocopying and photographic expenses), for a total of $3,628.52.

The complainant's supplemental statement of additional attorney fees for the period November 17, 1990, through March 15, 1991, is for $8,325, representing the following claimed expenses:

1. Attorney Tony Oppegard. 53.8 hours billed at $150 per hour, for a total of $8,070.

2. Attorney Stephen A. Sanders. 1.7 hours billed at $150 per hour, for a total of $255.

The total amount of claimed attorney fees and expenses submitted by the complainant is $63,538.52.

The respondent has filed objections to any award of attorney fees, and the objections and issues raised are as follows:

1. The respondent denies liability for any attorney's fees or costs because the complainant's counsel are employed by a Federally funded, non-profit legal services corporation, and the complainant is not an "eligible client" as defined by the Federal Legal Services Corporation regulations.

2. The amount of attorney fees sought by the complainant is clearly unreasonable in light of the monetary value of the other remedies sought and obtained by the complainant.

3. The hourly billing rate claimed by the complainant's counsel is excessive.

4. The complainant's requested attorney fees are clearly excessive and/or redundant and reflect a duplication of attorney effort.

5. The complainant is not entitled to attorney fees and costs incurred for the period from September 15, 1989, through November 1, 1989, during which period he had proceeded under section 105(c)(2) of the Act and was awaiting MSHA's determination as to whether or not the alleged violation had in fact occurred.

The respondent has also filed an objection and opposition to the complainant's motion for post-judgment interest on any attorney fees award, and it has also filed a motion to hold in abeyance any award with respect to attorney fees pending the final disposition of a complaint which the respondent has filed with the Legal Services Corporation challenging the propriety of the Appalachian Research and Defense Fund's representation of the complainant in this case.

The Status of the Appalachian Research and Defense Fund of Kentucky, Inc. (ARDF)

The respondent denies any liability for the payment of attorney fees and maintains that the complainant has incurred no costs for attorney fees because his counsel are employees of a federally-funded, non-profit corporation. The respondent states that it has filed a complaint with the Legal Services Corporation regarding the Appalachian Research and Defense Fund of Kentucky, Inc., (ARDF), and the propriety of its representation of the complainant and seeking attorney fees for its services. The respondent maintains that the regulations of the Legal Services Corporation provide that the "recipient" of funding by that agency may accept a court-awarded fee only under certain circumstances, and that a prerequisite to ARDF's acceptance of a fee in a fee-generating case is that a client be an "eligible client." The respondent takes the position that the complainant was not an "eligible client" when his representation was undertaken by ARDF, because his income exceeded the allowable maximum income level for "eligible clients," and that ARDF therefore should not be permitted to accept any fees which may be awarded in this case.

The complainant takes the position that there is nothing improper in ARDF's representation of the complainant, and that pursuant to the regulations of the Legal Services Corporation, any complaint in this regard, including any resulting sanctions, is for that agency to consider. Citing 42 U.S.C. § 2996e(b)(1)(b), the complainant maintains that a trial court is prohibited from affecting the final disposition of a legal proceeding because of an alleged impropriety by a Legal Services Corporation recipient program, and it cites the following cases in support of its argument: Martens v. Hall, 444 F. Supp. 34 (S.D. Fla. 1977); Anderson v. Redman, 474 F. Supp. 511 (D. Del. 1979); Holland v. Steele, 92 F.R.D. 58 (N.D. Ga. 1981); Harris v. Tower Loan of Mississippi, Inc., 609 F.2d 120 (5th Cir. 1980).

Findings and Conclusions

Costs and attorney fees have consistently been awarded to counsel who were employed by a union or a private legal services organization such as ARDF. See: Eldridge v. Sunfire Coal Company, 5 FMSHRC 1245 (July 1983); Munsey v. FMSHRC, 701 F.2d 976 (D.C. Cir. 1983); Chaney Creek Coal Corporation v. FMSHRC, 866 F.2d 1424 (D.C. 1989); Robert Simpson v. Kenta Energy, Inc. and Roy Dan Jackson, 11 FMSHRC 2543 (December 1989); Ronald Tolbert v. Chaney Creek Coal Corp., 9 FMSHRC 929 (May 1987). See also: Council of the Southern Mountains, Inc. v. Martin County Coal Corporation, 3 FMSHRC 526 (February 1981), and in particular the cases cited at 3 FMSHRC 549-552, concerning costs and attorneys fees awardable to legal services non-profit corporations.

Prior challenges to the propriety of ARDF's legal representation of miners in discrimination proceedings before the Commission have been rejected. See: Bradley v. Belva Coal, 3 FMSHRC 921, 924 (1981); Eldridge v. Sunfire Coal Company, supra. In addition, eight U.S. Circuit Courts of Appeals have considered and rejected similar challenges concerning the propriety of legal representation provided by such legal services organizations. See: Bonnes v. Long, 599 F.2d 1316 (4th Cir. 1979); Weisenberger v. Huecker, 593 F.2d 49 (6th Cir. 1979); Mid-Hudson Legal Services v. G & U, Inc., 578 F.2d 34 (2nd Cir. 1978); Perez v. Rodriguez Bou, 575 F.2d 21 (1st Cir. 1978); Rodriquez v. Taylor, 569 F.2d 1231 (3d Cir. 1977); Bond v. Stanton, 555 F.2d 172 (7th Cir. 1977), cert. denied, 438 U.S. 916 (1978); Sellers v. Wallman, 510 F.2d 119 (5th Cir. 1975); Brandenburger v. Thompson, 494 F.2d 885 (9th Cir. 1974).

After further consideration of the arguments presented by the parties, I conclude and find that the complainant's position is correct, and the position taken by the respondent is rejected.

Unreasonableness of Attorney Fees in Light of Other Remedies

The respondent asserts that the amount of attorney fees sought by the complainant is clearly unreasonable in light of the monetary value of the other remedies sought and obtained by the complainant in this case. Citing Hensley v. Eckerhart, 103 S. Ct. 1933 (1983), the respondent points out that the amount of money involved in a dispute is a relevant factor in determining the reasonableness of attorney fees to be awarded. Respondent concludes that while the complainant has been awarded reinstatement in addition to back pay, he had already obtained other employment when this litigation was begun and the difference in his wages was not so great as to justify the huge fee sought by his counsel.

Conceding the fact that the monetary amount of a plaintiff's recovery is a relevant factor in determining the reasonableness

of attorney fees to be awarded, the complainant asserts that this is but one factor to be considered, and that the Supreme Court has expressly rejected the proposition that attorney fee awards under civil rights statutes should necessarily be proportionate to the amount of damages a plaintiff actually recovers. Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974); City of Riverside v. Rivera, 106 S. Ct. 2686, 2691, 2694 (1986). The complainant has cited a number of Federal court cases in which attorney fees awarded greatly exceeded the amount of damages recovered by a plaintiff.

Recognizing the fact that the requested attorney fees are almost five times greater than his backpay award, the complainant nonetheless points out that the respondent has been ordered to reinstate him to his former position, and that although he is currently employed by another company, he intends to return to work with the respondent if he prevails on any appeal of this case. Under the circumstances, the complainant asserts that his backpay continues to accrue, will continue to grow pending any appeal, and could increase greatly if he were to lose his present job.

Complainant further argues that the Mine Act is remedial legislation which affects the public interest as well as the interest of the individual miner, and that by prevailing in this case, he has served the public interest by vindicating important federal safety rights. Further, by establishing that the respondent has violated the Act, complainant concludes that his case may also deter the respondent from continuing its unlawful conduct, and thus assure that other miners are not subjected to similar unsafe working conditions.

Citing the Supreme Court's decision in Hensley v. Eckerhart, supra, the complainant believes that since his attorney obtained excellent results in his case, he should recover a fully compensatory fee which normally encompasses all hours reasonably expended on the litigation. Relying on the Commission's consistent holdings in discrimination cases that miners who have suffered discrimination should be made whole, the complainant concludes that he would not be made whole, and the effects of the respondent's unlawful discrimination would not be eliminated, if his counsel are not fully awarded the reasonable fees sought in this matter.

Findings and Conclusions

It seems clear to me that the amount recovered as back pay does not determine the reasonableness of the attorney fee request, Copeland v. Marshall, 641 F.2d 880, 906-908, (D.C. Cir. 1980). See also: Munsey v. Smitty Baker Coal Company, Inc., 3 FMSHRC 2056 (1981); Simpson v. Kenta Energy, Inc., 7 FMSHRC 272 (1985); and Munsey v. Smitty Baker Coal Co., Inc., et al.,

5 FMSHRC 2085 (December 1983), where Judge Melick stated as follows at 5 FMSHRC 2091:

> While the overall attorney fee award in this case is more than seventeen times the damages awarded the actual victim of discrimination, it is well recognized that market value fee awards in cases such as this take into account the need to assure that miners with bona fide claims of discrimination are able to find capable lawyers to represent them. In addition, the success in this case represents a vindication of societal interests incorporated in the mine safety legislation above and beyond the particular individual rights vindicated in the case. Accordingly, I do not find the substantial fee award in this case to be excessive or in the nature of a "windfall."

After careful consideration of the arguments presented by the parties, I agree with the position taken by the complainant, and I conclude and find that any attorney fee award to the complainant in this case should not be reduced simply because his back pay award is relatively small and he had already obtained other employment when this litigation was begun.

The appropriate Hourly Rate

Arguments Presented by the Parties

The complainant's counsel Oppegard has billed at an hourly rate of $150. Co-counsel Sanders has billed at an hourly rate of $75 for claimed work with Mr. Oppegard, and at an hourly rate of $150 for his remaining claimed legal work. In support of the $150 hourly rate, the complainant states that the rate represents the current market rate for legal work performed in order to compensate for delay in payment and in lieu of requesting an enhancement of the "lodestar." The complainant believes that enhancement of the lodestar is fully warranted in this case, and in his interrogatory response to a discovery request by the respondent, complainant asserted that such enhancement was warranted because of the contingent nature of the case, particularly the high risk factor in light of the fact that the case was rejected for prosecution by MSHA, the excellent representation provided and the results achieved, and the certain delay in payment that will occur in view of the respondent's assertion that it intends to appeal the decision in his case.

Complainant asserts that his attorneys have exercised billing judgment with respect to the hours worked in litigating his claim, and that when counsel felt that certain legal work could have been performed in less than the actual hours expended, they did not bill for those additional hours. In addition, complainant asserts that while travel time is compensable,

counsel has not billed for several hours of travel time spent on his case.

In his responses to certain discovery requests by the respondent, and in support of the $150 hourly rate, the complainant cites the Supreme Court's holding in Blum v. Stenson, 104 S. Ct. 1541 (1984), that the "prevailing market rate" is the rate "prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation," 104 S. Ct. at 1547, n. 11. The complainant asserts that counsel Oppegard and Sanders are the most experienced attorneys in eastern Kentucky in handling safety discrimination litigation under section 105(c) of the Act. Complainant points out that there are few plaintiffs' attorneys in eastern Kentucky who have litigated even one such case, whereas counsel Oppegard has litigated approximately 42 such cases, and Sanders about 9.

The complainant has submitted affidavits from counsel Oppegard and Sanders, and affidavits from seven (7) local plaintiffs' attorneys in support of the reasonableness of the claimed hourly rate of $150. The complainant has also submitted an affidavit from a local attorney who successfully represented a complaining miner in a recent proceeding before Judge Fauver, Charles T. Smith v. Kem Coal Company, 12 FMSHRC 2130 (October 1990). The complainant states that this was the only case ever litigated by the attorney pursuant to section 105(c) of the Act, and that on January 31, 1991, Judge Fauver awarded the attorney $150 per hour for his services after finding that the fee rate was reasonable for comparable cases in the eastern Kentucky area.

In further support of his argument, the complainant, in his discovery responses, states that on December 18, 1989, Judge Broderick approved an hourly rate of $125 for legal work performed by counsel Oppegard and Sanders during the period of December, 1984, through November, 1989, in the cases of Robert Simpson v. Kenta Energy, Inc. and Roy Dan Jackson, 11 FMSHRC 2543 (1989), and that more recently in the case of Odell Maggard v. Chaney Creek Coal Corporation, 12 FMSHRC 1749 (August 1990), Judge Melick awarded counsel Oppegard an hourly fee of $150 for legal work performed during the period June, 1986, through April, 1990. The complainant also cites a case 10 years ago, where former Commission Judge Steffey awarded an attorney an hourly rate of $100, for representing a miner in the only discrimination case ever litigated by the attorney, Elias Mosley v. Whitley Development Corporation, 3 FMSHRC 746, 762 (1981).

In its initial statement objecting to the payment of any attorney fees, the respondent asserted that the complainant bears the burden of establishing the "current market rate," citing Hensley v. Eckerhart, 103 S. Ct. 1933 (1983).

In its subsequently filed objections, the respondent maintains that the claimed hourly billing rate for the complainant's attorneys is excessive. In support of its argument, the respondent asserts that five of the supporting attorney affidavits submitted in support of the requested hourly rate are based, in part, on the supposed "contingent" nature of this case. Under the circumstances, the respondent concludes that it would appear that instead of requesting enhancement of the lodestar, complainant's counsel have incorporated the enhancement into the lodestar by adjusting their hourly rate to account for supposed "delay in payment" and "contingency," and have also subsequently moved for an award of post-judgment interest to be added to their fee.

The respondent argues that contingency should not be a factor which leads to an award of a high hourly attorney fee in this case. The respondent points out that the complainant has been fully employed throughout this litigation and has earned $48,560.90, in substitute employment as of January 31, 1991. The respondent believes that had complainant's counsel been in private practice, they could have entered into an agreement with the complainant providing for payment of their fees, at a lower hourly rate (i.e., one not reflecting "delay in payment" or "risk of non-payment"), and could reasonably have expected to be paid, win or lose. In view of the complainant's arguments that his attorneys are entitled to the same fees as that of counsel in private practice, notwithstanding the fact that they are employed by a non-profit corporation, the respondent concludes that complainant's attorneys clearly should not be awarded additional compensation for delays or risks incurred because their employing organization cannot bill its client directly.

The respondent further believes that the complainant's request for post-judgment interest on its attorney's fees stands on the same footing as the request for an hourly rate based on contingency or delay, and that it seems obvious that counsel cannot be compensated twice, in different ways, for the same thing. The respondent concludes that in the event the complainant's counsel are awarded an hourly billing rate which reflects anticipated delay in payment or risk of non-payment, then an award of interest in addition thereto would be an impermissible redundancy, citing Library of Congress v. Shaw, 106 S. Ct. 2957 (1986) ("delay adjustment" equated with award of interest and therefore not awardable against Federal government).

In further response to the respondent's argument's concerning the "contingent" nature of his case, the complainant asserts that the respondent's argument that he could have entered into a standard attorney fee arrangement with his attorneys if they were in private practice, while at the same time arguing that his attorneys should be treated differently than attorneys in private practice because they are employed by a non-profit organization that does not bill its clients directly, is contradictory,

irrelevant and without merit. The complainant points out that his attorneys are not private, for-profit practitioners, and that the respondent has produced no evidence that miners who retain private, for-profit counsel in section 105(c) discrimination cases in eastern Kentucky have entered into anything other than contingency agreements, and that the affidavits submitted by the complainant indicates that private attorneys in the area uniformly view such cases as contingent in nature.

The complainant further asserts that the respondent's argument that the contingent nature of his case should be overlooked because the ARDF is a non-profit law office ignores the explicit holding of the Supreme Court in Blum v. Stenson, 104 S. Ct. 1541 (1984), where the court stated as follows at 104 S. Ct. 1564:

> Petitioner's argument that the use of market rates violates congressional intent . . . is flatly contradicted by the legislative history of [the statute].
>
> It is also clear from the legislative history that Congress did not intend the calculation of fee awards to vary depending on whether plaintiff was represented by private counsel or by a nonprofit legal services organization . . . . The statute and legislative history establish that "reasonable fees" under § 1988 are to be calculated according to the prevailing market rates in the relevant community, regardless of whether plaintiff is represented by private or nonprofit counsel. 104 S. Ct. at 1546-1547 (emphasis added).

Citing a Supreme Court and several lower federal court decisions, the complainant further argues that a contingent fee contract does not impose an automatic ceiling on an award of attorney fees, and that even if private, for-profit attorneys bill their poorer clients at lower than normal (reduced) billing rates because of the financial inability of the client to pay regular rates, the prevailing market rate method should be used to compute the proper attorney fee award.

The complainant points out that in the few instances where the respondent has actually challenged the reasonableness of specific work performed by his attorneys, its objections are nothing more than speculating that, in retrospect, perhaps the work could have been performed by a single attorney. However, the complainant believes that he should be granted some latitude with respect to the legal strategy and techniques employed by his counsel, particularly since he prevailed, and in spite of the difficulty encountered by his attorneys in securing testimony from frightened witnesses. The complainant concludes that the respondent has not rebutted his convincing evidence that $150 per hour is a reasonable fee for both attorneys Oppegard and Sanders,

particularly in light of Judge Fauver's recent award of $150 per hour to an inexperienced attorney practicing his first discrimination case.

Finally, the complainant suggests that the substantial amount of work performed by his attorneys could have been avoided had the respondent engaged in good faith settlement negotiations with him. The complainant asserts that on May 3, 1990, prior to the trial of this case, he offered to wave reinstatement and attorneys fees, and to dismiss his case for the payment of $20,400 by the respondent. However, the respondent rejected his offer, and made a counteroffer of only $3,000. The complainant views this rejection as an extension of the respondent's belief that his case is frivolous, and he believes that the respondent is simply a litigant who does not want to pay the reasonable fees for the work required of his counsel to prove its inlawful conduct.

Findings and Conclusions

The recognized method of computing the amount of attorney's fees begins by multiplying a reasonable hourly rate by the number of hours reasonably expended. Hensley v. Eckerhart, 103 S. Ct. 1933 (1983); Blum v. Stenson, 104 S. Ct. 1541 (1984); Copeland v. Marshall, 641 F.2d 880 (D.C. Cir. 1980). The resulting figure is called the lodestar. The lodestar fee may then be adjusted to reflect a variety of other factors, including the complexity of the case, the experience level of the attorney, the contingent nature of the case, and any anticipated delay in payment of the fee award. See: Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 717-719 (5th Cir. 1974), where the court established 12 guidelines for establishing attorney fee awards. These guidelines have been followed in the D.C. Circuit. See: Evans v. Sheraton Park Hotel, 503 F.2d 177, 188 (D.C. Cir. 1974); Copeland v. Marshall, supra. The appropriate hourly rate is the rate prevailing for similar work in the community where the attorneys practice law. Johnson v. Georgia Highway Express, Inc., supra; Copeland v. Marshall, supra.

Section 105(c)(3) of the Act provides for an award of attorney's fees which have been reasonably incurred by the prevailing miner in a discrimination case. Thus, the appropriate measure of an attorney's time for establishing his fees is not the actual time spent but the time that should reasonably have been spent. Spray-Rite Service Corporation v. Monsanto Co., 684 F.2d 1226 (7th Cir. 1982); Copeland v. Marshall, supra. In Johnson v. Georgia Highway Express, Inc., supra, the court made the following observation at 488 F.2d 720:

> The trial judge is necessarily called upon to question the time, expertise, and professional work of a lawyer which is always difficult and sometimes distasteful.

> But that is the task, and it must be kept in mind that the plaintiff has the burden of proving his entitlement to an award for attorneys' fees just as he would bear the burden of proving a claim for any other money judgment.

After careful review and consideration of the arguments presented by the parties, and taking into account the applicable case law, I conclude and find that the complainant has met its burden of establishing both the appropriateness and reasonableness of the claimed hourly rate of $150. I am persuaded that the affidavits submitted by the complainant, the experience and competence level of his attorneys, and the recent hourly fee awards made to his counsel in other comparable discrimination cases, which took into account the prevailing local community rate, supports an hourly fee award of $150 per hour in this case. While it is true that complainant's counsel have been awarded lesser hourly rates in the past, taking into account the increased cost of living, inflation, and the added experience level of counsel, I cannot conclude that $150 per hour is unreasonable or unjustified. The respondent's arguments to the contrary are rejected, and I find nothing improper or unreasonable in including contingency and delay in payment of a fee as part of the lodestar rate of $150 per hour in this case.

Attorney Fees for Work Performed Prior to Accrual of Cause of Action before the Commission

The respondent points out that any attorney fees for complaining miners who prevail pursuant to the Act are provided for by section 105(c)(3), which generally creates a private cause of action for any complaints the Secretary has declined to pursue after investigation. The respondent further points out that attorney fees are not provided for by section 105(c)(2) of the Act, and it objects to the payment of any fees incurred for the period from September 15, 1989, through November 1, 1989, when the complainant had proceeded under section 105(c)(2) and was awaiting MSHA's determination as to whether or not an alleged violation had in fact occurred. The fees claimed by attorney Oppegard for the period from September 15, through November 1, 1989, are for 23.3 hours at $150 per hour, for a total of $3,495. The respondent requests that these fees be disallowed.

The respondent takes the position that the time frame for any attorney fees payable in this matter initially began on November 14, 1989, when the complainant's cause of action before the Commission accrued with the receipt of MSHA's adverse determination on November 14, 1989, as alleged in his complaint. In support of its position, the respondent argues that the complainant had a right to pursue a complaint on his own behalf pursuant to section 105(c)(3) only after MSHA declined to prosecute his claim, and it concludes that the Act provides no basis for an

award of attorney fees for time spent by the attorney assisting the complainant in an effort to persuade MSHA to go forward with his claim. At that stage, the respondent believes that the complainant was an intervenor under section 105(c)(2) of the Act, and as such was not entitled to attorney fees. The respondent cites Chaney Creek Coal Company v. FMSHRC, 866 F.2d 1424 (D.C. Cir. 1989); and Eastern Associated Coal Corporation v. FMSHRC, 813 F.2d 639 (4th Cir. 1987), in support of its argument.

The respondent further argues that if MSHA had elected to prosecute the complaint in the complainant's behalf, then the complainant would not have been entitled to any award of attorney's fees. Under the circumstances, the respondent concludes that it would be both ironic and improper to allow the fees in question, for the time spent by the attorney during MSHA's investigation, because the complainant failed to convince MSHA that his claim had merit.

The complainant takes the position that the respondent's objections to the award of attorney fees for work performed prior to MSHA's determination in his case are wholly without merit. In support of his argument that fees are awardable, the complainant cites the language of section 105(c)(3), which authorizes an award to a miner whose complaint is sustained for expenses and fees reasonably incurred for, or in connection with the institution and prosecution of such proceedings.

The complainant maintains that because it is necessary for a miner to first file a discrimination complaint with MSHA prior to the filing of his complaint with the Commission, work performed by the complainant's attorney during this initial, critical phase clearly is "in connection with the institution" of the miner's complaint. Complainant asserts that his attorney performed important work during this stage of the proceeding, including an initial interview with the complainant, other witness interviews, and submissions to MSHA's special investigator. Complainant further asserts that the attorney-client relationship with ARDF had already begun during the relevant period, and all of the work claimed by his attorney was "in connection with" his proceeding against the respondent.

With regard to the respondent's "intervenor" argument, the complainant asserts that the respondent's reliance on Eastern Associated Coal Corporation is misplaced, and that at no time was the complainant an intervenor. The complainant asserts that only 5.7 of the 23.3 hours spent during the period in question was related to MSHA's investigation, and that the remainder of the time was not connected to the investigation, but rather was spent interviewing the complainant and various witnesses. The complainant concludes that in light of the fact that he was required to file a complaint with MSHA to initiate his action, and that MSHA then expects him to cooperate during its investigation of

his complaint, it is clear that the time spent by his attorney was reasonable.

Findings and Conclusions

In my view, if a private attorney agrees to perform work for a complaining miner while the matter is pending an MSHA investigation and determination as to whether a violation of section 105(c)(1) has occurred, the attorney does so at his own risk of not being compensated for his work should MSHA decide to pursue the claim before the Commission. In such a situation, the attorney would not be entitled to an award of attorney's fees. See: Eastern Associated Coal Corporation v. FMSHRC, 813 F.2d 639 (4th Cir. 1987). However, should MSHA decline to file a complaint on the miner's behalf, and the miner does so pursuant to section 105(c)(3), and prevails, his attorney would be entitled to an award of reasonable attorney fees because his work was for or in connection with the institution and prosecution of such proceedings which resulted in an order sustaining the complainant's charges under this subsection.

After careful consideration of the arguments presented by the parties, I conclude and find that the complainant has the better part of the argument. The respondent's contention that the complainant should be treated as an intervenor is rejected, and I agree with the complainant's position that any work performed by counsel during the pendency of his complaint with MSHA was work connected with his discrimination complaint against the respondent. On the facts of this case, I conclude and find that the work performed by complainant's attorney at the time the complainant filed his complaint with MSHA, and while his complaint was being investigated by MSHA, was work connected with the institution and prosecution of a discrimination proceeding which ultimately ripened into a section 105(c)(3) proceeding before the Commission.

In Johnson v. Georgia Highway Express, supra, at 488 F.2d 717, the Court of Appeals stated that "It is appropriate to distinguish between legal work, in the strict sense, and investigation, clerical work, compilation of facts and statistics, and other work which can often be accomplished by non-lawyers but which a lawyer may do because he has no other help available. Such non-legal work may command a lesser rate. Its dollar value is not enhanced just because a lawyer does it."

I conclude and find that the time spent by Attorney Oppegard during the period that the complaint was being pursued and investigated by MSHA, including interviews, meetings, and phone calls with the complainant and MSHA's special investigator, was "non-legal work" unconnected with the trial of the case, or preparation for the trial of the case. The complainant's assertion that only 5.7 of the 23.3 hours spent during the time in

question was related to MSHA's investigation is rejected. I conclude and find that all of the time spent was in connection with the investigation, including the 10.5 hours charged to "interviewing witnesses." I further conclude and find that $50 per hour is a reasonable billing rate for this work. Accordingly, I will allow $1,165, for this work (23.3 hours x $50), and the requested fees are reduced by $2,330.

Complainant has claimed an additional 6.0 of work for the period November 17, 1989, through December 15, 1989, prior to the receipt of the complaint by the Commission on December 18, 1989. With the exception of one day (December 15, 1989) for .4 hours spent in a letter to the complainant, the work claimed for the remaining 6 days includes telephone calls and conversations, either listed separately, or included as part of several activities. Except for the time spent on December 13, 1989, drafting and dictating the complaint of discrimination, I conclude and find that all of the remaining work was "non-legal" work conducted during the investigation stage of the complaint. I will allow 1.0 hour for the drafting of the complaint, which is not complex, at an hourly rate of $150, and 5.0 hours at $50 an hour for the remaining work claimed, for a total of $400. The requested fees ($900), for all of this work, is reduced by $500.

Fee Billing for Work Performed from December 18, 1989, through November 16, 1990

The complainant has billed for 271.1 hours for claimed work performed by attorney Oppegard from December 18, 1989 (the date the complaint was received by the Commission) through November 16, 1990, for a total of $40,665 (271.1 hours x $150).

The complainant has billed 8.3 hours for Mr. Oppegard's claimed work on April 25, 1990, in meeting with the complainant and in the "preparation" and taking of the depositions of respondent's adverse witnesses Clayton Hacker and Clyde Collins during the discovery stage of this case. The amount claimed for this work is $1,245 (8.3 hrs, x $150). The record reflects that both depositions were taken at the ARDF's law offices in Manchester, Kentucky. The deposition of Mr. Hacker began at 3:45 p.m., and except for 10 minutes of "off the record" time, it concluded at 6:05 p.m. The deposition of Mr. Collins began at 6:10 p.m., and concluded at 6:57 p.m. Mr. Oppegard conducted the examination of the witnesses, and respondent's counsel asked no questions. Although Mr. Sanders was present, he asked no questions, and his participation was apparently limited to his appearance.

It would appear from the foregoing that the actual time spent in the taking of the depositions amounted to three (3) hours at most, and the "preparation" required by Mr. Oppegard is not further explained or documented. I conclude and find that the claimed 8.3 hours for this work is excessive. I will allow

$645 for this work (4.3 hrs. x $150), and the requested fees are reduced by $600.

The complainant has billed 5.7 hours for unexplained "research" by Mr. Oppegard on June 23, August 23, and September 7, 1990, and the requested fee is $855 (5.7 hrs. x $150). Additional time charges for unexplained "research" are included among other claimed work items for April 24, May 6, and May 11, 1990. The requested fees for the 5.7 hours are unsupported and they are disallowed. I will also deduct a total of 3.0 hours for the unexplained "research" included with the other work items for April and May, 1990. The requested fees are reduced by $1,305 (8.7 hrs. x $150).

The complainant has billed 10.3 hours for Mr. Oppegard's claimed work on September 14, 1990, in connection with the drafting, dictation, editing, and finalizing of a reply brief and a "letter to client." The time devoted to the letter is included with the work on the brief. The amount claimed for all of this work is $1,545 (10.3 hrs. x $150).

At the conclusion of the trial in this matter, the parties were informed that they would have an opportunity to file simultaneous briefs (Tr. 246, Vol. II), and they did so in accordance with an order which I issued after receipt of the transcripts. Reply briefs were not requested or required by the trial judge, nor did the parties seek leave to file reply briefs. Mr. Oppegard filed the reply brief at his own initiative, and in his accompanying letter of September 14, 1990, he characterized it as "a short reply brief." Indeed, the brief consists of ten (10) double spaced "letter size" (8-1/2 x 10-1/2) pages.

I conclude and find that the initial brief filed by Mr. Oppegard adequately covered his position, and that the reply brief did not materially affect the trial judge's understanding of the factual and legal arguments presented by the parties. Under the circumstances, I conclude and find that the filing of the reply brief was not necessary or essential and that the time charged is excessive and unreasonable. However, since Mr. Oppegard did perform the work which he apparently believed was essential to his case, I will allow $300 for this work (2.0 hours x $150) and the client letter, and the requested fees are reduced by $1,245.

The complainant has billed 14.0 hours for Mr. Oppegard's actual trial participation during the 2-day trial conducted on May 8 and 9, 1990. The record reflects that the trial began at 9:30 a.m., on May 8, recessed an hour for lunch, and concluded at 4:40 p.m. The second day's trial session on May 9, began at 9:15 a.m., recessed an hour for lunch, and concluded at 3:20 p.m. Accordingly, the claimed trial time will be allowed.

The complainant has billed 4.0 hours for claimed work by Mr. Oppegard on May 1, 1990, in connection with his interview of one witness, his dictation of notes, and a telephone conversation with the complainant. Additional phone conversations and interviews with witnesses from May 2, through May 4, 1990, are included among other work items on those days, for a total additional billing of 16.7 hours. The sum total of all of this claimed work a week before the trial is 20.7 hours, and the amount claimed is $3,105 (20.7 hrs. x $150).

The complainant has billed 8.3 hours for May 5, 1990, for Mr. Oppegard's reading of the depositions of the complainant, the depositions of witnesses Clayton Hacker and Clyde Collins, and "other preparation for trial." An additional 13.5 hours is claimed for May 6, 1990, interviewing witnesses, dictating notes, and "preparation for trial," and 15.8 hours is claimed for May 7, 1990, in "preparation of client and witness for trial," phone conversations with opposing counsel and witnesses, and "other trial preparation." Further claims are made for 2.0 hours to "prepare for trial" on May 8, 1990, the first day of the trial, and an additional 5.5 hours is claimed that same day to "prepare for resumption of trial." An additional 1.5 hours to "prepare for resumption of trial" is also billed for May 9, 1990, the second day of the trial, and 1.5 hours is billed for Mr. Oppegard's return to Hazard from the Pikeville trial location. The sum total of all of this claimed work from May 5, 1990, through May 9, 1990, is 48.1 hours, and the amount claimed is $7,215 (48.1 hrs. x $150).

Excluding the 14.0 hours actually spent in the 2-day trial, and the 1.4 hours travel time to Hazard, complainant has billed a total of 67.3 hours, at a claimed cost of $10,095, for work by Mr. Oppegard in speaking with the complainant and witnesses, reading three depositions, and other "trial preparation" (which is not further explained).

The complainant's deposition is not a part of the record, but based on a claimed cost of $25.60 for a copy of the transcript, I assume that it is not particularly lengthy. The Hacker and Collins depositions are a part of the record. I have read both depositions, and the time consumed in reading them at a moderate rate of speed was less than 1 hour. Under the circumstances, and in light of the unexplained "other preparation for trial" work, I find that the claimed 8.3 hours for May 5, 1990, is excessive. I will allow 2.0 hours for this work, and disallow 5.3 hours. The requested fees are reduced by $945 (6.3 x $150).

In the course of certain pre-trial discovery rulings which I issued on January 25, 1990, I noted my belief that the issues in this case did not appear to be particularly complex. I am still of that opinion. Under the circumstances, I conclude and find that the 59.0 hours claimed for interviews with witnesses who are

not identified, and other unexplained "trial preparation" is excessive and unreasonable. I take note of the fact that during the complainant's testimony on the first day of trial, six of the subpoenaed witnesses called by the complainant gave relatively short and rather repetitive testimony, and four of them were examined by Mr. Sanders. From the submissions by the complainant, it is not clear to me which witnesses may have been contacted and interviewed by phone, and which were personally interviewed in advance of trial, and the unspecified work characterized as "trial preparation" is not explained or further documented. Under all of these circumstances, the claimed 59.0 hours of work is reduced by one-third, and the requested fees are reduced by $2,940 (19.6 hrs. x $150).

In view of the allowable mileage, lodging, and meal expenses while at the hearing, the requested fee payment of 1.5 hours for Mr. Oppegard's return to Hazard is disallowed, and the requested fees are reduced by $225 (1.5 hrs. x $150).

The complainant has billed 27.6 hours for Mr. Oppegard's reading of the transcripts, notetaking, and indexing, ($4,140) and 48.5 hours for his work in preparing his brief ($7,275). The sum total claimed for this work is $11,415. I take note of the fact that the hearing transcript for the 2-day trial is in two volumes totalling 534 pages. Under the circumstances, I cannot conclude that the time charged for reading, notetaking, and indexing of the transcript is excessive or unreasonable. However, I find that the time spent in brief preparation is excessive. As noted earlier, the case was not particularly complex, nor were the issues that difficult so as to require an inordinate amount of time in trial preparation, "research," and brief writing. In this regard, I take note of Mr. Oppegard's affidavit in support of the claimed fees in which he states that he has read virtually every safety discrimination decision issued by Commission Judges, the full Commission, and the U.S. Courts of Appeals since the passage of the 1977 Act, and that he has litigated far more discrimination cases than any other private attorney in the country. Under the circumstances, I have difficulty justifying the claimed 48.5 hours for working on the briefing. Accordingly, the time is reduced by one-third, and the requested fees are reduced by $2,415 (16.1 hrs. x $150).

The complainant has billed for 7.1 hours ($1,065) for claimed time spent by Mr. Oppegard in telephone conversations with the complainant, co-counsel Sanders, and opposing counsel Walker intermittently from January 5, 1990, to November 6, 1990. Additional time is claimed for numerous additional telephone conversations which are included among other claimed work items, and these conversations were with the complainant, Mr. Sanders, opposing counsel, unidentified witnesses, and other individuals

whose connection with this case is unexplained. Selected examples of such telephone conversations are as follows: 4/19/90 - "phone conversations with Herschel Potter . . . John Rosenberg & Steve . . David Griffith . ."; 4/26/90 - "phone conversation with Steve Hoyle (at MSHA Academy); 5/4/90- "phone conversations with Kentucky Department of Mines & Minerals." Since these additional daily telephone calls are not listed separately from the other claimed work, I have no way of knowing how much time Mr. Oppegard spent on the telephone or how much was devoted to the other listed work items. I take note of the fact that many of the calls to the complainant were apparently made to discuss the "status of case," and while some calls are unexplained, I assume that the posthearing calls were in connection with the relief aspects of this case. I take particular note of a claimed charge of .4 hours for Mr. Oppegard to "dictate posthearing thoughts."

Upon review of the detailed itemized listing of the time claimed for telephone calls and conversations, I am not totally convinced that all of these calls and conversations were necessary in this case. However, in the absence of any specific challenge by the respondent, I will allow most of the charges. However, in view of the fact that some of the telephone time is unexplained, I will make a deduction of two (2) hours from the claimed fees and will disallow the .4 hours for Mr. Oppegard's dictation of his posthearing thoughts. The requested fees are reduced by $360 (2.4 hrs. x $150).

Duplicative and Redundant Legal Work

The respondent argues that the complainant has requested attorney's fees for services which are "clearly excessive and/or redundant." As an example, the respondent asserts that numerous entries in the claims for attorney's fees for Mr. Sanders are designated as "work performed simultaneously with co-counsel." Recognizing that Complainant's counsel have billed such services at a lesser rate, the respondent believes that it still would be unfair to require it to pay any amount for duplication of effort by two attorneys. In support of this argument, the respondent maintains that neither the issues nor the proof in this case were so complex, nor was the amount in controversy so great, as to require or justify the presence of two attorneys for one party at depositions, meeting with the client, interviews with witnesses, and the formal hearing.

The respondent argues that the evidence submitted by complainant's counsel in support of their billing rate tends to show that Mr. Oppegard possesses considerable skill and expertise in the area of mine safety law, so it is not consistent with Mr. Oppegard's position that he required assistance with the technical aspects of this case. If, on the other hand, the case was so time consuming as to require a division of labor, respondent concludes that this would not justify the presence of two

attorneys simultaneously for steps taken in the investigation and discovery of the case, or at the hearing.

The respondent asserts that the time spent by attorney Sanders on February 13, 1990, "to review case file," apparently "to bring himself up to speed in the case," is not a service for which an assisting attorney should expect compensation from a client, or, in this case, from the opposing party. Respondent points out that while it appears that Mr. Sanders spent some time on May 7, 1990, reviewing "depositions of Hacker and Collins," an activity which also had been performed by Mr. Oppegard, it is not clear how much time was spent since this item is part of an aggregate entry incorporating several activities.

The respondent maintains that since Mr. Sanders' attendance at the hearing was duplicative, his preparation for the hearing and his travel to and from the hearing should be disallowed, as well. The respondent concludes that the elimination of these redundancies results in a deduction of Mr. Sanders' fees by at least 9.5 hours at $150 per hour and by 34 hours at $75 per hour, for a total reduction of at least $3,975, not including time spent in review of depositions on 5/7/90, which cannot be determined on the basis of complainant's submissions. Charles v. National Tea Co., 488 F. Supp. 270 (W.D.LA. 1980).

The complainant maintains that the participation by Mr. Sanders was vital to the success of his case, and he points out that he had the burden of proof, that his discrimination complaint was rejected by MSHA, and that virtually all of the witnesses were reluctant to talk to his counsel. Complainant concludes that a diligent effort was required in order to uncover the facts and thoroughly present his case at trial, that the successful prosecution of his case required the work of two attorneys, and that he should not be penalized for employing multiple counsel. The complainant cites several federal court decisions awarding attorney fees for more than one counsel in support of his argument.

The complainant asserts that there are only six billing instances, totalling 34 hours, for services performed simultaneously by Mr. Sanders with Mr. Oppegard, and that in each instance Mr. Sanders has billed at only one-half the rate claimed by Mr. Oppegard. The complainant asserts that the trial responsibilities of Mr. Sanders and Mr. Oppegard "were roughly evenly divided." and that Mr. Sanders spent 14 hours at the trial, during which both he and Mr. Oppegard conducted direct and cross-examination of the witnesses. Complainant points out that Mr. Sanders also spent 5.5 hours interviewing an expert witness and inspecting the mine with Mr. Oppegard, and that all of this time was essential for Mr. Sanders' understanding of the case, particularly since he was responsible for the direct examination of the expert witness.

The complainant asserts that Mr. Sanders also spent 9.5 hours in preparing for and attending depositions of key witnesses in the case, including the deposition of one witness (Clayton Hacker), whom Mr. Sanders was responsible for cross-examining at trial, and that he also spent 5 hours interviewing several witnesses with Mr. Oppegard on May 3, 1990. Complainant maintains that Mr. Sanders' interviews was likewise necessary in that he was responsible for questioning some of the witnesses at trial.

Findings and Conclusions

In Johnson v. Georgia Highway Express, Inc., supra, at 488 F.2d 714, the fifth Circuit Court of Appeals stated "If more than one attorney is involved, the possibility of duplication of effort along with the proper utilization of time should be scrutinized. The time of two or three lawyers in a courtroom or conference when one would do, may obviously be discounted." Likewise, in Copeland v. Marshall, supra, at 641 F.2d 891, the D.C. Circuit Court of Appeals, stated ". . . where three attorneys are present at a hearing when one would suffice, compensation should be denied for the excess time." See also: Charles v. National Tea Co., 488 F. Supp. 270 (D.C. W.D. La. 1980), where the court cited Johnson v. Georgia Highway Express, Inc., supra, and stated at 488 F. Supp. 276 that "The time of two (2) lawyers in a courtroom when one would do, may obviously be discounted."

The complainant's argument that two attorneys were necessary because he had the burden of proof, that his discrimination complaint was rejected by MSHA, and that the witnesses were reluctant to speak with his counsel are rejected as a reasonable basis for justifying the need for two attorneys. The burden of proof, MSHA's rejection of initial complaints, and the reluctance of witnesses to speak with counsel are not unique to the instant case, and these arguments can be made in any discrimination case. Indeed, counsel Oppegard has handled prior cases where these factors were present, but only he prepared and tried the case. Although the complainant has filed an affidavit by Mr. Oppegard stating that the respondent's hourly employees were afraid to talk to his counsel and were intimidated prior to trial, there is no suggestion or assertion that Mr. Sanders played any unique or unusual role in eliciting the cooperation or testimony of these employees, all of whom were under subpoena to testify.

The complainant's argument that the trial responsibilities of Mr. Sanders and Mr. Oppegard were roughly evenly divided and that both attorneys conducted direct and cross-examination of the witnesses is rejected as any justification for the need for two attorneys. The issue is not whether the work was done, but rather, whether the use of two attorneys was necessary or crucial to the successful prosecution of the complainant's case. I

conclude and find that it was not. See: Donnell v. United States, 682 F.2d 240, 250 fn. 27 (D.C. Cir. 1982).

The record reflects that Mr. Oppegard conducted the examination of the complainant and four of the witnesses who testified the first day of the trial. Mr. Sanders examined the expert witness (Craft) and four additional witnesses (Marty Lewis, Eldridge, Combs, and Caudill). The direct testimony of these witnesses is relatively brief and uncomplicated, with little cross-examination, and limited redirect of only one witness. The direct testimony of Mr. Lewis consumed six (6) transcript pages; Mr. Eldridge, three (3) pages; Mr. Caudill, four pages; and Mr. Combs, five pages, and seven additional questions on redirect. I find nothing unique or unusual about the testimony of these witnesses, nor do I find any particular unique "trial strategy" that necessitated or required the questioning of these witnesses by Mr. Sanders, rather than Mr. Oppegard. In short, I can find no valid reason why Mr. Oppegard could not have prepared and examined these witnesses.

The record further reflects that Mr. Oppegard handled the cross-examination of two of the three witnesses presented by the respondent during the second day of trial (Garcia and Hacker), and that Mr. Sanders cross-examined one of the witnesses (Collins). Although Mr. Sanders was present at the pre-trial depositions of Hacker and Collins on April 25, 1990, he asked no questions, and Mr. Oppegard conducted the entire questioning of both deponents. Again, I find no valid reason why Mr. Oppegard could not have conducted the cross-examination of Mr. Collins.

I have reviewed the case decisions cited by the complainant at page 9 of his initial response to the respondent's objections to the payment of any attorney fees to Mr. Sanders and I find that the factual basis on which the courts found that more than one attorney was reasonable are distinguishable from those presented in this case. The cases cited involved protracted civil rights class actions, difficult constitutional First Amendment rights issues, a lengthy and complex "abortion rights" case with constitutional issues, and a difficult school desegregation case. In my view, the difficulty and complexity level of the complainant's case does not rise to the level of the cited cases, and his arguments are rejected.

In his fee supporting affidavit, Mr. Oppegard asserts that the presentation of the complainant's case was made more difficult because it concerned a piece of mining equipment, i.e., the continuance haulage system, that is unusual for eastern Kentucky, and required the employment of an expert witness who travelled underground with counsel to inspect this system. In his fee supporting affidavit, Mr. Sanders confirms that the continuous haulage system in question is not in common use in eastern Kentucky and that an understanding of how that equipment operated

was necessary to fully appreciate the dangers which the complainant was subjected to. Mr. Sanders further asserts that any understanding of these dangers required consultation with an expert and a visit to the mine to view the equipment.

The complainant's suggestion that the continuous haulage system utilized by the respondent rendered the case more difficult and complex is rejected. Although I agree that an underground mine visit was necessary to view the system so that counsel and the witness could familiarize themselves with it in an actual working environment, I am not convinced that two attorneys were required to do this. Nor am I convinced that an examination of the continuous haulage system, which was used in conjunction with a conventional continuous-mining machine and roof bolters, required any particular engineering or technical expertise. Indeed, the complainant's "expert" witness William Craft was offered as an expert with respect to the application and interpretation of MSHA's mandatory safety standards and general mine safety matters, rather than any technical or engineering expert on a Long-Airdox continuous haulage system (Tr. 185, Vol. I).

The record reflects that Mr. Craft is the former MSHA District Manager at Madisonville, Kentucky, who retired on disability in 1981, and who has worked since that time as a self-employed consultant. Mr. Craft's testimony and opinion that it would be dangerous for a miner to service the continuous haulage system while it was in operation, did not, in my view, require any particular scientific or technical knowledge of the system, and his opinion testimony concerning the hazards associated with servicing the system while it was moving and in operation could just as well have applied to any piece of underground mining equipment. Indeed, the record reflects that Mr. Craft's knowledge of the continuous haulage system was limited to the mine visit when he viewed the system with counsel, and his review of a rather brief Long-Airdox sales brochure which explains the operation of the system. Aside from his opinion concerning the servicing of the system while it was moving, the critical thrust of Mr. Craft's testimony was that to do so violated at least two MSHA mandatory safety standards (Tr. 201-206, Vol. I). I see no reason why Mr. Oppegard could not have prepared and examined Mr. Craft at the hearing.

As noted earlier, the complainant's justification for the hourly fee of $150 in this case is based on Mr. Oppegard's longstanding expertise in mine safety discrimination cases and his asserted role as a leading nationwide attorney in this area of the law. Under the circumstances, I find it rather contradictory that the complainant would require the additional services of Mr. Sanders to assist Mr. Oppegard in the pursuit of his case, and expect the respondent to pay for this.

In view of the forgoing, and in the absence of any showing of any compelling need or justification for the use of two attorneys in this case, I agree with the respondent's position that the services of Mr. Sanders were not required or justified, and that the fees claimed by the complainant for these services should be denied. Accordingly, they are denied, and the complainant's requested fees are reduced by an additional $6,525.

Other Litigation Expenses

The respondent has filed no objections to the complainant's claims for the itemized other litigation expenses shown in Exhibit C to his initial statement of expenses. Under the circumstances, the claimed expenses are allowed.

Supplemental Attorney Fee Claims for Work Performed from November 17, 1990, through March 15, 1991

Complainant has billed 12.3 hours for the time spent by Mr. Oppegard in telephone conversations with Mr. Sanders and other private attorneys in connection with the question of the reasonableness of the hourly rate charged by Mr. Oppegard. An additional 19.9 hours are charged for research and other work by Mr. Oppegard concerning the attorneys fee issue. Thus, the complainant has claimed $4,830 (32.2 hrs. x $150) for work by Mr. Oppegard justifying his fee rate and responding to the respondent's objections. This is over and above the $675 claimed by Mr. Oppegard for work on November 16, 1990, calculating litigation expenses and preparing the fee statement. An additional amount of $255 is claimed for work by Mr. Sanders in talking with private attorneys about the reasonableness of the attorney fees (1.7 hrs. x $150). The total amount of fees claimed for work connected with defending and justifying the reasonableness of the complainant's attorneys fees is $5,760.

I take note of several court decisions in the D.C. Circuit allowing and disallowing an attorney compensation for time spent on the question of his fees. In Kiser v. Miller, 364 F. Supp. 1311, 1318 (D.D.C. 1973), the court discounted by 30 percent the amount of time spent by attorneys on the question of their fees. In National Ass'n of Regional Medical Programs v. Weinberger, 396 F. Supp. 842, 850 (D.D.C. 1975), the court reduced the number of hours claimed for fee petition work from 475 hours to 150 hours, after finding that the claimed hours were excessive considering the amount of effort and skill expended in seeking the fees. See also: National Council of Community Mental Health Centers, Inc., v. Weinberger, 387 F. Supp. 991 (D.D.C. 1974). In Parker v. Matthews, 411 F. Supp. 1059, 1066-1067 (D.D.C. 1976), the court allowed the full amount of time spent on attorneys fees.

Approximately seventy (70) percent of the 53.8 hours and $8,070, claimed by the complainant for the additional work of Mr. Oppegard, is for work in connection with the issue concerning the reasonableness of Mr. Oppegard's fees. After reviewing the submissions by the parties with respect to this issue, I cannot conclude that the fee issue was so complex as to require the amount of work expended by Mr. Oppegard. Under the circumstances, I conclude and find that the hours and amount claimed in the supplemental filing for fees is excessive, and I have reduced it by one-half and will allow 16.1 hours and $2,415. I will also allow the $675 for fee work claimed by Mr. Oppegard on November 16, 1990. The $255 claimed for fee work by Mr. Sanders on January 22, 24, and 28, 1991, is denied. The requested fees are reduced by $255, and by $2,415 (16.1 hrs. x $150).

On the basis of the foregoing findings and conclusions, including the reductions made to the complainant's requests for attorneys fees, the total requested fees are reduced by $22,060, and I will allow payment of $37,850, for attorney fees in this case, and $3,628.52, for other litigation costs and expenses, or a total of $41,478.52 for attorney fees and litigation costs and expenses ($63,538.52-$22,060).

ORDER

IT IS ORDERED that:

1. My decision in this case, issued on September 28, 1990, is now final

2. The respondent shall reinstate the complainant to his former position with full backpay and benefits, with interest, at the same rate of pay, on the same shift, and with the same status and classification that he would now hold had he not been unlawfully discharged.

The backpay due the complainant for the period of September 8, 1989, through January 31, 1991, less any interim earnings and less interest is $12,853.69. Backpay and interest will continue to accrue until this matter becomes final and Mr. Hays is reinstated and paid. The interest accrued with respect to the backpay will be computed according to the Commission's decision in Local Union 2274, UMWA v. Clinchfield Coal Co., 10 FMSHRC 1483 (1988), aff'd sub nom. Clinchfield Coal Co. v. FMSHRC 895 F.2d 773 (D.C. Cir., 1990), and calculated in accordance with the formula in Secretary/Bailey v. Arkansas Carbona, 5 FMSHRC 2042 (1984).

3. The respondent shall expunge from the complainant's personnel records and/or any other company records any reference to his discharge of September 7, 1989.

4. The respondent shall adhere to its agreement to make retirement payments into the complainant's account as if he had not been discharged.

5. The respondent shall adhere to the agreed upon procedure for determining any payments due the complainant for covered medical expenses incurred during his employment, and it shall give the same consideration to the complainant's submitted medical expenses as it would have done had he not been discharged.

6. The respondent shall pay the complainant's attorney fees and other litigation costs and expenses of $41,478.52.

7. The respondent shall post a copy of my decision of September 28, 1990, and the instant decision, at its No. 62 Mine in a conspicuous, unobstructed place where notices to employees are customarily posted for a period of 60 consecutive days from the date of this decision and order.

IT IS FURTHER ORDERED that:

1. The respondent shall comply with the aforesaid enumerated Orders within thirty (30) days of the date of this decision.

2. The complainant's request for post-judgment interest on the attorney fee award IS DENIED.

3. The respondent's motion to hold the attorney fee award in abeyance pending determination of its complaint filed with the Legal Services Corporation IS DENIED.

George A. Koutras
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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APR 19 1991

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. KENT 90-107 A.C. No. 15-16508-03516
v.	:	
	:	Harlan Mine No. 1
J B D MINING COMPANY, INC., Respondent	:	

DECISION

Appearances: Thomas A. Grooms, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for the Petitioner;
Mr. Jefferson B. Davis, President, J B F Mining Company, Inc., Pathfork, Kentucky, for the Respondent.

Before: Judge Fauver

This case for civil penalties under § 110(i) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., came on for hearing in Kingsport, Tennessee, on March 12, 1991. At the conclusion of the submission of evidence, the parties moved for approval of a settlement. For the reasons stated on the record, the motion was granted. This decision confirms the bench decision.

ORDER

WHEREFORE IT IS ORDERED that:

1. The § 104(a) citations and § 104(b) orders involved in this proceeding are each AFFIRMED.

2. Respondent shall pay the approved civil penalties of $1,620.00 within 30 days of the date of this decision.

William Fauver
William Fauver
Administrative Law Judge

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APR 26 1991

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. CENT 90-25 A.C. No. 29-00096-03534
v.	:	McKinley Mine
PITTSBURG & MIDWAY COAL Respondent	:	

DECISION

Appearances: Michael H. Olvera, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas, for Petitioner;
Ray D. Gardner, Esq., Pittsburg & Midway Coal Mining Company, Englewood, Colorado, for Respondent.

Before: Judge Cetti

This case is before me upon the petition for civil penalty filed by the Secretary of Labor (Secretary) 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 Pittsburg & Midway Coal Mining Company (P&M) with a 104(d)(1) significant and substantial violation of 30 C.F.R. § 77.404(a).

P&M filed a timely answer to the Secretary's proposal for penalty, denying the alleged violation. After notice to the parties, an evidentiary hearing on the merits was held before me at Albuquerque, New Mexico. Both parties filed post-hearing briefs, which I considered, along with the entire record in making this decision.

Issues

The issues presented in this proceeding include the following:

1. Whether the 170-ton Unit Rig Haul truck powered by a Cummins diesel engine was being maintained in a safe operating condition as required by 30 C.F.R. § 717.404(a).

2. If a violation of the cited standard is found, whether it is of a "significant and substantial" nature.

3. If a violation is found, whether the contested 104(d)(1) order resulted from an unwarrantable failure by P&M to comply with the cited standard.

4. If a violation is found, the appropriate civil penalty that should be assessed, taking into consideration the statutory civil penalty criteria found in Section 110(i) of the Act.

Statement of the Case

The McKinley Mine operated by the Respondent P&M is a surface coal mine. The citation in question charges P&M with a violation of 30 C.F.R. § 77.404(a), which is a broadly worded safety standard requiring operators of surface coal mines to maintain mobile and stationary machinery and equipment in "safe operating condition". The cited safety standard in its entirety reads as follows:

> **77.404 Machinery and equipment; operation and maintenance.**
>
> (a) Mobile and stationary machinery and equipment shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed immediately.

P&M is charged with failure to maintain its Unit Rig 170-ton haul truck in a safe operating condition.

The haul truck weighs 192 fully loaded and travels at an average speed of 22 miles per hour. The haul truck functions as follows: (a) a fuel pump located and fixed on the diesel engine draws fuel from a tank to run the diesel engine (b) the diesel engine turns an alternator to generate electricity, and (c) the electricity generated runs two electric driven motors located near the rear wheels. Although the haul truck was supplied by Unit Rig Inc., the diesel engine, including the electrical fuel shut-off system and the mechanical fuel shut-off system it replaced to successfully abate the alleged violation, were both manufactured by Cummins Engine Company.

After careful review and evaluation of the evidence, the

arguments of the parties and the record as a whole, I find that the preponderance of the evidence presented fails to establish that P&M did not maintain the truck in a safe operating condition. I therefore find that there was no violation of 30 C.F.R. § 77.404.

Even though there was no violation of the cited standard, it is undisputed and clear from the record that Respondent made the modification required to successfully and timely abate the alleged violation.

At the time the citation was issued, the haul truck had a properly designed and functional electric fuel shut-off system that was turned on and off by turning a key on the dashboard in the cab of the truck. The modification made to abate the violation was to replace the electric fuel shut-off system with a mechanical fuel shut-off system. Both options are manufactured by the Cummins Engine Company. After abatement, the truck still had a single fuel shut-off system. There was no meaningful difference in the safe operating conditiion of the truck before and after abatement of the citation.

II

The finding and conclusion that there was no violation of the cited safety standard is based upon the fact that the preponderance of the evidence presented at the hearing established that none of the optional fuel shut-off systems for the Cummings diesel engine on the Unit Rig haul trucks are related to employee safety. The evidence established that the fuel shut-off systems on these trucks are designed solely to protect the diesel engine from damage and thus mitigate the potential economic loss that would result from destruction of the truck's diesel engine. These findings and conclusions are based on the creditable testimony of Mr. William R. Baltus, regional service manager for the Cummins Engine Company, and Mr. Norvell Moore, mine manager at the McKinley Mine. The only witness called by Petitioner was the MSHA inspector who issued the citation. He testified he had no experience with haul trucks. (Tr. 34). Messrs. Baltus and Moore, on the other hand, have had many years of relevent experience. Mr. Baltus has been the regional service manager for Cummins Engine Company for the past 13 years and has worked for the manufacture of the diesel engine in question for 35 years. This experience included working in the research and engineering labs with production-type and advanced research-type engines. Mr. Baltus was also employed as the supervisor of the company's test mechanics.

I credit the testimony of Messrs. Baltus and Moore. The evidence presented at the hearing fails to establish that the haul truck in question was not being maintained in a safe operating condition. The citation should therefore be vacated.

III

The cited safety standard, 30 C.F.R. § 77.404 is a broadly worded standard. It requires all machinery and equipment to be maintained in safe operating condition. The Commission in Ideal Cement Company, 11 FMSHRC 2409 at 2416 (November 1990) stated that in interpreting and applying broadly worded standards, the appropriate test is whether a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the specific prohibition or requirement of the standard, citing Canon Coal Co., 9 FMSHRC 667, 668 (April 1987), Quinland Coal, Inc., 9 FMSHRC 1614, 1617-1618 (September 1987).

Assuming arguendo that the fuel shut-off system on the truck in question affected safety, I find, on the basis of the evidence presented at the hearing, that a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would not have recognized that the haul truck should have been equipped with a mechanical fuel shut-off system rather than the functional electric fuel shut-off system with which it was equipped at the time the citation was issued.

Based on the creditable testimony of Mr. Baltus of the Cummins Engine Company and Mr. Moore, I conclude there were no violations of the cited standard. The citation is **VACATED**.

ORDER

Citation No. 2840029 is **VACATED** and its related proposed penalty is set aside.

August F. Cetti

August F. Cetti
Administrative Law Judge

Distribution:

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APR 29 1991

CHARLES M. LAPOE, Complainant	:	DISCRIMINATION PROCEEDING
v.	:	Docket No. WEVA 91-72-D
EASTERN ASSOCIATED COAL CORP., Respondent	:	MORG CD 90-13
	:	Federal No. 2 Mine

DECISION

Appearances: Charles M. LaPoe, pro se, Core, West Virginia; Thomas L. Clarke, Esq., Charleston, West Virginia for Respondent.

Before: Judge Melick

During hearings the Complainant acknowledged that he had obtained the remedy he was seeking in these proceedings in that he has been reassigned to his job classification as a belt cleaner. Accordingly these proceedings have been rendered moot and the Complaint is hereby dismissed.

Gary Melick
Administrative Law Judge

Distribution:

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FALLS CHURCH, VIRGINIA 22041

APR 30 1991

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS Docket No. KENT 91-12 A.C. No. 15-13920-03680
v.	:	
PYRO MINING COMPANY, Respondent	:	Docket No. KENT 91-13 A.C. No. 15-14492-03572

DECISION

Appearances: W.F. Taylor, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for the Secretary of Labor (Secretary); William M. Craft, Mine Safety and Health Consultant, Madisonville, Kentucky for Pyro Mining Company (Pyro).

Before: Judge Broderick

STATEMENT OF THE CASE

The Secretary seeks penalties for seven alleged violations of mandatory safety standards contained in the above dockets. Docket No. KENT 92-12 involves the No. 9 Wheatcroft Mine; Docket No. KENT 92-13 involves the Baker Mine. When the cases were called for hearing on March 19, 1991, the Secretary submitted an oral motion on the record for approval of a settlement between the parties with respect to all the alleged violations in Docket No. KENT 91-12. The first two citations in the docket charge violations of 30 C.F.R. § 75.313 because methane monitors were inoperative. The violations were originally assessed at $192 each. Both violations were judged significant and substantial. The motion proposes a reduction in the penalties to $96 each, and a modification of the citation to eliminate the significant and substantial finding. No methane was detected in the area and the motion stated there was no reasonable likelihood of injury. The third and fourth citations charging violations of 30 C.F.R. §§ 75.1725 and 75.302 were assessed at $192 each and Pyro agrees to pay those amounts. The final citation charged a violation of 30 C.F.R. § 75.400 because of coal dust and float coal dust along the belt. The motion proposes a reduction in the penalty from $335 to $165, and a deletion of the significant and substantial finding on the ground that the accumulation was not as extensive or dangerous as originally believed.

I stated on the record that I would approve the settlement agreement.

Pursuant to notice, Docket No. KENT 91-13 was called for hearing in Nashville, Tennessee, on March 19, 1991. Inspector Cheryl Smith McMackin and Clifford D. Burden were called as witnesses by the Secretary. Charles Dame was called as a witness by Pyro. Both parties argued their positions on the record at the conclusion of the hearing and waived their rights to file post-hearing briefs with proposed findings of fact and conclusions of law. I have considered the entire record and the contentions of the parties in making the following decision.

FINDINGS OF FACT

I

PRELIMINARY FINDINGS

At all times pertinent hereto, Pyro was the owner and operator of an underground coal mine in Webster County, Kentucky, known as the Baker Mine. Pyro is a large operator. The Baker mine liberates 500,000 cubic feet of methane in a 24 hour period. Because of this, it is subject to spot inspections every 15 days at irregular intervals under section 103(i) of the Mine Act. Between September 10, 1988 and September 9, 1990, Pyro had 1581 paid violations of mandatory health and safety standards. Between July 16, 1988 and July 16, 1990, the Baker Mine had 7 cited violations of 30 C.F.R. § 75.305 and 13 cited violations of 30 C.F.R. § 75.316. This history is not such that penalties otherwise appropriate should be increased because of it.

II

CITATION 3420048/ORDER 3420053

In early July 1990, a roof fall occurred in the return air course in the No. 1 Unit of the Baker Mine. The fall was about six feet high and extended 35 to 50 feet along the entry.

This was the return air course of an active unit, but the faces were inactive when the citation involved in this proceeding was issued. On July 12, 1990, Federal Mine Inspector Cheryl McMackin was conducting a regular inspection of the Mine and was unable to travel the air course because of the roof fall. She tried to circumvent the area of the fall, but was prevented in part by other roof falls. It was therefore not possible to walk the entire return air course in the No. 1 unit. She discussed the matter with Pyro's Safety Manger, Charles Dame, and decided to further discuss the matter with her MSHA supervisors.

On July 16, 1990, Inspector McMackin returned to the mine and to the return air course of the No. 1 Unit. The condition had not changed from that which existed on July 12. She issued a section 104(a) citation charging a violation of 30 C.F.R. § 75.305. At the time the citation was issued the air was following its proper course. Methane in the amounts of .2 to .3 percent was found in the dead end faces beyond the roof fall. It was not possible to see or adequately communicate from one side of the roof fall to the other. On this issue, I accept the testimony of Inspector McMackin:

> Q. Could you communicate back and forth through the area?
>
> A. Not in a conversation. I could hear that he was over there.
>
> Q. Was he yelling?
>
> A. Yes.
>
> Q. Did you yell back at him?
>
> A. Yes, I did. (R. 46)

And, discount that of Mr. Dame:

> The Witness: I couldn't see her physically. I could see her speak.
>
> Judge Broderick: Did you communicate with each other?
>
> The witness: Yes, sir. (R. 123)

The inspector considered the violation to be significant and substantial, because in the area where travel was impossible, an examiner would be unable to evaluate the methane liberation, oxygen content in the atmosphere, and hazards in the roof. She fixed the date for termination of the violation as July 23, 1990.

Inspector McMackin returned to the mine on July 24, 1990. She met Mr. Dame prior to going underground, and he told her the condition cited on July 16 had not been corrected. No request was made for an extension of time to correct the condition. McMackin and Dame went underground and found that the condition cited on July 16 was unchanged. She issued a section 104(b) order of withdrawal for failure to abate the cited violation. After she came out of the mine, Baker Mine Superintendent Potter told her that a petition for modification had been filed which would have permitted mining to continue with the cited condition. She ascertained by consulting MSHA offices that such a petition had not been filed. Later C.D. Burden, Safety Director, said

that the petition was prepared but not yet mailed. Still later on the same day, before the inspector left the mine, an addendum to the ventilation plan was approved by MSHA concerning re-routing the return air course so that it could be travelled. However, the addendum failed to show roof falls which had occurred in the middle entries, and thus the return still could not be entirely examined. Another addendum was submitted and approved by MSHA on July 25, changing the air course in a way that it could be travelled in its entirety. This abated the condition cited, and Inspector McMackin terminated the citation and order.

III

CITATION 3420049

The MSHA approved ventilation plan for the Baker mine provides in part that airlock doors shall be so arranged that the passage of equipment along the entries will not cause interruption of the air current. Doors are required to be in pairs to form an airlock. On July 16, 1990, Inspector Cheryl McMackin issued a citation charging a violation of 30 C.F.R. § 75.316 because the inby door of the pair of doors installed in the 2nd East submain track entry was chained open. The two doors were approximately 300 feet apart. The inspector took an air reading with the outby door closed and recorded approximately eleven hundred cubic feet of air per minute travelling down the entry. When the outby door was open there was an increase of approximately 30,000 feet per minute of air going down the entry. The ventilation system of the Baker Mine is tied in with the ventilation system of the Wheatcroft No. 9 mine. An increase in the amount and velocity of the air resulting from the doors being open could change the direction of air in the belt entry, could circumvent the C.O.-monitoring system, and make it difficult to determine in the event of a fire, where the fire was. The area in question was travelled regularly in that it was the main access to the mine's two producing units. The violation was abated within the time prescribed in the citation by repairing the door controls. There had been an electrical or mechanical failure in the controls.

REGULATIONS

30 C.F.R. § 75.305 provides in part as follows:

> In addition to the preshift and daily examinations required by this Subpart, examinations for hazardous conditions, including tests for methane, and for compliance with the mandatory standards, shall be made at least once each week by a certified person designated by the operator in the return of each split of air where it enters the main return, on pillar

falls, at seals, in the main return, at least one entry of each intake and return air course in its entirety, idle workings, and insofar as safety considerations permit, abandoned areas.

* * *

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

A ventilation system and methane and dust control plan and revisions thereto suitable to the conditions and the mining system of the coal mine and approved by the Secretary shall be adopted by the operator.

* * *

ISSUES

1. Whether the evidence shows that as of July 16, 1990, it was not possible to make a weekly examination of at least one entry in the 4th East return air course in its entirety?

2. If a violation of 30 C.F.R. § 75.305 was established, whether the time for abatement should have been extended prior to the issuance of a withdrawal order under section 104(b)?

3. If a violation of § 75.305 was established, what is the appropriate penalty therefor?

4. Whether the evidence shows a violation of the approved ventilation plan on July 16, 1990, because the inby door of a pair of airlock doors could not be closed?

5. If a violation of § 75.316 was established, what is the appropriate penalty therefor?

CONCLUSIONS OF LAW

I

At all times pertinent to this case, Pyro was subject to the provisions of the Mine Act in the operation of the Baker Mine, and I have jurisdiction over the parties and subject matter of this proceeding.

II

30 C.F.R. § 75.305 requires that a weekly examination be made of at least one entry of each return air course in its entirety. In the case of Rushton Mining Company v. Secretary, 11 FMSHRC 1301 (1989), I held that the standard does not mandate that the air course be travelled in its entirety, but that it be

adequately examined in its entirety. In the same decision I held that where an area in the air course is impassible, and it is not possible to adequately examine the area visually, a violation of the standard is established. In the present case an area in the return air course extending 35 to 50 feet along the entry was impassible. Further, it was not possible to sight across this area, or to easily communicate from one side to the other. The 35 to 50 foot area of the air course could not be examined. Therefore, I conclude that it was not possible to adequately examine the entire air course.

I accept the Secretary's argument that the return air course in the No. 1 Unit of the subject mine was a single entry. The fact that a portion of that entry, designated by Pyro as entry No. 6, was open and travelable does not meet the requirements of the standard. Therefore since the return air course entry could not be examined in its entirety, I conclude that a violation of 30 C.F.R. § 75.305 has been established.

The return air course was the return of an active unit, but the faces were inactive and coal was not being produced when the citation was issued. The air was travelling in its proper course, and there was minimal methane in the area of the roof fall. The Secretary has not established that there was a reasonable likelihood that the hazard contributed to by the violation will result in a serious injury. United States Steel Mining Company, 7 FMSHRC 1125 (1985). Therefore, the violation was not properly designated as significant and substantial.

Nevertheless, because a mine examiner was unable to evaluate the methane liberation, oxygen content, and roof hazards in the entire air course, the violation was serious. The Secretary concedes that Pyro's negligence was low.

Pyro did not abate the violation within the time provided in the citation, so a section 104(b) order was issued. Although a Petition for Modification had been prepared, it had not yet been filed, and the inspector was not informed of it before issuing the order. An addendum to the ventilation plan ultimately was approved changing the return air course and by-passing the areas of the roof falls. This did not occur however until after the order was issued. Pyro did not request an extension of time to abate the citation. The time fixed for abatement was not unreasonable. Therefore, the order was properly issued. See Rushton Mining Company, 9 FMSHRC 325, 329 (1987). A request for change in a ventilation requirement does not excuse a violation.

I conclude, considering the criteria in section 110(i) of the Act, that an appropriate penalty for the violation is $500.

III

The approved ventilation plan for the Baker Mine provides that: "Overcasts, undercasts, and/or airlock doors shall be so arranged that the passage of equipment along the entries will not cause interruption of the air current. Doors, where doors are installed, shall be in pairs to form an airlock." (GX 9, page 3). An Addendum to the plan was approved June 26, 1990, and included a map showing the airlock doors (GX 10). The Mine Safety Manager testified that between the date of the addendum and the date of the citation, the airlock doors became unnecessary and were not used because a new air shaft was created. However, the inspector testified that when both doors were opened, the quantity and velocity of air substantially increased. In any case, there was a violation of the approved ventilation plan, and therefore a violation of 30 C.F.R. § 75.316.

The Secretary has not established that there is a reasonable likelihood that the hazard contributed to by the violation will result in serious injury. See United States Steel Mining Company, supra. Therefore, the violation was not properly designated as significant and substantial. I also conclude, on the basis of the testimony of Mr. Dame, that it was not serious. It was the result of Pyro's negligence. It was promptly abated. Considering the criteria in section 110(i) of the Act, I conclude that an appropriate penalty for the violation is $100.

ORDER

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

1. Citation 3420048 and 3420049 issued July 16, 1990, are **MODIFIED** to delete in each citation the finding that the violation was significant and substantial, and, as modified, the citations are **AFFIRMED**.

2. Order 340053 issued July 24, 1990, is **AFFIRMED.**

3. Pyro shall within 30 days of the date of this order pay the following civil penalties to the Secretary:

CITATION	30 CFR	AMOUNT
3420048/3420053	75.305	$500
3420049	75.316	100
	TOTAL	$600

James A. Broderick
James A. Broderick
Administrative Law Judge

ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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APR 4 1991

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. WEVA 91-65
	:	A.C. No. 46-02249-03546
v.	:	
	:	No. 7 Mine
HOBET MINING, INCORPORATED, Respondent	:	

DECISION ON MOTION TO REMAND
AND
CERTIFICATION OF INTERLOCUTORY
RULING TO THE COMMISSION

Before: Judge Fauver

This action is a petition for assessment of civil penalties under §§ 105(a) and 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq.

The Secretary seeks civil penalties for 11 citations. The penalties proposed for four of them were determined under the "regular assessment" method of 30 C.F.R. § 100.3; the penalties proposed for seven citations were determined under the "special assessment" method of 30 C.F.R. § 100.5.

Hobet Mining objects to the Secretary's application of the "special assessment" method to the seven citations on the ground that it includes an increase for an "excessive history" of violations based on a new policy, stated in Program Policy Letter P90-111-4. In its Motion to Remand, Hobet Mining contends the policy letter is invalid and seeks to remand the seven proposals to the Secretary "for recalculation of the proposed assessment without reference to [the policy letter]."

In summary, Hobet Mining contends the policy letter is invalid because:

(1) The policy letter exceeds the scope of the Court's remand order in Cole Employment Project v. Dole, 889 F.2d 1127 (D.C. Cir. 1989).

(2) It was unlawfully implemented without public notice and comment as required by the Administrative Procedure Act.

(3) The "excessive history" proposed penalties under the policy letter are unlawfully retroactive.

The Secretary contends that the Commission lacks jurisdiction to review the manner in which the Secretary proposes a penalty and, in the alternative, if the policy letter is reviewable by the Commission, it should be held to be exempt from the rulemaking requirements of the APA, consistent with the Court's remand order, and otherwise lawful.

The Penalty Assessment Scheme

Under the Act, the Secretary proposes penalties for violations of the Act, but the Commission has exclusive jurisdiction to assesses penalties. When the Secretary proposes an assessment, it becomes final if it is not contested. If it is contested, the proposal goes before the Commission, which decides a penalty de novo based on an evidentiary hearing. Youghiogheny & Ohio Coal Co., 9 FMSHRC 673, 678-79 (1987). In proposing and assessing penalties, the Secretary and the Commission, respectively, are guided by the six penalty criteria contained in § 110(i) of the Mine Act. [1] In proposing civil penalties, the Secretary possesses "unchallenged broad discretion in devising an effective penalty scheme." Coal Employment Project v. Dole, 889 F.2d 1127, 1133 (D.C. Cir. 1989).

As noted, one of the statutory criteria is the operator's "history of violations." The D.C. Circuit's decision in Coal Employment Project figures prominently in the way in which the Secretary may consider an operator's history of violations for penalty purposes.

Prior to the Court's decision, the Secretary proposed a $20 civil penalty (called a "single penalty assessment") for all

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[1] Section 110(i) identifies the six criteria as: "(1) the operator's history of previous violations, (2) the appropriateness of such penalty to the size of the business of the operator charged, (3), whether the operator was negligent, (4) the effect upon the operator's ability to continue in business, (5) the gravity of the violation, and (6) the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation." (Emphasis added.) Section 110(i) also provides that "the Secretary may rely upon a summary review of the information available to him and shall not be required to make findings of fact concerning the [six] above factors."

violations considered to be timely abated and not "significant and substantial." 30 C.F.R. § 100.4. The Secretary's single penalty assessment system exempted from an operator's history of violations all $20 violations that were timely paid. 30 C.F.R. § 100.3(c). See 47 Fed. Reg. 22,286. The Coal Employment Project and the United Mine Workers of America challenged the "single penalty assessment" system on the grounds (among others) that assessments under § 100.4 did not give proper weight to the history of violations criterion in the Act, and that, under the regular assessment formula, paid single penalty violations were improperly excluded from an operator's history.

The Court recognized the Secretary's "broad discretion" to determine how she would propose penalties. However, it found it unreasonable for the Secretary to fail to weigh the history of violations in determining whether a violation qualifies for a "single penalty" (i.e. $20, non-S&S) assessment. It also found it unreasonable for the Secretary to fail to consider paid single penalty violations as part of an operator's history in calculating regular proposed assessments under 30 C.F.R. § 100.3(c). Accordingly, the Court remanded the case to the Secretary to determine how "to ensure that MSHA does take account of past single penalty violations in deciding whether a special assessment is required in a case where the violation itself might qualify for another single penalty" and "to amend or establish regulations, as necessary, that clarify how administration of the single penalty standard will take account of the history of violations of mandatory health and safety standards that do and do not pose significant and substantial threats to miners' safety." 889 F.2d at 1138.

The Court's remand directed that, pending completion of formal compliance with the remand, the Secretary take immediate corrective measures to comply with its decision. The Court stated:

> In the interim, until MSHA formally complies with our remand, we direct MSHA to instruct its field personnel in assessing single penalties to consider an operator's history of non-significant-and-substantial violations, and to consider an operator's history of past single penalty assessments when imposing regular assessments against operators who commit a significant-and-substantial violation after having committed a series of non-significant-and-substantial violations.

889 F.2d at 1138 (emphasis added). The Court retained jurisdiction to consider the issues further after the Secretary complied with its remand order. [2] Id.

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[2] As of this date, jurisdiction still lies with the Court.

In response to the Court's remand, on December 29, 1989, the Secretary, through MSHA, published an interim final rule which temporarily suspended the sentence in 30 C.F.R. § 100.3(c) that excluded single penalty violations from an operator's history of violations for regular penalty assessment purposes. 54 Fed. Reg. 53,609. In the interim final rule, MSHA also revised its enforcement policies by instructing its personnel to review non-S&S violations involving high negligence and an excessive history of the same type of violation for possible special assessment under § 100.5.

MSHA's interim final rule was challenged by the Coal Employment Project and United Mine Workers of America on the ground that it was not responsive to the Court's remand order. In a per curiam opinion issued on April 12, 1990, the Court agreed, stating that it was "primarily concerned" with MSHA's "high negligence" requirement, and ordered the agency to devise a "suitable interim replacement" within 45 days.

On May 29, 1990, the Secretary responded to the Court's April 12 order by issuing Program Policy letter No. P90-111-4, which sets forth a new policy called "Increased Assessments for Mines with Excessive History of Violations." Through this letter, the Secretary addressed the concern of the Court that the "history of violations" criterion of § 110(i) of the Mine Act be properly considered in determining whether a violation qualifies for single penalty (i.e. $20, non-S&S) assessment. P.P. Ltr. at 2. [3] She did this by providing for increased penalties for non-S&S violations by operators found to have an "excessive history" of violations, defined as either 16 or more penalty points out of a possible 20 points in the preceding two-year period, or 11 or more repeat violations of the same health or safety standard in a preceding one-year period. P.P. Ltr. at 1. "Non-S&S violations with excessive history are no longer eligible for the single penalty assessment. MSHA has elected to waive the single penalty (as provided in 30 CFR 100.[4]) in such cases and assess penalties under the regular formula contained in 30 CFR 100.3." P.P. Ltr. at 2 (emphasis added). The policy letter also states that "S&S violations with excessive history that previously would have received a regular formula assessment now receive a special-history assessment" for which "MSHA has elected to waive the regular formula assessment and assess them under the special assessment provisions of 30 CFR 100.5." Id. (emphasis added). The "special-history assessment" is based on the regular

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[3] The Secretary also addressed the concern of the Office of Inspector General that "repeat violations" receive a higher penalty assessment. Id.

formula point system plus a percentage increase for excessive history. [4]

The Secretary served Program Policy Letter No. P90-111-4 upon all mine operators, including Hobet Mining. P.P. Ltr. at 3. Subsequently, on December 28, 1990, MSHA published a proposed rule, entitled "Criteria and Procedures for Proposed Assessment of Civil Penalties," setting forth essentially the same provisions contained in Program Policy Letter No. P90-111-4. 55 Fed. Reg. 53481 et seq.

The Issue of the Commission's Jurisdiction to Order the Secretary to Re-propose Penalties

The Mine Act does not grant authority to the Commission to determine the validity of the Secretary's rules or procedures for proposing civil penalties. Indeed, §§ 105(a) and (d), and 110(a) and (i) of the Act indicate that the penalty proposal function is within the exclusive domain of the Secretary, while the critical penalty assessment function is within the exclusive domain of the Commission.

This plain reading of the Act is consistent with the Commission's long-held view concerning the "separate roles of the Secretary and the Commission under the Mine Act's bifurcated penalty assessment scheme" by which, after a non-binding penalty is proposed by the Secretary, the Commission conducts a de novo evidentiary hearing in contested cases, and independently assesses a penalty on the basis of the hearing evidence and the statutory criteria, not on the penalty formulas in the Secretary's regulations. Youghiogheny & Ohio Coal Co., 9 FMSHRC 673, 678-79 (1987). Cf. UMWA v. Secretary, 5 FMSHRC 807 (1983) (miners may not initiate Commission review of citations issued by MSHA as there is no authorization under the Mine Act to do so), aff'd, 725 F.2d 126 (D.C. Cir. 1983).

In Y&O, supra, the operator contended that in proposing penalties the Secretary failed to comply with Part 100 of his regulations, and moved a Commission judge to remand the matter to the Secretary to re-propose a penalty in a manner consistent with the Secretary's regulations.

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[4] MSHA has set forth a conversion table equating an operator's "Overall History Points" and "Number of Repeat [Violations]" to a percentage increase in the proposed penalty. P.P. Ltr. at 2.

The judge denied the motion, holding that:

> The operator's attack on the MSHA's special assessment procedures is without merit. The Commission has repeatedly held that the procedures by which penalty assessments are proposed by the Secretary of Labor are irrelevant and immaterial to a penalty assessment by the Commission or its trial judges. [8 FMSHRC at 134.]

The Commission affirmed the judge's denial of the motion to remand after discussing principles that will govern its review of objections to the Secretary's manner of proposing penalties. The Commission held that, in light of its exclusive authority to assess penalties de novo after an evidentiary hearing, "it generally is neither required nor desirable to require the Secretary to re-propose a penalty." 9 FMSHRC at 679. "[O]nce 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." Id.

However, before a hearing is held, the Commission stated, "in certain limited circumstances the Commission may require the Secretary to re-propose his penalties in a manner consistent with his regulations." Id. Rather than a statutory authorization, this limited review rests on the axiom that "an agency must adhere to its own regulations." The scope of review in such cases is narrowed by the Commission's holding that, when a prehearing objection is raised as to the Secretary's manner of proposing a penalty, "the Secretary need only defend on the ground that he did not arbitrarily proceed under a particular provision of his penalty regulations" (9 FMSHRC 680).

The Commission's discussion of its scope of review of objections to the Secretary's manner of proposing penalties is similar to the "clean hands" doctrine in equity cases. A party (the Secretary) seeking relief (a civil penalty) before the Commission may first be required to comply with its own obligations (Part 100 of the Secretary's regulations) toward the respondent. However, review by the Commission is limited to prehearing objections and to a test of arbitrariness concerning an alleged failure of the Secretary to comply with Part 100 of the regulations.

In sum, the Commission has not held that it has authority to determine the validity of the Secretary's regulations or rules

for proposing civil penalties, but it has held that it has a limited scope of review of objections that the Secretary has failed to comply with Part 100 of her regulations in proposing a penalty.

The instant case is distinguished from the Y&O case because it does not involve a question of complying with Part 100 of the Secretary's regulations. Those regulations, in the part contended to be relevant here, are under remand by a Court of Appeals, which still has jurisdiction. The question which the operator seeks to raise in this forum is whether Program Policy Letter No. P90-111-4 is valid as being in compliance with the Court's remand order and with the rulemaking requirements of the APA. I hold that such issues are for the courts, and lie outside the jurisdiction of the Commission. The Commission's exclusive authority to assess penalties de novo based on an evidentiary hearing would render any defects in Program Policy Letter P90-111-4 irrelevant and harmless in a case before the Commission. Two other Commission judges have ruled on motions to remand based on Program Policy Letter P90-111-4, and reached different results. [5] My conclusions differ from the holdings in both those cases. The matter is plainly ripe for review by the Commission.

ORDER

WHEREFORE IT IS ORDERED that the Motion to Remand is DENIED. Under Rule 74(a)(1) of the Commission's Procedural Rules (29 C.F.R. § 2700.74(a)(1)), this interlocutory ruling is CERTIFIED TO THE COMMISSION.

William Fauver
William Fauver
Administrative Law Judge

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[5] In one case, the judge held the policy letter to be reviewable and found it invalid, thus granting the motion to remand (Drummond Company, Inc., SE 90-126, _____ FMSHRC _____ (Judge Merlin, March 6, 1991). In the other, the judge held the policy letter to be subject only to limited review -- on a test of arbitrariness -- and found the operator did not meet this standard for remand, thus denying the motion to remand (Utah Power and Light Company, Mining Div., WEST 90-320, et al., _____ FMSHRC _____ (Judge Lasher, March 19, 1991)).

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APR 15 1991

SECRETARY OF LABOR, MINE SAFETY & HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. WEST 91-44
	:	A.C. No. 42-00171-03602
v.	:	Docket No. WEST 91-45
	:	A.C. No. 42-00171-03604
CYPRUS-PLATEAU MINING CORPORATION, Respondent	:	Docket No. WEST 91-46
	:	A.C. No. 42-00171-03605
	:	Docket No. WEST 91-91
	:	A.C. No. 42-00171-03601
	:	Docket No. WEST 91-118
	:	A.C. No. 42-00171-03606
	:	Star Point No. 2 Mine

ORDER OF REMAND

Before: Judge Morris

Pending herein are the motions of Respondent Cyprus Plateau Mining Company (Cyprus) to strike or in the alternative to remand proposed penalties to the Secretary for recalculation.

BACKGROUND

1. On November 21, 1989, the United States Court of Appeals, District of Columbia Circuit, issued its mandate in Coal Employment Project, et al. v. Elizabeth Harford Dole, in her capacity as Secretary of Labor, United States Department of Labor, 889 F.2d 1127.

Petitioners therein asked the Court to rule on the validity of the single penalty assessment provision ("single penalty") authorized by regulations issued pursuant to the Federal Mine Safety and Health Act of 1977 (the "Act"), 30 U.S.C. § 801 et seq. (1982).

In its decision, the Court noted that a single penalty is a $20 civil fine imposed on mine operators for violations that are not serious and have been timely abated. If the single penalty is promptly paid, it is excluded from an operator's violation history for future penalty assessment purposes. The criteria and

procedures for proposed assessments of civil penalties were published and are now codified at 30 C.F.R. § 100, et seq. The single penalty assessment is contained in 3 C.F.R. § 100.4. [1] The preceding section, 30 C.F.R. § 100.3, laying out guidelines for taking into account the history of previous violations in regular assessments, states, in part:

> [V]iolations which receive a single penalty assessment, under § 100.4 and are paid in a timely manner will not be included in the computation [of history].

In its decision, the Court reviewed the statutory and regulatory background of the Act and observed that "the Secretary has very broad discretion to devise a scheme implementing the Act's civil penalty guidelines," 889 F.2d at 1129. The Court further concluded "that Congress was intent on assuring that civil penalties provide an effective deterrent against all offenders, and particularly against offenders with records of past violations. Thus, despite the Secretary's unchallenged broad discretion in devising an effective penalty scheme, the civil penalty regulations must not run contrary to that intent," 889 F.2d at 1127.

In its opinion, the Court further considered all the statutory criteria contained in Section 110(i) of the Act. It further focused on two scenarios involving the impact of the single penalty assessment, 889 F.2d at 1136, 1138.

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[1] The cited section provides as follows:

> **§ 100.4 Determination of penalty; single penalty assessment.**
>
> An assessment of $20 may be imposed as the civil penalty where the violation is not reasonably likely to result in a reasonably serious illness, and is abated within the time set by the inspector. If the violation is not abated within the time set by the inspector, the violation will not be eligible for the $20 single penalty and will be processed through either the regular assessment provision (§ 100.3) or special assessment provision (§ 100.5).

After reviewing the facts, the Court concluded it was not able to determine from the record whether the manner in which the single penalty is selected and administered is consistent with the Mine Act. Accordingly, the Court remanded the record.

The Court, in fashioning a remedy, stated as follows:

> The penalty scheme in 30 C.F.R. §§ 100.3(c), 100.4 does not appear to provide for consideration of the mine operator's violation record where that record consists of numerous single penalty violations. Without ruling on how MSHA should reconcile the language of § 110(i) of the Mine Act, 30 U.S.C. § 820(i), with its proposed practices for taking account of an operator's history of previous violations, we remand the record in this case to MSHA (1) to resolve the inconsistency between the MSHA regulations as written and MSHA's written and oral representations to the court, so as to ensure that MSHA does take account of past single penalty violations in deciding whether a special assessment is required in a case where the violation itself might qualify for another single penalty; and (2) to amend or establish regulations as necessary, that clarify how administration of the single penalty standard will take account of the history of violations of mandatory health and safety standards that do and do not pose significant and substantial threats to miners' safety. In the interim, until MSHA formally complies with our remand, we direct MSHA to instruct its field personnel in assessing single penalties to consider an operator's history of non-significant-and-substantial violations, and to consider an operator's history of past single penalty assessments when imposing regular assessments against operators who commit a significant-and-substantial violation after having committed a series of non-significant-amd-substantial violations. We will retain jurisdiction in this case until the remand is complete. An order to this effect is attached.
>
> 889 F.2d at 1138

The Court's order reads as follows:

ORDER

> In accordance with the opinion issued this day in Coal Employment Project, et al. v. Dole, et al., No. 88-1708, it is hereby
>
> ORDERED that the Mine Safety and Health Administration ("MSHA") resolve any inconsistency in its regulations and policy statements so as to ensure that the history of past single penalty assessments is considered in regular and single penalty assessments pursuant to 30 C.F.R. §§ 100-3, 100.4 and that MSHA amend or establish policies, as necessary, to ensure that all penalties take account of an operator's history of violations of mandatory standards that do and do not pose significant and substantial threats to miners's safety.
> It is hereby
>
> FURTHER ORDERED that until MSHA complies formally with said remand, MSHA direct its field personnel in assessing single penalties for non-significant-and-substantial violations to take account of the past history on the part of the mine operators of non-significant-and-substantial violations, and to take into account past single penalty assessments in imposing regular assessments against operators who have previously committed a series of non-significant-and-substantial violations.
>
> Consistent with Local Rule 15(c), this court retains jurisdiction over this case until said proceedings are completed. MSHA shall prompty transmit the record in this case to this court.

2. On December 29, 1989, the Secretary responded to the Court's decision by (1) temporarily revising its assessment policies to instruct its field personnel to review non-significant-and-substantial violations involving high negligence and an excessive history of the same type of violation for possible special assessment under 30 C.F.R. § 100.5; and (2) temporarily suspending the sentence in 30 C.F.R. § 100.3(c) which excludes timely paid single penalty assessments from an operator's history of

violations for regular assessment purposes. Based on its publication in the Federal Register MSHA stated that "[t]herefore, during the interim period, MSHA enforcement personnel will review high negligence non-significant-and-substantial violations when there is an excessive history of the same type of violation at the mine for possible special assessment. Further, all violations that have been paid or finally adjudicated will be included in history under the regular formula assessment.

MSHA further stated that in light of the specific instruction from the Court, MSHA must immediately comply with its order, and the Agency was compelled to take immediate action. Under such circumstances, MSHA concluded it would, therefore, be impracticable to comply with the requirements of notice and comment rule-making under Section 553 of the Administrative procedure Act [A.P.A.], 5 U.S.C. § 553. Further, under 5 U.S.C. § 553(b)(B) MSHA was taking the action in the suspension notice. In addition, for good cause, based on these same reasons and pursuant to 5 U.S.C. § 553(d)(3) MSHA's action was excepted from the 30-day delayed effective date requirement of the A.P.A.

MSHA further revised Part 100 by suspending the third sentence in Part 100.3(c) effective December 29, 1989. Part 100.3(c), emphasizing the portion to be deleted, reads as follows:

> **(c) History of previous violations.**
>
> History is based on the number of assessed violations to a preceding 24-month period. Only violations that have been paid or finally adjudicated will be included in determining history. However, violations which receive a single penalty assessment under § 100.4 and are paid in a timely manner will not be included in the computation. The history of previous violations may account for a maximum of 20 penalty points. For mine operators, the penalty points will be calculated on the basis of the average number of assessed violations per inspection day (Table VI). For independent contractors, penalty points will be calculated on the basis of the average number of violations assessed per year at all mines (Table VII). (Emphasis added).

MSHA's publication amending Part 100 was entered in the Federal Register Vol. 54 No. 249, December 29, 1989.

3. On April 17, 1990, the United States Court of Appeals filed a supplemental opinion in Coal Employment Project Dole. The Court criticized the Secretary's regulations and noted that MSHA's "high negligence" requirement in its interim regulation runs contrary to the spirit of the original order.

The Court further observed that inasmuch as the issues have not been fully briefed, it declined to fully resolve such issues.

4. On May 29, 1990, MSHA issued a Program Policy Letter ("PPL") No. P90-III-4. The program deals with the subject of increased assessments for mines with excessive history of violations. The PPL under its terms was effective on May 29, 1990. [2]

5. In the period between April 23, 1990, and September 4, 1990, MSHA issued 18 citations against Cyprus. The proposed penalties involve "significant and substantial" citations and "non-significant-and-substantial" citations.

The penalties proposed against Cyprus for the "S&S" citations are as follows:

DOCKET NO.	CITATION NO.	DATE ISSUED	PROPOSED PENALTY
91-44	3583453	5-29-90	$216
91-45	3583497	5-15-90	$229
	3583500	5-21-90	$216
91-46	3225820	4-23-90	$202
	3583465	4-25-90	$292
	3583467	4-26-90	$202
	3583487	5-10-90	$216

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[2] Subsequently, on December 28, 1990, MSHA published a proposed rule, titled "Criteria and Procedures for Proposed Assessment of Civil Penalties", essentially setting forth the provisions contained in Program Policy Letter No. P90-III-4. 55 Fed. Reg. 53481 et seq. However, it is settled that comments after promulgation of penalty rules did not cure any noncompliance with Section 553. Air Transport Ass'n, 900 F.2d at 379.

DOCKET NO.	CITATION NO.	DATE ISSUED	PROPOSED PENALTY
91-91	3583456	5-31-90	$333
	3583458	6-05-90	$292
	3583460	6-05-90	$216
	3583635	8-02-90	$292
	3583638	8-14-90	$292
	3583639	8-15-90	$292
91-118	3583469	4-26-90	$202
	3583335	9-04-90	$189

The penalties proposed for the non-S&S citations are as follows:

DOCKET NO.	CITATION NO.	DATE ISSUED	PROPOSED PENALTY
91-45	3583499	5-21-90	$136
91-91	3583632	4-26-90	$126
	3583633	8-01-90	$192

DISCUSSION

The Court's directions to the Secretary in Coal Employment Project have been previously set forth at length in this order. The Court directed the Secretary to consider the operator's history of past single penalty (non S&S) assessments in computing regular assessments; instead the Secretary has created an "excessive history" assessment which relies on both S&S and non S&S violations. The court further directed the Secretary to modify its standard for assessing single penalties to accommodate a history of violations; instead the Secretary implemented an automatic blanket waiver of the single penalty whenever it finds an "excessive history" of violations. To the extent that the Secretary's actions purport to implement the Court's decision, the Secretary has, to a large degree, exceeded the Court's mandate. Accordingly, it is inappropriate for the Secretary to rely on such mandate.

The Secretary further contends the Commission lacks jurisdiction to order the Secretary to reassess a proposed civil penalty. It is argued that Sections 105(a) and (d) and 110(a) and (i) of the Act expressly establish that the penalty proposal function is within the exclusive domain of the Secretary while the critical penalty assessment function is within the exclusive domain of the Commission.

However, in Youghiogheny Ohio Coal Company 9 FMSHRC 673 (April 1987) the argument was advanced that when the Secretary fails to conform to his own regulations in proposing penalties, the Commission must require him to re-propose a penalty in a manner consistent with his regulations. The Commission ruled "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." 9 FMSHRC at 679.

These limited circumstances appear to be present here when the Secretary's proceedings under Part 100 is a legitimate concern to the mine operator and the Secretary's departure from his regulations can be proven by the operator. In such circumstances, "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," 9 FMSHRC at 680.

The main thrust by Cyprus alleges a lack of Secretarial fidelity to his regulations. On the authority of Youghiogheny Ohio Coal Co., the Secretary's motion to dismiss for lack of jurisdiction is denied.

The penalties proposed here were not computed on the basis of the Secretary's civil penalty regulations but on the basis of a rule that MSHA implemented without public notice and comment as required by the Administrative Procedure Act ("A.P.A.").

The penalties proposed against Cyprus impose an "excessive history penalty" based on an MSHA Policy Program Letter (PPL) issued May 29, 1990. Under the PPL, two changes are made in MSHA's civil penalty assessment scheme: (1) non-significant-and-substantial ("non-S&S") violations with excessive history are no longer eligible for single penalty assessment under 30 C.F.R. § 100.4, and instead are computed using the regular formula in 30 C.F.R. § 100.3; and (2) significant-and-substantial ("S&S") violations with excessive history that previously would have received a regular formula assessment now receive what MSHA calls "special-history assessment." The penalties are computed by determining the regular assessment formula of 30 C.F.R. § 100.3 and then also adding on top of that a "percentage increase for excessive history" which is added to the penalty amount based on total points. MSHA promulgated this policy as an update to its policy manual and did not publish it in the Federal Register.

MSHA's PPL excessive history policy is fatally defective in that it violates the public rulemaking requirements of the A.P.A., 5 U.S.C. § 553(b).

Civil penalty rules fall within the requirements for notice and comment. Air Transport Ass'n of America v. Dep't of Transportation 900 F.2d 369 (D.C. Cir. 1990). Yet MSHA's PPL nullifies the applicability of the single penalty assessment, 30 C.F.R. § 100.4, to non-S&S violations with excessive history "which are no longer eligible for the single penalty assessment." Secondly, it creates a new type of assessment called a "special-history assessment" consisting of a percentage increase of from 20 percent to 40 percent of the regular formula assessment. However, the regular formula already takes into account an operator's history of previous violations. Advance notice and comment has been required in a similar situation. See Batterton v. Marshall, 648 F.2d 694 (D.C. Cir. 1980).

In addition to the foregoing defects, MSHA's policy of excessive history penalties is unlawfully retroactive. In the case at bar nine citations were issued before May 29; one was issued on May 29, and eight were issued after May 29. As previously noted, the PPL was effective on May 29.

The Supreme Court recently observed that the law does not favor retroactivity. Further, statutes and administrative rules will not be construed to have a retroactive effect unless their language requires this result, Bomen v. Georgetown Univ. Hosp., 109 S. Ct. 468, 471 (1988).

Nothing in the Mine Act or in the Coal Employment Project decision dictates the retroactive imposition of such penalties. MSHA's PPL adds considerably to the detriment an operator unknowingly incurred when it chose not to contest earlier single penalty assessments and other violations. Thus, it cannot be applied retroactively. See New England Telephone and Telegraph Co. v. FCC, 826 F.2d 1101, 1110 (D.C. Cir. 1987).

Cyprus finally argues that penalties proposed by the Secretary do not comply with the regulations in 30 C.F.R. Part 100. (Brief pages 8-14).

Inasmuch as these proposed penalties are to be remanded to the Secretary for publication, comment and recalculation, where necessary, the Secretary will no doubt have an opportunity to consider these additional issues.

Cyprus has moved to strike or remand the proposed penalties in these cases. Under Rule 12(f), F.R.C.P., an order striking allegations may be proper. However, such a motion would not reach the crux of the issues presented here. Accordingly, the motion to strike is denied.

The alternative motion to remand should be granted.

Accordingly, for the foregoing reasons, I enter the following,

ORDER

1. Respondent's motion to strike is **DENIED.**

2. Respondent's alternative **MOTION TO REMAND** is **GRANTED.**

John J. Morris
Administrative Law Judge

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sh/ek

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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APR 26 1991

MICHAEL E. HOLLAND, Complainant	:	DISCRIMINATION PROCEEDING
v.	:	Docket No. WEVA 90-315-D
CONSOLIDATION COAL COMPANY, Respondent	:	HOPE CD 90-17
	:	Amonate No. 31 Mine

ORDER

On September 26, 1990, Michael E. Holland (Complainant) filed a Complaint alleging Consolidation Coal Company (Respondent) discriminated against him in violation of Section 110(c) of the Federal Mine Safety and Health Act of 1977 (The Mine Act).[1/]

On March 19, 1991, Respondent filed a Motion for Summary Decision alleging that the issues and claims raised by the complaint herein, have been previously adjudicated by The West Virginia Mine Board of Appeals (Board of Appeals) and resolved in favor of Respondent. Respondent alleges that Complainant is precluded from relitigating these issues on the grounds of collateral estoppel and res judicata. On March 27, 1991, Complainant filed his Statement in Opposition to Respondent's Motion for Summary Judgment, and Respondent fled a Reply Memorandum on March 29, 1991.

For the reasons that follow, I conclude that it has not been established that either res judicata or collateral estoppel applies to the decision of the Board of Appeals, so as to preclude Complainant from proceeding with his claim under Section 105(c) of the Act.

1/ Pursuant to notice, the case was scheduled for hearing on February 5, 1991, in Charleston, West Virginia. In a telephone conference call on January 25, 1991, Counsel for Complainant requested an adjournment of the hearing to allow him adequate time to respond to Respondent's Request for Discovery. Respondent did not object to this request, and the case was rescheduled for March 19, 1991. Subsequently an Order was entered granting Complainant's request for a continuance, and the case was rescheduled for May 14-16, 1991.

I. Res Judicata

In a statement filed with the Commission on September 26, 1990, Complainant alleged that he has been discriminated against because Respondent forced him to wear metatarsal boots in spite of the fact that he had a "legitimate waiver" not to wear them. He indicated that Respondent "wouldn't let me work and not wear the boots" He also indicated that Bob Wyatt took him out of the mine because he is a Part 90 miner.

Respondent in its Memorandum in Support for its Motion for Summary Decision asserts that on June 7, 1990, Complainant filed a "Discrimination Complaint" with the Board of Appeals. The proceeding before the Board of Appeals was heard by three of its members on November 18, 1990, and December 14, 1990. At the hearing, the Complainant was represented by Counsel, and according to Respondent's assertions, in its Memorandum, had the opportunity to present witnesses, evidence, and to cross-examine witnesses. Respondent also asserts that all testimony was taken under oath and transcribed.

On January 24, 1991, the Board of Appeals entered a Decision containing 24 enumerated findings of fact, as well as 5 enumerated conclusions of law. The Board of Appeals set forth Complainant's allegations as follows: "Mr. Holland alleges that his status as a Part 90 miner is a protected activity under State law and motivated Consol to impose the requirement that he wear metatarsal protection, which he contends is discriminatory. Additionally, Mr. Holland alleges that the requirement that he wear metatarsal protection is an illegal act of discrimination under W. Va. Code §22A-A-20, because it creates an unsafe or hazardous condition to him." (Michael Holland v. Consolidation Coal Company, West Virginia Mine Safety Board of Appeals, Docket No. DIS 90-3, January 24, 1991, page 7, set forth in Respondent's Memorandum, Attachment D).

The Board of Appeals set forth its Conclusions of Law as follows:

> 25. The Board of Appeals unanimously concludes, based upon a review and consideration of the complete record before it, that Michael Holland failed to establish the existence of an unsafe or hazardous condition sufficient to support a claim of protected activity under W. Va. Code §22A-1A-20.
>
> 26. The Board of Appeals unanimously concludes, based upon a review and consideration of the complete record before it, that Consol has done all that it can reasonably be expected to do to assist Michael Holland under the circumstances, and therefore, Michael

Holland's continued refusal to wear metatarsal protection is unreasonable and lacks a good faith foundation.

27. The Board of Appeals unanimously concludes, based upon a review and consideration of the complete record before it, that Mr. Holland's status as a Part 90 miner did not motivate Consol in whole or in part, to engage in discriminatory conduct.

28. The Board of Appeals unanimously concludes, based upon a review and consideration of the complete record before it, that the requirement that Mr. Holland wear metatarsal protection is not an act of discrimination under the W. Va. Code §22A-1A-20, but rather is motivated solely by a legitimate business purpose to comply with State law and the Amonate Mine work rule requiring metatarsal protection, which have as their goal the protection of miners from crushing foot injuries.

29. The Board of Appeals concludes that as a matter of law it is not an act of discrimination to require employee compliance with State safety laws requiring that metatarsal protection be worn by miners. (Holland v. Consolidation Coal Company, Mine Safety Board of Appeals, supra, at 8-9).

In analyzing whether the Decision of the Board of Appeals precludes Complainant from litigating a Section 105(c) complaint of discrimination before the Commission, the Commission in Bradley v. Belva Coal Company, 4 FMSHRC 982, at 986 (1981), held that "Preclusion is an affirmative defense, and the Party asserting it must prove all the elements necessary to establish it." In general, Respondent must thus establish, with regard to its claim of res judicata, an identity of claims between the action before the Board and the instant proceeding. For the reasons set forth below, I conclude that Respondent has not met its burden of establishing an identity of claims.

In Bradley, supra, an ultimate issue before the Commission was whether a decision of the Board of Appeals denying a miner's claim of discrimination under West Virginia law, (W. Va. Code §22A-1A-20) precluded litigation of a discrimination claim under the Mine Act. In Bradley, supra, at 988, the Commission indicated that in analyzing a discrimination action brought under the West Virginia law compared to one arising under the Mine Act, ". . . we will examine both the facts and the substantive legal protection afforded the miner under both statutes."

It appears, based upon the statements of Complainant filed with the Commission as his Complaint, that the gravamen of his complaint is that he was discriminated against, in that Respondent would not let him work without wearing boots for which he had a waiver. Also, that he was discriminated against because he was designated a Part 90 miner. Respondent, at page 12 of its Memorandum, quoted testimony of the Complainant before the Board of Appeals, in which he asserted somewhat the same claim. However, the record before me does not contain the entire transcript before the Board of Appeals, nor does it contain the Complaint filed before the Board of Appeals, nor the specific arguments made by Complainant or his Counsel. I thus can not make a definite finding as to the exact claim or claims presented to the Board of Appeals.

Further, it would appear that the legal basis for Complainant's claim before the Commission is that his apparent refusal to wear the boot constituted a "work refusal"[2]/ Although Section 105(c) of the Mine Act does not provide for the right to refuse work, the Commission, in Pasual v. Consolidated Coal Company, 2 FMSHRC 2786 (1980), rev'd on evidentiary grounds, 663 F.2d 1211 (3rd Cir. 1981), and in Robinette v. United Castle Coal Company, 3 FMSHRC 803 (1981), held that the legislative history evidences Congress's intent for Section 105 to embrace this right. (See, Bradley, supra, at 998-989).

The Commission, in Bradley, supra, at 989 analyzed Section 22A to 1A-20[3]/ of the West Virginia Code as follows:

> "In contrast, section 22-1-21(a) of the West Virginia Code (n. 2 above), under which Bradley brought his state action, provides in relevant part that "No person shall discharge . . . by reason of the fact that he believes or knows that such miner . . ." It is not clear from the face of this provision whether the State law would treat Bradley's refusal to obey an order as a protected "notification to an operator of a danger." Belva has not demonstrated in any event that West Virginia law confers a general right to refuse

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[2]/ See, Price v. Montery Coal Company, 12 FMSHRC, 1505 (1990) wherein the Commission held that a miner's refusal/failure to comply with the Operator's metatarsal boots policy constituted a refusal to comply with a mandatory work rule, and hence was properly treated by the trial judge as a work-refusal case.

[3]/ It appears that the provisions at issue presently set forth in Section 22A-1A-20, were previously found at West Virginia Code Section 22-1-21(a).

work. (Belva has presented us with no other substantive provisions of the State law.) Other than the West Virginia Board decision in issue, Delva has presented no West Virginia Board decisions (which, from all that appears, are not officially published) nor any other court decision interpreting the West Virginia Act. Nor has Belva presented any legislative history to explain the meaning of section 22-1-21(a). Similarly, Belva has not shown that West Virginia Law affords a miner in a discrimination case the burden of proof structure and analytical framework used to resolve a Mine Act discrimination case."

This reasoning applies with equal force to the case at bar.[4]/ The Board of appeals found that the "cause of

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[4]/ Decisions by the West Virginia Supreme Court cited by Respondent in its Memorandum, at page 5, do not support the proposition, as argued by Respondent, that under West Virginia Code §22A-1A-20," . . . the appropriate analyses to be made are identical to those made under Section 105(c), 30 U.S.C. § 815(c)." None of the cases cited dealt directly with the issue, as to whether the protected activities set forth in Section 22-1-21(a), supra, encompass a refusal to work. Specifically, these cases do not discuss whether refusal to obey a work order constitutes a protected "notification to an operator of a danger under Section 22A-1A-20, supra. In Collins v. Elkay Mining Company, 371 S.E. 2d 46 (1988), and Wiggins v. Eastern Associated Coal Corporation, 357 S.E. 2d 745 (1987), the Supreme Court did not have to determine the scope of activities protected in Section 22A-1A-20, supra, as the issues presented was whether a miner may institute a discharge action in State Court without first resorting to pursuing administrative remedies afforded by Section 22A-1A-20, supra, and Section 105(c) of the Act, and whether the State Legislature intended to make the remedies provided for in Section 22A-1A-20, supra, exclusive. As such, the footnote in Wiggins, supra, at 747, n.2, that in all relevant aspects Section 22A-1A-20 (presently Section 22A-1A-20) and Section 105(c) of the Act are the same in that they protect the same activities, is clearly dictum, and not necessary to the disposition of the issues before the court.

In Davis v. Kitt Energy, 365 F.2d 82 (1987) a safety committeeman made a demand of the operator to withdraw workers from the mine due to a safety hazard. The safety committeeman was subsequently removed from the safety committee by the operator on the ground that his withdrawal demand was arbitrary. The Supreme Court held that the safety committeeman who communicated a safety violation, and thus enforced a right under the collective bargaining agreement to demand withdrawal, is entitled to the protection afforded by Section 22A-1A-20, supra,

Mr. Holland's complaint has not been documented as deriving from the use of metatarsal protection." (Holland v. Consolidation Coal Company, supra, finding 18). It also found that the operator's refusal to permit Complainant to work without metatarsal protection was not motivated in whole or in part by an intent to discriminate against him because of his status as a Part 90 miner. In its Conclusions of Law, the Board of Appeals concluded that Complainant "failed to establish the existence of an unsafe or hazardous condition sufficient to support a claim of protected activity under W. Va. Code §22A-1A-20." (Holland, v. Consolidation Coal Company, supra, paragraph 25). The Board of Appeals also concluded that Complainant's "continued refusal to wear metatarsal protection is unreasonable and lacks a good faith foundation." (Holland v. Consolidation Coal Company, supra, paragraph 26). Hence, it might be implied that the issue of Complainant's claim of a reasonable work refusal was litigated and considered by the Board of Appeals. However, the decision of the Board of Appeals is conclusionary and does not contain a discussion of the evidence in its records, nor does it make resolutions of credibility of witnesses, or explain the conclusions of law reached, or the findings of fact that it made. Further, the decision does not specifically indicate that the issue of the right to refuse work was litigated and that such a right specifically exist in State law. The decision also does not set forth the legal analysis and framework that it employed in analyzing the work refusal issue. Nor does it set forth the burden of proof it utilized and the legal analysis on the issue of discrimination.[5]/

Also, although the Board apparently considered whether Complainant's status as a Part 90 miner motivated Respondent to

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(Footnote 4 continued)
when he is thereafter subject to discrimination by his employer. In its Decision, the Court indicated that the focal inquiry is the reasonableness in reporting a safety violation and that this standard is analogous to that fashioned by Courts' decisions under the Federal Mine Safety Act of 1977, which has been interpreted to permit a work refusal in an area believed to be hazardous. Hence, no issue was presented to the Court as to whether a work refusal is within the scope of activities protected under Section 22A-1A-20, supra.

[5]/ As noted by the Commission in Bradley, supra, at 986, quoting Montana v. United States, 440 U.S. 147, 164 n. 11 (1979), an example of an exception to the applicability of preclusion based on the decision of an administrative agency exists where "there is reason to doubt the quality, extensiveness, or fairness of procedures followed in prior litigation."

Mr. Holland's complaint has not been documented as deriving from the use of metatarsal protection." (Holland v. Consolidation Coal Company, supra, finding 18). It also found that the operator's refusal to permit Complainant to work without metatarsal protection was not motivated in whole or in part by an intent to discriminate against him because of his status as a Part 90 miner. In its Conclusions of Law, the Board of Appeals concluded that Complainant "failed to establish the existence of an unsafe or hazardous condition sufficient to support a claim of protected activity under W. Va. Code §22A-1A-20." (Holland, v. Consolidation Coal Company, supra, paragraph 25). The Board of Appeals also concluded that Complainant's "continued refusal to wear metatarsal protection is unreasonable and lacks a good faith foundation." (Holland v. Consolidation Coal Company, supra, paragraph 26). Hence, it might be implied that the issue of Complainant's claim of a reasonable work refusal was litigated and considered by the Board of Appeals. However, the decision of the Board of Appeals is conclusionary and does not contain a discussion of the evidence in its records, nor does it make resolutions of credibility of witnesses, or explain the conclusions of law reached, or the findings of fact that it made. Further, the decision does not specifically indicate that the issue of the right to refuse work was litigated and that such a right specifically exist in State law. The decision also does not set forth the legal analysis and framework that it employed in analyzing the work refusal issue. Nor does it set forth the burden of proof it utilized and the legal analysis on the issue of discrimination.[5]/

Also, although the Board apparently considered whether Complainant's status as a Part 90 miner motivated Respondent to engage in discriminatory conduct, it would appear that this

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when he is thereafter subject to discrimination by his employer. In its Decision, the Court indicated that the focal inquiry is the reasonableness in reporting a safety violation and that this standard is analogous to that fashioned by Courts' decisions under the Federal Mine Safety Act of 1977, which has been interpreted to permit a work refusal in an area believed to be hazardous. Hence, no issue was presented to the Court as to whether a work refusal is within the scope of activities protected under Section 22A-1A-20, supra.

[5]/ As noted by the Commission in Bradley, supra, at 986, quoting Montana v. United States, 440 U.S. 147, 164 n. 11 (1979), an example of an exception to the applicability of preclusion based on the decision of an administrative agency exists where "there is reason to doubt the quality, extensiveness, or fairness of procedures followed in prior litigation."

analysis is ultra vires to the Board's authority. The plain language of Section 22A-1A-20, supra, appears to limit protected activities to notifying an operator of alleged violations or danger. Thus, on its face, status as a Part 90 miner is not within the scope of protected activities recognized by West Virginia Law.

I conclude that, considering all the above, Respondent has failed to establish that the claim before the Board of Appeals is identical to the instant claim before the Commission. Hence, res judicata does not prevent Complainant from litigating his complaint before the Commission.

II. Collateral Estoppel

As set forth in Bradley, supra, at 990, "The basic premise for applying collateral estoppel is a showing that the precise issues involved in the second action were actually and necessarily decided in the first." I conclude that Respondent has not made such a showing.

As discussed above, I, infra, it has not been established that the issues before the Commission were necessarily decided by the Board of Appeals. It has not been established that the issue of a work refusal was necessary and relevant to the disposition of the matter before the Board of Appeals. Also, as stated above, I, infra, the record does not establish the analysis and burden of proof utilized by the Board of Appeals, and the evidence it accepted and rejected. As such the doctrine of collateral estoppel is not available to preclude Complainant from litigating before the Commission facts that were allegedly litigated before the Board of Appeals.

For all the above reasons, the Motion for Summary Decision made by Respondent is **DENIED**.

Avram Weisberger
Administrative Law Judge
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

APR 26 1991

MICHAEL E. HOLLAND, Complainant	:	DISCRIMINATION PROCEEDING
v.	:	Docket No. WEVA 90-315-D
CONSOLIDATION COAL COMPANY, Respondent	:	HOPE CD 90-17
	:	Amonate No. 31 Mine

ORDER

I. Motion to Compel

On December 28, 1990, Respondent served Petitioner with a First Set of Interrogatories. On January 24, 1991, Respondent filed a Motion to Compel Discovery. On March 7, 1991, an Order was issued granting the Motion to Compel Discovery on the ground that Complainant had not filed any opposition to the Motion. On March 8, 1991, Complainant served Respondent with Answers to its First Set of Interrogatories. On March 14, 1991, Respondent filed a Second Motion to Compel Answers to the First Set of Interrogatories, requesting an order compelling Complainant to answer completely and fully Interrogatories Nos. 3, 5 through 11, 13[1]/ and 14. On April 2, 1991, Complainant filed his response to the Motion.

Interrogatory No. 3

Interrogatory No. 3 provides as follow: "Please provide the names, address, telephone number, and identity of the present employer of each and every person you expect may be called as an expert witness at any hearing held in this matter." Complainant as a response stated as follows: "See response to Interrogatory No. 2 above." Interrogatory No. 2 had requested the name, address, employer, and current telephone number for each person

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[1]/ In the first page of its Motion, Respondent indicated that it sought to compel a response to interrogatory No. 12. However, in setting forth those interrogatories for which there is a Motion to Compel, Respondent set forth Interrogatory No. 12, but did not set forth any Motion to Compel a response to this interrogatory. In contrast, Respondent did set forth a Motion to Compel a response to Interrogatory No. 13.

". . . you intend to call as a witness at the hearing in this matter." Complainant, in response thereto, had furnished Respondent with a list of 22 persons.

In its response to Respondent's Motion, Complainant, in essence, to the best of my understanding, argued that he made a general referral to Interrogatory No. 2, because of the uncertainty as to who might be called as an expert witness. The Interrogatory does not seek a listing of those experts whom Respondent, of certainty, intends to call as witnesses, but only those he expects "may be called." Fed. R.CIV.P 26(b)(4)(A), in essence, provides that a Party through interrogatories may require identification of persons whom the other Party ". . . expects to call as an expert witness at trial." (Emphasis added). Hence, Complainant shall be required to provide Respondent, within 5 days of this Order, the identity of each person it expects to call as an expert witness.[2]/

Interrogatory No. 5

Interrogatory No. 5 provides as follows: "For those witnesses listed in response to Interrogatory No. 3, please provide a summary of the testimony each witness is expected to render and the facts and circumstances upon which such expert's testimony will be based, along with references to any publications, documents, treatises or other written works the expert is expected to rely upon in rendering any opinion."

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[2]/ In a written statement dated March 28, 1991, Complainant's Counsel notified me that he ". . . will withdraw from this case." However, as of the date of this Order, Counsel has not withdrawn. In this connection, included in Counsel's statement to me of March 28, 1991, is the following: "We do not, however, feel comfortable formally withdrawing until resolution of the pending Motion to Compel and the pending Motion for Sanctions." Hence, since Counsel is still representing Complainant at this point, at least with regard to the instant Motion, it has an obligation to respond to Respondent's Discovery as ordered herein. Furthermore, should Counsel formally withdraw from representing Complainant in this case, Complainant, appearing pro se or substitute Counsel, will of necessity be involved in the preparation of his case scheduled for hearing on May 14-16, 1991. Further, the fact that Complainant's Counsel "will withdraw," should not operate to defeat Respondent's right to discovery by way of interrogatories upon a Party. 29 C.F.R. § 2700.57. This rationale applies to all orders contained herein.

In essence, Complainant's Counsel in his response, alleges that he has not spoken to any physicians about the merits of Complainant's claims, and that, "at the time of the responses," he did not know who would be an expert witness. Petitioner has been ordered, infra, to identify those person that he "expect may be called" as in expert witness. As to these persons, Complainant shall, pursuant to Rule 26(b)(4)(a)(1), supra, provide their names to Respondent. If Complainant has not decided which expert witnesses, if any, will testify at the hearing, then Complainant shall comply with the request contained in Interrogatory No. 5, when he makes such a decision, but not later than 14 days prior to the date of the hearing. Failure by Complainant to comply with this Order subjects it to possible sanctions pursuant to Fed. Rul. Civ. P. 37(b)(2), upon a proper Motion to be made by Respondent. Further, Complainant shall fully comply with the request for divulgence of the circumstances upon which the expert's testimony will be based, along with references to written works the expert is expected to rely upon in rendering his opinion, as these matters are within the scope of Rule 26(4)(A)(i), supra, which requires divulgence of a summary of the grounds for each opinion of an expert witness.

Interrogatory No. 6

Interrogatory No. 6 provides as follows: "Identify each and every person(s), by name and address, who has been retained or employed to participate in this litigation, or for hearing preparation purposes in this matter, who is not expected to be called to testify as an expert witness in any proceeding in this matter." Complainant argues that the information is privileged and protected under Fed. R. Civ.P. 26(b)(4)(B).

I am constrained to follow Ager v. Jane C. Stormont Hospital and Training, 622 F.2d 496, (10th Cir. 1980), wherein the Court of Appeals held that a Party may not require the other Party to compel discovery of the identity of a nonwitness expert retained and specially employed in an anticipation of litigation in the absence of "exceptional circumstances under which it is unpractical for the Party seeking discovery to obtain facts or opinions on the same subject by other means." (Ager, supra, at 503). The Court further held, citing Hoover v. United States Department of Interior, 611 F.2d. 1132, 1142, n.13 (5th Cir. 1980), that a Party seeking disclosure under Rule 26(b)(4)(b), supra, "carries a heavy burden." Respondent asserts in this connection that Complainant is solely and exclusively in control of information relevant to the issue of his medical condition and that his response is the only way to obtain this information. Hence, only Complainant and or his Counsel has knowledge of the

identity of an expert retained or specially employed. Hence, exceptional circumstances have been found to exist and discovery of the identity of these experts is required. Thus, Complainant shall comply with all terms of Interrogatory No. 5.

Interrogatory No. 7

Interrogatory No. 7 requires as follows: "Please identify all documents that you intend to introduce as exhibits at the hearing in this matter. For each such document, describe its present location and custodian, and identify the person(s) through whom you intend to introduce each document at any hearing or deposition in this matter."

The request falls within Fed R. Civ. P. 26(b)(1) and hence, a clear identification of the documents intended to be introduced as exhibits is required, as well as the identity of the persons through whom the document is to be introduced. Accordingly, Complainant shall specifically comply with all the terms of this interrogatory.

Interrogatory No. 8

Interrogatory No. 8 requires as follows: "Describe with specificity and in detail the facts and circumstances upon which you rely in contending that Michael Holland engaged in protected activity as defined under § 105(c) of the Mine Act. In responding, please identify:

a. The names and addresses of each and every person who will be called upon to provide testimony in support of your position and summarize the anticipated testimony of each such person; and

b. Identify each and every document and/or piece of evidence which is or will be relied upon to support your position."

Complainant argues that Respondent did not seek discovery within 60 days after the Complaint was filed, as is required by 29 C.F.R. § 277.55(b).

The Complaint herein was filed on September 26, 1990, and Respondent served a Request for Interrogatories on December 28, 1990.

In order to allow the Parties to prepare for trial and to eliminate surprise, the rules of discovery should be broadly applied (See, Hickman v. Taylor, 329 U.S. 495 (1947)). Complainant has not alleged any legal harm as a result of the

late request for discovery. Hence, the request in Interrogatory No. 8 is to be complied with, as, in general, the material requested falls within Rule 26(b)(1), supra.

It is further **ORDERED** that Complainant shall, within 5 days of this Order, file with me, for an in camera inspection, all material he claims as subject to either an informant's privilege, or a work product privilege.

Interrogatory No. 9

Interrogatory No. 9 requests as follows: "Describe with specificity and in detail the adverse action or discrimination you allege has occurred as a result of his alleged protected activity under § 105(c) of the Mine Act. In responding, please identify:

a. The names and addresses of each and every person who will be called upon to provide testimony in support of your position and summarize the anticipated testimony of each such person; and

b. Identify each and every document and/or piece of evidence which is or will be relied upon to support your position."

In its response, Complainant essentially referred to its response with regard to Interrogatory No. 8. The request set forth in Interrogatory No. 9 falls within the purview of Rule 26(b), supra. Hence, Complainant shall comply in detail to this interrogatory and within 5 days of this Order file with me, for an in camera inspection, any material that he claims is subject to the work product privilege or informant's privilege.

Interrogatory No. 10

Interrogatory No. 10 requests as follows: "Describe in detail and with specificity the facts upon which you rely in contending that the adverse action or discrimination complained of was motivated, in whole or in part, by alleged protected activity under § 105(c) of the Mine Act. In responding please identify:

a. The names and addresses of each and every person who will be called upon to provide testimony in support of your position and summarize the anticipated testimony of each such person; and

b. Identify each and every document and/or piece of evidence which is or will be relied upon to support your position."

As a response, Complainant merely made reference to his response to Interrogatory No. 8. My ruling with Interrogatory No. 10 is the same as the ruling I made with Interrogatory No. 8 for the same reasons.

Interrogatory No. 11

Interrogatory No. 11 provides as follows: "Explain in detail the remedies sought by you in this § 105(c) proceeding. If back pay is included in this request, please identify specifically the time periods for which you claim back pay." As a response, Complainant set forth the follow: "If Respondent will provide the work record at the time, Petitioner should be willing to provide this information." The information sought by this interrogatory is within the scope of Rule 26, supra, and hence, it is **ORDERED** that Complainant shall answer and comply with the interrogatory in full detail.

Interrogatory No. 13

Interrogatory No. 13 provides as follows: "If you contend that you have been subjected to discrimination and/or adverse consequences prohibited under § 105(c), list each date on which such alleged discriminatory activity took place and identify the persons other than you present or otherwise involved in the alleged incident."

The information sought is within the scope of Rule 26, supra. Complainant shall fully and specifically comply with this request identifying specific dates of alleged discriminatory activity and the specific identity of persons present when such activity allegedly occurred. In complying with this request, names of miners who are expected to testify shall not be disclosed until 2 days prior to the hearing. Names of informants who are miners shall not be disclosed.

Interrogatory No. 14

Interrogatory No. 14 alleges as follows: "Do you contend that it is hazardous or unsafe for you to wear metatarsal protection? If your answer is in the affirmative, please identify with specificity:

a. Each and every fact upon which you rely in support of this position;

b. The name and address of each and every person who will be called upon to provide testimony in support of this position and summarize the testimony of each such person; and

c. Each and every document and/or piece of physical evidence which is or will be relied upon to support this position."

The information sought is clearly within the purview of Rule 26, supra, and hence, it is **ORDERED** that Complainant shall comply fully with the request and shall identify persons with information of the facts requested, shall summarize the testimony of such persons and shall specifically identify the documents that will be relied upon. In complying with this Order, Complainant shall not be required, until 2 days prior to the hearing, to disclose the names of miners who are expected to testify, neither shall Complainant be required to disclose the name of an informant who is a miner.

II. Motion for Sanctions

In a Motion filed on March 14, 1991, Respondent seeks an order sanctioning Complainant's Counsel on the ground that he violated Fed. R. Civ P. 11 by refusing to answer interrogatories and by providing vague and unresponsive answers. Clearly the imposition of sanctions against an attorney is an extraordinary remedy. The rules of the Commission, 29 C.F.R. § 2700 et seq. do not provide any authority to sanction an attorney by ordering him to pay the reasonable expenses another Party has incurred because of a filing of a Motion that was responded to in a fashion in violation of Rule 11, supra.

In Rushton Mining Company, 11 FMSHRC 759 (1989), the Commission considered the question of whether the monetary sanctions provided by Rule 11, supra, apply to Commission proceedings. In Rushton, supra, the operator had sought reimbursement of its litigation expenses from the Secretary under Rule 11, alleging that the Secretary engaged in the type of litigation abuse covered by Rule 11, supra. The Commission held that the Operator did not have a right under Rule 11, supra, to reimbursement of its litigation expenses.

Respondent argues that Rushton, supra, dealt solely with the issue of imposing monetary sanctions on the government, and should not bar an injured Party from seeking Rule 11, supra, sanctions against a private Party. For the reasons that follow, I reject Respondent's argument.

In Rushton, supra, the Commission dealt solely with the issue of whether Rule 11 should be applied by the Commission in ordering sanctions against the Federal Government where it allegedly violated Rule 11, supra. However, guidance may still be found in the Commission's decision that is helpful in resolving the issue herein, i.e., whether Rule 11 should be applied in ordering sanctions against a private Party who allegedly violated Rule 11. In this connection, I note, that at

the outset of its analysis, the Commission, in Rushton, supra, at 763, took cognizance of the fact that the operator therein was seeking attorney's fees and costs against the government, not as a prevailing Party, but as "alleged victim of litigation abuse," but "nevertheless" noted that ". . . we have strictly interpreted the Act when determining whether such awards are due to prevailing Parties." Further, the caution of the Commission in providing relief in the form of an award of attorney's fees and costs can be seen in its statement in Rushton, supra, at 764 with regard to its underlining philosophy. "Thus, as we have observed in a number of analogous contexts, the absence of specific statutory authorization for an asserted from of relief under the Mine Act "dictates cautious review...." Counsel of So. Mtns. v. Martin County Coal Corp., 6 FMSHRC 206, 209 (February 1984), aff'd, 751 F.2d 1418 (D.C. Cir. 1985). See also Kaiser Coal Corp., 10 FMSHRC 1165, 1196-70 (September 1988)." Also, the Commission in Rushton, supra, at 765, was clear to state that the Federal Rules of Civil Procedure are not dictated by Commission Rule 1(b), (29 C.F.R. § 2700.1(b)) to be "reflexively applied on procedural questions not regulated by the Mine Act, Administrative Procedures Act, or our own procedural rules." Hence, in the absence of clear authority in either the Mine Act, Commission Rules, or Commission precedent, I am reluctant to sanction Complainant's Counsel and conclude that I do not have clear authority to do same.

Further, even if Rule 11, supra, or Fed. R.Civ. P. 26(g), supra, applies to the Commission's proceedings, the standards for an award thereunder have not been met. In general, as noted by the Commission in Ruston, supra, at 767 ". . . under Rule 11, monetary sanctions may be imposed if a reasonable inquiry discloses that a litigant's pleading or other paper is not well grounded in fact, is not warranted in law, or has been interposed for any improper purpose. See, e.g., Westmoreland v. CBS Inc, 770 F.2d 1168, 1174-80 (D.C. Cir. 1985)."

In general, it is the position of Respondent that Complainant's responses to the various interrogatories are "irresponsive and evasive," demonstrate a lack of good faith, are not well grounded in fact or warranted by existing law, and are obviously intended to harass or cause unnecessary delay or needless increase in cost in this litigation. I conclude that if responses to interrogatories are vague and incomplete a proper remedy is a motion to compel, which has been made herein, but that these deficiencies do not fall within the preview of those actions deemed by Rules 11 and 26(g), supra, to provide a basis for the imposition of sanctions.

Respondent, in its Motion, argues that the response of Complainant to various interrogatories constitute the basis for the imposition of sanctions under Rule 11, supra. Each of these are discussed below.

a. Interrogatory No. 3

Interrogatory No. 3 requested the identity of expert witnesses whom Complainant intended to call. As a response, Complainant referred to his response to a previous interrogatory, in which he set forth the names of persons he indicated that he might call as witnesses. Petitioner clearly has the obligation to respond to this interrogatory in a complete fashion. However, the failure to do so, is not evidence of any improper purpose, inasmuch as a complete list of witnesses were set forth in the previous interrogatory.

b. Interrogatory No. 5

Interrogatory No. 5 sought a summary of expected testimony of expert witnesses. As a response, Complainant indicated that, inasmuch as the request called for speculation as to what the persons will testify to under oath, it was not complied with. He also maintained the request was inconvenient, unduly burdensome and unduly expensive.

Complainant clearly has the obligation to reply to this interrogatory in detail as set forth above, I., infra in my ruling on the Motion to Compel. However, failure to do so under color of an argument that to comply would be inconvenient, burdensome and expensive, does not, per se, establish any ground for the imposition of sanctions.

c. Interrogatory No. 7

Interrogatory No. 7 requested Complainant to identify documents which he intends to introduce as exhibits at the hearing, and to set forth the identity of the person thorough whom Complainant intends to introduce the document. Complainant's response does not describe with specificity an identification of the document intended to be introduced, nor does it identify individual documents, nor the witnesses that would be used to introduce these documents. As such the response can be characterized as vague and unresponsive. Complainant has been ordered above, I., infra, to fully comply with the interrogatory. However, the vague nature of the response and the failure to fully comply with the terms of the interrogatory does not per se establish conduct that falls within the criteria set forth in Rules 11 and 26(g) for the imposition of the sanctions.

d. Interrogatory No. 8

Interrogatory No. 8 requested, in essence, the facts and circumstances upon which Complainant relies in contending that he was engaged in protected activities. Respondent asserts that there was no good faith basis for Complainant's objection based upon work product privilege. I have ordered Complainant to

furnish, for an in camera inspection, any material alleged to be subject to a work product privilege. (See above, I., infra). As such, I certainly can not find at this point, without having examined the material in question, that any claim of a work product privilege was not warranted in law.

Respondent also argues that Complainant's responses are vague, incomplete, and do not identify particulars. These defects are the subject of the Motion to Comply, and have been dealt with above, I., infra, but do not fall within the preview of activities causing liability for sanctions.

Respondent also refers to Complainant's refusal to identify and summarize anticipated testimony of witnesses. Complainant alleges that this request is burdensome and inconvenient. The failure to respond to the request has been dealt with above, I., infra, but Complainant's failure in this regard does not justify the imposition of sanction.

e. Interrogatory No. 9

Interrogatory No. 9 required Complainant to describe the adverse action which he alleged, and to provide the identity of witnesses and documents which are relied upon. In essence, Respondent argues that Complainant's responses are vague, evasive, and unresponsive. Respondent is correct in its characterization of Complainant's response and this has been dealt with above, I., infra, in my ruling on the Motion to Compel. However, providing a vague unspecific response is not an activity set forth in either Rules 11 or 26(g), supra, which provides a basis for the imposition of sanctions.

f. Interrogatory No. 10

Interrogatory No. 10 required Complainant to detail the facts relied upon in his allegation that adverse action was motivated in whole or part by protected activities, to identify the persons whose testimony will be offered in support of his position, and to identify those documents that are relied upon. Complainant did not provide any response other than stating as follows: "See answers No. 8 and No. 9." The lack of response has been noted above, I., infra, in my ruling on the Motion to Compel. However, failure to answer an interrogatory is not one of the actions set forth in Rules 11 and 26(g), supra, to warrant an imposition of sanction.

g. Interrogatory No. 11

Interrogatory No. 11 requested Complainant to explain in detail the remedies sought and to identify specifically the time period for which he claims back pay. Respondent argues that Complainant's response that he was seeking all remedies provided

under Section 105(c) including back pay, constitutes a refusal to provide the requested information. This issue has been dealt with above, I., infra, in my ruling on the Motion to Compel. However, although the response is vague and does not provide the specificity requested, it does not fall within the scope of actions set forth in Rules 11 and 26(g), supra, which constitute a basis for the imposition of sanctions.

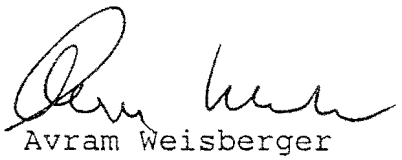
h. Interrogatory No. 13

Interrogatory No. 13 requested Complainant to list dates on which alleged discriminatory activity occurred, and to identify the persons present or involved in the incidents. Complainant responded that the discrimination occurred over a period of from 1988 to the present, and indicated that those persons whom he intends to call as witnesses are identified in the answer to a previous interrogatory. In essence, Respondent argues that the response, being vague, evasive, and unresponsive, is the basis for sanctions. While the response is vague, unspecific and not responsive, that issue has been dealt with above, I., infra, in my ruling on the Motion to Compel. However, the fact that the response is vague and not responsive to the interrogatory, does not form the basis for the imposition of sanctions as per Rules 11 and 26(g), supra.

i. Interrogatory No. 14

Interrogatory No. 14 requested Complainant to state the facts relied on supporting his contention that it is either hazardous or unsafe to wear metatarsal protection and to identity the witnesses and documents, which will be offered in support of his claim. Respondent, in essence, argues that Complainant's response is vague and attempts were not made to identify the information. Although the response is not specific and is not responsive to the interrogatory, these issues are discussed above, I., infra, in my ruling in the Motion to Compel. However, I find that Complainant's response does not fall within the activities delineated in Rules 11 and 26(g), supra, as forming the basis for the imposition of sanctions.

Wherefore, taking into account all the above, it concluded that Respondent's Motion for Sanctions is without merit, and is DENIED



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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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APR 30 1991

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEVA 91-43 A.C. No. 46-01453-03933
v.	:	
	:	Humphrey No. 7 Mine
CONSOLIDATION COAL COMPANY, Respondent	:	

DECISION GRANTING IN PART AND DENYING IN PART MOTION TO APPROVE SETTLEMENT

Before: Judge Fauver

The Secretary of Labor has moved for approval of a settlement of three citations, under § 110(k) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq.

Citation No. 3314307 charges a violation of 30 C.F.R. § 75.515, alleging that the power cable on a permanent pump was not properly entered into the junction box of the pump motor. The inspector observed that insulated leads were exposed on the outside of the box. The settlement motion states that "the hazard presented by the violation is that continued operation of the pump might cause the insulated leads to rub against the junction box resulting in the insulation failing and junction box and pump motor becoming energized." The Secretary moves to settle this charge by reducing the penalty and reducing the citation from a "significant and substantial" violation to a non-S&S violation, on the ground that "the Secretary does not believe that she can demonstrate, by a preponderance of the evidence, a reasonable likelihood that the hazard contributed to would result in an injury of a reasonably serious nature."

In a similar case involving a cable entering a pump, the Commission affirmed a decision by a Commission judge holding that the violation was significant and substantial. U.S. Steel Mining Co., Inc., 7 FMSHRC 327 (1985). The judge found that the pump vibrated and, in the absence of a bushing, the vibration could cause a cut in the insulation. He accepted the testimony of the

inspector that the cut in the insulation could cause the pump to become the ground and, if the circuit protection failed, anyone touching the pump frame could be shocked or electrocuted. Based on the evidence, the judge concluded that the violation was S&S. 5 FMSHRC 1788 (1983).

In reviewing the judge's holding, the Commission stated, inter alia:

> On review, U.S. Steel argues that the facts indicated that the occurrence of the events necessary to create the hazard, the cutting of the wires' insulation and failure of the electrical safety systems, are too remote and speculative for the hazard to be reasonably likely to happen and, consequently, that the judge erred in concluding that the violation was significant and substantial.
>
> We have held previously 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), we explained:
>
> > In order to establish that a violation of a mandatory safety standard is significant and substantial under National Gypsum the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard--that is, a measure of danger to safety--contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.
>
> 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. See 6 FMSHRC at 1836.

> Applying these principles to the instant case, we affirm the judge's holding that the cited violation properly was designated significant and substantial. U.S. Steel's only witness did not deny that the missing bushing could contribute to a shock hazard. [Emphasis added.] Rather, because of the pump's circuit fuses and its dual grounding system, he described the chance of miners being shocked or electrocuted as "very slight." Moreover, the inspector effectively testified that if the cited condition were left uncorrected an accident involving shock or electrocution was "reasonably likely" to occur. The inspector's statement that a person could serve as a better ground than the frame ground itself if the insulation on the wires was cut, was not refuted by U.S. Steel, and was accepted by the judge. The fact that the insulation was not cut at the time the violation was cited does not negate the possibility that the violation could result in the feared accident. As we have concluded previously, a determination of the significant and substantial nature of a violation must be made in the context of continued normal mining operations. [Emphasis added.] U.S. Steel Mining Co., 6 FMSHRC 1573, 1574 (July 1984). The administrative law judge correctly considered such continued normal mining operations. He noted that the pump vibrated when in operation and that the vibration could cause a cut in the power wires' insulation in the absence of a protective bushing. In view of the fact that the vibration was constant and in view of the testimony of the inspector that the insulation of the power wires could be cut and that the cut could result in the pump becoming the ground [emphasis added], we agree that in the context of normal mining operations, an electrical accident was reasonably likely to occur.
>
> Accordingly, we conclude that substantial evidence supports the judge's conclusion that the violation in this case was properly designated significant and substantial. * * * [7 FMSHRC at 328-329.]

The Commission's affirmance of an S&S violation on the evidence in U.S. Steel would indicate that the Commission's test of an S&S violation is a practical and realistic question whether the violation presents a substantial possibility of resulting in injury or disease, not a requirement that the Secretary prove that it is more probable than not that injury or disease will result. Thus, vibration of the pump might cause the insulation to wear down to bare wire, but if the missing bushing were replaced by the company beforehand, e.g., in a periodic examination, the wire would not become bare; and even if the company's future examinations missed the violation, and the wire

became bare, this would not cause shock or electrocution if the circuit breaker system functioned properly. The inspector's opinion that injury was "reasonably likely" did not change the scenario of possibilities into a combined probability that the company would not detect the violation, the wire would become bare, and the circuit breaker system would also fail to function. A substantial possibility of injury, yes, but not a showing that injury was more probable than not. In sum, the logical basis for the holding of an S&S violation was a scenario of a substantial possibility that the violation could contribute to shock or electrocution, not a scenario of probability that it was more likely than not that such an accident would occur.

Inasmuch as the operative test in U.S.Steel is a substantial possibility of injury, rather than proof that injury was more probable than not, the Commission's use of the phrase "reasonably likely to occur" or "reasonable likelihood" does not preclude an S&S finding where only a substantial possibility of injury or disease is shown by the evidence. This interpretation is consistent with the statutory definition, which does not use the phrase "reasonably likely to occur" or "reasonable likelihood" in defining an S&S violation. Under the statute, an S&S violation exists if "the 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" (§ 104(d)(1) of the Act; emphasis added).

The settlement motion does not state or show a factual basis for concluding that the alleged violation did not present a substantial possibility of resulting in injury within the context of continued normal mining operations. Determination of that issue will depend on a fuller presentation and evaluation of the facts. The settlement will therefore be rejected.

Citation No. 3314314 charges a violation of 30 C.F.R. § 75.517, alleging that a trailing cable to a continuous miner was not adequately insulated. The inspector observed that the outer jacket of the cable had been damaged and taped but the tape was worn, exposing the insulated leads. The Secretary moves to settle this citation by reducing the penalty and reducing the citation to a non-S&S violation, on the ground that the Secretary "does not believe that she can demonstrate, by a preponderance of the evidence, a reasonable likelihood that the hazard contributed to would result in an injury of a reasonably serious nature. . . ."

The settlement motion does not state or show a factual basis for concluding that the alleged violation did not present a substantial possibility of resulting in injury within the context of continued normal mining operations. For the reasons discussed above, I find the motion to be insufficient as to this citation.

Citation No. 3314316 charges a violation of 30 C.F.R. § 75.303(a), alleging that an adequate preshift examination was not performed on part of the mainline track entry. The proposed settlement is to pay the original proposed penalty without changing the citation. I have considered the documentation and reasons for this proposal and find that the settlement is consistent with the purposes of § 110(i) of the Act. The settlement will therefore be approved as to this citation.

ORDER

1. The motion to approve settlement of Citation No. 3314307 and Citation No. 3314314 is DENIED.

2. The motion to approve settlement of Citation No. 3314316 is GRANTED.

3. Respondent shall pay the approved penalty of $259 for Citation No. 3314316 within 30 days of this decision.

William Fauver
Administrative Law Judge

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