May 1982

Commission Decisions

Administrative Law Judge Decisions

Commission Decisions

The following cases were Directed for Review during the month of May:

United States Steel Corporation v. Secretary of Labor, MSHA, Docket Nos. LAKE 82-102-RM, etc. (Judge Steffey, April 15, 1982)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

May 3, 1982

EASTERN ASSOCIATED COAL CORPORATION	:	
v.	:	Docket No. PITT 76X203
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	IBMA 77-28

DECISION

This case arose under the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 et seq. (1976)(amended 1977)("the Coal Act"). 1/ Apart from the merits of this case, a procedural issue must first be addressed. The Commission requested supplemental memoranda and held oral argument on the question of whether under the Coal Act an operator could obtain review of a notice of violation independent of a civil penalty proceeding or a proceeding to review the validity of a withdrawal order. Attention was focused on this issue due to the decision of the United States Court of Appeals for the District of Columbia Circuit in UMWA v. Andrus (Carbon Fuel Co.), 581 F.2d 888 (1978), cert. denied sub nom. Carbon Fuel Co. v. Andrus, 439 U.S. 928 (1978). In Carbon Fuel the court, in essence, held that under the Coal Act notices of violation not involving an imminent danger could not be reviewed on the merits prior to the issuance of a withdrawal order or institution of civil penalty proceedings.

In Howard Mullins v. Andrus, 664 F.2d 297 (D.C. Cir. 1980), the D.C. Circuit again was confronted with a Coal Act case involving review of a notice of violation. Mullins was pending when the decision in Carbon Fuel was issued and the court refused to retroactively apply its Carbon Fuel holding. Balancing the factors relevant to retroactive application of a newly announced principle, the court concluded that retroactive application of its Carbon Fuel holding was not warranted. 664 F.2d at 302-305. Therefore, in Mullins the court proceeded to review the merits of the notice of violation therein at issue.

For reasons similar to those of the D.C. Circuit in refusing to retroactively apply its Carbon Fuel holding, we believe that it is unnecessary at this late date for us to resolve whether, in our view, Carbon Fuel or precedent established by other courts and the Board of Mine Operations Appeals correctly resolved the issue of review-

1/ On March 8, 1978, this case was pending on appeal before the Department of Interior's Board of Mine Operations Appeals. Accordingly, it is before the Commission for disposition. 30 U.S.C. § 961 (Supp. III 1979). The Mine Safety and Health Administration (MSHA) has been substituted for its predecessor agency, the Mining Enforcement and Safety Administration (MESA).

ability of the merits of notices under the 1969 Coal Act. 2/ The Coal Act was substantially amended in 1977 and this case and three others 3/ are the only remaining Coal Act cases posing this issue. Because of the age of these cases, and because we can perceive no realistic adverse impact that reviewing the merits of the three remaining cases could have on miner safety and health, we will proceed to review the merits at this time.

This case involves the interpretation of 30 C.F.R. § 77.215(j). The standard provides in pertinent part:

> All fires in refuse piles shall be extinguished, and the method used shall be in accordance with a plan approved by the District Manager.

On June 22, 1976, an inspector of the Mining Enforcement and Safety Administration ("MESA") inspected a burning refuse pile located on the surface of an underground bituminous coal mine owned and operated by Eastern Associated Coal Corporation ("Eastern"). The pile is composed of refuse deposited by the previous owner of the mine, Delmont Fuel Company. At the time of the inspection in this case, the pile was not being used as a depository for mine refuse and had not been so used since 1953. The refuse pile is located 2 miles from the Eastern mine's main portal and 800 to 1,000 feet from Eastern's preparation plant. The refuse pile is 1,800 feet long and 400 feet wide. To the west of the refuse pile is a railroad track running to the the mine's preparation plant. To the east are two roads - one on mine property, the other on township property.

The inspector was advised before he left his office that a plan to extinguish the fire had not been submitted to the MESA district manager for approval. When the inspector arrived at the mine, he saw smoke rising from the pile at several points and smelled a strong sulphurous odor. Trash was observed at the base of the pile. Motorcycle tire tracks were observed on the pile. 4/ Red dog had been removed from the pile. 5/ After viewing the pile the inspector issued a notice alleging a violation of § 77.215(j). The notice stated:

2/ Lucas Coal Co. v. IBMOA, 522 F.2d 581, 587 (3d Cir. 1975); Lucas v. Morton, 358 F. Supp. 900, 903-904 (W.D. Pa. 1973 (3 - judge court); Reliable Coal Corp., 1 IBMA 50 (1971); Freeman Coal Mining Co., 1 IBMA (1970). But see United States v. Fowler, 646 F.2d 859 (4th Cir. 1981) (agreeing with rationale of Carbon Fuel).

3/ Inland Steel Coal Co., VINC 77-164, IBMA 77-66 (unabated notice); Florence Mining Co. et al., PITT 57-15, etc, IBMA 77-66 (unabated notice); Alabama By-Products Corp., BARB 76-153, IBMA 76-114 (abated notice).

4/ It cannot be determined from the record who was responsible for the trash or the tracks. Eastern's miners, however, are instructed never to go onto the pile and no evidence was introduced that any ever did. Moreover Eastern conducts no work on or at the pile.

5/ Red dog. Material of a reddish color resulting from the combustion of shale and other mine waste in dumps on the surface. U.S. Department of the Interior, Dictionary of Mining, Mineral and Related Terms 904 (1968). Red dog is commonly used for road repair. Although Eastern had in the past allowed the township to remove red dog from the pile, this permission had been revoked one-half year before the inspection.

> A plan has not been submitted to the District Manager on the method that will be used to extinguish the existing fire in the inactive refuse pile....

Eastern claimed that the notice was invalidly issued because the cited standard does not apply to the subject refuse pile. The administrative law judge agreed. The judge held that, when a burning refuse pile is part of an underground mine, in order to prove a violation of the standard the Secretary must show: the pile is on mine property; the pile is located in a surface work area of the underground mine 6/; and the pile presents a real or potential hazard to a miner in the normal course of his employment. The judge held that the Secretary had proved the first element, but not the latter two.

The judge's conclusion that the regulation only applied to refuse piles located in "surface work areas where miners would reasonably be expected to work or travel in the normal course of their employment" was based upon his interpretation of section 101(i) of the Coal Act. He found that section 101(i) "authorizes the Secretary to promulgate mandatory safety standards for surface coal mines and for surface work areas of underground coal mines." 7/ (Emphasis added by judge). He concluded, "the Act by its very terms limits the Secretary's authority to regulate surface areas of underground mines and that limitation is specifically directed to a work area...." (Emphasis added by judge). 8/ The judge cited to the title of 30 C.F.R. Part 77 and to 30 C.F.R. § 77.1 as evidence that the Secretary recognized such a limitation. Part 77 is entitled: "Mandatory safety standards, surface coal mines and surface work areas of underground coal mines." (Emphasis added). 30 C.F.R. § 77.1, the scope provision for Part 77, states:

6/ The judge defined "surface work area" as:
> Any surface area of a coal mine which could present a hazard to the health and safety of miners in places where they could reasonably be expected to work or travel in the normal course and scope of their employment.

7/ Section 101(i), 30 U.S.C. § 811(i) (1976), stated:
> Proposed mandatory health and safety standards for surface coal mines shall be published by the Secretary, in accordance with the provisions of this section, not later than twelve months after the date of enactment of this Act. Proposed mandatory health and safety standards for surface work areas of underground coal mines, in addition to those established for such areas under this Act, shall be published by the Secretary, in accordance with the provisions of this section, not later than twelve months after the date of enactment of this Act.

8/ The judge noted the following statements appearing in the preamble when the refuse pile regulations were adopted:

> The final regulations will provide the operator with flexibility in constructing refuse piles and impounding structures which will present no hazard to coal miners in their work.

(footnote 8, cont'd)

> This part 77 sets forth mandatory safety standards for bituminous, anthracite, and lignite surface coal mines, including open pit and auger mines, and to the surface work areas of underground coal mines, pursuant to section 101(i) of the [Coal Act].

(Emphasis added).

We find that the judge erred in concluding that a burning refuse pile must be located in a surface work area of an underground coal mine to be subject to the standard and that the Secretary must prove a burning refuse pile presents a real or potential hazard to a miner in the normal cause of his employment.

Section 101(a) of the Coal Act, 30 U.S.C. § 811(a)(1976), granted the Secretary the authority to promulgate mandatory standards. That section stated:

> The Secretary shall, in accordance with the procedures set forth in this section, develop, promulgate, and revise ... improved mandatory safety standards for the protection of life and the prevention of injuries in a coal mine....

(Emphasis added). Section 3(h) of the Coal Act, 30 U.S.C. § 802(h)(1976), defined "coal mine" as:

> [A]n area of land and all structures, facilities, machinery, tools, equipment, shafts, slopes, tunnels, excavations and other property, real or personal, placed upon, under, or above the surface of such land by any person, used in, or to be used in, or resulting from, the work of extracting in such area bituminous coal....

This definition is broad enough to include refuse piles, and it does not indicate that the term was meant to be limited by whether work or travel transpired at or near the enumerated areas or structures. Section 77.215(j) was promulgated in the Federal Register "under the authority of section 101(a) of the 1969 Act." 40 Fed. Reg. 11775 (1975). We conclude that section 101(a)'s mandate to promulgate safety standards for the protection of life and the prevention of injuries in a "coal mine," as that term is defined in section 3(h), brings refuse piles in surface areas of underground mines under the Secretary's jurisdiction.

(footnote 8 cont'd.)

> .... A further addition is the requirement in 77.215(j) and 77.216(e) that the fire extinguishing operations on refuse piles and impounding structures be conducted in accordance with an approved plan. This new requirement is justified by the hazardous nature of the extinguishing operation and the necessity to ensure that miners employed in extinguishing operations are fully acquainted with the procedures to be used. (Emphasis added by judge). 40 Fed. Reg. 775-76 (1975).

In our view, section 101(i), in essence, was a procedural provision, not jurisdictional. It required the Secretary to publish the proposed mandatory health and safety standards for surface coal mines and "for surface work areas of underground coal mines" "not later than twelve months after the date of enactment of [the Coal Act]". The purpose of this section was to ensure that the Secretary acted promptly in proposing mandatory standards for surface mines and surface work areas of underground mines. Quick action by the Secretary was needed because the Coal Act itself contained no statutory standards pertaining to surface coal mines and very few statutory standards specifically relating to surface areas of underground mines. An analysis of the bills from which section 101(i) ultimately emerged indicates that although the term "surface work areas" appeared in Senate bill S. 2917, in section 219(c), the purpose of that section was to "require that proposed mandatory safety standards be developed and published ... as soon as possible, but not later than twelve months after enactment." U.S. Senate Committee on Labor and Public Welfare, Legislative History of the Federal Coal Mine Health and Safety Act of 1969, 94th Cong., 1st sess., at 213. The House bill, H.R. 13950, had a similar provision for the rapid publication of proposed mandatory standards, but its provisions were restricted to surface coal mines. Section 101(h) of the House bill stated:

> Proposed mandatory safety standards for surface coal mines shall be developed and published by the Secretary not later than twelve months after the enactment of this Act.

At conference the Senate provision was essentially adopted because it included a requirement that standards be published for surface work areas of underground mines as well as for surface coal mines. Legis. Hist. at 1509. Although neither the Senate Committee report nor the Conference Report explains why the term "surface work area" was used rather than "surface area," we believe it to have been a case of imprecise draftsmanship, rather than an attempt to restrict regulatory jurisdiction to "surface work areas". As we have noted, the broad grant of authority in the Act afforded the Secretary jurisdiction to regulate "an area of land and all ... property, real or personal ... upon, under, or above the surface ... used in ... to be used in, or resulting from, the work of extracting in such area bituminous coal". Restricting the Secretary's authority to only those portions of the surface areas where work or travel occurred, or could be expected to occur, would be inconsistent with the otherwise broad applicability of the Act.

Moreover, there are logical limits to literalism, one of which is when it leads to an incongruous result plainly at variance with the policy of a statute when viewed as a whole. United States v. American Trucking Associates, 310 U.S. 534, 543-544, (1940). The judge's finding that section 101(i) limits the Secretary's authority in regulating surface portions of underground mines to work areas leads to such a result. Under it, although a burning refuse pile in a non-work area of an underground mine would not be subject to § 77.215(j), an identical refuse pile in a non-work area of a surface mine would be, there being no "work area" language pertaining to surface mine standards. Thus, we conclude that the Coal Act, specifically section 101(i), did not restrict the Secretary to regulating only surface work areas of underground mines.

Eastern argues, however, that even if section 101(i) does not limit the Secretary, he voluntarily imposed such a restriction upon himself. Eastern notes, as did the judge, the title of Part 77, and the "scope" provision at § 77.1, both quoted supra. The phrase "surface work area", as used in both the title and the standard, clearly is taken from section 101(i). Indeed, 30 C.F.R. § 77.1 concludes with the statement that the standards are set forth "pursuant to section 101(i)." In view of our conclusion that the words "surface work areas of underground coal mines" are not used in a jurisdictional sense in section 101(i), we conclude that they do not acquire that sense by their repetition in the standards adopted by the Secretary. 9/

We also disagree with the judge's holding that the Secretary must establish "that the pile presents a hazard, real or potential, which can reasonably be expected to expose a miner to danger in the normal and reasonable course of his employment." During the promulgation of the refuse piles standards the Secretary published in the Federal Register findings of fact based upon public hearings. 39 Fed. Reg. 38,661 (1974). His general finding with respect to refuse piles was that "[c]oal refuse piles ... can present a hazard to health and safety." His specific finding with respect to burning refuse piles was that "[b]urning refuse piles present a health and safety hazard, and that hazard will be decreased or eliminated when the burning pile is extinguished by any safe and effective reasons." Id. Thus, the standard's requirement that burning refuse piles be extinguished in accordance with an approved plan is premised upon the finding that such piles are hazardous. That finding having been made, the Secretary need not prove anew the hazardous nature of burning refuse piles in every enforcement proceeding. 10/ To prove a violation of § 77.215(j), as with most standards, non-compliance with the standard's terms need only be shown, i.e., the refuse pile is burning and a plan has not been filed. Cf. Vecco Construction Co., 1977-78 CCH OSHD ¶22,247 (OSHRC).

9/ Because we reverse the judge's finding that in order to establish a violation of § 77.215(j) the Secretary must establish that the refuse pile is located in a surface work area, we need not determine whether, as the Secretary argues, the judge adopted too restrictive a definition of the term "surface work area."

10/ Evidence as to the actual extent of the hazard presented by a particular burning refuse pile is, of course, relevant in determining the gravity of a violation for penalty purposes.

Accordingly, the judge's decision is reversed and the case is remanded for further proceedings consistent with this decision. 11/

Richard V. Backley, Commissioner

Frank F. Jestrab, Commissioner

A. E. Lawson, Commissioner

11/ Chairman Collyer assumed office after this case had been considered at a Commission decisional meeting and took no part in the decision. A new Commissioner possesses legal authority to participate in pending cases, but such participation is discretionary and is not required for the Commission to take official action. The other Commissioners reached agreement on the disposition of the case prior to Chairman Collyer's assumption of office, and participation by Chairman Collyer would therefore not affect the outcome. In the interest of efficient decision-making, Chairman Collyer elects not to participate in this case.

Former Commissioner Nease participated in considering this case and also voted to reverse the judge's decision, but resigned from the Commission before the decision was ready for signature.

Distribution

Sally Rock, Esq.
Eastern Associated Coal Corporation
1728 Koppers Building
Pittsburgh, PA 15219

Michael McCord, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd.
Arlington, Virginia 22203

Mary Lu Jordan, Esq.
UMWA
900 15th St., N.W.
Washington, D.C. 20005

Charles W. Newcom, Esq.
Sherman & Howard
2900 First of Denver Plaza
633 Seventeenth St.
Denver, Colorado 80202

Administrative Law Judge George Koutras
FMSHRC
5203 Leesburg Pike, 10th Floor
Falls Church, Virginia 22041

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

May 3, 1982

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. PENN 80-268-R
v.	:	
DELMONT RESOURCES, INC.	:	

ORDER

In Secretary of Labor v. Cement Division, National Gypsum Company, 3 FMSHRC 821 (1981), the Commission established the test under section 104(d) of the 1977 Mine Act for determining whether a condition created by a particular violation is of such nature "as could significantly and substantially contribute to the cause and effect of a ... mine ... hazard." In the instant proceeding, a section 104(d)(1) citation was issued. On April 24, 1981, the administrative law judge issued a decision in which he applied the test enunciated in National Gypsum and determined that the "evidence [was] insufficient to sustain the allegation that the ... violation ... was of such nature as could significantly and substantially contribute to the cause and effect of a mine ... hazard." Regarding the "significant and substantial" question, the parties tried the case and submitted their post-hearing briefs prior to the issuance of National Gypsum. On review, the primary question before us is whether the judge correctly determined that the violation was not significant and substantial.

In his brief on review, the Secretary requested that the proceeding be remanded to the judge for the presentation of additional evidence if we determined that the record was insufficient under National Gypsum to sustain the section 104(d)(1) citation. On February 25, 1982, we ordered the Secretary to submit an explanation of the additional evidence that could be presented at this time to meet the National Gypsum test. On March 15, 1982, the Secretary filed a supplemental brief describing evidence he could present if the case were remanded. Neither Delmont nor the UMWA has opposed the Secretary's request for remand.

Having considered the Secretary's response in light of the present record, we conclude that remand is appropriate to give the parties an opportunity to present evidence relevant to the National Gypsum test. 1/ We express no views as to the probative value and weight of the evidence described by the Secretary.

Accordingly, this case is remanded to the Chief Administrative Law Judge for reassignment and further proceedings, on an expedited basis, consistent with this order. 2/

Rosemary M. Collyer, Chairman

Richard V. Backley, Commissioner

Frank F. Jestrab, Commissioner

A. E. Lawson, Commissioner

1/ Section 113(d)(2)(iii)(C) of the 1977 Mine Act provides in part:

> ... If the Commission determines that further evidence is necessary on an issue of fact it shall remand the case for further proceedings before the administrative law judge.

2/ The administrative law judge who rendered the initial decision in this matter has since left the Commission.

Distribution

Nancy S. Hyde, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd.
Arlington, Virginia 22203

Ronald S. Cusano, Esq.
Rose, Schmidt, Dixon, Hasley
Whyte and Hardesty
900 Oliver Building
Pittsburgh, PA 15222

Raymond J. Hoehler, Esq.
Harvey A. Zalevsky, Esq.
102 N. Main Street
Suite 200
Greensburg, PA 15601

Covette Rooney, Esq.
Office of the Solicitor
U.S. Department of Labor
14480 Gateway Bldg.
3535 Market St.
Philadelphia, PA 19104

Mary Lu Jordan, Esq.
UMWA
900 15th St., N.W.
Washington, D.C. 20005

Chief Administrative Law Judge Paul Merlin
FMSHRC
1730 K Street, N.W.
Washington, D.C. 20006

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

May 4, 1982

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	Docket No. CENT 79-300-M
v.	:	
CAPITOL AGGREGATES, INC.	:	

DECISION

This proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., (Supp. III 1979). The only issue on review is whether a ramp used at a facility of Capitol Aggregates, Inc., is an elevated roadway within the meaning of 30 C.F.R. § 56.9-22. 1/ The cited standard provides that "berms or guards shall be provided on the outer bank of elevated roadways." The administrative law judge found the ramp was an elevated roadway and that the standard applied. 2/ For the reasons that follow, we affirm.

The citation at issue states:

> The elevated ramp leading to the solid fuel loading hopper was not equipped with a berm or guard creating a hazard for the operator on the front-end loader in case of running off the ramp.

The parties stipulated that the ramp in question was approximately thirty feet long and four feet high at the highest point, and that it was used by a caterpillar front-end loader for dumping petroleum coke into a solid fuel loading hopper.

In finding that the ramp was an elevated roadway the judge referred to dictionary definitions of "ramp," "road," and "roadway," 3/ and the

---

1/ Capitol does not challenge the fact that the ramp was "elevated," rather it asserts the ramp is not a "roadway" subject to the standard.

2/ The judge's decision is reported at 3 FMSHRC 1684 (1981).

3/ The judge cited definitions in Webster's Third New International Dictionary: "roadways:" A strip of land through which a road is constructed and which is physically altered; "road:" An open way or public passage for vehicles, persons and animals ... a private way. The judge also cited the definition of "ramp" in Webster's New Collegiate Dictionary (1979): A sloping way: as a sloping low walk or roadway leading from one level to another. 3 FMSHRC at 1688 (emphasis added).

fact that "this 'ramp' was used to drive a piece of machinery back and forth over the structure." 3 FMSHRC at 1688. Further, on the basis of our decision in Cleveland Cliffs Iron Co., 3 FMSHRC 291 (February 1981), the judge rejected Capitol's argument that the standard applies only to roadways with one outer bank. Accordingly, the judge concluded that Capitol violated section 56.9-22 by failing to provide berms on the ramp.

We affirm the judge's conclusion that the ramp at issue is an elevated roadway within the meaning of the cited standard. Contrary to Capitol's assertion, this conclusion does not require an impermissible stretching of the standard. Rather, as indicated by the dictionary definitions relied upon by the judge, the conclusion that some ramps are elevated roadways is rooted in common usage. Furthermore, in light of the nature of the use of the ramp at issue and the purpose of the cited standard, the conclusion flows from a common sense application of the standard to the facts of record. Cf. Burgess Mining and Construction Corp., 3 FMSHRC 296 (February 1981)(bridge is an elevated roadway); El Paso Rock Quarries, Inc., 3 FMSHRC 35 (January 1981)(bench is an elevated roadway). We also hold that the judge properly relied on our decision in Cleveland Cliffs Iron Co. in rejecting the argument that 30 C.F.R. § 56.9-22 applies only to elevated roadways with one outer bank.

Finally, we reject Capitol's argument that the presence of 30 C.F.R. § 56.9-63 precludes application of the cited standard. Section 56.9-63 provides:

> Ramps and dumps should be of solid construction, of ample width, have ample side clearance and headroom, and be kept reasonably free of spillage.

"Elevated roadways" is a general descriptive term that encompasses a variety of more specific applications. See Burgess, supra; El Paso, supra. Although 30 C.F.R. § 56.9-63 further addresses certain safety requirements for a particular type of elevated roadway, it does not purport to exclusively set forth all safety requirements pertaining to ramps. In particular, it does not address the obvious hazard of travelling over the elevated sides of a ramp, nor does it in any way suggest that section 56.9-22's general requirement of berms on elevated roadways is not applicable. In this situation we conclude that it is appropriate to apply section 56.9-22 to the ramp involved. See H.B. Zachry Co. v. OSHRC, 638 F.2d 812, 817-818 (5th Cir. 1981).

Accordingly, the decision of the administrative law judge is affirmed. 4/

Rosemary M. Collyer, Chairman

Richard V. Backley, Commissioner

Frank F. Jestrab, Commissioner

A. E. Lawson, Commissioner

4/ Capitol's pending motion to disregard the Secretary's brief is denied.

Distribution

Richard L. Reed, Esq.
Johnston, Krog & Vives
2900 Tower Life Building
San Antonio, Texas 78205

Leslie J. Canfield, Esq.
Michael McCord, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd.
Arlington, Virginia 22203

Administrative Law Judge Virgil Vail
FMSHRC
333 West Colfax Ave., Suite 400
Denver, Colorado 80204

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

May 5, 1982

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. SE 79-46-M
ALLIED PRODUCTS COMPANY	:	

ORDER

In Allied Products Co. v. Federal Mine Safety and Health Review Commission, No. 80-7935, 5th Cir. Unit B (February 1, 1982), rehearing den. March 9, 1982, the court affirmed a final order of the Commission finding that Allied Products violated three mandatory safety standards. 2 FMSHRC 2517 (ALJ, Sept. 1980). The court found, however, that the penalties assessed were an abuse of discretion and remanded for further proceedings "with instructions to recalculate the penalties based on the existing record and on considerations outlined in this opinion." The court's mandate was received by the Commission on April 9, 1982.

We need not address at this time the court's discussion of the relationship between the Commission's statutory authority to assess penalties (30 U.S.C. § 820(i)) and the Secretary of Labor's penalty assessment regulations. 30 C.F.R. Part 100. Rather, we leave to the administrative law judge the initial determination of the necessary and appropriate action in light of the court's decision and remand.

Accordingly, the case is remanded to the administrative law judge for further proceedings.

Rosemary M. Collyer, Chairman

Richard V. Backley, Commissioner

Frank F. Jestrab, Commissioner

A. E. Lawson, Commissioner

82-5-4

Distribution

Gilbert E. Johnston
Patricia Clotfelter
Johnston, Barton, Proctor, Swedlaw & Naff
1212 Bank for Savings Building
Birmingham, Alabama 35203

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

Administrative Law Judge William Fauver
FMSHRC
5203 Leesburg Pike, 10th Floor
Falls Church, Virginia 22041

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

May 5, 1982

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	Docket Nos. VINC 78-11
	:	78-12
v.	:	78-13
	:	78-14
SAM KENNEDY d/b/a/ ENERGY SALVAGE COMPANY	:	78-15
	:	IBMA 78-4

ORDER

The Secretary of Labor's unopposed motion for voluntary dismissal of his appeal is granted.

Rosemary M. Collyer, Chairman

Richard V. Backley, Commissioner

Frank F. Jestrab, Commissioner

A. E. Lawson, Commissioner

Distribution

Linda Leasure, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd.
Arlington, Virginia 22203

D. Michael Riva, Esq.
115 East Main Street
West Frankfort, Illinois 62896

Administrative Law Judge George Koutras
FMSHRC
5203 Leesburg Pike, 10th Floor
Falls Church, Virginia 22041

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

May 20, 1982

NATIONAL MINES CORPORATION	:	
	:	
v.	:	Docket No. KENT 80-130-R
	:	
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	

ORDER

In Secretary of Labor v. Island Creek Coal Co., et al., Nos. 80-2405, etc., D.C. Cir., April 27, 1982, the court remanded this case to the Commission for further proceedings consistent with the court's decision in UMWA v. FMSHRC, Nos. 79-2503, etc., D.C. Cir., February 23, 1982. Accordingly, this case is remanded to the administrative law judge for further proceedings consistent with the court's order.

Rosemary M. Collyer, Chairman

Richard V. Backley, Commissioner

Frank F. Jestrab, Commissioner

A. E. Lawson, Commissioner

Distribution

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

Robert L. Elliot, Esq.
Harbison, Kessinger, Lisle & Bush
400 Bank of Lexington Building
Lexington, Kentucky 40507

Harrison Combs, Esq.
UMWA
900 15th St., N.W.
Washington, D.C. 20005

Administrative Law Judge Richard Steffey
FMSHRC
5203 Leesburg Pike, 10th Floor
Falls Church, Virginia 22041

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

May 20, 1982

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. LAKE 80-142
SOUTHERN OHIO COAL COMPANY	:	

ORDER

In Secretary of Labor v. Southern Ohio Coal Co., No. 81-2299, D.C. Cir., April 27, 1982, the court remanded this case to the Commission for further proceedings consistent with the court's decision in UMWA v. FMSHRC, Nos. 79-2503, etc., D.C. Cir., February 23, 1982. Accordingly, the case is remanded to the administrative law judge for further proceedings consistent with the court's order.

Rosemary M. Collyer, Chairman

Richard V. Backley, Commissioner

Frank F. Jestrab, Commissioner

A. E. Lawson, Commissioner

82-5-11

Distribution

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

David M. Cohen, Esq.
American Electric Power Service Corp.
P.O. Box 700
Lancaster, Ohio 43130

Administrative Law Judge Michael Lasher
FMSHRC
5203 Leesburg Pike, 10th Floor
Falls Church, Virginia 22041

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

May 20, 1982

VIRGINIA POCAHONTAS COMPANY	:	
	:	
v.	:	Docket Nos. VA 79-131-R
	:	VA 79-137-R
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	

ORDER

In Secretary of Labor v. Island Creek Coal Co., et al., Nos. 80-2405, etc., D.C. Cir., April 27, 1982, the court remanded these cases to the Commission for further proceedings consistent with the court's decision in UMWA v. FMSHRC, Nos. 79-2503, etc., D.C. Cir., February 23, 1982. Accordingly, these cases are remanded to the administrative law judge for further proceedings consistent with the court's order.

Rosemary M. Collyer, Chairman

Richard V. Backley, Commissioner

Frank F. Jestrab, Commissioner

A. E. Lawson, Commissioner

Distribution

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

Marshall S. Peace, Esq.
Island Creek Coal Company
2355 Harrodsburg Road
P.O. Box 11430
Lexington, Kentucky 40575

Harrison Combs, Esq.
UMWA
900 15th St., N.W.
Washington, D.C. 20005

Administrative Law Judge Richard Steffey
FMSHRC
5203 Leesburg Pike, 10th Floor
Falls Church, Virginia 22041

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

May 20, 1982

RANGER FUEL CORPORATION	:	
	:	
v.	:	Docket No. WEVA 79-218-R
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	

ORDER

In Secretary of Labor v. Ranger Fuel Corp., No. 81-1388, D.C. Cir., April 27, 1982, the court remanded this case to the Commission for further proceedings consistent with the court's decision in UMWA v. FMSHRC, Nos. 79-2503, etc., D.C. Cir., February 23, 1982. Accordingly, this case is remanded to the administrative law judge for further proceedings consistent with the court's order.

Rosemary M. Collyer, Chairman

Richard V. Backley, Commissioner

Frank F. Jestrab, Commissioner

A. E. Lawson, Commissioner

82-5-13

Distribution

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

Donald R. Johnson
Ranger Fuel Corporation
Lebanon, Virginia 24266

Harrison Combs, Esq.
UMWA
900 15th St., N.W.
Washington, D.C. 20005

Administrative Law Judge Gary Melick
FMSHRC
5203 Leesburg Pike, 10th Floor
Falls Church, Virginia 22041

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

May 20, 1982

SECRETARY OF LABOR,	Docket Nos.	KENT 80-14-D
MINE SAFETY AND HEALTH		KENT 80-15-D
ADMINISTRATION (MSHA)		KENT 80-22-D
on behalf of		KENT 80-23-D
Anthony E. Heriges,		KENT 80-42-D
Tom Antonini, Johnny Gibson and		KENT 80-52-D
Larry Haley,		
v.		
ISLAND CREEK COAL COMPANY		

ORDER

In Secretary of Labor v. FMSHRC, No. 80-1350, D.C. Cir., April 27, 1982, the court remanded these cases to the Commission for further proceedings consistent with the court's decision in UMWA v. FMSHRC, Nos. 79-2503, etc., D.C. Cir., February 23, 1982. Accordingly, the cases are remanded to the chief administrative law judge for further proceedings consistent with the court's order.

Rosemary M. Collyer, Chairman

Richard V. Backley, Commissioner

Frank F. Jestrab, Commissioner

A. E. Lawson, Commissioner

82-5-8

Distribution

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

Marshall S. Peace, Esq.
Assistant Corporate Counsel
Island Creek Coal Company
2355 Harrodsburg Road
P.O. Box 11430
Lexington, Kentucky 40575

Chief Administrative Law Judge Paul Merlin
FMSHRC
1730 K Street, N.W.
Washington, D.C. 20006

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

May 20, 1982

ISLAND CREEK COAL COMPANY	:	
	:	
v.	:	Docket Nos. KENT 79-216-R
	:	WEVA 79-183-R
SECRETARY OF LABOR,	:	WEVA 79-184-R
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
v.	:	Docket No. WEVA 80-72
	:	
ISLAND CREEK COAL COMPANY	:	

ORDER

In Secretary of Labor v. Island Creek Coal Co., No. 80-2201, D.C. Cir., April 27, 1982, the court remanded these cases to the Commission for further proceedings consistent with the court's decision in UMWA v. FMSHRC, Nos. 79-2503, etc., D.C. Cir., February 23, 1982. Accordingly, the cases are remanded to the administrative law judge for further proceedings consistent with the court's order.

Rosemary M. Collyer, Chairman

Richard V. Backley, Commissioner

Frank F. Jestrab, Commissioner

A. E. Lawson, Commissioner

82-5-9

Distribution

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

William R. Bodell, II
Island Creek Coal Company
P.O. Box 11430
Lexington, Kentucky 40575

Harrison Combs, Esq.
UMWA
900 15th St., N.W.
Washington, D.C. 20005

Administrative Law Judge Gary Melick
FMSHRC
5203 Leesburg Pike, 10th Floor
Falls Church, Virginia 22041

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

May 20, 1982

ISLAND CREEK COAL COMPANY	:	
	:	
v.	:	Docket No. VA 79-74-R
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	
and	:	
	:	
UNITED MINE WORKERS OF AMERICA	:	
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	
v.	:	Docket No. VA 80-9
	:	
ISLAND CREEK COAL COMPANY	:	

ORDER

In Secretary of Labor v. Island Creek Coal Co., et al., Nos. 80-2405, etc., D.C. Cir., April 27, 1982, the court remanded these cases to the Commission for further proceedings consistent with the court's decision in UMWA v. FMSHRC, Nos. 79-2503, etc., D.C. Cir., February 23, 1982. Accordingly, the cases are remanded to the administrative law judge for further proceedings consistent with the court's order.

Rosemary M. Collyer, Chairman

Richard V. Backley, Commissioner

Frank F. Jestrab, Commissioner

A. E. Lawson, Commissioner

Distribution

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

Marshall S. Peace, Esq.
Island Creek Coal Company
P.O. Box 11430
Lexington, Kentucky 40575

Joyce A. Hanula
UMWA
900 15th St., N.W.
Washington, D.C. 20005

Administrative Law Judge Richard Steffey
FMSHRC
5203 Leesburg Pike, 10th Floor
Falls Church, Virginia 22203

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

May 20, 1982

ISLAND CREEK COAL COMPANY	:	
	:	
and	:	Docket Nos. VA 79-61-R
	:	VA 79-62-R
VIRGINIA POCAHONTAS COMPANY	:	VA 79-63-R
	:	
v.	:	
	:	
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
and	:	
	:	
UNITED MINE WORKERS OF AMERICA	:	

ORDER

In Secretary of Labor v. Island Creek Coal Co., et al., No. 80-1859, D.C. Cir., April 27, 1982, the court remanded these cases to the Commission for further proceedings consistent with the court's decision in UMWA v. FMSHRC, Nos. 79-2503, etc., D.C. Cir., February 23, 1982. Accordingly, the cases are remanded to the administrative law judge for further proceedings consistent with the court's order.

Rosemary M. Collyer, Chairman

Richard V. Backley, Commissioner

Frank F. Jestrab, Commissioner

A. E. Lawson, Commissioner

Distribution

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

William K. Bodell, II
Virginia Pocahontas Company
P.O. Box 11430
Lexington, Kentucky 40575

Administrative Law Judge George Koutras
FMSHRC
5203 Leesburg Pike, 10th Floor
Falls Church, Virginia 22041

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

May 20, 1982

ISLAND CREEK COAL COMPANY	:	
	:	
v.	:	Docket No. WEVA 79-242-R
	:	
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	

ORDER

In Secretary of Labor v. FMSHRC, No. 80-1630, D.C. Cir., April 27, 1982, the court remanded this case to the Commission for further proceedings consistent with the court's decision in UMWA v. FMSHRC, Nos. 79-2503, etc., D.C. Cir., February 23, 1982. Accordingly, the case is remanded to the chief administrative law judge for further proceedings consistent with the court's order.

Rosemary M. Collyer, Chairman

Richard V. Backley, Commissioner

Frank F. Jestrab, Commissioner

A. E. Lawson, Commissioner

Distribution

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

William K. Bodell, II
Island Creek Coal Company
P.O. Box 11430
Lexington, Kentucky 40575

Harrison Combs, Esq.
UMWA
900 15th St., N.W.
Washington, D.C. 20005

Chief Administrative Law Judge Paul Merlin
FMSHRC
1730 K Street, N.W.
Washington, D.C. 20006

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

May 20, 1982

PRINCESS SUSAN COAL COMPANY	:	
	:	
v.	:	Docket No. WEVA 79-423-R
	:	
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	

ORDER

In Secretary of Labor v. FMSHRC, No. 80-1449, D.C. Cir., April 27, 1982, the court remanded this case to the Commission for further proceedings consistent with the court's decision in UMWA v. FMSHRC, Nos. 79-2503, etc., D.C. Cir., February 23, 1982. Accordingly, the case is remanded to the administrative law judge for further proceedings consistent with the court's order.

Rosemary M. Collyer, Chairman

Richard V. Backley, Commissioner

Frank F. Jestrab, Commissioner

A. E. Lawson, Commissioner

Distribution

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

C. Lynch Christian, Esq.
Jackson, Kelly, Holt & O'Farrell
P.O. Box 553
Charleston, West Virginia 25322

Harrison Combs, Esq.
UMWA
900 15th St., N.W.
Washington, D.C. 20005

Administrative Law Judge Gary Melick
FMSHRC
5203 Leesburg Pike, 10th Floor
Falls Church, Virginia 22041

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

May 20, 1982

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of Arnold J. Sparks, Jr.	:	
v.	:	Docket No. WEVA 79-148-D
ALLIED CHEMICAL CORPORATION	:	

ORDER

On February 23, 1982, the United States Court of Appeals for the D.C. Circuit issued its decision in this case reversing the decision of the Commission and remanding for further proceedings. UMWA v. FMSHRC, Nos. 79-2503, etc., D.C. Cir. (consolidated cases). Accordingly, we remand to the administrative law judge for further proceedings consistent with the court's decision.

Rosemary M. Collyer, Chairman

Richard V. Backley, Commissioner

Frank F. Jestrab, Commissioner

A. E. Lawson, Commissioner

Distribution

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

Marshall C. Spradling, Esq.
Spillman, Thomas, Battle & Klostermeyer
P.O. Box 273
Charleston, West Va. 25321

Harrison Combs, Esq.
UMWA
900 15th St., N.W.
Washington, D.C. 20005

Administrative Law Judge Joseph Kennedy
FMSHRC
5203 Leesburg Pike, 10th Floor
Falls Church, Virginia 22041

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

May 20, 1982

RANGER FUEL CORPORATION,	:	
	:	
v.	:	Docket No. WEVA 79-217-R
	:	
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	

ORDER

In Secretary of Labor v. Island Creek Coal Co., et al., Nos. 80-2405, etc., D.C. Cir., April 27, 1982, the court remanded this case to the Commission for further proceedings consistent with the court's decision in UMWA v. FMSHRC, Nos. 79-2503, etc., D.C. Cir., February 23, 1982. Accordingly, this case is remanded to the chief administrative law judge for further proceedings consistent with the court's order.

Rosemary M. Collyer, Chairman

Richard V. Backley, Commissioner

Frank F. Jestrab, Commissioner

A. E. Lawson, Commissioner

Distribution

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

Fletcher A. Cooke, Esq.
Ranger Fuel Corporation
Lebanon, Virginia 24266

Harrison Combs, Esq.
UMWA
900 15th St., N.W.
Washington, D.C. 20005

Chief Administrative Law Judge Paul Merlin
FMSHRC
5203 Leesburg Pike, 10th Floor
Falls Church, Virginia 22041

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

May 20, 1982

KENTLAND-ELKHORN COAL CORPORATION,	:	
v.	:	Docket No. PIKE 78-399
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
and	:	
UNITED MINE WORKERS OF AMERICA	:	

ORDER

On February 23, 1982, the United States Court of Appeals for the D.C. Circuit issued its decision in this case reversing the decision of the Commission and remanding for further proceedings. UMWA v. FMSHRC, Nos. 79-2503, etc., D.C. Cir. (consolidated cases). Accordingly, we remand to the administrative law judge for further proceedings consistent with the court's decision.

Rosemary M. Collyer, Chairman

Richard V. Backley, Commissioner

Frank F. Jestrab, Commissioner

A. E. Lawson, Commissioner

Distribution

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

C.Lynch Christian, Esq.
Jackson, Kelly, Holt & O'Farrell
P.O. Box 553
Charleston, West Virginia 25322

Harrison Combs, Esq.
UMWA
900 15th St., N.W.
Washington, D.C. 20005

Administrative Law Judge Michael Lasher
FMSHRC
5203 Leesburg Pike, 10th Floor
Falls Church, Virginia 22041

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

May 20, 1982

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. PITT 79-11-P
THE HELEN MINING COMPANY	:	

ORDER

On February 23, 1982, the United States Court of Appeals for the D.C. Circuit issued its decision in this case reversing the decision of the Commission and remanding for further proceedings. UMWA v. FMSHRC, Nos. 79-2503, etc., D.C. Cir. (consolidated cases). Accordingly, we remand to the administrative law judge for further proceedings consistent with the court's decision.

Rosemary M. Collyer, Chairman

Richard V. Backley, Commissioner

Frank F. Jestrab, Commissioner

A. E. Lawson, Commissioner

Distribution

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

Todd Peterson, Esq.
Crowell & Moring
1100 Connecticut Ave., N.W.
Washington, D.C. 20036

Harrison Combs, Esq.
UMWA
900 15th St., NW
Washington, D.C. 20005

Chief Administrative Law Judge Paul Merlin
FMSHRC
1730 K Street, N.W.
Washington, D.C. 20006

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

May 26, 1982

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket Nos. WEST 81-163
v.	:	WEST 81-164
MEDICINE BOW COAL COMPANY	:	

DECISION

This consolidated case on interlocutory review involves two civil penalty proceedings arising under section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (Supp. III 1979). The issue is whether the Secretary's admitted failure to file his penalty proposals in the two proceedings below within the 45-day period prescribed by Commission Rule 27, 29 C.F.R. § 2700.27, required dismissal of the cases. For the reasons discussed below, we affirm the administrative law judge's conclusion that under the test announced in Salt Lake County Road Department, 3 FMSHRC 1714 (1981), dismissal was not warranted on the facts present in this record.

The facts are not disputed. In the first case (Docket No. WEST 81-163), an MSHA inspector issued five citations to Medicine Bow Coal Company during the period June 24, 1980, through August 12, 1980. 1/ In the second case (Docket No. WEST 81-164), the same MSHA inspector issued Medicine Bow another citation on August 26, 1980. 2/ On December 22, 1980, Medicine Bow received the Secretary's proposed assessments in both cases for the six citations. Medicine Bow timely sent the Secretary notices of contest by certified mail in both cases. According to the certified mail return receipts, the notice of contest in the first case was received in the Secretary's Denver, Colorado Assessment Office on January 19, 1981, and the notice in the second case was received on January 20, 1981.

1/ The citations charged violations of various regulations applicable to surface coal mining operations. One citation alleged a violation of 30 C.F.R. § 77.504 (damaged insulation on electrical equipment); another alleged a violation of 30 C.F.R. § 77.603 (improper clamping of trailing cables); and three alleged violations of 30 C.F.R. § 77.1104 (accumulations of combustible material).

2/ This citation alleged a violation of 30 C.F.R. § 77.1605(b) (inadequate brakes for mobile equipment).

On February 2, 1981, the Secretary sent copies of both notices of contest to the Commission's Washington, D.C. office, and on February 9, 1981, the Commission assigned docket numbers to the two cases. (Commission Rule 26, 29 C.F.R. § 2700.26, requires the Secretary to "immediately transmit to the Commission the notice of contest, at which time a docket number will be assigned and all parties notified.") On March 20, 1981, the Secretary mailed his penalty proposals in both cases to the Commission, and the documents were received on March 23, 1981. 3/

In relevant part, Commission Rule 27 provides:

> (a) When to file. Within 45 days of receipt of a timely notice of contest of a notification or proposed assessment of penalty, the Secretary shall file a proposal for a penalty with the Commission.

Applying Rule 27 and with January 19 and 20, 1981, as the respective dates on which the Secretary received Medicine Bow's notices of contest, the Secretary's penalty proposals were due to be filed on March 5, 1981, in the first case, and March 8, 1981, in the second. 4/ Since the Secretary filed on March 20, 1981 (n. 3 below), his proposals were a maximum of 15 days late.

In both cases, Medicine Bow filed motions for dismissal with the judge based on the late filing of the Secretary's penalty proposals. In separate orders issued on August 7, 1981, the judge denied the motions on the basis of our decision in Salt Lake, which was issued on July 28, 1981, after all the relevant filings had occurred in these two cases.

3/ The certificates of service and envelopes used for mailing reflect that the Secretary apparently mailed the penalty proposals by certified mail, although the return receipts are not included in the formal files. The judge found that there was "no indication in the file" that the Secretary had sent the proposals by certified mail, and treated the documents as having been filed on March 23, 1981, when they were received by the Commission. We give the Secretary the benefit of the doubt in this matter and treat his proposals as having been filed on March 20, 1981, when they were apparently sent by certified mail. See Commission Rule 5(d), 29 C.F.R. § 2700.5(d) (as relevant here, filing is effective upon receipt or upon mailing by certified or registered mail, return receipt requested). In any event, the three-day difference in the filing date does not affect our resolution of this case.

4/ The filing date in the second case was actually Saturday, March 6, 1981, but Commission Rule 8(a), 29 C.F.R. § 2700.8(a), would move the due date to the following Monday.

This case basically involves a straightforward application of Salt Lake to the relevant facts. Nevertheless, there are a few preliminary matters on computation of time and the Secretary's response to Salt Lake which we address before moving to the major analysis.

We affirm the judge's determination that the Secretary will be deemed to have received a notice of contest sent by certified or registered mail on the date indicated on the return receipt (in this case, January 19 and 20). 5/ We disagree with the judge, however, that the filing time for penalty proposals is augmented by the 5 days that Commission Rule 8(b), 29 C.F.R. § 2700.8(b), allows for filing documents in response to those served by mail. On review, the Secretary disavows reliance on this 5-day bonus period. Br. 8 n. 4. The 45-day period in Rule 27 is a sufficient amount of time to allow for the processing of mail. We fear that further delay would be the inevitable by-product of reading Rule 8(b) into Rule 27. We hold, therefore, that Rule 8(b) does not apply to the Secretary's filing of penalty proposals.

In his brief to us, the Secretary states that "the test established in Salt Lake reflects the appropriate factors which an administrative law judge should consider in deciding whether or not to accept a late-filed proposal for penalty." Br. 6. However, the Secretary takes issue with a major premise of Salt Lake--namely, that Commission Rule 27 "implements" the statutory directive in section 105(d) of the Mine Act that "the Secretary shall immediately advise the Commission of [a notification of contest of penalty], and the Commission shall afford an opportunity for hearing." See Salt Lake, 3 FMSHRC at 1715. The Secretary contends that he satisfies this statutory directive by complying with Commission Rule 26, which, as noted above, requires the Secretary after receipt of a notice of contest to "immediately transmit" the notice to the Commission so that a docket number can be assigned.

5/ We fully endorse the judge's rejection of the Secretary's argument that the date on which such documents are internally stamped "received" should be the notification date. As he stated:

> The purpose of sending a document by certified mail is to provide the sender confirmation of its receipt by the proper party and the date of receipt. This is the only date the mine operator has notice of and upon which it can base any subsequent actions.
>
> The Secretary's statement that it must rely on [internal bureaucratic processing of the mail] does not support its position. Mine operators as well could contend that they have various office procedures upon which they must rely that may delay the actual receipt of a notice from the government by the individual charged with the responsibility of responding to that document. The law has traditionally recognized the date on the return receipt as evidence of the date a document was received. I see no reason to give special consideration to the bureaucratic procedures of the government.

(Footnote continued)

The Secretary takes too narrow a view of the relationship of Rules 26 and 27 to section 105(d). As developed in Salt Lake, Congress' overriding concern in enacting section 105(d) was providing for prompt penalty enforcement. To effectuate that goal, the Secretary has two related duties under Commission rules after receiving a notice of contest: notifying the Commission's docket office in order that a docket number can be assigned, and filing his penalty proposal so that the crucial stage of the pleading process is started, leading to the hearing that the Commission must provide under section 105(d). That hearing requires more than a docket number; it requires the filing of a penalty proposal as an essential pleading. Both procedural steps are a form of "notification," one for clerical purposes, and the other for pleading purposes; both implement the Mine Act's mandate for prompt penalty assessment. If the Secretary believes that his clerical notice to the docket office under Rule 26 is sufficient for "notification of the Commission," that may well explain the delays in filing penalty proposals. We accordingly reject the Secretary's position. We now turn to the issue of whether the judge properly refused to dismiss the cases.

The judge correctly interpreted Salt Lake as creating a two-part test. Salt Lake first established that the Secretary must show adequate cause for any delayed filing. 3 FMSHRC at 1715-17. The Secretary's excuse here is basically the same one accepted as minimally adequate in Salt Lake: insufficient clerical help. The excuse was presented in more detail in these cases, and considerably less delay was involved than in Salt Lake. The significant operative events in the two proceedings below occurred prior to our warning in Salt Lake and, thus, the Secretary did not have the benefit of those views when the late filings occurred. Had the delay occurred after our admonition in Salt Lake, our conclusion as to whether adequate cause was established might be different. 6/

We also held in Salt Lake that adequate cause notwithstanding, dismissal could be required where an operator demonstrates prejudice caused by the delayed filing. 3 FMSHRC at 1715-18. Medicine Bow has shown no specific claim of prejudice such as missing witnesses, or lateness so great as to unduly delay a hearing. Medicine Bow's argument that during the pendency of the case it is effectively forced to comply with MSHA's interpretation of standards and that the citations are carried on MSHA's records, presents nothing more than the unavoidable consequences of a contested citation faced by all operators. As the judge reasoned, the relatively short delay here did not result in any significantly later hearing, and if Medicine Bow wanted expedited proceedings, it should have so moved. In short, Medicine Bow has failed

---

fn. 5/ continued
The Secretary did not press this argument on review. The Secretary also states that steps have been taken to improve the internal mail routing of notices of contest--a development that we hope augurs well for increased efficiency in processing penalty cases.

6/ We reject the suggestion in the Secretary's brief that unless his delayed filing is caused by "significant malfeasance," a penalty proceeding should not be dismissed absent prejudice to the operator. Our test is adequate cause, not absence of malfeasance, significant or otherwise.

to show a delay so great that preparation or presentation of its case was prejudiced.

On the basis set forth above, we affirm the judge. We vacate our stay pending interlocutory review, and remand these cases to the judge for further proceedings.

Rosemary M. Collyer, Chairman

Richard V. Backley, Commissioner

Frank H. Jestrab, Commissioner

A. E. Lawson, Commissioner

Distribution

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

Brent L. Motchan, Esq.
Medicine Bow Coal Company
500 North Broadway
St. Louis, Missouri 63102

Administrative Law Judge John Morris
FMSHRC
333 West Colfax Ave., Suite 400
Denver, Colorado 80204

Administrative Law Judge Decisions

888

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

MAY 3 1982

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), ex rel Phillip Dennis Irvin, et al.,	:	Complaint of Discharge, Discrimination, or Interference
	:	Docket No. LAKE 82-5-D
Applicants	:	Eagle No. 2 Mine
v.	:	
PEABODY COAL COMPANY,	:	
Respondent	:	

DECISION

Appearances: Rafael Alvarez, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois, for Complainants; Thomas R. Gallagher, Esq., and Michael O. McKown, Esq., St. Louis, MIssouri, for Respondent.

Before: Administrative Law Judge Broderick

STATEMENT OF THE CASE

This proceeding is an action brought by the Secretary of Labor on behalf of 70 miners employed in February 1981 at Respondent's Eagle No. 2 Mine alleging that the named miners were discriminated against in violation of section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. Pursuant to notice, a hearing was held in St. Louis, Missouri, on February 18, 1982. Forrest A. Younker was called as an adverse witness by Applicants and Ownly Franklin Williams, Phillip Dennis Irvin, William Henry Gibson and Narnie E. Nangle testified on behalf of Complainants. Forrest A. Younker testified on behalf of Respondent. The parties agreed that the depositions of Narnie E. Nangle, Robert Walker and Mike Wolfe may be received as evidence. Sixteen joint exhibits were admitted, and 2 additional exhibits were offered by Applicants and admitted. Posthearing briefs were filed by both parties.

Based on the entire record and considering the contentions of the parties, I make the following decision:

Findings of Fact

1. At all times pertinent to this decision, Respondent was the operator of an underground coal mine in Gallatin County, Illinois, known as the Eagle No. 2 Mine. Respondent is a large operator.

2. The Complainants herein were miners employed at the Eagle No. 2 Mine.

3. There were three shifts in the subject mine, denominated A, B, and C. The hours were 8 a.m. to 4 p.m., 4 p.m. to 12:01 a.m. and 12:01 a.m. to 8:00 a.m. respectively.

4. Three shower room facilities were maintained at the mine, one for male employees, one for female employees and one for foremen.

5. The male employee's shower room was approximately 40 feet long, 12 feet wide and 7 feet high. The floor and walls were concrete. There were two doors and no windows. On February 12, 1981, there were three flourescent lights in the room suspended from a metal ceiling, each with two bulbs, a metal casing and a plexiglass bottom. There were four ventilation fans and two floor drains with metal grates. There were approximately 25 to 30 shower heads.

6. Above the shower room on a metal floor was a 3,000 gallon water tank and four electrically operated water heaters.

7. On February 12, 1981, during the C shift (12:01 a.m. to 8:00 a.m.), a leak developed in the hot water tank. Repairs were begun on the tank before 8:00 a.m., and hot water was not available for the C shift employees. The employees on the A shift were assured that the tank would be repaired prior to the completion of their shift, and entered the mine on the basis of that assurance. The tank was repaired about 10:00 a.m. but developed another leak at about 11:00 a.m. This leak could not be repaired without completely draining the tank and making showers unavailable for both the A and B shift employees. A trough was made to drain the leaking water down through the roof into the shower room.

8. The leaking water entered the fluorescent light fixtures at the north end of the room. Water collected in the fixture and dripped down on to the floor of the shower room. The wire was cut to the light but the power remained on.

9. Representatives of the miners were concerned about the danger involved to those who might shower in these circumstances and had a meeting with mine management, commencing at about 3:55 p.m., February 12. The B shift employees did not enter the mine at the beginning of the B shift because of this controversy.

10. The Mine Superintendent and the Representatives of the miners discussed some alternative solutions to the problem: (1) drain the tank in order to repair it. However, this would make the shower unavailable to all the employees on the three shifts. (2) Use the female employees' and foremens' shower rooms. However this would provide only 11 showerheads for 77 employees on the B shift. (3) Cut off the power and install a temporary lighting system using cap lamps. The third alternative was proposed by the Superintendent to the employee representatives but they rejected it and called State and Federal inspectors.

11. The State inspector arrived at the mine at about 6:00 p.m. He found some "irregular things" in one of the heaters which were repaired immediately. He stated to the miners representatives that he saw nothing wrong in using temporary lighting in the shower room until the tank was repaired on the weekend.

12. The miners on the B crew were not satisfied, refused to go to work and left the mine premises.

13. A federal inspector arrived at the mine at about 10:30 p.m. At that time the power had been cut off to the flourescent lights and certain conditions respecting the heater had been or were being taken care of. The federal inspector stated that he would have no objection to the use of battery operated cap lamps to provide light for the shower room.

14. Complainant William Gibson who worked on the C shift rode to work with five other employees from their homes in Kentucky (about 80 miles or more to the mine). Because the shower room was not available the previous morning, Gibson called the mine office before leaving for work on January 12 (he was to work 12:01 to 8:00 on January 13) and was assured that the tank would be repaired in time for his shift.

15. When Mr. Gibson and his crew arrived at the mine, the tank was still being worked on, and the lights in the shower room were off. Because he objected to these conditions, Mr. Gibson and eight others from the C shift (calling themselves "the boys from Kentucky") refused to go underground and went home "for safety reasons."

16. The other members of the C shift worked their regular shift and took showers afterwards using camp lamps for lighting.

17. The employees on B and C shifts were not paid for the shift in which they refused to work. Each also received a letter of warning of disciplinary action.

18. William Gibson received a written notice of suspension with intent to discharge.

19. Gibson filed a grievance which went to arbitration. Gibson was reinstated pursuant to an arbitrator's award.

20. Prior to the hearing in this case, the letters of discipline issued to the Complainants herein were rescinded and removed from their employment records.

STATUTORY PROVISION

Section 105(c)(1) of the Act provides:

> (c)(1) No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this Act because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine, or because such miner, representative of miners or applicant for employment is the subject of medical evaluations and potential transfer under a standard published pursuant to Section 101 or because such miner, representative of miners or applicant for employment has instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding, or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this Act.

ISSUES

1. Were Applicants disciplined by Respondent for activity protected under the Mine Act?

2. If so, what is the remedy for the violation?

CONCLUSIONS OF LAW

1. Respondent is subject to the provisions of the Federal Mine Safety and Health Act of 1977, and the undersigned has jurisdiction over the parties and subject matter of this proceeding.

2. Applicants, miners on the B and C shifts, failed to establish that their refusal to perform work on February 12 and 13, 1981, resulted from a reasonable, good faith belief that it was hazardous to do so.

DISCUSSION

Refusal to perform work is protected under section 105(c)(1) of the Act if it results from a good faith belief that the work involves safety hazards, and if the belief is a reasonable one. Secretary of Labor/Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2 BNA MSHC 1001 (1980), rev'd on other grounds sub nom Consolidation Coal Co. v. Marshall, _____ F.2d _____ (3rd Cir. 1981); Secretary of Labor/Robinette v. United Castle Coal Co., 3 FMSHRC 803, 2 BNA MSHC 1213 (1981). I conclude that the objections raised by the B shift miners to showering in a room where water was running through electric light fixtures were reasonable and were made in good faith. Respondent concedes that at that time the miners had a good faith reasonable belief of the possibility of a shock hazard. However, Respondent offered an alternative, i.e., cutting off the electricity and using temporary lighting in the form of cap lamps. This proposal removed the potentially dangerous condition and provided shower facilities which were adequate. The State mine inspector stated that he could see nothing wrong with the proposed temporary lighting. The refusal of the B shift employees to work under these circumstances became at that point unreasonable and therefore was not protected by the Act. See Secretary/Bennett v. Kaiser Aluminum and Chemical Corporation, 3 FMSHRC 1539 (1981). The electricity had been removed from the fluorescent lights and the water heater was being repaired at the time the C shift employees refused to go into the mine. Both the State and Federal inspectors had indicated that the condition was no longer a hazard. I conclude that the refusal of the miners on the C shift to go to work was unreasonable and not protected under the Act.

3. The failure of Respondent to pay Applicants for the time they did not work on February 12 and 13, 1981, was not a violation of section 105(c)(1) of the Act.

ORDER

Based on the above findings of fact and conclusions of law IT IS ORDERED that this proceeding is DISMISSED.

James A. Broderick
Administrative Law Judge

Distribution: By certified mail

Rafael Alvarez, Esq., Office of the Solicitor, U.S. Department of Labor, 230 South Dearborn, 8th Floor, Chicago, IL 60604

Thomas R. Gallagher, Esq., Peabody Coal Company, P.O. Box 235, St. Louis, MO 63166

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

MAY 11 1982

VICTOR McCOY, Complainant	:	Complaint of Discharge, Discrimination, or Interference
v.	:	
	:	Docket No. PIKE 77-71
CRESCENT COAL COMPANY, CRESCENT INDUSTRIES, INTERNATIONAL MINERALS AND CHEMICALS CORPORATION (IMC), Respondents	:	

ORDER APPROVING SETTLEMENT AGREEMENT

On September 28, 1981, I issued a decision in this proceeding in which I found that Complainant was discharged by Respondent on April 22, 1977, in violation of section 110(b) of the Coal Mine Safety Act of 1969. I ordered that Respondent Crescent Coal Company offer Complainant reinstatement in the position from which he was discharged; that Respondent pay him back pay with interest thereon from the date of discharge until he is offered reinstatement; and that Respondent Crescent pay a reasonable attorney's fee for services rendered by counsel for Complainant.

Pursuant to notice, a hearing was called on May 4, 1982, in Pikeville, Kentucky, for the purpose of receiving evidence on the issues of the amount of Complainant's entitlement to back pay and attorneys fees.

After the commencement of the hearing, the parties agreed to settle Complainant's claims and stated their agreement on the record as follows:

1. Respondents agree not to seek review of my decision of September 28, 1981, on the merits of the Complainant.

2. Reinstatement will not be provided or offered Complainant.

3. Respondents shall pay to Complainant Victor McCoy the sum of $55,000 in full settlement of his claim for back wages and interest resulting from his discharge on April 22, 1977.

4. Respondents shall pay to Complainant and his attorneys the sum of $45,000 in full settlement of their claim for reimbursement of attorneys fees and expenses of litigation in this proceeding.

5. The rights of Respondents among themselves as to the amounts due hereunder are not determined by this order.

The agreement was explained to Complainant on the record and he expressed his understanding of it, and his agreement to its terms. Having duly considered the matter, I conclude that the agreement is in the best interest of Complainant and serves the purposes of the Act.

Therefore, IT IS ORDERED that the settlement agreement is APPROVED. IT IS FURTHER ORDERED

1. that Complainant has no right to reinstatement, under paragraph 1 of my order of September 28, 1981, or otherwise.

2. Within 40 days of the date of this order, Respondent shall pay the sum of $55,000 to Complainant as back wages and interest due under paragraph 2 of my order of September 28, 1981.

3. Within 40 days of the date of this order, Respondent shall pay the sum of $45,000 to Complainant and his attorneys as attorneys fees and expenses due under paragraph 3 of my order of September 28, 1981.

4. Upon payments of the amounts recited in paragraphs numbered 2 and 3 above, Complainant will have no further claim under the Coal Mine Safety Act of 1969 against Respondents arising out of his discharge on April 22, 1977.

5. The rights of Respondents as among themselves are not determined by this order.

James A Broderick

James A. Broderick
Administrative Law Judge

Distribution: By certified mail

Stephen A. Sanders, Esq., Appalachian Research & Defense Fund of Kentucky, Inc., 205 Front Street, Prestonsburg, KY 41653

Tony Oppegard, Esq., Appalachian Research & Defense Fund of Kentucky, Inc., 104 Morgan Street, P.O. Box 360, Hazard, KY 41701

David C. Stratton, Esq., Stratton, May and Hays, P.O. Drawer 851, Pikeville, KY 41501

Dan Jack Combs, Esq., Combs and Lester, P.S.C., 207 Caroline Avenue, Pikeville, KY 41501

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

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

MAY 12 1982

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. F & F MENDISCO MINING COMPANY, Respondent.	CIVIL PENALTY PROCEEDING DOCKET NO. WEST 80-458-M MSHA Case No. 42-00472-05006 F Mine: Rim Columbus

Appearances:

James H. Barkley, Esq., and
Katherine Vigil, Esq.
Office of Henry C. Mahlman, Regional Solicitor
United States Department of Labor, Denver, Colorado
For the Petitioner

Gary Cowan, Esq.
Grand Junction, Colorado
For the Respondent

Before: Judge John J. Morris

DECISION

The Secretary of Labor, on behalf of the Federal Mine Safety and Health Administration, (MSHA), charges respondent, F & F Mendisco Company, (Mendisco), with violating Title 30, Code of Federal Regulations, Section 57.12-13, 1/ a safety regulation adopted under the Federal Mine Safety and Health Act, 30 U.S.C. 801 et seq.

1/ 57.12-13 Mandatory. Permanent splices and repairs made in power cables, including the ground conductor where provided, shall be: (a) Mechanically strong with electrical conductivity as near as possible to that of the original; (b) Insulated to a degree at least equal to that of the original, and sealed to exclude moisture; and, (c) Provided with damage protection as near as possible to that of the original, including good bonding to the outer jacket.

After notice to the parties a hearing on the merits was held in Grand Junction, Colorado on August 18, 1981.

ISSUES

The threshold issue is whether respondent, as the lessee mine operator, can prevail on the defense that he was an independent contractor in relation to the owner of the property. 2/

Additional issues are whether respondent violated the regulation, and, if so, what penalty is appropriate.

SUMMARY OF THE EVIDENCE

Jackie Lewis Garrison, in his 19th year, died on the third day of employment with the Mendisco Company (Tr. 47, 50, 51, P16). On the fateful day Garrison was working alone as the grizzly man at the bottom of a two compartment shaft (Tr. 8, 47, 48). The electrocution occurred on the landing in the sump of the mine. A cable carrying 460 volts supplied power to the pump (Tr. 8).

The inspection took place on the day of the fatality. The MSHA inspector observed a bad splice with an exposed lead just below the tie down wire (Tr. 10, 12). There was water on the splice and very little insulation (Tr. 20, 21). If a person contacted the hot lead he would be exposed to 220 volts (Tr. 24). Drawings, photographs of the area, and the defective splice were received in evidence (Exhibits P2-P14).

MSHA witness Craig Miller, an electrical engineer, testified in detail. He dissected the bad splice and concluded that a person could be electrocuted if he contacted the energized wire (Tr. 68, 69). The wires in the splice were corroded and merely twisted together in a knot (Tr. 72).

After visiting the site witness Miller determined that Garrison was electrocuted in this fashion: when he climbed down into the sump he leaned against the ladder and with the wire rope from the tugger motor wrapped around his left wrist he was exposed to the conductor. The wire rope would have ridden down the cable to the bad splice (Tr. 79-80, 91, 98).

2/ In Cathedral Bluffs Shale Oil Company, WEST 81-186-M, an unrelated case decided this date, the mine owner, retaining project control by contract, defends on the basis that the liability lies with its independent contractor.

John Renowden, an MSHA electrical inspector, as well as a journeyman electrician, inspected the site. He tested all of the electrical systems related to the pump motor. Renowden also concluded that the tugger cable came in contact with the bad splice (Tr. 110-111).

Respondent Mendisco leases this mine from Atlas Minerals (Atlas) (Tr. 28, 30, 37, 47). Mendisco does the mining and Atlas has agreed to install and maintain the electrical system (Tr. 130, 131, 134, 147, 148, R3).

If Mendisco had an electrical problem they would contact Atlas to remedy it. MSHA found no evidence that Mendisco knew of the bad splice (Tr. 41, 49).

DISCUSSION

Mendisco asserts, as a threshold matter, that it is not responsible for the defective wiring. The defense pivots on the basis that Mendisco is an independent contractor as to Atlas. It further relies on its agreement with Atlas and argues that Atlas and not Mendisco should have been cited. Mendisco further relies on the Secretary's guidelines relating to independent contractors.

The independent contractor cases arise in the Commission decision of Republic Steel Corporation, 1 FMSHRC 5, and its progeny. Generally such cases arise when the Secretary seeks to impose a penalty on a mine operator for an act performed by the operator's independent contractor. Cf U.S. Steel Corporation, 4 FMSHRC 163, (February 1982).

Mendisco's reliance on the doctrine is misplaced. In this factual setting Mendisco was the mine operator. It did the mining, its employees were exposed and it could have eliminated the hazard. In these circumstances Mendisco's legal relationship with Atlas is not relevant nor is it a defense.

The recent Commission decision of Phillips Uranium Corporation, CENT 79-281-M (April 27, 1982) is not applicable here. The Phillips doctrine is limited by two factors. These are, first, the owner is not in violation of the Act where he has retained an independent company with experience and expertise in the activity being undertaken, and, two, where the employees of the owner do not perform any work other than to observe the progress of the work to assure compliance with quality control and contract specifications (slip op. 1, 2).

Mendisco further contends that the electrocution could not have occurred as outlined by MSHA's evidence. This contention rests in part on Felix Mendisco's testimony concerning the positioning of the wire tugger cable and a likelihood that the cable could not contact the defective splice. I am not persuaded. At the time of the accident MSHA experts

considered several theories of how the electrocution occurred. However, at trial, both experts concurred in their views. Their expertise is apparent, one is an electrical engineer and the other a journeyman electrician. I find the electrocution occurred in the same fashion as contended by the MSHA experts.

CIVIL PENALTY

Section 110(i) of the Act [30 U.S.C. 820(i)] provides as follows:

> The Commission shall have authority to assess all civil penalties provided in this Act. 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.

The Secretary proposes a civil penalty of $4,000 for this violation.

In reviewing the statutory criteria I note that the facts favorable to Mendisco include the lack of any prior violations and the company's small size (Tr. 48, 126). The negligence and gravity are apparent. I hesitate to assess the proposed penalty since it appears that a $4,000 penalty would be unduly burdensome on the company. On the other hand, the purposes of the Act require a substantial penalty to alert at least this company that the safety and health of miners must have a high priority in the Company's activities. In sum, and in view of the statutory criteria, I conclude that a penalty of $1,000 is appropriate.

Based on the foregoing findings of fact and conclusions of law I enter the following

ORDER

1. Citation 336665 is affirmed.

2. A penalty of $1,000 is assessed.

3. Respondent is ordered to pay said sum within 40 days of the date of this order.

John J. Morris
Administrative Law Judge

Distribution:

James H. Barkley, Esq.
Katherine Vigil, Esq.
Office of the Solicitor
United States Department of Labor
1585 Federal Building
1961 Stout Street
Denver, Colorado 80294

Gary Cowan, Esq.
P.O. Box 2540
Grand Junction, Colorado 81502

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

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

MAY 12 1982

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	)	CIVIL PENALTY PROCEEDING
Petitioner,	)	DOCKET NO. WEST 81-186-M
v.	)	A/C No. 05-03140-05005
CATHEDRAL BLUFFS SHALE OIL COMPANY,	)	Mine: Cathedral Bluffs Shale
Respondent,	)	

Appearances:

James H. Barkley, Esq., and
Katherine Vigil, Esq.
Office of Henry C. Mahlman, Regional Solicitor
United States Department of Labor
Denver, Colorado 80294
For the Petitioner

James M. Day, Esq.
Cotten, Day and Doyle
Washington, D.C. 20036
For the Respondent

Before: Judge John J. Morris

DECISION

The Secretary of Labor, on behalf of the Federal Mine Safety and Health Administration, (MSHA), charges respondent, Cathedral Bluffs Shale Oil Company, (Cathedral), with violating Title 30, Code of Federal Regulations, Section 37.19-100, 1/ a safety regulation adopted under the Federal Mine Safety and Health Act, 30 U.S.C. 801 et seq.

1/ The cited regulation provides as follows: 30 CFR 57.19-100:

57.19-100 Mandatory. Shaft landings shall be equipped with substantial safety gates so constructed that materials will not go through or under them; gates shall be closed except when loading or unloading shaft conveyances.

After notice to the parties a hearing on the merits was held in Grand Junction, Colorado on August 17, 1981.

ISSUE

The issue is whether MSHA may impose liability on an owner-operator where such owner has retained an independent company with experience and expertise in sinking shafts and where the owner's exposed employees are quality control and safety inspectors. 2/

SUMMARY OF THE EVIDENCE

On the date of this inspection there was a chain but no safety gate at level 1050. The shaft bottom was one hundred feet below this station (Tr. 41). If miners were in the shaft they could be struck by falling objects (Tr. 7, 8, 41).

Occidental Shale Oil Company (Occidental), as the owner-operator contracted with the Gilbert Corporation of Delaware (Gilbert) (Tr. 11, 12, R1). Gilbert was to serve as the contractor in sinking shafts at the Cathedral Bluffs Shale Oil project (Tr. 20, R1). Portions of the contract received in evidence indicates considerable reliance by Occidental on the expertise of Gilbert (R1).

On September 4, 1980, MSHA inspector Michael Dennehy issued Citation 327786 against the operator and the contractor. 3/ The citation was against the operator, Occidental, because they engineered the shaft and had quality control men checking on its completion (Tr. 20). However, the inspector conceded that he had never seen any Occidental employees other than quality inspectors 4/ working in the shaft (Tr. 17). Gilbert, the contractor, had a continuing presence on the project and its workers were exposed to the hazard (Tr. 19, 31).

According to the contract Gilbert, who is designated as an independent contractor, (R1, page 1) agrees to comply with all applicable laws, rules, and regulations (R1, page 15).

2/ In F & F Mendisco, WEST 80-458-M, an unrelated case decided this date, a mine operator whose employees were exposed defended on the basis that his legal relationship to the owner was that of an independent contractor.

3/ The record does not reflect what disposition was made of the citation against contractor Gilbert.

4/ The inspector also testified that Occidental safety inspectors were working in the shaft. However, except for the incidental activities of Occidental safety inspectors Parker and McClung, infra, I find the only Occidental shaft workers were those individuals inspecting the quality of the workmanship (Tr. 62).

Witness Chuck Inman, the Occidental surface safety inspector, testified that Gilbert was in charge of safety and that he did not have the right to enter the shaft alone (Tr. 43, 44).

Witness Don McClung, Occidental's safety and health manager, indicated he had no control over safety and health in this particular shaft other than by contract (Tr. 56, 60). Any hazards observed by Occidental employees should be reported to Gilbert. The hazard would either be fixed or Gilbert would lose its contract (Tr. 50).

DISCUSSION

The recent Commission decision of Phillips Uranium Corporation, CENT 79-281-M (April 27, 1982), is dispositive of this case. The Commission holds that liability for a violation may not be imposed against an owner-operator where the owner has retained an independent company with experience and expertise in the activity being undertaken and where the owner's exposed employees do not perform any other work other than to observe the progress of the contractor's activities to assure compliance with quality control and contract specifications,(slip op. 1, 2). I further note that Gilbert in this case was sinking mine shafts. This is the same specialized activity undertaken by the contractor in Phillips.

Petitioner in his post trial brief contends that Occidental is liable because its employees were exposed to the hazard and it had the authority to require abatement.

Concerning the Occidental employees exposed to the hazard: the evidence at best shows the only Occidental employees possibly exposed were checking quality control in the shaft. I agree that in January 1980 Ron Parker, an Occidental safety inspector, took underground gas samples and I further agree that Don McClung, the Occidental Safety and Health manager, had been down the shaft two or three times (Tr. 47-49). However, in my view, such activities fall within the the doctrine expressed in Phillips.

Petitioner further argues that one hundred Occidental employees were exposed. However, the evidence does not stretch as far as petitioner contends. There may be one hundred Occidental employees at the Occidental site but except as indicated above no witness places any such employees in the shaft (Tr. 67-68).

I agree with petitioner's contention that Occidental had a right to abate the hazard. Such a right was by contract.

On the authority of Phillips, I conclude that the citation issued here should be vacated.

On the foregoing findings of fact and conclusions of law I enter the following:

ORDER

Citation 327786 and all proposed penalties therefor are VACATED.

John J. Morris
Administrative Law Judge

Distribution:

James H. Barkley, Esq.
Katherine Vigil, Esq.
Office of the Solicitor
United States Department of Labor
1585 Federal Building
1961 Stout Street
Denver, Colorado 80294

James M. Day, Esq.
Cotten, Day & Doyle
1899 L Street, N.W., Twelfth Floor
Washington, D. C. 20036

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

MAY 14 1982

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding
	:	Docket No. LAKE 81-185-M
	:	A.C. No. 21-00820-05027
v.	:	
	:	Minntac Plant
UNITED STATES STEEL CORPORATION, Respondent	:	
LOCAL UNION 1938, DISTRICT 33, UNITED STEELWORKERS OF AMERICA, Representative of the Miners	:	

DECISION

Appearances: Robert A. Cohen, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Petitioner; Louise Q. Symons, Esq., United States Steel Corporation, Pittsburgh, Pennsylvania, for Respondent; Clifford Kasenan, Safety Chairman, Local 1938, United Steelworkers of America, Virginia, Minnesota, for Representative of the Miners.

Before: Administrative Law Judge Broderick

STATEMENT OF THE CASE

In this proceeding, the Secretary seeks a penalty for the violation of 30 C.F.R. § 55.14-29 which proscribes repairs or maintenance on machinery until the power is off and the machinery is blocked against motion. Pursuant to notice the case was heard in Duluth, Minnesota on March 23, 1982. Federal mine inspector Thomas Wasley, and Michael Tintor testified on behalf of Petitioner. Richard Maki, Rod Robillard and Ronald Ranalta testified on behalf of Respondent. No witnesses were called by the Representative of the Miners. Petitioner and Respondent have filed posthearing briefs. Based on the entire record and considering the contentions of the parties, I make the following decision:

FINDINGS OF FACT

1. At all times pertinent to this proceeding, Respondent was the operator of the Minntac Plant, a mine as defined in the Federal Mine Safety and Health Act of 1977. The subject plant produces goods which enter interstate commerce.

2. Respondent is a large operator and the assessment of a penalty will not affect its ability to continue in business.

3. A total of 180 violations were assessed against the subject mine within the 24 months prior to the violation charged herein, of which 170 have been paid.

4. Respondent demonstrated good faith abatement after the issuance of the citation involved in this proceeding.

5. On April 14, 1981, three laborers in the fines crusher building of the Minntac Plant were engaged in shovelling material that had dropped to the floor from a conveyor belt. The material was shovelled into a wheelbarrow and dumped away from the beltline.

6. The belt was moving while the laborers were shovelling. There was approximately 18 inches of material buildup under the belt, and the laborers were shovelling under the belt.

7. There were two bars in front of the belt designed to prevent workers from walking into or falling into the belt or rollers. The material buildup under the belt was approximately the height of the lower bar.

8. It was possible to put a shovel between the bars to break up the material under the belt. It would be difficult to remove the material in this way.

9. A pinch point existed between the belt and the pulley, and could have been reached if a long handled shovel was inserted between the two bars.

10. Inspector Wasley issued a citation alleging a violation of 30 C.F.R. § 55.14-29. He contended that shovelling material from under the belt constituted maintenance of the beltline.

11. The citation was terminated when Respondent had the employees removed from the area and instructed in the hazard involved.

12. The shovels being used were long handled shovels without a hand grip and were approximately 4-1/2 to 5 feet long.

13. Respondent has a safety rule requiring that a minimum of 18 inches body clearance must be maintained when working near a moving conveyor.

REGULATION

30 C.F.R. § 55.14-29 provides: "Repairs or maintenance shall not be performed on machinery until the power is off and the machinery is blocked against motion, except where machinery motion is necessary to make adjustments."

ISSUES

1. Whether shovelling material from under a belt line constitutes repairs or maintenance on machinery?

2. If a violation of the mandatory standard was established, what is the appropriate penalty?

CONCLUSIONS OF LAW

1. Respondent is subject to the provisions of the Federal Mine Safety and Health Act of 1977 in its operation of the Minntac Plant.

2. The undersigned Administrative Law Judge has jurisdiction over the parties and subject matter of this proceeding.

3. Shovelling spilled material from under a belt does not constitute repairs or maintenance on machinery.

DISCUSSION

The wording of the mandatory standard is clear - plainer than many such standards - it forbids performing repairs or maintenance on moving machinery except where motion is necessary to make adjustments. It cannot reasonably be stretched to forbid cleanup under a belt which may expose a worker to a pinch point. The fact that the inspector stated that he would accept a guard as an abatement of the violation makes it apparent that he was confusing the standard for which Respondent was cited with another standard requiring guarding of moving machinery parts which might be contacted by persons. There is no provision in the cited standard which would permit repairs or maintenance on moving machinery if a guard is provided. In any event, it appears clear to me that the activity described in the subject citation, whatever hazard might have been involved, did not constitute repairs or maintenance on moving machinery.

ORDER

Based on the above findings of fact and conclusions of law, IT IS ORDERED that the citation is VACATED and this proceeding is DISMISSED.

James A. Broderick

James A. Broderick
Administrative Law Judge

Distribution: By certified mail

Robert A. Cohen, Esq., Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Blvd., Arlington, VA 22203

Louise Q. Symons, Esq., Attorney for United States Steel Corporation, 600 Grant Street, Room 1580, Pittsburgh, PA 15230

Clifford Kasenen, Safety Chairman, Local Union 1938, United Steelworkers of America, 307 First Street North, Virginia, MN 55702

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

MAY 14 1982

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceedings
	:	Docket Nos. SE 80-21-M
		SE 80-61-M
		SE 80-73-M
v.		SE 80-79-M
		SE 81-6-M
CAROLINA STALITE COMPANY, Respondent	:	Stalite Mill

DECISION AND ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY DECISION

In view of the Solicitor's frequent failure to respond to critical motions, on May 4, 1982, I issued a written order requiring the Secretary to "fully respond" to Respondent's Motion for Summary Decision. Petitioner's response merely urged that an extension be granted pending its appeal of the dispositive decision of the Commission to the United States Court of Appeals.

By its decision dated March 29, 1982, the Commission determined that the Respondent was not a mine subject to the Federal Mine Safety and Health Act of 1977. Secretary v. Carolina Stalite Company, 4 MSHRC 423 (1982). Accordingly, Respondent's motion is granted and the five subject penalty proceedings are dismissed.

Michael A. Lasher, Jr., Judge

Distribution:

James H. Woodson, Deputy Regional Solicitor; Ken S. Welsch, Esq., Office of the Solicitor, U. S. Department of Labor, 1371 Peachtree St., NE, Rm. 339, Atlanta, GA 30367 (Certified Mail)

William C. Kluttz, Jr., Esq., Kluttz, Hamlin, Reamer, Blankenship & Kluttz, 131 N. Main St., P. O. Drawer 1617, Salisbury, NC 28144 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

MAY 17 1982

SECRETARY OF LABOR,	:	Civil Penalty Proceedings
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 81-397
Petitioner	:	A/O No. 46-05653-03009
v.	:	
	:	Docket No. WEVA 81-433
CLAY KITTANNING COAL CO.,	:	A/O No. 46-05653-03010V
Respondent	:	
	:	Gail Mine

DECISION AND ORDER

These matters came on for an evidentiary hearing that, with the consent of the parties, was converted to a settlement conference in Beckley, West Virginia on April 21, 1982.

The operator, who appeared pro se, initially took the position that he was not responsible for the violations charged because he was the lessee of the mineral rights and had contracted with a third party to extract the coal. There was no dispute about the fact that the contract miner, who had never been identified as the operator, had committed the violations. Nor was there any dispute about the fact that Mr. Ray, the lessee-operator, had worked closely with his contract miner. Mr. Ray was understandably chagrined over his claim that he was being held monetarily responsible for violations committed by a contract miner and that the contractor had never paid the royalty due under the contract. On the other hand, Mr. Ray conceded he was responsible for employing the contractor and that the contractor was not a safe operator.

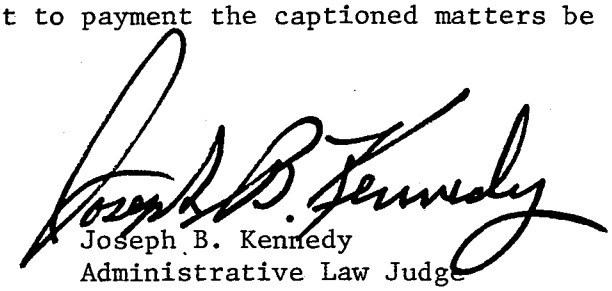
I told Mr. Ray that under the statute as both originally written and amended a lessee-operator is vicariously liable for violations committed by his contractors. Mitigating circumstances may be shown by such operators but under the circumstances presented I could see no basis for diminishing Mr. Ray's responsibility. 1/

1/ In its decision of April 27, 1982 in the Phillips Uranium case the Commission held that the Secretary's refusal to proceed against a construction contractor either directly or by impleading the independent contractor was an abuse of prosecutorial discretion that required the sanction of dismissal of the charges against the owner-operator. The Commission was obviously displeased with the rigidity in the solicitor's litigating posture. I do not believe the Commission intended to hold that owner-operators or lessee-operators are no longer jointly and severally liable for violations committed by their contractors.

Mr. Ray also asserted an inability to pay the penalties because of straitened financial circumstances. It developed, however, that these circumstances are expected to improve considerably over the next year. On the basis of these considerations, Mr.Ray and the solicitor negotiated a stipulation for settlement which is the basis for the present motions.

Based on an independent evaluation and de novo review of the circumstances, I find the settlement proposed is in accord with the purposes and policy of the Act.

Accordingly, it is ORDERED that the motions to approve settlement be, and hereby are, APPROVED. It is FURTHER ORDERED that the operator pay the amount of the settlement agreed upon, $3,570, on or before April 30, 1983 and that subject to payment the captioned matters be DISMISSED.



Joseph B. Kennedy
Administrative Law Judge

Distribution:

William A. Ray, President, Clay Kittanning Coal Co., Inc., Box 296, Summersville, WV 26651 (Certified Mail)

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

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

MAY 18 1982

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding
v.	:	Docket No. LAKE 82-36-M
	:	A.O. No. 21-00282-05029
	:	Minntac Mine
UNITED STATES STEEL CORPORATION, Respondent	:	
UNITED STATES STEEL CORPORATION, Contestant	:	Contest of Citation
v.	:	Docket No. LAKE 81-191-RM
	:	Citation No. 486750; 7/30/81
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Minntac Mine
LOCAL UNION NO. 1938, DISTRICT 33, UNITED STEELWORKERS OF AMERICA, Representative of the Miners	:	

DECISION

Appearances: Robert A. Cohen, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, on behalf of the Secretary of Labor;
Louise Q. Symons, Esq., Pittsburgh, Pennsylvania, on behalf of United States Steel Corporation;
Clifford Kasenan, Safety Chairman, Local Union 1938, United Steelworkers of America, Virginia, Minnesota, on behalf of the Representative of the Miners.

Before: Administrative Law Judge Broderick

STATEMENT OF THE CASE

The two cases have been consolidated since they both involve the same citation. The notice of contest filed by U.S. Steel challenges

the validity of the citation and the civil penalty proceeding seeks a penalty for the violation charged in the citation. Pursuant to notice, a hearing was held on the consolidated cases in Duluth, Minnesota on March 23, 1982. Federal mine inspector James Bagley and Larry Claude testified on behalf of the Secretary. William Parker and Michael Kerr testified on behalf of U.S. Steel. No witnesses were called by the Representative of the Miners. The Secretary and U.S. Steel have filed posthearing briefs. Based on the entire record and considering the contentions of the parties, I make the following decision.

FINDINGS OF FACT

1. At all times pertinent to this proceeding, U.S. Steel was the operator of the Minntac Plant, a mine as defined in the Federal Mine Safety and Health Act of 1977. The subject plant produces goods which enter interstate commerce.

2. U.S. Steel is a large operator, and the assessment of a penalty will not affect its ability to continue in business.

3. A total of 180 violations were assessed against the subject mine within the 24 months prior to the violation involved herein, of which 170 have been paid.

4. Respondent demonstrated good faith in abating the condition after the issuance of the citation involved in this proceeding.

5. In July, 1981, and for some time prior to that, it was a common practice at the subject mine for drivers of 85 ton and 120 ton haulage trucks to check the oil level while the truck motor was running.

6. Newly hired truck drivers since 1977 have been instructed by U.S. Steel to turn off the truck engine while checking the oil.

7. On July 30, 1981, the driver of a Wabco truck (No. 528) with a Cummins engine checked the oil in his vehicle while the motor was running.

8. In checking the oil, it is necessary to place one's foot on the bottom step of a boarding ladder, take a hand hold on a grab iron or radiator brace and pull oneself up to the exposed engine.

9. There was a pinch point between the V-belt on the alternator and the alternator pulley located at the front or right hand side of the alternator from the point of view of the person on the ladder.

10. The oil dipstick was toward the back or left hand side of the ladder. It was approximately 16 inches from the alternator pulley. The pinch point was approximately 18 inches from the grab iron.

11. On July 30, 1981, Inspector Bagley issued a citation for a violation of 30 C.F.R. § 55.14-1 in which he charged that the truck in question had an alternator V-belt drive assembly which was not guarded to prevent persons from contacting it, and the equipment operator stated that he checked the engine oil with the engine running.

12. The citation was terminated when U.S. Steel fabricated and installed a guard over the alternator and its V-belt assembly. The inspector refused to accept as abatement the company's proposal that it issue a "job safety procedure" instructing the equipment operators to shut down the trucks before checking the engine oil.

13. The inspector testified at the hearing that mechanics checking the timing of the engine might also be exposed to the pinch point. This aspect of the alleged hazard was not included in the citation, nor was it part of the reason for issuing the citation. I am not considering it in this proceeding.

REGULATION

30 C.F.R. § 55.14-1 provides as follows: "Gears; sprockets; chains; drive, head, tail, and takeup pulleys; flywheels; couplings; shafts; sawblades; fan inlets; and similar exposed moving machine parts which may be contacted by persons and which may cause injury to persons, shall be guarded."

ISSUES

1. Whether an unguarded V-belt on the alternator of a truck engine constitutes a violation of the standard in question where the truck operator checks the engine oil with the engine running?

2. If so, whether the condition can be abated by requiring that the engines be turned off before checking the oil, or whether a guard is necessary?

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

CONCLUSIONS OF LAW

1. The U.S. Steel Corporation is subject to the provisions of the Federal Mine Safety and Health Act of 1977, in the operation of the Minntac Plant.

2. The undersigned Administrative Law Judge has jurisdiction over the parties and subject matter of this proceeding.

3. The V-belt assembly on the alternator of the No. 528 Wabco truck is, while the engine is running, a moving machine part. If the engine oil is checked with the engine running, the V-belt assembly constitutes a pinch point which may be contacted by persons.

DISCUSSION

There is no real dispute that one checking the oil by the dipstick on the truck in question while the engine is running is subjected to the possibility of coming in contact with the pinch point formed between the alternator V-belt and the alternator pulley. U.S. Steel argues that the risk is remote (it compares it to the risk of being struck by a falling meteor); that no other operator has ever been cited for the condition; that no injuries have ever been reported due to the condition; that the citation resulted from the personal campaign of a U.S. Steel employee to have guards installed; that the equipment manufacturers never considered the need for a guard; that the inspector was arbitrary in requiring the installation of a guard for abatement. (". . . if MSHA inspectors have that right they have succeeded where President Truman failed in dictating how the steel companies should run their businesses. Youngstown Sheet and Tube v. Sawyer, 343 U.S. 579 (1952)"). Brief of United States Steel, p. 7). These arguments are largely beside the point. A risk of injury from the possible contact with moving machine parts was shown by the evidence.

4. There is no risk of injury from contact with moving machine parts in checking the oil with the engine off, since in that case, there are no moving machine parts. Therefore, the condition could properly have been abated by requiring that the engine oil be checked only with the engine turned off. This is the procedure recommended by the equipment manufacturers and the stated policy of U.S. Steel.

5. The probability of an injury occurring in the circumstances shown was slight. On the other hand, if an injury occurred it could be relatively serious. I conclude that the violation was not serious.

6. The company had an official policy of requiring the engines to be turned off when checking the oil. For various reasons, the policy was more honored in the breach than in the observance. This fact should have been known to management personnel. I conclude that U.S. Steel was negligent in permitting the practice to continue.

7. I conclude that an appropriate penalty for the violation is $75.

ORDER

On the basis of the above findings of fact and conclusions of law, IT IS ORDERED that Citation No. 486750 issued July 30, 1981, is AFFIRMED. IT IS FURTHER ORDERED that U.S. Steel Corporation, within 30 days of the date of this decision, pay the sum of $75 as a civil penalty for the violation of 30 C.F.R. § 55.14-1 charged in the citation.

James A. Broderick
Administrative Law Judge

Distribution: By certified mail

Robert A. Cohen, Esq., Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Blvd., Arlington, VA 22203

Louise Q. Symons, Esq., Attorney for United States Steel Corporation, 600 Grant Street, Room 1580, Pittsburgh, PA 15230

Clifford Kasenan, Safety Chairman, Local Union 1938, United Steelworkers of America, 307 First Street North, Virginia, MN 55702

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JACK PARKS,	:	Complaint of Discharge,
Applicant	:	Discrimination, or Interference
v.	:	
	:	Docket No. NORT 75-377
L & M COAL CORPORATION,	:	
Respondent	:	

DECISION

Appearances: Mary Lu Jordan, Esq., United Mine Workers of America, Washington, D.C., for Applicant;
No appearance for Respondent.

Before: Administrative Law Judge Broderick

STATEMENT OF THE CASE

The case is before me on a motion filed by Applicant for a post decision hearing to determine the amount due Applicant as back wages, costs and expenses pursuant to the order in my decision of November 9, 1977. The decision was affirmed by the Commission (2 FMSHRC 2815) and the Court of Appeals for the Fourth Circuit (Unpublished Opinion October 7, 1981 No. 80-1320).

A Notice of Hearing was issued March 30, 1982, scheduling a hearing in Abingdon, Virginia, for April 29, 1982. On March 30, 1982, counsel for Respondent filed a motion to withdraw as counsel because he had been appointed to a Judicial position in Virginia. Counsel stated that he had advised his client of the motion and suggested that he retain other counsel.

On April 2, 1982, I issued an order granting the motion of counsel to withdraw and notifying Respondent of the time and place of the hearing. The notice was sent by certified mail and returned unclaimed April 29, 1982. On April 27, 1982, I called Respondent's former attorney who stated that he sent a copy of the notice of hearing to Respondent when he received it, but had not heard from Respondent. On

April 27, 1982, I attempted to call Respondent's President, W. L. Lanningham, at his home (there was no listing for the corporation). My Secretary talked to a person who identified herself as his wife and asked Mr. Lanningham to call. No call was received. Under the circumstances, I find that Respondent was notified of the hearing. No one appeared on his behalf.

Evidence was received at the hearing and submitted subsequent to the hearing by Complainant on the issues of back pay, interest, legal expenses and costs of litigation. Based on the evidence submitted and on the entire record, I make the following decision on the amounts due Complainant:

BACK PAY

My order directed Respondent to pay Complainant full back wages from the date of discharge (May 9, 1975) to the date he is reinstated with interest thereon computed at the rate of 6 percent per annum. Respondent was permitted to deduct from the back wages due under the order, any wages Complainant received from other employment. Complainant is seeking back pay only for the period from May 9, 1975 to December 5, 1977.

1. Back pay, including vacation pay, holiday pay, unused sick leave pay and cost of living allowances which Complainant would have received for the period in question totals $37,708.45. Interim earnings total $7,318.69. The net back pay due Complainant is $30,389.76.

2. Interest on the net back pay at the rate of 6 percent per annum totals $10,756.42. My order directed that interest be paid at 6 percent although under the formula followed by the NLRB and by me in more recent decisions, the rate would fluctuate between 6 percent and 20 percent for the periods involved. I am using the rate of 6 percent per annum since my order specified payment of interest at 6 percent.

3. Complainant is entitled to have payments made to the United Mine Workers Health and Retirement Fund on his behalf as part of back wages. The amount that would have been paid for the period involved is $6,629.12.

LEGAL EXPENSES

1. At the time the case was tried Complainant was represented by an attorney in private practice who was engaged by the United Mine Workers. When the UMW counsel took over the case directly, the UMW

paid the private counsel the sum of $5,329.46. UMW attorneys, based on their salaries, health and pension benefits, are entitled additionally to a total of $1,820.77.

2. Complainant had costs in the amount of $61.97 for attendance at the hearing in Abingdon.

ORDER

Respondent shall within 30 days of the date of this decision pay the following amounts pursuant to my order of November 9, 1977:

1. To Complainant Jack Parks the sum of $41,146.18 as back wages and interest.

2. To Complainant Jack Parks and the United Mine Workers of America the sum of $7,150.23 as attorneys fees and legal expenses.

3. To the United Mine Workers Health and Retirement Fund on behalf of Complainant Jack Parks the sum of $6,629.12 as employer contributions to the Pension and Benefit Trusts.

4. To Complainant Jack Parks the sum of $61.97 as incidental expenses of litigation.

IT IS FURTHER ORDERED that upon payment of the above amounts, Complainant will not be entitled to reinstatement, nor will he have any other claim against Respondent under the Coal Mine Safety Act of 1969, resulting from his discharge on May 9, 1975.

James A. Broderick

James A. Broderick
Administrative Law Judge

Distribution: By certified mail

Mary Lu Jordan, Esq., United Mine Workers of America, 900 15th Street, N.W., Washington, DC 20005

Mr. W. L. Lanningham, Route 4, Box 118, Jonesville, VA 24263

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

May 21, 1982

UNITED MINE WORKERS OF AMERICA, Contestant	:	NOTICE OF CONTEST
	:	Docket No. LAKE 82-70-R
v.	:	Order No. 1226709; 3/15/82
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Saginaw Mine

ORDER OF DISMISSAL

On March 15, 1982, an MSHA inspector issued a withdrawal order under section 104(d)(1) of the Act citing a violation of 30 CFR 75.200. On March 16, 1982, the order was terminated. On March 19, 1982, the withdrawal order was vacated on the ground that it had been issued in error.

The Contestant union challenges the vacating of the withdrawal order. I conclude Contestant does not have that right under the Act.

Under section 105(d) of the Act a representative of miners may contest "the issuance, modification, or termination of any order." The Act does not give the representative of miners the right to challenge the vacating of an order. The term "vacating" is used elsewhere in the Act including a subsequent phrase of the same sentence of section 105(d). Congress gave each of the terms "issuance", "modification", "termination" and "vacation" its own separate and discrete meaning and in dealing with these terms Congress has acted with great specificity. If Congress wished the union to have the right to challenge the vacating of an order it would have expressly so provided as it did with respect to other actions that are taken with respect to orders. In view of the precise delineations set forth in 105(d) there is no basis to expand by implication the rights granted therein or to read into it any other part of the Act such as

104(h). It is clear therefore, that only the designated actions regarding orders may be disputed by a miner's representative. The preciseness of section 105(d) previously has been recognized in other contexts. United Mine Workers of America v. Secretary of Labor, 3 FMSHRC 2016 (August 28, 1981); Chester M. Jenkins v. Secretary of Labor, 3 FMSHRC 2175 (September 22, 1981).

In light of the foregoing, this case is DISMISSED.

Paul Merlin
Chief Administrative Law Judge

Distribution: Certified mail.

Thomas M. Myers, Esq., UMWA, 56000 Dilles Bottom, Shadyside, OH 43947

John H. O'Donnell, Esq., Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Boulevard, Arlington, VA 22203

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

May 21, 1982

UNITED MINE WORKERS OF AMERICA, Contestant	:	NOTICE OF CONTEST
	:	Docket No. LAKE 82-71-R
v.	:	Citation No. 1226715; 3/15/82
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Saginaw Mine

ORDER OF DISMISSAL

On March 15, 1982, an MSHA inspector issued a citation under section 104(a) of the Act citing a violation of 30 CFR 75.303. On March 19, 1982, the citation was vacated.

The Contestant union challenges the vacating of the citation. I conclude that Contestant does not have that right under the Act.

Under section 105(d) a representative of miners only has the right to dispute the "reasonableness of the length of time set for abatement by a citation or modification thereto." An operator may contest the issuance or modification of a citation and the reasonableness of abatement time. No one is given the right to contest the vacating of a citation. Section 105(d) is very specific in delineating the types of actions taken with respect to citations and orders that can be challenged and the identity of those who can assert these challenges. See my decision in United Mine Workers of America v. Secretary of Labor, LAKE 82-70-R of this date which is adopted and incorporated herein. It has previously been held that a miner's representative cannot challenge the issuance of a citation. United Mine Workers of America v. Secretary of Labor (CENT 81-223-R) dated August 28, 1981. It also has been held that a miner cannot challenge issuance of a citation. Jenkins v. Secretary of Labor (WEST 81-348-RM) dated September 22, 1981. The

rationale of those decisions which is based upon a recognition that the rights conferred by 105(d) are defined and delimited by the very explicit language of that section applies here. Clearly, with respect to citations a miner's representative is limited to an attack upon the reasonableness of abatement time.

Contestant's reliance upon section 104(h) is unpersuasive. That section is merely declarative of the fact that a citation or order remains in effect until it is changed or set aside in the ways specified by those authorized to do so. It does not enlarge upon the rights conferred by section 105(d).

In light of the foregoing, this case is DISMISSED.

Paul Merlin
Chief Administrative Law Judge

Distribution:

Thomas M. Myers, Esq., UMWA, 56000 Dilles Bottom, Shadyside, OH 43947

John H. O'Donnell, Esq., Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Boulevard, Arlington, VA 22203

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

MAY 24 1982

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding Docket No. WEVA 82-5 A.O. No. 46-04160-03014 V
v.	:	Marilyn No. 1 Mine
OAK MINING COMPANY, Respondent	:	

DECISION

Appearances: Aaron Smith, Attorney, U.S. Department of Labor, Philadelphia, Pennsylvania, for the petitioner; Robert V. Berthold, Jr., Esquire, Hoyer, Sergent & Berthold, Charleston, West Virginia, for the respondent

Before: Judge Koutras

Statement of the Case

This proceeding concerns a proposal for assessment of civil penalty 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), charging the respondent with three alleged violations of certain mandatory safety standards found in Section 75, Title 30, Code of Federal Regulations.

Respondent filed a timely answer to the proposals, admitted that the mine is subject to the provisions of the Act, and in defense of the violations stated that the conditions cited were abated within a reasonable time, did not constitute an immediate threat to the health and safety of miners, and did not constitute a continued pattern of conduct. Further, respondent submitted that the initial proposed penalty assessment amounts for the violations are inappropriate considering the size of the mine, the size of respondent's company, and the number of previously assessed violations.

By notice of hearing, as subsequently amended, the case was docketed for hearing on April 28, 1982, in Charleston, West Virginia. Prior to the Commencement of the hearing, respondent's counsel of record withdrew from the case and also advised that the respondent had filed a Petition for reorganization under Chapter II of the United States Bankruptcy Code in the U.S. Bankruptcy Court for the Southern District of West Virginia at Charleston, West Virginia.

By motion filed April 1, 1982, respondent's bankruptcy counsel filed a motion for a stay of the scheduled hearing on the ground that Section 362 of the U.S. Bankruptcy Code automatically stays the pending adjudicative proceeding before this Commission. The motion for stay was denied by me on April 9, 1982, and my reasons for the denial are detailed in the order which is a part of the record. The hearing was convened as scheduled and the parties appeared and participated fully therein.

At the request of the parties, an informal prehearing conference was held in Charleston on the evening of April 27, 1982, for the purpose of discussing the issues to be tried, the status of respondent's bankruptcy petition, and a possible settlement of the case. The parties advised me that they had reached a proposed settlement of the case and they were afforded an opportunity to present their arguments in support of the settlement on the record at the hearing.

Discussion

Citation No. 904194, issued on June 8, 1981, is a Section 104(d)(2) Order of withdrawal, cites a violation of 30 CFR 75.303, and the condition or practice cited is as follows:

> There were no evidence that a preshift examination had been made before miners entered the 002 Section, in that initials, date or time could be found at or near the face areas.

Citation No. 904293, issued on June 19, 1981, is a Section 104(d)(2) Order of Withdrawal cites a violation of 30 CFR 75.400, and the cited condition or practice is as follows:

> Loose coal and coal dust, in depths from 1 to 18 inches, was allowed to accumulate on the mine floor and coal ribs in the following entries in the No. 1 (001) section: From the face of No. 1 entry outby 60 feet the face of No. 2 entry outby 50 feet, the face of the No. 3 entry outby 74 feet, the hold of No. 4 entry outby 98 feet, the face of No. 5 entry outby 85 feet and the face of No. 6 entry outby for 59 feet.

Citation No. 904294, issued on June 19, 1981, Section 104(d)(2) Order of Withdrawal, cites a violation of 30 CFR 75.316, and the cited condition or practice is as follows:

> Permanent stoppings were not maintained up to and including the third connecting crosscut in the No. 1 (001) section in that permanent stoppings were terminated 4 crosscuts outby the faces of the No. 2 and 3 (intake) faces and No. 4 and 5 (Return) face.

Stipulations

The parties stipulated that the respondent owned and operated the subject mine, that the mine is subject to the Act, that the citations were duly served on respondent's agents at the times and dates stated therein, and that I have jurisdiction to hear and decide the matter.

Respondent's bankruptcy petition

As noted in my April 9, 1982, Order denying respondent's motion for stay, Section 362 of the Bankruptcy Code, 11 U.S.C. 362, contains exceptions to the automatic stay provisions of the law, and one of those exceptions reads as follows:

> (b) The filing of a petition under section 301, 302, or 303 of this title does not operate as a stay - * * *
>
> (4) Under subsections (a)(1) of this section, of the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental units police or regulatory power; (5) under subsection (a)(2) of this section, of the enforcement of a judgment, other than a money judgment, obtained in an action or proceeding by a governmental unit to enforce such governmental units police or regulatory power;

N.L.R.B. v. Evans Plumbing Company, 639 F.2d 291 (5th Cir. 1981), contains a detailed discussion of the section 362 bankruptcy code stay exception, particularly in cases involving a Federal agency's exercise of regulatory powers, including the enforcement of safety regulations. See also: In re Tauscher, et al., E.D. Wisc. Bankruptcy Court, 24 WH cases 1310, holding that administrative proceedings involving the assessment of civil penalties for child labor violations of the Fair Labor Standards Act are excepted from the automatic stay provisions of section 362 of the Bankruptcy code.

In an April 6, 1982, decision concerning a discrimination complaint filed by the Secretary pursuant to section 105(c) of the Federal Mine Safety and Health Act of 1977, MSHA, et al. v. Leon's Coal Company, et al., Docket No. CENT 80-339-D, Judge Melick ruled that enforcement proceedings before this Commission brought by MSHA pursuant to the Act come within the aforementioned statutory exception to the automatic stay provisions of the Bankruptcy Code. Citing several applicable court decisions in addition to those cited above, Judge Melick further held that in spite of the pending bankruptcy proceeding in the case before him, this Commission retained jurisdiction to proceed with hearings in pending cases and to issue decisions and orders.

I am in total agreement with the Leon Coal Company decision and adopt Judge Melick's rulings regarding the Commission's jurisdiction to proceed with the final adjudication of cases involving coal mining companies who are parties in proceedings before the Commission or its administrative Law Judges as my finding and conclusion on this issue. I also reaffirm my previous ruling and order denying respondent's motion for a stay of this adjudicative proceeding.

Petitioner's counsel presented full and complete arguments in support of the proposed settlement disposition of this case, including information concerning the six criteria found in section 110(i) of the Act.

Fact of violations

Respondent does not dispute the fact of violations and presented no defense to the citations. Under the circumstances the citations in question are AFFIRMED.

Size of business and the effect of the civil penalty assessments on the respondent's ability to remain in business.

The parties agreed that the respondent is a moderate-to-medium sized coal mine operator that all of the mines owned and operated by the parent company, Coal Management Services Incorporated, had an annual production of 1,088,959 tons of coal, and that the subject mine had an annual production of 272,321 tons.

The parties stipulated that the initial proposed civil penalty assessments for the three citations in question would have an adverse impact on the respondent's ability to continue in business, particularly in light of the pending bankruptcy proceedings. Although the mine is not presently in operation, respondent's counsel indicated that respondent is attempting to resolve its financial affairs and will attempt to reopen the mine sometime in the future. Counsel also asserted that the approval of the proposed settlement will contribute to the respondent's efforts to remain solvent and get back into the coal mining business.

History of prior citations

The parties stipulated that for the 24-month period prior to the issuance of the citations in question the respondent paid civil penalty assessments for a total of 37 violations.

Gravity

Petitioner argued that all the citations were moderately serious. The failure to conduct the required preshift examination (citation 904194), exposed miners to potential hazards. The failure to clean-up the cited coal accumulations (904293), presented a fire hazard. The failure to maintain the permanent stoppings could have affected the mine ventilation system.

Negligence

The parties agreed that the citations resulted from the respondent's failure to exercise reasonable care and that this constitutes ordinary negligence as to each of the citations. Although recognizing that the citations were "unwarrantable failure" orders, petitioner's counsel agreed that there is no evidence of any gross negligence by the respondent in this case.

Good faith compliance

Petitioner stated that citation no. 904194 was abated within 20 minutes after it was issued, and that the conditions cited in the remaining citations were promptly corrected by the respondent and that the inspector terminated the citations upon his next visit to the mine.

The parties proposed that a civil penalty assessment for the three citations in question in the total amount of $1,000 is reasonable and in the public interest, particularly in light of the pending bankruptcy proceedings.

Conclusion

After careful review and consideration of the pleadings, arguments, and submissions in support of the petitioner's motion to approve the proposed settlement of this case, I conclude and find that the proposed settlement disposition is reasonable and in the public interest. Accordingly, pursuant to 20 C.F.R. § 2700.30, petitioner's motion is GRANTED and the settlement is APPROVED.

The agreed upon penalty assessment of $1,000 is allocated as follows:

Citation No.	Date	30 CFR Section	Assessment
904194	6/8/81	75.303	$300
904293	6/19/81	75.400	$400
904294	6/19/81	75.316	$300

ORDER

Respondent IS ORDERED to pay civil penalties in the settlement amounts shown above in satisfaction of the citations in question within thirty (30) days of the date of this decision and order, and upon receipt of payment by the petitioner, this proceeding is DISMISSED.

George A. Koutras
Administrative Law Judge

Distribution:

Aaron Smith, Attorney, U.S. Department of Labor, Office of the Solicitor, 3535 Market St., Philadelphia, PA 19104 (Certified Mail)

Robert V. Berthold, Jr., Esq., Hoyer, Sergent & Berthold, 22 Capital St., Charleston, WV 25301 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

May 26, 1982

QUARTO MINING COMPANY, Contestant	:	Contest of Orders
	:	Docket No. LAKE 81-118-R
v.	:	Order No. 1121181; 3/2/81
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Docket No. LAKE 81-119-R
	:	Order No. 1121182; 3/2/81
	:	
	:	Docket No. LAKE 81-120-R
	:	Order No. 1121183; 3/2/81
	:	
	:	Docket No. LAKE 81-121-R
	:	Order No. 1121185; 3/2/81
	:	
	:	Docket No. LAKE 81-122-R
	:	Order No. 1124038; 3/2/81
	:	
	:	Docket No. LAKE 81-123-R
	:	Order No. 1124039; 3/2/81
	:	
	:	Docket No. LAKE 81-124-R
	:	Order No. 1124040; 3/2/81
	:	
	:	Docket No. LAKE 81-125-R
	:	Order No. 1124041; 3/2/81
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceedings
	:	Docket No. LAKE 81-147
	:	A.C. No. 33-01157-03250-V
	:	
v.	:	Docket No. LAKE 81-148
	:	A.C. No. 33-01157-03251
QUARTO MINING COMPANY, Respondent	:	Powhatan No. 4 Mine

DECISION

Appearances: John T. Scott, III, Esq., Crowell & Moring, Washington, DC for Contestant/Respondent, Quarto Mining Company;
Patrick M. Zohn, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, PA for Respondent/Petitioner, MSHA.

Before: Judge Merlin

Statement of the Case

The first eight docket numbers captioned above are notices of contest filed by Quarto Mining Company under section 105(d) of the Act to challenge the validity of eight orders of withdrawal issued by two inspectors of the Mine Safety and Health Administration for alleged violations of 30 CFR 75.1003-2. The last two docket numbers are petitions for the assessment of civil penalties filed by the Secretary of Labor under section 110(a) of the Act for violations alleged in the orders.

Prior to the hearing the parties filed preliminary statements, joint stipulations and memoranda of law. The hearing was held as scheduled on May 12, 1982. Documentary exhibits and oral testimony were received from both parties. At the conclusion of the hearing both parties waived the filing of written briefs and agreed I should render a decision based upon the transcript of the hearing and documentary evidence (Tr. 203).

At the outset of the hearing the Solicitor moved to vacate Order 1121182 (LAKE 81-119-R) and to dismiss the civil penalty petition with respect to that item. The operator also moved to dismiss its notice of contest for that order. From the bench I granted the motions (Tr. 5).

During the course of the hearing the Solicitor also moved to vacate Order 1121181 (LAKE 81-118-R) and to dismiss the civil penalty petition with respect to that item. The operator also moved to dismiss its notice of contest for that order. From the bench I granted the motions (Tr. 146).

This left for decision the validity of the remaining six orders and associated penalty items.

The Mandatory Standard

Section 75.1003-2 of the mandatory standards provides in pertinent part as follows:

> § 75.1003-2 Requirements for movement of off-track mining equipment in areas of active workings where energized trolley wires or trolley feeder wires are present; pre-movement requirements; certified and qualified persons.

(a) Prior to moving or transporting any unit of off-track mining equipment in areas of the active workings where energized trolley wires or trolley feeder wires are present:

(1) The unit of equipment shall be examined by a certified person to ensure that coal dust, float coal dust, loose coal oil, grease, and other combustible materials have been cleaned up and have not been permitted to accumulate on such unit of equipment; and,

(2) A qualified person, as specified in § 75.153 of this part, shall examine the trolley wires, trolley feeder wires, and the associated automatic circuit interrupting devices provided for short circuit protection to ensure that proper short circuit protection exists.

(b) A record shall be kept of the examinations required by paragraph (a) of this section, and shall be made available, upon request, to an authorized representative of the Secretary.

(c) Off-track mining equipment shall be moved or transported in areas of the active workings where energized trolley wires or trolley feeder wires are present only under the direct supervision of a certified person who shall be physically present at all times during moving or transporting operations.

(d) The frames of off-track mining equipment being moved or transported, in accordance with this section, shall be covered on the top and on the trolley wire side with fire-resistant material which has met the applicable requirements of Part 18 of Subchapter D of this Chapter (Bureau of Mines Schedule 2G).

....

(f) A minimum vertical clearance of 12 inches shall be maintained between the farthest projection of the unit of equipment which is being moved and the energized trolley wires or trolley feeder wires at all times during the movement or transportation of such equipment; provided,

however, that if the height of the coal seam does not permit 12 inches of vertical clearance to be so maintained, the following additional precautions shall be taken:

....

(3) At all times the unit of equipment is being moved or transported, a miner shall be stationed at the first automatic circuit breaker outby the equipment being moved and such miner shall be: (i) In direct communication with persons actually engaged in the moving or transporting operation, and (ii) capable of communicating with the responsible person on the surface required to be on duty in accordance with § 75.1600-1 of this part;

....

(5) No person shall be permitted to be inby the unit of equipment being moved or transported, in the ventilating current of air that is passing over such equipment, except those persons directly engaged in moving such equipment.

....

The Cited Conditions or Practices

Order No. 1121183 (LAKE 81-120-R) cites a violation of 30 CFR 75.1003-2(f)(3)(i) for the following condition:

While the conveyor belt tailpiece unit was being transported along the No. 1 main line track entry, a miner was not stationed at the first automatic circuit breaker outby the equipment being moved or in direct communication with persons actually engaged in the transporting operation. The unit contacted the trolley wire on 2-27-81 at about 6:55 p.m. Person in charge was W. McIntire, construction foreman.

Order No. 1121185 (LAKE 81-121-R) cites a violation of 30 CFR 75.1003-2(f)(5) for the following condition:

While the conveyor belt tailpiece unit was being transported along the No. 1 main line track entry, which came in contact with the trolley wire on 2-27-81 at about 6:55 p.m., persons were permitted to be inby the unit being transported and in the ventilating current of air that passed over the equipment. The persons were working on the 5 right and 6 right sections of 3 south along with other personnel doing "dead work." Person in charge was W. McIntire, construction foreman.

Order No. 1124038 (LAKE 81-122-R) cites a violation of 30 CFR 75.1003-2(a)(1) for the following condition:

An inspection revealed that on February 27, 1981, a belt conveyor tailpiece unit (off-track mining equipment) was moved along the No. 1 main line haulage road in violation of the following mandatory standard: The unit of equipment (belt conveyor tailpiece) was not examined by a certified person to ensure that loose coal, coal dust, and float coal dust were cleared up and not permitted to accumulate on such equipment. Accumulations of loose coal, coal dust, and float coal dust were present on the entire surface area of the belt conveyor tailpiece unit in depths of 1/4 to 4 inches. W. McIntire, Recovery Foreman, was the person in charge.

Order No. 1124039 (LAKE 81-123-R) cites a violation of 30 CFR 75.1003-2(b) for the following condition:

An inspection revealed that on February 27, 1981, a belt conveyor tailpiece unit (off-track mining equipment) was moved along the No. 1 main line haulage road under energized trolley wire in violation of the following mandatory standard: The absence of entries into the record book indicated that a qualified person did not examine the trolley wires, trolley feeder wires, and the associated automatic circuit interrupting devices provided for short circuit protection to ensure that proper short circuit protection existed. W. McIntire, Recovery Foreman, was the person in charge.

Order No. 1124040 (LAKE 81-124-R) cites a violation of 30 CFR 75.1003-2(c) for the following condition:

> An inspection revealed that on February 27, 1981, a belt conveyor tailpiece unit (off-track mining equipment) was moved along the No. 1 main line haulage road under energized trolley wire without the direct supervision of a certified person. The recovery foreman in charge was not physically present during the transporting operation. W. McIntire, Recovery Foreman, was the person in charge.

Order No. 1124041 (LAKE 81-125-R) cites a violation of 30 CFR 75.1003-2(d) for the following condition:

> An inspection revealed that on February 27, 1981, a belt conveyor tailpiece unit (off-track mining equipment) was moved along the No. 1 main line haulage road under energized trolley wire in violation of the following mandatory standard: The frame of the belt conveyor tailpiece unit was not covered on the top and trolley wire side with fire-resistant material. The top surface of the unit measured 10 feet, 6 inches in length by 5 feet, 9 inches to 6 feet, 9 inches in width, and only one piece of fire-resistance belt measuring 5 feet, 2 inches in length by 3 feet in width was placed on top of the unit. W. McIntire, Recovery Foreman, was the person in charge.

Stipulations

In the first preliminary statement filed September 1, 1981, the parties agreed to the following stipulations:

1. Quarto Mining Company is the operator of the Powhatan No. 4 Mine.

2. The operator and the Powhatan No. 4 Mine are subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977.

3. The presiding administrative law judge has jurisdiction over this proceeding.

4. Each of the inspectors who issued the subject orders was a duly authorized representative of the Secretary.

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

6. The annual coal tonnage produced by the Powhatan No. 4 Mine is between 1.1 and 2.0 million, and the annual coal tonnage produced by the operator is over 10 million.

7. The average number of violations assessed per year during the two years prior to the issuance of the [orders] was over 50.

8. Imposition of any penalty in this proceeding will not affect the operator's ability to continue in business.

On April 8, 1982, the parties submitted an additional 19 stipulations which are as follows:

1. On Monday, February 23, 1981, miners under the supervision of Support Foreman Walter McIntire loaded four on-track supply cars in the 9 and 10 Right 1 North Section of the Powhatan No. 4 Mine of Quarto Mining Company. The four cars were loaded with belt structure, hydraulic oil, brattice cloth, empty oil cans, rags, trash and a belt tailpiece. This belt tailpiece had been modified by putting steel wings on it which increased its width. The wings were added so that when coal was dumped onto the tailpiece it would not overflow. The tailpiece was 10 feet 6 inches in length, 3 feet 1 inch in height and varied in width from 5 feet 9 inches to 6 feet 9 inches.

2. On Friday, February 27, 1981, at approximately 6:00 p.m., Mr. McIntire instructed Dwight Lancaster, general inside laborer, and George Harold, stoper operator, to transport

the four loaded cars from the 9 and 10 Right 1 North Section of the mine to the 3 South Runaround Section of the mine. Mr. Lancaster drove the locomotive pulling the cars and Mr. Harold accompanied him. The locomotive usually travels at about five miles per hour.

3. Prior to the move of the tailpiece, it was not examined by a certified person to ensure that coal dust, float coal dust, loose coal, oil, grease and other combustible materials had been cleaned up and not permitted to accumulate on it.

4. Because no examination of the tailpiece took place, no record could be kept and made available to an authorized representative of the Secretary of Labor.

5. No certified person was physically present at all times during the movement of the tailpiece to directly supervise its trip from 9 and 10 Right 1 North to the 3 South Runaround.

6. The entire top of the tailpiece was not covered by fire resistant material, although a piece of rubber matting measuring 5 feet 2 inches in length and 3 feet in width was placed on the right side or trolley wire side of the tailpiece.

7. A minimum vertical clearance of 12 inches between the wings of the tailpiece and the energized trolley wires could not be maintained during the movement of the tailpiece in part due to the physical restrictions of the coal seam.

8. The locomotive pulling the cars was using direct current electric power which was provided by a power source inby. During the move of the tailpiece, no miner was stationed to cut off the power source, no miner was outby in direct communication with Dwight Lancaster and George Harold while they were moving the tailpiece, and no miner was stationed at the first automatic circuit breaker outby the tailpiece at all times during the move.

9. The locomotive moving the four cars had traveled approximately two miles to the 95 Crosscut on the main haulage line when at approximately 6:55 p.m., the wing on the right hand side of the tailpiece came in contact with the energized trolley wire, knocking down 78 feet of trolley wire and several cable hangers. When the belt tailpiece contacted the energized trolley wire, the automatic circuit interrupting device shut off the power in the line. The power came back on a minute later, interrupted again, and remained off.

10. After the tailpiece contacted and pulled down the wire, Lancaster and Harold informed the Dispatcher and the Main Line Foreman of the incident and left their shift for the day with their section foreman Walter McIntire.

11. After Lancaster and Harold left the mine, members of the Union Safety Committee were contacted. Three members, Pete Polverini, Floyd Lucido, and Gary Anderson, arrived at the mine early in the evening and thereupon examined the tailpiece and the location of the incident.

12. Members of the Union Safety Committee contacted the MSHA Subdistrict Office later that evening and informed it about the incident. Three days later, on Monday, March 2, 1981, Federal Coal Mine Inspectors Franklin Homko and William Allen McGilton were instructed by their Supervisor Louis P. Jones to conduct an inspection of the area where the incident had occurred.

13. After examining the tailpiece and the location of the incident, the inspectors tentatively decided to issue eight orders to Quarto alleging violations of eight paragraphs of 30 C.F.R. § 75.1003-2. The inspectors then held a meeting with Quarto and union officials after their inspection.

14. At this meeting Hugh Lucas, General Mine Superintendent for the No. 4 Mine, stated that Quarto's position was that a belt tailpiece was not off-track mining equipment. For this reason, Quarto believed that the requirements set forth in Section 75.1003-2, which apply only to off-track mining equipment, did not apply to the transport of a tailpiece.

15. The two inspectors took Quarto's view under advisement and contacted by telephone their subdistrict manager in St. Clairsville, Ohio, Mr. George Svilar, to reaffirm their belief that a belt tailpiece was classified as off-track mining equipment. Based on their investigation, interviews, the call to Mr. Svilar, and interpretation of the applicable regulations, the inspectors issued eight § 104(d)(2) orders of withdrawal.

16. Inspector McGilton issued four orders for violations of the following:

Order No.	Paragraph of 30 C.F.R. § 75.1003-2 Allegedly Violated
1124038	75.1003-2(a)(1)
1124039	75.1003-2(b)
1124040	75.1003-2(c)
1124041	75.1003-2(d)

17. Inspector Homko issued four orders for violations of the following:

Order No.	Paragraph of 30 C.F.R. § 75.1003-2 Allegedly Violated
1121181	30 CFR 75.1003-2(f)(1)(ii)
1121182	30 CFR 75.1003-2(f)(2)
1121183	30 CFR 75.1003-2(f)(3)(i)
1121185	30 CFR 75.1003-2(f)(5)

18. The parties to this litigation also stipulate to Facts Not In Dispute listed at pages 2-3 of Quarto's Response to Pretrial Order filed on September 1, 1981.

19. The parties also stipulate that the transcript of MSHA's Deposition of Mr. Hugh Lucas be introduced as evidence. A copy of that transcript is filed with these Joint Stipulations.

In addition, at the hearing the parties stipulated that 24 men were inby the tailpiece when it was being moved (Tr. 6).

The parties also stipulated at the hearing that the underlying 104(d)(1) citation and order had been validly issued for the purpose of setting off the chain in which subject orders were issued (Tr. 97).

I accepted all the stipulations.

Discussion and Analysis

Existence of a Violation

The existence of a violation depends upon whether the tailpiece was off-track equipment. In accordance with the factual stipulations, the parties agree that if the tailpiece is off-track equipment, the conduct of the operator violated the Act (Tr. 6).

"Off-track" is not defined in the Act or regulations. Neither is "on-track." However, on-track has a well accepted meaning. On-track is equipment which moves on rails or tracks either under its own power like a locomotive or as in the case of a mine car under the power of another vehicle to which it is attached (Tr. 150).

I believe the determination of what is off-track must be reached by placing that term in juxtaposition to on-track. The key to both terms is mobility, how something moves. On-track refers to a certain type of movement by machines, i.e., on rails (Tr. 150). Off-track refers to another kind of movement by machinery, i.e., not on rails, as for instance on wheels like a shuttle car. As operator's safety director recognized at the hearing, off-track equipment,

like on-track, is not limited to self-propelled machines but includes equipment which is pulled or moved along by another vehicle which has power (Tr. 150-151). The operator's safety director offered a fan on skids which can be pulled about by a self-propelled machine as an example of off-track equipment without its own power of mobility (Tr. 182).

The tailpiece in question was mounted on skids (Tr. 186). It could be moved about and indeed was intended to be moved about the section without damage to the mine floor by being attached to a shuttle car which had power (Tr. 187, 189). It is therefore mobile like the fan which the operator's safety director admitted is off-track. The operator's safety director admitted that the mobility of the fan and the tailpiece were the same (Tr. 188-190). In light of the foregoing, I conclude the tailpiece is off-track equipment within the meaning of the mandatory standard.

Both parties purport to rely upon the decision in Southern Ohio Coal Company v. Secretary of Labor, 3 FMSHRC 1449 (1981, which holds that this mandatory standard only applies to "complete or reasonably complete pieces of off-track mining equipment" and does not apply to "component parts of off-track mining equipment." However, neither party seems certain what that decision means. So many things can be characterized as components of a larger entity and no one offered a basis for me to distinguish between a component and something that is reasonably complete. Therefore, I cannot apply that decision here.

Insofar as the mandatory standard covers a "unit" of off-track equipment, I conclude this tailpiece is included. It is a single or distinct part used for a specific purpose. Webster's New World Dictionary (2nd College Edition 1972).

The argument that the term off-track is too vague also must be rejected. As set forth above, the terms off-track and on-track relate to specific aspects of mine machinery and are susceptible of precise delineation. To be sure, it would have been better had the Secretary taken appropriate action to define the parameters of these terms. However, his failure to do so does not mean they are too vague to be properly defined and enforced in this proceeding. The situation here is far different from one where a wholly subjective description such as "excessive" is employed as the sole standard. Secretary of Labor v. Quarto Mining Company, 2 FMSHRC 2669 (1980), appeal dismissed, 3 FMSHRC 2051 (1981).

Accordingly, I conclude this tailpiece was off-track equipment within the purview of the mandatory standard and that therefore, the operator violated the Act.

Unwarrantable Failure

The governing definition of unwarrantable failure is still to be found in Zeigler Coal Company, 7 IBMA 280 (1977) decided under the 1969 Act which held in pertinent part as follows at 295-296:

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

Zeigler was specifically approved during consideration of the 1977 Act. S.Rep. 95-181, 95th Cong., 1st Sess., at 31-32 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2nd Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 619-620 (1978).

In this case it is clear that the operator knew of the conditions or practices which comprised its failure to comply with the mandatory standard. The evidence makes clear that the operator's recovery foreman was in charge of moving the tailpiece and either knew or should have known of all the circumstances surrounding the move.

This is not however, the end of the matter. Under the circumstances presented here further inquiry must be made with respect to whether the operator knew or should have known that the conditions or practices constituted a violation. I recognize that after pointing out that the legislative history of the 1969 Act was not clear on the point, Zeigler concluded that unwarrantability did not depend upon knowledgeability of the operator with regard to a matter of law, i.e., whether it had committed a violation. But Zeigler was an accumulations case under 30 CFR 75.400. It did not

involve a situation like this one and I do not believe it should be dispositive here. The evidence in this case shows that tailpieces had been routinely moved from section to section in this mine without complying with 75.1003-2. Never had tailpieces been recorded in the book kept by the operator for the purpose of recording moves of off-track equipment and never had the operator been cited for failure to apply 30 CFR 75.1003-2 to tailpieces (Tr. 125-126). The MSHA inspector thought the operator's belief that the tailpiece was not off-track was reasonable, although erroneous (Tr. 135-138).

Finding unwarrantable failure and therefore imposing upon the operator the harsh sanctions flowing from mine closure and high penalty assessment is offensive to fundamental fairness where, as here, the Secretary for years has done nothing to interpret the regulatory language or to advise the operator what is expected of it. As previously stated, the Secretary's failure to act does not prevent interpretation and application of the mandatory standard in this case. However, it is quite another matter to hold the operator guilty of unwarrantable failure and subject it to attendant severe punishments in such a situation. This the Act should not be interpreted to require. I conclude therefore, the operator is not guilty of unwarrantable failure in this case.

Modification of Orders to Citations

In light of the foregoing, the subject 104(d)(2) withdrawal orders cannot stand as withdrawal orders under that section because there was no unwarrantable failure. Pursuant to section 105(d) of the Act, I hereby modify these orders to 104(a) citations. Under section 105(d) the Commission and its Judges have authority after a hearing to affirm, modify or vacate an order. I recognize that Board decisions under the 1969 Act denied administrative law judges the power to modify. See e.g., Freeman Coal Mining Corp., 2 IBMA 197, 209-210 (1973), aff'd sub nom. on other grounds, Freeman Coal Mining Co. v. IBMA, 504 F.2d 741 (7th Cir. 1974). However, another approach seems to be emerging under the 1977 Act. See the Commission's decision in Old Ben Coal Company, 2 FMSHRC 1187 (1980). Administrative law judges have modified orders under the 1977 Act. Consolidation Coal Company, 3 FMSHRC 2207 (1981); Youngstown Mines Corporation, 3 FMSHRC 1793 (1981). In this case neither party would be prejudiced by modification of the orders to citations. Both parties have had full notice and opportunity to argue every conceivable issue and they have done so.

Other considerations also dictate that these unwarrantable orders be modified to citations. The instant consolidated proceedings involve penalty assessments as well as notices of contest. The Commission has held that the allegation of a violation survives the vacation of an imminent danger or unwarrantable failure withdrawal order. According to the Commission the allegation of a violation and the assessment of a civil penalty remain in citations issued by the Secretary after the withdrawal orders are vacated. Island Creek Coal Company, 2 FMSHRC 279 (1980); Van Mulvehill Coal Company, Inc., 2 FMSHRC 283 (1980). Allowing modification of the instant orders to citations at the administrative law judge level would be the most expeditious way of handling the matter. It would avoid wasting time and money by requiring the Secretary to engage in the pro forma tasks of issuing new citations and filing new petitions for assessment of civil penalties.

In light of the foregoing, the subject withdrawal orders are modified to 104(a) citations.

Issuance of Multiple Orders

Section 110(a) of the Act provides "Each occurrence of a violation of a mandatory health or safety standard may constitute a separate offense." The operator argues that there was only one occurrence--moving the tailpiece, and that therefore only one order should have been issued. The operator also relies upon an MSHA policy memorandum dated October 3, 1979, which provides that:

> [W]here there are multiple violations of the same standard which are observed in the course of an inspection and which are all related to the same piece of equipment or to the same area of the mine, such multiple violations should be treated as one violation and one citation should be issued.

I cannot accept the operator's position. In allowing separate citations, section 110(a) refers to the occurrence of a "violation" not the occurrence of an event which may be composed of multiple incidents or happenings, each with its own identity and each of which may independently violate the Act for a different reason. In this case moving the tailpiece involved several incidents such as miners inby the equipment, failure to examine the equipment, lack of supervision by a certified person, absence of fire resistant

material, etc., each of which violated a different part of the mandatory standard. Section 110(a) allows each of these to be cited as a separate violation. The MSHA memorandum does not support the operator's position. The examples given in the memorandum, e.g., loose ground in four places on a haulageway, make clear that the memorandum is directed at the same thing happening more than once in the same area or with respect to the same piece of equipment. Here different things happened and each of them violated a different sub-section of the mandatory standard for a different reason.

Accordingly, multiple violations properly were found and separate orders, now modified to citations, were properly issued for each of them. As set forth infra, the fact that the violations arose out of the same event may be taken into account in determining the appropriate amount of civil penalties to be assessed.

The Amount of Civil Penalties

Section 110(i) of the Act sets forth the factors which must be considered in assessing civil penalties.

In accordance with the stipulations, I find the operator is large in size, imposition of penalties will not affect its ability to continue in business, and its history of prior violations is rather significant. As agreed at the hearing, I further find abatement was within a reasonable time and in good faith (Tr. 29-30).

As shown by the testimony, the violations posed hazards such as smoke inhalation. I conclude they were moderately serious.

As set forth above, I do not believe the operator was guilty of unwarrantable failure. However, since the recovery foreman was on the scene and in charge of the move, the operator must be held to have been negligent. In addition, I believe the fact that all violations were committed in moving the tailpiece should be borne in mind in assessing the degree of negligence and gravity. This situation is somewhat different than where the operator commits several wholly unrelated serious violations and is negligent in situations which have nothing to do with each other.

In light of the foregoing, a penalty of $100 is assessed for each of the violations cited in the six orders now modified to citations.

Order

It is ORDERED that the Solicitor's motions to vacate Orders 1121181 and 1121182 be GRANTED and that LAKE 81-118-R and LAKE 81-119-R be DISMISSED.

It is ORDERED that 104(d)(2) Orders 1121183, 1121185, 1124038, 1124039, 1124040 and 1124041 be Modified to 104(a) citations.

It is ORDERED that within 30 days of the date of this decision the operator pay penalties of $600.

Paul Merlin
Chief Administrative Law Judge

Distribution: Certified mail.

John T. Scott, III, Esq., Crowell & Moring, 1100 Connecticut Avenue, N.W., Washington, DC 20036

Patrick M. Zohn, Esq., Office of the Solicitor, U.S. Department of Labor, 881 Federal Building, 1240 East Ninth Street, Cleveland, OH 44199

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

MAY 26 1982

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding
	:	Docket No. WEVA 81-11
	:	A.C. No. 46-05653-03004
v.	:	
	:	Gail Mine
CLAY KITTANNING COAL CO., INC., Respondent	:	

DECISION

Appearances: David E. Street, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Petitioner;
William Ray, Summersville, West Virginia, for Respondent.

Before: Judge Melick

This case is before me upon a petition for assessment of civil penalty under section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act," in which the Secretary has proposed penalties of $2,000 against the Clay Kittanning Coal Co., Inc., (Clay Kittanning) for four violations of mandatory standards. Clay Kittanning does not deny the violations, but maintains that an independent contractor was solely responsible for those violations and that therefore it is not liable for any civil penalties under the Act. Accordingly, the general issue in this case is whether Clay Kittanning is responsible in any way for the admitted violations set forth in the petition for assessment of civil penalty and, if so, what are the appropriate civil penalties to be assessed for those violations. Evidentiary hearings were held in this case in Charleston, West Virginia.

Liability of Mine Owner

Clay Kittanning is admittedly the owner of the Gail Mine at which the orders and citation at bar were issued. William Ray, President and spokesman for Clay Kittanning insists, however, that the company was not at all responsible for the cited violations because, at the time of the inspection, the Gail Mine was being operated by an independent contractor, William White, who was doing business as the Palma Coal Company.

Even assuming, arguendo, that Mr. Ray's allegations were correct, it is now the clearly established law that mine owners may be held responsible without fault for independent contractor violations under the Act. Section 3(d) of the Act; Cyprus Industrial Minerals Company v. FMSHRC, 664 F.2d 1116 (9th Cir. 1981; Republic Steel v. Interior Board of Mine Operations, 581 F.2d 868 (D.C. Cir. 1978); Bituminous Coal Operator's Association v. Secretary of Interior, 547 F.2d 240 (4th Cir. 1977). The Secretary's decision to proceed against an owner for such violations is, however, subject to review for impermissible motives. Secretary v. Phillips Uranium Corporation, 4 FMSHRC _____ (April 27, 1982). Administrative efficiency or convenience is apparently an impermissible motive regardless of the results achieved by the Secretary's action. Phillips Uranium, supra. Since the Phillips decision was rendered subsequent to the hearings in this case specific inquiry was not made at those hearings into the Secretary's initial motivation for proceeding solely against the mine owner herein. Evidence exists, however, from which the Secretary's motives may be inferred.

At the time of the inspection here at issue, February 7, 1980, the Secretary was following an interim policy of proceeding only against owner-operators for violations of the Act. Phillips Uranium, supra. Subsequently, on July 1, 1980, the Secretary published his final rules establishing guidelines for holding independent contractors as well as owners responsible for the safety and health requirements of the law. 45 Fed. Reg. 44494. Even assuming, arguendo, that the Secretary's motives were impermissible when the citation and orders at bar were issued under his interim policy, it is apparent in this case that the Secretary later sought to correct any such deficiencies by attempting to apply his new guidelines.

In an obvious good faith effort to apply those guidelines to the case at bar the Secretary sought through formal discovery procedures under Commission Rules 55 and 57, 29 C.F.R. §§ 2700.55 and 2700.57 to ascertain the proper entity or entities against whom enforcement action should be pursued. Accordingly, on March 27, 1981, the Secretary served upon Clay Kittanning a request for production of "any or all contracts between the owner/Respondent, Clay Kittanning Coal Co., Inc., and William White concerning the functions, duties and responsibilities of William White at the Gail Mine prior to February 27, 1980," and served written interrogatories relating to the responsibilities for operation of the Gail Mine. Clay Kittanning did not respond to either discovery request and the Secretary thereafter on June 17, 1981, filed a motion for sanctions against Clay Kittanning for this failure to reply.

In response to that motion, the undersigned issued an order to Clay Kittanning to show cause providing in part as follows:

> * * * Respondent, Clay Kittanning Coal Company, Inc., is ordered to answer the said interrogatories and to produce the documents requested by Petitioner within 15 days or show good reason for not doing so. Otherwise, the undersigned will take appropriate sanctions. Such sanctions may include issuing an

order refusing to allow Respondent to support defenses relating to the requested information, prohibiting the introduction of related evidence at any hearing in this case, and placing Respondent in default and ordering immediate and full payment of MSHA's proposed penalty. Rule 37, Federal Rules of Civil Procedure.

Respondent failed to reply to the show cause order and on August 6, 1981, the undersigned issued pursuant to Federal Rule 37(b)(2)(A), an Order That Facts Be Taken As Established. That Order provided that the following facts be taken as established: (1) that Respondent is the operator of the Gail Mine, within the meaning of section 3(d) of the Federal Mine Safety and Health Act of 1977, and (2) that Respondent is the party solely responsible for the conditions and equipment cited for violations of the Act or regulations in the above captioned proceeding." 1/

Under the circumstances it is clear that the Secretary had acted reasonably and prudently in his efforts to ascertain the responsible party or parties but was thwarted in these efforts by the failure of the mine owner to comply with lawful discovery requests and orders of the Administrative Law Judge. 2/ Clearly there was no abuse of the Secretary's discretion here. This case is accordingly distinguishable from Phillips Uranium. Since Clay Kittanning does not deny the existence of any of the violations the sole issue remaining for determination is the amount of civil penalty for which Clay Kittanning is responsible.

1/ Inasmuch as Mr. Ray contended at subsequent hearings that the Secretary already knew the answers to the questions asked in the interrogatories, and that it was therefore unfair to bar him from presenting evidence at hearing on the question of the proper entity or entities to be held responsible for the violations I allowed evidence at hearing concerning that issue. The evidence did not demonstrate, however, that the Secretary had sufficient information before initiating discovery from which he could have determined these issues with any degree of certainty. Accordingly, the "Order That Facts Be Taken As Established" issued August 6, 1981, is dispositive of the issue of liability for the violations. It is also noted that although given ample opportunity to do so, Mr. Ray never did provide complete information concerning the relationship between employees, officials and shareholders of Clay Kittanning and the employees and owners of Palma Coal Company, the purported independent contractor. It was disclosed at hearing, however, that the mine superintendent and certified electrician for the independent contractor was also an official of the corporate mine owner.

2/ It was also disclosed at hearing that the owner's relationship with the independent contractor herein was terminated shortly after the citation and orders at bar were issued and that Mr. Ray did not then know where the contractor could be located.

The Amount of Penalty

Citation No. 650520 alleges a violation of the standard at 30 C.F.R. § 75.703 and reads as follows:

> No frame ground was provided for the roof bolting machine in that the frame ground conductor was doubled back and taped to the cable and was not connected to the return conductor at the 250 volt direct current feeder line. This condition was listed in the book for examination of the electric face equipment on 1/30/80 and was dated and initialed by Ed McClure, superintendent and certified electrician at this mine. This machine was parked in No. 3 entry and the mine floor contained water from 0 to 4 inches deep.

As previously noted, the existence of the cited conditions is not disputed. Moreover, the uncontradicted testimony of MSHA inspector Willis is that if one of the power conductors had been damaged and the damaged portion of the cable had touched a metal part of the machine, the machine frame would become energized thereby subjecting the machine operator to electrical shock. The hazard was amplified by the existence of water and wet conditions on the mine floor. Under the circumstances, I find that a serious hazard from electrical shock in fact existed as cited and was "significant and substantial." See Secretary v. Cement Division, National Gypsum Company, 3 FMSHRC 822 (1981).

I further find that Clay Kittanning was grossly negligent in permitting the condition to exist. The fact that the frame ground had been doubled back and taped to the cable, requiring some affirmative act, is clear evidence of an intentional violation. Moreover, it is uncontradicted that an entry in the inspection book for the cited machine, on January 30, 1980, some 8 days prior to the discovery of the condition by Inspector Willis, showed that even as of that date, it had not been frame grounded. The violation herein was abated timely.

Order No. 650421 also alleges a violation of the standard at 30 C.F.R. § 75.703 and reads as follows:

> The cutting machine was not provided with a frame ground in that the frame ground was doubled back and taped to the cable and was not connected to the return feeder line of the 250 volt direct current power system. This condition was listed in the book for the examination of electric face equipment at this mine and was dated and initialed by Ed McClure, superintendent and certified electrician at this mine. The cutting machine was located in No. 3 entry. The mine floor in this entry was wet and water was 0 to 4 inches deep.

The existence of the cited condition is not disputed nor is the testimony of Inspector Willis that the negligence and the extent of the hazard was the

same as in the citation previously discussed. Accordingly, I find the same degree of negligence and hazard existing here. The condition was apparently properly abated on the following day. The violation was also "significant and substantial" under the National Gypsum test.

Order No. 650426 alleges a violation of the standard at 30 C.F.R. § 75.601 and reads as follows:

> A suitable circuit breaker or other device approved by the Secretary was not provided for the trailing cables applying power 250 volts direct current to the roof bolting and cutting machines at this mine. The cables were connected directly to the 500 MCM DC feeder lines.

According to the undisputed testimony of Inspector Willis, the trailing cable was not protected its entire length. Willis found that insulation had been removed from the trailing cable and the cable was clamped directly to the 500 MCM feeder line without intervening fuses or a circuit breaker. He pointed out that in the absence of short circuit protection for the trailing cable, there was indeed a hazard of fire or, if the insulation melted to expose the cable, of shock or electrocution. Willis observed that the operator did not have on the premises sufficient equipment to correct the cited conditions. Superintendent McClure, who was also the only certified electrician at the mine, acknowledged the deficiencies and admitted that he did not have a fuse, circuit breaker, or other overload device available at the mine to correct the deficiencies.

Under the circumstances, I find that the cited condition was a serious hazard to the miners and, because it required an affirmative act to create, was the result of gross negligence. The violation was accordingly "significant and substantial." One of the cited conditions was corrected by the following day when a 125 amp dual element fuse was furnished for the cutting machine. A 90 amp duel element fuse was not provided for the roof bolting machine until later and the violation relating thereto was not abated until February 14, 1980.

Order No. 650428 alleges a violation of the standard at 30 C.F.R. § 77.701 and reads as follows:

> The metal frame of the battery charger located near No. 1 entry on the surface was not frame grounded in that the grounding conductor was connected to the grounding medium.

The order was subsequently modified to read as follows: "Order of Withdrawal No. 6540428 is modified to state that the grounding conductor was not connected to the grounding medium for the 240 volt system." The uncontradicted testimony of Inspector Willis is that such a condition would present a shock hazard if the battery charger were to develop a short circuit and energize the frame of the battery charger. The cables leading into the charger were located only a foot off the ground in an area commonly used by

miners. I find that the condition accordingly presented a risk of serious injury from electrical shock. The violation was accordingly "significant and substantial." Inasmuch as the condition required an affirmative act to create, I find that it was the result of gross negligence.

In determining the appropriate penalties for the admitted violations, I have considered the relationship of the mine superintendent for the independent contractor with the mine owner. Both before and after the violations here cited that same individual, Ed McClure, had also acted as mine superintendent for the mine owner and at relevant times was also an official of the corporate mine owner. Since that same person was also the only certified electrician at the Gail Mine and since each of the violation's in this case was clearly caused by affirmative action to electrical equipment or electrical cables it is apparent that the negligence for the violations may be directly attributed to the corporate mine owner, i.e., Clay Kittanning. Secretary v. Ace Drilling Coal Company, Inc., 2 FMSHRC 790 (April 1980). In determining the amount of penalty I have also considered that the mine owner was small in size and had no history of violations. Under the circumstances I find that the following penalties are appropriate: Citation No. 650520-$600; Order No. 650421-$600; Order No. 650426-$600 Order No. 650428-$600.

ORDER

Clay Kittanning Coal Company, Incorporated is ordered to pay penalties of $2,400 within 30 days of the date of this decision.

Gary Melick
Assistant Chief Administrative Law Judge

Distribution:

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

Mr. William Ray, President, Clay Kittanning Coal Company, Inc., P.O. Box 296, Summersville, WV 26651 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

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

MAY 27 1982

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner,	CIVIL PENALTY PROCEEDING
v.	DOCKET NO. LAKE 81-116-M
UNITED STATES STEEL CORPORATION, Respondent.	A/C No. 21-00282-05021 V
	MINE: Minntac

UNITED STATES STEEL CORPORATION, Contestant,	CONTEST OF CITATION PROCEEDING
v.	DOCKET NO. LAKE 81-77-R
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent.	Citation No. 293731 Issued December 29, 1980
	MINE: Minntac

DECISION

APPEARANCES:

Peter D. Broitman, Esq., and Janet M. Graney, Esq.
Office of the Solicitor
United States Department of Labor
230 S. Dearborn Street, Eighth Floor
Chicago, Illinois 60604
For the Petitioner

Louise Q. Symons, Esq.
United States Steel Corporation
600 Grant Street
Pittsburgh, Pennsylvania 15230
For the Respondent

Before: Judge Virgil E. Vail

STATEMENT OF THE CASE

The above two cases, which were consolidated for hearing, involve an alleged violation of section 110(a) of the Federal Mine Safety and Health

Act of 1977 (hereinafter the "Act"), 30 U.S.C. 820(a) (Supp. 111, 1979).1/

Docket No. Lake 81-116-M involves a petition by the Secretary of Labor, (Secretary), for assessment of a civil penalty against respondent for an alleged violation of 30 C.F.R. § 55.12-14. 2/

Docket No. Lake 81-77-R involves a Notice of Contest filed by the respondent of Citation No. 293731 which alleged a violation of section 104(d)(1) of the Act. The Secretary filed a motion to amend its petition changing a violation of 104(d)(1) to a violation of section 104(a) of the Act, and a reduction of the proposed assessment of a penalty of $750 to $345. This motion was granted.

A hearing was held in Duluth, Minnesota, where the parties were represented by counsel. Post-hearing briefs were filed.

STIPULATION

The parties stipulated to the following:

1. The Administrative Law Judge has jurisdiction in this matter.

2. The inspector who issued Citation No. 293731 is and was a duly authorized representative of the Secretary.

3. U.S. Steel is a large operator within the meaning of 39 C.F.R. § 100.3(b)(2)(ii).

4. Minntac, is a large mine within the meaning of 30 C.F.R. § 100.3(b)(1)(ii).

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

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

2/ 30 C.F.R. 55.12-14 states in pertinent parts as follows:

... When such energized cables are moved manually, insulated hooks, tongs, ropes, or slings shall be used unless suitable protection for personnel is provided by other means ... .

5. Joint Exhibit A (computer printout) represents a true and correct record of all violations for Minntac Mine for the period beginning January 1, 1977 and ending January 1, 1981.

6. If a violation is found, the assessment of the proposed penalty would not impair U.S. Steel's ability to remain in business.

7. Exhibit B is a true and correct copy of a safety memorandum prepared by U.S. Steel for dissemination to its employees on or about December 18, 1980.

8. The following employees manually moved the cable identified in Citation No. 293731 on December 29, 1980 without the use of protective hooks, tongs, ropes, slings, or other personal protective equipment: Eugene Varani, Mary Ellen Jaskela, Michele Heinzer, Richard Paine, Terrance Stachovich.

ISSUES

Whether respondent violated 30 C.F.R. § 55.12-14, and, if so, the appropriate amount of the civil penalty which should be assessed for such violation pursuant to section 110(a) of the Act?

FINDINGS OF FACT

1. Minntac is a large taconite mine utilizing approximately fourteen drills and twenty-eight shovels in its operation. Each piece of equipment is electrically powered through a trailing cable which varies in length but averages from four to five thousand feet and sometimes reaches nine thousand feet.

2. The type of trailing cable primarily used at Minntac is U.S. Steel Tiger brand rated at 8kV (8000 volts) with a weight of approximately three pounds per foot. It is a shielded type cable incorporating three copper phase conductors each wrapped with an insulating material and encased in a braided wire mesh which in turn is in physical contact with two ground wires. There is also a separate insulated ground wire in the system that can be used as a continuous ground monitor. Minntac does not have a continuous ground monitor system in use. 3/

3. The trailing cables attached to the various pieces of equipment run to either a substation or a meter house. The substation is a building on a platform containing a transformer and various electrical switching and metering devices capable of serving four pieces of equipment used in the mining process. In those situations where the substation does not contain OCB's (oil circuit breakers) a meter house is used to feed the electrical current to the equipment.

3/ Joint Exhibit C.

4. After the trailing cable is attached from its power source to the piece of equipment it is to serve and energized, the system is so designed that should a disruption or break (fault) in the electrical system occur, the current goes to the ground wire in the cable and is carried back to the meter house or substation where it trips a circuit breaker. A phase-to-ground fault will trip the circuit breaker in the meter house in one-one hundreds (.01) of a second. A second back up ground-fault tripping device located usually in the substation is set to trip in three seconds. The ground-fault system is designed to trip the circuit breakers whenever there is a leakage of 5 amps or more of current.

5. Respondent utilizes four procedures for testing trailing cables, particularly when reconnecting a trailing cable to the piece of equipment it is intended to power. After one end of the trailing cable is attached to the piece of equipment it is to power and the other end to the meter house or self-contained substation, the electrician, using a special testing transformer, will perform a high voltage test by placing more than twice the voltage on the three copper phase wires than is used in normal operations. A high current test will show if there is a fault in the cable as it will likely burn at that location. A third test, termed a continuity test, is to determine if the ground wire from the piece of equipment to the meter house is intact. The fourth test is a ground tripping test to determine that the ground-fault tripping system is working properly. 4/

6. Respondent's employees at Minntac are assigned the task of moving trailing cables manually and in the past have done so without using protective gloves.

7. There are no recorded instances of anyone receiving an electrically caused injury from handling trailing cables at respondent's Minntac Mine since the mine started in 1967.

8. On December 18, 1980, a general safety contact was issued by respondent to its employees which stated as follows:

General Safety Contact (I.C. #18)MSHA Regulation 55.12-14

> A recent interpretation of this regulation requires that insulated hooks, tongs, ropes, slings, or proper gloves be used to handle live 4160 volts or 440 volt trailing cables (shovels, drills, pumps, etc.). As rapidly as possible, we are providing this equipment for use in handling such cables.

4/ Exhibit R-4.

Although this is not a company safety rule, and we feel that there is not a safety hazard with our present method of handling this type of cable, the MSHA regulation must be complied with. M. Van Deline, Superintendent - Taconite Mining. (Emphasis is that of U.S. Steel). 5/

9. On December 29, 1980, a cable crew consisting of five of respondent's employees manually moved a trailing cable energized to a potential of 4160 volts without using hooks, tongs, ropes, slings, or the electricians gloves that had been supplied them by their employer.

10. The respondent's ground-fault system is set to trip out or disconnect at a level of five amps or more. Exposure of miners to current with amps in excess of five milliamps has a potential for injury. Miners exposure to amps between 5 milliamps and the 5 amps required to trip the ground-fault system has the potential of causing serious injury or death.

DISCUSSION

Minntac Mine is a large taconite mine utilizing approximately fourteen drills and twenty-eight shovels in its mining process. These machines are powered electrically through power cables which are also referred to as trailing cables. As a result of an inspection of Minntac Mine on December 29, 1980, Citation No. 293731 was issued charging a violation of mandatory safety standard 30 C.F.R. § 55.12-14 which provides as follows:

> Power cables energized to potentials in excess of 150 volts, phase-to-ground, shall not be moved with equipment unless sleds or slings, insulated from such equipment, are used. When such energized cables are moved manually, insulated hooks, tongs, ropes, or slings shall be used unless suitable protection for persons is provided by other means. This does not prohibit pulling or dragging of cable by the equipment it powers when the cable is physically attached to the equipment by suitable mechanical devices, and the cable is insulated from the equipment in conformance with other standards in this part.

At the commencement of the hearing in this case, the parties stipulated that five of respondent's employees manually moved a trailing cable which was energized to a potential in excess of 150 volts, phase-to-ground, without using insulated hooks, tongs, ropes, slings, or other personal equipment such as protective gloves which had been furnished employees for such use (Tr. Vol. 1, p. 13).

5/ Joint Exhibit B.

Historically, respondent's employees have been manually moving trailing cables without using protective gloves for several years prior to December 1980. Respondent has in the past relied upon a belief that the ground-fault system in the shielded power cable and four testing procedures used whenever cable is reconnected to equipment affords suitable protection by other means within the requirement of the standard for miners manually moving energized cable (Tr. Vol. 13). However, several events occurred in 1980 which prompted respondent to issue a general safety contact on December 18, 1980 providing for the use of proper gloves, in addition to other devices required by § 55.12-14, whenever energized cable is moved or handled manually (Finding No. 8, supra).

The first event involved a Commission decision in the Matter of Pickards Mather and Company v. MSHA, (Case Nos. 79-MS12 and 79-MS19; September 18, 1980) which involved petitions by Hibbing Taconite and Erie Mining Company for a modification of the application of § 55.12-14 wherein they argued that their ground-fault system constituted suitable protection for employees by other means. These two companies are involved in taconite mining similar to the respondent's mining operation, but did not utilize identical ground-fault system and testing procedures as that used by this respondent. The petitions for modification were denied. Based upon testimony he heard at the hearing and the decision in the Pickards Mather Case, MSHA inspector James Begley contacted respondent's management in September 1980 advising them that he intended to start issuing citations if he saw miners moving cable without wearing proper gloves (Tr. Vol. , p. 26). As indicated in the respondent's safety contact, gloves were to be provided for the employees, but as stated in the last paragraph, respondent did not feel there was a safety hazard with the present method of handling cable (Exhibit B, supra).

The issue in this case is not whether electricians gloves constitute other proper suitable protection as provided in § 55.12-14 for the gloves furnished by respondent were not being used by the miners when the citation was issued. The sole issue here is whether respondent's ground-fault system and the testing procedures constitutes other means of suitable protection for persons handling energized cable within the meaning of § 55.12-14. 6/

Respondent contends that the trailing cable used at its Minntac Mine provides a ground-fault system that provides suitable protection for persons as required in § 55.12-14. They point out that the cable is rated at 8000 volts whereas the cable usually only carries 4160 volt and that each of the three copper phase wires enclosed in the cable is surrounded by insulating material with a dialectric strength of 8000 volts surrounded by a braided wire mesh in physical contact with two ground wires. Respondent argues that if a fault occurs in this cable, or the equipment served by the

---

6/ Respondent's Brief, page 5.

cable, the current would leak to the ground wires, which conduct the current back to the meter house where it would trip the circuit breaker shutting off the current allegedly preventing an electrical shock. Respondent also contends that its four field tests performed on the trailing cable whenever it is reconnected to the equipment would reveal any fault in the cable and reveal to the electrician testing same, whether the cable is intact or damaged and whether the ground fault tripping system is working. Respondent further contends that its experience and that of other mining operators with similar ground fault systems is such that there have been no proven electrically caused injury from manually moving these trailing cables while they are energized.

A careful review of the record in this case shows that, in spite of a remarkable history of no proven electrical injuries from handling trailing cables, a potential for serious injury or death from such activities is present at all times. Phillip Medure, who is an electrician for the respondent, testified that the trailing cables at Minntac can be in service for periods of time up to nine years and are exposed to varied weather and operating conditions including extreme hot and cold temperatures, rain and snow, and various types of physical abuse including dragging the cable over rocks, snow, lying in snow and water and being run over by equipment which is a frequent occurrence. Medure stated that when the cable becomes damaged, it is usually spliced in the field with either a pipe splice or what is termed a 3M splice (Tr. Vol. 1, pages 57 to 64). The evidence is clear that the trailing cables can be damaged accidentally including cuts, slices and nicks in the rubber type material that encases the copper phase wires and ground wires.

Respondent contends that should the trailing cable be damaged severely enough to cause a leak of current, the ground-fault system will provide for the circuit breaker to trip cutting off the current. However, respondent's argument is based on the fact that the ground wire is intact and that the amount of amps to the circuit breaker is at least 5 amps for the circuit breaker is set to trip at that level or above.

I find that the most credible evidence shows that personnel exposure to ampres above five milliamps or five one thousands of an ampre can result in injury or death (Vol. I, page 119). William Helfrich, an electrical engineer experienced in electrical systems in mining testified that the ground-fault system incorporated in respondent's trailing cables is designed to protect the equipment rather than persons handling the cables. I find this evidence along with statements of other witnesses, most convincing on this point. James McNamara, respondent's field electrical foreman at Minntac testified that it was possible for damage to occur to the trailing cables due to the adverse conditions to which they are exposed and that a person coming in contact with this type of damage could be injured (Vol. 2, pages 27 and 28). Frank Erjavec, respondent's General Foreman for pit electrical operations, testified that if the system were intact, a person touching the shield in the cable would not feel anything

on an energized cable. However, he agreed that if the system is not intact, you could get a leakage of current through the body (Vol. 2, page 54). Witness Helfrich testified that the shield in the trailing cable is a fine wire netting and can become easily broken making it potentially dangerous to persons coming in contact with it (Tr. . Vol. I, pages 122 and 123).

Respondent's employee Medura testified that he has experienced situations where splices in the cable have pulled apart and the machine continues to run and the circuit breaker failed to trip out. Also, once during the testing procedure while reconnecting a cable, he found the ground wire was not properly connected and the meter showed continuity in the wire (Vol. I, pages 62 through 68). Mary Jaskela, a drill laborer for respondent, testified that her duties included moving trailing cable for drills. On one occasion, after a cable had been reconnected and tested by the electrician, she was told that it was all right to move the cable and while she was standing near the cable, felt a hot flash on her leg which was caused by a small hole in the cable (Tr. Vol. I, pages 100 to 102). These experiences by miners in handling and working around trailing cables contradicts the respondent's argument that the ground-fault shielded cable and testing system is adequate personnel procedure. Although the history for electrical injury in handling trailing cables is remarkable, I find that the most credible evidence supports petitioner's contention that the potential for serious injury or death always exists unless some further precautions are taken. The same conclusion was reached in a recent case Secretary of Labor, MSHA v. United States Steel Corporation, Docket No. WEST 80-58-M (April 1982) wherein the Judge affirmed a similar violation of § 55.12-14 stating in part as follows:

> ... that when the energized power cables are moved manually the ground fault system is not suitable protection from the electrical hazards provided by means other than insulated hooks, tongs, ropes, or slings as called for in the cited regulation.

In view of the foregoing, and after careful consideration of all of the facts, I find that there is substantial evidence to support a finding that the respondent violated 30 C.F.R. § 55.12-14.

ORDER

Citation No. 293731 is affirmed. The Notice of Contest in Docket No. LAKE 81-77-R is dismissed. Respondent is ordered to pay a civil penalty in the sum of $345.00 within 30 days of the date of this decision.

Virgil E. Vail
Administrative Law Judge

Distribution:

Peter D. Broitman, Esq.
Janet M. Graney, Esq.
Office of the Solicitor
United States Department of Labor
230 S. Dearborn Street, Eighth Floor
Chicago, Illinois 60604

Louise Q. Symons, Esq.
United States Steel Corporation
600 Grant Street
Pittsburgh, Pennsylvania 15230

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

MAY 28 1982

ROGER D. ANDERSON,	:	Complaint of Discrimination
Complainant	:	
v.	:	Docket No. WEVA 80-73-D
	:	
ITMANN COAL COMPANY,	:	Itmann No. 3A Mine
Respondent	:	

DECISION

Appearances: F. Alfred Sines, Jr., Esq., for Complainant;
Jerry F. Palmer, Esq., for Respondent.

Before: Judge William Fauver

This proceeding was brought by Roger D. Anderson under section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 891 et seq., for an alleged discriminatory discharge. The case was heard in Charleston, West Virginia. Both parties were represented by counsel, who have submitted their proposed findings, conclusions, and briefs.

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

FINDINGS OF FACT

1. At all pertinent times, Respondent, Itmann Coal Company, operated a coal mine known as the Itmann No. 3A Mine in Itmann, West Virginia, which produced coal for sales in or substantially affecting interstate commerce. The Complainant, Roger D. Anderson, was employed by Respondent as a section foreman on the evening shift at the Itmann No. 3A Mine.

2. Complainant began his employment with the Consolidation Coal Company on February 24, 1970, as a coal sampler at the Rowland Coal Preparation Plant. On November 18, 1972, he was promoted to environmental technician and on August 1, 1973, to safety coordinator. On January 1, 1974, he was promoted to safety inspector and on December 1, 1974, to section foreman. On March 1, 1975, he received another promotion to safety inspector and a transfer to the Itmann Operations. On February 1, 1977, he became an assistant accident investigator. On July 1, 1978, he was promoted to section foreman at Itmann No. 3A mine, which position he held at the time of his discharge on July 30, 1979.

3. The 3A mine is a large coal mine involving approximately 250 miles of entryways and airways, 30 beltheads, 8 active sections, and extensive amount of gob area.

4. At all pertinent times, Dave Bailey was the mine superintendent at the Itmann 3A mine. The Itmann 3A mine ran three shifts: the hootowl (12-8), the dayshift (8-4), and the evening shift (4-12). The mine superintendent was in overall charge of all three shifts, and had six assistants. These were categorized as lead foreman (shift foremen) and assistant foremen. Each shift would have one of each and the dayshift lead foreman and his assistant were also known as the mine foreman and assistant mine foreman.

5. On the evening shift on July 29, 1979, Roger Lamastus was the lead foreman, Larry Kiser was assistant lead foreman, Mickey Sizemore was the belt foreman, and Complainant was a section foreman.

6. As section foreman, for about 15 months, Complainant reported to his immediate supervisor, Roger Lamastus, lead foreman on the evening shift.

7. Complainant attended various training classes and courses held by the Itmann Coal Company and scored 88 percent or better on various tests and exams given by Respondent. Complainant attended a managerial grid school in 1975 in Dallas, Texas. This school was sponsored by Respondent and all expenses were paid for Complainant for one week. Complainant attended a job safety analysis school in Pittsburgh, Pennsylvania, sponsored by the Respondent in which all of his expenses were paid. Complainant also attended the Dale Carnagie course sponsored by the Consolidation Coal Company. All courses, seminars, and schools attended by Complainant were completed without missing any classes or failing any exams.

8. As section foreman, Complainant regularly worked 5 weekdays; every other weekend he also worked either on Saturday or Sunday.

9. Weekend duties normally involved preparing the mine to produce coal on the next coal producing shift. Usually on Thursday, the lead foreman would assign men to report for duty the upcoming weekend. Roger Lamastus and his assistant, Larry Kiser, were in charge of assigning weekend duties and seeing that they were carried out. Roger Lamastus and his assistant alternated as lead foreman on weekends.

10. On Thursday, July 26, 1979, Roger Lamastus, evening shift mine foreman (4:00 p.m. to 12:00 midnight shift), instructed Mickey Sizemore and Complainant to report for weekend duty on the Sunday shift, July 29 (4:00 p.m. to 12:00 midnight). Roger Lamastus had scheduled several UMW employees to report for the Saturday shift (4:00 p.m. to 12:00 midnight) to make an equipment move.

11. On Sunday, Mickey Sizemore and Complainant reported to the mine office about 3:10 p.m. About 3:30, Complainant picked up the mine fireboss book and

opened to the last entry in the book, read and countersigned that entry. This was the entry for the 12:01 a.m. to 8:00 a.m. shift on Sunday, July 29. Roger Lamastus picked up the mine fireboss book and looked at the last entry, but did not sign it.

12. Minutes later, Lamastus summoned Mickey Sizemore, Complainant and the UMW employees around the company's supply truck. Lamastus explained the equipment move he and his crew had started on the Saturday evening shift. Lamastus drew a diagram in the dust on the truck hood to explain his instructions to Complainant to complete the equipment move. He said it had to be finished so that the Sunday, midnight shift could run coal.

Lamastus then led Complainant to the foremen's room, where he showed him on the mine map what had to be done, and to the superintendent's office, where he drew on a legal pad to illustrate the configuration of the equipment move. He stressed the importance of doing it correctly so coal could be produced on the upcoming midnight shift.

Shortly after 4:00 p.m., while Complainant was sitting in his buggy, Roger Lamastus stepped from the mine office door opening, looked at his watch, looked at Complainant, and shouted a curt order to Complainant to get underground. Complainant went underground as directed.

13. About 7:30 that evening, Foreman Sizemore was notified by the dispatcher that James Bowman, MSHA inspector, wanted Sizemore and Complainant to come outside the mine.

Sizemore and Complainant Anderson reached the outside about 7:45 p.m. James Bowman, who was waiting for them, directed questions to Complainant, because he knew Complainant and did not know Sizemore. He asked Complainant how many men were underground. When Complainant replied, "seven or eight," Bowman asked whether he was aware that there had not been a preshift examination of the mine in the hours from 8:00 to 4:00. Complainant said he knew that, but company policy, and federal regulations to his knowledge, required preshift examinations only once every 24 hours on weekends. Inspector Bowman then said, "Your mine is now under a 104(d)(2) order, which is under the Act an unwarrantable failure closure order."

At the hearing, Inspector Bowman explained that he questioned the foremen as to their knowledge of the lack of a preshift examination in order to determine what kind of order should be issued. Complainant's admission was an important factor in Bowman's decision to issue an unwarrantable failure order.

14. Complainant called Bobby McBride, dispatcher, and instructed him to call the men underground out of the mine. Mickey Sizemore called Roger Lamastus to inform him that James Bowman had issued a 104(d)(2) closure order.

While Mickey Sizemore was talking to Roger Lamastus on the phone, James Bowman and Complainant discussed their opposing interpretations of Part 75.303 of the regulations requiring preshift examinations.

At about 9:30 p.m., David Bailey, superintendent, arrived at the mine and talked to Mickey Sizemore concerning the fireboss book.

The following day, Monday, July 30, 1979, David Bailey called Complainant to his office and gave Complainant a choice of resigning or being discharged. Complainant asked, "Why?", and David Bailey pointed to the closure order. Complainant said it was not his nature to quit. Complainant was discharged on that date.

DISCUSSION WITH FURTHER FINDINGS

The MSHA inspector issued the order of withdrawal on Sunday, July 29, 1979, after examining the preshift books and discovering the mine had been last preshifted more than 8 hours before the evening shift, in violation of 30 C.F.R. § 75.303. 1/ The Complainant and another foreman working that shift had been called to the surface to speak with the inspector before the order was issued. The inspector asked the Complainant if he knew the mine had not been preshifted within 8 hours. The Complainant stated that he knew that, but that company policy, and federal regulations, to his knowledge, required preshift examinations only once every 24 hours during weekends. Thereupon, the inspector showed Complainant the text of the regulation and issued an order. That order, not the subject of this proceeding, reads in part:

> A preshift examination was not made within 8 hours immediately preceding the entrance of miners scheduled to work in active workings. The section foremen in charge of the mine stated that they knew the mine had not been preshift examined on the preceding shift. Four other men worked over-time from the preceding shift making a total of 11 miners underground on the 4:00 p.m. shift, and a preshift was not made.

Mine management subsequently discharged the Complainant for knowingly violating a federal mine safety law, whereupon Complainant filed this action.

1/ Section 75.303 provides, in part:

"(a) Within 3 hours immediately preceding the beginning of any shift, and before any miner in such shift enters the active workings of a coal mine, certified persons designated by the operator of the mine shall examine such workings andany other underground area of the mine designated by the Secretary or his authorized representative * * *. Each such mine examiner shall also record the results of his examination with ink or indelible pencil in a book approved by the Secretary * * *.

The facts show that the Complainant, the belt foreman, and the supervisory shift foreman all believed that company policy required preshift examinations of the mine only once every 24 hours on weekends. The evidence clearly shows that on Sunday, July 29, they acted according to this belief.

Complainant's supervisor held the same mistaken beliefs concerning the regulations requirements and he knew Complainant was unaware that the 8-hour inspection rule applied during weekends. These facts were apparently ignored by, or not communicated to, the company vice presidents who decided to fire Complainant for "knowingly" violating a federal mine safety law.

The result was that management discharged Complainant for conduct which in fact was a good faith belief by Complainant and was simply his compliance with orders from his immediate supervisor, who received no discipline. If the company management discharged Complainant knowing this situation, their action was arbitrary and discriminatory. If they discharged him without knowing this situation, they were arbitary, discriminatory, and grossly negligent in failing to interview Lamastus and check with other personnel, and examine the preshift books, to investigate Complainant's side of the story, which would have been borne out by any reasonable investigation into the facts.

Management's arbitrary treatment of Complainant establishes, by a preponderance of the evidence, that the effective motivation for his discharge was Complainant's admission to the inspector in which he stated that he knew the mine had not been preshifted within 8 hours. It was this admission that contributed to the federal inspector's issuance of a closure order.

Section 105(c)(1) of the Act 2/ protects miners against discrimination for filing or making a safety complaint under the Act, for instituting a proceeding under or related to the Act, and for other protected activities. The drafters of section 105(c)(1) stated that "(t)he listing of protected rights contained in section (105)(c)(1) is intended to be illustrative and not exclusive (and should) be construed expansively to assure that miners will not be inhibited in any way in exercising any rights afforded by the legislation." S. Rpt. No. 95-181, 95th Cong., 1st Sess. 36 (1977), reprinted in Legislative History of the Federal Mine Safety and Health Act of 1977 at 624 (1978). I find that Complainant's statements to the inspector were protected activities under the Act. Complainant made his statements in response to a question posed by a federal inspector. He responded truthfully and to the best of his knowledge. As such, he was participating in an investigation of mine safety with a federal inspector, actions which fall under the protection of the Act. Cf. Pace v. Consolidation Coal Company, 3 FMSHRC 176 (January 13, 1981). I therefore find that the Complainant was engaged in activities protected by section 105(c).

2/ Quoted on p. 7

To find otherwise would frustrate the purposes of the Act. Miners in positions similar to Complainant's would be encouraged not to cooperate with safety inspectors, thereby creating danger for themselves and other miners, if they knew they could be discharged for their statements. The government's investigative functions would be severely impaired and the policy of the Act would be thwarted.

Complainant engaged in protected activities and those activities were an effective or substantial motive for his discharge. His discharge was therefore discriminatory, in violation of section 105(c) of the Act.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the parties and subject of this proceeding.

2. Respondent violated section 105(c)(1) of the Act by a discriminatory discharge of Complainant, as found above.

3. Complainant is entitled to reinstatement, back pay with 12 percent interest, attorney's fee, and other reasonable costs of prosecuting his complaint herein, and other relief to be specified in a final order.

PENDING A FINAL ORDER

Pending a final order, counsel for the parties are directed to confer in an effort to stipulate the amount of back pay, interest, attorney's fee, and costs due Complainant under this decision, and to stipulate the other terms of a proposed final order.

If counsel are unable to stipulate as to any particular point, counsel for Complainant should file a proposed final order and Respondent shall be granted leave to reply to it and, if necessary and appropriate, a further evidentiary hearing will be held on issues of material fact bearing on the relief to be accorded to the Complainant.

Accordingly, counsel for Complainant should file herein, not later than 30 days from receipt of this decision, either (1) a joint proposed final order or (2) his own proposed final order with an explanation of issues existing between the parties as to such order.

William Fauver

WILLIAM FAUVER, JUDGE

Distribution Certified Mail:

F. Alfred Sines, Jr., Esq., Anderson & Sines, Drawer 1459, Beckley, WV 25801

Jerry F. Palmer, Esq., Itmann Coal Company, 1800 Washington Road, Pittsburgh, PA 15241

2/ Section 105(c(1) of the Act provides:

> (c) (1) No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this Act because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine, or because such miner, representative of miners or applicant for employment is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101 or because such miner, representative of miners or applicant for employment has instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding, or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this Act.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

MAY 28 1982

SECRETARY OF LABOR,	:	Complaint of Discharge
MINE SAFETY AND HEALTH	:	Discrimination or Interference
ADMINISTRATION (MSHA),	:	
on behalf of JOSEPH PASTINE	:	Docket No: WEVA 81-393-D
Applicant	:	MORG CD 81-16
	:	
v.	:	Susan No. 1 Mine
	:	
FAIRFAX TRUCKING COMPANY,	:	
Respondent	:	

ORDER GRANTING MOTION TO WITHDRAW

MSHA, with the consent of Mr. Pastine, has moved to withdraw its complaint of discrimination that it filed on Mr. Pastine's behalf. Its reason for filing the motion is that subsequent investigation has indicated that there was no violation.

MSHA has stated that its position is that Mr. Pastine should be able to file his own complaint under Section 105(c)(3) of the Act within 30 days after the case is dismissed if he chooses to do so. The Act, however, does not address the situation where the government files an action on a miner's behalf and later changes its mind and obtains a dismissal of the case. The government's proposition is equitable, however, and if Mr. Pastine should choose to file an action on his own behalf he would certainly have an argueable position. But I do not see that any ruling that I might make in the instant case could have any effect on a case he might file in the future.

The Motion to withdraw is granted and the case is dismissed.

Charles C. Moore, Jr.

Charles C. Moore, Jr.,
Administrative Law Judge

Distribution: By Certified Mail

Covette Rooney, Esq., Office of the Solicitor, U.S. Department of Labor, 14480 Gateway Building, 3535 Market Street, Philadelphia, PA 19104

Harry A. Smith, III, Esq., Counsel for Fairfax Trucking Company, P.O.B. 1905, Elkins, WV 25241

James G. Polino, President, Fairfax Trucking Co., P.O.B. 230, Elkins, WV 26241

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

MAY 28 1982

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. PENN 82-29 A.C. No. 36-00970-03111
v.	:	
U.S. STEEL MINING COMPANY, INC., Respondent	:	Maple Creek No. 1 Mine

DECISION AND ORDER OF DISMISSAL

Appearances: David Bush, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Petitioner; Louise Q. Symons, Esq., Pittsburgh, Pennsylvania, for Respondent.

Before: Judge Melick

This case is before me upon a petition for assessment of civil penalty under section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act", in which the Secretary has proposed a penalty for an alleged violation on September 17, 1981, of a mandatory safety standard. The Secretary's petition was filed on January 6, 1982, and was answered by the U.S. Steel Mining Company, Inc., (U.S.Steel) on January 18, 1982. Notice was issued on February 24, 1982, scheduling hearings to commence on May 3, 1982. An amended notice was issued on April 6, 1982, rescheduling the hearings for May 4, 1982.

The Secretary's case-in-chief was purportedly to be presented at hearing through the testimony of an MSHA inspector. The inspector proceeded to testify, however, about a citation unrelated to the case at bar (Citation No. 1145239 issued March 31, 1982). After discovering his error, the inspector conceded that he was unable to recall the facts relating to the citation at issue in this case. Counsel for the Secretary explained that the two citations charged violations of the same standard and the factual allegations in each were similar. He further proferred that, inexplicably, the citations became mixed up during prehearing preparations.

Under the circumstances, I granted a recess to permit the inspector to contact his office to locate his notes for the purpose of refreshing his recollection about the citation at issue. Although it was made clear that at least an

hour's recess would be granted for this purpose, it appears that no effort was made to search for the notes and no explanation given except that "it would be impossible [to locate the notes] unless [the inspector himself] was present." Counsel for the Secretary thereupon conceded that he was unable to present any evidence to support his case and requested a further continuance for an unspecified time.

In deciding that no further continuance was warranted, I considered: (1) that more than 60 days notice of hearing was provided the Secretary, giving him ample opportunity to prepare his case, (2) that the Secretary was particularly negligent in the preparation of this case, since the citation about which the inspector was prepared to testify had not even been issued at the time the hearing was scheduled and had been issued only shortly before the actual hearing, (3) that once his error was known, the Secretary showed a lack of good faith in failing to conduct a search for the inspector's notes (to refresh the inspector's recollection of the citation at issue) during a continuance granted specifically for that purpose, (4) that significant expenditures in time and money had been incurred as a result of the scheduled hearing and that additional such expenditures would be incurred by any further continuance of the proceedings, (5) that there were no assurances that even after a further continuance, the Secretary would be any better prepared to present his case, and (6) that the operator was prepared for hearing with two staff attorneys and six witnesses present.

The bench decision denying the Secretary's request for an additional continuance and dismissing the case for lack of evidence is affirmed at this time. Accordingly, Citation No. 1050294 is VACATED and this case is DISMISSED.

Gary Melick
Assistant Chief Administrative Law Judge

Distribution: By certified mail.

Louise Q. Symons, Esq., United States Steel Corporation, 600 Grant Street, Pittsburgh, PA 15230

David Bush, Esq., Office of the Solicitor, U.S. Department of Labor, Room 14480 Gateway Building, 3535 Market Street, Philadelphia, PA 19104

*U.S. GOVERNMENT PRINTING OFFICE: 1982-0-361-638/4371