

APRIL 1993

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

Secretary of Labor, MSHA v. U.S. Steel Mining Company, Docket No. WEVA 92-783. (Judge Fauver, March 11, 1993)

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

Jim Walter Resources, Inc. v. Secretary of Labor, MSHA, Docket No. SE 92-249-R, etc. (Judge Fauver, March 10, 1993)

Secretary of Labor, MSHA v. Peabody Coal Company, Docket No. KENT 92-748. (Judge Melick, March 9, 1993)

COMMISSION DECISIONS AND ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

April 6, 1993

ENERGY WEST MINING COMPANY :
 :
 v. : Docket No. WEST 91-83-R
 :
 SECRETARY OF LABOR, MINE SAFETY :
 AND HEALTH ADMINISTRATION (MSHA) :

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

DECISION

BY THE COMMISSION:

This contest proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988) ("Mine Act" or "Act"), presents the question of whether Energy West Mining Company ("Energy West") was required to report to the Department of Labor's Mine Safety and Health Administration ("MSHA"), pursuant to 30 C.F.R. § 50.20, an injury that occurred to a miner as he was driving his personal car on mine property on his way to work.¹ Commission Administrative Law Judge Michael A. Lasher, Jr., upheld the

¹ The cited regulation provides, in pertinent part:

§ 50.20 Preparation and submission of MSHA Report Form 7000-1 -- Mine Accident, Injury, and Illness Report.

(a) Each operator shall maintain at the mine office a supply of MSHA Mine Accident, Injury, and Illness Report Form 7000-1.... Each operator shall report each accident, occupational injury, or occupational illness at the mine. The principal officer in charge of health and safety at the mine or the supervisor of the mine area in which an accident or occupational injury occurs, or an occupational illness may have originated, shall complete or review the form in accordance with the instructions and criteria in §§ 50.20-1 through 50.20-7.... The operator shall mail completed forms to MSHA within ten working days after an accident or occupational injury occurs or an occupational illness is diagnosed....

citation. 13 FMSHRC 1164 (July 1991)(ALJ). For the reasons set forth below, we affirm the judge's decision.

I.

Factual and Procedural Background

The parties in this proceeding stipulated to all the essential facts. The stipulations pertinent on review are as follows:

4. Citation No. 3413924 (Joint Exh. 1.) was issued on November 1, 1990 by Inspector Robert L. Huggins, alleging that Energy West violated 30 C.F.R. § 50.20 by failing to report an injury sustained by employee Donald Hammond in an automobile accident on mine property on Wednesday, October 3, 1990.

6. At the time of the accident, Mr. Hammond was driving his own personal car on his way to work. He was injured when, after passing through the gate onto company property and driving uphill towards the parking lot, the engine of his car stalled and his brakes failed. The car rolled backwards down the road approximately 150 feet (see Joint Exhs. 3, 4) and turned on its side into a drainage ditch on the side of the road (see Joint Exhs. 5, 6).

7. The accident occurred at 7:30 a.m. as Mr. Hammond was on his way to report for his 8:00 a.m. shift at the mine. Mr. Hammond sustained a strained neck.

8. After the accident, Mr. Hammond did not report to the 8:00 a.m. shift on Wednesday, October 3, 1990. He returned to work on Monday, October 8, 1990.

9. At the time of the accident and at all times relevant to the subject Citation, the road was paved, in good repair with guard rails on one side and a hillside on the other, and in substantially the same condition as the publicly maintained road leading to the entrance of the company property.

10. The accident occurred in daylight during good weather conditions and clear visibility.

11. The condition of the road was not the cause of the accident.

12. Inspector Huggins was present at the Deer Creek Mine on the day of the accident and visited the accident site. He asked Deer Creek Safety Engineer Kevin Tuttle whether Energy West planned to report the

injury to the Mine Safety and Health Administration. In response, Mr. Tuttle stated his belief that the injury was not reportable, because it occurred while Mr. Hammond was on his way to work, not while he was on the job, and involved Mr. Hammond's personally owned vehicle. Inspector Huggins informed Mr. Tuttle that he would check to see whether MSHA thought the injury was reportable.

13. Shortly thereafter, Inspector Huggins informed Mr. Tuttle that the injury was reportable. On November 1, 1990, Inspector Huggins issued the subject Citation when no accident report was forthcoming. To abate the alleged violation, Mr. Tuttle then completed MSHA Form 7000-1 (Joint Exh. 2) on November 1, 1990 and mailed it to the MSHA Health and Safety Analysis Center, and Inspector Huggins terminated the Citation.

The citation charged Energy West with a non-significant and substantial violation of section 50.20 and, as modified, alleged high negligence.² The Secretary has not alleged that Energy West was responsible for, or contributed to, the conditions that lead to Hammond's injury.

Energy West filed a notice of contest of the citation and the matter was submitted to Judge Lasher on stipulated facts. After noting that Hammond's injury was not the result of an "accident," as that term is defined by section 50.2(h), the judge evaluated whether Hammond's injury fit within the definition of "occupational injury" as defined by section 50.2(e).³ The judge determined that the stipulations established that Hammond was a miner who, while at the mine, suffered an injury resulting in his inability to perform all his job duties. 13 FMSHRC at 1171. The judge concluded, based on these undisputed facts, that Hammond suffered an "occupational injury" as

² The citation alleged the following violation:

A[n] accident occurred to Donald Hammond on 10-3-90 and a 7000-1 report form was not submitted to the MSHA Health and Safety Analysis Center in Denver, Colorado. Mr. Hammond was involved in an automobile accident that occurred on mine property and Mr. Hammond failed to report to his next shift of work. Mr. Hammond returned to work on 10-8-90.

³ Section 50.2(e) provides:

Occupational injury means any injury to a miner which occurs at a mine for which medical treatment is administered, or which results in death or loss of consciousness, inability to perform all job duties on any day after an injury, temporary assignment to other duties, or transfer to another job.

defined in section 50.2(e) and that Energy West was required to report this occupational injury to MSHA pursuant to section 50.20. He rejected Energy West's contention that the injury was not reportable because of the lack of a "causal nexus" to Hammond's work at the mine. The judge based this conclusion on the Commission's decision in Freeman United Coal Mining Co., 6 FMSHRC 1577 (July 1984). 13 FMSHRC at 1172. The Commission granted Energy West's Petition for Discretionary Review and permitted the American Mining Congress ("AMC") to file an amicus curiae brief.

II.

Disposition of the Issues

The Secretary interprets section 50.20 to require each mine operator to report to MSHA all injuries that occur at the operator's mine site, including injuries that are not directly work-related. Energy West⁴ objects to that approach and argues that, since it is undisputed that Hammond's injury was not work-related, reporting the injury to MSHA was not required.

Energy West argues that the Secretary's interpretation of the injury reporting provisions exceeds the scope of the Mine Act because his interpretation requires mine operators to report non-work-related injuries to MSHA under section 50.20. Energy West also argues that the Secretary's interpretation of the regulation is unreasonable because it conflicts with the overall purposes of Part 50 and leads MSHA to calculate inherently flawed rates of injury occurrence ("incident rates"). It argues that, the information gathering provisions of Part 50 were developed so that incident rates could be calculated by the Secretary pursuant to section 50.1. It maintains that, by requiring mine operators to report non-work-related injuries that occur before or after the miners' shifts, while prohibiting operators from including such off-shift time as part of the total number of employee hours worked under section 50.30-1(g)(3), MSHA calculates an incident rate under section 50.1 that is "flawed and untrustworthy for its intended purpose." AMC Br. 10.

Energy West relies heavily on the regulatory history of Part 50 to support its position. It argues that when the Department of the Interior ("Interior") consolidated injury reporting in Part 50 it did not "sever the existing linkage between work-related injuries and the filing of reports." AMC Br. 16. It argues that the preambles to the proposed and final rule are "devoid of any statement or indication" that "a dramatic substantive change" was being made "that would require, for the first time, the reporting of non-work-related, as well as work-related, injuries." AMC Br. 17. Energy West points to language in the preamble to the final rule stating that MSHA "seeks data only respecting injuries whose occurrence rate it can affect and diminish." E.W. Br. 21; AMC Br. 18. Energy West contends that the Commission should reconsider its decision in Freeman.

⁴ Unless otherwise noted, the arguments of the AMC are included in our discussion of Energy West's position.

In Freeman, the Commission concluded that section 50.20 requires operators to report to MSHA certain injuries that occur to miners at mines. 6 FMSHRC at 1579. The Commission held that "sections 50.2(e) and 50.20(a), when read together, require the reporting of an injury if the injury -- a hurt or damage to a miner -- occurs at a mine and if it results in any of the specified serious consequences to the miner."⁵ Id. The Commission determined that the Secretary's regulations "do not require a showing of a causal nexus" between the injury and the miner's work. Id. The Commission also indicated that the definition of occupational injury in section 50.2(e) and the regulatory history of that section "control in construing the related reporting requirement of section 50.20(a)." Id. Finally, the Commission concluded that the Secretary's interpretation of section 50.20(a) "is consistent with and reasonably related to the statutory provisions under which it was promulgated." 6 FMSHRC at 1580.

In Consolidation Coal Co., 14 FMSHRC 956 (June 1992) ("Consol"), the Commission examined MSHA's calculation of incident rates under Part 50.⁶ The operator in that case had reported to MSHA the total amount of time that it estimated miners were present at its mine, not simply the hours worked. It argued that MSHA's Part 50 reporting requirements, as interpreted by the Secretary, leads MSHA to calculate inaccurate incident rates. The Commission determined that mine operators are required to report to MSHA, as "total employee-hours worked" under section 50.30-1(g)(3), the number of employee-hours reflected in the operators' payroll records and that operators are not permitted to add to those hours the time miners spend on mine property before and after their shifts. 14 FMSHRC at 966-68. The Commission noted that the "incident rates calculated by MSHA are flawed because the injury and accident information that mine operators are required to submit does not correlate with the data that mine operators must report for employee hours worked." 14 FMSHRC at 968. The Commission held, however, that any flaws in MSHA's calculation of incident rates did not excuse Consol's violation of the regulation:

Incident rates provide a general picture of the safety record of a mine operator. The assertion that MSHA's method of calculating incident rates is less than perfect or that there may be better methods does not

⁵ As set forth in section 50.2(e), an injury with serious consequences is one "for which medical treatment is administered, or which results in death or loss of consciousness, inability to perform all job duties on any day after an injury, temporary assignment to other duties, or transfer to another job." Hammond's injuries resulted in at least one of these serious consequences because he was unable to work on the day after the accident. Stip. 8.

⁶ MSHA calculates the incident rate for a mine by dividing the total number of occupational injuries, occupational illnesses and accidents reported in a calendar quarter (multiplied by a constant: 200,000) by the total number of employee-hours worked during the quarter. 30 C.F.R. § 50.1; Consol, 14 FMSHRC at 959.

excuse mine operators from complying with the data submission requirements of Part 50.

14 FMSHRC at 969.

We have reviewed again the relevant provisions of Part 50 and the regulatory history and we decline to overrule or modify our holding in Freeman as urged by Energy West.⁷ We hold that, despite the fact that the regulation requires the reporting of injuries that are not directly work-related, MSHA's injury reporting requirements in section 50.20(a) do not exceed the Secretary's broad authority to obtain from mine operators information relating to safety conditions and the causes of accidents. See section 103 of the Mine Act, 30 U.S.C. § 813.

As stated in Consol, the Commission's task is not to devise the best method of monitoring injuries sustained by miners but to determine whether the Secretary's method, as implemented by the regulations, is reasonable. 14 FMSHRC at 969. The Secretary uses a mine site test for reportable injuries. As a consequence, a work-related injury that occurs off mine property is not reportable, while a non-work-related injury that occurs on mine property is reportable. While such reporting requirements do not focus precisely on injuries that MSHA may seek to diminish, the requirements are not so arbitrary as to be unreasonable.⁸ The Secretary's geographic approach is consistent with the jurisdiction conferred upon him under section 3(h)(1) of the Mine Act, 30 U.S.C. § 802(h)(1), which defines "coal or other mine" in geographic terms.⁹ Moreover, it is not unreasonable for the Secretary to require the

⁷ The statement in the preamble to the final rule, that MSHA sought only data concerning "injuries whose occurrence rate it can affect and diminish," relates to Interior's rejection of a suggestion that work-related injuries that occur off mine property should be reported. 42 Fed. Reg. 65, 534 (December 30, 1977). In response to that comment, the Secretary stated that he did not have jurisdiction over injuries that occur off mine property "regardless of whether the injured miner was engaged in his employer's business at the time of the injury." Id. Thus, the statement in the preamble relied on by Energy West does not suggest that the Secretary intended to exempt mine operators from reporting non-work-related injuries that occur on mine property.

⁸ The Secretary argues that reportable, non-work-related injuries "are rare events" that occur infrequently. S. Br. 34. We note that Energy West did not present any evidence to show that it has experienced a significant number of such injuries at its mine.

⁹ Section 3(h)(1) of the Mine Act states in pertinent part:

"coal or other mine" means (A) an area of land from which minerals are extracted ..., (B) private ways and roads appurtenant to such area, and (C) lands, excavations, underground passageways, shafts, slopes, tunnels and workings, structures, facilities, equipment,

(continued...)

reporting of all designated injuries at mines so that MSHA can decide whether an investigation of the injury is necessary or whether regulatory action is indicated.¹⁰ The cause of an injury may not be obvious and MSHA may need to evaluate whether it should seek to reduce the risk of similar injuries. In section 103 of the Act, 30 U.S.C. § 813, Congress granted to the Secretary broad investigation and information gathering authority. MSHA would abdicate its responsibilities under the Act were it to rely solely on the mine operator's determinations, as urged by Energy West, that an injury was not work-related.

We have determined that the Secretary's requirement that injuries occurring at mines be reported to MSHA is reasonable, in part, because such injury reports enable MSHA to obtain a comprehensive overview of the safety and health conditions at each mine. As in Consol, however, we are concerned that the goal of improving mine safety can be unnecessarily compromised when MSHA's injury statistics are inaccurate. In our view, the purposes of the Mine Act would be better served if the Secretary, in calculating incident rates, were to exclude injuries that are not work-related.

⁹(...continued)

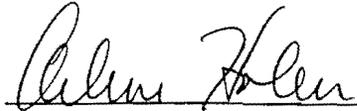
machines, tools, or other property including impoundments, retention dams, and tailings ponds, on the surface or underground, used in, or to be used in, or resulting from, the work of extracting such minerals from their natural deposits....

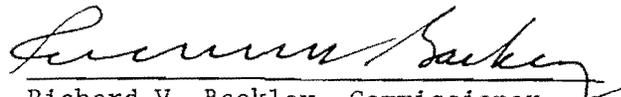
¹⁰ If an operator believes that an injury is not work-related, it may state its belief in the report submitted to MSHA. Section 9 of the reporting form (MSHA Form 7000-1) requires an operator to "Describe Fully the Conditions Contributing to the Accident/Injury/Illness." The Secretary's criteria at section 50.20-6(a)(3) direct operators to "[d]escribe what happened and the reasons therefore" and to "clearly specify the actual cause or causes of the ... injury."

III.

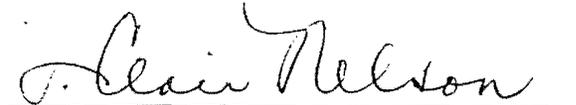
Conclusion

For the foregoing reasons, the judge's decision is affirmed.


Arlene Holen, Chairman


Richard V. Backley, Commissioner


Joyce A. Doyle, Commissioner


L. Clair Nelson, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
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April 22, 1993

SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA) : Docket Nos. WEVA 92-1008
 : WEVA 92-1096
 v. : WEVA 92-1097
 : WEVA 92-1108
MARTIN SALES & PROCESSING :

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

ORDER

BY THE COMMISSION:

In these civil penalty proceedings arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988)(the "Mine Act"), Commission Administrative Law Judge George Koutras issued Summary Default Decisions ("default decision") on March 29, 1993, finding respondent Martin Sales & Processing ("Martin") in default for failing to respond to discovery requests served by the Secretary of Labor and to the judge's February 25, 1993, order to show cause. The judge assessed civil penalties of \$32,166 as proposed by the Secretary. For the reasons that follow, we vacate the default order and remand this case for further proceedings.

The judge's jurisdiction over this case terminated when his decision was issued on March 29, 1993. 29 C.F.R. § 2700.65(c). On April 8, 1993, the judge received from Martin's attorney a Motion to Alter, Vacate, or Amend the default decision. Martin asserts that it had timely filed a response, dated March 8, 1993, to the judge's show cause order. Martin does not assert that it mailed the response by certified or registered mail, return receipt requested, and the Commission's records do not indicate receipt of Martin's response to the show cause order.

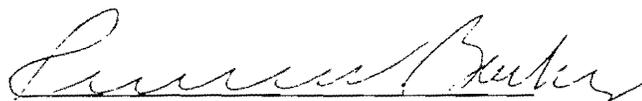
Under the Mine Act and the Commission's procedural rules, relief from a judge's decision may be sought by filing a petition for discretionary review with the Commission within 30 days of the decision. 30 U.S.C. § 823(d)(2); 29 C.F.R. § 2700.70(a). We will treat Martin's motion as a timely filed petition for discretionary review of the decision. See, e.g., Middle States Resources, Inc., 10 FMSHRC 1130 (September 1988).

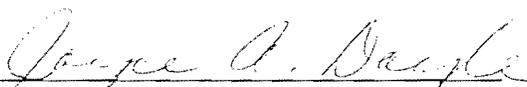
It appears that Martin may have attempted to respond to the judge's show cause order. The Commission has noted "under appropriate circumstances a

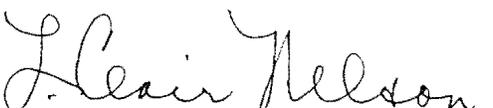
genuine problem in communication or with the mail may justify relief from default." Middle States Resources, Inc., 10 FMSHRC at 1131, quoting Con-Ag, Inc., 9 FMSHRC 989, 990 (June 1987). We are unable, however, to evaluate the merits of Martin's explanation on the basis of the present record. We will afford Martin the opportunity to present its position to the judge, who shall determine whether default is warranted.

Accordingly, we grant Martin's petition for discretionary review, vacate the judge's default decision, and remand this matter for proceedings consistent with this order.


Arlene Holen, Chairman


Richard V. Backley, Commissioner


Joyce A. Doyle, Commissioner


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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

April 22, 1993

SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA) :
: :
v. : Docket Nos. WEVA 91-2077 :
: WEVA 91-2123 :
STEELE BRANCH MINING :

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

DECISION

BY THE COMMISSION:

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988) ("Mine Act" or "Act"). It involves a dispute between the Secretary of Labor and Steele Branch Mining ("Steele Branch") regarding two citations alleging violations of 30 C.F.R. §§ 77.404(a)¹ and 50.11(b).² Following an evidentiary hearing, Commission

¹ 30 C.F.R. § 77.404 provides, in relevant part:

(a) Mobile and stationary machinery and equipment shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately.

² 30 C.F.R. § 50.11 provides, in relevant part:

* * *

(b) Each operator of a mine shall investigate each accident and each occupational injury at the mine. Each operator of a mine shall develop a report of each investigation. No operator may use Form 7000-1 as a report, except that an operator of a mine at which fewer than twenty miners are employed may, with respect to that mine, use Form 7000-1 as an investigation report respecting an occupational injury not related to an accident. No operator may use an investigation or an investigation report conducted or prepared by MSHA to

Administrative Law Judge Avram Weisberger found that Steele Branch violated both provisions and that its violation of section 77.404(a) was significant and substantial ("S&S").³ 14 FMSHRC 871 (May 1992)(ALJ). The Commission granted Steele Branch's petition for discretionary review, which raises the following issues: (1) whether the operator violated section 77.404(a) because 270 to 300 degrees of slack existed in the steering wheel of a road grader, measured while the grader was not in operation; and (2) whether the operator violated section 50.11(b) when it did not promptly submit an accident investigation report upon the request of the Department of Labor's Mine Safety and Health Administration ("MSHA"). For the reasons set forth herein, we affirm the judge's conclusion on the first issue and reverse his conclusion on the second.

I.

Factual and Procedural Background

Steele Branch, which is owned by the Geupel Construction Company, operates a surface coal mine in Logan County, West Virginia. On April 23, 1991, MSHA inspected Steele Branch following a fatal accident. Rayburn Browning operated the No. 9 road grader used to maintain a haulage road at the mine. The grader's engine had stalled on a hill and the grader began rolling backwards. Unable to control the vehicle, Browning jumped off, and the grader ran over him.

MSHA Inspector Donald Mills inspected the grader and observed that there was between 270 and 300 degrees of slack in the steering wheel. The inspector did not test the slack while the grader was operating. Inspector Mills issued a citation, alleging a violation of section 77.404(a). The citation stated that the road grader "was not maintained in a safe operating condition[] in that excessive slack was present at the steering wheel...."⁴ The inspector determined that the violation was S&S.

comply with this paragraph. An operator shall submit a copy of any investigation report to MSHA at its request....

³ The S&S terminology is taken from section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), which distinguishes as more serious in nature any violation that "could significantly and substantially contribute to the cause and effect of a ... mine safety or health hazard...."

⁴ This citation also alleged that the grader's primary fuel filter was not properly installed. The judge determined that the Secretary had failed to establish that the inoperative primary filter violated the safety standard because the secondary filters on the vehicle would have adequately "screened and trapped" any contaminants and that, as a consequence, the grader was in safe operating condition as to its fuel-filtering system. 14 FMSHRC at 872-73. The Secretary did not seek review of this finding.

That same day, another MSHA Inspector, James E. Davis, requested that Steele Branch prepare an investigation report of the accident, as required by section 50.11(b). On April 24 and 26, Inspector Davis reiterated his request. On April 29, he spoke with Mark Potnick, the Steele Branch official in charge of safety. Potnick described to Davis the preventive measures that Steele Branch planned to take to avoid such an accident in the future. MSHA made follow-up requests for the written report on May 8 and 9.

On May 13, MSHA cited Steele Branch, alleging an S&S violation of section 50.11(b), for its failure to submit an accident investigation report. The citation stated:

During and after the investigation of a fatal accident at this mine several requests were made to the operator for a copy of the required Company investigation report and a description of steps taken to prevent a similar occurrence in the future. The requests were made to the mine management on April 23, 24, 26, May 8 and 9, 1991. The requests have not been complied with as required by 30 C.F.R. § 50.11(b).

MSHA proposed a special assessment of \$500 for the operator's failure to provide the report. Steele Branch submitted the accident report on May 16. The report reiterated the measures described by Potnick to Davis to prevent a recurrence of the accident.

Steele Branch's contests of the citations were consolidated for hearing. In concluding that Steele Branch violated section 77.404(a) and that the violation was S&S, the judge found that the grader in question was not in safe operating condition due to excessive play in the steering wheel. 14 FMSHRC at 874. In concluding that Steele Branch violated section 50.11(b), the judge found that it failed to submit an investigation report in spite of numerous requests by MSHA. 14 FMSHRC at 875-76. The judge concluded, however, that the latter violation was not S&S. As a consequence, he assessed a penalty of \$10, rather than \$500 proposed by the Secretary. 14 FMSHRC at 877.

II.

Disposition of Issues

A. Violation of Section 77.404(a)

Steele Branch asserts that, because the grader was equipped with "hydraulic steering," slack is always present when its engine is off and that such slack is eliminated when the grader is running. Thus, MSHA's inspection of the steering wheel was deficient because the grader was not operated during the inspection. Steele Branch relies primarily on the testimony of Edward Casto, an independent mechanic who operated the grader within a few hours after the accident. Casto testified that he noticed "some play, but not any great amount" when he operated the grader up a hill. Tr. 261, 262. Steele Branch also points out that Wiley Queen, its head mechanic, drove the grader sometime prior to the accident and did not perceive excess slack. After the

accident, Queen replaced all loose parts in the steering and testified as follows: "To me it wasn't that loose ... to cause it to be unsafe to operate." Tr. 215.⁵

The judge concluded that the steering wheel exhibited approximately 270 to 300 degrees of slack when the engine was off and that such slack was "clearly evidence of play in the steering wheel to a more than non-significant degree when the engine is on." 14 FMSHRC at 874. The judge determined that Steel Branch violated 30 C.F.R. § 77.404(a) based on excessive slack in the steering, and on the fact that the grader was being operated on a road containing curves and an eight to nine percent grade. *Id.*

The Commission is bound by the Mine Act to apply the substantial evidence test when reviewing an administrative law judge's decision. 30 U.S.C. § 823(d)(2)(A)(ii)(I). The term "substantial evidence" means "such relevant evidence as a reasonable mind might accept as adequate to support [a] conclusion." *See, e.g., Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (November 1989) *quoting Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938). We are guided by the settled principle that, in reviewing the whole record, an appellate tribunal must also consider anything that "fairly detracts" from the weight of the evidence that may be considered as supporting a challenged finding. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951). Considering the record before us, we conclude that substantial evidence supports the judge's determination that the steering wheel exhibited excessive play, thereby making the grader unsafe to operate.

Inspector Mills' testimony that, on the day of the accident, slack of between 270 and 300 degrees existed in the steering wheel of the road grader was uncontradicted. Tr. 87. William Roberts, Steele Branch's equipment manager, testified that steering play when the engine is off should amount to no more than 120 degrees. Tr. 378, 394. He further testified that 270 degrees of slack in the steering mechanism when the grader was off would be considered "excess play." Tr. 395. Inspector Mills also testified that the haulage road was hilly with narrow curves and that excessive slack could delay movement of the wheels toward the direction turned and, consequently, result in an accident. Tr. 88-91.

⁵ Steele Branch also argues that the deceased miner had an excellent safety record and, if excess slack in fact existed, he would have noticed it during his pre-shift equipment inspection. Steele Branch further argues that, to the extent that Browning failed to adequately inspect the grader, his negligence should not be imputed to Steele Branch. The latter argument is without merit. The Commission has held repeatedly that an operator is liable for violations of mandatory standards committed by its employees. *Asarco, Inc.*, 8 FMSHRC 1632, 1634 (November 1986); *Southern Ohio Coal Co.*, 4 FMSHRC 1459, 1462 (August 1982). In any event, the judge determined that Steele Branch's evidence that Browning was a careful employee who would not have operated the grader if it was unsafe was "insufficient to contradict or impeach the specific testimony of Mill[s] that, on April 23, 1990, when he tested the steering there was between 270 to 300 degrees of play." 14 FMSHRC at 874.

In addition to challenging the evidentiary support to the judge's finding of a violation of the regulation, Steele Branch contends that the regulation addresses only "the condition of the ... vehicle while it is operating." SB Br. 8, 10. Steele Branch notes that the grader was not in operation when Mills inspected it. There is no dispute, however, that the grader was operating at the time of the accident and Steele Branch has not asserted that the slack detected by MSHA was caused by the accident. The judge concluded, and we have affirmed as supported by substantial evidence, that "play in the steering wheel of approximately 270 degrees when the engine is off, is clearly evidence of play in the steering wheel to a more than non-significant degree when the engine is on." 14 FMSHRC at 874.

B. Violation of Section 50.11(b)

Steele Branch argues that the regulation does not set a specific time for the submission of an accident investigation report. It maintains that, as a consequence, reports must be submitted within a reasonable time, and that its submission met this requirement. We agree, and reverse the judge's finding of a violation.

The judge found that Steele Branch violated that part of section 50.11(b) requiring operators to "submit a copy of any investigation report to MSHA at its request." The evidence established that MSHA had made numerous requests for a report. Although the judge credited Steele Branch's evidence that the "delay" was reasonable under the circumstances, he determined that Steele Branch's evidence was "insufficient to rebut the Petitioner's case that by [the date of the citation], Respondent had failed to submit a copy of its investigation report in spite of numerous requests by MSHA." 14 FMSHRC at 876. Nevertheless, because the judge found that Steele Branch's delay in submitting the report was reasonable, he held that Steele Branch was not negligent and reduced the penalty from \$500 to \$10. 14 FMSHRC at 876-77.

Section 50.11(b) requires operators to investigate all accidents and to "develop a report" of each investigation. A copy of the report must be submitted "to MSHA at its request," but no period of time is specified in the regulation, or indicated in the regulatory history or in MSHA's policy guide. The Commission has not previously addressed the issue of the time allowed for submission of a report pursuant to this standard. Under the judge's approach, an operator violates the regulation if it fails to submit an investigation report upon MSHA's demand, even if there are legitimate reasons why the report has not been completed and, therefore, is not ready for submission. Under this interpretation, operators could be forced to prepare reports hastily in order to comply with the regulation, to the detriment of accuracy and thoroughness.

Where a standard is silent as to the period of time required for compliance, the Commission has imputed a reasonable time. In Penn Allegh Coal Co., 3 FMSHRC 2767, 2771 (December 1981), the Commission noted that it is implicit in a roof control plan that the operator has a reasonable time to file a plan. In Monterey Coal Co., 5 FMSHRC 1010, 1019 (June 1983), the Commission imputed a reasonable time for the operator to submit a revised engineering plan. Further, in Old Ben Coal Co., 3 FMSHRC 608, 610-11 (March

1981), the Commission interpreted a standard requiring a foreman to countersign a weekly hazardous conditions report as allowing a reasonable period for such signing.

Consistent with this approach, we conclude that section 50.11(b) requires operators to submit an accident investigation report within a reasonable period of time after MSHA's request, taking into consideration the specific circumstances. Factors pertinent to whether the operator complied with the section within a reasonable time may include the volume and complexity of information to be reviewed, and the circumstances surrounding the preparation and submission of the report. Such an approach accords with the purpose of the regulation, which is to "ensure that operators are in fact investigating accidents and injuries and are engaged in constant upgrading of health and safety practices." 42 Fed. Reg. 65534 (December 30, 1977).

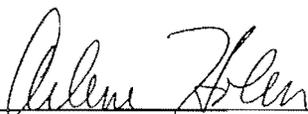
We believe the evidence shows that Steele Branch responded in a reasonably timely manner in submitting its report. Inspector Davis issued the citation just 14 working days after the accident and 10 working days after MSHA completed its accident inspection. The judge found that Steele Branch had orally informed MSHA, six days after the accident, of the critical portion of the investigation report, i.e., the preventive steps Steele Branch would take to avoid a similar accident. 14 FMSHRC at 876-77. Additionally, he found that the operator acted in good faith in submitting the report in mid-May. He further found that Steele Branch's delay was caused by its thorough compilation of the facts relating to the accident, by its company policy requiring supervisory review of such reports and by a death in the family of the employee preparing the report. 14 FMSHRC at 876. The judge determined that Steele Branch's failure to submit the report by May 13 was justified under the circumstances. He held that Steele Branch was not negligent and he reduced the penalty from \$500 to \$10. 14 FMSHRC at 876-77.⁶ We rely upon the judge's findings of fact in reaching the conclusion that Steele Branch submitted its report within a reasonable time following MSHA's request and, therefore did not violate the regulation.

⁶ We note that MSHA's accident investigation report of the Browning accident was not completed until September 1991, four months after Steele Branch submitted its report. Tr. 62.

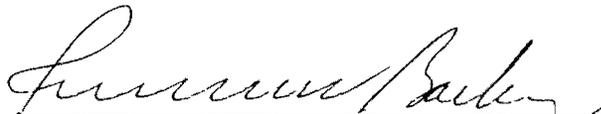
III.

Conclusion

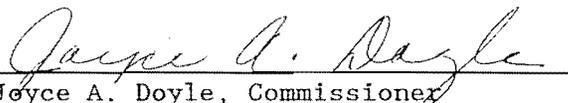
For the foregoing reasons, we affirm the judge's decision with regard to 30 C.F.R. § 77.404(a), but reverse his conclusion that Steele Branch violated 30 C.F.R. § 50.11(b).



Arlene Holen, Chairman



Richard V. Backley, Commissioner



Joyce A. Doyle, 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 26, 1993

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

v.

M.A.G., INC.

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:
Docket Nos. WEVA 92-1021
:
WEVA 92-1046
:
WEVA 92-1047
:
WEVA 92-1048
:
WEVA 92-1072
:
WEVA 92-1073

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

ORDER

BY THE COMMISSION:

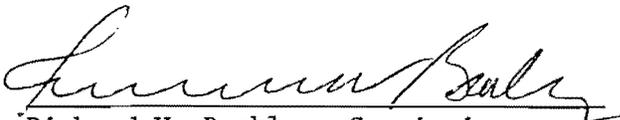
In these civil penalty proceedings arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988)(the "Mine Act"), Commission Chief Administrative Law Judge Paul Merlin issued six Orders of Default on March 17, 1993, finding respondent M.A.G., Inc. ("M.A.G.") in default for failing to answer the civil penalty proposal of the Secretary of Labor ("Secretary") and the judge's December 10, 1992, Order to Show Cause. The judge assessed civil penalties of \$14,370 as proposed by the Secretary. For the reasons that follow, we vacate the default orders and remand the cases for further proceedings.

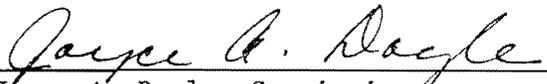
The judge's jurisdiction over these cases terminated when his decision was issued on March 17, 1993. 29 C.F.R. § 2700.65(c). On April 15, 1993, Michael Stanley, President of M.A.G., filed a letter with the Commission appealing the judge's default orders. Mr. Stanley requests that the default orders be withdrawn and that M.A.G. be given an opportunity to address the penalty assessments.

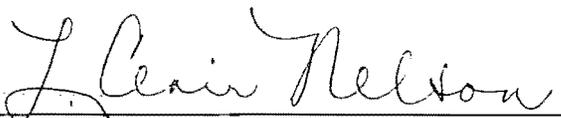
Under the Mine Act and the Commission's procedural rules, relief from a judge's decision may be sought by filing a petition for discretionary review with the Commission within 30 days of the decision. 30 U.S.C. § 823(d)(2); 29 C.F.R. § 2700.70(a). We will treat M.A.G.'s letter as a timely filed petition for discretionary review of the decision. See e.g., Middle States Resources, Inc., 10 FMSHRC 1130 (September 1988). On the basis of the present record, we are unable to evaluate the merits of M.A.G.'s position. In the interest of justice, we will permit M.A.G. to present its position to the judge, who shall determine whether final relief from the default orders is warranted.

Accordingly, we vacate the judge's default orders and remand these matters for further proceedings.


Arlene Holen, Chairman


Richard V. Backley, Commissioner


Joyce A. Doyle, 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 27, 1993

CLIFFORD MEEK :
 :
 v. : Docket No. LAKE 90-132-DM
 :
 ESSROC CORPORATION :
 :

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

DECISION

BY: Holen, Chairman; Doyle and Nelson, Commissioners

This is a discrimination proceeding brought under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988)("Mine Act" or "Act") by Clifford Meek against Essroc Corporation ("Essroc"). Commission Administrative Law Judge William Fauver concluded that Essroc was the successor corporation of Meek's former employer and that Essroc discriminated against Meek by its failure to hire him at the time of the changeover in ownership. 13 FMSHRC 1970 (December 1991)(ALJ). The Commission granted Essroc's petition for discretionary review, which challenges: (1) whether Essroc is a successor corporation to Meek's former employer; (2) whether the judge's finding of discrimination is supported by substantial evidence; (3) whether the judge erred as to several procedural rulings; (4) whether the judge erred in his calculation of the backpay award, which was not reduced to reflect Meek's unemployment compensation; and (5) whether the judge's attorneys' fee award was erroneous. We affirm the judge's rulings with the exception of the backpay award, which we remand for further findings consistent with this opinion.

I.

Factual and Procedural Background

A. Factual Background

Essroc's cement division, Essroc Materials, Inc.,¹ owns and operates a grinding plant in Stark County, Ohio (the "Middlebranch Plant") with approximately 40 employees. The Middlebranch Plant grinds materials, such as

¹ Essroc and its subsidiary, Essroc Materials, Inc., are collectively referred to as "Essroc."

limestone and clay, and stores and ships dry cement. This plant, along with several others, was purchased by Essroc from United States Cement Company ("USC") on or about February 27, 1990. All but two USC hourly employees from the Middlebranch Plant were hired by Essroc: an injured employee who remained with USC, and Clifford Meek whose employment application was denied. 13 FMSHRC at 1970-71.

On January 31, 1990, USC's management requested approximately ten USC hourly employees, including Meek, to attend a safety meeting with Richard L. Jones, an inspector from the Department of Labor's Mine Safety and Health Administration ("MSHA"). During the meeting, Inspector Jones encouraged the employees to discuss their safety and health concerns and assured the confidentiality of their remarks. Meek asked the inspector why the company appeared to know in advance when an inspection would occur. The inspector became angry, apparently interpreting Meek's question as an accusation that he was violating the law. Meek left the meeting shortly after the interchange.

Later that morning, Inspector Jones told Plant Manager Marvin Bragg and Plant Supervisor Dale Lewis that the meeting "went pretty good," with the exception of one employee who had a "bad attitude." Tr. 332. Jones told Lewis and Bragg of Meek's insinuation that management knew beforehand when MSHA was going to inspect the plant.² Bragg then informed his superior, Mike Roman, USC's Industrial Relations Director, that the inspector was "upset." Tr. 381. Roman became concerned and sent a USC safety director to the Middlebranch Plant to see if he could placate the inspector. Jones' subsequent inspection resulted in the issuance of 15 citations, one of which was a "significant and substantial" citation that shut down a crane for a day and a half.

In mid-February, three Essroc supervisors met with Bragg and Roman to select the hourly employees to be hired by Essroc. 13 FMSHRC at 1973. By that time, Bragg and Roman knew that they were going to assume supervisory positions at Essroc. 13 FMSHRC at 1973-74. Bragg reported that Meek had a poor attitude and had repeatedly stated that he would not work for Bragg. 13 FMSHRC at 1974; Tr. 287. Bragg showed the Essroc supervisors a written evaluation form dated January 26, 1990, which he had filled out for Essroc, as well as four other documents from Meek's personnel file. 13 FMSHRC at 1974;

² Inspector Jones was subpoenaed to appear at the hearing but did not comply. At the hearing, Meek introduced into evidence the inspector's non-contemporaneous notes recounting the meeting and his conversation with plant management. 13 FMSHRC at 1972. The judge discredited these notes because they were at variance with some of the witness accounts and were not subject to cross-examination. Id.

Tr. 284-88.³ On Bragg's recommendation, with Roman's support, it was decided that Meek would not be hired. 13 FMSHRC at 1974.

A meeting was held by Bragg on February 27, 1990, announcing to the employees that Essroc was purchasing the Middlebranch Plant and that all employees were terminated as of that date. He advised all those interested in Essroc positions to apply for the jobs they had held at USC and to attend a meeting the next day. Bragg telephoned Meek early the next morning and told him not to bother coming to the meeting because Essroc was not going to approve his job application. Meek attended anyway. Bragg and Roman took him aside and told him that USC had terminated him and that Essroc refused to hire him. Tr. 55-56.

B. Procedural History

Meek filed a discrimination complaint with MSHA on March 30, 1990. MSHA subsequently informed Meek that it had found no discrimination in violation of section 105(c) of the Mine Act, 30 U.S.C. § 815(c). On September 27, 1990, Meek filed a discrimination claim on his own behalf with the Commission pursuant to section 105(c)(3) of the Act, 30 U.S.C. § 815(c)(3). A hearing was scheduled and Essroc filed a motion for summary judgment, which was denied.

At the May 28, 1991, hearing, Essroc moved to dismiss the complaint at the close of Meek's case. The judge took the motion under advisement. On June 6, Meek's counsel moved to reopen the hearing on the basis of newly discovered evidence, i.e., that two separation notices, entered into evidence, might have been altered. Meek's counsel sought to put Andy Coccoli, who had prepared them, on the stand to so testify. Essroc opposed the request to reopen and the judge heard oral argument on the motion during a teleconference on June 25. The judge granted the motion and the hearing was reopened on July 18, 1991.

³ In the January 26, 1990, evaluation, Bragg gave Meek a "Poor" mark in the category "Attitude Toward Work & Company." He received "Fair" ratings for "Quality of Work" and "Productivity & Quantity of Work." Bragg had also written: "This employee has ability to do a lot but is unwilling, his attitude is very close to being insubordinate, also can't get along with other employees." Ex. R-1. Also presented to Essroc were separation (layoff) notices dated February 13, and April 24, 1987, signed by Andy Coccoli, a former plant manager. The third document was an Employee Evaluation Report dated January 18, 1989, prepared by Bragg and initialed by Lewis, that rated Meek's "Cooperation, Attitude and Initiative" as "Poor." The comments on the report stated: "Must improve. This employee has made statements to other employees that he is not afraid to go to jail for assault" against his supervisors. Ex. R-2. The fourth document was a separation notice dated September 25, 1989, signed by Bragg, that rated Meek's "Conduct and Application" as "Poor." Ex. R-1.

On December 24, 1991, the judge issued a decision solely with respect to liability.⁴ He found that Essroc, through its subsidiary, Essroc Materials, Inc., was a successor in interest to USC at the Middlebranch Plant. 13 FMSHRC at 1975. The judge determined that "[t]he evidence shows continuity of the business operations of the Middlebranch Plant from USC to Essroc with Essroc's use of the same plant, equipment, and essentially the same work force and supervisory personnel." Id.

The judge also found that Essroc had discriminated against Meek because of activity protected under section 105(c) of the Mine Act. The judge found that Meek's complaint to the MSHA inspector that the operator appeared to have had prior knowledge of inspections qualified as protected activity and that the adverse action was motivated in part by that protected activity. The judge discounted the reasons given by Essroc for not hiring Meek because they were based in large part upon Bragg's and Roman's recommendations. Additionally, the judge determined that the separation documents had been tampered with in an effort to disparage Meek. 13 FMSHRC at 1975.

The judge also concluded that Essroc had failed to raise a successful affirmative defense to Meek's prima facie case because evidence did not show that, "independent of Meek's complaint to Inspector Jones, his application for employment by Essroc would not have been accepted as were the applications from all other USC Middlebranch Plant hourly employees." 13 FMSHRC at 1979-80.

After extensive correspondence and filings by the parties on the issue of backpay, interest and attorneys' fees, the judge's final order awarded Meek backpay and interest amounting to \$24,000.00, and attorneys' fees of \$17,065.80. 14 FMSHRC 518 (March 1992).

II.

Disposition of Issues

A. Whether Essroc is a successor of USC

Essroc argues that it is not a successor of USC because its upper level management and ownership are different and distinct from those of USC. Essroc, as a large enterprise, produces many more products than USC. Additionally, USC still exists as a business entity because Essroc purchased only 70% of its assets. These factors are insufficient to avoid a finding of successorship under the circumstances presented.

The judge found that Essroc was a successor to USC under the Commission's successorship test first enunciated under the Federal Coal Mine Health and Safety Act of 1969 in Munsey v. Smitty Baker Coal Company, Inc., 2 FMSHRC 3463 (December 1980), aff'd in relevant part sub nom. Munsey v. FMSHRC,

⁴ On January 31, 1992, the judge issued a supplemental decision denying Essroc's motion to dismiss, for the reasons set forth in his December 24, 1991, decision.

701 F.2d 976 (D.C. Cir.), cert. den. sub nom. Smitty Baker Coal Co. v. FMSHRC, 464 U.S. 851 (1983), and readopted under the Mine Act in Secretary on behalf of James Corbin et al. v. Sugartree Corp., Terco, Inc. and Randal Lawson, 9 FMSHRC 394, 397-99 (March 1987), aff'd sub nom. Terco, Inc. v. FMSHRC, 839 F.2d 236, 239 (6th Cir. 1987). See also Secretary on behalf of Keene v. Mullins, 888 F.2d 1448, 1453 (D.C. Cir. 1989). Under this test, the successor operator may be found liable for, and responsible for remedying, its predecessor's discriminatory conduct. The factors for determining successorship are: (1) whether the successor company had notice of the underlying charge of possible discrimination; (2) the ability of the predecessor to provide relief; (3) whether there has been a substantial continuity of business operations; (4) whether the new employer uses the same plant; (5) whether he uses the same or substantially the same work force; (6) whether he uses the same supervisory personnel; (7) whether the same jobs exist under substantially the same working conditions; (8) whether the new employer uses the same machinery, equipment and methods of production; and (9) whether he produces the same product. See Terco, 839 F.2d at 239; Mullins, 888 F.2d at 1454.

Substantial evidence supports the judge's decision that, under the Munsey-Terco test, Essroc qualifies as a successor to USC at the Middlebranch Plant. Essroc acquired the entire Middlebranch Plant; it used virtually the entire workforce (except for Meek and an injured employee); it assumed the same supervisory personnel; it produced the same product; there was a substantial continuation of business operations at the Middlebranch Plant between USC and Essroc; Essroc knew of the "charge" involving Meek through Roman, Bragg and Lewis, who became Essroc supervisors. Roman and Bragg were instrumental in the decision not to hire Meek. The judge did not expressly address in his decision the ability of the predecessor to provide relief, but concluded generally that all the relevant criteria were satisfied. Thus, Essroc may be held derivatively liable for the discriminatory acts of USC.

B. Merits of Meek's discrimination case against Essroc

A miner alleging discrimination under the Mine Act establishes a prima facie case by proving that he engaged in protected activity and that the adverse action complained of was motivated in any part by that activity. Secretary on behalf of Pasula v. 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 (3d 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. Pasula, 2 FMSHRC at 2799-2800. 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, 2 FMSHRC at 2800; Robinette, 3 FMSHRC at 817-18; 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).

1. Prima facie case

On review, Essroc does not dispute the judge's finding that Meek engaged in protected activity by raising a safety-related question at the January 31, 1990, meeting of employees. It is also undisputed that Meek suffered an adverse employment action in not being hired by Essroc upon its takeover of the Middlebranch Plant. The issue on review is whether that adverse action was linked to Meek's protected activity. The judge determined that Meek established a causal nexus between the adverse action and his protected activity. We agree.

As the judge noted, "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.'" 13 FMSHRC at 1977, quoting Secretary on behalf of Chacon v. Phelps Dodge Corp., 3 FMSHRC 2508, 2510 (November 1981); see also Bradley v. Belva Coal Company, 4 FMSHRC 982, 992 (June 1982) ("[C]ircumstantial evidence ... and reasonable inferences drawn therefrom may be used to sustain a prima facie case of discrimination.").

It is evident from the record that USC supervisors had knowledge of Meek's protected activity. Plant Manager Bragg, Plant Supervisor Lewis, and Industrial Relations Director Roman all quickly learned of Meek's comment to the MSHA inspector. Inspector Jones reported to Lewis and Bragg that his meeting with USC employees went well, with the exception of Meek, who had a "bad attitude." Roman became concerned enough about the comment that he sent USC's safety director to the Middlebranch plant to placate the inspector. Thus, there is substantial evidence to support the finding that management had knowledge of Meek's activity. As the Commission has noted, "[t]he operator's knowledge of the miner's protected activity is probably the single most important aspect of a circumstantial case." Chacon, 3 FMSHRC at 2510.

Further, the record shows that USC reacted in a hostile manner to Meek's protected activity. "Hostility towards protected activity -- sometimes referred to as 'animus' -- is another circumstantial factor pointing to discriminatory motivation." Chacon, 3 FMSHRC at 2511, citing NLRB v. Superior Sales, Inc., 366 F.2d 229, 233 (8th Cir. 1966). Here, USC employee James Gallentine testified that Plant Supervisor Lewis told him that USC's vice president was upset over Meek's remark to the inspector and wanted Meek fired. Tr. 35. Although Lewis denied making the remark, the judge credited Gallentine's testimony. 13 FMSHRC at 1973, 1979. Therefore, the judge's finding that USC management wanted to fire Meek because of his protected activity is supported by substantial evidence.

The judge made reasoned conclusions in discrediting the reason given by Bragg and Roman for not hiring Meek. Bragg did not testify at the hearing. Essroc submitted affidavits from Bragg and Roman in which they stated that Meek had told Bragg that he would not work for Bragg. However, Meek, after being warned by Gallentine to "watch [his] back," had begun wearing a tape recorder during his conversations with management. Among the conversations recorded and put into evidence were those on February 27 and 28, with Bragg and Roman. In Meek's tapes, he did not say he would not work for Bragg nor

was there an indication that he had made such a statement. 13 FMSHRC at 1978. The other supervisor present at the February 27 conversation did not recall Meek making such a statement. Tr. 365. Thus, there is substantial evidence for the judge's conclusion that Bragg made his allegation so that Essroc would not hire Meek.

Meek's evaluations and Essroc's alleged justification for not hiring him, because he was a poor worker, are also suspect. The February 13, and April 24, 1987, separation notices contain a rating scale by which a supervisor could check off an employee's performance as "Good," "Fair," or "Poor" in various categories. They show that Meek's "Conduct" was rated as "Poor." Exs. C-2-B, C-3-B. However, Coccoli, who had signed the notices, testified that he had not checked those items and, to the contrary, had found Meek to be an excellent employee in all work areas, including skills, performance and attitude. Tr. II 33-35, 38-39.⁵ Coccoli testified that he had found Meek to be "courteous, honest," and "excellent all the way through," and that, "If I had to open a company today, I would say he would be one [of] the first guys I would hire." Tr. II 33, 34. He stated that if he were to rate Meek's conduct and productivity, given the choices of good, fair or poor, he would check the "good" box. Tr. II 35. Coccoli stated: "I would say he's got a lot of ability. He's a good mechanic. It didn't take long for him to ... learn the jobs in the lab or as a ... crane operator, which is a pretty delicate job. And as a miller, I would rate him excellent...." Tr. II 34. The judge concluded that "tampering" had occurred and "raised a serious cloud over the integrity and credibility of USC's evaluation of Meek." 13 FMSHRC at 1975. The other evaluations of Meek were signed by Plant Manager Bragg.

Apart from the discredited evaluations and affidavits, other record evidence supports the judge's finding. Meek was never presented with any of the alleged poor evaluations during his eight years of employment with USC, nor was he ever disciplined or cautioned. Tr. 26-29. He was always rehired after layoffs and had received promotions and plant-wide pay raises. His attendance record was exemplary, never having missed a day of work in eight years. Tr. 28.

Finally, Essroc's decision not to hire Meek was made in close proximity to the MSHA meeting. That meeting was held on January 30, 1990, and the hiring meeting with Essroc occurred in mid-February. Coincidental timing can be indicative of discriminatory motivation. As the Commission noted in Chacon, "[a]dverse action under circumstances of suspicious timing taken against the employee who is [a] figure in protected activity casts doubt on the legality of the employer's motive...." 3 FMSHRC at 2511.

We conclude that the judge's finding of a prima facie case of discrimination is supported by substantial evidence and is consistent with relevant Commission case law. Accordingly, we affirm that finding.

⁵ Tr. II refers to the second hearing in this proceeding held on July 18, 1991.

2. Affirmative defense

Essroc contends that, even if Meek established a prima facie case, it affirmatively defended against that case by proving it would not have hired him in any event. In support, Essroc relies on three earlier unfavorable evaluations of Meek that were prepared by Bragg prior to the MSHA meeting. Essroc also points out that the three Essroc officials who made the hiring decision were not aware of Meek's protected activity.

An operator bears the burden of proving an affirmative defense to a discrimination complaint. Pasula, 2 FMSHRC at 2799-2800; Bradley, 4 FMSHRC at 993. As noted, the evaluations on which Essroc relies are suspect and are insufficient to establish an affirmative defense. While an operator may establish an affirmative defense by proving that the employee received past warnings, prior disciplinary action or unsatisfactory work evaluations (see Bradley, 4 FMSHRC at 993), Essroc's evaluation system does not reflect normal business practices regarding an employee evaluation system.⁶ Additionally, the testimony of Meek's former supervisor, Coccoli, directly contradicts Bragg's unfavorable evaluations of Meek.

Further, it is immaterial that the three Essroc officials attending the hiring meeting may not have been aware of Meek's protected activity. Essroc qualifies as a successor to USC, and hence is derivatively liable for the actions of USC management who knew of Meek's protected activity.

Thus, Essroc did not establish that its failure to hire Meek was also motivated by unprotected activity and that it would have taken the adverse action in any event for the unprotected activity alone. Pasula, 2 FMSHRC at 2800; Robinette, 3 FMSHRC at 817-20. Therefore, we conclude that substantial evidence supports the judge's determination that Essroc failed in its burden of proof with respect to its affirmative defense.

C. Whether the judge committed procedural error

Essroc argues that the judge made a number of procedural errors at the hearing. We find Essroc's claims to be without merit.

1. Reopening of the hearing

Essroc argues that the judge erred in reopening the hearing to take additional testimony on the basis of newly discovered evidence. Essroc contends that the evidence presented was not "newly discovered" but simply evidence that, with the use of pretrial discovery, could have been presented at the initial hearing. It asserts that the Coccoli testimony should have been

⁶ All employees who testified stated that they were unaware that any evaluation system existed at USC. Tr. 26-27, 128, 137, 174. USC did not show Meek any of his evaluations, nor had any disciplinary action been taken against him as a result of the allegedly poor evaluations. Tr. 26, 28.

uncovered before the hearing, and thus was not "newly discovered" under the Federal Rules of Civil Procedure ("Fed. R. Civ. P.").⁷

Meek's motion to reopen was made prior to entry of judgment. Commission Procedural Rule 54(a), 29 C.F.R. § 2700.54(a), empowers Commission judges to regulate the course of hearings and to dispose of procedural motions. Under this authority, Commission judges may reopen hearings in appropriate cases. See Kerr-McGee Coal Corp., 15 FMSHRC 352, 357 (March 1993). Commission may also properly look for guidance to the Federal Rules of Civil Procedure ("Fed. R. Civ. P.") (29 C.F.R. § 2700.1(b)), and precedent thereunder. A motion to reopen the record to submit new evidence is not expressly addressed in the federal rules but, rather, is committed to the sound discretion of the trial judge. See generally, Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 331 (1971). In general, an abuse of discretion occurs when the trial court bases its decision on an erroneous conclusion of law or where there is no rational basis in the evidence for its ruling. See, e.g., In re Coordinated Pretrial Proceedings, etc., 669 F.2d 620, 623 (10th Cir. 1982).

A motion for a new trial under Fed. R. Civ. P. 59 has certain similarities and affords some guidance. See J. Moore, J. Lucas & G. Grother, 6A Moore's Federal Practice ¶ 59.04[13] (2d ed. 1992) ("Moore's"). Generally, in determining whether to grant a motion to reopen, it is appropriate to consider the time when the motion is made, the character of the additional evidence, and the effect of granting the motion. 6A Moore's ¶ 59.04[13].

Meek's motion was made on a timely basis, approximately nine days after the hearing and before a decision was issued by the judge. No unnecessary delay occurred. See Carracci v. Brother Int'l Sewing Machine Corp. of L.A., 222 F. Supp. 769, 771 (E.D. La. 1963), aff'd, 341 F.2d 377 (5th Cir. 1968). As to the character of the additional evidence, it was not cumulative of testimony presented at the hearing. Rather, Meek sought to rebut evidence of his poor performance by presenting evidence that the two separation notices had been altered to indicate that he was a "poor" worker. Coccoli, the author of the notices, was to testify that he had not provided such a poor rating. The third factor, the effect of granting the motion, also supports reopening. The testimony involved serious allegations of fraud upon the Commission. See generally Bowles v. Six States Coal Corp., 64 F. Supp. 651, 652 (W.D. Pa. 1946). For these reasons, we conclude that the judge acted within his sound discretion in granting Meek's motion to reopen the hearing and in receiving the additional testimony.

⁷ Essroc also contends that Meek should not have been permitted to reopen the hearing to introduce the testimony of former USC Plant Manager Kalman Potter. The judge did not rely on the Potter testimony in any respect in reaching his decision. Therefore, we conclude that no error arose from hearing that testimony.

2. Denial of Essroc's motions for summary decision and for directed verdict

Essroc contends that the judge should have granted Essroc's motion for summary decision prior to the hearing. Applying Commission Procedural Rule 64, 29 C.F.R. § 2700.64,⁸ the judge determined that there were four factual areas in contention: (1) was Essroc a successor in interest to USC?; (2) did MSHA Inspector Jones inform management of his conversation with Meek?; (3) did supervisor Lewis inform miner Gallentine that USC management wanted to fire Meek?; and (4) did Meek inform supervisors Bragg or Roman that he couldn't work with Bragg? Unpublished Order dated May 8, 1991. Summary decision may be entered only when there is no genuine issue as to any material fact. Missouri Gravel Co., 3 FMSHRC 2470, 2471 (November 1981). Here, the record revealed that there were four disputed factual areas that precluded summary decision.

Essroc's reliance on Meek's deposition for failing to establish a discriminatory motive is also misplaced. Meek was under no duty to prove his case during his deposition. On the contrary, at a deposition the opposing party poses particular questions to the deponent and he is required only to answer fully and truthfully the questions posed. Accordingly, Judge Fauver acted within his discretion in denying Essroc's motion.

Similarly, Essroc argues that the judge should have granted its motion for directed verdict made at the close of Meek's case. It was within the judge's discretion to take under advisement Essroc's motion. Fed. R. Civ. P. 52(c), "Judgment on Partial Findings," provides: "If during a trial without a jury a party has been fully heard with respect to an issue ..., the court may enter judgment as a matter of law against that party on any claim ..., or the court may decline to render any judgment until the close of all the evidence." (Emphasis added). The Notes of the Advisory Committee on Rules to Fed. R. Civ. P. 52(c) specify that a court possesses "the discretion to enter no judgment prior to the close of evidence." Here the judge exercised that discretion. Accordingly, we find no error by the judge and affirm his procedural determinations.

E. Backpay award

Essroc contends that the judge erred in his backpay award on two grounds: the judge should have deducted from the award unemployment compensation received by Meek; and, the judge should have used comparable wage

⁸ Commission Procedural Rule 64 provides:

(b) Grounds. A motion for summary decision shall be granted only if the entire record, including the pleadings, depositions, answers to interrogatories, admissions, and affidavits shows: (1) [t]hat there is no genuine issue as to any material fact; and (2) that the moving party is entitled to summary decision as a matter of law.

data from a certain Essroc employee, rather than relying on an estimate of lost wages.

1. Deduction of unemployment compensation

In the proceedings below, Essroc requested that Meek's unemployment compensation be deducted from Meek's backpay. The judge summarily denied Essroc's request without setting forth reasons. Unpublished Order dated February 18, 1992. Although the total unemployment compensation that Meek received has not been established, it appears from the record to be approximately \$2,700. For the following reasons, we conclude that Meek's unemployment compensation should be deducted from the backpay award.

The question of whether to deduct unemployment compensation from a backpay award is one of first impression for this Commission. The Mine Act is silent on the question. For guidance, we look to case law interpreting relevant remedial provisions of the National Labor Relations Act, 29 U.S.C. § 160 ("NLRA"), Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(g) ("Title VII") and the Age Discrimination in Employment Act (29 U.S.C. § 634 ("ADEA")). The Mine Act's remedial provisions, as well as those of Title VII and the ADEA, are modeled on section 10(c) of the NLRA, as amended, 29 U.S.C. § 160(c). See, e.g., Secretary on behalf of Dunmire and Estle v. Northern Coal Company, 4 FMSHRC 126, 142 (February 1982).

In NLRB v. Gullett Gin Co., 340 U.S. 361 (1951), the Supreme Court was presented with the issue of whether the National Labor Relations Board ("NLRB") exceeded its discretion in refusing to deduct unemployment compensation from a backpay award. The NLRB's order allowed deduction of other earnings during the backpay period but did not provide for a deduction of unemployment compensation. In concluding that the NLRB had not abused its discretion, the Court stated: "Because the relation of remedy to policy is peculiarly a matter for administrative competence, courts must not enter the allowable area of the Board's discretion..." 340 U.S. at 363.

Consistent with the Supreme Court's decision in Gullett Gin, courts have held uniformly that similar discretion exists under other labor statutes with remedial provisions patterned on the NLRA. Thus, reviewing courts have determined that, under Title VII and the ADEA, the deduction of unemployment compensation from backpay awards is a matter within the discretion of the trial judge. See, e.g., EEOC v. Enterprise Ass'n Steamfitters, 542 F.2d 579, 591-92 (2d Cir. 1976)(Title VII); EEOC v. Sandia Corp., 639 F.2d 600, 624-26 (10th Cir. 1980)(ADEA); Naton v. Bank of California, 649 F.2d 691, 699-700 (9th Cir. 1981)(ADEA); Hunter v. Allis-Chalmers, 797 F.2d 1417, 1428-29 (7th Cir. 1986)(Title VII); Cooper v. Asplundh Tree Expert Co., 836 F.2d 1544, 1555 (10th Cir. 1988)(ADEA). We conclude that, under the Mine Act's remedial scheme, this Commission may exercise its discretion to adopt an appropriate policy concerning the deduction of unemployment compensation.⁹ See Gullett

⁹ We note that in Boich v. FMSHRC, 704 F.2d 275, 286-87 (6th Cir. 1983), the Sixth Circuit concluded that a Commission administrative law judge did not
(continued...)

Gin, 340 U.S. at 363. See also S. Rep. No. 181, 95th Cong., 1st Sess. 25 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 625 (1977) ("Legis. Hist.").

The Commission endeavors to make miners whole and to return them to their status before illegal discrimination occurred. See Munsey, 2 FMSHRC at 3464; Secretary on behalf of Bailey v. Arkansas-Carbona Co., 5 FMSHRC 2042, 2056 (December 1983). "Our concern and duty is to restore the discriminatees, as nearly as we can, to the enjoyment of the wages and benefits they lost as a result of their illegal terminations." Dunmire, 4 FMSHRC at 143. Monetary relief is awarded "to put an employee into the financial position he would have been in but for the discrimination." Secretary on behalf of Gooslin v. Kentucky Carbon Corp., 4 FMSHRC 1, 2 (January 1982). Further, "we endeavor to make our awards as reasonable as possible." Dunmire, 4 FMSHRC at 143. The Commission seeks to fashion relief that is just and does not overcompensate the discriminatee. Id. at 142-43.

A policy of deducting unemployment compensation from a backpay award under the Mine Act does not mean that the miner is less than fully compensated for his lost wages. Rather, as the Second Circuit has stated in a Title VII case, "We see no compelling reason for providing the injured party with double recovery for his lost employment...." Enterprise Ass'n Steamfitters, 542 F.2d at 592. Additionally, failing to deduct unemployment compensation conflicts with the Commission's well established policy of deducting earnings from the backpay award. See, e.g., Dunmire, 4 FMSHRC at 144. If earnings are deducted from backpay, we see no reason why unemployment compensation should not be deducted as well.¹⁰

Deducting unemployment compensation from backpay awards is not inconsistent with the Mine Act's goal of deterring illegal conduct. The employer will still be required to place the victim of unlawful discrimination in the same position he was in but for the unlawful discrimination, providing backpay, reinstatement with full seniority rights and attorneys' fees. The employer should not be required to additionally compensate the miner with backpay for funds already received, if the miner has worked in the interim or

⁹(...continued)

abuse his discretion in declining to deduct unemployment compensation from backpay. Boich relied primarily on Gullett Gin to determine that the judge and the agency had such remedial discretion. Id. Boich was not briefed and argued to the Commission, since the Commission had not granted review. 704 F.2d at 278. Therefore, it does not represent Commission policy.

¹⁰ We note that when unemployment compensation and backpay are both received, unemployment compensation must, in many instances, be repaid to the state fund. See Gullett Gin, 340 U.S. at 365 n.1. States may require restitution of unemployment compensation when, as a result of an award of backpay, the worker is rendered not unemployed for the period of the award and the benefits received become overpayments. See generally 42 U.S.C. § 503(g) (1988); 26 U.S.C. § 3304(a)(4)(1988).

received unemployment compensation.¹¹ Significantly, the Mine Act, unlike the NLRA, Title VII, and the ADEA, authorizes that a separate civil penalty be assessed against an operator who unlawfully discriminates against a miner. 30 U.S.C. §§ 815(c), 820(a). The Commission's recently issued Procedural Rules require the Secretary of Labor to propose a separate civil penalty for a violation of section 105(c). 58 Fed. Reg. 12168 (1993) (to be codified at 29 C.F.R. § 2700.44)(effective May 3, 1993).

For the reasons set forth, we conclude that deducting unemployment compensation from a backpay award is a reasonable and sound policy that fully effectuates the Mine Act's goal of making whole miners who have been wrongfully discharged in violation of the Act.

In Brown v. A.J. Gerrard Mfg. Co., 715 F.2d 1549, 1550-51 (11th Cir. 1983), and Craig v. Y&Y Snacks, 721 F.2d 77, 81-85 (3d Cir. 1983), the Eleventh and Third Circuits, respectively, established a consistent approach to the deductibility of unemployment compensation among the district courts whose decisions those circuit courts review. Both circuits relied on Gullett Gin. The Commission, as did those circuit courts, now adopts a policy for its administrative law judges, in order to ensure equality of treatment of miners and mine operators in Commission decisions. Like the Eleventh Circuit in Brown, we determine that "[a] consistent approach to this legal question seems preferable to a virtually unreviewable discretion which may produce arbitrary and inconsistent results." 715 F.2d at 1551.¹²

Thus, we reverse the judge's decision not to deduct Meek's unemployment compensation. We remand to the judge to determine the amount of unemployment compensation received by Meek and to deduct that amount from Meek's backpay in accordance with our opinion.

2. Use of comparable wage data

On March 10, 1992, the judge ordered Essroc to produce copies of the W-2 statements and quarterly gross wages for all its hourly employees at the Middlebranch Plant for the period from February 27, 1990, to March 1, 1992. Essroc submitted wage information pertaining to only three employees, whom it

¹¹ "All states ... incorporate experience rating as the basis for determining employers' contribution rates." Employment and Training Administration, U.S. Dept of Labor, Unemployment Insurance Program Letter No. 3-92, Experience Rating Index (1991). When an individual receives unemployment compensation, his previous employer is, as a result, taxed at an increased rate, depending upon the degree of experience rating. See 26 U.S.C. § 3303(a)(1988).

¹² In a case currently before the Commission, Secretary on behalf of Nantz v. Nally & Hamilton Enterprises, Inc., 15 FMSHRC 237, 241 (February 1993)(ALJ), Administrative Law Judge George A. Koutras determined that unemployment compensation should be subtracted from a backpay award. The Secretary of Labor took no position on the issue "other than to stipulate that it is within the discretion of the presiding judge." Id.

believed were "comparable" to Meek. The judge's final order notes that Essroc had failed to provide certain financial materials relevant to backpay that he had ordered produced. 14 FMSHRC at 518. The judge awarded backpay in the amount of \$24,000 based on Meek's estimates.

Essroc contends that the judge should have awarded \$22,582.91, based on the wage reports of one of the three Essroc employees concerning whom it had provided data. The judge was not able to determine whether the wages of that employee were comparable because of Essroc's failure to produce relevant wage documentation. Because Essroc did not produce the information ordered by the judge, we are unable to evaluate whether the \$1,500 reduction urged by Essroc is appropriate. Accordingly, we conclude that, based on the information before him, the judge acted appropriately by determining Meek's lost wages to be \$24,000.

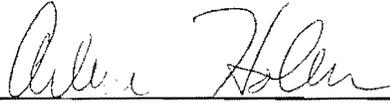
E. Attorneys' fee award

On review, Essroc provides the Commission with no detail supporting its charge of excessive attorneys' fees. An attorneys' fee award in Mine Act discrimination cases lies within the sound discretion of the trial judge. Secretary on behalf of Ribel v. Eastern Assoc. Coal Corp., 7 FMSHRC 2015, 2027 (December 1985), rev'd on other grounds in Eastern Assoc. Coal, 813 F.2d 639. The judge considered extensive documentation from Meek's counsel, including itemized statements, before reaching his determination. We perceive no abuse of discretion. Accordingly, we affirm the judge's award of attorneys' fees.

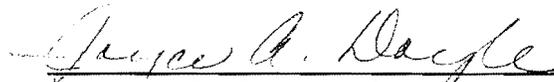
III.

Conclusion

For the foregoing reasons, we affirm the judge's decision in all respects, except for the failure to deduct Meek's unemployment compensation from backpay. We remand the case for further findings on the amount of unemployment compensation Meek received during the backpay period and direct that the sum be deducted from Meek's backpay award in accordance with this decision.¹³



Arlene Holen, Chairman



Joyce A. Doyle, Commissioner



L. Clair Nelson, Commissioner

¹³ We note that the judge ordered the interest on backpay computed at the IRS adjusted prime rate under Arkansas-Carbena Company, 5 FMSHRC at 2050-52. 13 FMSHRC 1980 n.4. In Clinchfield Coal Co., 10 FMSHRC 1493 (November 1988), the Commission modified the calculation of such interest. We remind the judge that interest should be calculated according to Arkansas-Carbena, as modified by Clinchfield.

Commissioner Backley concurring in part and dissenting in part.

The majority has correctly concluded that under the Mine Act the Commission has the discretion to fashion a policy regarding the effect of unemployment compensation upon the backpay award received by a miner. The Commission however, as with any court or agency, must base its exercise of discretion upon reasoned, rational principles that are not in conflict with binding precedent. Failure to do so amounts to an abuse of that discretion. In this case, examination of the bases upon which the majority concludes that unemployment compensation received shall be deducted from backpay awards constrains me to conclude that the majority has abused its discretion.

Distilled to its core, the majority's rationale is that the failure to deduct unemployment compensation results in a windfall to the miner that is in conflict with the policy to require deductions of earnings from backpay, and that such failure to deduct constitutes an additional expense to the employer.

The foregoing reasoning has long since been considered and rejected by the Supreme Court. Indeed the very same Supreme Court case relied upon by the majority, in support of its conclusion that it has discretion to adopt a policy on this issue, provides a clear prescient rejection of the majority's rationale.

To decline to deduct state unemployment compensation benefits in computing back pay is not to make employees more than whole, as contended by respondent. Since no consideration has been given or should be given to collateral losses in framing an order to reimburse employees for their lost earnings, manifestly no consideration need be given to collateral benefits which employees may have received.

NLRB v. Gullett Gin Co., 340 U. S. 361, 364 (1951) (emphasis in original).

Thus, in determining that the NLRB acted properly within its discretion by refusing to deduct unemployment compensation from backpay owed, the Supreme Court clearly differentiated unemployment compensation from earnings. The Court flatly rejected the argument that unemployment compensation was to be treated as earnings.

In Marshall Field & Co. v. National Labor Relations Board, 318 U.S. 253, 87 L ed 744, 63 S Ct 585, this Court held that the benefits received by employees under a state unemployment compensation act were plainly not earnings which, under the Board's order in that case, could be deducted from the back pay awarded.

340 U.S. at 363.

The Gullett Gin Court also rejected the argument that the unemployment compensation payments were to be considered as direct payments from the employer and therefore properly set-off against the backpay award. The Court stated:

Payments of unemployment compensation were not made to the employees by respondent but by the state out of state funds derived from taxation. True, these taxes were paid by employers, and thus to some extent respondent helped to create the fund. However, the payments to the employees were not made to discharge any liability or obligation of respondent, but to carry out a policy of social betterment for the benefit of the entire state.

340 U.S. at 364 (citations omitted).

Although the Commission has the discretion under the Mine Act to establish a policy on this issue, even one that differs from the result reached by the Supreme Court, the Commission does not have the authority to bottom its discretionary policy choice upon standards or reasons which have been rejected by the Supreme Court.

A lower court, when faced with a factually distinguishable but legally relevant Supreme Court decision, may employ the Supreme Court's method of analysis to render a decision that differs from the Supreme Court's. A lower court, however, may not employ a different standard in analyzing the different facts.

Levine v. Heffernan, 864 F.2d 457, 460 (7th Cir. 1988) (emphasis in original).

In this case the majority has strayed even further than the lower court in Levine. Here the majority has relied upon a rationale which has been rejected by the Supreme Court. ^{1/} The Commission is required to follow not only the decisions but also the clear implications of Supreme Court decisions. Hendricks County Rural Elec. v. N.L.R.B., 627 F.2d 766, 769, rev. on other grounds, 454 U. S. 170, on remand, 688 F.2d 841. ^{2/} Unless and until the Supreme Court chooses to depart from its ruling and rationale we must be so guided. Kovacs v. United States, 355 F.2d 349, 351 (9th Cir. 1966).

^{1/} "The collateral benefits rationale was one of the bases for the Supreme Court's decision in Gullett Gin." Craig v. Y&Y Snacks, Inc., 721 F.2d 77, 84 (3rd Cir. 1983); see also Kauffman v. Sidereal Corp., 695 F.2d 343, 346, (9th Cir. 1982).

^{2/} The Supreme Court did not disturb the circuit court's conclusions regarding the binding effect of prior Supreme Court decisions and implications thereto. However, the Supreme Court did rule that its own statement, contained in a prior decision and relied upon by the circuit court, was in error.

To the extent that my colleagues attempt to excuse their failure to apply the Supreme Court's rationale on the basis that the above-quoted Gullet Gin statements are merely dicta, and therefore not controlling, they err. Whether dicta or not, the Commission should always be guided by the opinion of the Supreme Court. United States v. Willard, 211 F.Supp. 643, 652 (N. D. Oh. 1962). Moreover, assuming arguendo that the above-quoted rationale is dicta, "it cannot be treated lightly by inferior federal courts until disavowed by the Supreme Court." 627 F.2d at 768 n. 1 (citation omitted). For the foregoing reasons I conclude that the majority has acted arbitrarily and therefore has abused its discretion.

Beyond the foregoing legal basis for my disagreement with the majority, I am eager to disassociate myself from a policy choice which fails to fairly balance the interests of the parties. After reading the majority's opinion on this issue, it would seem necessary to remind the reader that in this case the miner prevailed, i.e., he was the victim of an illegal discharge. This caution is necessary because the majority's expressed concern focuses unduly on avoiding the risk of visiting a windfall recovery upon the miner. Never mind that in pursuing their approach, there seems to be no concern that a reciprocal windfall may inure to employers whose backpay liability will be partially discharged from a public fund not intended for such use.

The deduction or offsetting of unemployment benefits may well result in a windfall to the employer. He finds himself in a position where he is not responsible for the payment of the illegally withheld back pay and then offsetting it with unemployment benefits by the government, which is unjust enrichment except to the extent that employers make contributions to the fund.

EEOC v. Sandia Corp., 639 F.2d 600, 626 (10th Cir. 1980).

Ideally, our goal is to formulate a policy which will result in a windfall to neither party. In seeking to achieve that same goal, the majority of courts have opted to not deduct unemployment compensation from backpay awards. Indeed four Circuit Courts, the Third, Fourth, Ninth and Eleventh have adopted rules which have removed this matter from district court discretion. The rule requires that no deduction of unemployment compensation be made from Title VII backpay awards. ^{3/} Furthermore, it is settled law within the NLRB that unemployment compensation not be deducted from back pay. 340 U.S. at 365-366; see also Brown v. A. J. Gerrard Mfg. Co., 715 F.2d 1549, 1551 (11th Cir. 1983). The most effective and sensible approach to resolve this issue is rooted in a

^{3/} I share the majority's view that case law relating to: Title VII of the Civil Rights Act of 1964; the National Labor Relations Act; and the Age Discrimination in Employment Act is applicable to this issue.

footnote the Supreme Court used to support its opinion that "back pay does not make the employees more than 'whole.'" 340 U.S. at 365. The Court observed that "some states permit recoupment of benefits paid." *Id.* n. 1. This approach has been widely followed. In adopting a rule of non-deductibility of unemployment benefits and rejecting the windfall argument, the Third Circuit reasoned:

although it appears to provide double recovery, in fact that is not the inevitable result. Often insurers have subrogation rights, and in some circumstances state benefits are recoupable. For example, a recently enacted Pennsylvania statute provides for recoupment of unemployment benefits when back pay has been awarded.

Craig v. Y & Y Snacks, Inc., 721 F.2d 77, 83-84 (3rd Cir. 1983) (citation omitted.); see also Cooper v. Asplundh Tree Expert Co., 836 F.2d 1544, 1555 (10th Cir. 1988), where the court rejected the set-off because Colorado law requires an employee who receives a back pay award to "repay . . . all unemployment benefit payments received."

In affirming the lower court, the Ninth Circuit referred approvingly to the rationale that:

if Congress did not intend for an employee to receive unemployment benefits in addition to back pay the logical solution is a recoupment of the unemployment benefits by the state employment agency.

Kauffman v. Sideral Corp., 695 F.2d 343, 347 (9th Cir. 1982).

Indeed, even in the Seventh Circuit where the court registered a clear concern and preference that an employee not receive unemployment compensation and overlapping backpay, the court reasoned that the solution was not to allow the employer to "get a deduction for unemployment insurance benefits but that Hunter should have to repay them." Hunter v. Allis-Chalmers Corp., Engine Div., 797 F.2d 1417, 1429 (7th Cir. 1986). The court went on to observe that if that were not possible "the choice seems to be between conferring a windfall on Allis-Chalmers and a windfall on Hunter. As the victim of Allis-Chalmers' wrongdoing, Hunter is the logical choice." *Id.*

The court's reasoning in Hunter serves to pinpoint the basic unfairness of the majority's policy choice. The majority concedes that state recoupment of unemployment compensation occurs "in many instances." (Slip op. 12 n. 10), thereby suggesting that the risk of a windfall recovery to the miner is limited. On the other hand the majority also concedes that the risk of any increased employer expense is variable and unknown. Slip op. 13 n. 11. Thus the majority's twin concerns -- miner windfall recovery, and increased employer payment -- are bottomed upon nothing more than vague speculation regarding

the effects of wide state-by-state legal variations. Notwithstanding the foregoing, the majority, in their zeal to ensure only that illegally discharged miners not receive a windfall, has adopted a national policy which will at times provide an employer with a windfall set-off from his backpay obligation. I, as did the court in Hunter, find this choice to be illogical and unfair. Moreover, the majority's policy is directly in conflict with the Gullett Gin Court's expressed rationale which details the basis for its rejection of the employer's argument that under the experience-rating record formula it will be prejudiced.

We doubt that the validity of a back-pay order ought to hinge on the myriad provisions of state unemployment compensation laws. (citations omitted.) However, even if the Louisiana law has the consequence stated by respondent, which we assume *arguendo*, this consequence does not take the order without the discretion of the Board to enter. We deem the described injury to be merely an incidental effect of an order which in other respects effectuates the policies of the federal Act. It should be emphasized that any failure of respondent to qualify for a lower tax rate would not be primarily the result of federal but of state law, designed to effectuate a public policy with which it is not the Board's function to concern itself. (citation omitted.)

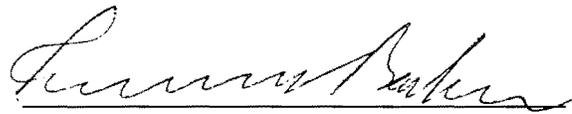
340 U. S. at 365.

The majority has also concluded that "deducting unemployment compensation from backpay awards is not inconsistent with the Mine Act's goal of deterring illegal conduct." Slip op. 12.

This leap of logic is too vast to be ignored. In fact, it is correct to state the opposite -- that adoption of a non-deduction policy is consistent with the Mine Act's goal of deterring illegal conduct. There certainly is no deterrent value in establishing a policy whereby a violating operator may be relieved of his obligation to furnish illegally withheld pay from a discharged worker by off-setting his obligation by the use of state funds. In adopting a circuit wide rule of non-deductibility of unemployment benefits, the Third Circuit concluded that "the legislative history and Gullett Gin are persuasive, that the primary prophylactic policy of Title VII would thereby be better served." 721 F.2d at 85. Recognizing that backpay awards, have a prophylactic or deterring effect upon future discrimination the court also concluded: "To the extent that a backpay award is reduced by unemployment benefits, this purpose is diluted." 721 F.2d at 84.

Finally, I find it curious that the majority attempts to support its policy choice 4/ by noting that the Mine Act imposes a civil penalty upon offending operators. Slip op. 13. I see no relevance of this fact to the issue of what constitutes an appropriate, fair backpay award to a miner who has been illegally discharged. In commenting on the wide breadth of relief that the Commission should require under the Mine Act, the Senate Committee on Human Resources expressly stated "the relief provided under Section 10[5](c) is in addition to that provided under sections 10[4](a) and (b) and 10[5] for violations of standards." S. Rep. No. 181, 95th Cong., 1st Sess. 35 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 623.

For the foregoing reasons I would follow the reasoning of the Supreme Court, and the rule followed by the majority of courts, to not deduct unemployment compensation from backpay awards. I would therefore affirm the administrative law judge.



RICHARD V. BACKLEY, Commissioner

4/ In view of the fact that my colleagues have recently taken the unusual step of issuing a Direction for Review, sua sponte in the matter of Secretary of Labor on behalf of Clayton Nantz v. Nally & Hamilton Enterprises, Inc., Docket No. KENT 92-259-D (March 15, 1993) solely in order to review this one narrow issue, I can only presume that they are eager to provide the Secretary of Labor with the opportunity to present his views on this important issue, an opportunity unavailable to him in this matter arising under Section 105(c)(3).

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

April 30, 1993

SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA) :
 :
v. : Docket Nos. KENT 91-179-R
 : KENT 91-185-R
PEABODY COAL COMPANY :

ORDER

The Commission issued a decision in this matter on March 25, 1993, affirming in part and reversing in part the decision of the administrative law judge and remanding to the judge the issue of whether a disputed ventilation plan provision was "suitable" to the conditions of the mines in question. 15 FMSHRC 381, 389 (March 1993). The Commission has subsequently received from Peabody Coal Company ("Peabody") a Petition For Reconsideration and For Stay Of Decision Pending Reconsideration ("Petition"). The Commission also has received from the Secretary of Labor a Response To Petition For Reconsideration ("Response").

All Commissioners have considered Peabody's Petition and the Secretary's Response and have agreed unanimously that the Chairman may issue an order setting forth their disposition of the Petition.

The Commission held that the Secretary bears the general burden of proving that the disputed plan provision was suitable to the mines in question. 15 FMSHRC at 388. Peabody's Petition requests the Commission to clarify that the Secretary bears the burden of proving not only that the disputed plan provision was suitable but also that Peabody's previously approved ventilation plans were no longer suitable. Petition at 4-7. The Secretary's Response states that, in the present case, where he seeks to have Peabody make changes in previously approved plans, he has no objection to bearing a burden of proving both the non-suitability of those plans and the suitability of the disputed plan provision. Response at 1 & n.1, 3.

Upon consideration of the Petition and Response, the Commissioners have determined unanimously that the issues raised in the Petition are best resolved in the first instance by the administrative law judge on remand. Accordingly, the Petition is denied.

For the Commission:



Arlene Holen
Chairman

ADMINISTRATIVE LAW JUDGE DECISIONS

10/10/10

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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APR 2 1993

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. KENT 92-380
Petitioner : A.C. No. 15-16592-03518
v. :
SPURLOCK MINING COMPANY, INC., : Docket No. KENT 92-419
Respondent : A.C. No. 15-16592-03517
: Docket No. KENT 92-420
: A.C. No. 15-16592-03519
:
: No. 2 Mine
:
SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. KENT 92-306
Petitioner : A.C. No. 15-12875-03556
v. :
SARAH ASHLEY MINING CO., INC., : Docket No. KENT 92-307
Respondent : A.C. No. 15-12875-03557
: Docket No. KENT 92-323
: A.C. No. 15-12875-03558
:
: Docket No. KENT 92-324
: A.C. No. 15-12875-03559
:
: Docket No. KENT 92-608
: A.C. No. 15-12875-03561
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: Docket No. KENT 92-609
: A.C. No. 15-12875-03562
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: Docket No. KENT 92-701
: A.C. No. 15-12875-03563
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: Docket No. KENT 92-836
: A.C. No. 15-12875-03565
:
: Docket No. KENT 92-837
: A.C. No. 15-12875-03566
:
: Docket No. KENT 92-838
: A.C. No. 15-12875-03567
:
: Docket No. KENT 92-889
: A.C. No. 15-12875-03568
:
: No. 2 Mine

DECISION

Appearances: Anne T. Knauff, Esq., Office of the Solicitor,
U.S. Department of Labor, Nashville, Tennessee,
for Petitioner;
Hobart W. Anderson, President, Spurlock Mining
Company, Inc. and Sarah Ashley Mining Company,
Inc., Ashland, Kentucky, for Respondents

Before: Judge Melick

These consolidated cases are before me upon the 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, 30 U.S.C. 801, et seq., the "Act," charging Spurlock Mining Company, Inc. (Spurlock) with 13 violations and seeking penalties of \$1,197 for those violations and charging Sarah Ashley Mining Company, Inc. (Sarah Ashley) with 76 violations and seeking amended penalties of \$7,382 for those violations.¹

There is no dispute that the violations were committed as alleged nor is there dispute concerning the Secretary's findings of gravity and negligence under Section 110(i) of the Act as noted on the face of the charging documents.² It is also undisputed that Respondents are small operators and that they are no longer in business. In spite of this undisputed evidence, Respondents nevertheless assert that the proposed penalties would affect their ability to continue in business. Clearly, however, since they are no longer engaged in business, the proffered excuse is no longer relevant. The financial condition of Respondents is now only an issue of

¹ Docket Nos. KENT 92-323, KENT 92-324, KENT 92-608, KENT 92-609, KENT 92-701, KENT 92-836, KENT 92-837, KENT 92-838 and KENT 92-889 were consolidated for purposes of this decision following hearings on September 4, 1992, after the parties stipulated that the evidence taken at those hearings would apply as well to these cases.

² Section 110(i) of the Act provides, in part, as follows:

"In assessing civil monetary penalties, the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation."

collection and while the Secretary may have to stand in line with other creditors this is no longer an issue under Section 110(i) of the Act.

In any event, the Commission has long held that absent proof that the imposition of authorized penalties would adversely affect an operator's ability to continue in business it is presumed that no such adverse affect would occur. MSHA v. Sellersburg Stone Co., 5 FMSHRC 287 (1983), aff'd 736 F.2d 1147 (7th Cir., 1984). Hobart Anderson, a certified public accountant with a masters degree in business administration and 15 years experience in public accounting, testified at hearing on behalf of the Respondents. Anderson incorporated Spurlock around 1987 and incorporated Sarah Ashley in 1988 or 1989. They are closely-held corporations and Anderson is president and chief operating officer of both. Hobart Energies, Inc. (Hobart) owns 100 percent of the stock of Sarah Ashley, Spurlock and 13 other corporations apparently also intermittently engaged in the coal mining business, and Anderson owns 25 percent of the stock of Hobart. Anderson and former accounting partner David Griffith are the only two officers and directors of all these subsidiaries. Anderson sets corporate policy and is responsible for the management of Spurlock and Sarah Ashley.

The financial evidence presented by Anderson primarily consists of state and Federal corporate tax returns, unaudited balance sheets, notices of tax and other liens, and copies of court pleadings apparently involving litigation by creditors against the Respondents and Hobart Anderson personally. While this evidence in itself, as noted by the Secretary in his brief, may not be sufficiently reliable to provide a basis to evaluate the impact of the proposed penalties, it is in any event too limited in scope. It is clear from the evidence in these cases that the relevant operating enterprise for evaluating the criterion at issue must include not only Spurlock and Sarah Ashley but also, under either an equity theory or an alter ego theory, the individual shareholders of the larger operating enterprise.

Under applicable Kentucky law, under either theory the following factors must be considered when determining whether to pierce the corporate veil: (1) undercapitalization; (2) failure to observe corporate formalities; (3) nonpayment or overpayment of dividends; (4) siphoning of funds by major shareholders; and (5) guarantee of corporate liabilities by major shareholders in their individual capacities. White v. Winchester Land Development Corp., 584 S.W.2d 56 (Ky App. 1979); U.S. v. WRW Corporation, et al., No. 91-6253 (6th Cir. Feb. 17, 1993) (1993 West Law 36152); United States v. Daugherty, 599 F.Supp. 671 (E.D. Tn. 1984).

In these cases Anderson admitted that both Spurlock and Sarah Ashley were thinly capitalized with only \$1,000 of capital investment each. The record demonstrates that this capitalization was insufficient to pay the normal expenses associated with the operation of coal mines. In addition, the evidence shows that corporate formalities have been disregarded. Since 1988 there have been no regular stockholder meetings and there has not been an accounting to all shareholders. The evidence further shows that Hobart Anderson is a personal guarantor on every bank loan to Respondents, that he posted the required bonds to enable Respondents to conduct mining operations, and that he has personally directed the reallocation of assets, including mining equipment between and among his network of corporations as if they were his own.

Anderson himself concedes that no one tells him how to run the businesses. In particular, he notes that he makes all the decisions about the allocation of corporate assets and decides when and where among the various subsidiaries to send the mining equipment. He injected more than \$100,000 from Hobart into Spurlock for expenses and between \$100,000 and \$150,000 from Hobart into Sarah Ashley for operating expenses while both companies continued to lose money. Anderson also made the decision for Hobart to pay Spurlock's \$51,000 bank line of credit. Anderson also transferred equipment owned by Hobart to Sarah Ashley and Spurlock without charge. Hobart and some of its other subsidiaries also pay expenses on behalf of the Respondents.

Hobart also owns 100 percent of eleven other corporate entities identified at the hearings as B&M Mining, Cross Gate Mining Company, Woodland Hills Mining Company, DMV Mining Company, Broken Hill Mining Company, Little Elkhorn Coal Company, Oak Park Coal Company, White Cloud Mining Company, Brass Ring Mining Company and Dusco. Anderson is president and chief operating officer of all 13 corporations and has asserted complete discretion to act on behalf of all of them.

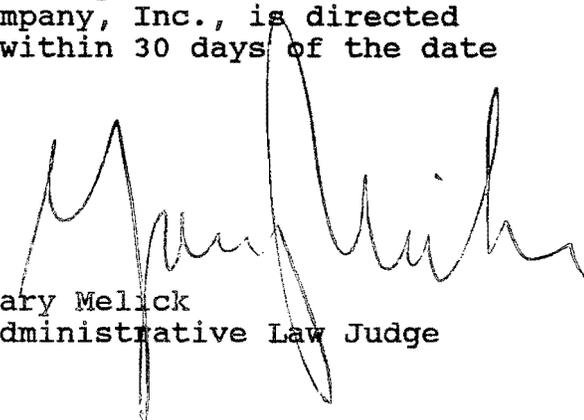
Finally, although the evidence appears inconclusive regarding the distribution of dividends to the individual shareholders and there is no evidence that individual shareholders siphoned off corporate funds, these factors alone do not mitigate against piercing the corporate veil in this case because Respondents were never sufficiently capitalized and appear to have continuously operated at a loss. As the court held in the WRW case, to emphasize these two White factors under the circumstances would be to hold in effect that courts cannot pierce the veil of an insolvent corporation, despite the fact that all other factors favor piercing the corporate veil.

In addition to holding that the equities of this case support piercing the corporate veil, it is clear that the corporate veil should be pierced under the "alter ego" theory, because Respondents and Anderson did not have separate personalities. In light of the lack of observance of corporate formalities or distinction between the individual and the corporations there was indeed a complete merger of ownership and control of Respondents with Anderson personally. WRW, supra.

Thus, even assuming, arguendo, that the criterion at issue is relevant to a mine operator already out of business, I do not find that Spurlock and Sarah Ashley would in any event have met their burden of proving that the proposed penalties of \$1,197 and \$7,382, respectively, would have an adverse affect on their ability to continue in business. Accordingly, and in consideration of the representations and documentation submitted in these cases regarding the criteria under Section 110(i) of the Act, I find that the penalties proposed are indeed appropriate.

ORDER

Spurlock Mining Company, Inc. is directed to pay civil penalties of \$1,197 within 30 days of the date of this decision. Sarah Ashley Mining Company, Inc., is directed to pay civil penalties of \$7,382 within 30 days of the date of this decision.



Gary Mellick
Administrative Law Judge

Distribution:

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Hobart W. Anderson, President, Spurlock Mining Co., Inc., Sarah Ashley Mining Co., Inc., P.O. Box 989, Ashland, KY 41105 (Certified Mail)

/lh

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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APR 02 1993

SECRETARY OF LABOR, : DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. SE 92-181-D
Petitioner :
v. : Mine No. 50
: :
LAD MINING INCORPORATED, LARRY :
FLYNN AND RONALD CALHOUN, :
Respondent :

PARTIAL DECISION PENDING FINAL ORDER

Appearances: Gretchen M. Lucken, Esq., Office of the Solicitor,
U.S. Department of Labor, Arlington, Virginia,
for Petitioner;
Michael W. Boehm, Esq., and Thomas S. Kale, Esq.,
Spears, Moore, Rebman and Williams, Chattanooga,
Tennessee, for Respondent.

Before: Judge Barbour

STATEMENT OF THE CASE

This case involves a discrimination complaint filed by the Secretary of Labor ("Secretary") on behalf of Jerry Lee Dotson pursuant to Section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §815(c)(2) ("Act" or "Mine Act"). The Respondents are Larry Flynn, Lad Mining, Inc. ("Lad") and Ronald Calhoun. The essence of Dotson's complaint is as follows: (1) that Dotson was working at Mine No. 50; (2) that the operator for whom Dotson was working went out of business and closed the mine; (3) that shortly thereafter, the mine reopened under a new operator, Lad Mining, Inc., and that Larry Flynn, the owner of Lad, and Ronald Calhoun, the president of the company that leased coal rights to Lad, refused to hire Dotson to continue working at the mine because of Dotson's protected activity and 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

(continued...)

Dotson seeks "reinstatement" to his former position as a miner, back pay with interest, all employee benefits lost because of the refusal to hire, and compensation for economic damages resulting from the refusal to hire. Dotson also seeks a cease and desist order barring the Respondents from further - discriminatory conduct against Dotson and other employees, and expungement from Dotson's records of all references to the circumstances giving rise to the failure to hire. In addition, the Secretary seeks assessment of a civil penalty against the Respondents for their alleged violation of Section 105(c)(1) of the Act. Tr. I 5, 11.² A hearing on the merits of the claim of discrimination was held in Chattanooga, Tennessee. Helpful post-hearing briefs have been filed by counsels.

COMPLAINANT'S CONTENTIONS

At the commencement of the hearing, counsel for the Secretary outlined the case she intended to prove on Dotson's behalf. According to counsel, the evidence would show that prior to working at Mine No. 50, Dotson worked at Mine No, 15, where he made protected safety complaints to the operator, Lonnie Stockwell, about conditions at the mine.³ The evidence would

¹(...continued)

[Act] because such miner, representative of miners or applicant for employment, has filed or made a complaint under or related to the [Act], including a complaint notifying the operator or the operator's agent, or the representative of miners at the...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] of this [Act] or because such miner, representative of 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 of such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this [Act].

30 U.S.C. §815(c)(1)

² During the course of the hearing I determined that evidence relating to restitution issues should be deferred pending my decision with respect to whether the Respondents violated Section 105(c)(1). Tr. I 94-95; Tr. II 211. Accordingly, this partial decision treats only the issue of the alleged violation.

³ Counsel maintained that Stockwell was a contractor-operator of Tennessee Consolidated Coal Corporation ("TCC"), that TCC controlled the coal
(continued...)

further show that Dotson also complained to the Mining Enforcement and Safety Administration ("MSHA") about conditions at the mine, and subsequent to his complaint, MSHA inspected the mine and issued citations and orders.

According to counsel, when Dotson complained to Stockwell about conditions at the mine he was told either to mine in the face of the conditions or to quite, and he quite. Tr. I 8-9. As a result, Dotson filed a discrimination complaint against Stockwell alleging that he had been subjected to a discriminatory discharge. However, a few days after filing the complaint he changed his mind and withdrew it. Id.

Counsel stated that shortly thereafter Dotson was hired by Alfred Meeks to work as a miner at Mine No. 50. Meeks, like Stockwell, was a contractor-operator of TCC. Counsel maintained that about one week after Dotson was hired, Calhoun went to Mine No. 50 and told Meeks that Dotson was a troublemaker and to get rid of Dotson. A few days later Calhoun returned and told Meeks that he, Calhoun, would arrange a meeting between Stockwell and Meeks so that Stockwell could tell Meeks about the trouble that Dotson had caused at Mine No. 15. Tr. I 9. Meeks declined the offer, and Dotson continued to work at Mine No. 50.

Counsel further stated that approximately six months later, Meeks went out of business and closed Mine No. 50. Approximately, one week later, Larry Flynn reopened the mine under the name of Lad Mining Incorporated and as a contractor-operator of TCC. Flynn hired all of the miners who previously had worked at Mine No. 50 with the exception of Dotson and another miner who had an attendance problem. Tr. I 9. Counsel asserted that Dotson was not hired because of his protected activity while at Mine No. 15 and that Lad, Flynn and Calhoun were jointly and severally responsible for violating Dotson's Section 105(c)(1) rights.

RESPONDENTS' CONTENTIONS

Counsel for the Respondents answered that the Respondents had not discriminated against Dotson and that, in any event, the Secretary's case was based on several fallacious assumptions. According to counsel, contrary to the Secretary's contention, when a mine in the area closed and changed owners it was not a common practice for every miner who worked at the mine prior to it closing to be hired by the new operator. Rather, operators went through an application process and hired only those whom

3 (...continued)

rights, which Stockwell leased from TCC, and that although Stockwell was the titular operator of the mine, TCC's president, Ronald Calhoun, also, had control and influence over the operation of the mine in that he made frequent visits to the mine and oversaw its production and costs. Tr I 8-9, 11.

they needed. Further, Calhoun did not control hiring and firing, as shown by the fact that after Calhoun supposedly told operators not to hire Dotson, Dotson was hired by Meeks. Moreover, to accept the Secretary's position would be to accept that Dotson had a vested right to be hired by Flynn at Mine No. 50, when, in fact, he did not. Flynn, as was his right, employed a standard method of hiring and filled positions as he needed them. The fact that Flynn had no need to hire Dotson did not suggest unlawful discrimination on Flynn's part.

THE SECRETARY'S CASE

Jerry Lee Dotson

The Complainant was the first to testify. Dotson stated that he had worked as a miner since 1975. During that time, he had engaged in a number of different jobs, including operating continuous mining machines, shuttle cars, roof bolting machines, and tractors. He estimated that he had worked for a dozen operators in the area of Tennessee where he lives -- the Whitley Mountain area.

From 1985 through January or February 1991, he worked at Faith Coal Company's ("Faith") No. 15 Mine. At that mine, he did a number of different jobs, including running a scoop, a roof bolting machine, a cutting machine and general maintenance work. Tr. I 20-21.

Dotson stated that Lonnie Stockwell was the president of Faith. Tr. I 101. Dotson described Stockwell as a contractor-operator of TCC. Tr. I 20. Dotson understood that Stockwell leased the No. 15 Mine from TCC. Tr. I 101.

Ronald Calhoun is the president of TCC, and Dotson described the relationship of Stockwell and Calhoun as he had observed it. He stated that Calhoun "quite often" (i.e., more than two times a week) was at the mine. Tr. I 21. According to Dotson, Stockwell reported the mine's daily production to Calhoun and informed Calhoun of any conditions that would cause a decrease in production. Dotson reported Stockwell as saying, "When Mr. Calhoun comes . . . if you don't run coal he gets on you." Tr. I 23.

Dotson also described the events that he believed had led to his differences with Stockwell and Calhoun. He stated that in December 1990 or January 1991, there were safety and managerial problems at the No. 15 Mine. Miners were working in what had been a sealed off area. In addition, some taxes were not being withheld from the miners' pay checks and FICA taxes were not being paid. Tr. I 24, 101, 159. According to Dotson, these problems lead to a strike. Tr. I 24. In the negotiations to end the strike, Calhoun represented management.

Dotson stated that during the strike, and in front of other miners, he told Calhoun, "[I]f you don't want to run these mines halfway right . . . get out of them and let somebody in here that will run them right because they will run." (He claimed that when he spoke to Calhoun about "running the mines right," he was referring to working in the previously sealed off area and to withholding taxes. Tr. I 25-26.) Dotson described Calhoun's reaction: "He didn't like it. He gets red faced. [H]e looks like he's got tobacco in both jaws. He could have bit a twenty penny nail in two that day." Tr. I 26.

However, Dotson agreed that Calhoun had played a positive role ending the strike: that Calhoun talked to miners on the picket line, listened to their complaints about the way they were being paid, agreed that the miners were justified in striking, suggested they all talk to Stockwell to resolve the matter, and told Stockwell that he needed to pay the men right and give them the pay records they needed. Tr. I 104.

After the strike, in February 1991, Stockwell again sent the miners to work in the area that had been sealed off. According to Dotson, the foreman did not want to work in the area because it was so dangerous. Dotson described being sent into the area as equivalent to "taking a gun and putting it up to somebody's head and pulling the trigger." Tr. I 28. Because of the danger, Dotson called MSHA Inspector Larry Anderson and told him that Stockwell was "going to get somebody killed." Tr. I 29. This led to an MSHA inspection of the mine on or about February 6. Tr. I 28, 105. In turn, the inspection led to citations and orders being issued against Faith and to a criminal investigation of Stockwell, an investigation in which Dotson was called to testify. Tr. I 30-40. Dotson believed that somehow "the word got out" and both Stockwell and Calhoun learned that he had made the safety complaint to MSHA that triggered the inspection. Tr. I 110-112.

On or about February 18, 1991, Dotson was working under what he believed were bad roof conditions. Stockwell was in the mine and Dotson asked him for some jacks or timbers to support the roof. Stockwell did not respond and left the mine. Because he got no response from Stockwell, Dotson asked the foreman, Dennis Nunley, for the roof supports. Dotson testified that Nunley answered that if Dotson didn't like the job he should either leave or do another job. Tr. I 40-41. When he came out of the mine at the end of the shift, Stockwell asked Dotson to stay and Stockwell, in front of Nunley and some others, asked Dotson what the problem was? Dotson described his safety concerns and the group argued with Dotson over whether or not the mining practice that led to the need for the additional roof supports was permissible under the mine's approved roof control plan. Tr. I 46-47. Stockwell told Dotson that he did not have the plan at the mine, and Dotson went home. Tr. I 47.

The discussion resumed when Dotson returned to work the following morning. Finally, according to Dotson, Stockwell told him, "either do it the way we've always done it or . . . go to the house," meaning that Dotson should quit. Tr. I 48. Dotson described his response: "I just bowed my head and I said that the best thing I can do is go to the house." Id.

The next day Dotson filed a discrimination complaint with MSHA and against Stockwell. Tr. I 51; C. Exh 2. Dotson also began looking for another job. A few days after he had left Mine No. 15, Dotson met James Earl Nunley, another contractor-operator with TCC. Dotson stated that Nunley told him if he proceeded with his discrimination action against Stockwell he would not work again on the mountain (i.e., in any of the mines on Whitley Mountain). Tr. I. 55, 105. On February 28, 1991, Dotson withdrew the complaint. Tr. I 56, 58; C. Exh. 3. Dotson explained, "I thought . . . if I dropped this thing than everything would be hushed, I could go back to work and just let things go . . . I just needed to work. I got a family." Tr. I 55.

Eight to ten days later, Dotson was hired to work as a general laborer at Mine No. 50. The mine was operated by Mosley Creek Coal Company and Alfred Meeks was the owner. Meeks leased the coal rights from TCC and was a contractor-operator with TCC. Tr I 61-62. Mine No. 50 is "on the mountain."

As a general laborer Dotson performed a variety of jobs, including operating a shuttle car, a scoop and a roof bolting machine, as well as maintenance work. Tr. I 63. In getting the job at Mine No. 50, Dotson did not apply for any specific job, but rather for any job that was available. As Dotson stated, "I needed to work." Tr. I 64.

Dotson was asked about the relationship of Meeks and Calhoun. He stated that, frequently, he had seen Calhoun at the mine. Dotson believed that Calhoun "stayed on" Meeks about production at the mine and that Meeks had to report the mine's production on a daily basis to Calhoun. Tr. I 65-66.

Dotson worked for Meeks from late February 1991 until approximately August 12, 1991, when Meeks and Mosley Creek Coal Company went out of business. Although, he did not know for sure, Dotson believed that Meeks ceased mining because "he was tired and [Calhoun] was on him" to produce coal and to cut supply costs. Tr. I 66, 123. (Under the contractor-operator relationship, TCC purchased the necessary supplies.)

Once Meeks ceased to operate Mine No. 50, Meeks told Dotson that approximately two weeks after hiring Dotson, Calhoun had come to the mine and told Meeks to get rid of Dotson. Tr. I 79, 117. According to Dotson, Meeks told Calhoun that

Dotson was hired subject to a ninety day probationary period and that if Dotson did not work out, Meeks would then get rid of him. Tr. I 79. Dotson recalled that Meeks also told him that Calhoun, subsequently, offered to arrange a meeting between Meeks and Stockwell; so that Stockwell could tell Meeks why Dotson should be fired. At that time, Calhoun told Meeks that Dotson was "a troublemaker." Id.

The same day that Meeks ceased operating Mine No. 50, Dotson stated that he learned a new operator was going to take over the mine. Meeks' son, Donnie Meeks, who was employed by his father as the mine foreman, told Dotson that he should go and see the new operator, Larry Flynn, because Flynn needed a crew for Mine No. 50. Tr. I 67. At the time, Flynn was operating another mine on the mountain, Mine No. 35.

On the day after Mine No. 50 closed, Dotson telephoned Flynn and told him that he was looking for a job and that he would "do anything." Tr. I 68. According to Dotson, Flynn did not have a crew picked yet and he told Dotson that he would get back to him. Tr. I 68. Dotson believed that he called Flynn on or about Wednesday, August 14, 1991. During cross-examination, Dotson recalled the substance of their conversation: "He told me . . . he was fixing to be putting some men to work. He wanted to know what I could do . . . I told him I could do anything. And he said . . . I'm sure going to be putting some men back to work . . . I'll be getting back in touch with you . . . just as soon as I can use you . . . I will get back a hold of you." Tr. I 128.⁴

On Friday, August 16 when he had not heard from Flynn, he went to Flynn's mine with three other men to talk to Flynn in person about a job. Dotson and two of the men previously had worked for Meeks at Mine No. 50. The person who had not worked at Mine No. 50 was a young man with no previous mining experience. Tr. I 69-70. Flynn gave two of the men, Dewey Layne and Barry Mosley, applications. He told them to complete the applications and to be at Mine No. 50 at 6:00 a.m., the following Monday to start work. Dotson maintained that it was another story as far as he was concerned. He stated that Flynn looked at him and said that he would have to get back to him. Tr. I 69-70. (Dotson further stated that the young man with no mining experience was never considered by Flynn for a job.) Dotson was not given any explanation as to why he was told this, nor did he ask. Tr. I 158.

⁴ This version of the conversation was more expansive than the one reported to the MSHA investigator on October 8, 1991. At that time, Dotson reported that he had called Flynn and asked him about a job and that Flynn had stated that he would be getting right back to Dotson. C. Exh 4 at 4.

Dotson stated, he was certain that during the discussion with Flynn he did not say anything to Flynn about wanting to only work at one job, as a roof bolter. Tr. I 70. Rather, he told Flynn that he would do anything. Tr I 72. However, he recalled, Flynn asked him what positions he had held when he worked for Meeks and that he had told Flynn he had run a roof bolting machine. Tr. I 131.

Flynn began operating Mine No. 50 on Monday, August 19. Tr. I 128. For the first two weeks that Mine No. 50 was in operation under Flynn's direction, Dotson worked as a security guard near the mine. Dotson stated that he had been hired by the county sheriff's department to guard some equipment that was the subject of a legal dispute between TCC and a bank holding a lien on the equipment. See Tr. 73. During this time, Dotson maintained that when he would see Flynn, he would tell Flynn he needed work and would do anything. Id. Flynn never offered Dotson a job.

According to Dotson, Flynn hired all of the other miners who had worked at Mine No. 50 for Meeks, except Dotson and Davey Johnson, who had a bad absentee record. However, not all of the miners who had worked for Meeks were hired right away. Dotson stated that Hank Lawson, a roof bolter, first worked for another operator before Flynn hired him. Tr. I 76, 132. In addition, two others, Johnny Hamby and Ricky Burgan also were hired after working as miners for someone else. Tr. I 76.⁵

Dotson recalled that after failing to get employment with Flynn he continued to visit other mines on the mountain in order to find work. During one of these visits he happened to see Henry Harvey standing by the mine entrance talking to the operator of the mine. Dotson asked the mine operator about jobs and the mine operator said that he had none available. Later, in November or December 1991, Dotson again saw Harvey at the post office. As Dotson remembered it, Harvey said that when he had seen Dotson at the mine he knew Dotson was wasting his time, that the operator had told Harvey that he could not hire Dotson, that everyone knew about his troubles with Stockwell. Harvey knew that somebody had "put the word out" on Dotson. See Tr. I 83, 85-86.

⁵ Dotson maintained that it was a common practice on the mountain for a new operator to hire the crew that had previously worked in the mine. His opinion was based on "common sense." "[I]f you've got good miners there and their record speak for theirselves, they know the mines, they know the operation, they know the top, you'd be a fool not to keep these same men." Tr. I 145. However, he could not think of an occasion when a new operator came in and hired all of the previous miners. Tr. I 148.

Dotson stated that after he was not hired by Flynn, he continued to look for a job on the mountain and that he visited the eight to ten mines located there. For several months he was unable to get a job. In December 1991, he was offered a job at Mine No. 30, but he turned it down because of his concern that the mine was not safe. Tr. I 135.⁶

Dotson's believed that because of his safety complaints to Stockwell and because it had become known that he requested the MSHA inspection at Stockwell's mine, Calhoun had, in effect, blacklisted him on the mountain and that Flynn and Lad in denying him employment, were complying with Calhoun's wishes that he not be employed because of his protected activity.

ALFRED MEEKS, JR.

The Secretary next called Alfred Meeks, Jr. to testify. Meeks stated that prior to going out of business on August 12 or 13, 1991, he had worked for 27 years in the mining industry and that for 18 or 19 of those years he had been associated with TCC, either as an employee or as a contractor-operator. Tr. I 177. Regarding Mine No. 50, Meeks testified that he was asked by Calhoun if he wanted to operate the mine and ultimately he became the operator under a contract arrangement with TCC. Tr. I 177-178. (Prior to operating Mine No. 50, Meeks had operated two other mines as a contractor-operator for TCC. Tr. I 202-206.) It took several months for Meeks to get Mine No. 50 to the point where production could begin and during this time TCC paid all of Meeks' expenses. Once mining began, TCC paid all of Meeks' costs and Meeks received a salary. TCC purchased all of the coal that Mine No. 50 produced. Tr. I 213-214.

Meeks described Calhoun as being very involved in the running of Mine No. 50. According to Meeks, Calhoun decided in which direction to mine coal and Calhoun was constantly concerned about increasing production. Tr. I 179-181. Calhoun, frequently, would come to the mine and would ask how many trucks of coal had been loaded and what were the mining conditions. In addition, Calhoun was concerned that Meeks' supply costs were too high. Tr. I 182-183, 190-191, 216-217. Meeks understood that TCC had a contract requiring it to provide coal to TVA. He also understood Calhoun to believe that if TCC was to survive economically, Mine No. 50 had to be a productive mine. Tr. I 218.

⁶ Dotson also stated that he turned down the job because he was advised by "his lawyer" not to go back to work on the mountain. Tr. I 140-141. Dotson's testimony regarding the advice is confusing. It seems to have been given after he declined the offer. It also appears that the advice was based upon events unrelated to this case. Tr. I. 153-156.

Despite Calhoun's concern with production and cost, Meeks testified that he, Meeks, was solely responsible for hiring and firing at the mine. Tr. I 231. Meeks hired Dotson on February 28, 1991. Dotson was hired to operate a roof bolting machine and to do anything else that Meeks needed him to do. Meeks explained that he would not hire a person to do only one job because "they ha[ve] to pitch in and do other jobs." Tr. I 192. Thus, while working at Mine No. 50, Dotson not only operated a roof bolting machine, he also ran a scoop, cleaned the belt line, hung ventilation curtains, and "did anything that he was asked to do." Id. Meeks described Dotson's skills, attendance and attitude as "excellent." Tr. I 193.

Turning to his conversations with Calhoun involving Dotson, Meeks stated that when he told Calhoun that he had hired Dotson, Calhoun "said . . . Dotson is nothing but a 'GD' troublemaker [and that I] had better get rid of him." Tr. I 193. Meeks testified he responded that Dotson was on a 90-day probationary period and if he caused Meeks trouble during that time, Meeks could let him go. Id. Meeks stated that this conversation occurred about one week after he had hired Dotson. Tr. I 194, 221. Meeks was positive the conversation did not occur during labor trouble at another mine and that the conversation did not involve a strike at another mine. Tr. I 194.

Meeks also stated that he had a second conversation with Calhoun concerning Dotson. Meeks testified that a few days later Calhoun came to the mine and told Meeks that Stockwell would come to the mine and that Meeks could talk to Stockwell and find out from Stockwell "what kind of a man . . . Dotson was." Tr. I 194, 221. However, Meeks stated that he was not interested in talking to Stockwell. Tr. I 194-195. At the time, the only person Meeks told about his conversations with Calhoun was his son, Donnie Meeks, the section foreman at Mine No. 50. Tr. 195-196. Calhoun did not raise the subject again with Meeks and Dotson remained employed at Mine No. 50 until Meeks ended the operation. Tr. 221.

Meeks terminated mining activity on or about August 13, 1991, because he was "tired of constant harassment day in and day out for more production and to cut supply costs . . . I just had enough." Tr. I 196. Meeks testified when he shut down he told Calhoun that a "good bunch of men" had worked for him and that Calhoun responded that he wanted to get them all back to work. Tr. I. 198.

DONNIE MEEKS

The Secretary subpoenaed Donnie Meeks. Donnie Meeks stated that in February 1991, while he was acting as foreman at Mine No. 50, his father told him that Calhoun had said that Dotson had caused trouble and his father had asked him to keep an eye on Dotson in order to see what kind of an employee he was.

Tr. I 236. He confirmed his father's testimony that Dotson worked as a roof bolter and that he also did anything else that needed to be done. Tr. I 236.

After his father went out of business, Donnie Meeks stated that he spoke with Flynn over the telephone and gave Flynn the names of all of the employees at the mine, including Dotson, and told Flynn what they could do. As he recalled, he told Flynn that Dotson could operate, among other things, a roof bolting machine, a shuttle car and a scoop. Tr. I 238-239.

However, Donnie Meeks confirmed that not everyone who had worked for his father was hired by Flynn. Davey Johnson, who had an absentee problem, was not hired and Johnny Hamby and Ricky Burgan were not hired immediately. (Donnie Meeks did not state why Hamby and Burgan were not hired when Flynn commenced operation of the mine.)

Donnie Meeks also recalled that Flynn brought two miners with him, Johnny Jones and Buck Harris. Harris was employed as a roof bolter. (In addition, Harris was authorized to act as a mine foreman. He could fill-in as mine foreman if Donnie Meeks were sick. Tr. I 248.) Jones was employed to do general maintenance. Tr. I 240-241. Harris came with Flynn the day Flynn began mining. Jones came approximately one month later. Tr. I 242. Donnie Meeks also stated that a miner named Jerry Boston came to work at Mine No. 50 from one of Flynn's other mines, but that too was later. Id.

Donnie Meeks gave his opinion that when hiring a roof bolter, it is advantageous to hire someone who knows the roof and is familiar with the mine. Tr. I 243-244.

HENRY HARVEY

The Secretary also subpoenaed Henry Harvey to testify. Harvey stated that he had worked as a miner for 27 years, 17 of which were with TCC. During his mining career, he had occasion to supervise Dotson. He described Dotson as a good worker, who never missed a day and who always did any job asked of him. Tr. II 8-10. Harvey stated that in October or November 1991, he worked at a mine operated by James Earl Nunley and that he and Nunley were standing together when Dotson pulled up in the mine parking lot. Harvey assumed that Dotson was looking for a job because when someone comes to a mine that is usually why. Tr. II 12-13. Nunley said to Harvey "[I]t won't do him any good." Tr. II 11.

In January 1992, Harvey saw Dotson at the post office. He asked Dotson if Dotson had asked Nunley for a job that day? Dotson responded that he had and that Nunley told him that he did not need any miners. Harvey responded that this was strange

because Nunley had hired people after telling Dotson that he did not need anybody. Tr. II 15-16. Harvey added, "I told Jerry, in my opinion, it looked like somebody had put the word out on him not to hire him." Tr. II 16-17.

RESPONDENTS' CASE

LARRY FLYNN

Larry Flynn, the forty-nine-year-old president of Lad Mining, Incorporated, was the first person to testify for the Respondents. Flynn stated that Lad was formed in July 1987. Since that time he had been a contractor-operator of TCC and had constantly operated Mine No. 35. Also, there had come a time when he became the operator of Mine No. 50, and Flynn described how that happened.⁷

On approximately the same day that Meeks ceased mining, Flynn met Calhoun who told him about Meeks' decision to shut down. Calhoun asked Flynn if he would be interested in taking over the operation? Flynn responded that he would have to look at the mine first. Tr. II 51. There was no discussion of Dotson, whom Flynn had never met and did not know. Tr. II 52.

Flynn went to Mine No. 50. After he had examined it, he met Donnie Meeks who asked if Flynn were going to take over the mine? Flynn stated that he was not sure, that he would have to talk to Calhoun. Flynn stated that Donnie Meeks responded he would like to work for Flynn as a foreman if Flynn decided to operate the mine. Tr. II 55. Flynn told Donnie Meeks that he had heard good things about him and that he would give him a job if he decided to run the mine. Donnie Meeks said, "I'll send you some more people if you take this mine over." Id.

Flynn also stated that he did not recall a telephone conversation with Dotson on that date regarding Dotson's desire for any type of job should Flynn operate Mine No. 50. Tr. II 62.

Subsequently, Flynn decided to reopen Mine No. 50 and on approximately Friday, August 16, he called Donnie Meeks and asked him to come to the mine the next day to help get the mine ready to reopen. That same Friday, Dotson, Dewey Lane and Barry Mosley came to Mine No. 35 to speak with Flynn. They asked if he were going to reopen Mine No. 50. When Flynn responded affirmatively, they asked if he needed miners and Flynn said that he did. According to Flynn, he asked the three what they could do. Dotson asked Flynn for a roof bolting job. Flynn stated that he told Dotson he already had roof bolters, that he did not need any more, but that if he did, he would be in touch with Dotson.

⁷

Flynn no longer operates Mine No. 50.

Tr. II 56-57.⁸ (Flynn was asked about the basis for his recollection of the meeting, and he testified that shortly after the commencement of this discrimination action he had spoken with Dewey Layne about what had transpired. He said to Layne, "I don't remember for sure and I want to know everything I said to [Dotson]." Tr. II 63. Flynn's testimony thus reflected what Layne had told him. Tr. II 63-64.)

Flynn explained that he had decided to take a roof bolter named Bradley Shipley to Mine No. 50, as well as one named Buck Harris. Tr. II 57, 59. (As it turned out, Shipley never showed up to work at Mine No. 50 (Tr. II 59) and of the two, the sole roof bolter who went to Mine No. 50 was Harris.) According to Flynn, three months before the Mine No. 50 situation arose, he had discussed with Calhoun the possibility of opening a different mine and at that time Harris had asked if he could work at the other mine as a roof bolting machine operator? Flynn stated that the mine he was interested in opening was near Mine No. 50 and that both mines were closer to Harris' home than was Mine No. 35. Tr. II 57-58. Harris was a qualified roof bolter as well as a mine foreman. The advantage of employing a person with foreman's papers was that mining could continue if the regular foreman was for some reason unable to work. Tr. II 59.

Flynn began mining on Monday, August 19. When Shipley did not report for work, Flynn needed to hire another roof bolter. (Flynn maintained that unbeknownst to him, Shipley had been on layoff when he was hired and that he had been called back to work. Tr. II 115.) Flynn stated that the choice was then between Dotson and Hank Lawson, both of whom had worked for Meeks when he ceased operation. Because he did not know either man, Flynn asked Donnie Meeks about them. According to Flynn, Donnie Meeks said that both were good workers. Flynn then asked who was the best, and Donnie Meeks said that Lawson was and Flynn hired Lawson. Tr. II 60-61.⁹ Flynn acknowledged, however, that he had not told the MSHA investigator about this conversation with Donnie Meeks. Also, he did not mention the conversation when Dotson's counsel deposed him in April 1992. Tr. II 121-122.¹⁰

⁸ Flynn stated that he did not give an application to Dotson because he only gave applications to people he was going to hire. Tr. II 138.

⁹ Flynn stated that he told Dotson that he would hire him as a roof bolter for the second shift when he started one. However, Flynn never heard from Dotson again about employment. Tr. II 113.

¹⁰ Donnie Meeks testified on the first day of the hearing and was excused as a witness after the Secretary rested. Counsel for the Secretary wanted to recall Donnie Meeks as a rebuttal witness concerning Flynn's testimony that Donnie Meeks had recommended Lawson over Dotson. However, counsel decided not to do so after a telephone conversation with Donnie Meeks. (continued...)

Flynn was asked whether it was an usual practice to hire all previous workers when a mine was reopened? Flynn stated that he had never heard of such a thing, that he had no knowledge of an entire crew being rehired. He testified that when he reopened Mine No. 35 he had hired only one person from the previous crew. Tr. II 68. However, he confirmed that he brought only two of his employees to Mine No. 50 -- Buck Harris as a roof bolter and Jerry Boston as a belt man -- and that other than these two, the rest of the men he used at Mine No. 50 previously had worked there. Tr II 99. Whether he hired all of the previous workers except Dotson and Davey Johnson, Flynn could not say. Tr. II 100.

Flynn described a very different relationship with Calhoun than had Meeks. The Calhoun depicted by Flynn did not come to the mine on a regular basis. He might come once or twice a week, or he might not come for two weeks at a time. He also telephoned infrequently. Tr. II 81-82. Flynn maintained that he did not report mining conditions to Calhoun on a regular basis and that although, he completed production reports he did not know if Calhoun reviewed them. Tr. II 83. However, Flynn recalled Calhoun telling him that Calhoun wanted Mine No. 50 to be a big producer of coal. Tr. II 82. According to Flynn, it was Calhoun who pressed for the addition of the second shift. As Flynn described it, Calhoun "said they needed the coal bad." Tr. II 84.

Flynn also stated that Calhoun never attempted to influence his decisions regarding hiring and firing, that Flynn had never even recommended someone that he might hire. He further stated that before this discrimination case was brought he had never discussed Dotson with Calhoun. Tr. II 68-69. Flynn claimed that until he was deposed in connection with this case he had never heard of the discrimination complaint that Dotson filed against Stockwell and Faith Coal Company. Tr. II 72.

ROY CALHOUN

Roy Calhoun, president and chief executive officer of TCC, was the last witness for the Respondents. Calhoun explained that TCC has 15 to 18 million tons of coal reserves in southeastern Tennessee, all but approximately 5 million of which are leased from USX Corporation. TCC does not mine coal, but rather contracts with others to mine its reserves. Tr. II 145-147. Calhoun also explained that under the contractor-operator arrangement between TCC and the actual operator, the operator has full responsibility for everything relating to the operator's

10 (...continued)

She reported that Donnie Meeks stated that he had no recollection of the conversation. Tr. II 208.

employees, including hiring and firing. Further, the contractor-operator, also, is responsible for submitting all required plans to MSHA, except that TCC supplies an up-to-date map of the mine workings. Because TCC leases the coal reserves, it makes the decisions regarding the direction of mining so that future mining of the reserves will not be jeopardized. Tr. II 152-154.

Calhoun stated that while it was not his practice to go to all of the mines of TCC's contractor-operators on a daily basis, he did go to Mine No. 50 more often than to the others. Indeed, Calhoun acknowledged that he went to Mine No. 50 "fairly regularly", because the mine was under development and needed to be looked at more closely than the others. Tr. II 155-156, 170. Still, he maintained, he did not go daily to the mine nor did he call Meeks every night at home. Tr. II 156.

Calhoun's version of the strike at Mine No. 15 differed from Dotson's. Calhoun stated that the strike was solely about economic issues -- Stockwell was not showing that he was withholding FICA taxes on the miners' pay slips and he was not paying additional money that he had promised the miners for increased production. Tr. II 158-160. Calhoun was advised of this by miners on the picket line, including Dotson, and he went to discuss the situation with Stockwell and was successful in resolving the matter. Tr. II 159. (Calhoun made no mention of any complaints regarding safety or of any discussion with Dotson alluding to safety.)

After leaving Mine No. 15, Calhoun stated he went that same day to Mine No. 50 where Meeks asked him about the strike. Calhoun testified that he told Meeks what he knew, but that when Meeks persisted in inquiring, Calhoun told him if he wanted to know more about what was going on, he (Calhoun) would arrange a meeting between Stockwell and Meeks. When Meeks then asked who was on the picket line, Calhoun mentioned, Dotson and "a bunch more." Tr. II 162. Calhoun stated that he had no recollection of Meeks telling him that he had hired Dotson. Tr. II 186. Calhoun denied that he had ever told Meeks to fire or to get rid of Dotson or that he had ever told Meeks that Dotson was a troublemaker. Tr. II 162, 186-187.

Calhoun also claimed that he never discussed Dotson with Flynn. Further, he stated that his "recommendations" to Flynn concerning who should be employed consisted of advising Flynn that someone wanted to work and saying something to the effect that "[i]f you have anything, there's a man that's available." Tr. II 166.

With regard to his knowledge of Dotson's contacts with MSHA, Calhoun claimed that the first he knew of the MSHA "raid" on Mine No. 15 (i.e., the "blitz" inspection of February 6, 1991, that

Dotson requested and that resulted in criminal charges being brought against Stockwell) was when his deposition was taken for this discrimination proceeding in April 1992. Tr. II 162. He acknowledged, however, that it was "unusual" that he did not know sooner. Tr. II 199. Calhoun claimed that if he had known, he probably would have closed the mine. Tr. II 192.

Further, Calhoun claimed that until the MSHA investigator took his statement with respect to this case, he had no prior knowledge of Dotson's previous discrimination complaint against Stockwell. Tr. II 163.

Calhoun maintained that it was not a common practice for a new operator to hire all miners, previously employed at a mine and that he knew of no instance where a new contractor-operator hired 100 percent of the previous miners. He stated that while a new operator usually would check with the previous operator and would hire some of the previous miners, if he operated another mine, the new operator usually would bring with him some of the miners from the other mine. Tr. II 164. As Calhoun explained, a new contractor-operator is under no legal obligation to hire the previous miners, and Calhoun did not believe that a previously employed miner had a legitimate expectation to be hired, even if he had a good work record and was recommended by his old foreman. Tr. II 191. Calhoun stated, "I think . . . a coal mine operator ought to have his right to hire who he wants to for his mine. He's the one paying them. He's the one that works them and he should be the one that makes that decision." Tr. II 192.

APPLICABLE CASE LAW

In order to establish a prima facie case of discrimination under Section 105(c) of the Act, a complaining miner bears the burden of production and proof to establish, (1) that he engaged in protected activity and (2) that the adverse action complained of was motivated in any part by that activity. Secretary on behalf of Pasula v. Consolidation Coal Co., 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 (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 than no protected activity occurred or that the adverse action was in no way motivated by the protected activity.

With regard to establishing that the adverse action complained of was motivated in any part by protected activity, the Commission has acknowledged the not-infrequent difficulty the Complainant faces in establishing a motivational nexus between

protected activity and the adverse action that is the subject of the complaint when the link between the protected activity and the adverse action cannot be supplied by direct evidence. The Commission has stated that such "[d]irect 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." Chacon, 3 FMSHRC at 2510 (quoting NLRB v. Melrose Processing Co., 351 F.2d 693, 698 (8th Cir. 1965)). In analyzing the evidence, whether it be circumstantial or direct, the Commission and its judges are free to draw reasonable inferences. Melrose, 351 F.2d at 698.

If the operator cannot rebut the prima facie case, it may nevertheless affirmatively defend by proving that it was also motivated by the miners' unprotected activity 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); Donovan v. Stafford Construction Company, 732 F.2d 954 (D.C. Cir. 1984) (specifically approving the Commission's Pasula-Robinette test). See also NLRB v. Transportation Management Corporation, 462 U.S. 393, 397-413 (1983) (where the Court approved the NLRB's virtually identical analysis for discrimination cases arising under the National Labor Relations Act).

COMPLAINANT'S PRIMA FACIE CASE

The Secretary claims that the evidence establishes that Dotson engaged in protected activity in January and February 1991, when he was employed by Stockwell. According to the Secretary, Dotson's protected activities are: (1) his complaints to Calhoun about unsafe mining practices during the strike at Mine No. 15, (2) his request to MSHA for an inspection of the mine, (3) his complaints to Stockwell about unsafe conditions and practices at the mine, and (4) his filing of a discrimination complaint against Stockwell. According to the Secretary, Flynn's refusal to hire Dotson in August 1991 when Flynn took over Mine No. 50 was directly motivated by these activities. See Sec. Br. 18-19, 31-32.

PROTECTED ACTIVITY

Reviewing each of the alleged protected activities in sequence, I conclude the evidence establishes Dotson engaged in protected activity while employed by Stockwell with respect to Nos. 2, 3 and 4.

Dotson's Safety Complaints to Calhoun

The Secretary's first contention is that Dotson engaged in protected activity when he complained to Calhoun about safety conditions during the strike at Mine No. 15. I do not believe that the evidence allows a conclusion that Dotson actually made such a complaint. While, it is clear that the strike involved economic issues, the record does not establish that it also involved safety issues. Dotson maintained that his statement to Calhoun that "[I]f you don't want to run these mines halfway right . . . get out of them and let somebody in that will run them right because they will run" referred to both the withholding of taxes and to unsafe working practices at the mine. Tr. I 25-26. However, the statement is general and open to interpretation. On its face it does not clearly relate to safety nor does the testimony regarding the context in which it was delivered tie it to safety. Certainly, Calhoun, the only other person who was present and who testified, did not indicate that he understood a safety complaint had been made to him at the time. Indeed, he did not mention any complaint made by Dotson nor did he indicate that he understood the strike to involve any safety-related issues. See Tr. II 158-160. In fact, I find the weight of the evidence to be that it did not.

Dotson's rendition of how the strike was resolved essentially corresponds with Calhoun's. Tr II 158-160. As Dotson himself testified, Calhoun's involvement in the strike led to its successful resolution, when Calhoun intervened with Stockwell on the miners' behalf and advised redress of their economic complaints. Tr. I 104. Even more telling, in my view is the fact, that on October 7, 1991, when Dotson filed his discrimination complaint, he did not mention his strike-related statement to Calhoun as a reason for the alleged discrimination. See C. Exh. 4 at 2. Further, although four days later he told the MSHA investigator that he guessed his statement "made the man mad at me," he did not then link it with any expression of his safety concerns. C. Exh 5 at 9.

Dotson's Inspection Request

The Secretary next asserts that Dotson engaged in protected activity when in early February 1991, he requested an MSHA inspection of Mine No. 15 because of what he believed to be unsafe mining practices. Sec. Br. 20. There is no doubt that Dotson made the request that resulted in the inspection of Stockwell's mine. Dotson's testimony in this regard was not disputed by the Respondents. Tr. I 29 and 105. Such a request is protected activity under the Act.

Dotson's Safety Complaints to Stockwell
and
Dotson's Discrimination Complaint against Stockwell

The Secretary also asserts that Dotson's safety complaints to Stockwell in late February 1991 were protected. Sec. Br. 20. Dotson's testimony to the effect that he complained to Stockwell on or about February 18, 1991, regarding mining practices resulting in the need for additional roof support was not refuted. Tr. I 46-47. It was, of course, these complaints that lead to the alleged order from Stockwell to either continue the practice or "go to the house" and Dotson's resulting short-lived discrimination complaint against Stockwell.

I accept Dotson's un rebutted testimony concerning his complaints to Stockwell. His testimony at trial describing his discussion with Stockwell essentially corresponded with his nearly contemporaneous account of the same discussion in his discrimination complaint. See C. Exh. 2. A miner's safety complaints when reasonable and made in good faith are protected. Further, the filing of a complaint of discrimination is protected activity. I conclude, therefore, that when Dotson complained to Stockwell and when he filed the complaint charging Stockwell with discrimination he engaged in activity that cannot be the basis for subsequent retaliation.

ADVERSE ACTION

Having established protected activity, Dotson must prove that he suffered an adverse action. The adverse action of which Dotson complains is that he was denied employment by Flynn at Mine No. 50, when Flynn took over as the operator of the mine. Dotson and Flynn agreed that Dotson sought and was denied employment by Flynn and Lad.

I credit Dotson's testimony that he telephoned Flynn on or about Wednesday, August 14, 1991, and asked for employment. Dotson had a specific recollection of this telephone conversation, while Flynn had none. Tr. I 67-68, Tr. II 62. In addition, approximately two months after the conversation, Dotson told the MSHA investigator that he had made the call. C. Exh. 5 at 4. Dotson credibly stated that Flynn said that he would get back in touch with Dotson, but he did not, and Dotson was never hired. Id.

In addition, Dotson testified that on Friday, August 16, 1991, he went to Mine No. 35 and spoke with Flynn about working for Flynn at Mine No. 50. Tr. I 69-70. Flynn agreed that Dotson had come to Mine No. 35 on August 16. Tr. II 56-57. Although, Dotson and Flynn gave decidedly different versions of what transpired at the meeting, both agreed that the reason Dotson was at the mine was to seek employment. Dotson also stated that

after Flynn took over operating Mine No. 50 and during the time that Dotson was employed as a security guard, he asked Flynn for employment whenever he would see Flynn. Tr. I 73. Flynn did not testify regarding these contacts with Dotson and I credit Dotson's testimony. It is clear that Dotson was anxious for work and I find it reasonable to believe that he asked Flynn about employment whenever the opportunity to do so presented itself. The record thus establishes that Dotson repeatedly sought employment at Mine No. 50, and I so find. An adverse action is an act of commission or omission by an operator that subjects the affected miner or applicant for employment to discipline or to a detriment in an employment relationship. See Secretary on behalf of Jenkins v. Hecla-Day Mines Corp., 6 FMSHRC at 1847-48. Failing to be hired by Flynn and Lad meant that Dotson had no employment relationship, which was certainly a detriment, to say the least. It is clear, therefore, that Dotson established he was subjected to an adverse action.

Having established protected activity and adverse action, the next question is whether Dotson, also, established that in denying him employment, any or all of the Respondents were motivated by his protected activity.

MOTIVATION

Dotson presented no direct evidence that he was denied employment because he had complained about safety conditions, requested an inspection and had filed a discrimination complaint while he was employed by Stockwell. However, as noted, the Commission has recognized that such evidence is rarely available to a complainant and has made clear that a finding of discriminatory motivation may be made on the basis of circumstantial evidence. Chacon, 3 FMSHRC at 2510. The Commission has 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. Chacon, 3 FMSHRC at 2510.

A logical approach for analysis of a motivation question is to accept as a starting point that something, at this point unknown, motivated Flynn to reject Dotson as an employee and to deduce what it was.¹¹ This is the approach adopted by the 8th

¹¹ The Respondents point out, correctly, I think, that this is not a case of an employee seeking to be rehired. When Meeks went out of business, his employees' jobs ceased. Thus, Dotson's employment with Meeks had ceased. Flynn was a new operator. In general, I agree with Calhoun that a new contractor-operator is under no legal obligation to hire miners who had

(continued...)

Circuit in Melrose, 351 F.2d at 698-700, and it is one that courts frequently have followed.

The approach begins with the elimination of certain motivational factors that are usually offered in these types of cases. There is no suggestion that Dotson was incompetent, had a record of absenteeism, had a poor safety record or that Flynn or Calhoun had any personal animosity (i.e., extra-mining related animosity) toward Dotson.

Dotson had been mining coal since 1975. In that capacity he had engaged in a wide variety of tasks. After Dotson left his job at Faith Coal Company, he was hired shortly thereafter by Meeks. Meeks described Dotson as a man of "excellent" skills, attitude, and attendance, and I credit his testimony. Tr. I 193. After all, it would hardly have been in Meeks's interest to employ someone who did not have these qualities. In addition, Donnie Meeks, who was Dotson's foreman and thus should know, described Dotson as a "good miner" with "good" skills. Tr. I 237. Further, Dotson's reputation as a good, willing and reliable worker was confirmed by Harvey, another former supervisor of Dotson. Tr. II 9-10.

Also, there is no suggestion in the record that Flynn's failure to hire Dotson was the result of any personal hostility. There was no testimony that prior to Flynn taking over Mine No. 50, he and Dotson were even acquainted. Moreover, there was no indication in the record that Calhoun had any extra mine-related animus toward Dotson. As described in the record, Calhoun's knowledge of and contacts with Dotson were based solely on Dotson's mining activities, first, with Stockwell, and second, with Meeks.

Still, the fact remains that Flynn did not hire Dotson, and the search for the reason why continues with an examination of the customary hiring practice and a determination of whether Flynn's failure to hire Dotson represented a departure from that practice. If so, motivation may be suggested in the manner and the reasons proffered for Dotson's rejection.

11 (...continued)

previously worked at the mine and that a coal mine operator has the right to hire whomever he wants. There is a caveat, however -- hiring must be done according to law and cannot be denied because of protected activity.

The right to hire or not to hire is not an absolute right, and the Act makes very clear that it is not only miners but also applicants for employment who cannot be discriminated against because of protected activity. The fact that Dotson was seeking work as an applicant for employment rather than as a miner subject to rehire, does not alter the protections afforded him by Section 105(c) or the fact that he cannot be denied employment solely on the basis of protected activity.

Evidence regarding hiring practices by a new contractor-operator was in conflict. Dotson, who spoke from the perspective of a miner who had worked on the mountain and for several different contractor-operators, believed that it was just common sense for a new operator to hire the previous crew. As he pointed out, these are the people who know the mine best. Tr. I 145. Meeks' testimony supports by inference what Dotson believed. He stated that when he decided to shut down his operation at Mine No. 50 he told Calhoun that "there's a real good bunch of men working here" and that Calhoun replied "I want to get them all back to working." Tr. I 198. Like Dotson, Meeks struck me as an honest and forthright individual, and I believe his account of this conversation.

Donnie Meeks' testimony, also, supports Dotson's "common sense" theory of hiring. He stated that it would be advantageous to hire a roof bolting machine operator who was familiar with the roof conditions in the mine because such a person would be aware of the mine's particular roof problems. He believed this to be especially true of Mine No. 50, which had a roof fall problem. Tr I 243-244.

Flynn emphasized that in his experience he had never known of a situation wherein a new operator took all previous workers. Tr. I 65-66. I do not doubt this to be a fact and, indeed, Flynn supported his statement with several examples of situations in which few previous miners were hired. Tr. I 67-68. However, his testimony in this regard is not necessarily inconsistent with that of Dotson and Meeks. In the situations that he cited, Flynn did not explain why previous miners were or were not hired, and, obviously, there could be any number of reasons. Nor was Calhoun's testimony, necessarily, inconsistent with the essence of Dotson's and the Meeks'. Calhoun explained that the new operator will check with the previous operator and will hire some of the old employees but that he knew of no instance where 100 percent of the old employees were hired. Tr. II 164.

I do not understand Dotson and the Meeks' to have testified that when an operator goes out of business and another operator reopens the mine the new operator will hire all previous employees. Dotson himself could not think of such a situation. Tr. I 148. Rather, I understand them to have stated that it is common for most of the miners to be hired, as indeed happened at Mine No. 50, and I so find. Dotson's observation that the previous miners are the ones who know the mine best, Donnie Meek's correlating acknowledgement of roof control problems at Mine No. 50 and the advantages of hiring miners who know the roof, and Meek's statement to Calhoun that he had good men at the mine and Calhoun's response that he wanted to get all of them back to work, convince me that such was the practice.

That being the case, when a previous miner is not hired while virtually all his peers are, the motive for failing to hire the left-out miner must be explained. In other words, here, where Flynn's failure to hire Dotson represented a departure from the norm, the question is why?

The Respondents offer a business justification -- that Dotson applied for a roof bolting job, that there were two roof bolter positions available, that the positions were filled when Dotson applied, and that when one of the hired roof bolters unexpectedly did not show up for work, Flynn, on the recommendation of Donnie Meeks, hired someone other than Dotson.

I conclude that this justification is not established by the evidence and that it is pretextual. I have accepted Dotson's testimony that he called Flynn on August 14, and asked about a job and was told that Flynn would get back to him. I also accept his testimony that Flynn asked him what he could do and that Dotson told Flynn that he could do anything. Tr. I 128. (Flynn could not recall this telephone conversation. Tr. II 62.) I also believe that when Dotson went to the mine on Friday, August 16, he was asked about the jobs that he had held and that Dotson indicated that he had run a roof bolter. Tr. I 131. However, I do not believe that Dotson indicated to Flynn he was applying to work only as a roof bolter.¹² Such a statement would have been self-limiting and, as Dotson explained, he needed work. Rather, it seems likely that Dotson indicated that he would work, also, as a roof bolter. In any event, I accept Donnie Meeks testimony that he spoke with Flynn the day his father went out of business and gave Flynn a list of names of the miners and a list of all jobs that the men could do. Tr. 236. Thus, when Dotson and Flynn met on August 16, I believe that Flynn already knew that Dotson was not limited to operating a roof bolting machine, but, as Donnie Meeks explained that Dotson could do "anything else that needed to be done." Id.

Flynn maintained that when Shipley, one of the roof bolters he had hired, failed to report for work he selected Lawson over Dotson on the basis of Donnie Meek's recommendation that Lawson was the better roof bolter. Tr. II 60-61. However, I find the credibility of this assertion undermined by Flynn's failure to

¹² It is important to note that during the course of the testimony I was struck by Dotson's sincerity and lack of guile. While I found him to be unsophisticated and naive, I also found him to be truthful.

mentioned it to the MSHA investigator when he was asked why Dotson was not hired. It is afterall, the major reason why the Respondents now contend Dotson was refused employment.

As the Secretary rightly points out, Flynn ultimately hired all of the previous crew except Dotson and Johnson. See Sec. Br. 26-27. There was a legitimate business reason for not hiring Johnson. The record discloses none for refusing Dotson employment.

Therefore, accepting the premise that something must have motivated Flynn to deny Dotson employment, and the proffered reasons for the refusal having been eliminated by the evidence and the reasonable inferences drawn therefrom, the search for motive must continue by analyzing other actions of Calhoun and Flynn relating to Dotson. When these are reviewed, I believe the conclusion is inescapable that in refusing to hire Dotson, Flynn was responding to Calhoun's directive and was motivated, as was Calhoun, by Dotson's protected activity.

In the first place, I conclude the evidence establishes that Calhoun was seeking to "blacklist" Dotson because of his safety complaints to Stockwell and his, subsequent, discrimination complaint. As I have found, Dotson engaged in protected activity, and I believe, despite Calhoun's denials, that Calhoun was fully aware of that activity. The picture of Calhoun that emerged at trial was of a person actively interested and involved in the daily affairs of TCC's contractors as those affairs related to production. Calhoun explained the interest TCC had in the development and production of its contractor's mines (Tr. II 152-154) and this was especially true of Mine No. 50. See Tr. I 179-183; Tr. II 155-156 and 170. I think that it is fair to conclude that if a matter affected production, Calhoun knew of it.

It was Calhoun, afterall, who took the lead in resolving the strike at Mine No. 15, a resolution that allowed production to resume. It was Calhoun who told Flynn that he wanted Mine No. 50 to be a big producer of coal. Tr. II 82. Certainly, MSHA's "blitz" inspection at Mine No. 15, coming as it did, on the heels of the strike, and resulting in the issuing of notices and orders at the mine and eventually in criminal charges against Stockwell, impacted production and must have been known almost immediately to Calhoun. Calhoun stated that it was "unusual" that he did not

know of the inspection until his deposition was taken in April 1992. Tr. II 192. I find it more than unusual; I find it incredible. Tr. II 162. Quite simply, I believe that he knew about it, and knew soon after it happened.¹³

I also find incredible Calhoun's assertion that he did not know about the discrimination complaint Calhoun filed against Stockwell until the MSHA investigator took his statement regarding the present discrimination complaint. Tr. II 163. Again, the closeness of Calhoun's relationship with the daily operations of TCC's contractor-operators makes it permissible to infer, in my view, that Calhoun was well aware of Dotson's complaint.

Being aware of these activities, activities that potentially impinged upon the smooth operation of TCC's contractor, I conclude that Calhoun undertook to bar Dotson from employment on the mountain and that Flynn followed his lead. I believe that Calhoun's animosity toward Dotson because of his safety-related activities is shown by Calhoun's attempt to have Meeks "get rid of" Dotson and, by his offer, to arrange a meeting between Meeks and Stockwell so that Stockwell could tell Meeks "what kind of a man . . . Dotson was." Tr. I 193-194, 221.

Calhoun, of course, stated that although he mentioned Dotson to Meeks it was in the context of a response to Meek's question concerning who had been on the picket line at Mine No. 15. I do not discount the fact that if in fact this conversation occurred in close proximity to the strike, the subject of the strike may have arisen in the course of the Meeks-Calhoun conversation. It is logical that Meeks would have been interested in the strike. However, Calhoun's denial that he ever told Meeks to fire or to get rid of Dotson or told Meeks that Dotson was a troublemaker rings false when viewed in the context of what must have been Calhoun's animosity toward Dotson for his activities impinging upon production at Mine No. 15. Tr. II, 162, 166, 187-186.

¹³ Although, I believe that Calhoun knew of the MSHA inspection on February 6, 1991, at Mine No. 15; I do not believe that there is sufficient evidence of record to conclude that he knew Dotson requested the inspection. Dotson admitted his suspicions in this regard were simply -- suspicions. Tr. I 111-113. Moreover, the Mine Act would prevent MSHA's inspectors from divulging the name of a person requesting an inspection, and I assume, unless proof to the contrary is offered, that MSHA complies with the law it administers. (There is, of course, nothing that would have prevented Stockwell from telling Calhoun about Dotson's safety complaints to Stockwell and Dotson's discrimination complaint against Stockwell.) Still, Calhoun's denial of any knowledge of the inspection until he was deposed in April 1992 is patently incredible and, in my view, casts a long shadow over the credibility of the rest of his testimony.

Rather, I believe Meeks' version of what Calhoun said to him. As I have stated Meeks impressed me as an honest and forthright witness. At one time he impressed Calhoun too, for Calhoun testified that Meeks had a good reputation when he worked for TCC and that he had considered Meeks to be a reliable business partner for the corporation. Tr. II 173. Although, Meeks was, subsequently, involved in a legal dispute with TCC, at the time the Calhoun-Meeks conversations occurred, they appear to have been on good business terms and were working closely together.

Given the fact that I conclude the Meeks-Calhoun conversations occurred, essentially as Meeks reported them, and given the fact I also conclude that Calhoun was aware of Dotson's safety complaints and his discrimination complaint against Stockwell; there is no other logical explanation offered or suggested by the record for Calhoun's desire to have Meeks "get rid of" Dotson than Dotson's protected activity.

Further, I agree with counsel for the Secretary that Calhoun's urging that Meeks get rid of Dotson for engaging in protected activity supports an inference that he, likewise instructed Flynn not to hire Dotson. Sec. Br. 32. As the evidence establishes, Flynn was subject to Calhoun's influence and monitoring; and as I have found, his excuses for failing to hire Flynn are otherwise pretextual.

CONCLUSION

Accordingly, I conclude that Dotson has established that he engaged in activity protected under the Act when he complained to Stockwell regarding safety conditions at Mine No. 15 and when he filed a discrimination complaint against Stockwell. Further, I conclude that Calhoun knew of these activities and was motivated by them to have Dotson "blacklisted" -- i.e., to have him removed from his job by Meeks and, failing that, to have him denied employment by Flynn. I also conclude that Flynn and through Flynn, Lad, in denying Dotson employment, were acting at Calhoun's behest and were motivated by the same protected activities. Finally, I conclude that the proffered reasons for Flynn's failure to hire Dotson are pretextual and that the Respondents have not established that they were in no way motivated by Dotson's protected activity or that they were only motivated by unprotected activity on Dotson's part.

Therefore, I hold that in failing to hire Dotson, the Respondent's violated Section 105(c)(1) of the Act.

ORDER

Counsels for the parties ARE ORDERED to confer with each other during the next fifteen (15) days with respect to the remedies due Dotson, and they are encouraged to reach a mutually agreeable resolution of the matter. Any stipulations or agreements in this regard shall be filed with me within the next thirty (30) days. In discussing any back pay due Dotson, counsels are requested to keep in mind Dotson's testimony that subsequent to being denied employment at Mine No. 50, he was offered a job at Mine No. 30, and he declined to accept the offer. Tr I 134-137.

In the complaint of discrimination the Secretary requests "[a]n order assessing an appropriate civil penalty against Respondent . . . not to exceed \$50,000.00". This proposal, void as it is of any reference to the statutory civil penalty criteria, is equivalent to no proposal. Accordingly, Counsel for the Secretary IS ORDERED within ten (10) days to submit a penalty proposal supported by the Secretary's contentions with respect to the relevant statutory criteria set forth in Section 110(a) of the Act, 30 U.S.C. § 820(a), and counsel for the parties are requested to confer regarding this aspect of the case during their discussions with respect to the remedies due Dotson.

In the event counsels cannot agree regarding the remedies and proposed civil penalty, they are to notify me no later than the end of the referenced fifteen (15) day period. Counsels ARE FURTHER ORDERED at that time to state their specific areas of disagreement and if they believe that a further hearing may be required on the remedial aspects of this matter, to state that as well. Counsels may notify me orally, but the notification must be confirmed in writing that same day.

I retain jurisdiction in this matter until the remedial aspects of this case are resolved and finalized. Until such determinations are made and pending a finalized dispositive order, my decision in this matter is not final. In addition, payment of any civil penalty by the Respondents is held in abeyance pending a final dispositive order.

David F. Barbour
David F. Barbour
Administrative law Judge
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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APR 5 1993

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. SE 92-393
Petitioner	:	A.C. No. 40-02045-03574
v.	:	
	:	Docket No. SE 92-394
S & H MINING, INCORPORATED,	:	A.C. No. 40-02045-03575
Respondent	:	
	:	Docket No. SE 92-395
	:	A.C. No. 40-02045-03578
	:	
	:	S & H Mine No. 2
	:	

DECISION

Appearances: Darren L. Courtney, Esquire, Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for the Petitioner; Imogene A. King, Esquire, Frantz, McConnell and Seymour, Knoxville, Tennessee, for Respondent

Before: Judge Melick

These consolidated proceedings are before me upon the petitions for civil penalty filed by the Secretary of Labor pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801, et seq., the "Act," charging S & H Mining, Incorporated (S & H), with violations of mandatory standards. The general issue before me is whether S & H violated the cited standards and, if so, what is the appropriate civil penalty to be assessed.

Docket No. SE 92-393

During hearings the parties moved to settle Citation Nos. 3383498, 3383499 and 3382595 proposing a reduction in penalties from \$471 to \$250. I have considered the representations and documentation submitted in this case, including supplemental information filed post hearing, and I conclude that the proffered settlement is appropriate under the criteria set forth in Section 110(i) of the Act. An order directing payment of these penalties will be incorporated in the order accompanying this decision.

Citation No. 3382581 alleges a "significant and substantial" violation of the mandatory standard at 30 C.F.R. § 75.400 and charges as follows:

Wet loose coal and coal dust black in color was allowed to accumulate under the suspended conveyor beltline starting at the No. 4 belt tailpiece and continuing to the belt head drive for a distance of approximately 800 feet in depths from 1 inch to 6 inches deep.

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 materials, shall be cleaned up and not be permitted to accumulate in active workings, or on electric equipment therein."

M. J. Hughett, an inspector for the Mine Safety and Health Administration (MSHA), testified that he discovered during the course of his inspection of the S & H No. 7 Mine on April 14, 1992, coal and float coal dust 1 inch to 6 inches deep over the entire 800 foot length of the cited beltline. He testified that he had traveled the entire length of the beltline at that time and noted that some of the coal was wet and in areas where it was not wet it had been rock-dusted. However, according to Hughett, even where there was rock dust there was some dry coal dust on top of that rock dust in areas near the face. No one was observed cleaning up the material at the time of his inspection. Hughett also noted that a number of permissibility violations existed on electrical equipment then operating in the mine, including a 506 Bridge Carrier in the immediate vicinity of the cited coal dust.

Cecil Broadus, lead man on the belt at the time the citation was issued did not observe the inspection party travel the entire length of the beltline. He maintains that when the inspector observed the coal dust, he stated "I guess the whole belt line is like this." Broadus conceded, however, that coal dust indeed lay along the belt line some 1/2 inch to 3/4 inch thick along with egg-size lumps of coal. Broadus maintains that at the time of the citation he already had a man shoveling coal about 150 feet from where the inspector was standing.

Within this framework of evidence, including the undisputed evidence that at least 1/2 to 3/4 inches of coal dust and egg-sized lumps of coal lay along the beltline, I am satisfied that a violation of the cited standard has been proven as charged. The fact that some of the coal dust lay on top of rock dust that admittedly had been laid down the week

before also indicates that the coal dust may have been lying in the area for a significant period of time. I also note, however, the testimony of Mr. Broadus that at the time the inspector was issuing the citation he indeed already had assigned a cleanup man to work on the cited accumulation. Under the circumstances I find operator negligence to be only moderate.

In light of the existence, however, of impermissible electrical equipment operating in close proximity to the coal dust and loose coal, I find that the violation was clearly of high gravity and "significant and substantial." See Mathies Coal Company, 6 FMSHRC 1 (1984). It was indeed reasonably likely under the circumstances for reasonably serious injuries to occur to the men then working underground at the S & H Mine. Under the circumstances I find that the proposed penalty of \$157 is appropriate.

Docket No. SE 92-394

At hearing the parties moved for settlement of Citation Nos. 3382598 and 3382651 proposing a reduction in penalties from \$382 to \$100. I have considered the representations and documentation submitted in the case, including supplemental material submitted post hearing, and I conclude that the proffered settlement is appropriate under the criteria set forth in Section 110(i) of the Act. An order directing payment of the penalty will be incorporated in the order accompanying this decision. At hearing the Secretary also moved to vacate Citation No. 3382600 for lack of evidence. The motion was granted and accordingly Citation No. 3382600 is vacated.

Citation No. 3382647 alleges a "significant and substantial" violation of the standard at 30 C.F.R. § 75.203(b) and charges that "a sightline [sic] or others [sic] method of directional control shall be used to maintain the projected direction of the mining in the No. 1 and 5 entries on the 001 working section."

The cited standard provides that "a sightline or other method of directional control shall be used to maintain the projected direction of mining in entries, rooms, cross-cuts and pillar splits."

According to MSHA Inspector Hughett this citation was issued because the entries were not completely straight and that no spads or other method of directional control were found in the Nos. 1 and 5 entries. Hughett acknowledged finding spads in the Nos. 2, 3 and 4 entries and finding no violations of the roof control plan.

According to Paul Smith, an owner and president of S & H, directional control in the Nos. 2, 3 and 4 entries is obtained

by establishing a line with a transit and then marking that with spads in the roof. In the Nos. 1 and 5 entries 50 foot measurements are taken from the spads in the Nos. 2 and 4 entries and marked with either spray paint or chalk. According to Smith, the miner operator then lines up these marks to the face where an additional mark is made to insure that the mining is straight. Under this method, once the cut is made the chalk or paint on the face is obliterated. In addition, the marks on the roof may later be obscured by rock dusting. According to Smith, when the next cut is being prepared a new measurement and mark on the face is again made. Lonny Cardon, an employee of S & H, testified that he in fact measured and marked the sightlines for the Nos. 1 and 5 entries which were the subject of the instant citation.

Within this framework of evidence I conclude that no violation of the cited standard has occurred. The testimony of Smith and Cardon regarding the directional controls used in the Nos. 1 and 5 entries is undisputed. While this method of directional control may have resulted in some lack of precision and some irregularities in the entries there was admittedly no violation of the roof control plan and no apparent hazard.

In reaching this conclusion I have not disregarded the testimony of Inspector Hughett that he was unable to find chalk marks on the mine roof or at the face of the Nos. 1 and 5 entries. However this lack of observable evidence does not in itself lead to the conclusion that no directional control was being used. The credible evidence shows that such control is established when the continuous miner begins cutting coal and that the sightlines at the face will be obliterated by cutting the coal. Under the circumstances I do not find that the Secretary has sustained her burden of proving the violation as charged and Citation No. 3382647 must accordingly be vacated.

Citation No. 3382649 charges a "significant and substantial" violation of the standard at 30 C.F.R. § 75.1704 and alleges that "the No. 4 return air escapeway was not maintained in a manner that would permit miners to escape from the mine in that water has accumulated [sic] to a dept [sic] of 10 inches to 14 inches in the 11 crosscut of the No. 4 entry of first left."

The cited standard provides, in part, that "at least two separate and distinct travelable passageways which are maintained to insure passage at all times of any person, including disabled persons, and which are to be designated as escapeways, at least one of which is ventilated with intake air, shall be provided from each working section continuous to the surface escape drift opening, or continuous to the escape shaft or slope facilities to the surface, as appropriate, and shall be maintained in safe condition and properly marked."

The testimony of Inspector Hughett regarding this citation is not in dispute. According to Hughett, during the course of his inspection on April 16, 1992, in the No. 4 return air escapeway at the No. 11 crosscut of the No. 4 entry off first left, he and Mine Superintendent Charles White entered a section where the escapeway was obstructed by 10 to 14 inches of water. White slipped and fell in the water as he walked through it. Hughett opined that if someone was injured he would therefore have difficulty passing through this area. It was slippery and, according to Hughett, dangerous and would slow down the escape.

Charles White admitted that he had slipped in the water hole. He acknowledged that the floor sloped down into the hole and he had to bend to pass through it. He further admitted that it was "slick" under the water. He explained that the company tried to keep this area pumped out but on this occasion the pump had not been primed.

Within this framework of essentially undisputed evidence it is clear that the violation was committed as charged. I do not, however, find that the violation was "significant and substantial" or of significant gravity. The Secretary has failed to sustain his burden of proof in this regard. See Mathies Coal Company, supra. In particular, the Secretary has failed to sustain his burden of proving the third and fourth elements of the Mathies formula, i.e., the Secretary has failed to prove "a reasonable likelihood that the hazard contributed to will result in an injury and "a reasonable likelihood that the injury in question would be of a reasonably serious nature." Considering the absence of evidence regarding significant negligence and, I find that a civil penalty of \$180 is appropriate.

Citation No. 3382650 also charges a violation of the standard at 30 C.F.R. § 75.400 and alleges that "loose coal was allowed to accumulate in depth of 1 to 12 inches in the Nos. 1, 2 and 3 entries on the 001 section for a distance of 70 feet."

Inspector Hughett testified that he observed these conditions on the 14th and 15th of April but did not then issue a citation because the area was inaccessible while work was being performed on the continuous miner. However, when he observed on April 21 that these accumulations had still not been cleaned up after the miner had been repaired, he cited the condition. He observed that the dust was dry and only partially rock-dusted. According to Hughett the energized power cables in the vicinity could cause an ignition so the violation was therefore "significant and substantial." In regard to this finding the following colloquy ensued:

Q. [By Government Counsel] What is the danger that's associated with having that accumulated coal dust?

A. Catching fire and causing --- you know, it might cause combustible smoke and stuff like that there.

Q. Please be sure to articulate your sentences. What kind of --- is it reasonably likely that an injury would occur if there were a fire or explosion from this combustible material?

A. Yeah.

Q. And what kind of injuries could there be?

A. Could cause breathing or, you know, smoke accumulation this far down where you couldn't get out or anything of that nature.

Q. Could the injuries be fatal?

A. They could, yes.

(Tr. 104-105).

This testimony is simply too ambiguous to enable any finding that the Secretary has met her burden of proving that the violation herein was "significant and substantial." In addition, the fact that the inspector allowed the cited condition to exist for seven days before issuing a citation contradicts his finding that the violation was "significant and substantial." Based on evaluation of the criteria under Section 110(i) of the Act I find that a civil penalty of \$180 is appropriate.

Docket No. SE 92-395

At hearing, Petitioner filed a motion to approve a settlement agreement as to the one citation at issue in this docket. Respondent has agreed to pay the proposed penalty of \$50 in full. I have considered the representations and documentation submitted in this case, and I conclude that the proffered settlement is appropriate under the criteria set forth in Section 110(i) of the Act.

ORDER

Docket No. SE 92-393

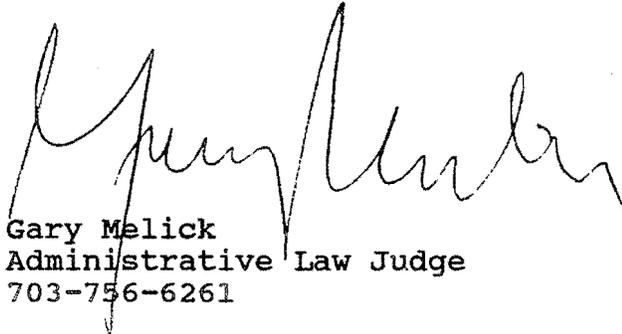
S & H Mining, Inc. is hereby directed to pay civil penalties of \$100, \$100, \$157, and \$50 for Citation Nos. 3383498, 3383499, 3382581 and 3382595, respectively.

Docket No. SE 92-394

Citation Nos. 3382600 and 3382647 are hereby vacated. S & H Mining Co., Inc. is hereby directed to pay civil penalties of \$50 each for Citation Nos. 3382598, 3382259, and 3382651. Citation Nos. 3382649 and 3382650 are affirmed but without "significant and substantial" findings and S & H Mining, Inc. is directed to pay civil penalties of \$180 for each of those violations.

Docket No. SE 92-395

S & H Mining Company is directed to pay civil penalties of \$50 for the violation charged in Citation No. 3382641.



Gary Melick
Administrative Law Judge
703-756-6261

Distribution:

Darren L. Courtney, Esq., Office of the Solicitor,
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/lh

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

APR 5 1993

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), :
Petitioner : Docket No. WEVA 92-986
v. : A.C. No. 46-05243-03624
: :
ONEIDA COAL COMPANY, INC., : Oneida No. 1 Mine
Respondent :
:

DECISION

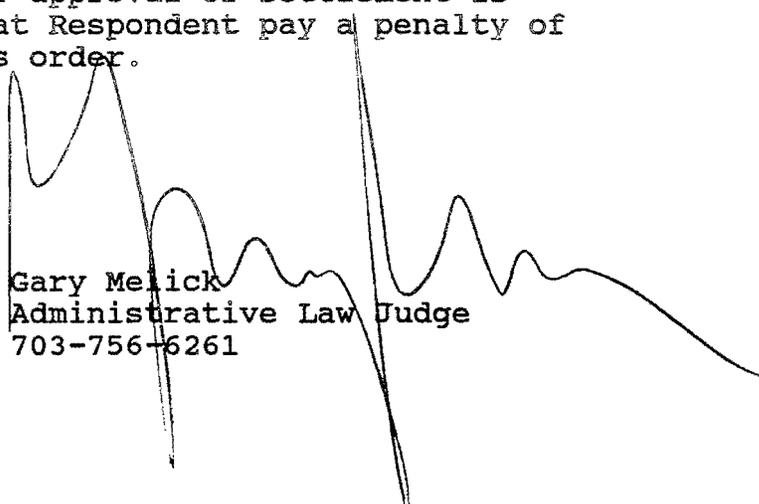
Appearances: Glenn M. Loos, Esquire, Office of the Solicitor,
U.S. Department of Labor, Arlington, Virginia,
for Petitioner;
W. Henry Lawrence, Esquire, Steptoe and Johnson,
Charleston, West Virginia, for Respondent

Before: Judge Melick

This case is before me upon a petition for assessment of civil penalty under Section 105(d) of the Federal Mine Safety and Health Act of 1977 (the Act). At hearings, Petitioner filed a motion to approve settlement agreement and to dismiss the case. Respondent has agreed to pay the proposed penalty of \$10,020 in full. I have considered the representations and documentation submitted in this case, including the addendum to the settlement agreement attached hereto as an appendix, 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 \$10,020 within 30 days of this order.

Gary Melick
Administrative Law Judge
703-756-6261



Distribution:

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(Certified Mail)

W. Henry Lawrence, IV., Esq., Steptoe and Johnson, Sixth Floor,
Union National Center East, P.O. Box 2190, Clarksburg, WV
26302-2190 (Certified Mail)

/lh

APPENDIX TO DECISION

UNITED STATES OF AMERICA
FEDERAL MINE SAFETY AND HEALTH REVIEW CORPORATION

LYNN MARTIN, Secretary of Labor,
United States Department of Labor,

Petitioner,

v.

ONEIDA COAL CO., INC.,

Respondent.

CIVIL PENALTY PROCEEDING

Docket No. WEVA 92-986

Assessment Control
No. 46-05243-03624

Mine: Oneida Mine No. 1

SOL No. 92-39276

ADDENDUM TO
JOINT MOTION FOR
APPROVAL OF SETTLEMENT

This day came the parties, by counsel, and represented to the Court that they have reached an agreement as to the issues in dispute herein whereby the Secretary agrees to modify its finding of negligence from "moderate" to "none" on Citation Number 330925 and to modify its finding of negligence from "moderate" to "no finding" on Citations Number 3110789 and 3110790 and whereby Oneida Coal Company, Inc. agrees to pay the penalty assessment. Wherefore, the parties hereby move the Court for approval of their settlement.

Dated this 2nd day of March, 1993.

W. Henry Lawrence IV
W. Henry Lawrence IV
Counsel for Respondent
Oneida Coal., Co., Inc.

Glen M. Loos
Glen M. Loos, Esquire
Department of Labor
4015 Wilson Boulevard, Room 516
Arlington, Virginia 22203
Counsel for Petitioner
Secretary of Labor

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FALLS CHURCH, VIRGINIA 22041

APR 6 1993

ERNIE L. SPAULDING, : DISCRIMINATION PROCEEDING
Complainant :
 :
v. : Docket No. WEVA 92-971-D
 :
 : HOPE CD 92-07
MADISON BRANCH MANAGEMENT, :
INC., :
Respondent :

DECISION

Appearances: Thomas L. Woolwine, Personnel Management
Consultants, Princeton, West Virginia, for
Respondent;
Ernie Spaulding, Pro Se.

Before: Judge Maurer

This case is before me based on a Complaint filed by Ernie Spaulding, alleging that he was discriminated against by Madison Branch Management, Inc., (Madison), in violation of section 105(c) of the Federal Mine Safety and Health Act of 1977, (the "Act"), 30 U.S.C. § 815(c). Pursuant to notice, the case was heard in Bluefield, West Virginia, on December 29, 1992. At the hearing, Mr. Ernie L. Spaulding appeared pro se and testified in his own behalf. David Collins also testified on behalf of complainant. At the conclusion of the complainant's case, respondent made a motion for summary decision, which I took under advisement at the time in order to hear their evidence. Messrs. Sturgill and Logan subsequently testified on behalf of respondent and were cross-examined by Mr. Spaulding. Finally, Mr. Spaulding made a closing statement on the record. Following that, I granted the respondent's motion for a summary decision.

Complainant, who has never worked for Madison, alleges basically that he was not hired to be a bulldozer operator at Madison in this instance because even though he professes to be "pretty good at it," he believes he was not given a fair tryout on the equipment. Furthermore, he believes that the reason for this "discrimination" was because of a previously poor work record with other employers when he was younger. He states he had a lot of "AWOLs" in those days, and thinks Madison might be aware of this along with the fact that he was a "union radical" in his previous coal mine employment. Madison's defense is essentially that they tried him out on the equipment and he performed poorly on the practical test.

As I explained to the parties at the beginning of this hearing (Tr. 15-16), in order to establish a case of discrimination under section 105(c) of the Act, the complainant 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 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 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 an 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 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). Cf. NLRB v. Transportation Management Corp., 462 U.S. 393, 397-413 (1983) (approving nearly identical test under National Labor Relations Act).

Complainant herein failed to demonstrate that he had engaged in any prior activity that would be considered "protected activity" under the Mine Act. Since this is a necessary element of any discrimination case, his case has failed of proof and must be dismissed.

ORDER

It is ORDERED that this case be DISMISSED.


Roy J. Maurer
Administrative Law Judge

Distribution:

Mr. Ernie Spaulding, 201 Meadow Road, Madison, WV 25130

Mr. Thomas L. Woolwine, Personnel Management Consultants,
P. O. Box 1389, Princeton, WV 24740-1389

dcp

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FALLS CHURCH, VIRGINIA 22041

APR 7 1993

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. PENN 92-523-M
Petitioner : A.C. No. 36-03161-05507
v. :
: Docket No. PENN 92-524-M
DELAWARE VALLEY LANDSCAPE : A.C. No. 36-03161-05506
INCORPORATED, :
Respondent : Delaware Valley Landscape
: Stone Inc.

DECISIONS

Appearances: Maureen A. Russo, Esq., Office of the Solicitor,
U.S. Department of Labor, Philadelphia,
Pennsylvania, for the Petitioner;
Jay H. Harsch, Esq., Eastburn and Gray,
Doylestown, Pennsylvania, for the Respondent.

Before: Judge Koutras

Statement of the Proceedings

These proceedings concern proposals for assessment of civil penalties filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a). Both cases concern alleged violations of mandatory safety standard 30 C.F.R. § 56.14131(a), which requires seat belts to be provided and worn in haulage trucks. Docket No. PENN 92-524-M, concerns a section 104(d)(1) "S&S" Citation No. 3866333, issued on December 10, 1991, by MSHA Inspector Elwood Frederick for the alleged failure of a haulage truck operator to wear a provided seat belt while hauling material at the respondent's mine site. Docket No. PENN 92-523-M, concerns a section 104(d)(1) "S&S" Order No. 3866334, issued by Inspector Frederick approximately one hour after the issuance of the citation on December 10, 1991. The inspector cited another haulage truck operator for not wearing the seat belt provided in his haulage truck while hauling material at the site.

The respondent filed timely notices of contests and answers denying the alleged violations and challenging the reasonableness of the proposed penalty assessments (\$600 in Docket No. PENN 92-524-M and \$500 in Docket No. PENN 92-523-M). The cases were consolidated for hearing in Allentown, Pennsylvania, on

March 11, 1993, and the parties appeared and participated fully therein, and they were given an opportunity to file posthearing briefs.

Issues

The issues presented are (1) whether the cited conditions or practices constitute violations of the cited standards; (2) whether the alleged violations were significant and substantial (S&S); (3) whether the alleged violations were the result of the respondent's unwarrantable failure to comply with the cited standards; and (4) the appropriate civil penalties to be assessed for the violations taking into account the civil penalty assessment criteria found in section 110(i) of the Act.

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(d)(1) and 110(1) of the Act.
3. 30 C.F.R. § 56.14131(a).
4. Commission Rules, 29 C.F.R. § 2700.1, et seq.

Stipulations

The parties stipulated to the following (Exhibit ALJ-1):

1. The respondent is a duly authorized Pennsylvania corporation and it is subject to the jurisdiction of the Act.
2. The presiding Administrative Law Judge has jurisdiction in these proceedings.
3. The subject order and citation were properly served by a duly authorized representative of the Secretary of Labor upon an agent of the respondent at the dates, times, and places stated therein, and may be admitted into evidence for the purpose of establishing their issuance, and not for the truthfulness or relevancy of any statements asserted therein.
4. The assessment of civil penalties in these proceedings will not affect the respondent's ability to continue in business.
5. The appropriateness of the penalties, if any, to the size of the business should be based on the fact that:

a. The respondent's company's annual production tonnage is 16,465 (small company);

b. The respondent's Delaware Valley Landscape Stone, Inc., Delaware Plant has an annual production of 5,846 tons (small plant).

6. The respondent was assessed a total of eight (8) violations during the 24 months preceding the issuance of the citation and order involved in these proceedings. (Exhibit G-K).

7. The parties stipulate to the authenticity of their exhibits but not to their relevance nor the truth of the matters asserted therein.

Discussion

In support of the alleged violations, the petitioner presented the testimony of Inspector Frederick. In its defense, the respondent presented the testimony of its plant manager and foreman, Clarence Pursell. According to the testimony, Mr. Pursell accompanied the inspector during his inspection on December 10, 1991, and the contested citation and order were served on Mr. Pursell. At the close of all of the testimony, the respondent's counsel presented closing arguments on the record (Tr. 138-142). Petitioner's counsel waived closing argument and opted to file a posthearing brief (Tr. 144). However, prior to the submission of any briefs the petitioner filed a motion pursuant to Commission Rule 30, 29 C.F.R. § 2700.30, seeking approval of a proposed settlement agreed to by the parties, the terms of which include an agreement by the respondent to pay civil penalty assessments of \$128, in settlement of each of the violations.

In support of the proposed settlement, the petitioner states that on the basis of the evidence presented during the hearing on March 11, 1993, the parties are in agreement that the respondent's negligence does not rise to the level of aggravated conduct required to support the inspector's unwarrantable failure findings. Under the circumstances, the parties are in agreement that the citation and order should be amended to section 104(a) citations, and that the remaining negligence and gravity findings made by the inspector will remain as issued. In addition, the parties state that the statutory civil penalty criteria found in section 110(i) of the Act have been considered, and they confirm that the violations were timely abated in good faith and that the respondent's history of eight prior citations does not include any seat belt violations.

Conclusion

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

ORDER

IT IS ORDERED THAT:

1. Docket No. PENN 92-523. The initial Section 104(d)(1) "S&S" Order No. 3866334, December 10, 1991, citing a violation of 30 C.F.R. § 56.14131(a), IS MODIFIED to a section 104(a) "S&S" citation, and the violation IS AFFIRMED. The respondent shall pay a civil penalty assessment of \$128, to MSHA within thirty (30) days of the date of this decision and order in satisfaction of the violation, and upon receipt of payment, this matter is dismissed.

2. Docket No. PENN 92-524. The initial Section 104(d)(1) "S&S" Citation No. 3866333, December 10, 1991, citing a violation of 30 C.F.R. § 56.14131(a), IS MODIFIED to a section 104(a) "S&S" citation, and the violation IS AFFIRMED. The respondent shall pay a civil penalty assessment of \$128, to MSHA within thirty (30) days of the date of this decision and order in satisfaction of the violation, and upon receipt of payment, this matter is dismissed.


George A. Koutras
Administrative Law Judge

Distribution:

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

Jay H. Karsch, Esq., Eastburn and Gray, 60 East Court Street, P.O. Box 1389, Doylestown, PA 18901-1389 (Certified Mail)

/ml

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FALLS CHURCH, VIRGINIA 22041

APR 7 1993

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. SE 92-335
Petitioner : A. C. No. 40-02666-03580
v. :
DOUBLE "B" MINING, INC., : Docket No. SE 92-336
Respondent : A. C. No. 40-02666-03581
: Mine No. 32

DECISION APPROVING SETTLEMENT

Appearances: Thomas A. Grooms, Esq., Office of the Solicitor,
U. S. Department of Labor, Nashville, Tennessee,
for the Secretary;
Ladue Bouldin, President, Double "B" Mining
Company, Inc., Tracy City, Tennessee, for
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, the parties
jointly moved to settle these cases based primarily on the
financial plight of the respondent on the following basis:

<u>CITATION NO.</u>	<u>PROPOSED ASSESSMENT</u>	<u>PROPOSED SETTLEMENT</u>
3396049	\$ 252	\$ 126
3396050	252	126
3396051	252	252
3396052	147	70
3369053	220	110
3396054	220	110
3396055	136	136
3396056	220	110
3396057	136	68
3396060	136	68
3396086	50	50
3396087	50	50
3396088	136	50
3396089	94	50

3396090	136	68
3396091	220	110
3396092	220	110
3396093	94	50
3396094	94	50
3396095	136	68
3396097	136	68
3396098	136	68
3396099	136	68
3396100	220	110
3530612	220	110
3530262	220	110
3530263	220	220
3530264	220	220
3530265	136	68
3530266	220	220
3530267	136	68
3530268	<u>220</u>	<u>220</u>

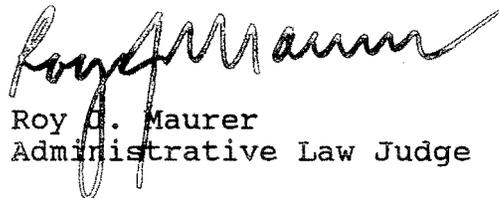
TOTAL

5421

3382

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 joint motion for approval of settlement is **GRANTED**, and it is **ORDERED** that respondent pay a total penalty of \$3382 within 30 days of this order.


 Roy G. Maurer
 Administrative Law Judge

Distribution:

Thomas A. Grooms, Esq., Office of the Solicitor, U. S. Department of Labor, 2002 Richard Jones Road, Suite B-201, Nashville, TN 37215, (Certified Mail)

Mr. LaDue Bouldin, President, Double "B" Mining, Inc., P. O. Box 280, Tracy City, TN 37387 (Certified Mail)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1244 SPEER BOULEVARD #280
DENVER, CO 80204-3582
(303) 844-5266/FAX (303) 844-5268

APR 9 1993

CYPRUS TONOPAH MINING CORPORATION, Contestant
v.
SECRETARY OF LABOR, MINE SAFETY AND HEALTH REVIEW ADMINISTRATION (MSHA), Respondent
CIVIL PENALTY PROCEEDING
Docket No. WEST 90-363-RM
Citation No. 3645243; 9/5/90
Docket No. WEST 90-364-RM
Citation No. 3459560; 9/5/90
Cyprus Tonopah Mine I.D. 26-02069
SECRETARY OF LABOR, MINE SAFETY AND HEALTH REVIEW ADMINISTRATION (MSHA), Petitioner,
v.
CYPRUS TONOPAH MINING CORP., Respondent

DECISION AFTER REMAND

Before: Judge Lasher

The Federal Mine Safety and Health Review Commission, in its Decision issued March 22, 1993, determined that the violation contained in Citation No. 3459560 did not, as I had previously held, result from Respondent's unwarrantable failure to comply with the pertinent safety standard and remanded the matter to me for recalculation of the penalty based on this change.

The penalty assessed in my original decision issued on September 23, 1991, was \$1,000.00. The basis for the Commission's determination that the violation was not the result of Respondent's unwarrantable failure is essentially set forth on page 11 of its decision.

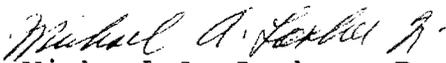
We also find significant the fact that on the day of Inspector Ellis's inspection, Cyprus was in the process of constructing a

larger berm at the base of the west wall. The Commission has previously recognized that an operator's pre-citation efforts in mitigating a violative condition are relevant in reviewing an unwarrantable failure determination. See, e.g., Utah Power and Light Co., 11 FMSHRC 1926, 1933 (October 1989).

Because Cyprus's conduct apparently resulted from a good faith, albeit mistaken, belief that its actions were in compliance with Section 56.3200, we conclude that substantial evidence does not support the Judge's finding that Cyprus's violation of 56.3200 was caused by its unwarrantable failure. See generally Utah Power and Light Co., 12 FMSHRC 965, 972 (May 1990).

It is found that Respondent was negligent, however, in permitting work and travel in the area where hazardous ground conditions existed until completion of the "corrective work" mentioned in the safety standard, i.e., the berm mentioned by the Commission was completed. See my Decision, fn. 22, 13 FMSHRC 1547.

Nevertheless, the elimination of the "unwarrantable failure" aspect of the violation stands in considerable mitigation of the culpability to be attributed and after consideration of this change and the other penalty assessment criteria previously ascertained, a penalty of \$500 is found appropriate and is here assessed.


Michael A. Lasher, Jr.
Administrative Law Judge

Distribution:

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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APR 9 1993

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 92-746
Petitioner	:	A.C. No. 46-05801-03618
v.	:	
	:	No. 21 Mine
TOP KAT MINING, INC.,	:	
W-P COAL COMPANY,	:	
Respondents	:	
	:	
BEAR RUN COAL, INC.,	:	
Successor-In-Interest	:	

DECISION

Appearances: Gretchen Lucken, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Petitioner;
Kurt A. Miller, Esq., Thorp, Reed and Armstrong, Pittsburgh, Pennsylvania, for Respondent W-P Coal Company;
No appearance on behalf of Top Kat Mining, Inc., or Bear Run Coal, Inc.

Before: Judge Melick

This case is before me upon the petition for civil penalty filed by the Secretary of Labor pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, at seq., the "Act", charging Top Kat Mining, Inc., (Top Kat) and W-P Coal Company (W-P) as mine operators and Bear Run Coal, Inc. (Bear Run) as a successor-in-interest with two safety violations at the No. 21 Mine and seeking civil penalties for those violations.¹ The Secretary's motion to withdraw Citation No. 3136609 was granted and, as the petition has been amended,

¹ This civil penalty case is one of at least 138 separate cases filed by the Secretary against W-P at the No. 21 Mine. Since the threshold issues presented herein are common to all of the cases this case was selected upon agreement of the parties to litigate those common issues as a "test case" and the others have been placed on stay pending final disposition of this case.

only one violation under the mandatory standard at 30 C.F.R. § 77.200 remains at issue.² At hearing the petitions for civil penalty against Top Kat and Bear Run were dismissed for failure to execute service on those parties. Accordingly, only the liability of W-P as an operator of the No. 21 Mine remains at issue.

Background

It is not disputed that during relevant times W-P was engaged in the business of purchasing coal from contract mining companies, processing that coal at a W-P preparation plant, and selling and distributing the coal to the Wheeling-Pittsburgh Steel Corporation. W-P's offices and its preparation plant are located in Logan County, West Virginia. These are its only facilities. W-P leases the mineral rights to six deep mines in Logan County and has contract mining agreements with five different contract mining companies. Under those agreements, the contract mining companies mine the coal in exchange for a royalty payment from W-P based on the amount of clean coal produced. This arrangement is common in southern West Virginia, where approximately 80 to 90 percent of all deep mines are operated on a contract-mining basis.

This case involves a deep mine known as the No. 21 Mine, located near Stirrat, West Virginia. W-P leases the mineral rights to that mine pursuant to a 1969 lease with the owner of the mine, Cole and Crane. W-P operated this mine from 1978 until January 1988, when it entered into a contract mining agreement with Deer Run. Deer Run terminated its contract with W-P in November 1989, and a new contract was awarded to Top Kat on December 29, 1989. There is no dispute that W-P and Top Kat are separate and distinct companies and have no common owners, officers, employers or facilities and there has been no interchange of employees between the companies.

The contract between W-P and Top Kat was a standard industry form. Under the contract, Top Kat agreed to assume complete control over the operation of the No. 21 Mine, including the hiring of miners and the administration of health and safety matters. W-P, in turn, agreed to pay Top Kat \$21.00 for each ton of clean coal produced. The contract further provided, in relevant part, as follows:

² This Citation, No. 3750647, was issued September 4, 1991, and alleges as follows:

"The No. 21 bathhouse facilities was [sic] not maintained in good repair to prevent accidents and injuries to employees in that there was an area of the bathhouse floor approximately 2-1/2 foot by 2-1/2 foot that was rotten and the wood was wet and weak (ready to collapse at any time)."

III(H). Owner and Contractor understand, agree and reaffirm and hereby covenant, each with the other, that in every respect in the performance of this Contract, Contractor shall stand in a relationship with Owner as that of an independent contractor and is in no manner a servant, agent, employee, shareholder, joint venturer or partner of Owner, and that this Contract shall be construed accordingly. Except as specified herein to the contract, Contractor shall do the work required hereby according to its own manner and methods, without the right of direction or supervision by Owner and Owner shall have the right to look to Contractor only for the results required and to be accomplished hereunder.

There is no dispute that W-P complied fully with all provisions of the contract throughout Top Kat's operation of the No. 21 Mine.

Under the contract, W-P also agreed to provide engineering services at the mine in exchange for a fee deducted from Top Kat's royalty payments. These engineering services, which W-P provides at all of its contract mines, included the preparation and updating of the mine map. Top Kat would indicate to W-P what section Top Kat wanted to mine and W-P engineers would then make projections for that particular area. This provision was included in the contract because, under the terms of its lease with Cole and Crane, W-P is required to submit mining projections and plans to them for their approval before mining. Similar provisions requiring the mine or mineral rights owner to provide engineering services are common in the contract mining industry. Pursuant to the contract, W-P's Chief Engineer, Joseph Dotson, and members of his engineering crew also visited the mine approximately once a week to set spads or update the mine map. The engineering crew did not direct Top Kat where to mine coal, other than in conformity with the mine projections.

Under the contract, W-P also permitted Top Kat to use W-P equipment located on the mine premises for a fee of \$1.50 per ton of coal produced. Effective in early 1990, W-P waived this fee because of the poor condition of the equipment and Top Kat's financial problems. W-P also loaned Top Kat \$75,000 for the purchase of a wage bond required by West Virginia law. In making that loan W-P required Top Kat to execute a security agreement and promissory note. W-P was reimbursed for that loan with interest, at the rate of \$6,000 per month.

W-P also permitted Top Kat to order supplies from its supply house deducting the cost of those supplies, plus a 10 percent service charge, from subsequent royalty payments.

W-P had an identical supply arrangement with all five of its contract miners. This type of supply house arrangement is also common in the contract mining industry.

During the period when Top Kat was the contract miner at the No. 21 Mine, W-P President Vernon Cornett recommended two persons to Top Kat for jobs as foremen. Top Kat was free however to accept or decline those recommendations. W-P management also telephoned Top Kat on a daily basis to ascertain production levels. If Top Kat was having production problems such problems would typically be reported during these calls. W-P President, Vernon Cornett, and W-P Safety Director, Mickey Senator, visited the mine infrequently, Cornett visiting approximately once a month to check the coal stockpile and Senator occasionally visiting to check on the roadways and mine maps.

During 1991, Top Kat began experiencing financial troubles. At the request of Top Kat's president, W-P advanced money to meet its payroll and other obligations. W-P recouped this money from Top Kat by deducting those advances from subsequent royalty payments.

During the time that Top Kat was the contract miner at the No. 21 Mine, MSHA conducted a number of health and safety inspections. MSHA never provided W-P with notice that an inspection was about to begin, did not invite W-P to participate in any inspection, did not invite W-P to participate in any pre-inspection conferences and cited only Top Kat as the operator of the mine. Moreover, the Secretary has never cited W-P for failing to register with MSHA as an operator of the No. 21 Mine.

During late 1990 and 1991, there was an increased number of MSHA inspections and Top Kat was issued an increased number of citations and orders. This resulted in decreased coal production. Apparently believing that the increased MSHA activity may have been caused by a personality conflict between MSHA and Top Kat, W-P Safety Director Mickey Senator requested a meeting between MSHA and Top Kat management in late 1990 or early 1991. Senator attended the meeting in an effort to resolve the apparent conflict.

Around February 1991, MSHA held meetings at the Logan Field Office with Top Kat representatives concerning the mine map and ventilation plan for the No. 21 Mine. W-P's engineer, Joseph Dotson and Mickey Senator, attended some of those meetings.

Around August 1991, Top Kat's President, William Adkins, requested that Cornett send Mickey Senator to accompany MSHA inspectors on the next inspection. Top Kat apparently made this request because Top Kat knew that Senator was experienced

with mine safety and health matters and with the local MSHA office. Cornett thereafter sent Senator to accompany MSHA inspectors and a Top Kat representative on an inspection on August 26 and 27, 1991. The inspection involved a shutdown of the belt lines. According to Senator, his role in the inspection was to observe the interaction between the MSHA and Top Kat representatives to determine whether a personality conflict was indeed the cause of the increased number of citations and orders, and to mediate any personality problem. Senator maintains that he understood that Top Kat was the sole operator of the No. 21 Mine and had sole responsibility for health and safety matters at the mine. He maintains that he therefore did not pay close attention to any health or safety violation cited during that inspection, nor did he take notes concerning those alleged violations. Moreover, he did not direct or advise Top Kat concerning abatement of the alleged violations.

Cornett, Senator and Dotson also visited the Logan Field Office on occasion to discuss the No. 21 Mine and the other mines to which W-P leased the mineral rights. The discussions as they pertained to the No. 21 Mine were general discussions concerning whether Top Kat was going to be able to mine coal. In contract mining situations, it is apparently common for representatives of the owner or lessee to meet with MSHA representatives.

On September 4, 1991, MSHA issued Citation No. 3750647 against Top Kat for allegedly having failed to maintain the flooring of a bathhouse at the No. 21 Mine, in alleged violation of 30 C.F.R. § 77.200. According to Tyrone Stepp, the issuing inspector, the bathhouse had "basically rotten, deteriorated floor." MSHA did not give W-P notice of the inspection, did not invite W-P to participate in the inspection, and did not invite W-P to attend the pre- or post- inspection conference.

In October 1991, Vernon Cornett met with William Adkins to discuss Top Kat's continued operation of the No. 21 Mine. Adkins informed Cornett that MSHA had put the No. 21 Mine on target status, and that Top Kat was shutting down the mine to deal with its health and safety problems. Cornett noted the production irregularities that Top Kat experienced over the preceding year, and further noted that Top Kat had been unable to resolve its problems with MSHA. Cornett then told Adkins that he, Cornett, did not see how Top Kat could continue to operate. Although W-P had the right to terminate the contract for Top Kat's failure to meet minimum production levels, W-P did not do so.

In late October 1991, Lawrence Fowler, the District Manager of the MSHA District Office covering the Logan Field Office, telephoned Noah Ooten, the MSHA Superintendent

responsible for the No. 21 Mine. In that conversation, Fowler instructed Ooten to modify the outstanding citations against Top Kat to name W-P as a "co-operator." After Fowler instructed Ooten to modify the citation, a representative of MSHA's collection office visited the Logan Field Office to search for records to support MSHA's theory of co-operator liability. The Solicitor's Office subsequently advised Ooten on the language the Logan Field Office should use in modifying the citation. Ooten then instructed his inspector to modify the citations.

MSHA modified the citation in this case, Citation No. 3750647, at 9:32 a.m. on November 14, 1991, more than a month after Top Kat had ceased operations. Approximately one hour later, and without having served W-P with the modified citation, MSHA issued Order No. 3742534 against W-P for allegedly having failed to abate Citation No. 3750647. At approximately 1:00 p.m. on November 14, 1991, MSHA served W-P with the modification of Citation No. 3750647. and Order No. 3742534.

Before the modifications, MSHA did not notify W-P that W-P was considered to be a "co-operator" of the No. 21 Mine nor that it would seek to hold W-P liable for safety and health violations at the No. 21 Mine.

Analysis

A preliminary issue raised in this case is whether W-P was an "operator" within the meaning of the Act. The term "operator" is defined in Section 3(d) of the Act as any "owner, lessee, or other person who operates, controls, or supervises a coal or other mine ...". Since there is no dispute that W-P was an "owner" and "lessee" of the subject mine, W-P was therefore an "operator" and subject to liability for violations committed by its contractors at this mine. Harman Mining Corporation v. Federal Mine Safety and Health Review Commission, 671 F.2d 794 (4th Cir. 1981), Secretary v. Calvin Black Enterprises, 7 FMSHRC 1151 (1985), Secretary v. Phillips Uranium Corp., 4 FMSHRC 549 (1982). See also Bituminous Coal Operators' Assoc., Inc. v. Secretary of Interior, 547 F.2d 240 (4th Cir. 1977), similarly construing provisions of Section 3(d) of the Federal Coal Mine Health and Safety Act of 1969 identical to those of Section 3(d) at issue herein. W-P's position, with which the Secretary is in agreement, that a mine owner or lessee can be liable as an "operator" only if the facts establish the exercise of control or supervision over the operation of the mine is therefore erroneous as a matter of law. In this case the Secretary also maintains that W-P is liable as a "co-operator" based on the alleged control and supervision it exercised at the mine. The term "co-operator" is not defined in the Act, however, and any liability on the part of W-P in this case must rest upon a finding that it was an "operator" under Section 3(d) of the Act.

W-P next argues that the Secretary's decision in this case to proceed against W-P was not consistent with the purposes of the Act and that the citation must be vacated under the principles set forth in Phillips Uranium, *supra*, at 551-553. In the Phillips case the Commission reaffirmed the principles enunciated in Old Ben Coal Co., 1 FMSHRC 1480 (1979) that in choosing the entity against whom to proceed, the Secretary should look to such factors as the size and mining experience of the independent contractor, which parties contributed to the violation, and the party in the best position to eliminate the hazard and prevent it from recurring. 4 FMSHRC at 552-53. The Commission stated in Phillips that a Secretarial decision grounded solely on considerations of "administrative convenience" rather than the protective purposes of the Act could not be approved. See also Secretary v. Calvin Black Enterprises, *supra*.

Applying these principles to the present case, I find that the Secretary has failed to establish that he has proceeded against W-P in this case on anything other than administrative convenience in an attempt to collect civil penalties from a "deeper pocket." Indeed, the Secretary readily acknowledges that one reason for selecting W-P for prosecution herein apparently after discovery that the contractor could not pay the civil penalties was W-P's "resources." Beyond that the Secretary has essentially refused to reveal the reasoning, if any, behind his selection of W-P for prosecution citing a "deliberative process" privilege. The result is that there is no evidence that the Secretary considered the factors enunciated in the Phillips decision.

Moreover, what little evidence there is in this case suggests that, under the Phillips criteria, W-P was not the appropriate entity to proceed against. Top Kat was clearly in charge of the day-to-day mining activities and because only Top Kat had crews of working miners at the mine during relevant times it may reasonably be inferred that it was the primary contributor to the violative condition, that it was in the best position to eliminate the hazard, and that it was best prepared to prevent it from recurring. Finally, it was Top Kat's employees who were primarily exposed to the cited hazard. While the Secretary also argues that W-P exercised co-equal supervision over the mining activities the facts do not support this argument.

The limited evidence that is available demonstrates moreover that the decision to select W-P for prosecution was in fact based on administrative convenience. For example MSHA did not cite W-P until after Top Kat ceased operations and was no longer in business. Moreover MSHA inspectors were at the No. 21 Mine frequently during 1990 and 1991, at which time they had ample opportunity to observe the relationship between Top Kat and W-P.

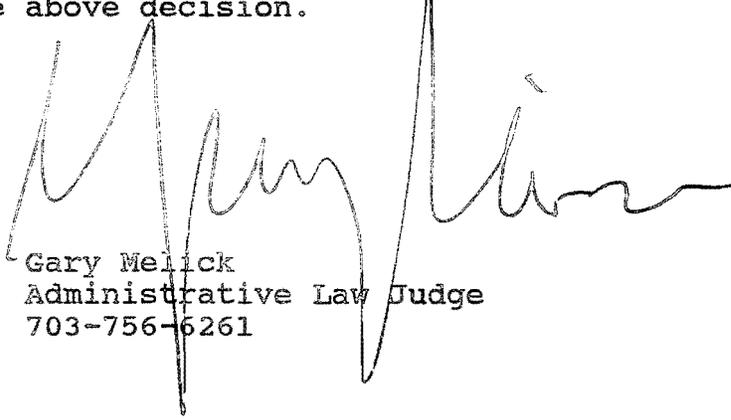
If citing W-P for violations at the No. 21 Mine would in fact have promoted the health and safety of miners, MSHA should have cited W-P at the time of the alleged violations.

In addition, Noah Ooten from MSHA's Logan Field Office testified that, after Top Kat ceased operations, a representative of MSHA's Mount Hope District Office advised him that MSHA would be modifying the outstanding citations against Top Kat to name W-P as a "co-operator." According to Ooten, a representative of MSHA's collection agency subsequently visited the Logan Field Office to search for evidence to justify citing W-P as a "co-operator." The decision was also made by MSHA's Office of Assessments and was made before the Secretary's investigation into the facts which he now contends support W-P's liability.

It may reasonably be inferred from these facts that the Secretary's motivation in citing W-P was therefore primarily to obtain a "deep pocket" to ensure collection of penalties. The idea that the purpose of charging W-P was to advance the health and safety interests of miners appears to have been only an afterthought not consistent with the actual sequence of events. Under the circumstances I find that the Secretary has not complied with the criteria set forth in Phillips Uranium, and this case must accordingly be dismissed. In light of this determination there is no need to decide whether the citations in this case could have been otherwise legally amended within the framework of Wyoming Fuel Company, 14 FMSHRC 1282 (1992).

ORDER

The civil penalty proceedings in Docket No. WEVA 92-746 are hereby dismissed as against Top Kat Mining, Inc., and Bear Run Coal, Inc., for failure to execute service. Furthermore, Citation No. 3750647 and Order No. 3742534 are vacated and these civil penalty proceedings are dismissed against W-P Coal Company for the reasons stated in the above decision.



Gary Melick
Administrative Law Judge
703-756-6261

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

APR 9 1993

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 92-219-M
Petitioner	:	A.C. No. 41-03717-05501
v.	:	
	:	Blum Quarry
ARROW CRUSHED STONE, INC.,	:	
Respondent	:	

DECISION

Appearances: Nancy Carpentier, Esquire, Office of the Solicitor, U.S. Department of Labor, Dallas, Texas, for Petitioner; Suzanne Arnold, President, Arrow Crushed Stone, Inc. and John Whitehorn, Vice-President, Arrow Crushed Stone, Inc., for Respondent

Before: Judge Melick

This case is before me upon the petition for assessment of civil penalty filed by the Secretary of Labor pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, et seq., the "Act" charging Arrow Crushed Stone, Inc. (Arrow) with 15 violations of mandatory standards and seeking civil penalties of \$1,107 for those violations.

During hearings Petitioner submitted a motion for settlement with respect to all citations, except Citation No. 4108051, seeking a reduction in penalties from \$924 to \$462 and seeking to remove the "significant and substantial" classification from Citation Nos. 3609050, 3690951, 360952, 3609056 and 360959. The motion was supplemented posthearing and was thereafter approved. An order approving the settlement and directing appropriate payment follows at the conclusion of this decision.

The one citation remaining at issue, Citation No. 4108051, alleges a "significant and substantial" violation of the standard at 30 C.F.R. § 56.14101(a)(1) and charges as follows:

On inspection the primary brakes on the Terex 72-51B front-end loader were not capable of stopping or holding the equipment stationary

on the incline ramp, primary feed hopper. The loader work area and practice typically to feed primary, will operate in the plant area with observed foot traffic.

The cited standard provides, in relevant part, as follows:

Self-propelled mobile equipment shall be equipped with a service brake system capable of stopping and holding the equipment with its typical load on the maximum grade it travels.

Mike A. Davis, an inspector for the Mine Safety and Health Administration (MSHA) testified that during the course of his inspection of the Arrow operation on March 31, 1992, and upon examination of the cited front-end loader, he observed at the right front wheel what he believed to be a brake fluid leak. As a result of this observation Davis performed a "standing brake test" on the loader. The loader was backed up the 100 foot long ramp, graded from zero to 4 feet and Inspector Davis signaled the equipment operator to stop. The loader failed to stop. The test was repeated and again the loader failed to stop. According to Davis, during the tests the bucket was unloaded and held off the ground 1 to 2 feet. The loader operator, Pueblo Villasano, also told Davis that he had applied the brakes during the tests but they would not hold.

Davis concluded on the basis of these tests that the cited standard had been violated. Davis further concluded that the violation constituted a serious hazard. He testified that the primary hopper into which the front end loader unloaded is adjacent to the haul road on which there was pedestrian traffic and light duty vehicles. Indeed, at the time he cited the condition he observed three persons on the ground. The violation was further aggravated by the absence of any berm on the ramp, the fact that the operator did not wear a seat belt and that there was no operable backup alarm nor operable horn on the cited loader. The loader was also large in size and according to Davis could cause serious damage to a light duty vehicle such as a pickup truck. Under the circumstances Davis concluded that it was highly likely for injuries to occur and that those injuries could be fatal.

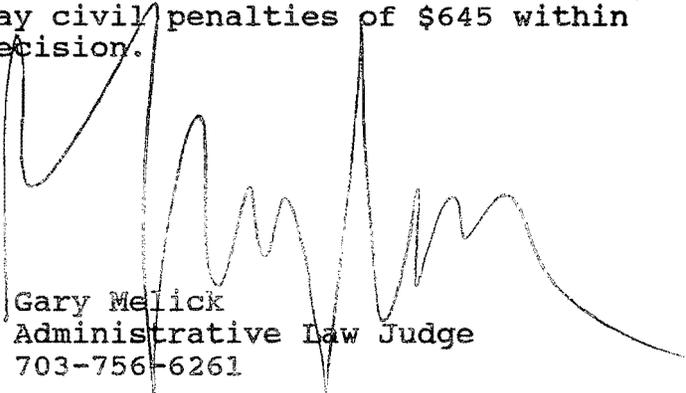
There is no direct evidence in this case to contradict Inspector Davis' observations. Arrow Vice President John Whitehorn testified that the loader operator subsequently advised him that he had told the inspector that he had in fact inspected the front end loader that morning and that it had been working fine at that time. Whitehorn also testified that typically the loader is used in reverse when backing

down the ramp to the primary hopper and therefore the test performed by Inspector Davis was not a true indication of how the brakes would perform in reverse.

I have evaluated the testimony of Mr. Whitehorn but do not find that it contradicts the testimony of Inspector Davis in essential respects. I find accordingly that the violation was "significant and substantial." See Secretary v. Mathies Coal Co., 6 FMSHRC 1 (1984). I do however credit the hearsay reports of the loader operator that there were no problems when he inspected the front-end loader earlier that morning and that it had been working fine at that time. This evidence suggests that the brake condition may very well have deteriorated during the course of operations during the morning and had not been noticed by the loader operator until the brake tests. Under the circumstances I find the operator chargeable with little negligence. Considering all the criteria under Section 110(i) of the Act I find that the proposed penalty of \$183 is appropriate.

ORDER

Citation No. 4108051 is AFFIRMED with its "significant and substantial" findings. The "significant and substantial" findings with respect to Citation Nos. 3609050, 360951, 3609052, 3609056 and 3609059 are deleted. Arrow Crushed Stone, Inc., is hereby directed to pay civil penalties of \$645 within 30 days of the date of this decision.



Gary Melick
Administrative Law Judge
703-756-6261

Distribution:

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Suzanne Arnold, President, John Whitehorn, Vice-President,
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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 12 1993

ROY FARMER and OTHERS, : COMPENSATION PROCEEDINGS
Complainants :
v. : Docket No. VA 91-56-C
ISLAND CREEK COAL COMPANY, :
Respondent : Docket No. VA 91-57-C
: VP-3 Mine

ORDER OF DISMISSAL

Before: Judge Koutras

Statement of the Proceedings

These proceedings concern complaints for compensation filed by the complainants against the respondent pursuant to section 111 of the Federal Mine Safety and Health Act of 1977. In Docket No. VA 91-56-C, the complaining miners claimed compensation for the time they were idled as a result of a section 107(a) Imminent Danger Order No. 3354742, issued by MSHA Inspector Arnold D. Carico on December 5, 1990. The inspector also issued a simultaneous section 104(a) Citation No. 3354743, citing an alleged violation of mandatory safety standard 30 C.F.R. § 75.316, in conjunction with the imminent danger order.

In Docket No. VA 91-57-C, the complaining miners claimed compensation for the time they were idled as a result of a section 107(a) Imminent Danger Order No. 3508496, issued by MSHA Inspector Claudy J. Scamell on December 13, 1990. Contrary to the assertion made by the complainants in their complaint, I find no evidence that the order issued by inspector Scamell on December 13, 1990, was accompanied by a section 104(a) citation.

On April 3, 1991, I issued decisions in Island Creek Coal Company v. Secretary of Labor (MSHA) and UMWA District 28, Local 1640, Docket Nos. VA 91-47-R, VA 91-48-R, and VA 91-49-R, vacating the aforementioned imminent danger orders and citation which gave rise to the instant compensation claims. 13 FMSHRC 592 (April 1991). The Secretary and the UMWA filed appeals with the Commission, and the compensation claims were stayed pending the Commission's review and decision. Thereafter, on March 3, 1993, the Commission rendered its decision affirming my decisions vacating the imminent danger orders and citation. Under the circumstances, I issued an Order to Show Cause on

March 16, 1993, ordering the parties to state why the previously issued stay should not be lifted and the compensation claims dismissed as a result of the Commission's decision. The parties were ordered to respond to my show-cause order within ten (10) days of its receipt.

Discussion

My show-cause order was served on the parties by certified mail. The return postal receipts reflects that the order was delivered to the respondent's counsel on March 22, 1993, and to the complainant's representative on March 23, 1993. On March 25, 1993, the respondent's counsel informed me by telephone that the respondent does not oppose the lifting of the stay and the dismissal of these claims, and that the respondent does not wish to respond further.

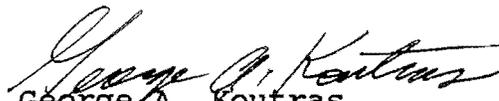
The complainant's representative of record (Roy Farmer) has not responded to my show-cause order, nor has he communicated with me further in this regard. Commission Rule 63(a), 29 C.F.R. § 2700.63(a), provides as follows:

(a) Generally. When a party fails to comply with an order of a judge or these rules, an order to show cause shall be directed to the party before the entry of any order of default or dismissal.

I have on several occasions in the past furnished Mr. Farmer (at his request) with copies of the Commission's procedural rules in several Island Creek civil penalty proceedings in which Mr. Farmer was granted party status as the representative of miners. Under the circumstances, I have no reason to believe that Mr. Farmer is ignorant of the rules. Accordingly, I conclude and find that the compensation claims should be dismissed because of the complainants' failure to respond to my Order.

ORDER

The previous stays ARE LIFTED. The compensation claims ARE DENIED, and these matters ARE DISMISSED.


George A. Koutras
Administrative Law Judge

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Marshall S. Peace, Esq., 201 West Vine Street, Lexington, KY 40507 (Certified Mail)

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APR 13 1993

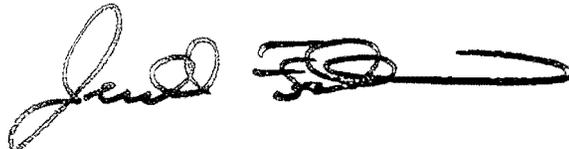
SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION on behalf,	:	Docket No. KENT 93-1-D
of Samuel Coble,	:	A.C. No. MADI CD 92-02
Petitioner	:	
v.	:	Foxfire Mine
	:	
CHRISTIAN COAL CORPORATION,	:	
Respondent	:	

ORDER APPROVING SETTLEMENT

Before: Judge Feldman

This case is before me as a result of the above captioned complaint filed under Section 105(d) of the Federal Mine Safety and Health Act of 1977. The parties now seek my approval of their joint motion for settlement of this matter. The substance of their proposed resolution is that the respondent, without admitting that any discriminatory act occurred, has agreed to pay the complainant the sum of \$5,000. In return, the complainant has agreed to request dismissal of his complaint. In addition, the respondent has agreed to pay a civil penalty of \$200.

I have considered the information provided in support of the parties' motion and I conclude that the proffered settlement should be approved. Accordingly, the motion for the approval of settlement **IS GRANTED** and **IT IS ORDERED** that the respondent make payment of the sums noted above within 30 days of the date of this order. **IT IS FURTHER ORDERED** that upon receipt of payment, Samuel Coble's complaint in this matter **IS DISMISSED WITH PREJUDICE**.



Jerold Feldman
Administrative Law Judge
(703) 756-5233

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

APR 13 1993

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. PENN 92-771
Petitioner	:	A.C. No. 36-04175-03569R
	:	
v.	:	Robena Prep Plant
	:	
CONSOLIDATION COAL COMPANY,	:	
Respondent	:	

DECISION APPROVING SETTLEMENT
ORDER TO MODIFY
ORDER TO PAY

Before: Judge Merlin

The above-captioned case was the subject of an extensive conference call between the undersigned and counsel for both parties. The Solicitor subsequently filed a motion to approve settlement of the one violation involved in this case. The originally assessed penalty was \$227 and the proposed settlement is for \$175.

Citation No. 3691596 was issued for a violation of 30 C.F.R. § 71.402(a) because the bathroom on the first floor of the prep plant was not maintained in sanitary condition. The Solicitor requests that the citation be modified to reduce the likelihood of injury from reasonably likely to unlikely and to delete the significant and substantial designation. The Solicitor advised at the conference call that after further investigation, the amount and location of the accumulation of dirt and mud would not support a finding that an injury was reasonably likely.

I have considered the representations and documentation submitted in this case along with the discussions in the conference call, and I conclude that the proffered settlement is appropriate under the criteria set forth in section 110(i) of the Act.

In light of the foregoing, the motion for approval of settlement is **GRANTED**.

It is **ORDERED** that Citation No. 3691596 be **MODIFIED** to reduce the likelihood of injury from reasonably likely to unlikely and to delete the significant and substantial designation.

It is further ORDERED that the operator pay a penalty of \$175 within 30 days of the date of this decision.

A handwritten signature in black ink that reads "Paul Merlin". The signature is written in a cursive style with a large, sweeping initial "P".

Paul Merlin
Chief Administrative Law Judge

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Daniel E. Rogers, Esq., Consol Inc., Consol Plaza, 1800 Washington Road, Pittsburgh, PA 15241

gl/

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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DENVER, CO 80204-3582
(303) 844-5266/FAX (303) 844-5268

APR 16 1993

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 92-202-M
Petitioner	:	A.C. No. 03-01475-05526
	:	
	:	Docket No. CENT 92-204-M
v.	:	A.C. No. 03-01475-05528
	:	
	:	Docket No. CENT 92-205-M
LITTLE ROCK QUARRY COMPANY,	:	A.C. No. 03-01475-05529
INCORPORATED,	:	
Respondent	:	De Roche Creek Quarry

DECISION ON REMAND

Before: Judge Lasher

On January 15, 1993, I issued a Decision and Order of Dismissal as a result of the Secretary's failure to show good cause for failure to comply with a prehearing order. A brief history of events is in order.

As the Commission noted in its remand of February 22, 1993, the Secretary requested reconsideration on January 27, 1993, indicating that the parties had "informally settled" the case on January 12, 1993, three days prior to the Dismissal Order.¹ The Commission determined that my jurisdiction terminated with the issuance of the Dismissal Order on January 15, 1993, and treated the Secretary's Motion for Reconsideration as a timely petition for discretionary review thereof, and to afford the Secretary the opportunity to present his position to me, vacated the Dismissal Order, and remanded the matter for such action as I deem appropriate. In compliance therewith, by Order dated March 2, 1993, I gave the Secretary until April 2, 1993, to file his position in writing with me.

¹ By Order dated February 10, 1993, I did deny the Secretary's motion for reconsideration noting that at the time the parties informally settled the matter on January 12, 1993, it was unknown to Respondent that the Secretary had not complied with an Order to Show Cause I had issued, nor with a subsequent Order. Respondent indicates that had it been in possession of all the facts, it would in all probability have declined the Secretary's offer of settlement, an allegation which I noted in My Order Denying Motion for Reconsideration.

On April 1, 1993, the Secretary filed a "Response to the Order of March 2, 1993, Related to the Dismissal for Want of Prosecution and Response to Respondent's Renewed Motion for Dismissal." In that it overlooks much of the history of non-compliance by Petitioner, including the fact that it was put on notice to take responsive action by written motions to dismiss for its non-compliance by Respondent on October 19, 1992, and November 13, 1992, a letter dated November 25, 1992, indicating Petitioner had not communicated with Respondent, and Orders of various sorts from me dated October 20, 1992, December 3, 1992, and December 11, 1992, this "Response" does not contain an accurate depiction of events which led to the dismissal of the three dockets in question. Further, Petitioner's explanation² that it was a "scheduling oversight," etc., does not explain away the failure to discharge the responsibility raised by repeated prompting from both this Judge and Respondent over the period of time involved from the issuance of the pre-hearing order on September 14, 1992, to December 3, 1992, when the Order to Show Cause issued.³ In short, Petitioner did not establish good cause for its lengthy non-compliance even though repeatedly urged and prompted to do so.⁴

Petitioner also argues that "... this case has been settled," and that Petitioner has not received any indication from Respondent that Respondent was not agreeable to the settlement proposal. This argument does not appear valid. As I previously pointed out,⁵

² In its Response to Order to Show Cause dated December 16, 1992.

³ As the Order to Show Cause indicated, Petitioner was required to show good cause at that "point in time" why it should not be deemed to have abandoned its prosecution of this matter. Petitioner's allegations in its April 1, 1993, Response regarding its compliance, which I do not concur in, are in any event untimely, and should have been made in response to the Order to Show Cause.

⁴ The importance to the Commission's ability to function and process proceedings to require at least minimal feedback from counsel was described in my Decision and Order Dismissing Proceeding and will not be repeated here. Nevertheless, it is believed the particular counsel involved is capable and conscientious and it is hoped that whatever circumstances were developing which led to the happenings here have been alleviated. The rights of the Respondent must also be considered.

⁵ Order Denying Motion for Reconsideration dated February 1993. Although my jurisdiction to issue such had terminated, this part of the reasoning therefrom appears applicable.

"In its Answer opposing Petitioner's Motion for Reconsideration, Respondent alleges:

9. Unknown to Respondent, however, at the time of such agreement to compromise, was the fact that Petitioner had not complied with the Order to Show Cause nor with the subsequent Order of 11 December 1992.
10. Superior knowledge was had by Petitioner on 11 January 1993 at the time of its telephone call to Respondent initiating its offer to compromise in the sum of \$760.00, that it had failed to comply with the Court's Order.
11. Had Respondent been in possession of such knowledge, it in all probability, would have declined Petitioner's offer"

Under the circumstances, it would be unreasonable to infer that the settlement, oral to begin with, would have proceeded had the facts and procedural posture of the case been known to Respondent.

I conclude that Petitioner's position lacks merit, such is **DENIED**, and my Decision and Order Dismissing Proceeding dated January 15, 1993, is **AFFIRMED**.

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

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APR 16 1993

FRED L. PETERS, : DISCRIMINATION PROCEEDING
Complainant :
 :
v. : Docket No. WEST 92-311-D
 :
 : DENV DC 91-02
 :
TWENTYMILE COAL COMPANY, :
DARYL FIRESTONE and :
CYPRUS MINERALS COMPANY, :
Respondents :

DECISION

Appearances: Patricia Jo Stone, Esq., Lakewood, Colorado,
for Complainant;
Stanley R. Geary, Esq., Pittsburgh, Pennsylvania,
for Respondents.

Before: Judge Morris

This case involves a discrimination complaint filed by Fred L. Peters against Respondents Twentymile Coal Company, Daryl Firestone and Cyprus Minerals Company, pursuant to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., (the "Act").

A hearing commenced in Denver, Colorado, on December 8, 1991. The parties filed post-trial briefs.

Section 105(c)(1) of the Act provides, in part, as follows:

No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, 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 for employment has instituted or caused to be instituted any proceedings 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.

APPLICABLE CASE LAW

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. Consolidated Coal Co. v. Marshall, 663 F2d 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 F2d 639, 642 (4th Cir. 1987); Donovan v. Stafford Constr. Co., 732 F2d 954, 958-59 (D.C. Cir. 1984); Boich v. FMSHRC, 719 F2d 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.)

Secretary on behalf of Chacon v. Phelps Dodge Corp., 3 FMSHRC 2508, 2510-11 (November 1981), rev'd on other grounds sub nom., Donovan v. Phelps Dodge Corp., 709 F.2d 86 (D.C. Cir. 1983); Sammons v. Mine Services Co., 6 FMSHRC 1391, 1398-99 (June 1984). As the Eighth Circuit analogously stated with regard to discrimination cases arising under the National Labor Relations Act in NLRB v. Melrose Processing Co., 351 F.2d 693, 698 (8th Cir. 1965):

It would indeed be the unusual case in which the link between the discharge and the (protected) activity could be supplied exclusively by direct evidence. Intent is subjective and in many cases the discrimination can be proven only by the use of circumstantial evidence. Furthermore, the (NLRB) is free to draw any reasonable inferences.

Circumstantial indicia of discriminatory intent by a mine operator against a complaining miner include the following: knowledge by the operator of the miner's protected activities; hostility towards the miner because of his protected activity; coincidence in time between the protected activity and the adverse action complained of; and disparate treatment of the complaining miner by the operator.

In Bradley v. Belva Coal Company, 4 FMSHRC 982, 993 (June 1982), the Commission stated as follows:

As we emphasized in Pasula, and recently re-emphasized in Chacon, the operator must prove that it would have disciplined the miner anyway for the unprotected activity alone. Ordinarily, an operator can attempt to demonstrate this by showing, for example, past discipline consistent with that meted to the alleged discriminatee, the miner's unsatisfactory past work record, prior warning 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.

SUMMARY OF THE EVIDENCE

BACKGROUND

FRED L. PETERS of Steamboat, Colorado, presently works in the electrical department of Twentymile Coal Company. He is working under temporary status and he has been there for over three years.

Mr. Peters has been a production foreman, a longwall utility foreman (hourly), and a shuttle car operator. Prior to his employment at Twentymile he was a mine superintendent for Western Fuels for over five years as well as a surface superintendent. He has also served as a fire boss for Mid-Continent Resources.

In addition, he has worked in southwestern Pennsylvania. He has been a miner since 1971 and is familiar with MSHA's operations.

In the spring of 1991 Mr. Peters (sometimes called Fred) was working as a shuttle car operator for Daryl Firestone, the face boss. Other employees included Jim Conner and employees Harrison, Turnipseed, Meckley, Stewart, and Williams.

In May 1991 they were working between sections as they were opening up a new longwall section.

In June 1991 Mr. Peters operated two different types of shuttle cars and in early June 1991 he was operating the No. 4 shuttle car.

The No. 4 car is a DC car and the overloads on the car kept kicking out. The heaters would kick on and this would occur three times a trip and usually once on a return. When it kicks out, the electrical controls on the car fail and the service brakes automatically engage. The service brakes would not hold this DC car. In addition to these problems, the No. 4 car also had loose bolts.

Mr. Peters reported this to Mr. Firestone and the maintenance foreman was told to look into it before the shift started. They said they were working on it, but they still used the same car.

Mr. Peters also became concerned about the air in the entry. It was necessary to turn off the ventilation tubes. If a door was not totally closed, air would recirculate in the face. Mr. Peters talked to Mr. Firestone and the mine manager about this. They also tried to put buffers behind the fans in an attempt to correct the problem. Mr. Peters reported this to Mr. Firestone because he was his supervisor. These conditions were not corrected before June 10, 1991.

On a Monday or Tuesday in June Mr. Peters was given a letter after he discussed the air recirculation and the brakes with Mr. Firestone. Mr. Peters said maybe he should shut the car down and Mr. Firestone replied that he should give him an unsatisfactory job performance. Mr. Firestone and Mr. Peters discussed the matter for approximately three hours and Mr. Peters thought they had the problem resolved. Mr. Firestone said that when he received a promotion he would take care of Mr. Peters' problems.

On Monday Mr. Firestone said he had talked to Steve Rosene and they were going to give him a letter anyway. He received the letter the next day. Management did not ask him his side of the issue. Because of that Mr. Peters felt MSHA was his only recourse.

The "second advisory" letter Mr. Peters received was dated June 10, 1991. The letter refers to Mr. Peters' "unacceptable job performance." The letter was signed by Daryl Firestone and acknowledged by Fred Peters on June 11, 1991 (see Exhibit C-1).

Mr. Peters had never received any first step letter. (The letter was stated to be a "second advisory.") Mr. Peters believes he didn't merit the letter.

On June 12 Mr. Peters went to work and he noticed the bolts were loose in the brakes. He and the section mechanic tightened them and he operated the car for two to three hours. About 7:30 or 8:00 o'clock while going uphill he lost the tram, the brakes, and the shuttle car rolled backwards and came to an abrupt stop. Mr. Firestone called the maintenance people so they could resume production. Mr. Peters didn't think he was injured. He told Mr. Firestone he had pulled some muscles in his lower back and they returned to mining coal.

Mr. Peters signed up to work through his scheduled vacation. While drilling into the floor he asked the safety representative if Mr. Firestone had ever filled out an accident report. They could not find such a report, and in July, after vacations, Mr. Firestone said he had not filled out such a report. The following night Mr. Firestone handed him an accident report form and told him to fill it out.

Mr. Peters went to a doctor and received therapy and an MRI; a ruptured disc was later removed.

Exhibit C-2 is Mr. Peters' handwritten complaint to MSHA.

Mr. Peters felt he had been discriminated against because of the letter given him by the company (Exhibit C-1). Mr. Peters thought the issues had been worked out in the three hour talk with Mr. Firestone.

When Mr. Peters made his complaints to Mr. Firestone, he had the company policies in mind and he felt he should tell his supervisor of any problems. He did not feel that the company was complying with the third paragraph of its safety and health policy statement which provides:

We hold every employee accountable for following all prescribed safe work practices and procedures. No job will be considered so urgent--no schedule will be considered so rigid that the time cannot be taken to perform the job in a safe manner.

With respect to the shuttle car, the company did not follow its policy. However, an operator does not shut down a piece of

equipment on a production shift and Mr. Peters was told to run the shuttle car.

MSHA investigated Mr. Peters' discrimination claim. MSHA found no discrimination and so advised Mr. Peters (Exhibit C-5). Mr. Peters felt threatened for his job at the mine. Different management people said maybe they could hurt their back and sit in the guard shack.

After disc surgery Mr. Peters returned and initially worked for the safety department and later in the electrical department. As his back improved, he did more and more underground work and he has continued to work in the electrical department.

Before the accident occurred Mr. Peters was a full-time shuttle car operator and now there is a possibility that he could be transferred to a job he could not do.

Company policy does not allow overtime when a person works on light duty status. In 1992 Mr. Peters' overtime lost wages came to about \$2,500. In 1991 he lost approximately \$21,406 in overtime. In Mr. Peters' view, if Mr. Firestone had heeded his complaints an accident would not have occurred.

Mr. Peters seeks the following relief: Recovery of loss of overtime wages, attorney's fees and costs, and assignment to a permanent position to a crew he's not on at this time.

Mr. Peters is more experienced in mining matters than Mr. Firestone.

In July 1990 he received a letter of congratulations from the company.

In October 1990 the company referred him to an alcohol abuse counselor.

The pivotal portion of this case generally deals with the events of April 23, 1991, May 3, 1991, June 6, 1991, June 7, 1991, June 8, 1991 and June 12, 1991.

On the credibility issues surrounding these dates I credit the testimony of Daryl Firestone. His testimony is supported by almost contemporaneous notes of the events.

In considering this evidence I have outlined Respondents' evidence and footnoted Complainant's evidence.

According to Mr. Firestone when Fred Peters started on Mr. Firestone's crew his performance was good and they got along well. (Tr. 225).

When Mr. Peters began using alcohol his performance started to drop. Mr. Firestone discussed Mr. Peters' performance with management, mostly the shift supervisor. He also discussed Mr. Peters' performance with Mr. Rosene.

On April 23, 1991 Gary Harrison said Mr. Peters' shuttle car had broken down. Gary said that on the last trip Mr. Peters was crowding he and Allen on the high side, i.e. he was pushing them tight to the rib. (Tr. 238, 239). It sounded like horseplay to Mr. Firestone. Gary and Mr. Peters hollered at each other. Gary then told Mr. Firestone that Mr. Peters had backed up and slammed into the miner as hard as he could with the shuttle car, putting the lights out. (Tr. 239).

At that point Mr. Firestone went back to the shuttle car to locate Mr. Peters. Mr. Firestone told Mr. Peters what Gary had said. Further, he said Allen (Meckley) had backed him up. Mr. Peters got real defensive and started hollering at Mr. Firestone. He told him he was calling him a liar because he was insisting his tram had stuck. (Tr. 239). Mr. Firestone was pushing the issue that Mr. Peters was crowding Allen and Gary. In addition, they had words. Mr. Firestone and Mr. Peters again had words; nothing was resolved and the car was down for 45 minutes. (Tr 239, 240).

Mr. Firestone described how in a small space miners can be crowded against the ribs. Mr. Firestone considered Mr. Peters' conduct an unsafe act and basic horseplay. He also believed Mr. Peters' hollering at him was insubordination.¹

On May 3, 1991 Gary (Harrison) complained that the shuttle car operators weren't helping them move from place to place. Mr. Firestone called a meeting between the miner operators and the shuttle car operators. Mr. Firestone flagged Ross and he got out. Fred kept going. Upon being flagged again he stopped. Mr. Peters got real defensive. He approached the four men: Conner, Gary Harrison, Ross Stewart and Mr. Firestone. Mr. Peters became defensive and he was hollering at Mr. Firestone and at Gary. He told Gary that he was "the laziest, sorriest shuttle car operator he'd ever seen in his life." (Tr. 242).

During this time Mr. Firestone was trying to calm Fred down. At the time he considered taking Fred outside but it was about five minutes to quitting time. If Mr. Firestone had taken Mr.

¹ Mr. Peters testified he was not aware of any complaint. But he admits he might have had words with Gary and possibly Mr. Firestone. When Mr. Firestone asked him what happened he said the tram stuck on the shuttle car. This was the only time they ever talked about the way he operated the shuttle car. (Tr. 49, 50). I am not persuaded by Mr. Peters testimony. It is considerably short of unequivocal.

Peters outside the crew would have been waiting underground for him. Also Mr. Peters had calmed down.

Taking him "outside" means Mr. Firestone would call the shift supervisor and tell him why he was taking such action. (Tr. 242, 243).

The next morning Mr. Peters immediately apologized and Mr. Firestone didn't feel it was necessary to take Mr. Peters to the supervisor's office.² (Tr. 243).

On June 6, 1991, Mr. Firestone and Mr. Peters met to review performance appraisals. Such appraisals are reviewed with each individual employee and supervisor. The evaluation was for the last six months of 1990, Daryl indicated it was a good evaluation but for the period in 1991 to June 6, 1991, he had some performance problems with Mr. Peters. Mr. Firestone told Fred his performance (in 1991) was not up to par and it wasn't acceptable. They discussed the hollering incidents. Fred agreed his performance was not up to par. It was a good meeting.³ (Tr. 243, 244).

The following day, June 7, Daryl was shorthanded a roof bolter and a new man (Phil) came in to run the bolter. Mr. Peters talked to Phil, telling him to run the shuttle car and he (Fred Peters) was going to bolt. Mr. Firestone told Mr. Peters that Phil was going to bolt, that he wanted him to learn and he (Mr. Firestone) was going to train him. (Tr. 245).

Mr. Firestone didn't say so to Mr. Peters but he wasn't going to reward him by letting him do any job he wanted for that day.⁴ (Tr. 245).

Fred was mad. He said he wasn't going to run that shuttle car and he was "shutting it down because of the brakes." (Tr.

² Mr. Peters remembered this incident when Gary complained to Mr. Firestone about the shuttle car operators not helping. A meeting was called between Ross, Fred, Jim and Gary.

He further agrees Gary, Daryl and Fred were talking in a heated tone of voice but he denies putting Mr. Firestone down in front of the crew. In addition he does not remember apologizing. Mr. Peters does not deny the main elements of the May 3 events.

³ Mr. Peters testified he had an attitude problem and it was in direct relationship to the way things were being run. (Tr. 52). During that discussion Mr. Peters agrees that Mr. Firestone might have told him that his performance was not up to par. (Tr. 53). I am not persuaded by Mr. Peters' less than positive testimony.

⁴ Mr. Peters didn't remember the roof bolter incident. (Tr. 54).

245). Mr. Firestone said "fine." Right at hand was Dean Smith, the graveyard mechanic. Mr. Firestone told Dean to go with Mr. Peters and to work on the brakes until Mr. Peters was comfortable enough to run with it. At that point Dean and Fred were working on the brakes. (Tr 245, 246). They were bleeding the brakes and pulling the equipment forward and backwards. At this time Jim (Lewis) told Mr. Peters he was walking behind him. When Jim made the statement Mr. Peters started to tram towards him. This scared Jim and he hollered for Mr. Peters to watch out. Jim had said to turn your lights on in the direction of travel. Mr. Peters got real defensive with Jim and hollered back "fuck you." Jim walked away and went to Mr. Firestone to complain.⁵

Later that day Mr. Firestone stopped Mr. Peters. Mr. Firestone wasn't real stern. Mr. Peters explained to Mr. Firestone the same thing that Jim had discussed. Mr. Firestone asked Mr. Peters not to holler or swear profanities at other employees. As foreman he didn't. Mr. Peters agreed and he apologized to Jim later that day. (Tr. 246, 247).

On June 8, 1991, the crew came into the section following the bull gang crew. The bull gang crew hadn't gotten all their work done. Mr. Peters' cable wasn't hung and the arc bar wasn't up. Mr. Peters hung the cable anchor but couldn't make one trip because he was running over his cable. Mr. Firestone asked Mr. Peters if they were going to have to drop the anchor and rehang the cable. Mr. Peters said he wasn't going to do it because he had just finished it.⁶

Fred was aggravated. Mr. Firestone told Mr. Peters the work had to be done. Mr. Firestone discussed taking him "outside."

They, that is, Mr. Peters, Mr. Firestone, and Clyde Bower, continued working hanging the cable. Mr. Peters complained

⁵ Mr. Peters recalled a "near miss" when Jim came around a corner. Mr. Peters told him he needed to watch where he was going. He and Jim had an argument and he possibly told Jim to "fuck off." (Tr. 55).

⁶ Mr. Peters denies that Mr. Firestone asked him to hang cable because it hadn't been hung by the down shift. (Tr. 56). Mr. Peters said he didn't have enough cable. He told Mr. Firestone that if he'd anchor his cable back there I'm going to run over it. Mr. Firestone said do it anyway. So he reanchored his cable and made one try and Mr. Firestone said you are running over your cable. Mr. Firestone told him to move the cable back. When asked to move the cable back for the second time he did not refuse to move it but he might have said "I don't want to." (Tr. 56). Mr. Peters did move the cable; he was upset because he knew he'd be running over his cable where he was told to locate it. (Tr. 56, 57).

I credit Mr. Firestone's version of the occurrence. Mr. Peters somewhat concedes he refused to rehang the cable. This could be considered to be an act of insubordination to the face boss. His continuing complaints about the down shift confirm that the downshift had not hung the cable.

constantly about the downshift screwing up. Mr. Firestone said we get paid for ten hours, let's continue to work. (Tr. 248).

Mr. Peters kept arguing. Mr. Firestone got fed up. Mr. Firestone said they were going outside to talk to a shift supervisor. Mr. Peters and Mr. Firestone and superintendent Bob Deirkes went into the kitchen. They discussed Mr. Peters' previous performances. Mr. Firestone told Bob he was instituting a second advisory step and if that didn't do any good then a third step. (Tr. 249).

Mr. Peters agreed he was not performing but it was because of the morale of the hourly employees. He was complaining that the downshift crew was not doing their jobs; likewise, as to the supervisors. Mr. Firestone said if this would be documented it was a second advisory. Bob Deirkes and Mr. Peters then had a discussion. (Tr. 250).

Mr. Firestone went back up to the section. Mr. Peters followed and said they needed to talk. They talked for two or three hours about everything including air to bull gang problems. (Tr. 250).

Mr. Firestone was completely frustrated due to the time he had been spending with Mr. Peters. They talked for three or four hours but didn't accomplish anything except they weren't hollering at each other when it was over. (Tr. 250). Both men agreed they could do better at communication. Mr. Peters didn't want to go to the second step. Mr. Firestone didn't give Mr. Peters any indication the second step letter wasn't going to happen. (Tr. 25).

On June 9 Mr. Peters called Mr. Firestone at home and wanted to know if he had talked to Steve Rosene. (Tr. 252, 253).

Mr. Firestone prepared a rough draft of the second-step letter. He and Steve Rosene and Bob Deirkes went over it. (Tr. 253).

The second advisory letter, dated June 10, 1991, was received by Mr. Peters on June 11, 1991. (Ex. C-1).

The parties presented evidence of events that occurred on June 12, 1991. On that occasion bolts were tightened on the shuttle car brakes. Four bolts held the rotary in place. The mechanic said the rotor needed to be changed out. Mr. Peters did not know the equipment would break. When the part broke, he was going upgrade and the car then rolled backwards. He did not hit the panic bar on the shuttle car. As a result of the accident, he did not feel he had a serious injury.

Mr. Firestone was in the area but did not see the parts break on No. 4 shuttle car. Mr. Peters told Mr. Firestone that he had pulled a muscle.

On June 12 Mr. Peters told Mr. Deirkes that he wanted off the shuttle car; he didn't remember telling him that he had hurt his back. Mr. Peters did not know if he had received a first step letter.

Since his back injury, Mr. Peters has received hourly wage increases from Twentymile when there has been a general hourly increase.

Mr. Peters has not been told by Twentymile that if equipment is unsafe he is not to run it.

In 1991 there was a period when he did not work because of back surgery. He also received Workmen's Compensation.

FRANK PAVLISICK of Paonia, Colorado, is employed by the Western Coal Company as a mechanic. Mr. Pavlisick was employed by Twentymile from February 1985 to July 1991 as a maintenance foreman. He and Mr. Peters were on the same crew.

On June 12, 1991, Mr. Pavlisick was called to repair shuttle car No. 4. He found the side was broken. Also, the drive line was broken. The witness was familiar with the particular shuttle car. It was an original in 1985.

Shuttle car No. 4 was not in continuous use but he had received complaints about the brakes not holding. The resistors had been bypassed in shuttle car No. 4 and this would cause the front of the shuttle car to rise up when it started forward. He testified that when an operator turns in a report that a piece of equipment is defective, the equipment goes to the maintenance department. The maintenance department fixes it with the necessary parts.

This car was used and worn out and the brakes had not ever been totally replaced. To fully repair the brakes, you need time to get the necessary parts and such a repair could be made in ten hours.

As maintenance foreman, failure to keep the brakes in repair could cause loss of control of the car when the brakes failed.

Mr. Pavlisick worked with Mr. Peters until he terminated with the company. He had never seen Mr. Peters operating the shuttle car in any way that might adversely affect the brakes. The equipment should do what is required of it. It is possible to tram with the brakes engaged and that will damage them.

Mr. Pavlisick would take Mr. Peters on his crew at any time. Mr. Pavlisick believed there was friction between Mr. Firestone and Mr. Peters. In his opinion, it was a power struggle and Mr. Firestone felt threatened by Mr. Peters.

Mr. Pavlisick had never observed Mr. Peters' conduct inappropriate or against safety. He was not aware Mr. Peters had complained about the brakes.

In the chain of command, Mr. Firestone could remove the shuttle car from service and have it repaired.

Mr. Pavlisick did not see any conduct on the part of Mr. Peters to justify any reprimand of Mr. Peters.

In Mr. Pavlisick's opinion, the cars should have been taken out of service or rebuilt; both of the shuttle cars were unsafe to run.

As maintenance foreman, Mr. Pavlisick's responsibility was to repair cars that break down during production.

Mr. Pavlisick examined broken parts in the shuttle car. The metal break had egg-shaped holes. That's why he directed the new parts be installed. Mr. Pavlisick did not know if the DC car was designed to hold itself back. At times these cars ran 20 hours with four hours' maintenance. Mr. Peters had worked for Mr. Pavlisick but not on a full-time basis and he had never worked with Mr. Firestone and Mr. Peters for any length of time.

On June 12 the rotor part broke. If Mr. Firestone had seen the loose bolts, he wouldn't know that they would break on that particular day.

DOUGLAS W. OGDEN of DeBeque, Colorado, is now a section mechanic for Powderburn Coal Company. He left Twentymile in 1992. He had started there as a downshift continuous miner mechanic and transferred to the electrical department. He has been mining since 1978.

In June 1991 he worked for Frank Pavlisick. On June 12 he was advised they needed help repairing a shuttle car in two-left. When he arrived he learned that the shuttle car was the one that Mr. Peters had been running. The brakes and traction were out and it was necessary to crawl under the equipment and work under it. Mr. Ogden explained in detail how the shuttle car brakes and traction were restored.

The supervisors knew about the problem on the shuttle cars as it kept coming up on conversation.

It was not part of Mr. Ogden's job function to analyze what needed to be done on the shuttle cars. He had talked to Mr. Peters socially and had seen him in the section.

After June 12, 1991, the shuttle car was returned to service when it was repaired. Mr. Ogden was never fully in charge of pulling down and repairing the brakes.

The bolt holes that were oblong were replaced. An individual would not notice if the bolt holes were tight.

Mr. Pavlisick had the authority to take defective equipment out of service.

After the repairs were effective, Mr. Ogden thought the brakes were operational but he believed some risk existed. They bled the brakes after tightening the bolts.

They would also tram the brakes and if the brakes were spongy, they would bleed them. As to shuttle car No. 4, they would report their repairs back to Frank Pavlisick and in a few days there would again be reports of loose bolts.

DAN GAGON of Craig, Colorado, has been at Twentymile since March 1984 on the longwall bull gang.

In June 1991 he was a shuttle car operator and he became acquainted with Mr. Peters. He operated the shuttle car No. 4 on a different shift.

Prior to June 12, 1991, shuttle car No. 4 had bad brakes and he reported this condition to the supervisor.

On June 12 he shut the car down because of the brakes and he tightened the bolts. He was stopping in a safe distance but the brakes were mushy. He had the same problems both before and after the repairs. On June 12 he parked shuttle car No. 4 and refused to run it. The shift mechanic then tightened the bolts and the brake rotors. Mr. Gagon also talked to the shift supervisor and the mechanics on the down shift.

After June 12, 1991, the brake rotors were repaired and they got a little better.

Mr. Gagon has no knowledge of the June 12 accident involving Mr. Peters. He has run shuttle car No. 4 and No. 5 off and on since 1984 and the brake rotor broke three times while he was operating the equipment. For the last two or three years he has lost the brakes on three occasions.

ROSS STEWART, Craig, Colorado, is now a shuttle car operator. In 1991 he was on the same crew with Mr. Peters.

Mr. Firestone was his supervisor.

In June 1991 Mr. Stewart drove No. 4 or No. 5 shuttle car. He didn't see the June 12 accident involving the shuttle car but he was in the section. He reported the brakes on his car when they were malfunctioning. These reports were made to the foreman or the mechanic.

There was a time when Mr. Firestone and Mr. Peters were co-bosses with Mr. Stewart. Mr. Stewart believed there was some friction between them.

Mr. Peters was a good worker.

Mr. Stewart believed he was familiar with the company criteria for a Step 1 or Step 2 reprimand. These included unsafe acts, horseplay, unsafe job conditions, and lack of concern for safety.

Mr. Stewart agreed that on one occasion Mr. Peters had run into his shuttle car, and he also had struck his once or twice.

Mr. Stewart complained about Mr. Peters having alcohol on his breath.

At a meeting of the shuttle car operators, Mr. Firestone and Mr. Peters yelled, and Mr. Peters criticized Mr. Harrison's performance and some words were said.

In May and June 1991 Mr. Peters complained about the down shift not doing its share of the work. Alcohol was not involved in any manner in the May or June 1991 incidents.

RESPONDENTS' EVIDENCE

DARLY FIRESTONE's testimony has been previously reviewed.

STEVE ROSENE has been in the employ of Twentymile Coal Company since October 1987. He is responsible for the Human Resources activities.

He has been involved in disciplinary matters for Mr. Peters since April 1989. He was involved in ten formal contacts, including a referral for alcohol abuse in 1989-1990 as well as overall job performance in 1990 and 1991.

Mr. Peters was issued a Step 2 advisory on June 11, 1991.

Mr. Rosene is familiar with the company's corrective action program. The program is a step program to identify performance issues which the company tries to resolve.

The steps consist of what is called a first reminder which takes place between the supervisor and the employee. If there's no change in the situation, there is a second reminder or advisory step. This involves formal documentation, letters and is structured towards improvements. It goes in the performance file. If there is no improvement, then there is a career discussion advisory where he meets with the employee and summarizes the problem. The employee is sent home for one day with pay and the company seeks a commitment by the employee to remedy whatever may be the problem.

Exhibit R-7 outlines the corrective action counseling guidelines that are followed.

There is not necessarily an initial step program; the company can go immediately to any one of the levels. The gambit of performance issues include fighting, disruptive activities, work quality, work quantity, and damaging company equipment. Miners have been terminated under this program. Mr. Rosene becomes involved in the second advisory level.

Mr. Firestone came to him concerning Mr. Peters. Mr. Rosene had counseled Mr. Peters on work performance, disruption with crew, and co-worker complaints.

Mr. Rosene was not aware of the air recirculation and shuttle car complaints. The fact that Mr. Peters had made safety complaints did not enter the conversation when the second advisory took place.

Mr. Rosene was aware of Mr. Peters' back surgery and when he returned to work, he was on restricted duty and the company required a doctor's report. When Mr. Peters returned, he joined the electrical group, working mostly on the surface. Mr. Peters has a permanent restriction, namely a 50-pound lifting limit. In view of Mr. Peters' restriction, he has not returned to work in full capacity, although he works full-time in the electrical department doing day-to-day duties and assisting in the maintenance of the electrical equipment. Mr. Peters requested this assignment and it was appropriate under the circumstances.

Twentymile has two departments, maintenance and production, and people are rotated in various subdepartments for training.

In 1991 and 1992 overtime work at Twentymile was handled through a sign-up system. The company posts a sheet and any miner can sign up. If he does, he's expected to show up for the work. Mr. Peters could sign up for electrical work. In the last two years the company's overtime percentage has been high.

Twentymile has been attempting to cut down its overtime and limit it to one overtime shift per employee per month. They also

hired additional miners to cut back on excessive overtime. The overtime percentage is over 10 percent and this was necessary due to two longwall moves.

Mr. Peters accepted a lead supervisory position and employees in this category are paid an additional one and a half hours at time and a half. From December 1989 to July 1990, this was his work status.

When Mr. Peters first returned to work, the return-to-work program necessarily restricts his duty and he is limited to 40 hours per week.

Twentymile has a complaint procedure. It's a step procedure. The employee first addresses the problem with his supervisor and the employee learns of this when he is a new hire. Mr. Peters would have learned of it at that time.

The second advisory letter of June 10, 1991, given to Mr. Peters recites "he (Peters) was not up to standard." The given behavior of Mr. Peters was not as clear as Mr. Rosene would like it to be, but the specific behavior by Mr. Peters was that he was not doing his assigned work; his manner of doing work; his request that miner cable be hung; his unacceptable performance; his foul language; and his insubordination. These were discussed with Mr. Firestone and Jody Hampton. Mr. Firestone mentioned the recirculating air but he did not mention the shuttle car.

The company had no complaints with Mr. Peters about fighting or about his absenteeism.

Mr. Rosene did not know in what manner Mr. Peters was operating the shuttle car.

Mr. Peters wasn't given the second advisory letter because of the air recirculation complaints nor for the shuttle car complaints.

Mr. Rosene was not aware of Mr. Peters' MSHA complaint (Ex. C-2) until after MSHA investigated his complaint. When he talked to Mr. Firestone there was some mention of the air in the section. Mr. Rosene did not discuss with Mr. Peters his side of the story, and his involvement went back to prior evaluations including the mandatory referral and Mr. Peters' work performance.

Mr. Rosene did not assume Mr. Peters was at fault and he talked to other supervisors and mine management. He did not talk to Messrs. Stewart or Gagon. He talked to Conner but didn't discuss anything about the brakes. He first learned about shuttle car No. 4 when Mr. Peters filed his complaint with MSHA at the end of the June 1991. No report was filed by Mr. Peters after the accident. The accident involving the shuttle car

losing its brakes was serious and it attracted attention when the shuttle car shut down. On June 12 nothing was reported to Mr. Rosene.

After his accident Mr. Peters had surgery on his back and filed a Workmen's Compensation claim.

On June 12, 1991, the company filed a form entitled "Final Admission of Liability" with the Colorado Department of Labor and, in particular, with the Division of Workmen's Compensation as it related to Mr. Peters. (Ex. C-7).

Mr. Rosene did not talk to Mr. Peters after he learned about shuttle car No. 4 because he felt it was inappropriate to discuss the matter with Mr. Peters while MSHA was investigating it.

At a later time he asked Mr. Firestone if shuttle car No. 4 or the air complaints resulted in any action, and he stated they did not.

COMPLAINANT'S REBUTTAL

Mr. Peters, in rebuttal, indicated that he didn't believe there was an emergency bar on the shuttle car on June 12, 1991.

Between June 8 and the step letter of June 11, Mr. Peters believed he had called Mr. Stuckey and stated that he had concerns over safety issues. He stated the mine was being run like Mid-Continent Resources when he worked there in 1977-1981. He had told Mr. Firestone about the air problems which were occurring. Mr. Firestone said he would take care of it, but other concerns were not being taken care of.

The following morning Mr. Peters was driving the mantrap and Mr. Firestone said it was a performance problem for him (Peters). He also said Mr. Peters' attitude was real bad and that he wasn't pulling his share. Mr. Peters agreed he wasn't happy about the recirculation and the brakes and the kicking heaters some 30 to 40 times a shift; this would engage the emergency brakes.

Prior to the evaluation in June 1991, all previous evaluations of Mr. Peters had been outstanding or excellent. There had been no alcohol recurrence. The last one was in October 1990.

Having considered the hearing evidence and the record as a whole, it is appropriate to enter specific findings of facts. The preponderance of the substantial, reliable and probative evidence establishes the following:

FINDINGS OF FACT

1. Fred L. Peters is a full-time employee of Twentymile Coal Company (Twentymile) in the electrical department as a mine electrician. (Tr. 15, 87).

2. Mr. Peters has held several mine management positions. (Tr. 48).

3. In May 1989 Mr. Peters was referred by Twentymile to counseling for alcohol abuse. In July 1990 Twentymile congratulated Mr. Peters on completion of his alcohol abuse counseling. (Tr. 48).

4. On September 20, 1990 Daryl Firestone and Jody Hampton counseled Mr. Peters about coming to work under the influence of alcohol. (Tr. 49).

5. In October, 1990 Mr. Peters was again referred by Twentymile to counseling for drug abuse. (Tr. 49).

6. Daryl Firestone was Mr. Peters' supervisor in the spring of 1991. (Tr. 18). Mr. Peters had been temporary foreman of the same crew before Daryl Firestone. (Tr. 49).

7. In the spring of 1991 Mr. Peters was operating two shuttle cars, including the No. 4 shuttle car. (Tr. 20).

8. On June 10, 1991 Mr. Peters was issued a second step discipline letter under Twentymile's corrective action counseling program. (Tr. 24, Ex. C-1).

9. Mr. Peters filed his complaint of discrimination on June 15, 1991, because he felt it was the only way to get the second step discipline letter removed from his file. (Tr. 36, Ex. C-2).

10. As of May 28, 1992, when Mr. Peters filed answers to interrogatories the only discriminatory act which Mr. Peters was complaining about was receipt of the second step letter. (Ex. R-6).

11. Mr. Peters served on Mr. Firestone's continuous miner crew. (Tr. 224).

12. There are several events which preceded issuance of the second step disciplinary letter, each of which would constitute sufficient business justification for the letter.

13. On April 23, 1991, Mr. Peters was crowding the continuous miner operators with his shuttle car, he was pushing them tight to the rib. One of the miner operators, Gary Harrison, had

words with Mr. Peters about the crowding. Mr. Peters then backed up and slammed his shuttle car into the miner, breaking the lights on the shuttle car. (Tr. 239, Ex. R-8). When confronted on this matter, Mr. Peters insisted that his tram had stuck. Mr. Firestone pressed the issue of Mr. Peters crowding the miner operators. Mr. Peters and Mr. Firestone had words. (Tr. 239-240, Ex. R-8). By "crowding" the miner operators (who stand behind the miner and operate it by remote controls) Mr. Peters was intentionally pushing them towards the rib. (Tr. 240). Such conduct is unsafe. (Tr. 240).

14. Mr. Peters admits that on April 23, 1991, he ran his shuttle car into the miner and broke the lights on his shuttle car. (Tr. 49).

15. Mr. Peters admits that on April 23, 1991, he had words with Daryl Firestone about the manner in which Mr. Peters was operating his shuttle car. (Tr. 50).

16. Mr. Peters admits that on the day he ran his shuttle car into the miner (April 23, 1991) he might have had words with Gary Harrison about crowding Gary with the shuttle car. (Tr. 50).

17. On May 3, 1991, Gary Harrison, a continuous miner operator, complained to Mr. Firestone that the shuttle car operators were not helping move the cable for the continuous miner. As a result, Mr. Firestone called a meeting of the two shuttle car operators and two miner operators and himself. (Tr. 24, Ex. R-9). When Mr. Firestone advised Mr. Peters that the meeting was about helping the miner operators, Mr. Peters became very defensive and began yelling at Mr. Firestone as he approached the meeting. Mr. Peters yelled at Mr. Firestone and had words with Gary Harrison. He told Mr. Harrison that he was the laziest, sorriest shuttle car operator he had ever seen. Mr. Peters was insubordinate to Mr. Firestone and he was abusive and derogatory towards Mr. Harrison. (Tr. 156, 242, Ex. R-9).

18. Mr. Peters admits that on May 3, 1991, he was involved in a heated argument with Daryl Firestone and Gary Harrison about the shuttle car operators' unwillingness to assist the continuous miner operators in moving the trailing cable for the miner. (Tr. 50-52).

19. On June 6, 1991, Mr. Firestone gave Mr. Peters his performance evaluation for the last 6 months of 1990. (Tr. 244). During the discussion concerning that performance evaluation, Mr. Firestone told Mr. Peters that, although the evaluation for the last 6 months of 1990 was good, Mr. Peters' performance in 1991 was not satisfactory. (Tr. 244, Ex. R-10). Mr. Peters agreed that his performance was not up to par. (Tr. 244, Ex. R-10).

20. Mr. Peters admits that on June 6, 1991, Mr. Firestone may have told him that his performance was not up to par. (Tr. 53).

21. On June 7, 1991, at the beginning of the shift, Mr. Peters wanted to run the roof bolter because the regular roof bolter was absent. Mr. Firestone, however, directed Mr. Peters to run his shuttle car and instructed another employee to run the roof bolter. Mr. Peters became angry because he was not permitted to run the roof bolter. He then threatened to shut down his shuttle car because of the brakes. At that time, the graveyard mechanic happened to be in the area and Mr. Firestone sent the mechanic with Mr. Peters to make sure the shuttle car brakes were working properly. While the mechanic and Mr. Peters were bleeding the brakes, Mr. Peters was trammng the car forward and backward. Jim Lewis told Mr. Peters that he was walking behind the shuttle car, but Mr. Peters trammed toward Mr. Lewis without turning on the lights in the direction of travel and scared Mr. Lewis. Mr. Lewis told Mr. Peters to turn on the lights in the direction of travel and Mr. Peters responded by swearing at Mr. Lewis. Mr. Firestone met with Mr. Peters and asked Mr. Peters not to swear at his fellow workers. (Tr. 53, 55, 246-247, Ex. R-11). Trammng towards Mr. Lewis was unsafe because Mr. Peters did not have his lights on in the direction of travel.

22. On June 8, 1991, Mr. Firestone's shift and crew followed the bull gang crew. The bull gang had not finished its work, so the cable for Mr. Peters' shuttle car needed to be hung and the anchor needed to be moved. Mr. Peters and Mr. Firestone discussed the possibility that the cable may be in the way where Mr. Firestone wanted it hung, but Mr. Firestone decided to hang it there because otherwise they would have to piggyback (loads of coal). (Tr. 247). Mr. Peters hung the cable as instructed and attempted to haul coal, but the shuttle car was running over the cable. Therefore, Mr. Firestone asked Mr. Peters to rehang the cable at another location and Mr. Peters refused. (Tr. 248).

23. Subsequently, Mr. Peters helped rehang the cable, but he complained the whole time about the down shift not getting its work done. Mr. Peters kept arguing with Mr. Firestone about the down shift not doing its job so Mr. Firestone decided to take Mr. Peters to talk with Dennis Bowens, a shift superintendent. However, Mr. Deirkes, another shift superintendent, came by and they had a meeting with him. (Tr. 248-249).

24. Mr. Peters admits that on June 8, 1991, he may have refused a directive from Mr. Firestone to relocate the cable for Mr. Peters' shuttle car. (Tr. 56). Mr. Peters also admits that he had an attitude problem in June, 1991. (Tr. 52).

25. While on Mr. Firestone's crew, Mr. Peters' performance level began to drop during the time when Mr. Peters was using

alcohol. (Tr. 226). He was counseled by Mr. Firestone and Jody Hampton for coming to work under the influence of alcohol in September, 1990. (Tr. 49).

26. Mr. Peters was referred to mandatory counseling for alcohol abuse in 1989 and again in 1990. (Tr. 170).

27. Mr. Peters' alcohol problem was part of his performance problem. Part of the performance evaluation given to him on June 6, 1991, referred to his previous alcohol abuse problems. (Tr. 267).

28. Mr. Ross Stewart has complained to Mr. Firestone about Mr. Peters coming to work with alcohol on his breath. (Tr. 155).

29. The way Mr. Peters operated his shuttle car was abusive to himself and the car. Other employees, including Mr. Peters' witness, Mr. Pavlisick, told Mr. Firestone that Mr. Peters had to slow down because he was going to hurt himself or damage the shuttle car. Mr. Firestone recalls one location where the road was rough and recalls seeing Mr. Peters really bouncing around in his shuttle car. This was before June 12, 1991. Mechanics also complained about Mr. Peters free wheeling the AC shuttle cars. (Tr. 259).

30. Mr. Peters' manner of operating his shuttle car was causing the car to be damaged. (Tr. 194).

31. Mr. Peters has a reputation for running his shuttle car hard. (Tr. 155).

32. Mr. Peters admits that Jody Hampton talked to him about taking better care of the equipment. (Tr. 90).

33. Mr. Stewart is aware of one instance where Mr. Peters crowded a continuous miner operator with his shuttle car; Mr. Stewart considered that to be an unsafe act. (Tr. 157).

34. On one occasion Mr. Peters rammed his shuttle car into Mr. Stewart's shuttle car. (Tr. 155).

35. Mr. Peters admits that he often became angry and complained to Mr. Firestone about the down shift not doing their job when Mr. Firestone's crew had to finish work which the down shift did not complete. (Tr. 57).

36. Mr. Peters complained about the down shift not doing its work and he complained if he had to do work that the down shift had not completed. (Tr. 158).

37. Mr. Peters' poor work performance included, insubordination, yelling at Mr. Firestone, yelling at his co-workers,

refusing to do work which he was directed to do, and not helping move the continuous miner from place to place. (Tr. 280).

38. Mr. Peters' failure to help move the continuous miner from place to place was a daily occurrence. (Tr. 280).

39. During their discussion on June 8, 1991, Mr. Firestone advised Mr. Peters that Mr. Firestone was going to issue a second step disciplinary letter to Mr. Peters. (Tr. 250).

40. On June 8, 1991, Mr. Peters threatened Mr. Firestone. After Mr. Firestone told Mr. Peters he was going to be issued a second step letter, Mr. Peters said he had notes on Mr. Firestone and other supervisors and that if he was going to lose his job, Mr. Firestone and other supervisors would also. (Tr. 252).

41. On June 8, 1991, Mr. Peters attempted to convince Mr. Firestone not to issue a second step disciplinary letter and tried to convince Mr. Firestone to tell Mr. Rosene that they (Firestone and Peters) had worked out the problem with Mr. Peters' performance. (Tr. 251).

42. Shortly after June 8, 1991, Mr. Peters called Mr. Firestone at home to ask if Mr. Firestone had talked to Mr. Rosene and to attempt to persuade Mr. Firestone not to issue the second step disciplinary letter. (Tr. 252). Mr. Firestone believed Mr. Peters did not want the second step letter issued because Mr. Peters was trying to get a truck driver job on the surface at the mine. (Tr. 252-253).

43. Mr. Rosene is the Human Resources Manager for Twentymile Coal Company. He had held that position since October 1968. Mr. Rosene has 14 years experience in coal and noncoal mines in hourly and management positions. (Tr. 168).

44. Twentymile Coal Company has a corrective action counseling program which was implemented in 1988. (Tr. 171, Ex. R-7).

45. The corrective action counseling program has three steps: a first reminder; a second reminder, and then a career discussion advisory. (Tr. 171, Ex. R-7).

46. A first reminder is a confidential meeting between a supervisor and an employee to identify performance problems. (Tr. 172, Ex. R-7).

47. A second reminder (or second step advisory) is more serious and it includes a letter to identify problems and means of improving. (Tr. 172, Ex. R-7).

48. A career discussion (or third step) advisory identifies performance issues and the affected employee is sent home for a

day with pay to decide whether or not he or she can make a commitment to the guidelines, policies and procedures of Twentymile. If the employee makes such a commitment, a joint action plan is formulated. If the employee succeeds in following the plan, the employment relationship continues. If not, the employee is terminated. (Tr. 173, Ex. R-7).

49. Any appropriate step of the corrective action counseling program may be used at anytime, depending upon the severity of the performance issues involved. (Tr. 175, Ex. R-7).

50. Mr. Firestone was frustrated with the amount of time he was spending concerning performance problems with Mr. Peters. (Tr. 250).

51. Mr. Peters was issued a second step advisory letter because his job performance was inadequate, he was disruptive on his crew, his co-workers were complaining about the way he treated them, he refused to hang his shuttle car cable when told to do so by his foreman, he refused to help the continuous miner crew move the miner, and for unsafe conduct. (Tr. 177, 192, 196, 280).

52. The second step disciplinary letter was based on concerns about Mr. Peters' performance since April 1991. (Tr. 199).

53. Mr. Peters signed the acknowledgment on the second step disciplinary letter (Ex. C-1), which letter specifically states that Mr. Peters agreed that his performance was not up to standard. (Tr. 60).

54. Mr. Peters admits that he tried to persuade Mr. Firestone that it would not be fair to give Mr. Peters a second step disciplinary letter. (Tr. 59).

55. Mr. Firestone's decision to issue the second step letter to Mr. Peters was not motivated in any way by Mr. Peters' complaints about ventilation or the condition of his shuttle car. (Tr. 177, 196, 221, 261).

56. Mr. Peters talked to Mr. Firestone and the mine manager about ventilation issues at various times. (Tr. 22-23).

57. When Mr. Peters complained to Mr. Firestone about ventilation in the mine, Mr. Firestone would take measurements. If they needed more air, Mr. Firestone would notify one of the shift supervisors who would make arrangements for the graveyard shift to provide more air. (Tr. 227).

58. If there was recirculation of air, Mr. Firestone would shut down production and repair what needed to be done. (Tr. 227).

59. Mr. Peters admits that when he identified ventilation problems to his supervisors, various actions were taken to correct them. (Tr. 23).

60. The No. 4 shuttle car is the one which Mr. Peters was operating on June 12, 1991, and generally during the time period in question. (Tr. 65).

61. The No. 4 shuttle car was also operated by another operator, Dan Gagon, on a different shift. (Tr. 66, 138).

62. Mr. Firestone would often run the No. 4 shuttle car during Mr. Peters' lunch breaks. (Tr. 65).

63. During May and June, 1991, Mr. Firestone ran Mr. Peters' shuttle car for approximately one hour every other day. (Tr. 229).

64. When Mr. Peters complained to Mr. Firestone about the brakes on Mr. Peters' shuttle car, Mr. Firestone and Mr. Peters would determine if the car was safe to continue operation. If something needed to be done immediately, it was done. If the maintenance or repair could wait, it was reported to the down shift. (Tr. 228). This was standard practice. (Tr. 103, 151).

65. Mr. Firestone relied upon the maintenance foreman to repair Mr. Peters' shuttle car. (Tr. 277).

66. During May and June, 1991, the brakes on Mr. Peters' shuttle car were adequate to stop the loaded car on an incline. However, the brakes were not as good as the brakes on the newer AC cars. (Tr. 230).

67. When the brakes failed on Mr. Peters' shuttle car on June 12, 1991, it was because a brake rotor broke. (Tr. 61).

68. It is not common for a brake rotor to break on shuttle cars such as shuttle car No. 4. (Tr. 132, 146, 256). A typical daily walk around inspection of the shuttle car would not have revealed that the brake rotor was about to break. (Tr. 63, 132, 145).

69. Mr. Dan Gagon operated the No. 4 shuttle car on a different crew from Mr. Peters. (Tr. 138).

70. On June 12, 1991, during the day shift, Mr. Gagon had his shift mechanic check the brakes on the No. 4 shuttle car. (Tr. 139).

71. On occasion, Mr. Gagon shut down the No. 4 car during his shift to check the brakes. He also reported problems with the brakes to his supervisor and to maintenance. (Tr. 138).

There was no testimony that Mr. Gagon was disciplined or of any hostility towards him for such actions.

72. Mr. Ross Stewart is a shuttle car operator for Twenty-mile Coal Company. He drove the other shuttle car on Mr. Peters' crew. (Tr. 148).

73. At times Mr. Stewart shut his shuttle car down when he felt it was not safe to operate. (Tr. 150). There was no testimony of any discipline or hostility towards Mr. Stewart for such conduct.

74. Mr. Frank Pavlisick was employed by Twentymile Coal Company from 1985 to July, 1992. In June 1991, he was a maintenance foreman. (Tr. 99)

75. Mr. Pavlisick's crew was not the regular crew that worked on the No. 4 shuttle car. (Tr. 115-116, 119). His crew only worked on it if it broke down during a production shift. (Tr. 116).

76. Generally, if Mr. Firestone reported problems with the brakes on the No. 4 shuttle car, they would have been fixed by a different maintenance crew than Mr. Pavlisick's crew. (Tr. 119).

77. When Mr. Pavlisick's crew did work on the No. 4 shuttle car, it was safe to operate when he released it for production work. (Tr. 116).

78. According to Mr. Pavlisick, no one could have known that the brake rotor was going to break on the day it broke. (Tr. 122).

79. Mr. Pavlisick does not know if the No. 4 shuttle car was designed and constructed so the motor would hold it back going down hills. In any event, the car still had brakes to hold it back on hills. (Tr. 118).

80. Mr. Pavlisick, as a maintenance foreman, had authority to take the No. 4 shuttle car out of service if he thought it was unsafe. (Tr. 134).

81. Mr. Pavlisick admitted that he is not an expert with regard to electrical matters. (Tr. 101). Therefore, the opinions he gave about the electrical circuits of the No. 4 shuttle car cannot be given any weight.

82. Mr. Doug Ogden was on Mr. Pavlisick's downshift continuous miner maintenance crew in June, 1991. (Tr. 125).

83. Mr. Ogden is aware that in June 1991, the brakes of the shuttle cars were checked by maintenance people on the production shifts and on the maintenance shifts. (Tr. 143).

84. When Mr. Ogden worked on the brakes on the No. 4 shuttle car he would check them to make sure they worked before he would release the car. (Tr. 133).

85. Mr. Ogden's crew had tightened the bolts on the brakes on the No. 4 shuttle car on occasions prior to June 12, 1991. When they tightened the bolts, they felt the machine was operational. (Tr. 129).

86. It was acceptable for Mr. Peters to shut down his shuttle car if he felt the brakes were not working properly. (Tr. 273, 275).

87. Mr. Firestone never decided not to have Mr. Peters' shuttle car checked or repaired because of Mr. Peters' complaints about the car or ventilation. (Tr. 262).

88. MSHA investigated shuttle car No. 4 following the brake failure on June 12, 1991, and found no neglect by Twentymile Coal Company with respect to maintenance of the car. (Tr. 213).

89. When Mr. Peters refers to the "heaters" on his shuttle car, he is referring to the electrical overloads. (Tr. 75).

90. An overload is an electrical unit that protects the motor from drawing too much amperage. (Tr. 20).

91. During the time in question, the "overloads" kept kicking on the No. 4 shuttle car. (Tr. 20).

92. When the "heaters" would kick on shuttle car No. 4, the power would be cut off. The shuttle car could not be operated again until the heaters cooled and they could be reset. (Tr. 228).

93. When the heaters kicked on Mr. Peters' shuttle car the breaks were activated by a selinoid and they set immediately. (Tr. 230).

94. The downshift had been working on the No. 4 shuttle car frequently to correct the situation with the heaters kicking. (Tr. 229).

95. If a shuttle car is worked on during a production shift, it is noted on a report called a production and maintenance report. (Tr. 69).

96. If a shuttle car is worked on during a maintenance shift, it is noted on a report called a maintenance report. (Tr. 69).

97. The brakes on the No. 4 shuttle car had been worked on several times shortly prior to June 12, 1991, as indicated in Exhibits R-1 through R-5. (Tr. 257).

98. The production and maintenance report for Mr. Peters' crew on the day shift on May 31, 1991, indicates that work was done on his shuttle car with regard to the heaters kicking and to replace a brake puck. (Tr. 71, Ex. R-1).

99. A maintenance report for the swing shift on May 31, 1991, indicates that repairs were made to the electrical system of the No. 4 shuttle car and that 4.1 hours were spent replacing the brake rotor on the right side of the shuttle car. (Tr. 72, Ex. R-1).

100. A maintenance report for the swing shift on June 6, 1991, indicates that work was done on the heaters on the No. 4 shuttle car. (Tr. 76, Ex. R-2).

101. A maintenance report for the graveyard shift on June 6, 1991, indicates that additional work was done on the heaters of the No. 4 shuttle car. (Tr. 76, Ex. R-2).

102. A maintenance report for the swing shift on June 7, 1991, indicates that work was done on the electrical system on the No. 4 shuttle car. (Tr. 77, Ex. R-3).

103. A maintenance report for the graveyard shift on June 7, 1991, indicates that work was done on the brakes on the No. 4 shuttle car. (Tr. 77, Ex. R-3).

104. A maintenance report for the swing shift on June 8, 1991, indicates that one man spent nine hours working on the electrical system on the No. 4 shuttle car. (Tr. 79-80, Ex. R-5).

105. A maintenance report for the day shift on June 10, 1991, indicates that work was done on the electrical system of the No. 4 shuttle car. (Tr. 78, Ex. R-4).

106. A maintenance report for the day shift on June 11, 1991, indicates that two men worked seven hours to check the tram circuit of the No. 4 shuttle car "for why the overloads kick." (Tr. 79, Ex. R-4).

107. Mr. Peters testified that it is the operator's responsibility to check his car before the start of each shift. (Tr. 27).

108. During the day shift on June 12, 1991, the operator of shuttle car No. 4 had the shift mechanic work on the brakes. (Tr. 139).

109. On June 12, 1991, Mr. Peters noticed some loose bolts on the brakes of the No. 4 shuttle car during his walk around inspection. He and the section mechanic tightened up the loose bolts. (Tr. 27).

110. After Mr. Peters and the section mechanic tightened up the bolts on the brakes on his shuttle car at the beginning of his shift on June 12, 1991, he operated the car for three or four hours before the brake rotor broke. (Tr. 27).

111. When the brake rotor broke, Mr. Peters was driving the unloaded shuttle car up a hill. (Tr. 27). The car then rolled backwards down the hill for a distance of 25 to 30 feet where it bottomed out and came to a sudden stop. (Tr. 27).

112. Mr. Peters is not sure whether his car had a panic bar on June 12, 1991, but he knows he did not hit the panic bar when the car rolled backwards. (Tr. 64).

113. At the time Mr. Peters shuttle car rolled backwards on June 12, 1991, Mr. Peters did not believe he had been injured and he told Mr. Firestone that there was no problem. (Tr. 28, 65).

114. On June 12, 1991, Mr. Peters did not tell Mr. Firestone that he was injured. If he had, Mr. Firestone would have either taken Mr. Peters outside or he would have completed an accident report. (Tr. 255-256).

115. Subsequent to June 12, 1991, while working through vacation, Mr. Peters began to have pain going down his leg which he believed was connected to the sudden stop of his shuttle car on June 12, 1991. (Tr. 29). It was then that Mr. Peters inquired as to whether an accident report had been filed. (Tr. 30).

116. Mr. Peters never proved that his back injury was a result of the sudden stop of his shuttle car on June 12, 1991, since there was no medical expert testimony to connect the accident to the injury.

117. Mr. Peters has been instructed by mine management personnel that if he feels a piece of equipment is unsafe, he is not supposed to operate it. (Tr. 88).

118. Mr. Firestone was not present in the section on June 12, 1991, when the brake rotor broke on Mr. Peters' shuttle car because he was in another section running an errand for his supervisor. (Tr. 255).

119. Mr. Peters is not aware of any damage to the shuttle car on June 12, 1991, when the brake rotor broke. (Tr. 67).

120. There was no reason for Mr. Firestone to file an accident report immediately following the failure of the brakes on June 12, 1991, because Mr. Peters said he was not injured and because there was no damage to the shuttle car other than the broken brake parts.

121. There was no accident report filed with respect to the incident when the brakes broke on Mr. Peters' shuttle car on June 12, 1991, until July, 1991. Mr. Peters did not file a report. Accident reports are initiated at the mine by the employee involved. (Tr. 203).

122. Mr. Peters' complaint to MSHA states that the brakes would not stop his shuttle car very good with a load on; however, his car was unloaded when the brake rotor broke on June 12, 1991. (Tr. 66).

DISCUSSION

As a threshold matter there is no proof in this record as to the status of Cyprus Minerals Company. Accordingly, the case is dismissed as to said Respondent due to lack of proof.

Protected Activity

There is no question but that Fred L. Peters was engaged in activities protected under the Mine Act when he complained about the shuttle cars, the overloads kicking out and the service brakes on the shuttle cars. In addition, his complaints about air in the entries and his written complaints to MSHA were further protected under the Mine Act.

Direct Evidence of Discrimination

As a threshold matter, it is apparent that the record fails to disclose any direct evidence of discrimination as to Mr. Peters' protected activities. However, as noted under the case law direct evidence is seldom seen in such cases. Accordingly, it is appropriate to determine whether any circumstantial indicia might be established by the evidence.

Knowledge of Protected Activity

Twentymile's supervisor knew of Mr. Peters' safety complaints but took no adverse action.

Hostility to Protected Activity

There was no hostility to Mr. Peters' protected activity. Ross Stewart, a shuttle car driver on Mr. Peters' crew shut down the shuttle car when he felt it was unsafe to operate it. No discipline or hostility was shown towards Mr. Stewart. In addition, it was acceptable for Mr. Peters to shut down his car if he felt it was unsafe. Finally, Mr. Peters had been instructed to shut down unsafe equipment. Compare Hicks v. Cobra Mining, Inc., et al 12 FMSHRC 563, 568 (Weisberger, J.).

In sum, the failure of management to manifest hostility, displeasure or anger appears to confirm the lack of any discriminatory intent against employees who exercise such rights.

Coincidence in Time

Mr. Peters claims the second step letter of June 10, 1991, was discriminatory conduct on the part of the company. However, that bears only a minimal relationship in time to the events beginning April 23, 1991. In Larry Cody v. Texas Sand and Gravel Co., 13 FMSHRC 606, 668 it was held that adverse action was not motivated by a two week old safety complaint.

Disparate Treatment

There is no evidence that Mr. Peters was treated differently than other employees.

In support of his position Mr. Peters relies on Phillips v. Interior Board of Mine Operations Appeals, 500 F.2d 772 (1974). He asserts Phillips is identical with the case at bar.

I disagree. The primary issue in Phillips is when a miner's safety complaints first come under protection of the Mine Act (when made to a foreman or when made to MSHA).

The determination in Phillips was specific to the facts in that case.

Mr. Peters further argues the failure of Respondents to fully repair the defective shuttle car brakes constitutes discrimination which resulted in direct damage to him and deprived him of full pay, overtime and a demotion to the status of a temporary position.

Contrary to Mr. Peters' views the record establishes extensive repairs were made to shuttle car No. 4. Mr. Peters' position apparently seeks to by-pass the work refusal rights under the Mine Act. On the other hand, the Judge is obliged to follow the Commission's established analysis for considering discrimination cases.

On the record of this case and for the reasons stated I conclude that any adverse action was not motivated, in whole or in part, by Mr. Peters' protected activities. Assuming Twenty-mile and Mr. Firestone's actions were motivated in part by Mr. Peters' protected activities the Respondents' established by a preponderance of the evidence that they were also motivated by business reasons and Mr. Peters' unprotected activities and they would have taken the adverse action in any event.

For the foregoing reasons stated herein, this case is **DISMISSED.**


John J. Morris
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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April 20, 1993

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 92-548
Petitioner	:	A.C. No. 15-02706-03752-A
v.	:	
	:	Hamilton No. 2 Mine
CURTIS CRICK, employed by	:	
ISLAND CREEK COAL COMPANY,	:	
Respondent	:	
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 92-550
Petitioner	:	A.C. No. 15-02706-03754-A
v.	:	
	:	Hamilton No. 2 Mine
JAMES BO JONES, employed by	:	
ISLAND CREEK COAL COMPANY,	:	
Respondent	:	
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 92-551
Petitioner	:	A.C. No. 15-02706-03755-A
v.	:	
	:	Hamilton No. 2 Mine
CHARLEY WRIGHT, employed by	:	
ISLAND CREEK COAL COMPANY,	:	
Respondent	:	

DECISION

Appearances: Gretchen M. Lucken, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Petitioner; Timothy M. Biddle, Esq. and J. Michael Clise, Esq., Crowell and Moring, for Respondents.

Before: Judge Melick

These cases are before me upon the petitions for civil penalty filed by the Secretary of Labor pursuant to Section 110(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, et seq., the "Act," charging Curtis Crick, James Bo Jones and Charley Wright as agents of a corporate

mine operator, Island Creek Coal Company, with knowingly authorizing, ordering, or carrying out a violation by that mine operator of the mandatory standard at 30 C.F.R. § 75.400 as alleged in Order No. 3549013.¹

In pretrial motions to dismiss the Respondents objected to the untimely filing by the Secretary of the instant petitions.² In this regard the undisputed facts show that:

1. On or about March 31, 1992, the Secretary issued to each of these Respondents a proposed civil penalty assessment for allegedly violating 30 C.F.R. § 75.400 on January 15, 1991.

2. By certified mail on April 22, 1992, each Respondent filed with the MSHA Office of Assessments a notice of contest requesting a hearing on the alleged violation and proposed penalty.

3. On April 27, 1992, the Secretary received the Respondents' notices of contest.

4. The Secretary filed the instant petitions for civil penalty against Respondents Crick, Jones and Wright on July 6, 1992, 70 days after receiving Respondents' notices of contest.

5. Respondents Jones and Wright first learned that the Secretary intended to propose individual civil penalties when they received the March 31, 1992, notice of proposed penalty from the Secretary.

¹ Section 110(c) provides as follows:

"Whenever a corporate operator violates a mandatory health or safety standard or knowingly violates or fails or refuses to comply with any order issued under this Act or any order incorporated in a final decision issued under this Act, except an order incorporated in a decision issued under subsection 105(c), any director, officer, or agent of such corporation, who knowingly authorized, ordered, or carried out such violation, failure, or refusal shall be subject to the same civil penalties, fines, and imprisonment that may be imposed upon a person under subsections (a) and (b)."

² Rulings on the pretrial motions to dismiss were deferred to enable the parties to develop an evidentiary record to support their positions. Hearings on these motions, as well as hearings on the merits with Docket No. KENT 92-549, were thereafter held on November 18 and 19, 1992.

6. Respondent Crick first learned that the Secretary intended to propose an individual civil penalty against him when the proposed individual penalty was conferenced in October 1991.

More particularly, Respondents argue that the petitions herein are untimely under Commission Rule 27(a) and must be dismissed under the principles of Salt Lake County Road Department, 3 FMSHRC 1714 (1981). In that case the Commission held that "if the Secretary does seek permission to file late he must predicate his request upon adequate cause." The Commission further held that a Respondent could also object to a late-filed penalty proposal on grounds that it was prejudiced by the delay. The Respondents argue that the Secretary's late petitions fail on both counts and should therefore be dismissed.

Commission Rule 27(a), 29 C.F.R. § 2700.27(a) provides that "within 45 days of receipt of a timely notice of contest of a notification of proposed assessment of penalty, the Secretary shall file a proposal for a penalty with the Commission." In these cases the Secretary now admits that he failed to comply with Rule 27(a). In the Salt Lake decision, the Commission held that the Secretary is not free to ignore the time constraints in Rule 27 for any mere caprice, as that would frustrate the enforcement purposes of Section 105(d) and, in some cases, deny fair play to operators. Clearly these principles are applicable as well to individual respondents in Section 110(c) cases and, because such cases directly impact individual rights, the concepts of fair play and due process must be even more carefully protected.

The Commission also held in the Salt Lake decision that "absent extraordinary circumstances, the Secretary is . . . admonished to proceed by timely extension motion when extra time is legitimately needed." The Commission found unacceptable the procedures followed by the Secretary in that case in filing an instanter motion accompanying the late filed proposal for civil penalty noting that under Commission Rule 9, 29 C.F.R. § 2700.9 a request for extension of time "shall be filed 5 days before the expiration of time allowed for the filing or serving of the document." In these cases the Secretary failed not only to comply with Commission Rule 9, but also failed to file any motion explaining the late filed petitions until, and only in response to, motions to dismiss filed by the Respondents. This cavalier disregard of the Commission Rules of Procedure and established Commission precedent in itself warrants dismissal of these proceedings.

In any event, the Secretary has failed to show "adequate cause" for the late filing in these cases. Salt Lake, supra at 1716. As reason for the late filing the Secretary alleges in her post hearing brief as follows:

[T]he record reflects that the Office of Assessments was experiencing an unusual backlog of cases at the time the case materials were generated and forwarded to the Solicitor's Office. The record also reflects that the 45-day deadline had already expired before undersigned counsel even received the case materials, and that the petitions were filed within 6 days of receiving the case."

The evidentiary record does not, however, contrary to the Secretary's representation, include any of the information now cited by the Secretary as justification for her late filing. As part of the Secretary's response in opposition to the Motions to Dismiss certain representations and allegations were made, however such representations made in pleadings are not evidence. In addition, attached to the Secretary's pleadings was a copy of an undated memorandum not on its face identified or associated in any way with the cases at bar purportedly issued by the Office of Assessments and directed to the Regional Solicitors' Offices stating the following:

The subject case is being sent to your office for a hearing with an Administrative Law Judge at the Federal Mine Safety and Health Review Commission.

However, due to the increased number of contested cases being received in this office, some cases may be late coming to your office.

We apologize in advance for any inconvenience this may cause, and we intend to make every effort possible to get these cases to your office as soon as humanly possible.

If you have any questions concerning this matter, please contact Edwina Pitts of my staff at FTS 235-8344.

Again, while this document was attached to the Secretary's pleadings, it was never introduced into evidence at the hearings. Even if it had been properly admitted at hearings and identified with these cases, the document needs further explanation.

In addition, as noted by the Respondents in their posthearing brief, the Secretary has apparently fallen into precisely the routine that the Commission condemned in the Salt Lake decision, i.e., the practice of filing rather uncomplicated pleadings late. The use of a generic intra-agency memorandum warning the regional solicitors to expect late transmittal of cases from the Office of Assessments creates an inference that the untimely filing of pleadings had become the Secretary's practice, not the rare exception. The untimeliness in these cases is particularly egregious when considering that these cases had already been delayed by the Secretary for over 14 months before he issued a proposed civil penalty assessment. Obviously at that point the Secretary had already computed the proposed assessments and had prepared the related workup so his administrative tasks were minimal, i.e., the transferral of the case files from one office in the agency to another and the filing of a two-page "boiler plate" pleading. Under the circumstances, and for this additional reason, the late filing in these cases warrants dismissal.

However, even assuming, arguendo, that the Secretary had presented justifiable circumstances for his violation of Commission Rules 9 and 27 the Respondents have established that they have been prejudiced by the late penalty proposals. Salt Lake, supra. First, I find that the delay of 25 days is inherently prejudicial to the Respondents, particularly following a delay of 14 months before Jones and Wright (and 9 months in the case of Crick) were even notified that they would be charged under Section 110(c) of the Act. The inherent prejudice to the individuals charged in cases under Section 110(c) is greatly exacerbated by the fact that, unlike mine operators who generally receive immediate notice of violations with the receipt of a citation or order, these individuals did not learn of the charges against them until well after the alleged violations had been abated, after evidence had been removed and after memories had faded.

There was no reason for these Respondents to have been aware when the underlying order was issued on January 15, 1991, that the Secretary would prosecute them months later and they did not therefore have any opportunity to preserve evidence or to effectively participate in the various stages of the proceedings. It was not until March 31, 1992, over 14 months later, that the Secretary first informed Respondents Jones and Wright that they were to be prosecuted under Section 110(c) and 9 months later before informing Respondent Crick.

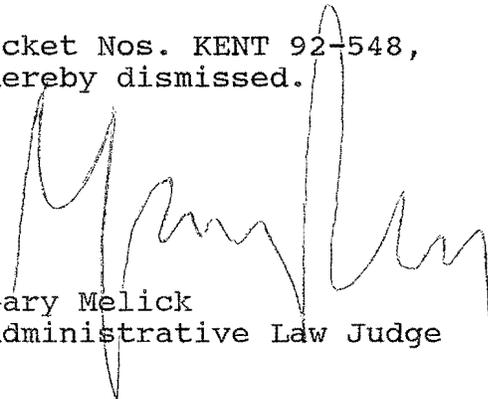
In addition, at hearing Respondents Jones and Wright could not recall with any specificity the circumstances surrounding the alleged violation and Respondent Crick's recollection was only refreshed "a little bit" by reading reports in the belt examiner's book. Moreover, Crick was unable to recollect conditions on the cited belt with specific detail.

Other witnesses also had difficulty recalling conditions on the cited belt. Belt Examiner Grisham, who conducted the belt examination on the day shift preceding the date of the order, could not remember the condition of the cited belt or any other particular belt. Belt Examiner Hatfield, who completed the last belt examination report before the order was issued, also admitted having no specific recollection of the conditions at the time of that examination or on the day the order was issued. Hatfield also testified that he took notes of his observations but that he had long since thrown them away. Even Inspector Gamblin, who issued the order, admitted that he had no recollection of conditions on the cited belt independent of reading the order itself. Moreover, Gamblin candidly recognized that "what the conversation was two years ago there would be no way I could tell you that."

Under the circumstances and recognizing that it would be impossible to identify and isolate that precise quantum of memory loss and prejudice attributable to the delay at issue after a delay of more than a year and a half, it can nevertheless reasonably be inferred that the former delay contributed to the prejudice. Under the circumstances and for this additional reason, the petitions herein must be dismissed.

ORDER

Civil penalty proceedings Docket Nos. KENT 92-548, KENT 92-550 and KENT 92-551 are hereby dismissed.



Gary Melick
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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APR 22 1993

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. WEST 92-375-M
Petitioner : A.C. No. 26-02161-05503-A
: :
v. : FKC Portable
: :
FRED KNOBEL, employed by :
FKC INCORPORATED, :
Respondent :

PARTIAL SUMMARY DECISION

Before: Judge Cetti

This case is before me upon the petition for civil penalty filed by the Secretary of Labor pursuant to section 110(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § et seq., the "Act."¹ The Secretary charges that Fred Knobel as an agent of a corporate operator, namely FKC Incorporated, knowingly authorized, ordered, or carried out a violation of the mandatory safety standard 30 C.F.R. § 56.14112(b) for the alleged failure to guard tail pulley on a portable rock crushing machine.

On the issue of jurisdiction the parties request a partial summary decision. I agree that such a decision may well be an efficient way to deal with this issue and result in an economy of the parties and Commission resources.

¹ Section 110c of the Act provides:

Whenever a corporate operator violates a mandatory health or safety standard or knowingly violates or fails or refuses to comply with any order issued under this Act of any order incorporated in a decision issued under subsection (a) or section 105(c), any director, officer, or agent of such corporation who knowingly authorized, ordered, or carried out such violation, failure, or refusal shall be subject to the same civil penalties, fines, and imprisonment that may be imposed upon a person under subsections (a) and (d).

I
STIPULATIONS

The parties have agreed to the following stipulations, which I accept:

At all times relevant in this matter:

1. Fred Knobel was the President of FKC Rock & Sand Company, Inc.

2. Fred Knobel was, and is, the President of FKC, Inc.

3. FKC, Inc. is a general contractor and is engaged in offsite grading, filling and leveling.

4. FKC, Inc. also grades local streets and roadways.

5. FKC, Inc. employs from 10 to 20 construction workers, depending on the needs of any given project.

6. FKC Rock & Sand Company, Inc. owned one portable rock crushing machine which was and is used to crush rock from construction excavation into smaller, more usable pieces.

7. FKC Rock & Sand Company, Inc.'s only business operation was the portable rock crushing machine.

8. The rock crusher owned by FKC Rock & Sand Company, Inc. was and is located in the Green Valley area, and was and is moved to various locations in that area depending upon need.

9. There was no excavation of materials performed by the rock crushing machine or by FKC Rock & Sand Company, Inc.

10. The rock crusher performs rock crushing for FKC, Inc. and other contractors.

11. On June 30, 1992, the rock crusher was being used to crush rock on a subcontract with other construction companies in Green Valley.

II

The Respondent requests a summary decision based upon the pleadings, papers, files, records and evidence herein, the affidavits of Glenn Dodd, Wes Parks and Pat L. Hickey, the Points and Authorities and its reply to Petitioner's Response to Motion for Summary Decision and Cross-Motion for Partial Summary Decision.

Petitioner's motion for summary decision on the issue of jurisdiction is based upon the arguments and authorities set

forth in Petitioner's Response to Motion for Summary Decision and Cross-Motion for Partial Summary Decision and the affidavits of Vernon Gomez and Arle Brown. In addition to the stipulations and material set forth above there is in the file a copy of Respondent's legal identity report dated July 5, 1990 signed by Respondent's executive secretary.

I have carefully reviewed the entire record including the arguments and points and authorities cited by the parties, the pleading, documents, affidavits and the stipulations.

Having considered all of the above and the research and arguments of both parties, I find the position of the Secretary on the issue of jurisdiction well stated, in accord with precedent, and meritorious. It is adopted here by reference.

Respondent's emphasis of the term "extracted" in his interpretation of the Mine Act's definition of mining overlooked the relevant terms of the definition of a mine as provided in section 3(h) of the Mine Act, 30 U.S.C. 801(3)(h).

The definition of a "coal or other mine" includes "equipment, machines, tool, or other property, ...used in, or to be used in, the milling...or the work of preparing coal or other minerals..." 30 U.S.C. 802(h)(1)(c) (emphasis added). MSHA's jurisdiction over portable crushing operations in this case is predicated on the preparation activity of crushing rock into smaller usable pieces. The crushed rock was used for house pads and some was sold to various contractors who haul it away for use elsewhere.

Rock is ordinarily defined as any consolidated or coherent and relatively hard mass of mineral matter. Respondent utilized the machine, the portable crusher cited by MSHA, to crush rock into smaller usable sizes. This activity is properly characterized as the "work of preparing coal or other minerals" (emphasis added).

Accordingly, Respondent's reliance on the term "extraction" to argue that the portable crusher is not a mining operation is misguided. According to the definition of mining provided in section 3(h) of the Mine Act, the portable crusher and its use in crushing rock into smaller sized usable material is a mining operation.

III

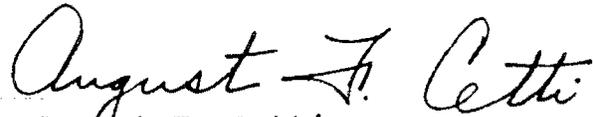
A legal identity report is required for newly established mines. Respondent took the affirmative step of registering its portable crusher "F.K.C. Portable" as a new mine with MSHA with the Federal mine identification number 26-02161. The same mine name and mine identity number appears on the citation at issue.

Although filing with MSHA for a mine identity number does not confer jurisdiction, it strongly indicates that there can be no claim of lack of notice or surprise when the inspection was made and the citation issued.

ORDER AND DECISION ON JURISDICTION

Respondent's motion to dismiss this proceeding is **DENIED**.
Petitioner's cross-motion for partial summary decision on the issue of jurisdiction is **GRANTED**.

The Secretary of Labor Mine Safety and Health Administration has jurisdiction.



August F. Cetti
Administrative Law Judge

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APR 26 1993

PEABODY COAL COMPANY,	:	CONTEST PROCEEDINGS
Contestant	:	
v.	:	Docket No. KENT 92-1107-R
	:	Order No. 3547306; 9/10/92
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. KENT 92-1108-R
ADMINISTRATION (MSHA),	:	Citation No. 3547307;
Respondent	:	9/10/92
	:	
	:	Camp No. 9 Prep Plant
	:	
	:	Mine ID 15-11012
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 93-177
Petitioner	:	A. C. No. 15-11012-03522
v.	:	
	:	Camp No. 9 Prep Plant
PEABODY COAL COMPANY,	:	
Respondent	:	

DECISION

Appearances: David R. Joest, Esq., Peabody Coal Company, Henderson, Kentucky, for Contestant/Respondent; Mary Beth Bernui, Esq., Office of the Solicitor, U. S. Department of Labor, Nashville, Tennessee, for the Secretary.

Before: Judge Maurer

STATEMENT OF THE CASE

Contestant, Peabody Coal Company (Peabody) has filed Notices of Contest pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d), challenging the issuance of a section 107(a) imminent danger order and a section 104(a) significant and substantial (S&S) citation which were both issued on September 10, 1992, at its Camp No. 9 Preparation Plant. The Secretary of Labor (Secretary) has filed a petition seeking a civil penalty of \$700 for the alleged violation of 30 C.F.R § 77.201 charged in the contested citation. The proceedings have been consolidated for purposes of hearing and decision.

Pursuant to notice, the cases were heard in Evansville, Indiana, on January 29, 1993.

The general issues before me include: (1) whether the condition cited in the contested imminent danger order was in fact an imminent danger warranting the withdrawal of miners; (2) whether Peabody violated the cited mandatory safety standard found at 30 C.F.R. § 77.201, and if so, whether that violation was S&S; and (3) the appropriate civil penalty to be assessed for the violation, should any be found.

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

STIPULATIONS

The parties have agreed to the following stipulations, which I accept (Tr. 5, Joint Exhibit No. 1):

1. Peabody Coal Company is subject to the Federal Mine Safety and Health Act of 1977.
2. Peabody Coal Company, Camp No. 9 Preparation Plant, has an affect upon interstate commerce within the meaning of the Federal Mine Safety and Health Act of 1977.
3. Peabody Coal Company and its Camp No. 9 Preparation Plant are subject to the jurisdiction of the Federal Mine Safety and Health Review Commission and stipulate that the administrative law judge has the authority to hear these cases and issue a decision.
4. Peabody Coal Company produced 82,713,677 tons of coal in the year 1992.
5. A reasonable penalty will not affect Peabody Coal Company's ability to remain in business.

DISCUSSION AND FINDINGS

Order No. 3547306, issued pursuant to section 107(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (the Act), charges as follows:

The following condition which constitutes an imminent danger was observed in the tunnel located below the raw coal storage silo. Methane concentrations of 5.2% to 5.4% were measured one foot

above the coal on No. 3 raw coal belt outby No. 1A and No. 1B raw coal feeders.

A separate citation will be issued for the violation included in this Order of Withdrawal.

Citation No. 3547307, issued pursuant to section 104(a) of the Act, charges as follows:

The raw coal storage silo tunnel is not being ventilated so as to maintain concentrations of methane below 1.0 volume per centum. Methane concentration of 5.2% to 5.4% was measured one foot above the coal on No. 3 raw coal belt outby No. 1A and No. 1B raw coal feeders.

FINDINGS OF FACT

1. The order and citation were issued at 9:10 a.m., on September 10, 1992, by MSHA Inspector Michael V. Moore during a CBC inspection of the Camp No. 9 Preparation Plant.

2. During the course of his inspection that day, Inspector Moore was accompanied by MSHA Inspector Ted Smith, Peabody Safety Manager Larry Cleveland, and miner's representative Sammy Thomas; all of whom testified in this proceeding, save Inspector Smith.

3. During his inspection, Inspector Moore took a series of methane readings utilizing a methanometer at several locations throughout the preparation plant and of particular significance herein, in the area underneath the raw coal storage silo. This area consists of a ground-level space in the silo structure open to the outdoors through an opening approximately 20 feet by 20 feet. The area underneath the silo contains two coal feeders which feed raw coal from the silo storage area above onto a coal conveyor beltline which conveys coal out through the 20 feet by 20 feet opening to the preparation plant.

4. The portion of the coal conveyor beltline which is located under the raw coal storage silo is covered by a tight-fitting metal cover which serves to contain coal dust. This cover has openings behind each of the feeders and is replaced at the tail end of the beltline by a metal mesh guard. The cover extends approximately to the point at which the beltline exits the area under the silo; at this point it is replaced by an arched corrugated metal cover with openings in the sides.

5. Inspector Moore obtained various readings indicating the presence of methane gas. He obtained one reading in the 2.2 to 2.4 percent range by opening an inspection door between the two feeders of the silo and holding his methanometer above the coal flow under the belt cover while the conveyor belt was running. He obtained another reading in excess of 2 percent methane by opening an inspection door in the chute area. He obtained two additional readings in excess of 2 percent methane further down the beltline toward the outside. These four readings were each taken above the coal flow on the running belt inside the belt enclosure.

Inspector Moore then proceeded to the area where the belt enclosure comes out of the silo and enters the corrugated metal belt cover outside of the silo. He positioned himself on top of the belt enclosure and placed his methanometer through the opening of the covered belt at the point where it ends, holding it above the coal flow and obtained a methane reading of 5.2 to 5.4 percent. Inspector Moore then obtained another methanometer and retested this area holding both methanometers above the coal flow, and both methanometers measured 5.2 to 5.4 percent methane. He then extended his arm inside the corrugated metal cover over the beltline outside the silo and obtained a reading of 3.7 percent methane.

6. All the other methane readings taken by the inspector in the area underneath the silo showed 0-1 percent concentrations of methane gas. These readings were all taken in the general atmosphere under the silo, as opposed to inside the belt enclosure itself.

7. Peabody employees regularly take methane readings of the general atmosphere in the area underneath the raw coal silo, but do not take them under the beltline cover while the coal is flowing. Typically, methane is not detected in the general atmosphere under the coal silo.

8. Several tests were run by Mr. Randy Wolfe, Supervisor of Safety Engineering at Peabody subsequent to Inspector Moore's issuance of the order and citation at bar. He measured airflow at the end of the covered section of the beltline (location R-4 on Joint Exhibit 2) and found an average airspeed of 276 feet per minute; and an average airflow volume of 552 cubic feet per minute with the belt running but the exhaust fan off. In order

to determine the airspace volume between the coal and the beltline cover, Wolfe had the belt stopped several times and took measurements. He found that the clearance between the coal and the belt cover ranged from 10-1/2 to 6 inches (the coal surface undulated because of the way the feeders work) and averaged 8-3/4 inches between the top of the coal and the belt. He also checked for methane when the beltline was stopped with coal on the belt and found none. Based on these measurements and observations, it was Wolfe's opinion that methane was being liberated while the coal was being fed onto the beltline, and this methane was carried outward to the end of the covered area by the natural ventilation created by the openings in the beltline cover (at the tail and behind each feeder) and the movement of the peaks and valleys of the coal. Wolfe also opined based on his measurements that it would have been impossible for Inspector Moore to take his readings underneath the cover of the beltline and still be at least 12 inches away from the flowing coal.

FURTHER DISCUSSION AND CONCLUSIONS

The mandatory safety standard set forth at 30 C.F.R. § 77.201 requires that with regard to surface installations "[t]he methane content in the air of any structure, enclosure or other facility shall be less than 1.0 volume per centum."

It is well recognized in the mining industry that methane measurements made closer than 12 inches from the point of methane liberation are not representative of the general atmosphere being sampled because of the undue influence of the methane source itself.

Inspector Moore testified that he tried to take his methane readings at least 12 inches from the coal on the beltline because this was "the accepted practice underground and I related it to the surface" He conceded that had he measured closer to the coal than 1 foot, he would expect a higher methane reading than he would have obtained 12 inches or more away from the coal. Taking the reading at least 1 foot off the top of the coal flow allows the natural ventilation to dilute any methane that may be there.

Inspector Moore, however, was unwavering in his testimony that he took the six methane readings identified on Joint Exhibit 2, and discussed herein, supra, at least 12 inches away from the coal on the beltline. But he also testified that he took five of these readings below the plane of the tight-fitting beltline cover. The sixth was taken under the corrugated metal

beltline cover outside the silo. On the other side, Mr. Wolfe, who actually measured coal heights at several points while the belt was stopped, testified that there was only 6 to 10 1/2 inches of clearance between the coal (which varied in height) and the belt-enclosing cover.

I am convinced by Mr. Wolfe's testimony that Inspector Moore's methane measurements must have been taken less than 12 inches from the top of the coal while it was running on the beltline. Wolfe's analyses, tests and measured observations are more inherently trustworthy than Moore's "eyeball" estimate of this distance which he made while the belt conveyor was in motion.

Accordingly, I find and conclude that the methane readings taken by Inspector Moore that formed the basis for the order and citation at issue herein, would have been some indefinite amount lower had they been taken at least 12 inches off the coal. However, notwithstanding that fact, I am still going to give the Secretary the benefit of the doubt that even though they would be somewhat lower than stated, they would still be in excess of 1 percent.

Turning to the mandatory safety standard at issue herein, Peabody called Donald W. Mitchell as an expert witness in the mine safety field. Earlier in his career, he had participated in the drafting of the regulations which appear in the 30 C.F.R. § 77.200 series as the immediate supervisor of the task force group responsible for their preparation. He testified that 30 C.F.R. § 77.201 was a surface safety standard adapted from the underground safety standards, and based on his involvement in preparing the rule, it was his opinion that section 77.201 was never intended to apply to methane concentrations in such relatively confined areas such as the space under the cover of covered beltlines; and that "enclosure" as that word is used in the standard, was contemplated to apply to much larger areas such as control rooms and that type of enclosure within a preparation plant. In the context of the area under the raw coal silo at Peabody's Camp No. 9 Preparation Plant, he opined the standard would be designed to limit methane in the atmosphere in the structure generally, not specifically in that confined space under the belt cover. Mr. Mitchell further testified that he was not familiar with any previous instance in which an MSHA inspector has taken methane measurements underneath the cover of a beltline. Inspector Moore agreed that it was a new practice in his own experience.

I concur with Mitchell and Peabody. A covered beltline is not a "structure, enclosure or other facility" within the meaning

of 30 C.F.R. § 77.201. The enclosed area under the raw coal storage silo where the covered beltline is located is the "structure, enclosure or facility" for purposes of the standard, which is violated if the methane concentration in the general atmosphere of the structure exceeds one percent by volume.

Irrespective of the interpretation of the mandatory safety standard alleged to have been violated, it is also alleged that the methane levels found by Inspector Moore represented an imminent danger.

Section 3(j) of the Act defines an imminent danger as "the existence of any condition or practice in a coal or other mine which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated." 30 U.S.C. § 802(j). In Rochester & Pittsburgh Coal Co., 11 FMSHRC 2159, 2163 (November 1989), the Commission noted that "the U.S. Courts of Appeals have eschewed a narrow construction and have refused to limit the concept of imminent danger to hazards that pose an immediate danger." (citations omitted). The Commission noted further that the courts have held that "an imminent danger exists when the condition or practice observed could reasonably be expected to cause death or serious physical harm to a miner if normal mining operations were permitted to proceed in the area before the dangerous condition is eliminated." Id., quoting Eastern Associated Coal Corp. v. Interior Bd. of Mine Op. App., 491 F.2d 277, 278 (4th Cir. 1974). The Commission also adopted the Seventh Circuit's holding that an inspector's finding of an imminent danger must be supported "unless there is evidence that he has abused his discretion or authority." 11 FMSHRC at 2164 quoting Old Ben Coal Corp. v. Interior Bd. of Mine Op. App., 523 F.2d 25, 31 (7th Cir. 1975).

In Utah Power & Light Co., 13 FMSHRC 1617, 1627 (October 1991), the Commission reaffirmed that an MSHA inspector has considerable discretion in determining whether an imminent danger exists. However, the Commission held in these cases that there must be some degree of imminence to support an imminent danger order and noted that the word "imminent" is defined as "ready to take place[;] near at hand[;] impending ...[;] hanging threateningly over one's head[;] menacingly near." 13 FMSHRC at 1621 (citation omitted). The Commission determined that the legislative history of the imminent danger provision supported a conclusion that "the hazard to be protected against by the withdrawal order must be impending so as to require the immediate withdrawal of miners." Id. Finally, the Commission held that an inspector abuses his discretion, in the sense of making a

decision that is not in accordance with law, if he issues a section 107(a) order without determining that the condition or practice presents an impending hazard requiring the immediate withdrawal of miners. 13 FMSHRC at 1622-23.

The Commission has also held that, in an imminent danger case, the judge must determine "whether a preponderance of the evidence shows that the condition or practice, as observed by the inspector, could reasonably be expected to cause death or serious physical harm, before the condition or practice could be eliminated." Wyoming Fuel Co., 14 FMSHRC 1282, 1291 (August 1992). The Commission went on to explain that, in making such a determination, a judge "should make factual findings as to whether the inspector made a reasonable investigation of the facts, under the circumstances, and whether the facts known to him, or reasonably available to him, supported issuance of the imminent danger order." 14 FMSHRC at 1292.

The Commission has also very recently held that:

While the crucial question in imminent danger cases is whether the inspector abused his discretion or authority, the judge is not required to accept an inspector's subjective "perception" that an imminent danger existed. Rather, the judge must evaluate whether, given the particular circumstances, it was reasonable for the inspector to conclude that an imminent danger existed. The Secretary still bears the burden of proving his case by a preponderance of the evidence. Although an inspector is granted wide discretion because he must act quickly to remove miners from a situation that he believes to be hazardous, the reasonableness of an inspector's imminent danger finding is subject to subsequent examination at the evidentiary hearing.

Island Creek Coal Co., Docket Nos. VA 91-47-R, 91-48-R, and 91-49-R, 15 FMSHRC _____ (March 3, 1993).

Inspector Moore testified that the high level of methane found inside the enclosed belt conveyor and the presence of coal dust on the belt could cause an explosion which would result in bodily injury such as burns or death to any personnel working in the area. He also testified that the possibility of an explosion was intensified by the presence of an ignition source in that roof bolts, mining machine bits, and other types of metal objects found intermittently mixed in the coal in the silo could strike the metal structure of the silo and create a spark.

Additionally, the Secretary presented testimony by Clete Stephan, an expert in the field of explosions related to coal mining. Mr. Stephan stated the methane levels found by Inspector Moore were within the explosive range and that the addition of coal dust on the belt conveyor would heighten the explosibility of the methane. Mr. Stephan also testified that there were four potential ignition sources that could have been present including: spontaneous combustion in the silo, metal to metal contacts such as Inspector Moore discussed, the possibility of welding or cutting by Peabody employees in the area of the silo and rollers on the belt conveyors which can become stuck and generate enough friction to increase the temperature on the beltline.

It is undisputed that cutting or welding is not performed while the raw coal beltline at Camp No. 9 Preparation Plant is running. Mr. Mitchell discounted the possibility of methane ignition by spontaneous coal combustion due to the lack of any history of such combustion at Camp No. 9, and the fact that the type of coal handled has little tendency to spontaneous heating. Based on the nature of the materials likely to be present on the belt and the amount of energy available, Mitchell did not believe that sparking or friction due to materials on the belt striking the beltline cover was a likely ignition source, and he did not believe that rollers becoming stuck and heated was a likely ignition source because studies have shown that temperatures associated with stuck rollers are below the ignition temperatures of either coal or methane and because there were no accumulations of coal dust around the rollers. Mitchell also considered and discounted static electricity as an ignition source because the beltline is grounded for its entire length and because the humidity is high. Mr. Mitchell also considered the possibility of ignition due to electrical equipment, which was not likely because the electrical equipment within the facility was designed to be incapable of igniting a vapor or gas.

In choosing Mr. Mitchell's opinion over that of Mr. Stephan, I have considered that Mitchell's opinions were based, at least in part, on his personal inspection of the raw coal silo, an investigation into the operational history of the facility and on the physical data gathered by Mr. Wolfe, including the important factor that the inspector's methane readings had to have been taken within 6 to 10 1/2 inches of the coal vice a minimum of 12 inches, as is standard practice. Mr. Stephan, on the other hand, was not sure he had ever visited the facility in question and he had accepted the inspector's methane readings at face

value. Therefore, his opinions were necessarily of a general nature, not specifically related to conditions and practices at this facility or taking into consideration the manner in which the readings were obtained and they accordingly carry less weight than Mitchell's in resolving the issues in these cases.

Mr. Mitchell and others testified that the standard practice in measuring methane was to measure at least 12 inches from the coal in order to obtain a measurement representative of the "general body" of the atmosphere being measured. High percentage concentrations of methane coming out of the surface of the coal (as in these cases) are unavoidable and do not represent a hazard in the absence of an ignition source. He also testified that ignition of methane under the belt cover was not likely due to the absence of an ignition source but that even if an ignition should occur it would be a "deflagration" rather than an explosion and would not endanger anyone who might be in the area, which is in and of itself, a rarity. Mr. Shirkey estimated that typically about 15 minutes per shift of work would be performed in the area under the raw coal storage silo. A certain volume of gas is required, according to Mr. Mitchell; you need more than a small pocket of air in the explosive range in order to sustain an explosion.

Furthermore, the highest methane reading obtained by Inspector Moore and the one cited in the order and citation was taken at position R-4 in Joint Exhibit No. 2. At that location, the methane is virtually outside; it is within inches of being outside and the potential ignition sources in that area are as a practical matter, nil.

Finally, it is undisputed that the covered beltline under the raw coal storage silo at Camp No. 9 has been in existence and in substantially the same condition and configuration since approximately 1981. It is also uncontested that no fires and/or explosions have occurred on the beltline in that time. Yet the Secretary contends, based on the methane levels measured by Inspector Moore on September 10, 1992, that a methane ignition is "imminent." Mr. Stephan testified that an explosion will definitely occur, and that the only question is when. This discrepancy between actual experience and the Secretary's theory defies explanation, and has not been explained to my satisfaction in this record.

Inspector Moore's readings in excess of 1 percent methane under the beltline cover do not represent a concentration of methane in excess of 1 percent in the general atmosphere of the structure in violation of 30 C.F.R. § 77.201 and do not represent an imminent danger in the absence of an ignition source, or a

sufficient volume of methane to cause any real damage, assuming an ignition. Accordingly, Order No. 3547306 and Citation No. 3547307 will be vacated herein.

ORDER

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

1. Section 107(a) Order No. 3547306 **IS VACATED** and Peabody's contest **IS GRANTED**.

2. Section 104(a) Citation No. 3547307 **IS VACATED** and Peabody's contest **IS GRANTED**.

3. The captioned cases **ARE DISMISSED**.


Roy J. Maurer
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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APR 29 1993

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 92-305-M
Petitioner	:	A.C. No. 05-2846-05521
	:	
v.	:	Del Camino Pit
	:	
VARRA COMPANIES, INC.,	:	
Respondent	:	

DECISION

Appearances: Kristi Floyd, Esq., Office of the Solicitor,
U.S. Department of Labor, Denver, Colorado,
for Petitioner;

Thomas Ripp, Esq., Wheat Ridge, Colorado,
for Respondent.

Before: Judge Morris

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

A hearing on the merits was held in Denver, Colorado, on December 29, 1992. Respondent filed a post-trial brief.

SETTLEMENTS

At the commencement of the hearing, Respondent moved to withdraw its contests as to Order Nos. 3905712, 3905713, and 390514.

The motion should be granted. (Tr. 8).

The remaining enforcement documents were litigated particularly as to negligence, unwarrantable failure, and civil penalties.

STIPULATIONS

The parties stipulated as follows:

1. Varra Companies, Inc., is engaged in mining and selling of sand and gravel in the United States, and its mining operations affect interstate commerce.

2. Respondent is the owner and operator of the Del Camino Pit, MSHA I.D. No. 05-2846.

3. Respondent is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (the "Act").

4. The Administrative Law Judge has jurisdiction in this matter.

5. The subject citation and orders were properly served by a duly authorized representative of the Secretary upon an agent of Respondent on the date and place stated therein, and may be admitted into evidence for the purpose of establishing their issuance. Moreover, the parties hereby stipulate to the facts contained in each citation and order and the designation of significant and substantial in each citation and order. The only issue remaining with regard to each citation and order is the degree of negligence, which affects the designation of each citation and order as an unwarrantable failure.

6. The exhibits to be offered by Respondent and the Secretary are stipulated to be authentic but no stipulation is made as to their relevance or the truth of the matters asserted therein.

7. The proposed penalty will not affect Respondent's ability to continue in business.

8. The operator demonstrated good faith in abating the violation.

9. Respondent is a small mine operator with 13,446 tons of production or hours worked in 1990.

10. The certified copy of the MSHA Assessed Violations History accurately reflects the history of this mine for the two years prior to the date of the citation and orders.

Citation No. 3905711

This citation, issued under Section 104(d)(1) of the Act, provides as follows:

The superintendent was observed operating (tramping) the Cat 416 backhoe/F.E.L. and was not wearing a seat belt. The Cat 416 (Serial No. 5PC01511) was used for various jobs at the plant and pit and as a "Gofer" shuttle for equipment and parts, etc. Management is aware of seat belt requirements. This is an unwarrantable failure.

The regulation allegedly violated, 30 C.F.R. § 56.14130(g), provides as follows:

(g) Wearing seat belts.

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

ARTHUR L. ELLIS, an MSHA metal and nonmetal inspector for the past five years, issued Citation No. 3905711.

The citation was issued when Mr. Ellis observed a small front-end loader being operated about the plant. The operator of the loader, Mike Ramsey, was not wearing a seat belt. It is a requirement that an equipment operator wear seat belts in these circumstances.

This particular equipment is not a grader but it is a wheel loader and wheel tractor. Seat belts are required on all mobile equipment.

Mr. Ramsey told the inspector that he knew the equipment operator is required to wear seat belts.

Mr. Ellis considered the operator's negligence to be high as there was no excuse for the violation. The only excuse offered by Mr. Ramsey was that he was only going a short distance.

The citation was abated when Mr. Ramsey stated he and all employees would wear seat belts and he would so advise the other employees.

MIKE RAMSEY is the superintendent of this sand and gravel operation. At the time of the inspection, he was loading steel into his backhoe. He observed Mr. Ellis on the premises and

drove over to talk to him. The weight of the material in the backhoe was insufficient to affect the balance of the equipment.

Mr. Ramsey described the terrain over which he drove as being smooth and it could not flip over a backhoe in any manner. As he also indicated, he had never seen any vehicle roll over on that terrain, nor had he ever received any reports to that effect. It was not his intention to flaunt the seat belt rule.

On the day of the inspection, all of the individuals at work were experienced operators who had been told about the necessity of wearing seat belts.

✓ **CHRISTOPHER VARRA** testified he is the general manager of Varra Companies Incorporated.

Before the inspection by Mr. Ellis, the operators of the equipment had been told to use seat belts. The company had not received any prior seat belt citations (see Ex. G-1).

DISCUSSION

It is apparent the superintendent was not wearing a seat belt. Accordingly, the citation should be affirmed.

It is further uncontroverted, as stated in Varra's brief, that Mr. Ramsey was driving over level terrain to meet the inspector. The loader was not out of balance and a loader had never overturned in this area.

Given these circumstances, I conclude Mr. Ramsey's conduct only involved ordinary negligence. The terms "unwarrantable failure" and "negligence" are distinguished in the Mine Act. A finding by an inspector that a violation has been caused by an operator's unwarrantable failure to comply with a mandatory health or safety standard may trigger the increasingly severe enforcement sanctions of section 104(d). 30 U.S.C. § 814(d). Negligence, on the other hand, is one of the criteria that the Secretary and the Commission must consider in proposing and assessing, respectively, a civil penalty for a violation of the Act or of a mandatory health or safety standard. 430 U.S.C. §§ 815(b)(1)(B) and 820(i). Although the same or similar factual circumstances may be included in the Commission's consideration of unwarrantable failure and negligence, the concepts are distinct. See Quinland Coals, Inc., 7 FMSHRC 1117, 1122 (August 1985); Black Diamond Coal Co., 9 FMSHRC 1614, 1622 (September 1987). Nevertheless, as explained in Emery, (9 FMSHRC 1997) and Youghiogheny and Ohio, (9 FMSHRC 2007) aggravated conduct constitutes more than ordinary negligence for purposes of a special finding of unwarrantable failure. "Highly negligent" conduct involves more than ordinary negligence and would appear, on its

face, to suggest an unwarrantable failure. Thus, if an operator has acted in a highly negligent manner with respect to a violation, that suggests an aggravated lack of care that is more than ordinary negligence.

Eastern Associated Coal Corp., 13 FMSHRC 178, 186 (February 1991).

Varra's brief observes that cases interpreting "unwarrantable failure" do not yield any facts which match the seat belt issues here. I agree. However, the Commission has recognized as relevant to unwarrantable failure determinations such factors as the extent of the violative condition, length of time it existed, whether the operator was placed on notice that greater efforts are necessary for compliance, and the operator's efforts in abating the violative condition. Peabody Coal Co., 14 FMSHRC 1261 (August 1992).

Mr. Ramsey's conduct involved only ordinary negligence. Accordingly, it follows that the unwarrantable failure allegations should be stricken.

Citation No. 3905711 should be affirmed.

Citation No. 3905715

This citation alleges a violation of 30 C.F.R. § 56.14130(i). The citation reads as follows:

The operator of the Cat D-9 Dozer, Serial No. 66A7250, was not wearing a seat belt. The seat belt was rotten and one side was torn almost in two pieces. While examining the belt, it fell in two pieces. The dozer was being operated in the pit on sloped and uneven ground. Management was not requiring seat belt use. This is an unwarrantable failure.

The regulation provides as follows:

(i) **Seat belt maintenance.**

Seat belts shall be maintained in functional condition, and replaced when necessary to assure proper performance.

Mr. Ellis indicated the D-9 dozer involved here is a crawler tractor with the blade on the front.

In Mr. Ellis's opinion, the operator was highly negligent. He based this view on the fact that the superintendent said he was aware of the defective seat belt. In addition, MSHA had issued a program manual relating to seat belts. The condition that existed here had been there for some time.

It takes five minutes to install a seat belt. Mr. Ramsey testified that he was not aware that there was anything wrong with the seat belt before the inspection. After the citation was issued, the seat belt was replaced.

Mr. Ramsey is familiar with the types of equipment that are required to have seat belts, but he was not aware that the seat belt on this equipment had anything wrong with it before the inspection. After the citation was issued, the seat belts were replaced.

At the pit there are no heavily traveled roads, although some of the heavy equipment has to go up and down the slopes.

Mr. Ramsey did not know how long it would take for a seat belt to rot.

CHRISTOPHER VARRA stated the D-9 dozer had been purchased a few months before the inspection. He was not aware that the seat belt had rotted. Before the inspection, the operator of the equipment had been told to use seat belts. Mr. Varra opined that the seat belt was probably overlooked when the equipment was purchased.

Mr. Varra agreed he is responsible for enforcing the seat belt law and if any violations are found they will be written up. However, he doesn't personally check to see that seat belts are being used by his operators.

DISCUSSION

The evidence establishes the seat belt was not maintained in a functional condition. The belt was rotten and one side was torn in almost two pieces. In fact, the belt fell in two pieces when the inspector examined it. The described conditions should have been readily observable.

Although Messrs. Ramsey and Varra testified they were not aware of the defective belt, they should have been since the equipment had been purchased only a few months before the inspection.

The above facts indicate a high degree of negligence on the part of the operator. As a result, the violation was due to the operator's unwarrantable failure.

Citation No. 3905715 should be affirmed.

Citation No. 3905716

This citation was amended to allege a violation of 10 C.F.R. § 56.14130(g) (cited above). The citation reads as follows:

Seat belts were not provided on the Komatsu Dozer Model No. 355A, exposing employees to the possibility of being thrown about and from the cab of the dozer. The dozer was used in the pit to mine with. Management was aware of this condition. This is an unwarrantable failure. The dozer was provided with R.O.P.S.

MSHA Inspector Arthur Ellis issued this citation when he observed Jim Whitley, an employee, operating the Komatsu dozer without wearing a seat belt. The seat belt had been missing since a new seat had been installed on the dozer. Mr. Ellis indicated the regulations require a seat belt on this type of equipment, which is a crawler tractor.

Mr. Ellis further designated this situation as one of high negligence. This is based on the fact that Mr. Ramsey said he was aware that seat belts were required and an MSHA policy manual had been sent to all operators.

The company offered no excuse.

The violation was abated by seat belts being installed and employees being instructed in their use.

Mr. Ramsey indicated that after the seat was unbolted, a seat belt was found lying under the seat. The first time that Mr. Ramsey learned the seat belts were not visible was when Mr. Ellis so advised him.

The equipment operator, Jim Whitley, had some 40 years' experience in operating dozers, and Mr. Ramsey himself has been aware of the seat belt requirement since he has been in the sand and gravel business.

The terrain where the Komatsu dozer was operated was on about a 35 degree angle.

DISCUSSION

The operator again challenges the unwarrantable failure designation.

However, I conclude the operator was highly negligent.

The company was aware seat belts were required. An MSHA policy manual had been sent to all operators. Any cursory check would have established that the seat belt on this Komatsu dozer had been bolted under the seat.

High negligence establishes the designation of unwarrantable failure.

Citation No. 3905716 should be affirmed.

In support of its position, Varra mentioned a prior citation (No. 3905429) where the operator was cited under § 104(a) for not wearing a seat belt while operating the loader. The loader was being operated on uneven ground. (Ex. R-1).

This evidence does not damage Mr. Ellis's testimony, since he explained the operator involved in the prior citation was not aware its employee was not wearing the seat belt.

CIVIL PENALTIES

Section 110(i) of the Act mandates consideration of certain criteria in assessing civil penalties.

Varra is a small operator. (Stipulation 9).

Varra has a favorable history with only 19 violations assessed in the two years ending November 4, 1991. (Ex. G-1).

The operator was negligent as to all the seat belt violations since the violative conditions were open and obvious.

Concerning the operator's gravity:

Order No. 3905711 involved a terrain where the CAT 416 would not likely turn over. As a result, the gravity should be considered as low.

In Order No. 3905715 the seat belt was not properly maintained. The inadequate belt establishes a situation of high gravity.

In Order 3905716, the seat belt was not worn. The terrain, at 35 degrees, establishes a situation of high gravity.

Varra abated the violative conditions and the company is entitled to statutory good faith.

The penalties set in the order of this case are appropriate.

For the foregoing reasons I enter the following:

ORDER

1. Order No. 3905712 and the proposed penalty of \$400 are **AFFIRMED**.

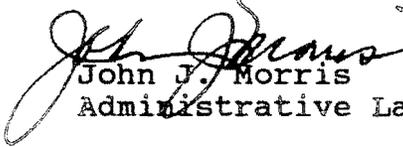
2. Order No. 3905713 and the proposed penalty of \$400 are **AFFIRMED**.

3. Order No. 3905714 and the proposed penalty of \$400 are **AFFIRMED**.

4. Order No. 3905711 is **AFFIRMED** and a penalty of \$100 is **ASSESSED**.

5. Order No. 3905715 is **AFFIRMED** and a penalty of \$400 is **ASSESSED**.

6. Order No. 3905716 is **AFFIRMED** and a penalty of \$400 is **ASSESSED**.


John J. Morris
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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APR 29 1993

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. YORK 93-65-DM
On Behalf of	:	
GERALD SAPUNARICH,	:	Cementon Plant & Quarry
Complainant	:	
	:	
v.	:	
	:	
LEHIGH PORTLAND CEMENT	:	
COMPANY,	:	
Respondent	:	

DECISION APPROVING SETTLEMENT

Before: Judge Fauver

This case involves an alleged discrimination against miner Gerald Sapunarich in violation of § 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq.

The parties propose to settle the case by assessment of a civil penalty of \$1,500.00 and by posting the settlement agreement on the mine bulletin board for a minimum of 30 days.

I find the settlement to be consistent with the purposes of § 105(c) and § 110(i) of the Act.

ORDER

1. The motion to approve settlement is GRANTED.
2. Respondent shall pay the approved civil penalty of \$1,500.00 within 30 days of this Decision, and upon such payment this proceeding is DISMISSED.

William Fauver
 William Fauver
 Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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APR 30 1993

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), :
Petitioner : Docket No. WEVA 92-922
v. : A.C. No. 46-01453-04008
: :
CONSOLIDATION COAL COMPANY, : Humphrey No. 7 Mine
Respondent :

DECISION

Appearances: Charles M. Jackson, Esq., Office of the Solicitor,
U.S. Department of Labor, Arlington, Virginia, for
the Petitioner;
Daniel E. Rogers, Esq., Consol, Inc., Pittsburgh,
Pennsylvania, for Respondent.

Before: Judge Maurer

Statement of the Case

In this case, the Secretary of Labor (Secretary) seeks a civil penalty of \$1,000 for an alleged violation of section 103(f) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 813(f)¹ which authorizes designated walkaround

¹ Section 103(f) states:

"Subject to regulations issued by the Secretary, a representative of the operator and a representative authorized by his miners shall be given an opportunity to accompany the Secretary or his authorized representative during the physical inspection of any coal or other mine made pursuant to the provisions of subsection (a), for the purpose of aiding such inspection and to participate in pre- or post-inspection conferences held at the mine. Where there is no authorized miner representative, the Secretary or his authorized representative shall consult with a reasonable number of miners concerning matters of health and safety in such mine. Such representative of miners who is also an employee of the operator shall suffer no loss of pay during the period of his participation in the inspection made under this subsection. To the extent that the Secretary or authorized representative of the Secretary determines that more than one representative from each party would further aid the inspection, he can permit each party to

representatives to accompany inspectors during their inspection of the mine.

Inspector Thomas W. May issued to the respondent section 104(a) Citation No. 3108715 which charges the following:

The operator did not give the representative, authorized by the miners, the opportunity to accompany an authorized representative of the Secretary. On day shift and afternoon shift on 01-13-92, the miner representative was not permitted to accompany me on my physical inspection of the Northwest bleeder system. On day shift John Higgins, General Superintendent, would not permit Sam Woody, the miner representative the opportunity to accompany me into the bleeder system. On afternoon shift Ron Weaver, Superintendent, would not permit Richard Matthews, the miner representative the opportunity to accompany me into the bleeder system. On afternoon shift I was accompanied by Rick Pauley, representative of the operator.

Pursuant to notice, a hearing was held on the alleged violation in Morgantown, West Virginia, on December 17, 1992. Both parties have filed posthearing letter-briefs, which I have duly considered in making the following decision.

Stipulations

The parties stipulated to the following, which I accepted (Tr. 7-9):

1. Consolidation Coal Company is the owner and operator of the coal mine at which the citation in this proceeding was issued.
2. Operations of Consolidation Coal are subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977.
3. This case is under the jurisdiction of the Federal Mine Safety and Health Review Commission and

have an equal number of such additional representatives. However, only one such representative of miners who is an employee of the operator shall be entitled to suffer no loss of pay during the period of such participation under the provisions of this subsection. Compliance with this subsection shall not be a jurisdictional prerequisite to the enforcement of any provision of this Act."

its designated Administrative Law Judges pursuant to sections 105 and 113 of the Mine Act.

4. The individual whose signature appears in block 22 of the citation at issue in this case was acting in his official capacity and as an authorized representative of the Secretary of Labor when the citation was issued.

5. True copies of the citation at issue in this case were served on the Respondent or its agent as required by the Mine Act.

6. The total proposed penalty for the citation contested by Consolidation Coal Company in this case will not affect the Respondent's ability to continue in business.

7. For the purposes of assessing any penalty that may be assessed in this case, Consolidation Coal Company is a large coal mine operator with an average history of violations.

8. The citation contained in Exhibit A attached to the Secretary's petition is an authentic copy of the citation at issue in this case with all appropriate modifications for abatements.

Discussion

On the morning of January 13, 1992, Inspector May informed Mr. Robert Smith, who works in Consolidation's Safety Department and Mr. Sam Woody, the miner's representative, that he was going to go back into the northwest bleeder system to inspect the Brock Four Bleeder Fan. He also informed them both at this time that they had the right to travel with him or not, as they chose.

This area had not been inspected for 8 months because the company had requested and been given a waiver to examine that area with the proviso that they take their air and gas readings on the surface. Prior to the issuance of this waiver, the area had been the subject of a weekly examination.

Mr. Woody was willing to go, but Mr. Higgins, the general superintendent, told Inspector May that the company representative and the miner's representative, Sam Woody would not be traveling with him to the fan. He told the inspector that he could go anywhere in the mine he wanted to, but that he (Higgins) was not going to permit company employees to go back there. Higgins felt that the area was too dangerous; it had not been inspected in 8 months and he was not going to allow company

personnel to go into that area. He informed the inspector that his men would stop at the six northwest cut-through.

Inspector May testified that he then told Mr. Higgins that under the Mine Act, the miner's representative had the right to travel with him and assist him in his inspection. Higgins again stated that the miner's representative, in this situation, Sam Woody, was a company employee and his responsibility if he were to get injured. He reiterated that he was not going to permit it.

Subsequently, Inspector May, accompanied by Smith and Woody arrived at the man door at the six northwest cut-through. Inspector May proceeded into the bleeder system alone. Smith and Woody remained on the outby side of the man door at the cut-through. Inspector May remained in the bleeder system for approximately an hour. As a result of his inspection, he issued a section 107(a) order because of methane concentrations. That order is not the subject of this proceeding, but I understand it was later vacated as part of a settlement negotiation.

There was a second inspection of the area that day by Inspector May, to terminate the order. He arrived at the mine about 8:30 p.m. At this time John Webber was the Safety Department representative and Richard Matthews the miner's representative. On this occasion, Mr. Ron Weaver, the superintendent of the Bowers Portal stopped him and informed him that Webber and Matthews would not be going into that area with him, but that a shift foreman, Rick Pauley would travel with him back to the bleeder. Inspector May advised Weaver of the right of the miner's representative under the Act to travel with the inspector and assist in the inspection. Weaver repeated that Matthews would not be going with him, and he didn't. The inspector, accompanied by Foreman Pauley carried out the termination inspection, leaving Webber and Matthews behind at the man door at the six northwest cut-through.

In this case, respondent maintains that it was their corporate duty to protect their employees from potential harm and that they did have a reasonable basis for considering going back into that bleeder system to be too dangerous.

Upon reflection, I am not going to get into the issue of whether or not it was too dangerous or dangerous at all for that matter to inspect the northwest bleeder system as Inspector May insisted on doing on the day in question. The Commission has emphasized repeatedly that the walkaround rights granted miners' representatives by section 103(f) of the Mine Act are a vitally important statutory right granted to miners and their representatives by the Act. And I can find no authority, nor has respondent been able to cite me any, for the proposition that the opportunity to engage in walkaround can be restricted by the

operator based on potential danger to the employee/miner's representative. Accordingly, I am going to affirm the citation at bar.

Civil Penalty Assessment

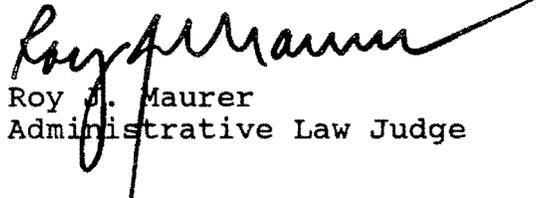
Taking into consideration all of the civil penalty assessment criteria found in section 110(i) of the Act, I conclude and find that the petitioner's proposed civil penalty assessment of \$1000 for the violation in question is reasonable, and it will be so ordered.

ORDER

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

1. Citation No. 3108715 IS AFFIRMED.

2. Respondent, Consolidation Coal Company shall within 30 days of the date of this decision pay the sum of \$1,000 as a civil penalty for the violation found herein.


Roy J. Maurer
Administrative Law Judge

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