

MAY 1984

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MAY

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

Pontiki Coal Corporation v. Secretary of Labor, Docket Nos. KENT 83-181-R, etc.. (Judge Kennedy, March 30, 1984)

Secretary of Labor, MSHA v. Mineral Coal Sales, Inc., Docket Nos. VA 83-26, etc.. (Judge Koutras, April 4, 1984)

Secretary of Labor, MSHA v. Belcher Mines, Inc., Docket No. SE 84-4-M. (Judge Kennedy, April 26, 1984)

Badger Coal Company v. Secretary of Labor, MSHA, Docket Nos. WEVA 81-36-R, etc.. (Judge Steffey, April 11, 1984)

Secretary of Labor on behalf of James Clarke v. T P Mining, Inc., Docket No. LAKE 83-97-D. (Judge Kennedy, May 10, 1984)

Review was Denied in the following cases during the month of May:

Monterey Coal Company v. Secretary of Labor, MSHA, Docket Nos. LAKE 84-19-R, etc.. (Judge Broderick, April 13, 1984)

Secretary of Labor, MSHA v. Todilto Exploration & Development Corporation, Docket Nos. CENT 79-91-RM, etc.. (Judge Vail, April 17, 1984)

COMMISSION DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

May 11, 1984

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

v.

CARBON COUNTY COAL COMPANY

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Docket No. WEST 82-106

ORDER

This civil penalty proceeding under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.* (1982), is before us on interlocutory review. Carbon County Coal Company seeks review of an order of a Commission administrative law judge denying Carbon County's motion for summary decision. For the reasons that follow, we vacate the judge's order and remand to the judge for reconsideration of Carbon County's motion.

This case arose out of a citation and withdrawal order issued by the Department of Labor's Mine Safety and Health Administration ("MSHA") on August 24 and September 3, 1981, respectively, alleging that Carbon County was operating a mine without an approved ventilation system and methane and dust control plan in violation of 30 C.F.R. § 75.316. Section 75.316, which mirrors the statutory standard contained in section 303(o) of the Mine Act, 30 U.S.C. § 863(o), provides:

A ventilation system and methane and dust control plan and revisions thereof suitable to the conditions and the mining system of the coal mine and approved by the Secretary shall be adopted by the operator and set out in printed form....
... Such plan shall be reviewed by the operator and the Secretary at least every 6 months.

Carbon County operates the Carbon No. 1 Mine, an underground coal mine located in Hanna, Wyoming. MSHA had approved and Carbon County had adopted a ventilation system and methane and dust control plan dated August 25, 1980, for the Carbon No. 1 Mine. In March 1981, Carbon County submitted a new ventilation plan to MSHA for the 6-month review required by section 75.316. In this new plan, Carbon County proposed changes in several of the provisions contained in the previously approved August 25, 1980 plan. Negotiations ensued over the proposed changes.

Although Carbon County and MSHA reached agreement with respect to most of the proposed changes, they could not agree upon the requirement dealing with the amount of air to be made available to auxiliary fans used to ventilate some sections of the mine. In its submission, Carbon County proposed that the volume of air made available to the auxiliary fans be greater than "the maximum rated face ventilation." In correspondence with MSHA Carbon County stated that the latter phrase referred to the "installed capacity" of the auxiliary fans. MSHA would not approve an "installed capacity" requirement and insisted that the auxiliary fans be provided with a volume of air greater than their "free discharge capacity." The previously approved ventilation plan dated August 25, 1980, required that the volume of air made available to the auxiliary fans exceed their "maximum rated capacity." There are indications in the record that MSHA officials may have believed that this term was equivalent to "free discharge capacity," while Carbon County, in its motion for summary decision, asserts that the term referred to "installed capacity." 1/

The Carbon No. 1 Mine is located in MSHA Coal Mine Safety and Health District 9, headquartered in Denver, Colorado. District 9 had published "guidelines" regarding the contents of ventilation system and methane and dust control plans. The District 9 guideline regarding the amount of air to be made available to auxiliary exhaust fans stated: "[T]he volume of intake air delivered to the fan prior to the fan being started shall be greater than the free discharge capacity of the fan." The District 9 guideline essentially restated MSHA's national guideline regarding the amount of air to be made available to exhaust fans. The national guideline stated in part: "[T]he volume of positive intake air current available ... shall be greater than the free discharge capacity of the fan." The legal effect of the District 9 guideline, and of MSHA's possible reliance upon it during the plan review process, are at issue in this case.

By August 1981, negotiations over the free discharge capacity requirement reached an impasse, and the parties were unable to agree on a plan requirement governing the amount of air to be made available to the auxiliary fans. In a letter dated August 21, 1981, MSHA revoked its approval of Carbon County's plan dated August 25, 1980, and stated that it would not approve Carbon County's plan unless the plan contained the free discharge capacity provision. After MSHA's revocation of approval of Carbon County's plan, Carbon County failed to submit a plan containing the provision sought by MSHA and continued to operate the mine. As a result, MSHA issued a citation and withdrawal order to Carbon County, under sections 104(a) and (b) of the Mine Act, respectively, for

1/ In essence, "installed capacity" refers to the ventilation capacity of an auxiliary fan when the fan is operated with tubing attached to it. "Free discharge capacity," on the other hand, refers to the ventilation capacity of an auxiliary fan when the fan is operated without tubing attached. The tubing extends from the fan to the face area. The fan pulls the air at the face area through the tubing and exhausts the face air into the return air. In this way dust generated by the mining process and gases liberated in the face area are removed from the mining section.

operating without an approved ventilation plan. The violation was abated when MSHA approved, and Carbon County adopted, a plan which contained the free discharge capacity requirement. MSHA then sought a civil penalty for the alleged violation.

Following MSHA's institution of the civil penalty proceeding, Carbon County initiated pretrial discovery. At the close of discovery, Carbon County advised the judge that it intended to move for summary decision under Commission Procedural Rule 64. 2/ In its motion and supporting brief Carbon County argued that MSHA had improperly required it to adopt the disputed provision in violation of the legal principles controlling the ventilation plan adoption and approval process enunciated in Zeigler Coal Company v. Kleppe, 536 F.2d 398 (D.C. Cir. 1976).

In Zeigler, which arose under the 1969 Coal Act, 30 U.S.C. § 801 et seq. (1976)(amended 1977), the court construed section 303(o) of that Act. This provision was retained without change as section 303(o) of the 1977 Mine Act. The court held that provisions of a ventilation system and methane and dust control plan, approved by the Department of Interior's Mine Enforcement and Safety Administration ("MESA"), MSHA's administrative predecessor, and adopted by the operator were enforceable under the 1969 Coal Act as though they were mandatory standards. 536 F.2d at 402-09. As Carbon County noted, however, in discussing the ventilation plan approval process the court drew a distinction between a negotiated plan requirement "suitable to the conditions and the mining system of the coal mine" and a provision of a general nature, not based on the particular conditions at the mine, which the government sought to impose in the plan but which "should more properly have been formulated as a mandatory standard" in conformity with the rule making requirements of section 101 of the 1969 Coal Act. 536 F.2d at 407.

Carbon County contended that MSHA had insisted on inclusion of the general free discharge capacity guideline in its ventilation plan, mechanically, without regard to the particular conditions at the Carbon No. 1 Mine. Carbon County maintained that MSHA's free discharge capacity guideline was a general provision applicable to all mines, and that before MSHA could lawfully impose that requirement on an operator in the plan approval process the provision should first have been promulgated as a standard pursuant to the rule making requirements of section 101 of the Mine Act. Carbon County also argued that, regardless of the applicability

2/ 29 C.F.R. § 2700.64 states in part:

(a) Filing of motion for summary decision. At any time after commencement of a proceeding and before the scheduling of a hearing on the merits, a party to the proceeding may move the Judge to render summary decision disposing of all or part of the proceeding.

(b) Grounds. A motion for summary decision shall be granted only if the entire record, including the pleadings, depositions, answers to interrogatories, admissions, and affidavits shows:

- (1) That there is no genuine issue as to any material fact; and
- (2) that the moving party is entitled to summary decision as a matter of law.

of the principles enunciated in Zeigler, MSHA acted in violation of the Mine Act and the Administrative Procedure Act, 5 U.S.C. § 551 et seq. (1982) (the "APA"). Carbon County asserted that the free discharge capacity requirement was a general legislative rule and that both the Mine Act and the APA required that such a legislative rule be promulgated as a regulation before it could be imposed. Therefore, according to Carbon County, MSHA invalidly insisted upon inclusion of the free discharge capacity requirement in Carbon County's ventilation plan.

In an unpublished order dated February 4, 1983, the Commission's administrative law judge denied Carbon County's motion for summary decision. The judge issued the order without providing the Secretary of Labor adequate opportunity to respond to Carbon County's motion. 3/ The judge did not address the issues raised by Carbon County. Rather, he viewed the question before him as simply requiring a decision as to which proposal for providing air to the auxiliary fans was safer. The judge stated:

I have no doubt that MSHA can properly approve a ventilation plan and then at a later date, and for good reason withdraw that approval. The procedures for withdrawing that approval and the amount of time allowed in this case seem reasonable so the question is: was there a good reason for MSHA to insist that the ventilation plan include a [free discharge capacity] provision.

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I am not concerned with the guidelines or who drafted them. I am concerned with what would happen if a break in the tubing occurred at various places where the available intake air does not exceed the ... free discharge capacity of the auxiliary fan. Until the parties provide me with that information, I will not be able to decide whether MSHA's demands would create a safer mine.

Ruling on Motion at 1-2.

We conclude that the judge's ruling was erroneous. Entry of summary decision is warranted when "the entire record ... shows: (1) that there is no issue as to any material fact; and (2) that the moving party is entitled to summary decision as a matter of law." 29 C.F.R. § 2700.64(b). Carbon County presented to the judge those facts,

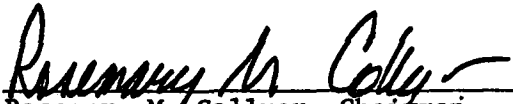
3/ The judge ruled before the 15 days permitted under our procedural rules for response to a motion served by mail had elapsed, and despite the fact that the Secretary had requested, and the company not objected to, additional time within which to respond. See 29 C.F.R. §§ 2700.8(b), .9, & .10(b).

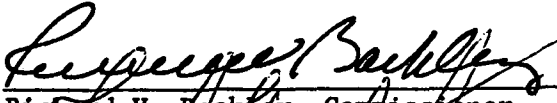
obtained through the discovery process, which it believed to be undisputed and material. Carbon County also presented legal theories as to why, given those facts, it was entitled to a decision as a matter of law. The judge did not rule on Carbon County's legal challenges to the plan approval procedure nor did he determine whether, in light of these arguments, there were undisputed material facts in the record which entitled Carbon County to a decision in its favor. The judge's bare statement that, "I am not concerned with the guidelines or who drafted them," is, to say the least, ambiguous. Because the judge provided no explanation of this statement, we cannot regard it as a persuasive indication that he did consider, or rule on, the operator's legal challenges.

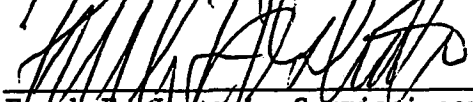
The court's exposition in Zeigler of the general legal principles controlling the ventilation plan approval and adoption process was premised on the same statutory standard presently applicable under the Mine Act. 30 U.S.C. § 863(o). We find the court's discussion persuasive and compelling, and hold that the general principles enunciated in Zeigler apply to the ventilation plan approval and adoption process under the Mine Act. See Zeigler, 536 F.2d at 407. Therefore, if MSHA's insistence in this case upon inclusion of the free discharge capacity provision in Carbon County's plan contravened the principles of Zeigler, the citation and withdrawal order issued to Carbon County cannot stand. As noted above, however, the judge did not rule on this question. We conclude that, in the interests of proper judicial administration, it is incumbent on the judge, as the trier of fact, to first consider and rule on Carbon County's arguments in its summary decision motion concerning the application of Zeigler to the facts at hand. Furthermore, before making his ruling, the judge shall afford the Secretary of Labor the opportunity to respond fully to Carbon County's motion. 4/

4/ We note that counsel for the Secretary of Labor has argued on interlocutory review that the free discharge capacity provision is merely an MSHA "policy statement" or "interpretation" of the mandatory standard prohibiting recirculation of air, 30 C.F.R. § 75.302-4(a), and that as such it does not run afoul of Zeigler, the Mine Act, or the APA. Counsel for the Secretary also has argued that the ventilation system proposed by Carbon County was rejected not because of MSHA's inflexible insistence upon the guideline but because MSHA's District Manager did not believe Carbon County's proposal was safe.

Accordingly, we vacate the judge's denial of Carbon County's motion for summary decision and remand the matter for further proceedings consistent with this decision.


Rosemary M. Collyer, Chairman


Richard V. Backley, Commissioner


Frank R. Jastrab, Commissioner


L. Clair Nelson, Commissioner

Commissioner Lawson concurring in part:

The majority has correctly concluded that the judge erred by failing to address the legal argument presented by Carbon County's motion for summary judgment and in ruling without permitting response by the Secretary. Accordingly, I concur in remanding this case to the judge for reconsideration of the summary judgment motion or the taking of additional evidence as may be appropriate.

The legal issue presented by Carbon County is one of first impression before the Commission. It is improper at this stage of the proceedings for this Commission to determine in the abstract, without the benefit of a complete record, whether the general principles discussed in Zeigler, supra, unnecessary to that holding and therefore dicta, should be adopted by this Commission. Furthermore, I note that this case appears to raise issues that the Zeigler court specifically declined to discuss, 536 F.2d at 410 n. 57, as well as factual and legal matters which distinguish it from the general principles there discussed. 1/ Under these circumstances, the majority's holding in this Order may be dicta as well.

Accordingly, I concur in the remand but intimate no view at this time as to whether Zeigler is "persuasive and compelling" (slip op. at 5) or even apposite to this case.


A. E. Lawson, Commissioner

1/ The Secretary has maintained on interlocutory review that the guideline is no more than a general statement of MSHA policy on approval of ventilation plans, and is to be distinguished from a legislative rule. In his view, the ventilation system proposed by Carbon County was rejected not because of any guideline, but because the Secretary did not believe it provided a safe ventilation system at the particular mine in question. The Secretary further asserts, with reference to specific deposition testimony, that the guideline does not bind the district manager, who is responsible for the approval or rejection of plans, and that the district manager's insistence upon "free discharge capacity" ventilation was required by conditions at this particular mine: the size and length of the tubing, the capacities of the main and auxiliary fans at the mine, previous history of air recirculation problems at this mine, and/or the previous history of violations resulting from a failure to maintain the ventilation system. In short, the Secretary is of the view that MSHA did not approve Carbon County's revised plan because MSHA's district manager had reasonable grounds to believe that Carbon County's proposed plan language would not meet the requirements of section 303(o) of the Act and the validly promulgated mandatory standards contained in Subpart D of 30 C.F.R. Part 75, and that an evidentiary hearing is required to resolve this disagreement. See §§ 303(a) & (c)(1) of the Act, 30 U.S.C. §§ 863(a) & (c)(1); 30 C.F.R. §§ 75.300, 75.302(a), 75.302-4(a), 75.302-4(g).

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR

WASHINGTON, D.C. 20006

May 23, 1984

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

v.

PONTIKI COAL CORPORATION

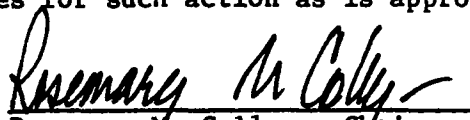
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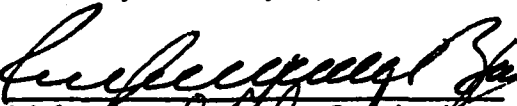
ORDER

The administrative law judge's motion for leave to intervene and his motion for a remand are denied as unauthorized. Canterbury Coal Co., 1 FMSHRC 335 (1979); Cf. Peabody Coal Co., 2 FMSHRC 1035 (1980); Penn Allegh Coal Co., Docket No. PITT 79-97-P (Order, January 3, 1979). Accordingly, the following documents are struck from the record in this proceeding: (1) the judge's motion to intervene and the accompanying opposition to the Secretary's petition for discretionary review; (2) the Secretary's opposition to motion for leave to intervene; (3) the judge's response to the Secretary's opposition; (4) the judge's motion to remand; (5) the Secretary's opposition to motion to remand; and (6) the judge's response to the Secretary's opposition.


Also, the affidavit and memorandum attached to the Secretary's petition for discretionary review are struck as not being part of the record before the judge. 30 U.S.C. § 823(d)(2)(C).

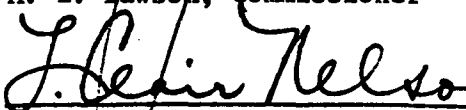
In view of the serious allegations contained in the judge's submissions, the Commission has, by letter dated May 18, 1984, brought the information contained in the documents struck from this record to the attention of the Attorney General of the United States for such action as is appropriate.


Rosemary M. Collyer, Chairman


Richard V. Backley, Commissioner


Frank E. Jastrab, Commissioner


A. E. Lawson, Commissioner


L. Clair Nelson, Commissioner

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

May 30, 1984

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

v.

MID-CONTINENT RESOURCES, INC.

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Docket No. WEST 82-174

DECISION

The issue presented in this civil penalty case is whether substantial evidence supports the conclusion of the Commission's administrative law judge that Mid-Continent Resources, Inc., violated 30 C.F.R. § 75.511, a mandatory safety standard requiring that certain electrical work be performed by qualified persons. For the reasons that follow, we conclude that substantial evidence supports the judge's decision and we affirm.

The case arose following a methane and coal dust explosion at the Dutch Creek No. 1 Mine on April 15, 1981. The mine is owned and operated by Mid-Continent and is located in Pitkin County, Colorado. Fifteen miners were killed in the accident and three received non-fatal injuries.

The Department of Labor's Mine Safety and Health Administration ("MSHA") investigated the explosion. In its accident investigation report (Pet. Exh. 1), MSHA concluded that the methane was ignited by an electric arc originating inside an electrical switch box on a continuous mining machine. The machine was fitted with two lighting systems: one provided by the manufacturer and an additional system installed by the company, known as "add-on lights." When the mining machine was examined after the accident, it was discovered that the switch box for the add-on lights had an opening between the box and the box cover (the switch box "cover plate") which exceeded permissible limits. (The opening was in excess of .015 inch. The maximum clearance permitted under the applicable mandatory standard is .004 inch.) The oversized opening was the result of an insulated wire having been wedged in the flange joint between the switch box and the cover plate.

MSHA concluded that prior to the explosion there had been a sudden release of methane. MSHA determined that following this release, mining was discontinued on the section and the section crew began making ventilation changes in the face area to dilute and carry away the methane. When the concentration of methane in the atmosphere around the continuous miner reached 2.0 volume per centum, power to the miner was automatically

shut off, except to the add-on lights. 1/ As a result, these lights may have "blinded" miners working in the face area so that someone then turned the add-on light switch on the top of the cover plate to the "off" position. (The light switch was found in the off position following the explosion.) MSHA concluded that this caused the switch mechanism inside the box to arc and that the arc ignited methane which had entered into the box. MSHA concluded that the flame then "escaped" the box through the non-permissible opening and touched off the explosion.

Because MSHA believed that the non-permissible opening between the switch box and the cover plate was part of the causative chain leading to the explosion, MSHA attempted to determine who had installed the cover plate. MSHA concluded that the cover plate was installed on April 6, 1981, nine days before the explosion and that this work was not performed by a qualified person or performed under the direction of such a person as required by 30 C.F.R. § 75.511. MSHA therefore issued a citation to Mid-Continent which alleged a violation of section 75.511. The pertinent provision of this standard states:

No electrical work shall be performed on low-, medium-, or high-voltage distribution circuits or equipment, except by a qualified person or by a person trained to perform electrical work and to maintain electrical equipment under the direct supervision of a qualified person.

A civil penalty proceeding ensued. Following an evidentiary hearing, the judge entered a decision in which he affirmed the violation and assessed a penalty of \$10,000. 5 FMSHRC 261, 273-78 (February 1983)(ALJ). 2/

The judge found that the cover plate was installed by Marge Theil, a miner who was not a qualified person within the meaning of section 75.511. At the hearing, the Secretary of Labor introduced evidence showing that

1/ The continuous miner was equipped with a methane monitor. 30 C.F.R. § 75.313, a mandatory safety standard requires that the methane monitor be set to deenergize the machine automatically when there is more than 2.0 volume per centum of methane in the mine atmosphere. However, in this instance, the methane monitor was not wired into the primary circuit of the continuous miner's lighting transformer. As a result, when the sensor of the methane monitor detected concentrations of methane exceeding 2.0 volume per centum it deenergized the continuous miner, but not the add-on lights which remained lit. MSHA therefore cited Mid-Continent for a violation of section 75.313, and the judge concluded the company violated the section by failing to properly wire the methane monitor. 5 FMSHRC at 269-71. Mid-Continent did not seek review of this portion of the decision.

2/ In addition to asserting that the cover plate was not installed by a qualified person, the citation also alleged that the light switch was not wired by a qualified person. Because MSHA offered no evidence to prove that alleged violation, the judge vacated that portion of the citation. 5 FMSHRC at 277-78. Neither party challenges the judge's action in this regard.

the plate was installed on April 6, 1981, during the maintenance shift (the "C", or third shift). 5 FMSHRC at 273. Cecil Lester, an MSHA inspector, testified that John Cerise, who was the foreman of the maintenance shift both prior to and after the explosion, told him that the cover plate "was probably installed by Marge Theil who was not a qualified person." 3/ The judge found this evidence to be uncontroverted. 5 FMSHRC at 277. The judge also noted that another MSHA inspector, Clarence Daniels, stated that Cerise had told him he did not know who had done the work but he thought it was Marge Theil. 4/

3/ Cecil Lester is a coal mine inspector stationed at MSHA headquarters in Arlington, Virginia. His specialty is the investigation of mine fires and mine explosions which are suspected of having an electrical cause. The following exchange at the hearing took place between Lester and the Secretary's counsel:

Q. Mr. Lester, did you participate in determining whether a qualified person had installed the light switch cover on the auxiliary light control?

A. Yes.

Q. And what did you learn as a result of that investigation?

A. Of course, no one was there that we knew of when the light switch cover was installed, therefore, we had to rely upon statements made by company officials. We questioned each foreman, trying to find out who installed it, and we determined by the process of elimination, and also by Mr. Meraz' statement that it was installed on the third shift. [Meraz was the master mechanic in charge of equipment maintenance at the mine. All maintenance foremen reported to him.] We talked to the maintenance foreman on the third shift, Mr. John Cerise, and he told us that it probably was installed by a Mrs. Marge Theil, who was not a qualified person. ... We talked to Marge Theil and she stated that she didn't remember whether she put the light switch cover on or not.

Tr. 389-90.

4/ Clarence Daniels is also an MSHA coal mine inspector specializing in electrical inspections. His task during MSHA's investigation of the explosion at the Dutch Creek No. 1 Mine was to examine the entire electrical system of the mine. He testified as follows:

Q. What did these two gentlemen [Cerise and Meraz] tell you?

A. They told me they thought this lid was put on this particular machine on April the 6th, 1981. John Cerise stated that he examined this lid on April 6th and found out if the light switch worked. He said he did not examine the box as far as permissibility. When asked who put the lid on, Mr. Cerise stated that he didn't know who put the box on. That he thought Marge Theil on his shift had put the light [sic] on. After interviewing Marge Theil, she couldn't remember whether she had put the lid on or not.

Tr. 57-58.

The judge characterized this statement by Cerise to Daniels as similar to the one Cerise made to Lester, "but not quite as strong." 5 FMSHRC at 277.

Mid-Continent offered testimony by its personnel that it was the custom and practice at the Dutch Creek No. 1 Mine always to have qualified persons do those tasks requiring qualified persons. The judge agreed that Mid-Continent's evidence supported a finding that there was an adequate number of qualified persons at the mine and that it was the operator's custom and practice to have only certified personnel perform those tasks which required special qualifications. However, in the judge's opinion, this evidence did not overcome the admission of the foreman, Cerise, to the inspectors concerning Marge Theil. The judge observed that neither Cerise nor Theil said anything to the inspectors concerning this custom and practice. 5 FMSHRC at 277. The judge noted that the only statement attributed to Theil on the subject was that she "couldn't remember whether she put the lid on or not." Id. 5/

The judge concluded that the evidence supported a finding that the cover plate was not installed by a qualified person as required by the cited standard, and found the operator to have violated 30 C.F.R. § 75.511. We granted Mid-Continent's petition for discretionary review and subsequently heard oral argument in the case.

The essence of Mid-Continent's challenge on review is that the judge's finding of a violation is not supported by substantial evidence. Mid-Continent argues that the judge, in relying upon Lester's and Daniels' recitations of what they were told by Foreman Cerise, based his finding of a violation upon uncorroborated hearsay speculations rather than upon statements of fact. Mid-Continent also contends that even if the violation could be established by the statements of Cerise, as recounted by the inspectors, it successfully defended by establishing that the Secretary failed to prove that all the qualified persons who could have installed the cover plate did not do so.

We begin by noting that the judge properly admitted and relied upon the testimony of Inspectors Lester and Daniels concerning what they were told by Foreman Cerise. Hearsay evidence is admissible in our proceedings so long as it is material and relevant. Secretary of Labor v. Kenny Richardson, 3 FMSHRC 8, 12 n.7, aff'd, 689 F.2d 632 (6th Cir. 1982), cert. denied, ___ U.S. ___, 77 L. Ed. 2d 299 (1983). In this instance, the hearing testimony was offered to prove that the cover plate was not installed by a qualified person. Because the installation was at issue in the case, the testimony was material. The hearsay testimony was relevant also in that, if true, it tended to prove this proposition.

Moreover, properly admitted hearsay testimony, and reasonable inferences drawn from it, may constitute substantial evidence upholding a judge's decision

5/ Theil was not called as a witness by either party and did not appear at the hearing. No attempt was made to subpoena her. During the course of MSHA's investigation of the explosion she was interviewed over the telephone by MSHA investigators. Statements attributed to Theil by the investigators were made during this interview. When the hearing took place Theil was no longer employed by Mid-Continent.

if the hearsay testimony is surrounded by adequate indicia of probativeness and trustworthiness. Richardson v. Perales, 402 U.S. 389, 407-408 (1971); Johnson v. United States, 628 F.2d 187, 190-91 (D.C. Cir. 1980); U.S. v. FMC, 655 F.2d 247, 253-54 (D.C. Cir. 1980). 6/ Hearsay testimony "may be treated as substantial evidence, even without corroboration, if, to a reasonable mind, the circumstances are such as to lend it credence." Hayes v. Dept. of the Navy, 727 F.2d 1535, 1538 (Fed. Cir. 1984) (footnote omitted). We reject a per se rule that evidence may not be considered to be substantial for purposes of our review merely because it bears a hearsay label. Rather, we look to its underlying probative value to determine if the evidence may support a judge's finding of fact.

Although no single test can be established to evaluate the role of hearsay in determining whether substantial evidence supports a judge's finding, we measure the probative value of such evidence by weighing it against various factors, which, when added together, may tip the scale for or against a determination that substantial evidence is present. For example, we look to whether the out-of-court declarant, whose statement is reported at the hearing by another, had an interest in the outcome of the case and thus a reason to dissemble. Richardson v. Perales, 402 U.S. at 402-03. We also examine whether the out-of-court statement rests on personal knowledge gained from firsthand experience. 402 U.S. at 403. If there is more than one reported statement, we inquire whether the statements are consistent. 402 U.S. at 404. We also find significant whether the party against whom the statement was used exercised the right of subpoena so as to cross-examine the out-of-court declarant.

6/ Counsel for the Secretary of Labor contends that Cerise's statements are "admissions by a party opponent" under Rule 801(d)(2) of the Federal Rules of Evidence. As such, counsel asserts that the statements are presumed to be reliable and trustworthy and are entitled to considerable weight as statements which are not hearsay. This argument may possibly confuse the presumed reliability of a party opponent's admissions with the reliability of an unavailable declarant's statements against interest. See Fed. R. Evid. 804(b)(3); 4 J. Weinstein & M. Berger, Weinstein's Evidence 801-134 to -139 (1981). Even were we to regard Cerise's statements as "admissions by a party opponent" we still would be required to examine their underlying probative value. However, we decline the opportunity to become enmeshed in the hearsay intricacies and terminology of the Federal Rules of Evidence. While the Federal Rules of Evidence may have value by analogy, they are not required to be applied to our hearings--either by their own terms, by the Mine Act, or by our procedural rules. By contrast, the National Labor Relations Board is required under its organic act, the National Labor Relations Act, 29 U.S.C. § 151 et seq., to conduct its administrative hearings "so far as practicable" in accordance with the Federal Rules of Evidence. 29 U.S.C. § 160(b). See NLRB v. Process and Pollution Control Co., 588 F.2d 786, 791 (10th Cir. 1978). We believe it better to view hearsay statements as possibly relevant and material evidence whose probative value must be evaluated on the basis of each particular case. See generally 3 K. Davis, Administrative Law Treatise ch. 16 (2d ed. 1980).

402 U.S. at 404. We likewise determine whether the making of the statement was denied or whether its contents were declared untrue. And we examine the content of any contradictory or corroborating evidence. School Board of Broward County, Florida v. H.E.W., 525 F.2d 900, 907 (5th Cir. 1976). Our aim is to determine if, given all of these factors, there is "such relevant evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion." Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938). Application of these criteria to the record in this case convinces us that the judge's finding of a violation is supported by substantial evidence.

John Cerise was the out-of-court declarant whose statements were testified to by the MSHA inspectors. Cerise, foreman of Theil's shift, would have had good reason not to state that the electrical work was done on his shift by an unqualified person. As the foreman of the maintenance shift, it was his job to assign the maintenance tasks which needed to be done, including the installation of the switch box cover plate. (Cerise directed repair work on mining equipment. Tr. 276, 378). Also, as foreman, he was responsible for assuring the work was done in compliance with applicable safety standards. Cerise's statements would tend to indicate that he may not have met his responsibilities in this regard. In addition, Cerise's statements rested upon his personal knowledge and first-hand experience. He was on the section on April 6, the day he stated that Theil probably installed the plate. In addition, as noted above, installation of the cover plate was the type of work which would be performed by his crew. As the foreman, he may be presumed to know what his miners were doing.

We note also that the testimonial accounts of the two MSHA inspectors concerning their conversation with Cerise refer to the same series of events and are consistent.

Nor did Mid-Continent produce witnesses who testified that Cerise's statements were not made or that the content of the statements was reported inaccurately. Both inspectors agreed that Theil stated that she could not remember whether or not she installed the cover plate. Mid-Continent had no records pertaining to the installation of the cover plate. Oral Arg. Tr. 10. Mid-Continent's vice president stated that the company did not know who installed the plate. Tr. 289. Further, Cerise, a salaried employee of Mid-Continent, was not subpoenaed by the operator to rebut what he was reported to have said to the inspectors. 7/

7/ Our dissenting colleagues err in their assertion that Mid-Continent was effectively denied by Commission Rule 59 the right to discover, prior to hearing, the identity of declarants Cerise and Theil (Slip op. at 5). The Secretary's MSHA accident investigation report (Exhibit 1) was referred to by Mid-Continent in its answer to the citation issued herein. The record notes that Cerise stated that the cover plate was installed on April 16, 1981, and this operator could certainly have interviewed Cerise and determined what he had told MSHA, including his identification of Theil as the miner who installed the cover. Further, it is unclear what effect, if any, Rule 59 would have had on Mid-Continent's ability to obtain the identity of an informant whose identity had already been disclosed in the report. Although Counsel for Mid-Continent stated at oral argument that he first learned at the hearing that Cerise's statements were part of MSHA's case, he did not attempt to call either Cerise or Theil and did not seek an adjournment. Counsel for Mid-Continent explained at oral argument that during the two-day hearing Cerise was employed on the night shift and was "in bed" while the hearing was in session. Oral Arg. Tr. 20-21.

Thus Mid-Continent did not defend against the Secretary's evidence that an unqualified person installed the cover plate by showing that a qualified person had installed it. Rather, Mid-Continent offered evidence of a general character that there was no shortage of qualified personnel and that it was the practice at the mine to use only those employees to perform the tasks requiring qualified persons. The judge concluded, however, that because this practice was not mentioned by Cerise (or Theil), Mid-Continent's evidence did not outweigh the testimony of Daniels and Lester as to the specific statements of Cerise. We agree. General evidence that a violation would not normally have occurred does not outweigh the inference drawn from specific testimony that the violation did occur.

In evaluating the probative value of Cerise's statements to the inspectors, we recognize that his statements, to some degree, were expressed in terms of probability rather than in terms of absolute certainty. However, the record clearly supports a finding that the cover plate was installed on Cerise's maintenance shift, the "C" shift, on April 6 by a member of Cerise's crew. Inspectors Daniels and Lester stated that they were told so by Cerise and by John Meraz, Mid-Continent's master mechanic whose job it was to supervise the foremen. Tr. 57, 71, 378, 389, 403. ^{8/} Presumably, therefore, Cerise knew whereof he spoke when he indicated his belief that Theil had probably installed the cover plate. The judge inferred from this testimony that it was more probable than not that Theil had, in fact, installed the plate. ^{9/} Such inferences are permissible provided they are inherently reasonable and there is a logical and rational connection between the evidentiary facts and the ultimate fact inferred. See, for example, EEOC v. Greyhound Lines, Inc., 635 F.2d 188, 194 (3rd Cir. 1980).

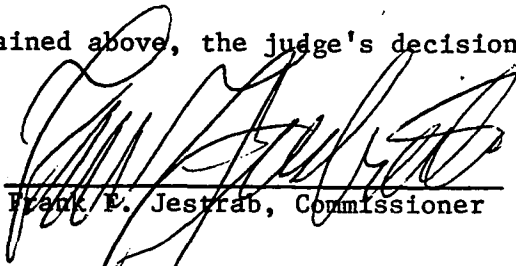
Moreover, as noted above, the substantial evidence standard may be met by reasonable inferences drawn from indirect evidence. See, for example, FMC v. Svenska America Linien, 390 U.S. 238, 248-49 (1968); U.S. v. FMC, 655 F.2d at 253-54. This is particularly true where, as here, it is either impossible or there is only a remote possibility of obtaining direct evidence to establish a violation. We must be mindful of the fact that the Secretary alleged a violation that was associated with a fatal explosion. It is not surprising under the circumstances that no person would admit installing the cover plate and that direct proof was lacking. Given the difficulty of obtaining direct evidence as to who installed the plate, we find the judge's inference that Theil installed it to be reasonable, inherently probable and logically connected to the evidentiary facts at hand. Moreover, as the Supreme Court has emphasized, "The possibility of drawing either of the two inconsistent inferences from the evidence [does] not prevent [an agency] from drawing one of them...." NLRB v. Nevada Consolidated Copper Corp., 316 U.S. 105, 106 (1942).


^{8/} In addition, the "B" shift maintenance foreman informed inspector Daniels that the lid was not installed on the "B" shift. Carl Heater, the only qualified person on the "A" shift told the inspector he had no knowledge of it being installed during the "A" shift. We also note that at oral argument Mid-Continent's counsel conceded that the cover plate was installed on April 6. Tr. Arg. 10.

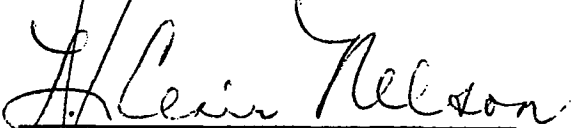
^{9/} Theil did not advise the MSHA investigators that she had never installed cover plates, a more likely response if, indeed, she had never performed this task.

In view of the indicia of probity and believability which surround Cerise's statements, the judge's conclusion that the cover plate was not installed by a qualified person is based on adequate record support and substantial evidence. It is, of course, the judge's duty to draw conclusions from the record and where, as here, that evidence is adequate to support the conclusion it is our duty to affirm his decision. 10/

Accordingly, on the bases explained above, the judge's decision is affirmed.


Frank E. Jestrab, Commissioner


A. E. Lawson, Commissioner


L. Clair Nelson, Commissioner

10/ The Secretary argues to us, as he argued to the judge, that he deductively proved the violation by establishing that all qualified personnel who could have installed the cover plate denied that they had done so. Mid-Continent disputes this claim. The judge did not rule on the merits of this contention, and in view of our disposition of the case we need not do so either. Nevertheless, we note in passing that Mid-Continent's contention in this regard centers on two named individuals, John Ball and Bernie Fenton. Although the statement of qualified electrician John Ball to the MSHA inspectors is to some degree uncertain, its thrust is a denial that he installed the cover plate, just as the thrust of Cerise's statement is an assertion that Theil had installed it. Ball is quoted by the inspectors as saying that he could not remember installing the cover plate, but that if he had installed it he would have checked between the plate and the switch box for impermissible openings. Tr. 58, 389-90.

We also note that Mid-Continent asserts that Bernie Fenton, a preventive maintenance engineer and a qualified person, was not interviewed by MSHA. Oral Arg. Tr. 13, 37. Without passing on the merits of this argument, we note that although Fenton usually worked on the "C" shift, it is not clear that his duties, unlike those of Cerise, would have included installation of the cover plate. His job was variously described as inspecting, oiling and greasing mine machinery and changing worn-out machine parts. Tr. 276, 358.

The dissent notes, at n. 2, that neither Mr. Guthrie nor Mr. Clark were interviewed. However, since both individuals were employed on the "B" shift, and the evidence establishes the lid was installed on the "C" shift, further exculpating evidence is unnecessary.

Collyer, Chairman and Backley, Commissioner dissenting:

This case was best summed up by the trial attorney for the Secretary of Labor at the beginning of the hearing where he stated:

The person or identity of the person who installed the light switch cover is not known, either by MSHA or Mid-Continent Resources. The light switch cover was most likely installed by the maintenance shift, which would be a third shift at this mine, but that fact has not been ascertained as a certainty. (Tr. 6).

After careful analysis of the entire record we find no reason to dispute the Secretary's counsel. Accordingly, we find that the Secretary failed to meet his burden of proving that the subject violation occurred and we would reverse the ALJ and vacate the subject citation.

We wish to stress at the outset that this case does not present the question of whether the cover plate was impermissible but only the question of who installed it.

The Secretary stated that he did not know who installed the subject cover plate, but that through a deductive process he could prove that Marge Theil, an unqualified miner, was the only miner who could have installed the cover plate. His deduction, however, rests on uncorroborated hearsay testimony which, as shown herein, is itself weak and inconclusive. In order to establish any valid inference made through a deductive process, it is integral to that process that no other choice or possibility reasonably exist. NLRB v. Melrose Processing Co., 351 F.2d 693 (8th Cir. 1965). Indeed, even the Secretary appears to have appreciated this point when he argued in opposition to Mid-Continent's motion to dismiss:

The testimony will show that in discussions with all the qualified personnel at the mine who may have had the opportunity to install that light switch box, all indicated they did not install it. Therefore, the only person who could have installed it would have been someone who was not qualified to install it. (Tr. 8; emph. added).

If the Secretary had actually conducted his investigation as indicated above, and if the Secretary had actually proved that all responses from all qualified personnel indicated that they had not installed the cover plate, we might have been persuaded to affirm the ALJ. However, the record evidence clearly establishes that all qualified miners were not interviewed by MSHA, as so claimed, and of those qualified miners interviewed, all did not clearly deny involvement with the installation of the subject cover plate. Moreover, we find the record evidence, upon which the majority relies, to be weak, equivocal, and not substantial.

Assuming arguendo that the Secretary's contention is correct and that the installation of the cover plate occurred on April 6, 1981 1/, the record contains no evidence of the identity of all Mid-Continent miners who were working on that day and who were legally qualified to install the subject cover plate. Although the record indicates that Mid-Continent's Master Mechanic Meraz and Maintenance Foremen Heater, Cordoba and Cerise were interviewed, none of the maintenance foremen was ever called to testify at hearing. Moreover, in closely scrutinizing the testimony of Inspectors Daniels (Tr. 58-60) and Lester (Tr. 389), it is apparent that they did not question all miners who were legally qualified to install the subject cover plate, but rather relied upon the qualified representations made by the aforementioned miners.

The record also clearly establishes that the Secretary, in issuing the subject citation and in prosecuting this matter, did not consider or interview the qualified personnel working on the preventive maintenance crew which operated on the "C" shift, the very shift during which the Secretary asserts the subject cover plate was installed. (Tr. 170). This unbelievable omission was apparently a continuing one because the Secretary professed ignorance of the existence of the special maintenance crew at oral argument. (Oral argument Tr. 25). This omission of evidence as to an entire crew significantly undermines the Secretary's deductive process. Indeed, the respondent's evidence suggests that the job of replacing the cover plate could have been routinely performed by the preventive maintenance crew or by one of the production crews.

We also find it significant that the "B" shift had been idled for five days preceding the April 15 explosion and that no coal production occurred during that time. During such "down time" mechanical and/or electrical work is customarily performed on the equipment. Inspector Daniels admitted that he did not know production had been suspended. (Tr. 76, 77). Additionally, Master Mechanic Meraz testified that a "foul up" involving qualified miner Ball had made it necessary for "B" shift mechanics Darrell Clark and Eugene Guthrie to perform permissibility checks ordinarily performed on the "C" shift. This testimony indicates that prior to the explosion, production shift personnel did perform work ordinarily performed on the "C" shift. This fact is ignored by the majority for the reason that it further removes support for their conclusion.

Clearly the line between production shift work assignments and maintenance shift work assignments often became blurred and therefore it is unreliable and unreasonable to hinge a conclusion of violation on a contrary presumption. Consequently, because the Secretary has not identified all of the qualified miners who were actually working on April 6, 1981, we can only wonder who else was not interviewed 2/.

1/ Although not established by the Secretary, Mid-Continent appears to have conceded this point. (Oral argument Tr. 10).

2/ Obviously, it was not possible to interview deceased qualified miner Eugene Guthrie. However the record contains no evidence to warrant a categorical removal of Mr. Guthrie from the list of those who may have had involvement in the installation of the subject cover plate. Also, the record contains no evidence inculpatory or exculpatory qualified miner Darrell Clark.

MSHA did, however, interview qualified miner John Ball 3/. His statement is characterized through the hearsay testimony of Inspector Daniels and Lester as follows: "John Ball, he stated he couldn't remember putting the lid on, but if he had, he was sure that he would have checked for permissability" (Daniels, Tr. 58); and "He stated that if he had installed it, he would have checked it with a feeler gauge." (Lester, Tr. 390).

The majority noted the foregoing and concluded that the statement of Ball was "uncertain" but "its thrust is a denial that he installed the cover plate." Although we find the declarations attributed to John Ball to be weak, equivocal, and insubstantial, not unlike the declarations attributed to John Cerise and Marge Theil, it is of greater interest to note the sharp inconsistency with which the majority evaluated the subject hearsay evidence. Inspector Daniels also testified that Marge Theil said "she couldn't remember whether she put the lid on or not." "Couldn't remember" results in the exculpation of John Ball, but through unexplained logic, is used to incriminate Marge Theil!

Beyond the foregoing hearsay testimony characterizing Marge Theil's statement, the Secretary's case rests upon the hearsay testimony of the two MSHA inspectors purporting to relate the declarations of John Cerise, Mid-Continent's maintenance foreman of the "C" shift.

Initially it should be noted that the record fails to clearly indicate the manner in which MSHA Inspectors Daniels and Lester conducted their interview(s) of declarants Cerise and Theil. Specifically, it is unclear whether the inspectors conducted all interviews jointly or separately. This is not insignificant. The number of times and circumstances under which witnesses are interviewed is material in evaluating the reliability and trustworthiness of the declarations. This factor is even more critical when the entire issue of liability may be hinged upon such "evidence."

As noted in the majority decision, Inspector Daniels testified that John Cerise said, "He didn't know who put the box on. That he thought Marge Theil on his shift had put the light on." (Tr. 57). Inspector Lester testified, "He told us that it probably was installed by a Mrs. Marge Theil." (Tr. 389).

If the foregoing testimony resulted from one interview then there is no explanation why the stronger inference of "probability" should have been adopted by the administrative law judge and the majority.

Beyond the fact that the attributed statement(s) itself is weak and inconclusive, more damaging is the fact that it stands alone without any corroboration. Although the record contains MSHA reference to a "notetaker", no written corroboration is found in the record. Indeed, even the most rudimentary attempt to corroborate the hearsay is not to be found in the record, i.e., there is no evidence showing that Marge Theil actually worked on April 6, 1981. Accordingly,

3/ The record is unclear as to whether Mr. Ball was interviewed by both MSHA inspectors jointly or separately.

the majority's reliance upon Secretary of Labor v. Kenny Richardson, 3 FMSHEC 8, 12 n.7, aff'd, 689 F.2d 632 (6th Cir. 1982), cert. denied, ___ U.S. ___, 77 L. Ed. 2d 299 (1983), is certainly in conflict with one of two express reasons stated therein by the Commission: "Virtually all of the hearsay was corroborated by direct evidence."

The majority's reliance upon Hayes v. Department of the Navy, 727 F.2d 1535 (Fed. Cir. 1984), is similarly flawed. Hayes involved the hearsay use of agency records in a hearing before the Merit Systems Protection Board on an appeal of Mr. Hayes' discharge. The record at issue detailed the circumstances of the employee's conviction for assault and battery on a 10-year-old female child. The record was developed by a Navy Captain, who had "prepared a memorandum for the record which reflected in detail his conversation with Mr. Hayes, his attorney, and with the prosecuting attorney..." 727 F.2d at 1536. It is noteworthy that this record was a contemporaneous one, on an issue the employee did not dispute. The employee had been advised, before the hearing, of his right to see and copy any part of the record developed by the Navy and had not done so. In accepting the hearsay, the court also relied on the fact that it was submitted as required by properly promulgated regulations of the MSPB. 727 F.2d at 1538-39.

Surely the hearsay evidence at bar, i.e., the testimony of two MSHA inspectors which completely lacks detail or any form of corroboration, is in no way analogous to the Hayes memorandum detailing the circumstances of a criminal conviction, which conviction was admitted by the employee.

Despite the inherent weakness of the Secretary's case, the majority has concluded, relying upon Richardson v. Perales, 402 U.S. 389 (1971), that hearsay evidence may constitute substantial evidence, and that in the instant case the subject hearsay evidence is substantial evidence.

Although we do agree that under certain circumstances hearsay evidence may constitute substantial evidence, we find the majority's reliance upon Perales to be erroneous. The quality, quantity and precision of the hearsay evidence reviewed by the Court in Perales was far superior to the instant hearsay evidence.

In Perales, the Supreme Court held that written medical reports prepared by licensed physicians who had independently examined a disability claimant could be received as evidence despite their hearsay character and could constitute substantial evidence supportive of a finding adverse to the claimant when the claimant had not exercised his right to subpoena the reporting physicians and thereby avail himself of the opportunity to cross-examine them. In reaching its decision, the Court carefully outlined several factors pertinent to the written reports which the Court felt would "assure underlying reliability and probative value." 402 U.S. at 402.

The Court noted that the social security administrative agency sponsoring the hearsay evidence operated as an adjudicator and not as an advocate. Certainly MSHA's posture as an enforcement agency in the instant case is not analogous.

The Court noted that the written medical reports were routine, standard and unbiased, and prepared by licensed physicians who were specialists who had personally examined the disability claimant. The Court further noted that the range of examinations (five) was impressive and represented a "careful endeavor by the state agency and the examiner to ascertain the truth." 402 U.S. at 404.

In reaching its conclusion that hearsay evidence may constitute substantial evidence, the Supreme Court placed considerable weight on the fact that "courts have recognized reliability and probative worth of written medical reports even in formal trials and while acknowledging their hearsay character have admitted them as an exception to the hearsay rule." 402 U.S. at 407. The Court further indicated that there exists a uniform court recognition of "reliability and probative value" in written medical reports. 402 U.S. at 405.

Our review of the subject hearsay evidence discloses the existence of none of the above-noted safeguards. MSHA's evidence is extremely narrow and inconclusive. It consists totally of unclarified hearsay without any indications of the circumstances under which statements were obtained, without contemporaneous corroborating notes, and without certainty within the declarations themselves. The haphazard investigation which overlooked a number of qualified persons who might have installed the cover plate was by no means a "careful endeavor." The Secretary's failure to call Marge Theil and/or John Cerise is similarly lacking in care. This house of cards is not by any measure "impressive."

The Court in Perales was also influenced by the fact that the claimant failed to seek issuance of the subpoena for the presence of the reporting physicians notwithstanding notification that the medical reports were on file and were available for claimant inspection prior to hearing.

In the instant case Commission Procedural Rule 59, 29 CFR Section 2700.59 effectively denied Mid-Continent the right to discover, prior to hearing, the identity of declarants John Cerise and Marge Theil 4/. Therefore Mid-Continent cannot properly be faulted for failure to seek a subpoena prior to hearing. Nor can this failure be utilized as it is by the majority, to give support to their findings. Moreover, in view of the weak and insubstantial evidence introduced by the Secretary, the party with the burden of proof, we have no difficulty in understanding why Mid-Continent apparently decided not to seek the issuance of subpoenas commanding the presence of declarants Cerise and Theil.

Lost in all the pirouetting is the basic proposition that the government has the burden of proof. Accordingly, its failure to adequately explain why it did not even attempt to subpoena the declarants who were apparently still living

4/ Although the name John Cerise, along with numerous other Mid-Continent employees, appears in the MSHA investigative report, there was no prior indication that Mr. Cerise knew, or disclosed to MSHA the name of Marge Theil, as the one who "probably" installed the cover plate. Moreover, to recommend, as the majority does, that Mid-Continent should have attempted to "determine what he (Cerise) had told MSHA" (Slip op. at 6; *emph. added*) reflects a potentially serious insensitivity to the parameters of the protections afforded miners under Section 105 (c), which prohibits interference with miners in the exercise of their statutory rights. We have found no record indication supporting the contention that Mid-Continent knew of John Cerise as the one who would have, or the one who did state that Marge Theil "probably" installed the subject cover plate.

within a reasonable radius of the hearing site is suspect, at least. NLRB v. Process and Pollution Control 588 F.2d 786 (10th Cir. 1978). This failure to call the very witnesses upon whom the government relied denied the administrative law judge the opportunity to make a very necessary credibility ruling which would have been especially significant in the instant case.

It appears that the government was intentionally selective in its presentation insofar as particular witnesses were concerned. At oral argument, Counsel for MSHA admitted that Mrs. Theil was not called by MSHA because:

...she would have been an extremely uncooperative witness. At best she would not have recalled what happened. At worst we may have ended up having to ask the judge to declare her a hostile witness. We had very little in the way of knowing exactly what she would testify to. (Oral argument at 30, 31).

Therefore, the government spared the ALJ from the rigors of determining where the truth may lie, and instead presented a neat, tidy statement purporting to be Marge Theil's position on this crucial issue. Accordingly, the question arises as to whether the judge was given the complete picture. Since he was not, his credibility findings are suspect.

Finally, it should be noted that the Perales Court was in part motivated to conclude that the written medical reports should be accepted as substantial evidence because of the extremely large volume of disability claim hearings conducted. The Court indicated that amount to be in excess of 20,000 cases per year. Obviously, the administrative burden placed upon MSHA as well as this Commission in no way approaches that volume.

We conclude that many of the well-reasoned factors relied upon by the Perales Court to insure the "reliability and probative value" of the hearsay evidence are not to be found in the hearsay evidence at bar. We find the hearsay to be weak, equivocal, uncorroborated and therefore suspect. As such it is "neither logical nor reasonable" to rely on such evidence as substantial evidence. See Union Carbide v. NLRB 714 F.2d 657.


We are troubled by other serious lapses and contradictions in this proceeding. The ALJ found that Mid-Continent had provided "extensive evidence" supporting its defense that an adequate number of qualified maintenance personnel were employed at the mine and that Mid-Continent's evidence did establish that the custom and practice at the Dutch Creek No. 1 mine was to have "only certified personnel perform occupational tasks which require special qualifications." 5 FMSHRC at 277. However, the ALJ rejected the defense of custom and practice. In support of that rejection, the ALJ found that declarants Cerise and Theil both failed to state to MSHA anything about custom and practice at the mine. 5 FMSHRC at 277.

We do not agree with the reasoning of the ALJ and the majority, and would conclude and find that he erred. The proper occasion to draw an inference from failure to state something occurs only under very narrow, limited circumstances.

To draw negative conclusions from silence in the instant case represents a gross misjudgment by the ALJ. Here we have been provided with no insight into the manner of investigation, no indication of precisely what questions were asked, and no indication of precisely what responses were provided. Here the enforcing agency characterized prior statements without any indication of the breadth and depth of the responses of either declarant. The record consists only of inconclusive recollections of two MSHA inspectors who may have heard one declaration from each of two Mid-Continent employees. The hearsay testimony is likely a selective synopsis of one or more interviews "seasoned" with the passage of time. Accordingly we find that the ALJ erred in basing his rejection of the Mid-Continent custom and practice defense on the conclusion and finding that specific words were not uttered by declarants Cerise and Theil 5/. Indeed the error is compounded in view of the fact that the ALJ relied on identical evidence in ruling, on a related citation, that Mid-Continent properly maintained its methane monitor maintenance program 6/.

For the foregoing reasons we would reverse the ALJ and vacate the citation.


Rosemary M. Collyer, Chairman


Richard V. Backley, Commissioner

5/ It should also be stated that the ALJ and majority (see majority decision f.n. 9) appear not to appreciate the fact that it would be legally permissible for Marge Theil to have deviated from the Mid-Continent custom and practice as long as she worked "under the direct supervision of a qualified person." See 30 CFR Section 75.511.

6/ This seems to be supported by the fact that on April 9 and 13, MSHA inspectors issued no citation to Mid-Continent related to the methane monitor during the course of their inspections.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

May 31, 1984

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

v.

UNITED STATES STEEL MINING CO.,
INC.

:
:
:
:
: Docket No. PENN 82-328
:
:
:

DECISION

On April 19, and June 1, 1982, inspectors from the Department of Labor's Mine Safety and Health Administration (MSHA) cited U.S. Steel Mining Company, Inc. for violations of mandatory safety standards at its Dilworth Mine. One citation alleged that U.S. Steel failed to comply with its approved ventilation plan in violation of 30 C.F.R. § 75.316. The other citation alleged that loose, dry coal and float coal dust were permitted to accumulate under and around the tail piece of the belt conveyor in violation of 30 C.F.R. § 75.400. On both citation forms the inspectors marked a box to indicate their finding that the alleged violations were of such nature as could significantly and substantially contribute to the cause and effect of a mine safety hazard. Both violations were abated within the time set by the inspectors. Pursuant to the Secretary of Labor's penalty assessment procedures set forth at 30 C.F.R. § 100.3, MSHA proposed a \$225 penalty for the violation of § 75.316 and a \$112 penalty for the violation of § 75.400. U.S. Steel declined to pay the proposed assessments and exercised its statutory right to obtain a hearing before this independent Commission. Thereafter, the Secretary of Labor filed a petition with the Commission seeking civil penalties for the alleged violations. U.S. Steel's answer denied that the violations were properly classified as "significant and substantial" and asserted that the penalties should be reduced to \$20 per violation "since none of the conditions cited had a reasonable possibility of causing a significant injury."

Following U.S. Steel's answer, an administrative law judge of the Commission ordered the parties to confer concerning possible settlement and to stipulate as to any matters not in dispute. Subsequently, the Secretary modified both citations to state that the violations were "non-significant and substantial" and presented no likelihood of injury. The parties then agreed to settle the matter, and the Secretary moved the administrative law judge to approve the settlement. In his motion for

approval of settlement the Secretary stated that the significant and substantial designations had been deleted, that the negligence of U.S. Steel was "moderate", and the gravity of the violations was "null." The Secretary further stated that "in accordance with 30 C.F.R. § 100.4 ... a \$20 civil penalty would be appropriate." 1/

The administrative law judge denied the motion for approval of settlement and set the matter for hearing. The judge stated that he was not bound by the Secretary's regulation at 30 C.F.R. § 100.4. At the hearing before the judge the Secretary presented evidence regarding the existence of the violations, their gravity, the operator's negligence, the abatement of the cited conditions and the history of previous violations at the mine. 2/ U.S. Steel did not deny that the alleged conditions existed. Rather, it argued that the judge was bound by 30 C.F.R. § 100.4 and, consequently, that he was required to assess \$20 penalties for each violation.

In his decision the judge again rejected this argument and held that he was required to make a de novo determination of the appropriate penalty amounts. 5 FMSHRC 934, 936 (May 1983) (ALJ). Citing the Commission's decision in Sellersburg Stone Company, 5 FMSHRC 287, 291 (March 1983), appeal docketed, No. 83-1630 (7th Cir. March 11, 1983), the judge held that he was bound by section 110(i) of the Act rather than by the Secretary's penalty assessment regulations and that he was required to determine the amount of each penalty by applying the six penalty criteria listed in section 110(i) in light of the evidence of record. The judge then made findings with respect to the penalty criteria and assessed a \$75 penalty for each violation. 5 FMSHRC at 936-37.

On review U.S. Steel renews its argument that when a violation meets the criteria set forth in 30 C.F.R. § 100.4, the Secretary of Labor's so-called "single penalty regulation", a Commission administrative law judge must assess a \$20 penalty. U.S. Steel's argument evidences a continued misunderstanding of the civil penalty scheme of the Act and of the discrete roles of the Department of Labor and this independent Commission in effectuating that scheme. We previously have addressed this subject on

1/ 30 C.F.R. § 100.4, a regulation adopted by the Secretary, provides:

An assessment of \$20 may be imposed as the civil penalty where the violation is not reasonably likely to result in a reasonably serious injury or illness, and is abated within the time set by the inspector. If the violation is not abated within the time set by the inspector, the violation will be processed through either the regular assessment provision (§ 100.3) or special assessment provision (§ 100.5).

2/ The parties stipulated as to U.S. Steel's size and that the assessment of penalties would not affect its ability to continue in business. See 30 U.S.C. § 820(i).

numerous occasions. See e.g., Secretary of Labor on behalf of Milton Bailey v. Arkansas-Carbona Co. 5 FMSHRC 2042, 2044-46 (December 1983); Sellersburg Stone Co., supra; Knox County Stone Co., Inc., 3 FMSHRC 2478, 2480-81 (November 1981); Tazco Inc., 3 FMSHRC 1895, 1896-98 (August 1981); Shamrock Coal Co., 1 FMSHRC 469 (June 1979), aff'd 652 F.2d 59 (6th Cir. 1981). We reiterate our previous holdings in an attempt to dispel any lingering misconceptions.

✓ The Mine Act divides penalty assessment authority between the Secretary of Labor and the Commission. The Secretary proposes penalties. The Commission assesses penalties. The Secretary's penalty proposals are made before hearing. In the event of a challenge to the Secretary's proposal, the Commission affords the opportunity for a hearing. Thereafter, the Commission assesses penalties based on record information developed in the course of the adjudicative proceeding. Sellersburg, 5 FMSHRC at 290-91, Arkansas-Carbona, 5 FMSHRC at 2044-46. In assessing a penalty the Commission and its judges are required to consider the six statutory ✓ penalty criteria set forth in section 110(i) of the Act (30 U.S.C. § 820(i)). Thus, the Commission's penalty assessment is not based upon the penalty proposal made by the Secretary, but rather on an independent consideration of the six statutory penalty criteria and the evidence of record pertaining to those criteria. Sellersburg, 5 FMSHRC at 291-92, Shamrock Coal, 1 FMSHRC at 469. The Commission's independent penalty determination and assessment, based upon the statutory criteria of section 110(i) of the Act, applies in all cases contested before the Commission.

The Act does not condition the penalty assessment authority and duties of the Commission upon the manner in which the Secretary of Labor has chosen to implement his statutory responsibility for proposing penalties. Therefore, it is irrelevant to the Commission for penalty assessment purposes whether a penalty proposed by the Secretary in a particular case was processed under § 100.3, § 100.4, or § 100.5 of the Secretary's regulations. The distinctions that U.S. Steel attempts to draw in this proceeding between a § 100.3 or § 100.4 penalty proposal by the Secretary are without merit and are rejected.

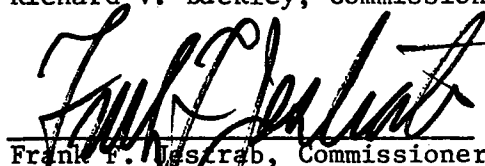
U.S. Steel further argues that even if the Act literally requires the Commission and its judges to consider the six penalty criteria when assessing a civil penalty, we nevertheless should hold, as a matter of policy, that when a violation poses little probable harm it will not be assessed through consideration of all six statutory penalty criteria. U.S. Steel adopts the Secretary's position, as published in the comments accompanying the promulgation of the Secretary's Part 100 regulations, that "when the gravity factor is low and good faith is established through abatement, ... analysis of the negligence, size and history criteria is [not] appropriate or necessary." 47 Fed. Reg. 22292 (May 1982). We decline to accept U.S. Steel's suggestion. Such a policy would, in our opinion, unwisely restrict the wide discretion the Act affords the Commission in assessing civil penalties commensurate with the evidence of record. This discretion is necessary if, as Congress intended, civil penalties assessed under the Act are effectively to encourage operator compliance with the Act and its standards and to protect the public interest. See Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977 at 629, 632-33.


In this proceeding the Commission's administrative law judge considered, as he was required to do, the six statutory penalty criteria set forth in section 110(i). The findings he made with respect to each of the criteria faithfully reflect the evidence and information before him. The penalties he assessed are commensurate with the findings and consistent with the statutory criteria.

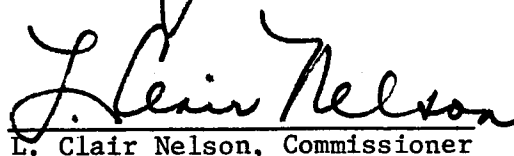
Accordingly, the decision of the administrative law judge is affirmed.


Rosemary M. Collyer, Chairman


Richard V. Backley, Commissioner


Frank F. Ussrab, Commissioner


A. E. Lawson, Commissioner


L. Clair Nelson, Commissioner

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ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

MAY 1 1984

U.S. STEEL MINING CO., INC.,	:	CONTEST PROCEEDING
Contestant	:	
v.	:	Docket No. WEVA 83-124-R
	:	Citation No. 2001887; 3/4/83
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Gary No. 50 Mine
ADMINISTRATION (MSHA),	:	
Respondent	:	
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 83-219
Petitioner	:	A.C. No. 46-01816-03519
v.	:	
	:	Gary No. 50 Mine
U.S. STEEL MINING CO., INC.,	:	
Respondent	:	
	:	
UNITED MINE WORKERS OF	:	
AMERICA,	:	
Intervenor	:	

DECISION

Appearances: Louise Q. Symons, Esq., U.S. Steel Mining Co., Inc., Pittsburgh, Pennsylvania for Contestant/Respondent;
James B. Crawford, Esq., Office of the Solicitor U.S. Department of Labor, Arlington, Virginia, for Respondent/Petitioner;
Mary Lu Jordan, Esq., United Mine Workers of America, for Intervenor.

Before: Judge Kennedy

The captioned review-penalty proceedings came on for an evidentiary hearing in Pittsburgh, Pennsylvania on March 15, 1984. The gravamen of the charge was the operator's refusal to pay a union walkaround for time spent participating in a "Ventilation Technical Inspection" in violation of section 103(f) of the Mine Safety Law. The operator challenged the validity of the citation and the penalty assessed on the ground the activity was not an "enforcement inspection" within the meaning of section 103(a).

During the course of his opening statement, the solicitor admitted MSHA gave advance notice of the "inspection" whereupon the operator moved to vacate and dismiss. In support of her argument counsel for the operator pointed out that section 103(a) prohibits advance notice of any enforcement inspection and section 110(e) makes it a misdemeanor punishable by a fine of up to \$1,000 and imprisonment for up to six months for any person to give advance notice of such an inspection.

The solicitor opposed the motion stating "there is advance notice of all inspections" and more particularly of the four quarterly inspections mandated by section 103(a) of the Act. The solicitor declared there has never been a prosecution for violating the advance notice prohibition and expressed confidence that the department would take no adverse action against an inspector for doing so. 1/

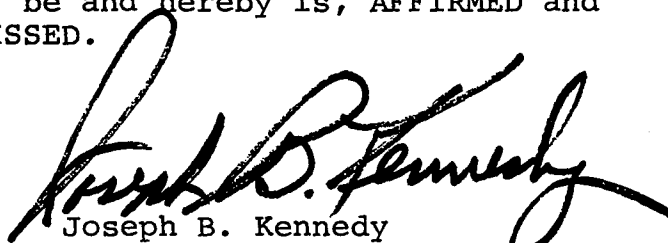
Despite the solicitor's zeal to compel testimony that might violate the inspector's Fifth Amendment rights, the trial judge refused to allow the inspector to testify unless given appropriate use immunity. 2/ 18 U.S.C. § 6002. Under the Omnibus Federal Immunity Statute, only the Attorney General or his duly authorized representative may approve issuance of an immunity order by administrative agencies of the United States. 18 U.S.C. § 6001, 6002, 6004. Unfortunately, the Federal Mine Safety and Health Review Commission is not an agency authorized to issue an immunity order.

1/ If the solicitor's statements accurately reflect MSHA policy, they would seem to confirm the widespread impression that MSHA is openly flouting the prohibition against giving advance notice of enforcement inspections. In my recent decision in Pontiki Coal Corporation, 6 FMSHRC _____, March 30, 1984, I called for an inspector general's investigation of what appeared to be a flagrant violation of the advance notice prohibition. I am advised that a "file" was opened but that no field investigation commenced because the investigator assigned to the matter went on "vacation". The matter seems to have been prejudged by the Assistant Secretary for Mine Health and Safety, Mr. Zegeer. On April 14, 1984, the press quoted him as saying "everything was done by the book" and that his investigation showed "the inspectors did everything exactly the way they were supposed to do it." If what the solicitor said is correct, "doing it by the book" may well be part of the problem.

2/ While the Labor Department may feel the advance notice prohibition conflicts with its policy of "cooperative enforcement," I believe the department's policy conflicts with my sworn duty to uphold the law. I declined therefore the suggestion to join in what appears to be a concerted action to thwart the law.

When it became apparent that neither the solicitor, the Secretary, nor anyone else in the Department of Labor or the Commission could grant the witness immunity and the trial judge refused to allow the solicitor to put the witness in jeopardy, the solicitor, after consultation with his superiors, moved to vacate the citation and dismiss the proposal for penalty. The operator having no objection, the trial judge entered an order from the bench granting the motion to vacate the citation and dismissing the proposal for penalty.

The premises considered, it is ORDERED that the bench decision of March 15, 1984, be and hereby is, AFFIRMED and the captioned matters DISMISSED.



Joseph B. Kennedy
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

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

MAY 2 1984

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 81-271-M
Petitioner	:	A.C. No. 29-01375-05008F
v.	:	
	:	Mt. Taylor Project Mine
GULF MINERAL RESOURCES	:	
COMPANY,	:	
Respondent	:	

DECISION

Appearances: Eloise V. Vellucci, Esq., Office of the Solicitor,
U. S. Department of Labor, Dallas, Texas,
for Petitioner;
John A. Bachmann, Esq., Gulf Mineral Resources
Company, Denver, Colorado,
for Respondent.

Before: Judge Morris

This case, heard under the provisions of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, et seq., (the "Act"), arose from a March 2, 1981 inspection of respondent's Mt. Taylor Project Mine. The Secretary of Labor seeks to impose two civil penalties because respondent allegedly violated the Act and a regulation promulgated under the Act.

Respondent denies that any violations occurred.

After notice to the parties, a hearing on the merits was held in Albuquerque, New Mexico on June 1, 1983.

Respondent filed a post trial brief.

Issues

The issues are whether respondent violated the Act and the regulation.

Stipulation

The parties agreed that at the time of the inspection the size of the company was 1,120,484 production pounds per year. The size of its Mt. Taylor Project uranium mine was 872,540 production pounds per year. The parties further stipulated that the mine was no longer in production (Tr. 5).

This citation alleges respondent violated Section 108(b) of the Act in that the operator delayed three MSHA inspectors in their investigation of a fatal accident at the mine.

Section 108(a)(1) provides, in part, as follows:

The Secretary may institute a civil action for relief, including a permanent or temporary injunction, restraining order, or any other appropriate order in the district court of the United States for the district in which a coal or other mine is located or in which the operator of such mine has his principal office, whenever such operator or his agent

(B) interferes with, hinders, or delays the Secretary or his authorized representative, ... in carrying out the provisions of this Act

Prior to the hearing the judge advised the parties that the pertinent provision of the Act was Section 103(a) and not the cited section. [Order, February 28, 1983; Waukesha Lime and Stone Company, Inc., 3 FMSHRC 1702 (1981)].

Pursuant to the Federal Rules of Civil Procedure the complaint is amended to allege a violation of Section 103(a) of the Act. Rule 15(b), F.R.C.P.

The pertinent part of Section 103(a) provides as follows:

...For the purpose of making any inspection or investigation under this Act, the Secretary ... with respect to fulfilling his responsibilities under this Act, or any authorized representative of the Secretary... have a right of entry to, upon, or through any coal or other mine.

Summary of the Evidence

MSHA's evidence indicates that at approximately 11:40 a.m. on March 2, 1981, Thomas Castor, the supervisory mining inspector at the MSHA Albuquerque office was advised of a fatality at respondent's mine. The supervisor dispatched a special investigator and two inspectors to the mine (Tr. 7-9, 13). The three men travelled to the mine in two vehicles. Since the mine was approximately 100 miles from Albuquerque, they had to pick up clothing at their homes in anticipation of an overnight stay (Tr. 9).

The purpose of an MSHA investigation is to determine the cause of an accident and to recommend methods of preventing similar accidents. MSHA goes to the scene of a fatality as soon as possible. MSHA investigators prefer to interview witnesses

and then take them to the scene for a detailed analysis and reconstruction of the occurrence (Tr. 9, 10, 26, 40). By law, an operator is also required to make a complete detailed accident report. But the operator does not have to give its report to MSHA unless it is requested. (Tr. 31, 32). MSHA accepts an accident report from operators on Form No. 7000-1 even though there are more than 20 miners at the reporting mine (Tr. 30, 33).

The accident at this mine occurred at 9:45 a.m. Since MSHA was not advised until 11:40 a.m., respondent was cited for a violation of 30 C.F.R. § 50.10. 1/ That citation is now a final order of the Commission (Tr. 10, 11).

Inspector Omer Sauvageau reached the mine at 3:30 p.m. He waited at the mine office for Inspectors Tanner and Sisk who arrived at 3:45 p.m. to 3:50 p.m. (Tr. 95, 96).

Inspector William Tanner, Jr. estimates that he arrived at the mine between 3:00 and 3:30 p.m. In the meeting room they introduced themselves to respondent's representatives John Thompson and David Wolfe. Tanner asked if they could interview the two eyewitnesses and the two location witnesses so they could continue their investigation. Company representative Dershimer said the witnesses were not available because they were being interviewed by the company attorney (Tr. 37, 38, 40, 60, 95, 96). At that point L. E. Lewis went to check. Upon returning, Lewis said it would be another 30 minutes before the MSHA inspectors could interview the witnesses. Lewis suggested the inspectors go underground to visit the scene. They did (Tr. 38, 39). The only comment, which was repeated to the inspectors, was that it was Gulf's policy for their attorneys to confer with its witnesses before MSHA inspectors could talk to them. The company did not state to the inspectors that they were conducting their own investigation (Tr. 39, 63). For their part, the inspector did not suggest they should join the company attorney (Tr. 61, 62).

Inspector Tanner told Wolfe the company would be cited and he issued Citation 152663 for a violation of Section 108(b) of the Act. The citation was given to the company three days later. It was issued because the witnesses were not available. The MSHA investigation was delayed and hindered at the scene because the inspectors could not get the comments of the witnesses firsthand (Tr. 41-43, 71, 72). The witnesses were interviewed at 6:00 p.m. that day (Tr. 43).

1/ 30 C.F.R. § 50.10 Immediate Notification.

If an accident occurs, an operator shall immediately contact the MSHA District or Subdistrict Office having jurisdiction over its mine. If an operator cannot contact the appropriate MSHA District or Subdistrict Office it shall immediately contact the MSHA Headquarters Office in Washington, D.C. by telephone, toll free at (202) 783-5582.

Respondent's evidence indicates the company called MSHA and the state inspectors at approximately 11:20 a.m. on the day of the accident. The state inspectors, enroute on another matter, arrived ten minutes after being called. They went underground to investigate and they also interviewed three or four witnesses (Tr. 101, 102).

Company representatives Jerry Omer (safety) and Terry Cullen (attorney) arrived from Denver the same day at approximately 3:30 p.m. They began interviewing the witnesses 15 to 30 minutes before the MSHA inspectors arrived (Tr. 102, 103, 113, 114).

After the MSHA inspectors arrived, Cullen requested an additional 20 to 30 minutes to complete his interviews. 2/

Respondent's manager F. K. Dershimer requested that the inspectors make the trip underground while Cullen continued his interviews. The inspectors voiced no objection, nor did they give an indication that they felt they were being delayed, hindered or inconvenienced (Tr. 104-106, 114, 115). The MSHA inspectors, as suggested, went underground (Tr. 106). The first notice of any dissatisfaction with this arrangement was when Dershimer received the citation (Tr. 107, 116, 117).

If the inspectors had requested a joint interview of the witnesses Dershimer would have checked with Cullen to see if it was "okey" (Tr. 115, 116). Respondent has never prohibited inspectors from talking to company witnesses. Further, there is no such company policy (Tr. 105, 115, 116).

2/ The record does not reflect the purpose of these interviews. But in view of the fact that the safety officer and company attorney were present on the day of the accident, I infer the operator was conducting its investigation pursuant to 30 C.F.R. § 50.11(b). The cited regulation provides, in part,:

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

Discussion

Section 103(a) of the Act authorizes the Secretary to enter any mine. On the essentially uncontroverted facts in this case there was no refusal or delay of the Secretary's right of entry. On the contrary, respondent facilitated the entry of the inspectors to the site. The only delay, if there was one, occurred when the company attorney requested additional time to interview the witnesses. This scenario, at best, establishes that respondent minimally interfered with the sequence in which MSHA prefers to conduct its investigation. But, construed in a light most favorable to MSHA, these facts would not constitute a denial of the Secretary's right to enter the mine.

Section 50.11(a) of Title 30 of the Code of Federal Regulations provides for accident investigations to be performed at the discretion of MSHA district or subdistrict managers. Once the decision to conduct an investigation has been made, Section 103(a) of the Act provides MSHA inspectors with broad powers in the exercise of such an investigation. An inspector has the right of entry into any mine. While 30 C.F.R. § 50.11(a) requires that notice be given prior to the investigation of accidents, the Supreme Court has held that no warrant is required to conduct such an inspection. Donovan v. Dewey, 452 U.S. 594, 101 S. Ct. 2534 (1981). However, neither the Act nor any implementing regulations mandate the interviewing of witnesses as the initial step in an investigation.

Accordingly, on the facts I conclude that no violation of Section 103(a) occurred. Citation 152663 and all penalties should be vacated.

Citation 152667

This citation charges respondent with violating Title 30, Code of Federal Regulations, Section 57.8-2, which provides:

Mandatory. (a) A competent person designated by the operator shall examine each working place at least once each shift for conditions which may adversely affect safety or health. The operator shall promptly initiate appropriate action to correct such conditions.

Summary of the Evidence

MSHA Inspector William Tanner, Jr. issued Citation 152667 because two men with authority at this particular work place failed to insist on the crew following the proper procedure for replacing the post (Tr. 44, 45).

Superintendent Sullivan had been present a few minutes before miner Maldonado was killed. In addition, leadman Baca was present and on one occasion the victim himself was considered to be a "competent person" within the terms of the MSHA regulation (Tr. 46, 47).

MSHA construes a "competent person" in Section 57.8-2 to be one qualified by ability and experience, who makes safety checks, prevents unsafe acts, and who works in this particular area of the mine (Tr. 45, 53, 88). There was nothing to indicate to the inspector that a safety check had been made or that a competent person had looked over the area before everyone "got into place" (Tr. 46, 53).

Sullivan, the level superintendent, came in about 9:30 a.m. and talked to leadman Baca about changing out the steel posts (Tr. 47).

At the intersection of 3N and 3E, the place of the accident, a cap goes directly across the back. It is supported by two posts. These posts are steel I-beams 8 inches by 8 inches and 10 feet long (Tr. 47). The cap is bolted by four bolts on each end (Tr. 47). A collar brace, a knee brace, and a toe brace tie all of this steel together to keep it from falling (Tr. 47).

According to the miners, on this particular day they cut all the collar braces off one side with a torch. The other side had only one collar brace. The inspector did not know why it was not supported (Tr. 48). At approximately 9:30 a.m., Sullivan and Baca discussed changing the post. Sullivan left without looking to see if the area was safe. At that time victim Maldonado was driving up with the replacement, a slightly larger post (Tr. 48).

When Sullivan was at the intersection there was one collar brace on one side and none on the other (Tr. 49). Normal procedure to remove and replace a post is to stick a direction boom under the cap and hold it up while a worker removes the bolts. After the bolts are removed the post is withdrawn and replaced with the new post while the boom holds up the 2,000 pound cap. The cap itself measures 21 feet by 21-1/2 feet (Tr. 49, 50).

The normal way to unscrew the bolts would be to climb up a ladder and remove them after the cap has been secured. On this particular day Maldonado climbed on top of the erection boom and was jockeyed into position. Barela handed him a one-inch impact wrench and Maldonado spun off the bolts without making sure the area was secured in any way.

After the bolts were spun off the cap leaned over. As it did, Maldonado climbed off of the erection boom pedestal (which was to be used only for lifting the cap). He then crawled down the boom into the bucket (Tr. 51-52). That's when the cap came down striking him in the back and killing him (Tr. 51, 52).

Baca, the lead miner, had not attempted to stop Maldonado. In addition, he did not see that the cap and post were secure (Tr. 51). Elliott, a co-worker, had to go after a ladder. He could have held the post to keep it from falling over. The cause of the accident was that nothing was secure (Tr. 51). This accident would not have happened had the cap been secured, pinned, or supported by the pedestal (Tr. 52).

The company said Baca and Sullivan were designated "competent persons." Sullivan told the inspector he did not investigate but he instructed the leadman in his duties (Tr. 53, 81-82). John Thompson and David Wolfe told the inspector they were "competent persons" and so designated by the company (Tr. 80-81).

The inspector did not check the log books from previous shifts to see who had signed the logs as the designated person (Tr. 82, 83).

This crew had changed out the post on the opposite side of the drift the previous day (Tr. 88). On that occasion, Maldonado, who was then the leadman, performed the same task (Tr. 91-92).

Respondent's evidence: F. K. Dershimer, the acting general manager, testified that the mine captain designates the level supervisor as the "competent person," for the purpose of the regulation. If the level supervisor is not present, then the mine captain does the walk-through for safety checks or he designates another person. Compliance with the walk-through is recorded on the shift report under the portion marked as "Supervisor". The time of the safety check, followed by the supervisor's initials, are also entered on the shift report (Tr. 118, 119, Exhibit R 1). If the supervisor saw something that needed to be fixed he would so direct (Tr. 123).

James Sullivan was in the employ of respondent between January 30, 1978 to May 14, 1982. He has 12 years of mining experience. He was hired as a long-hole driller and later was promoted to level supervisor, then to level foreman (Tr. 129-131, 152). Sullivan's experience in replacing posts has come about by watching Harrison & Western crews, in inspecting, and as a helper in installing steel (Tr. 162). Sullivan considered himself competent because he has used good judgment in putting up steel (Tr. 162).

Lead miner Baca had the responsibility for watching this crew and seeing they work safely (Tr. 158, 159). But only Sullivan, and not Baca, had the responsibility to check the entire level (Tr. 159).

On the day before this accident the same crew had changed out the post on the opposite side of the drift. Maldonado described the correct procedure to Sullivan. When he was on the scene, Sullivan discussed the situation with Cruz and Francisco. He told them to follow the same directions as before. On the day he was killed, Maldonado was doing the work improperly and he was not following his stated procedure (Tr. 165-168).

According to Sullivan, the post to be changed out was not collar braced when he passed through the area. He didn't recall if it was pinned at the bottom. In addition, he didn't know how the post holding the I-beam was braced (Tr. 164).

Changing posts is not hazardous. The proper way is to position the boom under the cap to hold it fast. Two workers then put a ladder at the post being changed. One worker removes the bolts. The boom is then raised slightly to release the downward pressure on the post. A worker then lays down the post and installs the replacement post (Tr. 166). Normally the crew would automatically install a collar brace (Tr. 169).

The MSHA regulation requires one safety inspection by a "competent person". Respondent requires two. On the day of the fatality, inspections were performed by Ray Willis during the day shift. If Sullivan had not been required to leave the level, he would have done the inspections and signed the logs (Tr. 167, 169, Exhibit R 1).

Discussion

MSHA's regulation, Section 57.18-2, imposes two broad requirements on an operator.

The first: The operator shall designate a person who is competent to examine each working place each shift for conditions which may adversely affect safety or health.

The second: If there are defective conditions, the operator, through his "competent person," shall initiate appropriate action.

We will review these requirements in the light of the evidence in the case. First of all, did respondent designate a person to examine each working place?

Yes, I find that witness James Sullivan was so designated by the company. He so testified. Further, the company records (Exhibit R 1) establish that Sullivan, as supervisor, initiated and indicated the times of the safety checks on March 3 and 4, 1981. He would have performed the safety checks on March 2 but, due to the accident, he went to the surface.

The inspector testified there was nothing to indicate that a "competent person" had looked over the area. But I am not persuaded by the inspector's testimony. He admits he did not check the company logs on this point.

Was Sullivan competent as a safety inspector?

Yes, I find that Sullivan's broad experience includes 12 years as a miner. He was hired as a long-hole driller, promoted to level supervisor and then level foreman. He has helped install steel,

watched other crews working with it, and he has inspected in connection with this activity.

The Secretary waived closing argument and a post trial brief; hence, it is somewhat difficult to perceive his position. But the citation and the evidence suggest several facets. The citation alleges that the person designated by the company as competent did not examine the work place "before work commenced." If the Secretary had intended a pre-shift inspection he could have done so as he did in 30 C.F.R. 57.3-22 and 57.19-129.

An additional element filtering through the evidence is that Baca, the lead miner, or for that matter anyone in charge of the crew, was the "competent person" under the regulation. Therefore, such a "competent person" would have prevented the unsafe acts.

I reject such a view of the regulation. On the facts, neither Baca nor anyone in the crew were so designated by the company as the "competent person" at the time of the accident.

A secondary factor appearing in MSHA's evidence is that the "competent person" should have been present when all of the workers were "in place." If so, he could have stopped Maldonado's unsafe acts.

The regulation does not require the "competent person" to anticipate unsafe acts by an employee. This record establishes that the changing of the post was not inherently dangerous. In addition, the crew was experienced. Maldonado had himself removed the post on the opposite side of the drift on the previous shift. Further, he recited the proper procedure to Sullivan. The crew was told to proceed as before. For the foregoing reasons, I conclude that respondent complied with the initial portion of the regulation; namely, the company designated a competent person to examine the work places.

The second broad requirement of the regulation mandates that the competent person initiate appropriate action if there is a defective condition. Simply put, was there a defective condition when Sullivan was present?

No, at the time Sullivan was present the most unfavorable scenario was that the post being changed out was not collar braced. But no evidence establishes that this in and of itself is a defective condition. Even without the collar brace the steel was also tied together with a knee brace, a toe brace and secured by four bolts. Sullivan was at the intersection of Drift 3N-3E at approximately 9:35 a.m. to 9:40 a.m. on March 2, 1981. At that time Maldonado was driving the loader in with the replacement post (Exhibit R 2). There was nothing to indicate to Sullivan that a defective condition existed. Further, there was nothing to indicate that the post could not be changed without incident. Under these facts he was entitled to proceed with his safety check survey at the other work places on the 3100 level.

Along with other contentions in its post trial brief respondent argues that the inspection performed by Sullivan at the beginning of the shift was not an "official inspection". Therefore, it is contended that his walk-through could not in any event constitute a faulty inspection.

I reject that position. If the facts had established that a defective condition existed at any time when Sullivan was present and he failed to take corrective action, I would affirm the citation.

For the reasons stated herein Citation 152667 should be vacated.

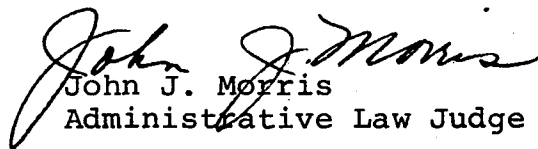
Brief

Respondent's counsel has filed a detailed brief which has been most helpful in analyzing the record and defining the issues. I have reviewed and considered this excellent brief. However, to the extent that it is inconsistent with this decision it is rejected.

ORDER

Based on the facts found to be true in the narrative portion of this decision, and based on the conclusions of law as stated herein, I enter the following order:

1. Citation 152663 and all proposed penalties therefor are vacated.
2. Citation 152667 and all proposed penalties therefor are vacated.


John J. Morris
Administrative Law Judge

Distribution:

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/ot

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

MAY 4 1984

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. PENN 83-131
Petitioner	:	A.C. No. 36-03425-03521
v.	:	
	:	Maple Creek No. 2 Mine
U.S. STEEL MINING CO., INC.,	:	
Respondent	:	

DECISION

Appearances: Janine C. Gismondi, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Petitioner; Louise Q. Symons, Esq., U.S. Steel Mining Co., Inc., Pittsburgh, Pennsylvania, for Respondent.

Before: Judge Koutras

Statement of the Case

This case concerns a civil penalty proposal filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a), seeking a civil penalty assessment in the amount of \$650 for one violation of mandatory safety standard 30 CFR 75.514. The violation was cited in a section 104(d)(1) order issued on December 9, 1982.

The respondent contested the proposed assessment, and the case was docketed for hearing in Uniontown, Pennsylvania, on March 27, 1984, with five other cases involving these same parties. However, when this docket was called for trial, the parties advised me that the respondent decided to withdraw its contest and request for a hearing, and agreed to pay the full amount of the \$650 civil penalty assessment.


Discussion

In view of the foregoing, and in light of the agreement by the parties to dispose of this matter by the respondent's request to withdraw its contest and to pay the full penalty assessment, I considered the request as a motion to approve a proposed settlement pursuant to Commission Rule 29 CFR 2700.30.

After due consideration of the arguments presented by the parties on the record in support of their joint dispositive settlement of this case, and after review of all of the pleadings filed, including the conditions and practices cited by the inspector in the order which he issued, I granted the motion and concluded that the proposed settlement was in the public interest, and it was approved from the bench (Tr. 6-8).

Order

Respondent is ordered to pay a civil penalty in the amount of \$650 in full satisfaction of 104(d)(1) Order No. 2102664, and payment is to be made within thirty (30) days of the date of this decision and order. Upon receipt of payment by MSHA, this case is dismissed.


George A. Koutras
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

MAY 7 1984

LOUIS E. HENDERSON,	:	DISCRIMINATION PROCEEDING
Complainant	:	
	:	Docket No. CENT 83-48-DM
v.	:	
	:	MD 83-13
LORING QUARRIES, INC.,	:	
Respondent	:	Loring Mine

DECISION

Appearances: Bryan E. Nelson, Esq., Alder, Nelson & McKenna,
Kansas City, Kansas, for the Complainant;
Kenneth J. Reilly, Esq., Boddington & Brown,
Kansas City, Kansas, for the Respondent.

Before: Judge Koutras

Statement of the Case

This proceeding concerns a discrimination complaint filed by the complainant against the respondent pursuant to Section 105(c) of the Federal Mine Safety and Health Act of 1977. The complaint was filed pro se after the complainant was advised by MSHA that its investigation of his complaint disclosed no discrimination against him by the respondent. Subsequently, the complainant retained private counsel to represent him in this proceeding.

The basis for Mr. Henderson's discrimination complaint is the assertion that he was discharged by the respondent because of his refusal to work in an area which he believed to be hazardous, and his summoning of certain MSHA inspectors to the mine to investigate his safety complaint. Respondent denies any discrimination, and asserts that Mr. Henderson was discharged for insubordination and that his discharge was solely because of a legitimate business purpose and not because of any protected activity on Mr. Henderson's part.

The matter was heard at Kansas City, Missouri on December 6, 1983, and the parties have filed posthearing proposed findings and conclusions which I have considered in the course of this decision.

Issue

The critical issue presented in this case is whether Mr. Henderson's discharge was in fact prompted by any protected activity under section 105(c)(1) of the Act. Specifically, the crux of the case is whether the discharge was in retaliation for any safety complaints made to MSHA, or whether it was justified because of insubordination, as claimed by the respondent.

Applicable Statutory and Regulatory Provisions

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

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

3. Commission Rules, 29 CFR 2700.1, et seq.

Louis E. Henderson, Jr. testified that he was first employed by the respondent on September 2, 1981, and that his last day of employment was November 25, 1982. He confirmed that he is unemployed and that his last position was as a "powder man" (Tr. 6). He stated that when he was discharged by the respondent he was told that he was being fired "for negligence of equipment, which consisted of a low tire on my air compressor" (Tr. 6). He confirmed that he inspected the equipment which he used to perform his duties on a daily basis, and he testified as to his training as a powderman for the respondent (Tr. 9-11).

Mr. Henderson explained that the mine in question is a limestone mine, and he indicated that he began working in the respondent's open pit mine but later moved underground where a new mine was being started (Tr. 12). He indicated that "it had about two shots taken out of the fact before I started it," and he described the mine entry as a 13-foot wide entrance, and as one advanced into the mine the float-to-ceiling height was approximately 11-1/2 to 12 feet. In November 1982, the mine had six or eight headings (Tr. 14).

Mr. Henderson identified the general mine superintendent as Bill Feathers, and he confirmed that Mr. Feathers was the person who hired and fired him. He identified the quarry owner as Ron Stanley, and the mine mechanic as Steve Folsom. Mr. Henderson stated that it was his job to report any low tire on his equipment, and Mr. Folsom was the person who would take care of it (Tr. 17). Tires were inflated by Mr. Folsom by means of an air hose connected to the compressor used by Mr. Henderson (Tr. 18).

Mr. Henderson described the limestone mine seam as eight to ten inches thick, and that after every shot he indicated that one could see the seam sag and that it sometimes separated from the ceiling. He stated that after the driller drilled the shot holes it was his job to load the shot and to detonate it with an electrical charge after testing the circuit. The shot was actually detonated while he was located several pillars away, but during the loading process he would be under the seam (Tr. 18-19). After blasting, approximately 12 feet of material would be removed, and the seam extended out from the fact for a distance of 12 feet after each shot. He described the seam as follows (Tr. 20-21):

Q. And this limestone seam that you described, how would that appear after a blast?

A. Well, you could plainly see it--it was up there. You could plainly see a seam between the ceiling and the limestone seam.

Q. How far did it extend from the fact?

A. About 12 foot, about.

Q. In other words, it would be pretty much be the extent of the area you blasted out?

A. Oh, yes, yes. Then you would set off the next shot. That seam would fall and there would be another one. This was after every shot.

Q. Now, tell us what else you observed about that seam. Can you give us any idea of how much space there was between the ceiling and the top of the seam?

A. Well, it depends. Sometimes it would look like it was tight, flush up against the ceiling. Other times I could get up on my loader bucket and I could stick my hand back there. It had sagged down eight or ten inches. I could stick a crowbar in there and I couldn't pry it down, but you could see it moving up and down, back and forth, all over. It was pretty loose.

Mr. Henderson testified that he first became concerned with the roof seam sometime in October 1982. At that time,

after returning from lunch, he found slabs of rock lying around his truck. The rock did not damage his truck, and he stated that the seam was 12 feet outby the face, and that the last five feet fell on the truck. He estimated the width of the seam which fell at ten feet (Tr. 24).

Mr. Henderson stated that the second seam fall incident occurred sometime between November 12 to 15, 1982. He loaded one-half of the heading and pulled out. Thirty seconds later the roof seam fell. He explained that he had "pulled out" in order to prepare the second half of the heading for loading of dynamite. He had "pulled out" for a distance of some 10 yards (Tr. 25-26).

Mr. Henderson testified that when the first fall occurred on his truck he told only the driller about it. However, when the second fall occurred, he immediately advised quarry owner Ron Stanley about it, and Mr. Stanley advised him not to go under the roof seam if he believed it was dangerous, and Mr. Stanley also stated that "I'll guarantee you'll never hear me say anything if you don't go under it" (Tr. 27).

Mr. Henderson stated that after informing Mr. Stanley about the fall, Mr. Feathers came to look the area over. Mr. Henderson indicated that he simply wanted to show Mr. Feathers where the seam had fallen because he had previously asked the drillers and loader operators to try to pull down the seam with the loader bucket or to "tap it down" (Tr. 28).

Mr. Henderson described the seam which fell as the seam "that hangs up there after every shot." He confirmed that he did not inform Mr. Stanley or Mr. Feathers about the rock which fell on his truck. He explained that "I was scared of losing my job, didn't want to stir up trouble and everything." He then said that efforts would be made to take the loose material down with a drill or loader, and he confirmed that efforts were made to do this (Tr. 30-31). When asked whether he had inspected the rock seam which fell on his truck, he replied that "I looked." He also indicated that he had no equipment or crowbars to scale the material down, but that he was given a crowbar after the second fall occurred (Tr. 32).

Mr. Henderson testified that after Mr. Feathers came to the scene of the second fall, the following occurred (Tr. 33-35):

A. He said, "Are you scared to go under this half of this heading that you're loading?" and I said, "Yes, I am," and he was standing right underneath it. He said that you could get killed just as easy driving down the interstate as you could up here loading in something like this, which was crazy to me. I don't see --

JUDGE KOUTRAS (Interrupting): Just relate what he said now.

THE WITNESS: That's what he said.

JUDGE KOUTRAS: O.K.

BY MR. NELSON:

Q. Did you have any other conversation?

A. No. I asked him if he would get me some sort of a pry bar so I could try to test it, and he said, "Yes," and he brought me up a little crowbar. It's about three feet long.

* * * *

Q. What instructions, if any, did Mr. Feathers give you so far as working under the seam?

A. He told me to test it with the crowbar from then on. This was after the second incident.

Q. And what, if anything, were you to do after you tested it?

A. I don't know, really. He just told me to test --

JUDGE KOUTRAS (interrupting): No. Now, Mr. Henderson, after you tested it, if you found out that it was loose, what, in your experience, would you do, would you continue to work under it? What do you mean, you don't know?

THE WITNESS: You couldn't tell sometimes that it was loose.

* * * *

JUDGE KOUTRAS: Assuming that you took the pry bar and started beating on the thing or prying on it and it didn't move, what would you do?

THE WITNESS: Well, I would have to go under it, I guess.

JUDGE KOUTRAS: What do you mean, you would have to? You would load it, wouldn't you, you would continue loading the shot if it was tight?

THE WITNESS: Well, the one that fell, though, Your Honor, was tight, too, though.

JUDGE KOUTRAS: O.K., but I am trying to understand what you would do as a reasonable person if you found that you had to go into an area after testing it and found that the roof was sound. That's your job to go under there, isn't it?

THE WITNESS: Not if I feel it is a hazard.

Mr. Henderson stated that later in the day after the second fall he called MSHA Inspector Jim McGee at his Topeka office after the roof seam had fallen and after he had spoken to Mr. Stanley and Mr. Feathers, and that he did so because "they weren't scaling it down to my satisfaction, to where I thought it was safe" (Tr. 37). Mr. Henderson then loaded the second half of the shot, and after he and Mr. Feathers tested it and found it "to be O.K.," he shot it down and then went home (Tr. 38).

Mr. Henderson stated that he returned to the mine the next day but refused to go under another heading because upon observation he believed that "it hadn't been pecked or tried to scale down at all." He confirmed that he tried to scale the roof material down while up in the bucket and that he "pecked around a bit." He indicated that it "seemed tight," and that he tested it with the bucket and pry bar, but that he still refused to go under it because he was afraid that it might come down again. He advised Mr. Feathers that he did not want to go under the roof, and he stated that Mr. Feathers "got irate with me, got mad," but that he did not instruct him to go under the roof (Tr. 41). He then called Mr. McGee later in the day or that evening and advised him about his refusal to go under the roof seam (Tr. 42).

Mr. Henderson stated that when he called Inspector McGee he asked him to send an inspector to the mine to "look at the situation." Mr. McGee dispatched Inspectors Caldwell and Williams to the mine on a Friday morning, and they looked at the situation which concerned him, as well as "the mine as a whole." Mr. Henderson stated that he did not go with the MSHA inspectors, and that the second heading which concerned him had not been shot down or loaded out and that it was "still hanging." Mr. Henderson was then summoned to the mine office with Mr. Stanley and the two inspectors, and he indicated that the inspectors told him that his complaint was justified, and that "there is a potential hazard there" (Tr. 44).

In further explanation of the events after the inspectors came to the mine, Mr. Henderson testified as follows (Tr. 46-48):

Q. Did you look at it with the inspectors?

A. No; I wasn't up there with them when they looked at it.

Q. O.K. When you refused to go under there, how far did that extend or stand out from the face?

A. Well, this particular heading, I believe, had only had one shot taken out of it, so there was about 10 feet of overhanging rock hanging there of the seam.

Q. And is it your testimony that 10 feet was overhanging when you refused to go under it?

A. Yes, I would say about that. I believe there was only one shot out of it.

Q. Now, what happened after the conversation you had with the inspectors? You have already told us that they said yes, there was a possible hazard.

A. Well, they told Mr. Stanley and me that I was responsible along with the foreman to make a safe working place. I said, "Yes, that is fine," and he told Mr. Stanley that I was protected by the Justice Department, and all this stuff.

Q. Did they make any recommendations as to what should be done?

A. O.K. They said we should get sort of a mechanical scaler, maybe build some sort of a canopy over the bucket that I was working out of--my lift--and there was a couple other suggestions, but it was along those lines.

Q. Did they make any suggestions as to whether or not it should be scaled each time blasting was done?

A. No, I don't believe so.

Q. Was that the first time--when was the first time that you were informed that it was your responsibility to check that seam?

A. When they came, when the mine inspectors came down.

Q. Nobody told you that before that?

A. No. They showed me right out of the rule book.

Q. And if you found or considered it to be a problem from your inspection, what was your understanding then of what was to happen?

A. Well, I was to get with the superintendent or the foreman, you know, whoever the supervisor was, to try to work out a solution to the problem, try to scale it down somehow.

Q. Another possible alternative was to put some kind of canopy over the truck?

A. Right, among other things.

Q. What other things?

A. Like a mechanical scaler or something.

Q. You didn't have a mechanical scaler in there, apparently?

A. No, not at all.

Q. What devices did you have available to scale it?

A. Just a crowbar.

Q. What about the company as a whole, what devices did they have to scale it?

A. Well, they tried to use a loader bucket sometimes to pull it down with, tried to run a drill steel in between the seam and ceiling to peck down some of it, but that's about it. That's all they had. They weren't really scaling machines or anything.

Mr. Henderson asserted that approximately a week after he called the MSHA inspector, he had a conversation with Mr. Feathers, and Mr. Feathers told him he "was making waves and didn't have to call the MSHA inspectors down" (Tr. 48). Mr. Henderson stated that he had the conversation with Mr. Feathers after showing him a piece of rock which had fallen from the roof. He explained the background and the conversation as follows:

JUDGE KOUTRAS: You mean you walked into some place and found a rock that had fallen, and you picked it up?

THE WITNESS: What I was trying to do, Your Honor, was just show him how thick the seam was, Your Honor.

JUDGE KOUTRAS: But that wasn't the rock that fell the time that you pulled it after loading, was it?

THE WITNESS: No.

JUDGE KOUTRAS: This was just a rock some place?

THE WITNESS: No, it was off the ceiling.

JUDGE KOUTRAS: Off the ceiling?

THE WITNESS: Right, it was off the ceiling.

JUDGE KOUTRAS: You just wanted to show him a representative sample if a rock fell?

THE WITNESS: It was a big rock.

JUDGE KOUTRAS: I can take judicial notice that if a big rock falls on you, it is liable to kill you. Is that what you were trying to impress him?

THE WITNESS: I was trying to tell him what would happen if it fell.

Q. This was a piece of seam?

A. A piece of the seam, right.

Q. O.K. Now, tell us about the conversation.

A. Well, I informed him I had called the MSHA people in Topeka, and he got pretty irate about that. He said, "You didn't have to call them people." He said, "I don't want you making waves around here," and that sort of thing. That's all I can remember specifically.

Q. How long did that conversation take?

A. How long did it last?

Q. Yes.

A. Less than five minutes.

Q. O.K., and what did you do after that?

A. I packed up my stuff, talked to Mr. Stanley.

Q. Did you tell Mr. Stanley you had called?

A. Yes, I informed him that I had called, too.

Q. What did he say?

A. He didn't say much. I can't remember what he said.

Mr. Henderson stated that after his conversation with Mr. Feathers, he began having "problems," and he described them as follows (Tr. 53):

A. Well, just little subtle hints, you know, and stuff just like I said, I made waves and things like that.

MR. REILLY: I am going to object--

JUDGE KOUTRAS (interrupting): Mr. Henderson, what I am interested in is was all this coming from Mr. Feathers.

THE WITNESS: Yes.

JUDGE KOUTRAS: When you say subtle, what? Just give me a for instance. You come to work in the morning and what would happen?

THE WITNESS: Oh, just--I don't know, just like I told you, he said I was making waves, causing trouble.

BY MR. NELSON:

Q. How many times did he say that?

A. Twice, I believe. This is all within a week--

Q. (Interrupting) You have got to be specific about these things that were said.

JUDGE KOUTRAS: It is not necessary for him to be that specific, counsel. His testimony is that subsequent to the time he called the inspectors, Mr. Feathers was giving him a "hard time" by reminding him on at least two occasions that he was a troublemaker, making waves.

Is that the essence of it?

THE WITNESS: Yes.

Mr. Henderson stated that he was discharged approximately two weeks after the inspectors came to the mine, and that he was told that he was being fired for "negligence of equipment," and he described the incident which precipitated his discharge as follows (Tr. 54-57):

A. O.K. I got to work in the morning at 7:30, looked over my equipment, noticed I had a low tire on my air compressor--

Q. (Interrupting) Now, where was your equipment?

A. It was parked down in the mine.

Q. How did you inspect it, with your light and all that?

A. Yes, with my head lamp.

Q. When you find a low tire, what do you do?

A. I told Steve Folsom, the mechanic, about it, that I needed an air hose.

Q. Now, what did you have to do to tell Steve about it?

A. He was right there--he just happened to be there, starting up the dump trucks and stuff. They park them down in the mine when it is cold.

Q. How low was the tire?

A. Oh, I would say it was maybe half low, not low enough to where it would really hurt anything. If you would have run it a long distance, it might of.

Q. So what did you do?

A. I told Steve Folsom that I needed an air hose.

Q. What did he tell you?

A. He said he was busy, that he was starting up the dump trucks and stuff, getting them warmed up. I said, "O.K., I'm going to limp on down here to the powder house, I'm going to start making my shots up, go down there real slow. When you get time, come down there and we will air it up." He said, "O.K. Fine."

Q. O.K., now, why did you go ahead and start work when you had a low tire?

A. Well, because it is a pretty pressing--see, I was the only powderman at the time. I was keeping the whole place running. To keep them in rock, you have to get started early in the morning and get right to it or you will fall way behind and be there until midnight.

Q. You were there a long time, then?

A. Oh, yes, every day.

Q. Now, is that the reason that you went ahead and started work?

A. Yes.

Q. Were you concerned that you might cause damage to the tire?

A. No, not at all.

Q. Why not?

A. Because I was watching it, making sure that I wasn't going to hurt anything.

Q. O.K., and then what took place after that, you went up to the powder house?

A. I was down at the powder house making up my shots, and here come Mr. Feathers, pulled up-- I didn't even know what was going on--pulled up, jumped out of the truck, started cussing at me--I'm not going to repeat what he said--but started cussing and told me, you know, get out, said I was fired, you know. He said that is what he was going to put on the report is negligence of equipment, and I said, "Why?" and he says, "Because you didn't air that tire up," and I said, "Well, you know, that's not much to fire me on, you know," and he said, "Get out, get out of my sight before I do something I'm sorry for." He did assault me, but there was no witnesses.

Q. What do you mean, he assaulted you?

A. Grabbed me, threatened to hit me.

Mr. Henderson testified that he was aware of other incidents of equipment misuse but that no action was taken against the employee. He cited an incident involving a pick-up truck which was driving too fast colliding with a dump truck, but that nothing was done about it. He also stated that he has observed "trucks hot-rodded around," but he was not aware of any other employees being fired or disciplined over these incidents (Tr. 58). He confirmed that employees had been "talked to" by supervisors, and that he had been previously warned by Mr. Feathers about "driving too fast" sometime in late September or early October 1982. He denied that any other disciplinary action had ever been taken against him for misusing equipment (Tr. 59). He believed he was fired because he called the MSHA inspectors and because other employees had not been disciplined for "things a lot worse," and he was fired over a low tire on his compressor (Tr. 60).

On cross-examination, Mr. Henderson identified exhibit R-1 as his handwritten complaint filed in this matter (Tr. 62). He confirmed that his first experience with a rock fall occurred in October 1982 when he began to experience some rock ledge formation that continued to cling to the ceiling after blasting. He confirmed that he did not inform Mr. Feathers

or Mr. Stanley about this incident and they did not know about it. After the second incident on or about November 18, 1982, he told Mr. Stanley about it. Mr. Stanley told him in no uncertain terms that he was not to go under any roof which he considered to be in an unsafe condition. Mr. Stanley also advised him that at no time would he ever be in trouble for not going under any unsafe condition (Tr. 65).

In response to further questions, Mr. Henderson testified as follows (Tr. 66-70:

Q. So the first time you ever complained to any official at the quarry, either your superintendent or his superior, about the problem, the responses were, "Don't go under anything that you consider to be an unsafe condition, and I'll come up right away and take a look at it with you?"

A. No, that's what Mr. Stanley said. Mr. Feathers didn't say anything.

Q. Mr. Feathers said, "I'll be right up and look at it," didn't he?

A. No, he didn't say that.

Q. He came right up and looked at it, didn't he?

A. It was later, about two hours later, that afternoon. He said, "Let's go take a look at it," and that's what we done.

Q. And at that time, as far as you were concerned, the condition was not unsafe, was it?

A. Yes, I was pretty scared then.

Q. I didn't ask you whether you were scared. I asked you if it was an unsafe condition.

A. Out there then, after the second time? Yes, I would consider it.

Q. Did you take a bar and try to pry it down to see if any rock came down?

A. Yes.

Q. Did any rock come down?

A. No.

Q. Did the ledge wiggle in any way?

A. Wiggled a little.

Q. I think you previously testified it appeared tight to you?

A. It appeared tight, but the edge of it wiggled a little bit; but the seam as a whole was tight, seemed tight.

Q. And at that time, you were handed a bar or given a bar by Mr. Feathers so that you could, and were instructed to test it any any time you felt it needed to be tested?

A. Right.

Q. And did you do that again?

A. Did I test before I went under these headings again?

Q. Right.

A. Yes.

Q. You only went under the heading one more time, didn't you?

A. Well, yes, O.K., yes, the one where there was one shot out, yes, one shot out. Then I refused.

Q. The next day you went back to Mr. Feathers and said, "I'm not going to go back under that thing again?"

A. Right.

Q. In fact, Mr. Feathers said, "Did you test it with your bar," didn't he?

A. I can't remember.

Q. And you said, "No," didn't you?

A. I can't remember whether he asked me or not.

Q. And after you said no, then he got angry with you for not having tested it as he had instructed you the day before, didn't he?

A. No.

* * * *

Q. The day you refused to go under it because--right, the next day.

A. Right, yes, I had a conversation with him. That's when he got mad.

Q. And he got mad because you hadn't tested the ceiling with the bar, didn't he?

A. I can't remember that. If that is what it was over or not, I can't say.

Q. Mr. Feathers, when you told him that you called MSHA, said, "Why did you call them, why didn't you come to me first so we could correct any situation that you found to be unsafe," didn't he?

A. I can't remember exactly what he said now.

Q. Isn't that approximately what he said to you?

A. I can't say for sure. I'll say maybe that's what he said, I don't know. It's hard to remember conversations way over a year ago.

Q. When Mr. Feathers had the conversation with you about--when he was talking with you about how you might get killed on the highway, he was trying to calm you down, wasn't he?

A. No.

Q. You were very excited, weren't you?

A. No.

Q. He wasn't trying to calm you down?

A. No.

Q. He didn't state--

A. (Interrupting) He was trying to rationalize me going under that ceiling again, and I wasn't going to do it.

Q. And you didn't view that as an effort to calm you down?

A. No, not at all.

Q. Were you upset?

A. Yes, but I wasn't hysterical or anything like that. I was concerned, very concerned.

Q. Do you have a temper, Mr. Henderson?

A. When I am pushed, just like anybody else, I guess.

Mr. Henderson stated that he could not recall the conversations with Mr. Feathers at the time he advised him that he would not go under the roof, and he stated that he was not sure whether Mr. Feathers tested the roof and that nothing came down (Tr. 71). He conceded that all of the events surrounding his complaining spanned a period of eight days from November 18 to November 26, 1982 (Tr. 71).

Mr. Henderson stated that he could not remember running the compressor on a flat tire in the past. While he indicated that he would not disagree with any testimony that he did, "I would just say I can't remember" (Tr. 73-74). With regard to his encounter with Mr. Feathers over the compressor tire, he stated as follows (Tr. 74-76):

Q. What was it you said to Mr. Feathers that made him so irritated after he called --

A. (Interrupting) After he called me a little f...er, I called him a mother f...er, and that is when he grabbed me and threatened to hit me, and he said I was fired before that.

Q. He said you were fired after you said, "F... you, you old f...er," didn't he?

A. He grabbed me, he tried to grab me; and that is when I got mad. He reached over the tongue of the air compressor and tried to grab me. He assaulted me. He actually bodily touched me, and that is when I got mad, and I was trying to defend myself any way I could. I didn't want to get in a hassle down there in the mine. I had dynamite strung all over the place trying to make up my shots, and that's when he came --

* * *

Q. After you said what you said to Mr. Feathers, he said, "You are fired. Get out of here?"

A. Right.

Q. And then you went down to the shop, didn't you?

A. After he threatened to grab me, after he grabbed me, I said that.

Q. Then you went down to the shop, didn't you?

A. Right.

And, at (Tr. 79-80):

Q. So Mr. Stanley said, "Well, calm down now, calm down. Let's see if we can't get this worked out," didn't he?

A. Right.

Q. He said, "I hate to see people get fired," didn't he?

A. That's right, that's what Mr. Stanley said, something to that effect.

Q. Something to that effect. He said, "You sit down in this room, and I will go get Bill and we will see if we can straighten this out," didn't he?

A. Yes.

Q. So at some point, you and Mr. Stanley and Mr. Feathers were all sitting in the car, weren't you?

A. Yes; this was over at the office.

Q. And at that point, Mr. Stanley was trying to resolve the whole situation so you weren't fired and you were calmed down and Bill was calmed down, didn't he?

A. What Mr. Stanley said was that he had to back up his superintendent, his foreman, whatever decisions he made. That's about all he said.

Q. At one point while you were sitting in that car, didn't you actually go beserk?

A. No, I didn't.

Q. You're sure you didn't?

A. No.

Q. Didn't you become almost incoherent?

A. No, not at all.

Q. And at that point, didn't Mr. Stanley then fire you?

A. No.

Q. Didn't Mr. Stanley then say, "You're gone. I can't even talk to you?"

A. No.

With regard to his allegations of harassment by Mr. Feathers, Mr. Henderson testified as follows (Tr. 84-88):

Q. At no time did anyone at the quarry tell you that you had to work under what you considered to be an unsafe condition, did they?

A. They didn't directly say that, no.

Q. Now, you said that for the week-long period in between when you called MSHA and when you got fired, Mr. Feathers impliedly did this and suggestedly did that. Do you recall any single instance where Mr. Feathers said anything to you?

A. Well, it's just the main instance that I remember, is when I told him that I had called MSHA, you know, and I told him no, that I wasn't trying to cause any trouble, and that is when he got mad.

Q. That's the only time you can recall Mr. Feathers saying --

A. (Interrupting) That's the only time I can recall any out and out harassment or anything like that.

Q. As a matter of fact, your complaint doesn't even mention any further communication with Mr. Feathers throughout the period of time from the day that you had this conversation with him until the day you were fired, does it?

A. Well, I was in close contact with him all the time. He was the superintendent, and he come up to check on you, see how you were doing, things like that.

JUDGE KOUTRAS: No. His question was from the time you fired -- I mean from the time you called MSHA until the time you were fired, your complaint doesn't say anything about the needling, the purported needling, that Mr. Feathers subjected you to.

THE WITNESS: No, there's no real -- I couldn't really peg anything down to it.

BY MR. REILLY:

Q. There wasn't anything he said to you that was actually directed to any of the events that occurred with MSHA?

A. Oh, no, not directly, no.

Q. He never criticized you or chastized you in any way, did he?

A. Except for that one time -- well, twice.

Q. You have already indicated except for the time when you just told him that you called MSHA, right?

A. Right; and he got mad, and he got mad the time I wouldn't go back under that second half of the ceiling that fell.

Q. Other than that, there was never any comment by anybody at the quarry to you about having called MSHA, was there?

A. Not directly, no.

Q. Not even indirectly, was there?

A. That's debatable.

JUDGE KOUTRAS: Was there or wasn't there, Mr. Henderson?

THE WITNESS: I would say yes, some things were.

BY MR. REILLY:

Q. What?

A. Just by increased workload, things like that, you know.

Q. What was your increased workload?

A. Working overtime, you know, and things like that.

Q. What was the overtime you worked, Mr. Henderson?

A. Oh, I don't know. I was putting anywhere from 55 to 60 hours a week in.

Q. We are only talking about a one-week period here, Mr. Henderson; how many extra hours did the quarry make you work because you called MSHA?

A. Well, I can't prove that.

JUDGE KOUTRAS: Hold it, counsel. Do you like to work overtime?

THE WITNESS: When I can, yes, sometimes.

JUDGE KOUTRAS: Did you ever refuse to work overtime?

THE WITNESS: No, I didn't.

JUDGE KOUTRAS: Did they ever order you to work overtime?

THE WITNESS: Sometimes, yes, I had to.

JUDGE KOUTRAS: I mean during this week.

THE WITNESS: I had to.

JUDGE KOUTRAS: I get the impression you're trying to convince me they punished you by making you work overtime, is that a fact?

THE WITNESS: I had to. I had to work overtime because I was the only powder man, and I had to get the rock down on the floor. I couldn't say no. They would say, "Hit the road. We will get somebody else."

JUDGE KOUTRAS: You got paid for it, didn't you?

THE WITNESS: Right.

JUDGE KOUTRAS: Are you trying to convince me that this operator, because of your complaint to the two inspectors, punished you by making you work overtime?

THE WITNESS: Well, I can't say that that was a punishment, no. I think some of it was.

JUDGE KOUTRAS: Why was some of it?

THE WITNESS: I don't know.

JUDGE KOUTRAS: What leads you to conclude that part of the requirement you work overtime was in punishment?

THE WITNESS: Well, it was not only overtime, it was subtle things that were going on.

JUDGE KOUTRAS: All right, Mr. Reilly.

BY MR. REILLY:

Q. What were the other subtle things, Mr. Henderson, can you name one?

A. No.

In response to question from the bench concerning his safety concerns, Mr. Henderson testified as follows (Tr. 95-100):

JUDGE KOUTRAS: All right, Mr. Henderson. Let me just ask you a couple of questions now. At the time when that half a header fell as you were pulling back, it's my understanding you went back and checked that area with a bar and found that maybe one of the corners may have been loose but it was all tight, it was tight, correct?

THE WITNESS: After one half of it fell?

JUDGE KOUTRAS: Right.

THE WITNESS: Yes. We went up in the bucket, I pried on it a little bit. It would wiggle a little bit but it seemed tight.

JUDGE KOUTRAS: But that is not the area where you refused to go under, is that right?

THE WITNESS: No.

JUDGE KOUTRAS: Did you actually go back under the second half of this header after you went up and tested it, the half of the header that you were working on after you pulled out, 30 seconds after you pulled out approximately 10 yards, it fell?

THE WITNESS: Right.

JUDGE KOUTRAS: And that caused you some problem, right?

THE WITNESS: Right.

JUDGE KOUTRAS: You reported that?

THE WITNESS: Right.

JUDGE KOUTRAS: Then Mr. Feathers gave you a pry bar?

THE WITNESS: Right.

JUDGE KOUTRAS: And you went back, and he came back up there a couple hours later and observed it, is that correct?

THE WITNESS: Yes. He was with me.

JUDGE KOUTRAS: He was with you. You tested it with a pry bar?

THE WITNESS: I went up with it, stuck it back up in there in that corner, and it wouldn't budge.

JUDGE KOUTRAS: Now, at that point in time, did you make a decision that that header that was remaining that you went up and tested was unsafe?

THE WITNESS: Well, I was taking a chance, really.

JUDGE KOUTRAS: Forget that. Answer my question. If you tested it with a bar and found that it was sound, then what else, what other alternative did you have?

THE WITNESS: Well, I am not going to say it was sound.

JUDGE KOUTRAS: Did you test it with a pry bar?

THE WITNESS: Yes.

JUDGE KOUTRAS: Did you determine after testing that it was not safe?

THE WITNESS: Yes and no. I decided I wanted to finish the job and get out from underneath it, O.K.?

JUDGE KOUTRAS: Why didn't you decide that it was unsafe and tell Mr. Feathers that you were not going to finish the second half of the shot?

THE WITNESS: I don't know. I felt under pressure at the time.

JUDGE KOUTRAS: You felt under pressure?

THE WITNESS: Right.

JUDGE KOUTRAS: And you went ahead and shot it down?

THE WITNESS: I already had half of it loaded. I felt I would go ahead. I was more or less taking a chance.

JUDGE KOUTRAS: You were taking a chance even though your pry bar test indicated that it was sound?

THE WITNESS: Right.

JUDGE KOUTRAS: Now, the next day is when you called the MSHA people?

THE WITNESS: Right.

JUDGE KOUTRAS: All right, but the next day when you reported to work, you went to another location in the mine, correct?

THE WITNESS: Yes.

JUDGE KOUTRAS: And you found a ceiling?

THE WITNESS: Yes.

JUDGE KOUTRAS: Did you test the ceiling?

THE WITNESS: Yes.

JUDGE KOUTRAS: With what?

THE WITNESS: Well, I went up and pecked it a little bit.

JUDGE KOUTRAS: Pecked it with what?

THE WITNESS: With the crowbar.

JUDGE KOUTRAS: With the crowbar that you wtil had from the day before?

THE WITNESS: I believe it was the same one.

JUDGE KOUTRAS: All right, and you pecked around, and what did you find?

THE WITNESS: It seemed tight.

JUDGE KOUTRAS: It seemed tight?

THE WITNESS: Right.

JUDGE KOUTRAS: Why didn't you go ahead and load that shot?

THE WITNESS: Well, because the other one seemed tight, too, and you can't tell when these things are going to fall.

JUDGE KOUTRAS: It could fall today, it could fall tomorrow, right?

THE WITNESS: Right.

JUDGE KOUTRAS: And what means do you have for determining whether the area is safe before you go in there?

THE WITNESS: You don't.

JUDGE KOUTRAS: You just told me. What's the normal procedure for testing for soundness of a ceiling or a roof in that situation?

THE WITNESS: The only way I know is to test it with a bar.

JUDGE KOUTRAS: All right.

THE WITNESS: And the tension on that ceiling, you could not pry it down with a bar. I never had been able to get anything down with a bar. The fact is you can't -- they can wiggle it around with a loader bucket. You can see it working up and down, and sometimes it won't fall, sometimes it will.

JUDGE KOUTRAS: Are you suggesting that a roof area that's tested with a bar and appears to be sound should be taken down anyway?

THE WITNESS: Yes, oh, yes.

JUDGE KOUTRAS: To make it 100 per cent safe?

THE WITNESS: Yes, absolutely.

JUDGE KOUTRAS: Is that the way it's normally done?

THE WITNESS: It should be.

JUDGE KOUTRAS: Why do you take something down if you sound it and find it is sound?

THE WITNESS: Who wants to mess around with somebody's life?

JUDGE KOUTRAS: Who wants to mess around underground in a mine to begin with? I'm not trying to be facetious, but I'm trying to understand it here. Were there any citations issued in this case to the mine operator for failing to sound the roof?

THE WITNESS: I don't believe so, no.

Mr. Henderson testified that prior to November 1982, he had loaded probably 50 to 100 shots, but that he did not always test the ceiling "because I didn't always have time. It takes time and I was busy. It's a heck of a schedule I was on" (Tr. 101). Mr. Henderson indicated that the responsibility for checking the ceiling is his as well as the superintendent's (Tr. 102). When asked what he would do if he checked the roof and found that it was not safe, he replied (Tr. 103-105):

JUDGE KOUTRAS: What would you do if you found it was not sound?

THE WITNESS: Sometimes, regrettably. I would go under and do it anyway.

JUDGE KOUTRAS: You would take the chance anyway?

THE WITNESS: Take a chance.

JUDGE KOUTRAS: Whose fault is that?

THE WITNESS: That would be mine. That is the reason why I complained about this, is because if I would have gotten crushed under there, it would have been my fault anyway.

JUDGE KOUTRAS: You wouldn't be here to complain, would you?

THE WITNESS: Yes.

JUDGE KOUTRAS: Isn't that true -- what I'm trying to understand is to what degree do you believe that the mine operator has to go to make an area absolutely fail-safe under all conditions.

THE WITNESS: He should buy a scaling machine and scale it down, make it safe.

JUDGE KOUTRAS: How about building a net or putting a canopy?

THE WITNESS: That wouldn't do any good with 10 tons of rock. It would smash it flat.

JUDGE KOUTRAS: Is there anything in the regulations -- now, you mentioned the federal standards. What is your understanding of what these federal laws require as far as testing and scaling?

THE WITNESS: All I know is what the mine inspectors showed me when they came out that day.

JUDGE KOUTRAS: What did they show you?

THE WITNESS: They showed me a section in there -- I can't remember the section -- like I said, it was my responsibility, along with the foreman or the superintendent, to make sure it was a safe working place.

JUDGE KOUTRAS: All right. Let's assume the section foreman and the mine superintendent determined that it was a safe working place?

THE WITNESS: Yes; but they never did, though. That's the thing, they rarely ever checked on it. They didn't even care.

JUDGE KOUTRAS: How do you know that on this day when this roof fell they didn't check it?

THE WITNESS: Well, I was working up there all day long, and I didn't see anybody go under the header.

JUDGE KOUTRAS: How about the second fall where you sounded with the bar and found it sound?

THE WITNESS: You are talking about the second half of the room that fell?

JUDGE KOUTRAS: Right.

THE WITNESS: I don't know if it was tested or not.

JUDGE KOUTRAS: And then the next day, you found the ceiling that you also said was sound, but you didn't want to go under it?

THE WITNESS: I thought it was. I wouldn't want to take a chance the next day.

JUDGE KOUTRAS: And what did you want the mine operator to do?

THE WITNESS: Scale it down.

When asked to clarify his prior statement in his complaint to MSHA that Mr. Feathers attempted to scale down the ceiling, Mr. Henderson stated as follows (Tr. 111-112):

BY JUDGE KOUTRAS:

Q. Part of your statement, you said that after you refused to go under the ceiling and after you had this conversation -- or at least wanted Mr. Feathers to look at it -- you said something to the effect in your statement -- and I am quoting: "So the next day he did make an attempt to scale the ceiling, and I told him I appreciated it."

Can you elaborate on that? You seem to indicate in your original statement that Mr. Feathers at some point in time made an attempt to scale the ceiling and you had told him you appreciated it.

That part there, what's that all about, was this when you went back to examine the ceiling, and is that the time that he came up to look at the second half of the header, or precisely what did you have in mind with that?

A. I don't remember him trying to scale it down, I really don't.

Q. Is that your statement there?

A. Yes. This has been so long ago, all this --

Q. (Interrupting) Mr. Henderson, now wait a minute.

A. I'm not denying he did, O.K.? I am trying to remember all this stuff as it comes up, but it is hard to remember, it really is. If I made it there, then he probably did try to scale it down.

* * * *

Q. You may not be able to answer this, but which ceiling were you referring to?

A. I guess it was the one that I refused to go under. I told you all it only had one shot taken out of it.

Steven H. Folsom, testified that he is employed by the respondent as a maintenance mechanic. He testified as to the incident concerning the low air pressure on Mr. Henderson's vehicle, and he confirmed that the tire looked flat and that he advised Mr. Henderson that he would look at it. However, before he could take care of the problem, Mr. Henderson left the area with the truck, and he observed him later in the shift in a conversation with Mr. Feathers about the tire, but did not hear what transpired (Tr. 113-117).

Mr. Folsom had no personal knowledge of any other employee actually being fired because of "negligence of equipment," although he was aware of the fact that other employees had abused equipment which required him to repair it (Tr. 117). He had no personal knowledge that the tire which Mr. Henderson drove on actually caused any damage (Tr. 118).

On cross-examination, Mr. Folsom confirmed that a tire on a compressor truck in the past had been ruined by someone driving it with low air pressure, but could not state whether

Mr. Henderson was involved in that incident. He did confirm, however, that the rim had to be straightened and that a new tire had to be installed to replace the damaged one (Tr. 119). He confirmed that he spoke with Mr. Henderson after he observed him speaking with Mr. Feathers, and that Mr. Henderson told him that he had been fired. Mr. Henderson was upset, but he had no other detailed conversation with him over the incident (Tr. 119). He confirmed that he had previously put air in compressor tires in the shop, and that he had previously performed this service for Mr. Henderson in the past (Tr. 121).

Terry Acock, testified that at the time Mr. Henderson was discharged he was employed at the quarry as a driller. He testified as to an accident which he (Acock) had with a truck which he had been driving when it collided with another vehicle, and that Mr. Feathers accused him and the other man of driving too fast. He was not fired over the incident, and knows of no one else who was fired for not taking care of equipment or for damaging equipment. However, he confirmed that he was discharged by the respondent, but that the reason for the discharge was not related to the maintenance of equipment (Tr. 121-123).

On cross-examination, Mr. Acock confirmed that he did not intentionally run into the truck in question and that it was an "accident." He did not curse Mr. Feathers, nor did he argue with him (Tr. 124).

William E. Feathers, quarry superintendent, testified as to his background and experience. He testified that Mr. Henderson said nothing to him about any rock fall which he may have experienced in October 1982, and he explained the procedures followed at the mine to scale down any rock which may remain after a shot (Tr. 128-134).

Mr. Feathers stated that sometime between November 16 and 20, 1982, Mr. Henderson came to him on a Thursday and showed him a rock which he threw at his feet and stated "You see this rock? That could kill a person." Mr. Feathers asked him to explain, and Mr. Henderson told him that the rock had fallen from a ceiling where he was working, and that he was not going back into the mine to work (Tr. 135). Mr. Henderson then explained to him that he called MSHA, and when Mr. Feathers inquired as to why he had not first brought the matter to his attention or to the attention of Mr. Stanley, Mr. Henderson did not reply (Tr. 136).

Mr. Feathers stated that he never asked Mr. Henderson "to go into any condition that he felt was unsafe," and he indicated that at any time an employee believes a condition is unsafe

they would come to him because "that's my job" (Tr. 137). Mr. Feathers stated that he and Mr. Stanley examined the area that Mr. Henderson complained about, and they found that "a chunk" of the ceiling had fallen out for a distance of some five feet, but that the rest of the ceiling was tight. Mr. Feathers checked the ceiling with a bar, which is the standard method for doing so, and he determined that it was safe (Tr. 138). Since it was the end of the work shift, there was no question raised at that time about Mr. Henderson going back to work, and the conversation ended (Tr. 138). The next day was a Friday, and since Mr. Feathers was not at work, he did not see Mr. Henderson again until the following Tuesday (Tr. 139).

Mr. Feathers stated that when he next spoke with Mr. Henderson on the Tuesday following the rock fall incident, Mr. Stanley had given him a seven-foot bar to use in scaling the ceiling and that Mr. Henderson had it in his truck. After examining the ceiling that Tuesday, Mr. Feathers found that it was "tight" and found nothing that he believed to be unsafe (Tr. 141). Later that week, Mr. Henderson told him that he had refused to "load a room," and when asked whether he had checked the ceiling, Mr. Henderson replied "no," and Mr. Feathers commented "What do you think we bought that bar for you, just to haul around and look at? We bought it for you to use." Mr. Feathers stated that he then went back and checked the room that Mr. Henderson was complaining about, but it was not the same room that he had complained about on the previous Thursday. He found that it was "tight" and found nothing unsafe (Tr. 141). Mr. Feathers explained further as follows (Tr. 142-143):

JUDGE KOUTRAS: Excuse me just a second now for interrupting your narrative, but was that the same ceiling that he had refused to go under?

THE WITNESS: No, no, no, sir.

JUDGE KOUTRAS: This was another location?

THE WITNESS: Yes. This was the whole mine in general that he told me to go up, and there was one particular area over there in the east wing that he wanted me to try and knock down, and so I went over and tried scaling it; but while I was up there, I went around and checked all of them and tried knocking down all the loose rock that I possibly could, and Louis came -- I thought it was a good gesture -- he came; and after he seen me doing it, he said, "I appreciate you doing it," and I said, "That is what we want to do," to try to make the place safe to work.

BY MR. REILLY:

Q. Was that the complete conversation?

A. That's the last conversation I had with Louis about the ceiling.

Q. That's the one he is referring to here in his complaint where he was you did make an attempt to scale the ceiling and he told you he appreciated it.

A. I imagine.

Q. That's the one he is referring to?

A. Yes.

Mr. Feathers testified as to the incident which occurred on the morning of November 26, with respect to Mr. Henderson's driving his truck with the air in the compressor truck tire low. He indicated that this was not the first time this had happened, and that on a prior occasion Mr. Henderson had ruined a tire by driving on it without air, and that he (Feathers) had warned him about this practice (Tr. 144-145). Mr. Feathers stated that when he discussed the matter with Mr. Henderson on November 26, Mr. Henderson swore at him, then Mr. Feathers told him that he was fired. Mr. Feathers conceded that he was angry and that he told Mr. Henderson "you're fired because you are going to cause me to do something we both might be sorry of" (Tr. 145). Mr. Feathers denied grabbing, touching, or attempting to swing at Mr. Henderson, and he stated that he fired Mr. Henderson because he swore at him. After he told him that he was fired, Mr. Henderson left the area (Tr. 146).

Mr. Feathers stated that after firing Mr. Henderson, he encountered Mr. Stanley at the entrance of the mine and informed him what he had done. Mr. Stanley informed him that he wanted "to talk the matter over," and they went to the mine office to speak with Mr. Henderson. The three of them then sat in a car outside the office to discuss the matter further, and Mr. Stanley was attempting to reconcile the matter. However, Mr. Henderson began criticizing Mr. Feathers' work and abilities as a supervisor. At that point, Mr. Feathers commented that "there was no way" he and Mr. Henderson could continue to work together and still have the cooperation needed to do the work (Tr. 148), and he described what happened next as follows (Tr. 149-150):

Q. O.K. Did Ron say something to Mr. Henderson at that point?

A. Well, Ron's gesture was that he was trying to impress upon him that if there would be some kind of more or less reconciliation between the two of us, he could continue to work there; and I knew that this was Ron's intentions and his own personal feelings that we could reconcile this difference, and I wanted to hear his opinion is because the reason why I wasn't saying anything. I knew Louis is -- well, it may be said maybe nobody really knows Louis -- I thought that I did and I had a working relationship between him, and he did -- and as far as powdering, he was a good powderman. I never had to get onto him for speed or anything, and we did maintain, I thought, a fairly decent working relationship, and I wasn't in no way looking forward to firing him and going out and finding a new powderman and bringing him in and spending 40 hours retraining somebody to take his job. That's nothing to look forward to because there is --

Q. (Interrupting) Did Mr. Henderson become enraged in the car?

A. Yes.

Q. And did Ron say, "That's it. You're out?"

A. Yes.

Mr. Feathers testified as to the incident concerning a truck accident involving Mr. Acock, and he confirmed that Mr. Acock was not fired, did not swear at him when he discussed the incident with him, and he confirmed that Mr. Acock did not intentionally wreck the truck, and in fact, apologized over the incident (Tr. 152).

On cross-examination, Mr. Feathers confirmed that during the cleanup procedures after a shot is fired, the loader operator is protected by an overhead canopy on his vehicle when he goes in to scale the area, and that his risk would be less than that of a powderman (Tr. 156). When asked whether he would have preferred that Mr. Henderson sit idly by while awaiting someone to air up the tire on the compressor, Mr. Feathers answered that Mr. Henderson could have left the compressor and gone ahead with his work without "endangering the tire" (Tr. 157). Mr. Feathers again denied provoking Mr. Henderson, or that he ever threatened or cursed him (Tr. 158). He denied that he accused Mr. Henderson of being a "troublemaker," or that he criticized him for calling in the inspectors (Tr. 159-160). He also denied that he fired Mr. Henderson for complaining to MSHA (Tr. 162).

Ronald H. Stanley, owner and manager of the quarry in question, testified that he has operated the facility for eight years. He confirmed that he works at the quarry on a daily basis, and he identified the quarry superintendent as Bill Feathers. Mr. Stanley confirmed that Mr. Henderson worked for him as a powderman, and he confirmed how rocks are scaled and the procedures followed by the loader operator after a shot is fired (Tr. 166-168).

Mr. Stanley confirmed that he first learned of any problems with Mr. Henderson on November 18, and that Mr. Henderson did not inform him of any prior problems which he may have had in October. He described his first encounter with Mr. Henderson as follows (Tr. 169):

A. It's foggy, but to the best of my knowledge, we were loading an outside shot, and we needed Louis's caps to load it, and so I was up preparing the holes to load them. Louis came down and we had already started a few holes before Louis had mentioned -- he said, "You know, some ceiling fell up there," and I said, "I don't know." He said, "Well, it did and it just scared the hell out of me." I said, "O.K., let's finish this shot, and we will get up there and look at it. Don't go in or anything if you don't think it's safe, obviously," and we went ahead and finished the shot, and I think we shot it -- I might have went somewhere -- in the meantime, Louis had told Bill about it.

Mr. Stanley stated that after finishing the shot in question, he went to the area where Mr. Henderson had indicated had previously fallen, and he found that approximately half of a ten-foot ceiling had fallen. After examining the area, he (Stanley) and Mr. Feathers, considered that it was safe, and as far as he knew Mr. Henderson had not called MSHA that day about this prior fall (Tr. 170). The next day, Mr. Henderson informed him that he had called MSHA, and Mr. Stanley stated that he told Mr. Henderson that he thought this was a "great idea" because of ceilings which had hung after six or eight months. Mr. Stanley stated further that he personally called an MSHA inspector to send some inspectors to the mine to check the mine ceilings because he did not want Mr. Henderson to work in areas which had not been inspected (Tr. 171).

Mr. Stanley confirmed that MSHA had previously inspected his mine, had been in the "upper mine" areas which concerned Mr. Henderson, and no one ever mentioned anything about the

seams which concerned Mr. Henderson. Mr. Stanley denied that he ever asked Mr. Henderson to go into any mine area which he or Mr. Feathers considered to be in an unsafe condition (Tr. 172). Mr. Stanley indicated that his instructions were that all walls were to be scaled with bars, and that if Mr. Henderson believed they were still unsafe he was to tell him or Mr. Feathers about it (Tr. 173). After the aforesaid incident. Mr. Stanley had no further contacts with Mr. Henderson. concerning any work refusals, nor did he have any conversations with him about the condition of the mine ceiling until the day of his discharge (Tr. 173). With regard to what transpired at the time of the discharge, Mr. Stanley stated as follows (Tr. 173-174):

A. I don't know how I knew he was fired. I was just driving through the mine, and Louis -- I think he was in the shed changing clothes or putting in his timecard -- and I asked, "What is going on?" and he said, "I got fired." He was upset but not vocally upset, and I said, "Oh, hell. Why don't you get in the car, go over to the office, get a pickup, go to the office. I will get Bill and we will come over to the office and talk. So I had to run Bill down; and I asked Bill what happened, and he said, "Well, he just cussed me out, drove with a flat tire, and I fired him," and I said, "Well, let's go over and talk to him," and I said, "If we go over and talk to him and we get this straightened out, would you hire him back?", and Bill said "Yes," which is hard to do because I stand behind Bill. That's his responsibility. So I said, "O.K., so let's at least go over and try to talk it out." Bill got in the car. Louis got in the car in front of the office. Bill was kind of being quiet, and it's real hard to start a conversation, and Louis really got upset as far as I'm concerned, just went totally -- he told one specific thing I remember definitely. He said, "Bill doesn't care how many men are killed out here as long as we get production." Well, that pissed me off because I know Bill cares about somebody's life, but he said he doesn't care if a man gets killed every day as long as we have production, and I said, "Louis, I know better than that," and as the conversation went on and on, Louis got hotter than hell, and I started getting made, and I said, "O.K., that's all. Forget it. You are gone," and that is the last I can remember.

Mr. Stanley stated that at the time of the discharge the question of Mr. Henderson calling MSHA never came up, and that Mr. Feathers said nothing about Mr. Henderson being "a troublemaker." As a matter of fact, Mr. Henderson stated that he had no problems with Mr. Henderson in the past and that he heard through hearsay that Mr. Feathers had in the past talked him out of quitting his job because others were "needling" him about working overtime. Mr. Stanley stated further that he never "punished" Mr. Henderson by requiring him to work extra hours, and he indicated that Mr. Henderson liked extra hours and "worked all the hours he could get" (Tr. 175).

On cross-examination, Mr. Stanley denied that Mr. Henderson told him that Mr. Feathers "grabbed him" or "started to hit him" (Tr. 176). He confirmed that Mr. Henderson worked at the quarry for about a year, and that matter concerning Mr. Feathers' talking him out of quitting occurred six to eight months into his employment (Tr. 176).

In response to bench questions, Mr. Stanley confirmed that he went to the area where the ceiling fell with the MSHA inspectors after Mr. Henderson called them, and that the area had already been shot and was "gone" (Tr. 177). He confirmed that the inspectors looked at the ceiling conditions of the entire mine in the areas where the ceiling is left after the shots are fired, and they inspected approximately 12 headings. Mr. Stanley suspected that Mr. Henderson was concerned generally about all of these ceiling conditions, and he stated further as follows (Tr. 179-181):

JUDGE KOUTRAS: All right. Now, what did the inspectors have to say about the conditions that they viewed, the general --

THE WITNESS: They said if it hangs back 10 foot, it's pretty bad even though you can get a bucket up there and you can lift. I have seen them lift the whole machine off the ground trying to pull it down; and there's two other things we can do. We can drill our top holes a little closer to the ceiling, and then it will break back. On half the shots, you may get a ledge only this far. You may get a foot. Some of them cling straight back to the face; but on ones that hang back, they said you have just got to try and make sure everybody tries harder to get it done the best they can; and when Louis comes up there to check with a bar and let somebody know if he doesn't feel it is safe, is their opinion.

JUDGE KOUTRAS: So, theoretically, is it your position that if none of this was done to your satisfaction, he would consider any roof area in that mine to be unsafe and he would probably refuse to work any place, or is that being unfair?

THE WITNESS: I don't know his frame of mind at the time. I'm sure that day he was nervous. He didn't want to go anywhere in the mine.

JUDGE KOUTRAS: If half a header fell, I can understand his being a little nervous about that. You probably should have given him the rest of the day off or something, but what I am trying to understand is the facts of this case. Now, let me ask you this. At that point in time, was your mine operating under a particular written plan for the scaling of walls, or do you simply refer to the mandatory standards?

THE WITNESS: The standards, but our own standards.

JUDGE KOUTRAS: Your own procedures as testified?

THE WITNESS: The man that is on the loader has been in limestone mines for 40 years, and he is kind of an old hand on ceilings. He is the first one in the room; and when he says it is unsafe or it needs picking, we kind of use him for a guide. I have been in mines for 20 years. He is kind of the old salt of the mines, and then the driller has been there a long time; and then after those two get through with it, we consider it safe -- I do unless someone comes around and tells us.

JUDGE KOUTRAS: Who is the person responsible for making the examination required under the mandatory standard?

THE WITNESS: Bill, Mr. Feathers.

JUDGE KOUTRAS: What is your track record, have you ever had any fatalities or accidents at that mine involving roof falls?

THE WITNESS: No fatalities. We had a rock fall. A guy skinned his arm one time off to the side.

JUDGE KOUTRAS: Have you ever had any citations issued to you for violations of mandatory standards dealing with underground ground support as found in Part 57 of the Regulations?

THE WITNESS: No.

JUDGE KOUTRAS: Did any citations or violations result of MSHA's, Mr. McGee's, visit to your mine?

THE WITNESS: No, as far as I know, no.

When called in rebuttal, Mr. Henderson stated that he had a good working relationship with Mr. Stanley. He also indicated that he had a similar good relationship with Mr. Feathers "until the time I turned him in to MSHA" (Tr. 136). When asked to elaborate, he explained as follows (Tr. 126-127):

Q. Now, what do you mean, real good, did you get along well?

A. Got along with him just fine as far as -- I don't know -- no hassles or anything like that, no arguments really.

Q. And what change did you notice in your relationship with Mr. Feathers after you made your complaint?

A. Just some sarcastic -- short with me all the time, stuff like that.

Q. That's what you were describing earlier about the incident?

A. Right.

MR. NELSON: Thank you.

CROSS-EXAMINATION

BY MR. REILLY:

Q. Can you recall what sarcasism Mr. Feathers expressed to you on any given occasion between November 18 and November 26 of 1982?

A. Not any outright hostility or anything like that.

Q. Can you recall any instance when he was short with you, can you tell the Court a specific instance when he was short with you between November 18 and November 26, 1982?

A. Not a specific instance, no.

MR. REILLY: No other questions.

JUDGE KOUTRAS: Mr. Henderson, you said up until the time you turned him in to MSHA. Now, when you called the MSHA inspectors, you just wanted them to come out to examine the workplace, right?

THE WITNESS: Right.

JUDGE KOUTRAS: How did that translate to turning him in, did you mean by that since he was in charge of the mine as the superintendent there, that he was responsible?

THE WITNESS: Well, I didn't mean it to sound like I was turning him in. I just wanted somebody to come out and look at the mine.

JUDGE KOUTRAS: When you called the MSHA people, did you mention Mr. Feathers' name?

THE WITNESS: I don't think I did.

JUDGE KOUTRAS: You just wanted the inspectors to come out to look at the scene?

THE WITNESS: Right.

On the evening prior to the scheduled start of the hearing, it was called to my attention that complainant's counsel had "requested" the appearance of two MSHA inspectors for testimony at the hearing. Although no subpoenas had issued for their appearance, they appeared voluntarily at the hearing, and were accompanied by a representative from the Labor Department's Kansas City Regional Solicitor's Office (Tr. 110). Since this is a "private" discrimination matter, the Solicitor's representative was prepared to interpose an objection to the service of the subpoenas on the inspectors in question in accordance with the applicable Departmental policy.

By agreement and stipulation of the parties, the inspectors were not called to testify and they were excused (Tr. 110). Complainant's counsel stated the following terms of the stipulation in lieu of the inspectors' testimony (Tr. 108-109):

The two inspectors are Dean William and Lloyd Caldwell, and I would expect them to testify that they were notified of this problem Mr. Henderson has described at the mine, and they went out to inspect the mine. They observed a condition at the point where Mr. Henderson said that he refused to work where the seam had been scaled down to six to eight feet from the face. They considered that any problem that had existed had been solved by that scaling down. However, they did make recommendations that the seams routinely be scaled down after the blast or that a protective shield of some kind be constructed for the vehicle and for Mr. Henderson's safety.

They would also testify that they did consider this particular seam to be potentially dangerous after blasting although they didn't observe it other than in the scaled-down condition it was in when they arrived.

They would further testify that it is the duty of the miner to inspect and that if the miner, after inspecting considers a condition to be hazardous or dangerous, that it is then the responsibility of the owners or supervisors to see that the condition is corrected before the miner goes underneath it, and I think we can get the citations for that from the Federal Register.

Respondent's counsel pointed out part of the stipulation should include the fact that when the MSHA inspector's came to mine in response to Mr. Henderson's request, they issued no citations for violations of any mandatory safety or health standards, and found no condition which was in any way hazardous to Mr. Henderson's health (Tr. 110).

Findings and Conclusions

The complainant alleges that his discharge was discriminatory in that it was in retaliation for his complaining to MSHA inspectors about certain mine conditions which he believed were hazardous. In his posthearing brief, complainant's counsel states that he is also claiming that Mr. Henderson's discharge was in retaliation for exercising his right to reasonably refuse work under conditions he considers "eminently dangerous." Further, although Mr. Henderson's original complaint made no mention of any harassment by mine management, he raised this issue during the course of the hearing. Finally, Mr. Henderson argues that prior to his discharge no one else was terminated for misuse of equipment. At page seven of his brief, Mr. Henderson's counsel asserts that "the record abounds with evidence of misuse of equipment by other employees."

Alleged Harassment and Intimidation

I find nothing in the record to support Mr. Henderson's assertion that Mr. Feathers harassed or intimidated him because of his exercise of any protected safety rights. Mr. Henderson could cite no specific instances of hostility or intimidation, and he simply concluded that Mr. Feathers accused him of "making waves" and "causing trouble."

Mr. Henderson asserted that Mr. Feathers retaliated against him for complaining to MSHA, and he inferred that this took the form of requiring him to work overtime. However, Mr. Henderson could not substantiate this claim, and I conclude and find that the record here does not support any such conclusions.

I conclude and find that any "hostility" shown by Mr. Feathers towards Mr. Henderson resulted from their encounter over the low air pressure in the compressor tire, as well as their obvious dislike for each other stemming from that incident, as well as Mr. Henderson's "opinions" concerning Mr. Feathers' supervisory talents as related to Mr. Stanley during their conversation after the discharge. After viewing the witnesses during the hearing, I find Mr. Feathers' account of the incident over the tire to be credible and believable, and I believe that he was provoked by Mr. Henderson's conduct, and reacted accordingly. Further, I take note of the fact that Mr. Henderson is much younger and physically larger than Mr. Feathers, and that after considering their testimony and viewing them on the stand, I simply do not believe Mr. Henderson's assertion that Mr. Feathers was the aggressor during their encounter over the tire incident.

With regard to any intimidation or harassment against Mr. Henderson by the quarry operator (Stanley), for safety reasons, there is absolutely no evidence to suggest this was the case. To the contrary, while it is true that Mr. Stanley ultimately discharged Mr. Henderson, the record shows that Mr. Henderson was tolerant and charitable towards Mr. Henderson, and even suggested that he and Mr. Feathers attempt to reconcile their differences, and Mr. Stanley attempted to mediate their differences. However, based on Mr. Stanley's testimony, which I find credible and believable, Mr. Henderson became argumentative, and after questioning Mr. Feather's supervisory abilities, Mr. Stanley supported Mr. Feather's version as to why he proposed to discharged Mr. Henderson, and Mr. Stanley finalized the action by firing Mr. Henderson.

Alleged Work Refusal for Safety Reasons

Mr. Henderson testified as to two rock falls which occurred in his work area. The first occurred sometime in October 1982, when a rock ledge formation remained on the ceiling after he had finished blasting the area. After returning to the area after his lunch break, he found some slabs of rock lying around his truck. The rock did not damage his truck, and he estimated that the last five feet of the seam which was some 12 feet outby the face, had fallen.

Mr. Henderson testified that the second rock fall occurred sometime between November 12 to 15, 1982. After loading on half of the heading, he withdrew for a distance of 10 yards, and while preparing to set off the shot some thirty seconds later, the roof which he had loaded fell.

Mr. Henderson conceded that at no time did anyone ever direct or order him to work under any conditions which he believed were unsafe. As a matter of fact, when the first fall occurred, Mr. Henderson admitted that he did not tell Mr. Feathers or Mr. Stanley about it. When the second fall occurred, he testified that he told Mr. Stanley about it, and Mr. Stanley advised him not to go under any roof seams which he believed were dangerous. Mr. Henderson also indicated that Mr. Feathers came to the area to look it over, and that Mr. Feathers provided him with a bar to test the roof. He also indicated that Mr. Feathers instructed him that he was to test the roof with the bar from that point on. Mr. Henderson also confirmed that after both he and Mr. Feathers tested the second half of the shot area and found it to be safe, Mr. Henderson loaded it, shot it down, and then went home.

Mr. Henderson stated that the day after the second fall occurred, he returned to work but refused to go under another heading because, upon visual observation, he did not believe that any attempts had been made to scale the roof. He tested it himself with a pry bar, and after "pecking around a bit" with the bar from a bucket, he found that the roof was tight, but he still refused to go under it because he was afraid that it might fall. At that point in time, Mr. Henderson claims Mr. Feathers became "irate." However, Mr. Henderson conceded that Mr. Feathers did not instruct him to go under the roof, and Mr. Henderson claims he then telephoned MSHA Inspector McGee the afternoon or evening after he returned to work to advise him about his refusal to go under the roof and to ask him to send an inspector to the mine to "look at the situation."

Mr. Henderson asserted that two inspectors came to the mine, but that he did not go with them to the area which concerned him, and he claims that the inspectors met with Mr. Stanley, and told him (Henderson) that his complaint was justified and that there was a "potential hazard there." However, Mr. Henderson also stated that the inspectors told him that he and the foreman had a joint responsibility to see to it that the working place was safe.

Mr. Henderson's counsel stipulated that after the MSHA inspectors came to the mine and inspected the area which concerned Mr. Henderson, the inspectors were of the opinion that any concern on Mr. Henderson's part had been resolved by the scaling of the area. As a matter of fact, the stipulation suggests that at the time the inspectors looked at the area which concerned Mr. Henderson, the area had been scaled down and the inspectors had no basis for making any determination as to whether the area was in fact hazardous. This probably explains why no citations or violations were ever issued by the inspectors.

When asked about his prior statement in his complaint that Mr. Feathers attempted to scale down the ceiling which he complained about, Mr. Henderson at first claimed that he could not remember making such a statement. He then acknowledged that he did make the statement, and he also admitted that the ceiling in question was the same one which he initially refused to work under.

Mr. Henderson conceded that when he first informed Mr. Stanley about his safety concern with respect to his working in any areas of the mine which he believed were not safe, Mr. Stanley advised him not to work in any such areas. Mr. Henderson also confirmed that Mr. Stanley told him that he would never question his decision in this regard, and even offered to go with him to inspect any areas of the mine which he (Henderson) believed were hazardous.

With regard to Mr. Feathers, Mr. Henderson conceded that Mr. Feathers agreed to inspect the areas which he (Henderson) believed were hazardous, and both Mr. Feathers and Mr. Stanley inspected these areas, tested them with a bar, and found that they were "tight" and safe. As a matter of fact, Mr. Henderson himself tested the areas with a bar and found that they were tight. It would appear to me that Mr. Henderson's concern for the stability of the ceiling stemmed from the fact that since part of a ceiling fell near his work area in the past, he was concerned that it might fall again. However, on the facts of this case, I conclude and find that this concern on his part was unreasonable.

Mr. Henderson confirmed that prior to November 1982, he had loaded 50 to 100 shots, but did not always test the roof because he did not have time. He acknowledged that testing the roof was part of his responsibility, and he admitted that if he tested the roof and found it not to be sound he would still take a chance and go under it.

Refusal to perform work is protected under section 105(c)(1) if it results from a good faith belief that to go ahead with the assigned work would expose the miner to a safety hazard, and if the belief is a reasonable one. Secretary of Labor, ex rel. Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2 BNA MSHC 1001 (October 1980), rev'd on other grounds, sub nom Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3rd Cir. 1981); Secretary of Labor ex rel. Robinette v. United Castle Coal Co., 3 FMSHRC 302, 2 BNA MSHC 1213 (April 1981); Bradley v. Belva Coal Co., 4 FMSHRC 982 (June 1982). Further, the reason for the work refusal must be communicated to the mine operator. Secretary of Labor ex rel. Dunmire and Estle v. Northern Coal Co., 4 FMSHRC 126 (February 1982).

On the facts of the instant case, there is absolutely no credible evidence to even suggest that Mr. Henderson's discharge was in any way connected with his alleged refusal to perform work which he believed was hazardous. Prior to the hearing in this case, Mr. Henderson never directly asserted that his "work refusal" motivated his discharge, and his counsel raised this issue during and after the hearing. Even if I were to conclude that Mr. Henderson's claim in this regard was a viable one, I would still reject it.

While it is true that Mr. Henderson's refusal to work under conditions which he believes to be hazardous is protected activity, the refusal must be reasonable. In this case, it appears to me that Mr. Henderson wanted mine management to guarantee that a mined-out roof would never fall, regardless of the area of the mine where Mr. Henderson happened to be at any given time. I find Mr. Henderson's position in this regard to be unreasonable, and for the reasons which follow, I conclude that the respondent promptly addressed Mr. Henderson's safety concerns, and did all that was reasonable to accomodate him.

Based on the credible testimony and evidence adduced in this case, Mr. Henderson's perceived safety concerns were immediately addressed by mine management, and management did everthing reasonably possible to insure that Mr. Henderson had a safe working environment. The particular area which concerned Mr. Henderson was inspected and scaled by mine management, and Mr. Henderson was provided with a scaling bar and detailed

instructions as to the procedures which he was to follow to insure that the roof was sound. Mine management never instructed Mr. Henderson to work in any hazardous areas, and the mine operator himself (Stanley) instructed Mr. Henderson to withdraw from any areas which he believed were hazardous. Further, by his own admissions, Mr. Henderson, on many occasions, often took chances in working under roof conditions which were less than desirable, and he never complained or brought these conditions to the attention of his supervisors. Under the circumstances, Mr. Henderson's assertions that his discharge was out of retaliation for his refusal to work under dangerous conditions are without foundation, and they are rejected. I conclude and find that on the facts of this case, Mr. Henderson's asserted refusal to work for safety reasons was unreasonable, and therefore not protected activity.

Mr. Henderson's Safety Complaints and the Alleged Retaliation for those Complaints

It is clear that a miner has an absolute right to make safety complaints about mine conditions which he believes present a hazard to his health or well-being, and that under the Act, these complaints are protected activities which may not be the motivation by mine management for any adverse personnel action against an employee; Secretary of Labor ex rel. Pasula v. Consolidation Coal Co., 2 FMSHRC 2786 (October 1980), rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3rd Cir. 1981), and Secretary of Labor ex rel. Robinette v. United Castle Coal Co., 3 FMSHRC 803 (April 1981). In order to establish a prima facie case a miner must prove by a preponderance of the evidence that: (1) he engaged in protected activity, and (2) the adverse action was motivated in any part by the protected activity. Further, the miner's safety complaints must be made with reasonable promptness and in good faith, and be communicated to mine management, MSHA ex rel. Michael J. Dunmire and James Estle v. Northern Coal Company, 4 FMSHRC 126 (1982).

As indicated above, Mr. Henderson's complaints about certain working conditions which he believed were hazardous were promptly and properly addressed by mine management. Further, under the facts of this case, I cannot conclude or find that Mr. Henderson's complaints or fears of perceived hazards were reasonable. While it is true that there were two rock falls in and about his work area, he failed to bring the first one to anyone's attention until well after the fact. As for the second one, once called to mine management's attention, the problems were immediately addressed.

With regard to Mr. Henderson's calling the MSHA inspector's to the mine, once there, they inspected the area and found that any loose rock had been scaled. While it is true that the inspectors may have made certain recommendations, the fact is that no citations or violations were issued, and there is no credible evidence that mine management disregarded MSHA's suggestions or attempted to avoid corrective action. As for any suggestion that Mr. Feathers or Mr. Stanley retaliated against Mr. Henderson for summoning the inspectors, I find absolutely no evidence of record, either direct, or indirect, to support any such conclusion or finding. Accordingly, Mr. Henderson's assertions in this regard are rejected.

Alleged Disparate Treatment

At page seven of his posthearing brief, Mr. Henderson's counsel states that "no one was previously terminated from the mine for misuse of equipment, despite the fact that the record abounds with evidence of misuse of equipment by other employees." However, counsel fails to cite any such evidence as part of his arguments, nor has he cited any references to the record to support his conclusions. Counsel simply asserts that "the attitude of Mr. Feathers regarding Mr. Henderson's complaint, Mr. Feathers' attitude at the time of termination, and the relationship in time between the refusal to work and termination establish complainant's burden of proof that he was discharged in violation of 30 U.S.C. § 815(c)(1)."

Mr. Henderson alluded to an accident involving a Mr. Acock in which he struck a dump truck with his pick-up truck while driving too fast, and he indicated that Mr. Acock was not terminated (Tr. 57). Mr. Henderson also mentioned that he had observed trucks "hot-rodded around," and indicated that he was not aware of anyone being fired for misuse of equipment (Tr. 58). However, Mr. Henderson conceded that he has heard supervisors speak to other employees for this conduct, and he admitted that he had previously been verbally warned by Mr. Feathers about driving too fast (Tr. 59).

Although mechanic Steve Folsom testified that in the 5 years he has worked for the respondent few employees have been fired, he did indicate that "most of them quit." However, he did indicate that a truck driver named "Tracy" was dismissed for "tearing up the transmission" (Tr. 117).

Terry Acock, formerly employed by the respondent as a driller, testified about the accident referred to by Mr. Henderson. Mr. Acock indicated that he did not intentionally run into the truck in question, and that it was an "accident."


He confirmed that Mr. Feathers accused him and the other driver of speeding, but that he was not fired over that incident. Mr. Acock confirmed further that he was subsequently discharged by the respondent, but for reasons unrelated to the accident in question (Tr. 123).

Mr. Feathers explained the circumstances surrounding the accident involving Mr. Acock. He stated that Mr. Acock did not intentionally wreck the truck, and that he apologized for the incident and did not curse him or abuse him. Under these circumstances, he did not believe that the facts surrounding the Acock accident were the same as those which prevailed when Mr. Henderson deliberately operated his compressor truck with low tire air pressure (Tr. 152).

Aside from the accident involving Mr. Acock, Mr. Henderson was unable to document any instances of disparate treatment. To the contrary, the record here suggests that at least one employee was discharged for damaging a truck transmission, and that others, including Mr. Henderson, were verbally warned and cautioned by Mr. Feathers about speeding and other such incidents. Given the fact that the respondent's quarry operation is a small, non-union operation, the fact that the respondent has not generally fired many employees is not critical. As confirmed by Mr. Folsom, employees usually quit rather than being fired, and since Mr. Henderson has the burden of proof here, it was incumbent on him to establish any disparate treatment by a preponderance of credible evidence. This he has not done. Accordingly, his arguments in this regard are rejected.

Conclusion and Order

In view of the foregoing findings and conclusions, and after careful consideration of all of the evidence and testimony adduced in this case, I conclude and find that the complainant here has failed to establish a prima facie case of discrimination on the part of the respondent. Accordingly, the complaint IS DISMISSED, and the complainant's claims for relief are DENIED.


George A. Koutras
Administrative Law Judge

Distribution:

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/slk/fb

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

MAY 8 1984

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 83-196
Petitioner	:	A.C. No. 15-10364-03501-A5A
v.	:	
	:	Preparation Plant
EDDIE HIGGS, d/b/a HIGGS	:	
TRUCKING COMPANY,	:	
Respondent	:	

DECISION

Appearances: Thomas A. Grooms, Esq., Office of the Solicitor,
U.S. Department of Labor, Nashville, Tennessee,
for Petitioner;
Byron W. Terry, Safety Director, Higgs Trucking
Company, for Respondent.

Before: Judge Broderick

STATEMENT OF THE CASE

This case is submitted for decision on a stipulated set of facts and certain exhibits. There is no dispute as to the essential facts. Both parties have filed written arguments on the applicable law. Based on the record including the stipulations and exhibits, and considering the contentions of the parties, I make the following decision.

FINDINGS OF FACT

Teddy D. Higgs and James E. Higgs (apparently also known as Eddie Higgs), his brother, were partners in a company known as the Higgs Trucking Company. The Higgs Trucking Company was an independent contractor doing coal haulage for Golden R. Coal Company, Inc. On October 8, 1982, Teddy Higgs was told to drive the company truck to Golden R. Coal Company and haul coal from the mine to the preparation plant. Teddy Higgs did as he was instructed and dumped his load of coal at the preparation plant at about 8:55 a.m. He then moved the truck and raised the truck bed in order to grease the rear universal joint. While lying across the truck frame he apparently contacted the control cable which released the bed. The bed crushed Teddy Higgs against the frame injuring him fatally.

Following an investigation, MSHA issued a citation charging Higgs Trucking Company with a violation of 30 C.F.R. § 77.404(c) (Repairs and maintenance were performed on machinery when the machinery was not blocked against motion). Respondent was assessed a penalty of \$500 for the violation.

Respondent is a small operator. James E. Higgs, presently a sole proprietor, had a gross income of \$36,657 in 1982, and of \$28,000 in 1983. His net profit in 1982 was said to be \$7,000. Respondent has no history of prior violations.

ISSUES

1. Is Respondent, an independent contractor, subject to the Act?
2. Was the deceased partner a miner under the Act?
3. Is the Partnership liable for a civil penalty for a violation of the Act committed by and affecting one of the partners?
4. If Respondent is subject to the Act and liable for the violation, what is the appropriate penalty?

CONCLUSIONS OF LAW

1. Section 3(b) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 802(b), defines "operator" to include "any independent contractor performing services or construction at such mine." Section 3(g) defines a "miner" as "any individual working in a coal or other mine." The Act thus clearly covers Respondent's activities in hauling coal for Golden R. Coal Company on October 8, 1982. See Secretary v. Old Ben Coal Company, 1 FMSHRC 1480 (1979); Secretary v. Phillips Uranium Corporation, 4 FMSHRC 549 (1982). Just as clearly, Teddy D. Higgs who was fatally injured on that date was a miner. Therefore, I conclude that Respondent was responsible to observe the mandatory safety standards and was properly cited for a violation of 30 C.F.R. § 77.404(c).

2. A civil penalty proceeding under the Mine Act is not analogous to a civil action for wrongful death. The purpose of imposing civil penalties for violations of safety standards is to promote safety in the nation's mines, and penalties are mandated for violations whether or not the mine operator was at fault. Secretary v. Ace Drilling Coal Company, Inc., 2 FMSHRC 790 (1980); Secretary v. Nacco Mining Company, 3 FMSHRC 848 (1981). The mine operator here was a partnership. The mine

operator is liable for violations of mandatory standards and for resultant civil penalties. Respondent's arguments, that truckers operating on mine sites are not required to have hazard training and are not acquainted with MSHA regulations are irrelevant.

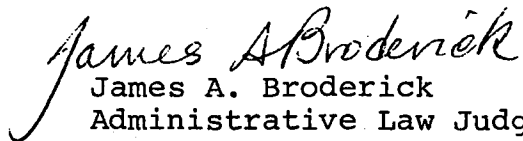
3. Although Respondent argues that the imposition of a penalty "could possibly effect his staying in business," there is no evidence in the record to support this assertion. The violation here was extremely serious since it resulted in a fatal accident. The negligence was very great, but perhaps should not be charged to the operator. The operator is a small operator and has no history of prior violations.

The tragic circumstances of this case make a substantial civil penalty inappropriate, despite the seriousness of the violation. The purpose of assessing penalties is to deter future violations. The deterrent effect of a monetary penalty cannot possibly add to the deterrence which resulted from a brother's fatal accident. See Secretary v. R. F. H. Coal Company, 5 FMSHRC 1863 (Decision Approving Settlement by Judge Steffey 1983).

Therefore, applying the criteria in section 110(i) of the Act to these facts, I conclude that a civil penalty of \$21 is appropriate for the violation.

ORDER

Based upon the above findings of fact and conclusions of law, Citation No. 2074514 issued December 17, 1982, to Respondent Higgs Trucking Company is AFFIRMED. Respondent is ordered to pay within 30 days of the date of this decision the sum of \$21 as a civil penalty for the violation found herein to have occurred.


James A. Broderick
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

MAY 9 1984

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 83-225
Petitioner	:	A.C. No. 15-13881-03502
v.	:	
	:	Pyro No. 9 Slope
PYRO MINING COMPANY,	:	William Station
Respondent	:	

DECISION APPROVING SETTLEMENT

Before: Judge Kennedy

By order of April 20, 1984, I denied the Secretary motion to approve settlement of this matter in the amount of \$20.00 and offered to consider an amended motion in the amount of \$250.00. On May 4, 1984, the Secretary renewed his motion setting forth that the parties had now agreed to settle the matter at the amount stipulated by the trial judge, namely, \$250.

The premises considered, therefore, it is ORDERED that the motion to approve settlement and dismiss be, and hereby is, GRANTED, and the captioned matter DISMISSED.


Joseph B. Kennedy
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

MAY 10 1984

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 83-40
Petitioner	:	A.C. No. 34-01241-03501
	:	
v.	:	Docket No. CENT 83-51
	:	A.C. No. 34-01241-03502
TURNER BROTHERS, INC.,	:	
Respondent	:	Muskogee No. 2 Mine
	:	
	:	Docket No. CENT 83-52
	:	A.C. No. 34-01357-03503
	:	
	:	Welch No. 1 Mine
	:	
	:	Docket No. CENT 83-54
	:	A.C. No. 34-01317-03506
	:	
	:	Docket No. CENT 83-55
	:	A.C. No. 34-01317-03507
	:	
	:	Heavener No. 1 Mine

DECISIONS

Appearances: Allen Reid Tilson, Esq., Office of the Solicitor,
U.S. Department of Labor, Dallas, Texas, for
Petitioner;
Robert J. Petrick, Esq., Muskogee, Oklahoma,
for Respondent.

Before: Judge Koutras

Statement of the Proceedings

These proceedings concern civil penalty proposals filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a), seeking civil penalty assessments for 17 alleged violations of certain mandatory safety and health standards promulgated pursuant to the Act. Respondent contested the proposed assessments, and hearings were held in Muskogee, Oklahoma. The parties waived the filing of written posthearing proposed findings and conclusions, but their oral arguments made on the record during the course of the hearings have been considered by me in the these cases.

Issues

The issues presented in these proceedings are (1) whether the violations occurred as stated in the citations issued by the MSHA inspector in question, (2) the appropriate civil penalties to be assessed for any violations which have been established by the preponderance of the evidence adduced at the hearings, and (3) whether several of the citations were in fact "significant and substantial" as alleged by the inspector who issued them.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, P.L. 95-164, 30 U.S.C. § 801 et seq.
2. Commission Rules, 29 CFR 2700.1 et seq.

Discussion

The citations and allegations of violations in each of these dockets follow below.

CENT 83-40

Section 104(a) Citation No. 2076868, March 21, 1983, cites a violation of 30 CFR 77.410, and the condition or practice cited is as follows:

The Caterpillar 777 rock haul truck, company no. 258, hauling rock from the 004 pit to the stock pile area would not give an automatic audible warning when put in reverse. The warning device was not in operating condition. Four front end loaders, two dozers, three haul trucks, and four persons on foot were in the area in the pit when this truck was being operated in reverse.

Section 104(a) Citation No. 2076869, March 21, 1983, cites a violation of 30 CFR 77.1605(d), and the condition or practice cited is as follows:

The Caterpillar 777 rock haul truck, company no. 249, hauling rock from the 004-0 pit to the stock pile area was not provided with an audible warning device (front horn) in operating condition. Three haul trucks, four frontend loaders, and four persons on foot were in the area where this truck was being operated.

Section 104(a) Citation No. 2076870, March 21, 1983, cites a violation of 30 CFR 77.1710-(i), and the condition or practice is as follows:

The caterpillar 966 frontend loader, company no. 314, equipped with a ROPS operating in pit 004-0 was not equipped with seat belts for the operator to wear. This loader is operated up and down an incline going in and out of the pit where there is a danger of it overturning.

Section 104(a) Citation No. 2076871, March 21, 1983, cites a violation of 30 CFR 77.1109-(c)(1), and the condition or practice is as follows:

The D-10 Caterpillar bulldozer, company no. 818, operating at pit 004-0 was not equipped with a portable fire extinguisher.

CENT 83-51

Section 104(a) Citation No. 2007403, May 3, 1983, cites a violation of 30 CFR 71.101, and the condition or practice is as follows:

A valid respirable dust sample taken by MSHA 4/19/83 from the operator's cab of a Caterpillar D-10 bulldozer operating in pit 001-1 (cassette # 40399373), showed a respirable dust concentration of 1.5 Mg/M³. This sample was sent to the Pittsburgh Health Technology Center for quartz analysis 4/20/83. The results of this analysis indicates a quartz percent [sic] of 18%. Therefore, the operator was not maintaining the average concentration of respirable dust in the atmosphere during each shift to which each miner at this work position (Designated 001-0, 368) is exposed at or below a concentration of respirable dust computed by dividing the percent [sic] of quartz into the number (10) ten as required by section 71.101, Title 30, CFR.

Section 104(a) Citation Nos. 2076408, 2076411, and 2076412, were all issued on May 17, 1983, and each cites a violation of 30 CFR 77.410. The conditions or practices cited are as follows:

2076408. The Caterpillar 980-C Frontend loader operating at Pit 001-1, cleaning coal was not equipped with an automatic warning device that would give an audible alarm when such equipment was put in reverse. No persons on foot in the area at the time this violation was observed.

2076411. The 510-B, PM Grader operating at Pit 001-0 cleaning coal was not equipped with an automatic warning device that would give an audible alarm when such equipment was put in reverse. No persons on foot in the area at the time this violation was observed.

2076412. The Caterpillar 988-B Front-end loader operating at Pit 001-0 (loading rear dump trucks) was not equipped with an automatic warning device that would give an audible alarm when such equipment was put in reverse. No persons on foot in the area at the time this violation was observed.

Section 104(a) Citation No. 2076409, May 17, 1983, cites a violation of 30 CFR 77.1605(d), and the condition or practice is as follows:

The Caterpillar 980-C operating in pit 001-0, cleaning coal was not provided with an audible warning device (horn) in operating condition. No persons on foot in the area at the time this violation was observed.

Section 104(a) Citation No. 2076410, May 17, 1983, cites a violation of 30 CFR 77.1110, and the condition or practice is as follows:

The fire extinguisher on the 510-B PM Grader operating at Pit 001-0 cleaning

coal was not being maintained in a useable and operating condition in that the guage on the fire extinguisher showed the fire extinguisher to be discharged. Three other fire extinguishers in the area at the time this violation was observed.

CENT 83-54

Section 104(a) Citation No. 2007402, March 15, 1983, cites a violation of 30 CFR 71.100, and the condition or practice is as follows:

The results of (3) valid respirable dust samples taken by MSHA 3/08, 09, 10/83 from the operator's cab of the Reed SK35 Drill at Pit 001 show the average concentration of respirable dust as 3.7 Mg/M³. Therefore the operator is not maintaining the average concentration of respirable dust in the atmosphere during each shift to which each miner at this work position (Designated 002-0, 384) is exposed at or below the allowable limit of 2.0 Mg/M³. The Reed SK35 Drill, serial number 1061193 is one of (2) two drills working at Pit 001 at the time these samples were collected.

The inspector modified the citation on March 23, 1983, and the justification for this action states as follows:

The results of a respirable dust sample collected by MSHA 3/10/83 from designated work position 002-0, 384 and forwarded to Pittsburgh Health Technology Center for quartz analysis show a quartz percent of 33 percent. Therefore, citation number 2007402 issued 3/15/83 is modified to show the respirable dust standard as 0.3 Mg/M³.

On March 28, 1983, the inspector extended the original abatement time from March 25, 1983, to April 5, 1983, and the justification for this action states as follows:

The mine operator removed the Reed SK35 highwall drill, serial # 1061193 (Dwp 002-0, 384) from service and replaced this drill with a Reed SK35, serial # 1061206 that is equipped with an air

conditioned pressurized cab. Therefore, more time is granted to allow the operator to collect the five (5) samples required by section 71.201(d).

On April 11, 1983, the inspector again extended the abatement time, to May 11, 1983, and the justification for this action states as follows:

The Heavener Mine No. 1, I.D. # 34-01317, was placed in a "B" nonproducing status April 1, 1983. Therefore, citation # 2007402 is further extended to allow production to resume before respirable dust samples required by section 71.201(d), Title 30 CFR can be collected by the operator.

On April 11, 1983, the inspector modified the original citation as follows:

Citation Number 2007402 issued 3/15/83 is hereby modified to show the part/section Title 30 CFR as 71.101 (respirable dust standard when quartz is present).

On May 18, 1983, the inspector issued a section 104(b), order of withdrawal (2007405) affecting the Reed SK35 highwall drill at pit 001, and the condition or practice justifying this order is shown as follows:

The results of the five (5) respirable dust samples taken by the operator to comply with the requirements of section 71.201(d), Title 30 CFR indicated an average concentration of 1.6 Mg/M³. Due to ineffective efforts by the operator to control respirable dust in the atmosphere of designated work positions 002-0, 384 at or below the allowable limit of 0.3 Mg/M³. Citation Number 2007402 is not extended.

On May 18, 1983, the inspector modified the section 104(b) order, and on June 1, 1983, he terminated it after compliance with the applicable respirable dust standards.

All of the citations issued in this case are section 104(a) citations served on the respondent on June 6, 1983.

Citation No. 2076969, cites a violation of 30 CFR 77.1605(d), and the condition or practice is as follows:

The caterpillar rock truck, company no. 912 being operated at Pit 001-0 was not provided with an audible warning device (front horn) in operating condition. This truck was hauling top soil and other equipment was being operated in the area. One rock truck, two front-end loaders, and one road grader.

Citation No. 2076970 cites a violation of 30 CFR 77.1110, and the condition or practice is as follows:

The 96 caterpillar bulldozer being operated at Pit 001-0 was not provided with a fire extinguisher maintained in a usable and operative condition. The fire extinguisher on this dozer was equipped with a guage that showed the extinguisher to be discharged.

Citation No. 2076971, cites a violation of 30 CFR 77.410, and the condition or practice is as follows:

The caterpillar 14G road grader being operated on the haul roads at the 001-0 pit was not equipped with an automatic warning device that will give an audible warning when the road grader was put in reverse. The warning device was not in operating condition.

Citation No. 2076972 cites a violation of 30 CFR 77.208(e), and the condition or practice is as follows:

The valves on two compressed gas cylinders, one oxygen and one acetylene, were not protected by covers. The cylinders were located on a portable welding machine near pit 001-0. Two mechanics were working in this area.

Citation No. 2076973 cites a violation of 30 CFR 77.410, and the condition or practice is as follows:

The 988 caterpillar front end loader being operated loading coal into trucks in the 001-0 pit was not equipped with an automatic warning device in operating condition that would give an audible warning when the loader was pit in reverse. Three persons were on foot working in the pit where the loader was being operated.

Citation No. 2076978 cites a violation of 30 CFR 77.1605(b), and the condition or practice is as follows:

The international coal haulage truck operating at pit 001-0 was not equipped with a parking brake in operating condition in that when the parking brake was set on a small incline going into the pit it would not hold the truck.

Testimony and Evidence Adduced by the Parties

CENT 83-40

Citation 2066868, 30 CFR 77.410 (Tr. 12-19).

Inspector Donalee Boatright cited a Caterpillar 777 rock haul truck after he asked the driver to back it up and heard no backup alarm sound. A horn was on the truck, but it was inoperative, and he believed that a wire was loose. The truck was taken out of service, and the device was repaired.

Mr. Boatright stated that he issued the citation at 9:30 a.m., and that the shift started at 7:00 a.m. He indicated that the alarm in question could have been working at the beginning of the shift, and it also could have been checked at the beginning of the shift. A simple two or three minute test is all that is required to test the alarm, and he conceded that wires can come loose or that normal wear and tear may render them inoperable.

Mr. Boatright described the pit where the truck was at as approximately 140 feet wide. He stated that when the truck is loading rock there are two loaders loading it and the truck back up to where the loaders are positioned for loading. In addition, in another part of the pit "over from where the trucks were loading, they were taking out coal."

Mr. Boatright stated that if the truck ran over someone, a fatality would occur, and if it struck someone "a glancing blow," lost workdays or restricted duties would result. He indicated that at the time of the citation, there were three or four front end loaders working four persons were on foot in the area, and two dozers were in the area. At times, the people operating the equipment would get off the equipment and would also be exposed to a hazard. He indicated that all of this equipment was working "more or less in the same area."

On cross-examination, Inspector Boatright described the parameters of the pit area and ramp where the truck in question would travel, and he described the pit as approximately 100 to 140 wide and 250 feet long (Tr. 23). He stated that the truck was hauling material out of the pit and traveling to a stockpile which encompassed a total trip area of some 2,000 to 2,500 feet (Tr. 24). He described the travel route of the truck and indicated on a sketch (exhibit R-2), where the truck would have traveled. He confirmed that the truck would travel into the pit area, go by the coal stockpile in a forward direction until it reached the face, and would then back into the area where two loaders would be waiting to load (Tr. 27). He also indicated that on the day he issued the citation, there were people on foot in the area where the truck was in reverse, and that they were "cleaning coal and taking coal down there" (Tr. 28).

Mr. Boatright further explained where the truck was operating, as follows (Tr. 29):

JUDGE KOUTRAS: No, no. Mr. Inspector, I think the point Mr. Petrick is trying to make is that you've indicated on here on the face of your citation is that there were four people on foot, and you've marked this violation as significant and substantial. Now what he's trying to determine is whether or not the people that you've described as being on foot were really exposed to this truck backing over them. In other words, were they in the immediate vicinity of the truck at the time that the truck would normally go into reverse?

THE WITNESS: At the time I saw them, they weren't directly behind the truck, no, sir, but they were in the pit area.

JUDGE KOUTRAS: But they were in the pit area. All right.

THE WITNESS: Yes, sir.

JUDGE KOUTRAS: All right, that's fine.

Q. (By Mr. Petrick). But the truck you're talking about -- the triple seven truck was loading spoil, shale; was it not --

A. Yes, sir.

Q. -- rock? Okay. And the coal that they were working on was cleaned and ready for processing taken out and being cleaned; was it not?

A. They were cleaning and loading it.

Q. Okay. And what was the distance between the time the area where the loaders were loading this triple seven truck and the coal area where they were cleaning?

A. I did not measure that. I did not measure the distance.

Q. Do you have a guess? 100 feet, 200 feet?

A. No, it wasn't. I would say not more than 7,500 feet. But it was all in the pit area right here (indicating).

Q. Okay. But my scenario so far as driving by the coal pad area is that they were always in the forward gear. They did not go into reverse until they got by the coal pad, the coal area.

A. That's probably right.

* * *

Q. (By Mr. Petrick). Now, Mr. Boatright, right before you inspected this truck, did you watch the operation for any length of time?

A. I had probably been an hour and a half or so I guess, I don't know.

Q. And during that period of time -- well let me ask you this way: Wasn't there two 992's in the pit taking rock at that particular time?

A. I believe there was.

Q. And the tandem that the truck is working in, there's three triple seven trucks. One pulls in and gets loaded and goes on its way to unload the thing. And then the second one comes in, backs in, gets its load, goes on. The third one backs in, gets loaded, and it goes on. By that time the first one has dumped and comes back, so you're running it in a cycle; is that not correct?

A. Yes, sir, they run in a cycle.

Q. Now in addition to that, in the pit area there is a grader that takes care of the road, there's a water haul truck that takes care of -- taking care of the dust and that type of stuff on the road. Were they in the area? Did you observe them?

A. Seemed like I saw a road grader, but I don't recall the water truck.

Q. Okay. Now also on the coal scene where these four men were working in the area, the most immediate piece of equipment to those four men was a 966 or 980 loader; was it not?

A. I believe they was using a 966 loader cleaning the coal.

Q. And it had a back-up horn, it was running back and forth all over the place right next to those men; wasn't it?

A. It was running back and forth cleaning up coal, yes, sir.

Q. Okay. And it had a back-up horn and the back-up horn was sounding?

A. Yes, sir.

Q. The back-up horns on the two 992's were sounding, weren't they?

A. As far as I recall they were, yes, sir.

Q. And the same with the grader when it was backing up, wasn't it? What I'm driving at, Mr. Boatright, is that at any given period of time in that pit is it not a fact that all of the other back-up horns were going?

A. Yes, sir. I think that was the only violation of a back-up horn I found.

Q. And what I'm saying is in the immediate proximity the back-up horn is going all the time on one of those pieces of equipment. So, so far as your gravity of being reasonably likely that somebody's going to get run over due to the result of this back-up horn not working, that's not really true. Because there's other back-up horns alerting people all the time in that pit in that area?

A. For the particular piece of equipment that it's on it's alerting, but not for the one that it's not operating on.

Q. Well the two 992's are right next to the triple seven truck, aren't they?

A. When a triple seven truck backs under them they are, yes, sir.

Q. And were the back-up horns different so far as sound is concerned, so that you can tell whether you've got a 992 coming at you or a triple seven truck?

A. I wouldn't say the sound was different.

Citation 2076869, 30 CFR 77.1605(d) (Tr. 39-44).

Inspector Boatright confirmed that he issued this citation on another Caterpillar 777 rock haul truck at approximately 9:45 a.m. after finding that the front horn was inoperative. He believed that the problem was caused by a loose wire, and the horn was repaired by 11:00 a.m. This citation was at the same location and area of the previous one (2076868).

Mr. Boatright stated that the purpose of the horn is to warn people and other equipment in the area, and that at

the time the citation issued, employees were on the ground, but he observed no "near misses," and observed no one actually in the path of the truck. However, in his opinion, the people and equipment previously testified to "could get in the path of this truck." He also believed the probability of an injury occurring in this area would be greater because of all of the equipment operating there.

Mr. Boatright stated that simply pushing the horn button would indicate whether the horn was working. He described the truck as being otherwise "in good shape," and that a foreman was in the pit area.

On cross-examination, Mr. Boatright indicated that the truck would not drive over the coal which was being cleaned up out of the pit, and he confirmed that when the trucks are loaded they would not go faster than five miles an hour at the ramp. However, he did not know how fast they would travel coming and going from the pit. He could not recall whether the pit crew was taken out by pick-up truck or whether they walked out, and he stated his rationale for his gravity finding as follows (Tr. 51-53):

JUDGE KOUTRAS: Mr. Petrick, if I may interject. Even in your scenario there, assuming that was the case, assuming that the foreman brought these three or four fellows in the pickup and the trucks come by, and these three or four fellows are out of the danger zone, if you will, on this particular day. The foreman comes back and puts them in the pickup truck and he drives away. Just at that time here comes a truck now with an inoperative horn, then in that situation his testimony would probably be the same, that the truck, the pickup truck would be exposed to a possible hazard of being struck by the truck because he wouldn't be able to sound his horn; isn't that true?

THE WITNESS: That's right, if neither one of them had brakes or go up there or whatever.

JUDGE KOUTRAS: That's right. But in my hypothetical, with all of these other hypotheticals then, that situation would certainly pose a more direct gravity situation than it would given the fact that these four guys over there working on the coal pile as the trucks go by on the road, that's some distance removed; isn't that true?

THE WITNESS: Yes.

JUDGE KOUTRAS: Yes, I understand all of that. Okay.

But see, the problem here is that this case was assessed based on the description as provided by the inspector on the face of this citation, and you're trying to establish in this hearing is that the gravity was less than what MSHA believed it was; isn't that true?

MR. PETRICK: That's right.

JUDGE KOUTRAS: Okay, fine.

Q. (By Mr. Petrick): Did you also inspect this triple seven truck for brakes at the same time?

A. Yes, sir.

Q. The brakes were in proper working order, were they not?

A. Yes, sir.

Q. Nothing to prevent the operator from stopping the truck in the event that somebody were to stray into the path of it?

A. This equipment -- you can have the best brakes in the world on it. When you get one of those trucks loaded, you don't stop them just like --

Q. Yeah, but in this pit area you're not talking about driving more than five miles an hour, are you?

A. No, sir, but I'm not talking -- taking long if it runs into somebody, or speeds, or somebody walks in front of it.

Q. Isn't it true with that truck driving five miles an hour, just will stop just as fast as your automobile in driving it five miles an hour?

A. No, sir, I don't think it would stop as fast as you could an automobile with 85 tons, as you said, on it.

Citation 2076870, 30 CFR 77.1710(i) (Tr. 56-59):

Inspector Boatright cited a 966 Caterpillar frontend loader because it was not equipped with a seat belt. The loader was equipped with ROPS (rollover protection), but without a seat belt for the operator to wear, there would be a danger if the vehicle overturned. The loader was immediately taken out of service and seat belts were installed within an hour.

Mr. Boatright stated that the loader traveled up and down a ramp which was at a 12-14 percent incline, and that the cited standard requires that when equipment is operating in an area where there is a danger of overturning, the operator shall wear his seat belt. Here, the loader was not equipped with a belt. The only person exposed to any hazard here would be the loader operator. Mr. Boatright determined that there was no seat belt by a simple visual inspection of the loader.

On cross-examination, Mr. Boatright stated that the cited regulation requires that all loaders be equipped with seat belts regardless of what they are doing, and that all operators of such loaders must wear the belts (Tr. 60). He then stated that the question as to whether the regulation would apply would depend on how the loader is equipped, and he confirmed that he issued the citation because he believed there was a danger of the loader overturning. Even if the loader were operating on a level pit area, he would still issue the citation because the loader has to use the ramp (Tr. 61). He described the loader as being 8 to 12 feet wide, and while he did not measure the width of the ramp, he estimated that it was probably 50 to 75 feet wide (Tr. 65). His interpretation of the regulation is that seat belts are required if "there's a possibility of overturning" (Tr. 65).

Citation 2076871, 30 CFR 77.1109(c)(1) (Tr. 72-76).

Inspector Boatright cited a D-10 bulldozer for not having a portable fire extinguisher. He stated that he did not consider this violation "significant and substantial" because there was other equipment operating in the area that had fire extinguishers on them. A fire extinguisher was obtained from the nearby mine office and placed on the bulldozer to abate the citation, and this took about ten minutes.

Mr. Boatright confirmed that the cited bulldozer was equipped with a "built-in" fire suppression system inside the operator's cab, but that the standard still requires a portable fire extinguisher.

Citation 2076969, 30 CFR 77.1605(d) (Tr. 150-153).

Inspector Boatright cited a Caterpillar rock haul truck at 9:15 a.m., because it had an inoperable front horn, and the respondent repaired it. The truck was hauling topsoil to the mine reclamation area, and Mr. Boatright was concerned with the fact that if another piece of equipment crossed in front of the truck, the driver would have no way of warning the equipment operator. He believed that "there could be" other equipment operating in the area, and that there was a "possibility" that the operator would not see the truck.

Mr. Boatright confirmed that no employees were exposed to any hazards on the ground, but if the truck collided with another piece of equipment, "lost work days, restricted duty, even fatal" would result. If the condition were to continue, he believed that it was reasonably likely that such injuries would occur, and he asserted that his instructions are to issue "S&S" violations, using this standard.

Mr. Boatright stated that the shift started at 7:00 a.m., and that it was possible that the truck was checked, but that he "couldn't say."

On cross-examination, Mr. Boatright stated that the pits at this mine are 150 feet wide and a half mile long, and he confirmed that the truck was traveling on a road which was 75 feet or more wide, hauling top soil from one location to another. He conceded that the roads had more than adequate clearance for the trucks to drive around in the area in question. He also confirmed that he observed no laborers on the ground in any area where the truck was operating. He also confirmed that any elevated roadway used by the truck would be bermed (Tr. 153-155).

When asked to explain why his citation stated that four people would be exposed to a hazard, he identified two front-end loaders, a road grader, and another truck operating "in the area." However, he conceded that the truck would be stopped when it was being loaded, and that he was simply counting the equipment that was in the area. However, he also indicated that he has no way of knowing when any of these equipment operators will get out of their equipment (Tr. 157).

Mr. Boatright stated that the truck and loaders are all equipped with seat belts, ROPS, but that he still believed that if they collided, the operators would be thrown around the

cabs, and possibly through the windshield (Tr. 158). He had no idea how fast the equipment would be traveling (Tr. 159). His rationale for finding a "significant and substantial" violation is reflected in the following bench colloquy (Tr. 162-163):

Q. But I get the impression that what you've found in this case, as in the others, you saw other equipment working in the pit. You saw men that were operating that equipment, and you figured that at some point in time during the mining process it's all together possible that some fellow may get out of his equipment and walk across the road, or a piece of equipment might get over close to a truck, and that therefore this is why they should have horns and back-up alarms. And since they didn't have them, this is why you found the gravity that you found; isn't that true?

A. Yes, sir.

Citation 2076970, 30 CFR 77.1110 (Tr. 168-169).

Inspector Boatright cited a 9L Caterpillar Bulldozer after observing that a fire extinguisher on the machine was not charged. He determined that it was not charged by observing "a guage indicating that it had been discharged, and the pin was pulled." A fire extinguisher is needed in the event of small fires on the machine, and since fire extinguishers were available on other equipment in the area, he marked the negligence "as low and unlikely." He confirmed that the machine operator tested the extinguisher and determined that it had been discharged.

Citation 2076971, 30 CFR 77.410 (Tr. 170-171).

Inspector Boatright cited a 14-G Caterpillar road grader after finding that the back-up alarm was inoperative. The grader was operating in the pit haul road and spoil areas, and he found the gravity to be "low" because the machine is seldom put in reverse. The condition was corrected within two hours.

Citation 2076972, 30 CFR 77.208(e) (Tr. 171-175).

Inspector Boatright cited an oxygen and an acetylene gas cylinder stored in a trailer near where two mechanics

were working on a bulldozer which had unprotected valves. The cylinders had no guages or hoses, and the protective covers had not been put back on them. The covers were immediately replaced, and they were located next to the cylinders. He assumed that the mechanics had used the cylinders and left the covers off.

Mr. Boatright indicated that the cylinders were vertical, and that if the valves were knocked off by a piece of equipment or someone hitting them, the tank could be ruptured. He believed the negligence was "moderate" in that the pit foreman or superintendent should have discovered the conditions.

On cross-examination, Mr. Boatright confirmed that the cylinders were immediately adjacent to each other and they were the only ones in the trailer (Tr. 175). He did not speak with the mechanics, and he indicated that the cylinders were secured by a chain which was around them. Although he did not ascertain what was in the cylinders, he indicated "they weren't empty cylinders, they were full" (Tr. 177). However, based on his interpretation of the standard, he would have cited the cylinders regardless of whether they were full or empty (Tr. 178).

Mr. Boatright confirmed that he observed no one actually using the cylinders, and when asked to explain his "significant and substantial" finding, he stated as follows (Tr. 180-186):

Q. Your testimony is that he said that they were full?

A. I asked him if the cylinders were empty or full, but I would have still cited those cylinders if they had been empty.

Q. If he told you that they were empty, you would have still cited him; is that what you're telling me?

A. That's exactly --

Q. And what kind of gravity finding?

A. I wouldn't have cited them if they had --

Q. I'm not trying to confuse you, I'm trying to understand. Go ahead.

A. It says they will be protected by covers.

Q. That's right.

A. It don't say whether they're empty or --

Q. That's right. But if he'd told you they were empty, you would have cited them because they didn't have the covers on them; right?

A. Yes, sir.

Q. But what kind of a gravity finding would you have made?

A. There wouldn't have been too --

Q. And why?

A. It was in violation of the standard.

Q. And why would there not have been too much of a gravity finding?

A. Because there wouldn't have been any hazards.

* * *

Q. Did you ever observe those mechanics or anybody else using those cylinders?

A. Not that particular day, no, sir.

Q. Would you tell me again what factors went into your determination that there was a significant and substantial danger as a result of those covers being off those cylinders?

Let me make sure -- we stopped in the middle of things. They were secured, were they not?

A. Yes, sir.

Q. And were standing?

A. Yes, they were standing.

Q. And up off the ground so that normal activity, if somebody walking on the ground, it would have been very unlikely that the top of those cylinders would have been touched?

A. A possibility it could have been.

Q. How far were those two mechanics away from these cylinders? What was the distance between the mechanics and the cylinders?

A. I'd say the trailer was 50, 60 feet away from where they were working.

Q. 50, 60 feet away from where they were working?

A. Yes.

Q. And how far away was the bulldozer they were working on? Further away than that?

A. That was about where the bulldozer was at in relation to where --

Q. Is there anything in between the bulldozer, the mechanics and those cylinders?

A. Not at that particular time, no, sir.

Q. Did you observe any other activity in the area at the time?

A. This is in the pit area, backed up behind the pit area. They haul in the pit area where this was at.

Q. Yeah, but you've got a pit that's a half a mile long?

A. Yes.

Q. Was there any other equipment in the immediate area of this trailer?

A. Not right in the immediate area, no, not right by it.

* * *

Q. Tell me what factors you used to determine that we were -- had a significant and substantial violation?

A. Well I felt like the negligence on the thing was moderate, because you had a superintendent in the area and there was a pit foreman working there, and they should have saw these things not being on it.

* * *

Q. Well that's -- let me get back to what I asked you before. You didn't determine how -- when it had last been used, or whether it was getting ready to be used; did you?

A. I'm sure it wasn't being ready to be used. If it was, it shouldn't have been off anyway. They should have put the guages on it they were going to use it. There were no guages there to even put on it.

Q. Well how much is involved in putting a set of gauges on that thing? How much time?

A. Very little time.

Q. A minute and a half?

A. I'd say probably.

* * *

Q. Okay. What other factors to into being significant and substantial?

A. If it continued to stay there, I'd say it would be reasonably likely that something would happen with the equipment there.

Q. Like what?

A. Like people working in this area. Your mechanics are working on the equipment and driving around, yes, sir.

Q. But you didn't observe any of that. All you're talking about is -- getting back to this same standard that you've heretofore testified -- you're speculating that something like that might happen. You didn't actually observe that in any way, shape or form?

A. No, sir, not right next to it.

Q. Nearest the thing that you observed to those two cylinders was 60 feet away?

A. Approximately 60 feet.

Inspector Boatright cited a 988 Caterpillar front-end loader at 11:00 a.m. after determining that the back-up alarm was inoperative when the equipment was operated in reverse. The loader was loading coal out of the pit and into the truck, and it operated forward and in reverse during this loading process. Three people were on foot in the area where coal was being loaded, and he believed it was "possible" and "reasonably likely" that these people would be in the path of the loader while it was in reverse. One of the individuals was a coal foreman, and the other two were cleaning around the coal with shovels, and they were working close to the loader. However, he saw no one actually step behind the loader or "almost get run over." The alarm was repaired that same day, and he believed the pit foreman should have noted that the back-up alarm was not working.

On cross-examination, Mr. Boatright did not believe the loader operator ever operated the loader more than five miles an hour, and at all times the employees were either in front or on the side of the machine, and when asked to explain his "significant and substantial" finding, he stated as follows (Tr. 198-202):

Q. So taking into account your observation of Turner Brothers operation, there's no reason for any of those workers that you've denominated there, to be behind that loader in any way, shape or form?

A. I don't know that those loaders are going to always be where they're at on that coal when they're in that pit area.

Q. Well we're back to the same situation we've been in before. I'm talking about your observation at that particular time?

A. I did not see one behind the loader at that particular time, no, sir.

Q. But yet you say there's a reasonable likelihood that one of those people are going to be hurt, and I don't understand how, if they're not behind it. Are you telling me that one of them might get away and wander over there because he doesn't have anything to do, and just get behind that loader and get run down? Is that what you're telling me?

A. I'm telling you it's possible when you have people on foot in the area, when there's equipment like that.

Q. Have you ever seen a laborer in Turner Brothers' organization stand around not doing anything?

A. No, sir, not too often, or anyone else.

Q. They all got a job to do and there's somebody out there making sure they're doing it; isn't there?

A. Yes, sir.

* * *

Q. Okay. Now you've checked the box with regard to significant and substantial. Again, what factors went into your determination from this particular case -- on this particular case as to what other factors had caused you to check that box?

A. I think it would be reasonably likely if this loader continued to operate like this and backed over someone, that you would have a serious accident or a fatality.

Q. But here's nobody in the area, nobody's job in the area, that would -- that you've testified about, that would indicate that you saw anybody, or there was -- in other words, what I'm started to say, and I lost the train of thought of this sentence. But unless somebody went over there and was goofing off or not doing his job, there would be no likelihood at all that anybody's get hurt as a result of that back-up horn being inoperable; is that correct?

A. Like this pit -- you were talking about this pit coming down the side, coming out here 75 feet and loading the coal. When you're taking this

coal and coming out here, this loader's backing up here. You don't know whether somebody's going to walk back and forth between it when you've got people on foot in that area, whether they're going to walk back in that area or not, or passing by there or something.

Q. Okay. But you've had enough observation at Turner operation that there's nothing for anybody on foot to do in that area where the coal has already been taken?

A. They could be walking back through that area to come out of the end of the pit.

Q. For what purpose?

A. To get out of the pit. If they had to get out of the pit for some reason.

Q. They could have walked across the coal seam, too, couldn't they?

A. They sure could have. Or they could have walked between the loader and the highwall there it could have backed in there.

Q. What other factors went into your determining that there was a significant and substantial hazard?

A. Well I think if it continued, it would be reasonably likely it would happen. And I've heard --

Q. You said that?

A. Sir?

Q. You said that before?

A. I think if it occurred, you would have loss of workdays or restricted duty. That was the determination that I marked.

Q. And that's all the factors that you've taken into account in checking the box that says there was a significant and substantial hazard, or was reasonably likely so far as your gravity is concerned?

A. Yes, sir.

Citation 2076978, 30 CFR 77.1605(b) (Tr. 203-207).

Inspector Boatright cited an International coal haul truck after he had the driver stop it on a small incline and set the parking brake. The brake would not hold the truck, and it rolled. The condition was corrected.

Mr. Boatright stated that the truck had been operating on level ground for two days and that a mechanic told him that a valve was not working. Mr. Boatright went to inspect the truck, and it appeared that it had been put back into service without the parking brake in operating condition.

Mr. Boatright stated that he never observed the truck parked where he tested it, and he indicated that the truck is not parked "too much." However, when the truck is not hauling coal, and when the driver is having lunch, it is parked on the north side of the pit. He believed that all of the trucks are shut down for lunch.

Mr. Boatright did not believe the pit superintendent was negligent because he thought the parking brake was probably working, and that "it could have been." However, the mechanic told Mr. Boatright that the truck had "an old rusty-looking valve" that did not appear to be working.

Mr. Boatright believed that the violation was "significant and substantial" because "the likelihood of an injury occurring could be reasonably likely if this condition continued to occur."

On cross-examination, Mr. Boatright stated that the parking areas where the trucks park for lunch is "fairly level," but that there are some areas in the pit, which are not on level ground, where the truck could be parked. He also confirmed that the area where the truck was parked and being worked on for two days was "fairly level," and he confirmed that he has not seen many trucks roll as the result of a defective parking brake (Tr. 207-209).

Mr. Boatright conceded that the parking areas used by the trucks during the lunch break are on level ground. He also conceded that when the trucks are parked at the end of the shift they are all parked in a row on level ground.

Mr. Boatright's reasons for a finding of "significant and substantial," is reflected in the following bench colloquy (Tr. 211-212):

MR. PETRICK: I'm having a terrible difficulty, your honor, with understanding his reasoning for checking the significant and substantial hazard situation.

JUDGE KOUTRAS: Well I don't have any difficulty understanding why he did it in this case. The truck didn't have a parking brake. The standard says it should have one. I'll correct the inspector, if I will -- but that's not his fault -- he says the standard requires you to have one in working order. It says no such thing. It just says to be equipped with parking brakes.

But there are decisions that say if it's not in working order, it's like not having one.

MR. PETRICK: All right.

JUDGE KOUTRAS: Maybe the standard should read, "it also shall be equipped with operable parking brakes," but it doesn't. So I'll give you that. I mean, if they're not operating, it's like not having them.

And the reason he found it was S and S is because he found that if this truck happened to be parked on an incline and got away due to a faulty brake, it would more than likely run into something.

Assuming that something was there -- and it didn't have them -- a collision and an injury. And that's why he considered it to be significant and substantial; isn't that true?

THE WITNESS: Yes, sir.

MR. PETRICK: What I'm trying to point out with his testimony is, there's no likelihood it would be parked on an incline.

JUDGE KOUTRAS: You may prevail on the finding that this may not be S and S. But he's already told you why he felt it was S and S. You're not going to change his mind.

You're free to develop your own record as to the factors that you feel he should have considered and were not present.

Mr. Boatright clarified the circumstances under which he cited the truck, as follows (Tr. 212-214):

JUDGE KOUTRAS: Let me just ask: What called your attention to this particular truck in the first place?

A. I was on a general inspection, Your Honor, and we have to check every piece of equipment down there. And I was checking the truck when it come into the pit. The parking brake is one of the things you check on your general inspection when you're checking the truck.

Q. Okay. Now on a general inspection, the parking brake is one of the things. But this truck -- you took him to an incline to check to see whether he had the parking brakes; is that right?

A. Yes, sir.

Q. Did you know in advance that there was something wrong with the parking brake?

A. No, sir, I sure didn't.

Q. Well what's this business about the truck had been down for a repair for a couple of days?

A. Something else was wrong with it -- this particular truck. I'd been there for two days on the inspection, and the point I'm saying, is that it should have been working after it had been down for two days. The parking brake was not in operating order.

Q. What I'm saying is, the truck was down for repairs for two days. And after they repaired it is when you decided to check it out?

A. I had not checked the truck during the general inspection. And also the law says I ought to check each piece of equipment that's operating, during the general inspection.

And they put it back into operation, and I didn't check the equipment until the operator put it back into operation.

Q. Okay. And that's why you decided to check it is because of your general --

A. Yes, sir.

Q. And in order to check the parking brake to see whether it works or not, you're not going to check it on level ground; right?

A. No, sir.

Q. So you had the driver -- what? -- take it to an incline?

A. It was on an incline going down into the pit, and I checked it there.

Q. Were you in the cab with him?

A. No, sir, I was standing outside.

Q. And you had him stop the truck on an incline?

A. Yes, sir.

Q. Was it full --

A. Checked the parking brake.

Q. Was it full or empty?

A. It was empty.

Q. The truck was empty?

A. It was stopped on an incline.

Q. And you had him set the brake?

A. Yes, sir, and it would not hold.

CENT 83-51

Inspector Boatright testified that he took some dust samples with an M.S.A. Dust Pump, and that he followed MSHA's usual procedures and instructions in doing so. He confirmed that he took some dust samples, and also made a noise survey when he was at the mine on March 21, 1983. He gave the samples to MSHA Inspector and Health Officer James Cameron, but could not recall how many samples he took, and he did not have his records with him at the hearing (Tr. 78-80).

When asked whether he took the samples on April 19, 1983, Mr. Boatright stated that he was not sure about the date, and indicated that he would have sampled whatever equipment was operating when he was there. This would have included a D-10 bulldozer, loader, truck, scraper, and a drill, if it were operating. He was not sure as to how many equipment samples were taken (Tr. 81).

Mr. Boatright explained his dust testing procedures, and he indicated that after he places the testing device on a particular piece of equipment, he will check it periodically during the course of the 8 hour shift. After removing the dust cassette, he plugs them, and places them in their respective containers with a dust record card and takes them to his office in McAlester, and the samples are never out of his possession during their transit to the office. He either personally gives them to Mr. Cameron, or leaves them on his desk or takes them to the laboratory if Mr. Cameron is not at the office. Mr. Boatright does not handle them or see them after this (Tr. 83-84).

MSHA Inspector James D. Cameron testified as to his background and experience, and he testified as to the procedures which he followed in processing the dust cassette obtained by Inspector Boatright during his inspection. He confirmed that he sent the cassette to MSHA's Pittsburgh laboratory for processing and that he did so following MSHA's procedures. After receiving the results of the testing, he issued citation 2007403, because the test results indicated that the respondent was out of compliance with the applicable dust standard. He confirmed that the quartz content percentage was high (Tr. 85-92).

Inspector Cameron did not know how many samples Inspector Boatright may have taken on the day of his inspection, and he confirmed that with the exception of the one sample which showed a high presence of quartz, the other samples were in compliance (Tr. 100). He also confirmed that he did not send in other samples for MSHA laboratory analyses because there was insufficient quartz weight gain to show any substantial presence of quartz (Tr. 101).

Inspector Cameron identified exhibit P-3 as a copy of an MSHA computer print-out showing the results of MSHA's Pittsburgh laboratory testing (Tr. 106). He explained that under MSHA's new quartz standards, if a particular piece of equipment which was tested indicated a presence of quartz in excess of the acceptable 0.5 level, a citation would be issued. In this case, the concentration of quartz was shown as

1.5, and even though it was based on one sample, under MSHA's instructions a citation would issue, and that is why he issued the citation in this case (Tr. 115). Since the one sample in question showed 18 percent of quartz, the testing indicated a concentration of 1.5, and that was sufficient to establish a violation under MSHA's interpretation of the standard (Tr. 117). MSHA's counsel took the position that under the cited standard, one sample which is out of compliance is sufficient to establish a violation (Tr. 125).

Respondent's Testimony and Evidence

William T. Turner, confirmed that he is the President of the respondent company, and is responsible for the supervision of all mining operations. He testified as to his education, and his mining experience, and confirmed that respondent operates four mines in the State of Oklahoma. He testified as the company safety program, daily safety inspections, and he stated that the Muskogee number two mine is comprised of a "group of pits," and he diagramed what the mine looked like (exhibit R-2; Tr. 132-135). He also described the operation of the mine in question, including the mining cycle and development of the pits (Tr. 135-138).

Mr. Turner went on to describe the operation of the cited trucks, and he indicated that the roadway where the trucks traveled were approximately 75 feet in width. He stated that under normal operating procedures, there would be no laborers on foot, and he indicated that the location where coal being loaded would be 75 to 100 feet from where trucks would be passing by (Tr. 140). He also indicated that if any trucks were in the coal loading area, they would be backing away from any trucks which may have been in the area, and that laborers would have no reason to be behind any of these trucks (Tr. 141-142).

CENT 83-54

MSHA Inspector James D. Cameron testified as to his mining background, experience, and training, and he confirmed that he issued Citation No. 2007402, on March 15, 1983. He also confirmed that he took three respirable dust samples from the operator's cab of the Reed SK-35 Drill on March 8, 9, and 10, 1983, in accordance with his usual practice and procedures, and that he tested the samples and found that average concentration of respirable dust exposure for that piece of equipment and operator was 3.7 milligrams per cubic meter of air. Since the mandatory requirements of section 71.100, require that respirable dust exposure be maintained at or below 2.0 milligrams, he cited the respondent with a violation of that mandatory section, and fixed a reasonable time for abatement.

Inspector Cameron explained that the three samples which he took to support his citation were mailed to MSHA's Pittsburgh dust laboratory for quartz analysis pursuant to MSHA's usual practice and procedures. He stated that his local MSHA district office has no testing capabilities for determining the presence of quartz in the dust samples which he took. He stated that if any dust samples contain more than five percent quartz, a new compliance standard is then established pursuant to section 71.101.

Inspector Cameron stated that the first sample of March 8, 1983, was rejected by MSHA's Pittsburgh laboratory because it was somehow defective. The second sample taken March 9, 1983, reflected the presence of 15 percent quartz, and the last sample taken on March 10, 1983, indicated the presence of 33 percent quartz. Under MSHA's policy guidelines and procedures, the last sample in a series where quartz is detected is used to compute the new compliance standard. In the instant case, the last sample showing 33 percent quartz was computed pursuant to section 71.101, to establish the new dust compliance standard for the cited drill as 0.3 milligrams per cubic meter of air, rather than the initial standard of 2.0 milligrams per cubic meter of air as stated in section 71.100. Under the circumstances, he modified his original citation on March 23, 1983, to cite the respondent with a violation of section 71.101 rather than 71.100.

Inspector Cameron stated that after he modified his citation, he extended the abatement time after the respondent removed the cited drill and replaced it with another one which was equipped with a pressurized air conditioning unit in the operator's cab. He extended the abatement time so as to permit the respondent time to collect five dust samples so as to determine whether the replacement drill was in compliance with the newly established standard of 0.3 milligrams. Subsequent samples indicated an average dust concentration of 1.6 milligrams, and since this did not achieve compliance, he decided to extend the abatement time further, and issued a section 104(b) order. He modified the order the same day in order to allow the respondent additional time to install a "Hupp Aire cab pressure system" on the drill, and after this was installed and additional samples taken, the respondent achieved compliance by lowering the dust concentration for the drill to 0.2 milligrams per cubic meter of air (Tr. 217-225).

Inspector Cameron confirmed that the dust samples which he took on March 8, 9, and 10, 1983, indicated the average concentration of respirable dust to be 3.7 milligrams, and he also confirmed that these test results were from his own personal weighing which he conducted at MSHA's laboratory

in McAlester (Tr. 226). The sampling for quartz content was conducted by MSHA's laboratory at Pittsburgh, but his laboratory tests pursuant to section 71.100 indicated the presence of respirable dust in excess of the required 2.0 amount (Tr. 227). He confirmed that the sample results of 7.3, 2.2, and 1.8, were processed by him and since they indicated an average concentration of 3.7, he issued the citation (Tr. 228). In short, he confirmed that his sampling of the dust exposure on the cited Reed SK 35 highwall drill indicated noncompliance, and that is why he issued the citation (Tr. 229). He confirmed that the drill was taken out of service and replaced with another one (Tr. 230).

Findings and Conclusions

Jurisdiction

MSHA Inspector Donalee Boatright testified that the respondent operates a surface strip mining operation and at one time actively mined at four strip mine locations. One of the locations ceased mining operations approximately three or four months prior to the date of the hearing.

Mr. Boatright testified that respondent's mining operations includes the stripping of overburden and top soil, the blasting of rock, the stripping of the exposed coal seam, and reclamation of the mined-out pit areas. Mr. Boatright estimated the respondent's annual coal production as between 500,000 to 750,000 tons, and he estimated that the respondent employs a total workforce of 40 miners working on rotating shifts, seven days a week.

Mr. Boatright also confirmed that the coal mined by the respondent is shipped out of state, and that the respondent is regularly inspected by MSHA pursuant to the Act (Tr. 8-11). He also confirmed that the mine has an MSHA identification number, and that he has inspected it on previous occasions (Tr. 18-19).

Mr. Boatright stated that mining at the respondent's Muskogee mine ceased sometime in late 1983, and that when the mine was operational, it worked seven days a week, 12 hours a day. Respondent's other mines are still operating (Tr. 11).

Respondent's President, Tom Turner, confirmed that his company uses approximately 70 pieces of major mining equipment

such as trucks, loaders, and bulldozers, and 30 pieces of other equipment in its mining operations.. He also confirmed that the coal produced is shipped out of state and that his mining operation is nonunion (Tr. 146).

Although the respondent entered a general denial of jurisdiction, it did not reassert this issue during the hearings, nor has it advanced any arguments that it is not a "mine" subject to petitioner's enforcement jurisdiction. I conclude that the testimony here indicates that the respondent is a mine subject to the Act and to MSHA's enforcement jurisdiction.

Stipulations

The parties stipulated as to the accuracy of the dates, times, and places where Inspector Boatright issued his citations, as well as to the fact that they were served on the respondent's representative as shown on the face of the citation forms (Tr. 57).

Fact of Violations - Docket CENT 83-40

I conclude and find that MSHA has established by a preponderance of the evidence that the cited Caterpillar 777 rock haul truck had an inoperative back-up alarm, that a second truck had an inoperative front horn, and that the cited D-10 Caterpillar bulldozer was not equipped with a portable fire extinguisher. Accordingly citations 2076868, 2076869, and 2076871 are all AFFIRMED.

With regard to the citation concerning the lack of a seat belt on the cited front end loader, the cited standard section 77.1710-(i) requires that seat belts be provided in a vehicle where there is a danger of overturning and where roll protection is provided. Here, the loader in question was provided with ROPS and the inspector believed there was a danger of overturning because the loader had to travel up and down a ramp which was at an incline of some 12 to 14 percent. He described the width of the ramp as 50 to 75 feet, and the width of the loader as 8 to 12 feet.

The standard in question contains two conditions precedent which must be met before seat belts are required. The standard does not require seat belts for all vehicles, nor does it require seat belts for vehicles equipped with ROPS. The inspector must first make a finding that there is a danger of overturning before he can require that seat belts be installed on ROPS-equipped vehicles.

In this case, when asked whether or not he issued the citation simply because he found that the loader had to travel up and down a ramp, Inspector Boatright replied "where there was a danger of overturning, yes sir" (Tr. 62). When asked whether he would have issued the citation if the loader where operating on "flat ground," Mr. Boatright stated that he would not. He clarified this answer by stating that since the loader had to travel up and down the ramp, he believed there was a "possibility" of overturning, and that is why he issued the citation. As a matter of fact, Inspector Boatright stated that his interpretation of the standard is that a seat belt is required whenever "there is a possibility of overturning." However, the standard does not state this proposition. The standard says that seat belts are required when there is a danger of overturning. In my view, the question of whether such a danger exists depends on the facts presented at any given time.

On the facts of this case, I cannot conclude that MSHA has established that there was a danger of the loader overturning. I am convinced that the inspector issued the violation simply because the loader in question was equipped with ROPS, and that it traveled up and down the ramp. It seems to me that if MSHA wishes to require seat belts for every vehicle which is equipped with ROPS and which happens to travel up and down an incline it should specifically say so in its standard. Here, the standard only requires a ROPS equipped vehicle to have seat belts if there is danger of overturning. Based on the testimony here, I cannot conclude that MSHA has established that there was a danger of the loader overturning. Simply because it traveled up and down a ramp is insufficient evidence to establish that it would overturn. The evidence here establishes that the ramp was of sufficient width to allow the loader to go up and down without being exposed to other traffic, there is no evidence as to how fast the loader traveled, the conditions under which it traveled the ramp, nor is there any testimony from any loader operators as to whether or not they were in any danger. In short, I conclude that the inspector issued the citation here because he believed that a ROPS-equipped vehicle had to have a seat belt. Under the circumstances, the citation IS VACATED.

Fact of Violations - CENT 83-51 and CENT 83-54

I conclude and find that MSHA has established by a preponderance of the evidence that the allowable respirable dust level for the tested Caterpillar D-10 bulldozer operator exceeded the requirements of cited mandatory standard

section 71.101. Respondent's evidence did not rebut the findings of the inspector, and although respondent questioned the validity of MSHA's testing procedures, he withdrew his objections when the inspector agreed that the violation was not "significant and substantial."

I find that Inspector Boatright's testimony concerning the procedures he followed in conducting and taking the dust samples to support his citation to be credible. Accordingly, Citation No. 2007403, issued in Docket No. CENT 83-51, IS AFFIRMED.

With regard to Citation No. 2007402, issued by Inspector Cameron in Docket No. CENT 83-54, I conclude and find that MSHA has established by a preponderance of the evidence that the allowable respirable dust level for the tested Reed SK 35 Drill operator exceeded the requirements of cited mandatory standard section 71.101 (as amended by Inspector Cameron on April 11, 1983). Respondent's evidence did not rebut the inspector's findings, and I find that Mr. Cameron's testimony regarding his testing procedures, as well as his detailed explanation of the application of the cited section to be credible. Accordingly, the citation IS AFFIRMED.

Fact of Violations - Docket No. CENT 83-55

I conclude and find that MSHA has established by a preponderance of the evidence that the cited No. 912 rock truck had an inoperable front horn, that the 14G road grader had an inoperable back-up alarm, that the 988 front end loader had an inoperable back-up alarm, and that the 96 bulldozer was equipped with a fire extinguisher which was not usable or operative. Accordingly, Citations 2076969, 2076971, 2076973, and 2076970, are all AFFIRMED.

With regard to Citation No. 2076978, concerning an inoperative parking brake on a coal haulage truck, I take note of the fact that while the regulatory language in section 77.1605 (b), that mobile equipment be equipped with adequate brakes, and that all trucks be equipped with parking brakes, may be ambiguous since it simply requires that a truck be equipped with parking brakes, with no specific requirement that they be serviceable or adequate, I conclude that a reasonable application of this standard requires that the parking brake perform the function for which it is designed. In short, a truck with a parking brake which will not hold it or prevent its movement while in a parking mode, regardless of where it is parked, does not satisfy the intent of the standard.

In the instant case, Inspector Boatright's testimony that the brake would not hold the truck when it was tested on a small incline has not rebutted by the respondent. Mr. Boatright testified that the truck was empty at the time he asked the driver to set the brake, and when he did, the brake would not hold.

I conclude and find that MSHA has established a violation by a preponderance of the evidence, and Citation No. 2076978 IS AFFIRMED.

With regard to Citation No. 2076972, concerning the absence of protective covers on two compressed gas cylinders, I take note of the fact that the cited standard section 77.208(e) provides that:

Valves on compressed gas cylinders shall be protected by covers when being transported or stored, and by a safe location when the cylinders are in use.

Inspector Boatright testified that he observed the two cylinders "stored" in a trailer "near" an area where two mechanics were working on a bulldozer. The valves were next to the cylinders, and he assumed that the mechanics had used the cylinders and simply forgot to replace the valves. The cylinders were next to each other in an upright position, and they were secured by a chain which was around them.

Mr. Boatright also testified that he did not speak to the mechanics, nor did he observe them using the cylinders. Although Mr. Boatright stated that the cylinders were full, he indicated that he would have issued a citation even if they were empty. He confirmed that the mechanics were working 50 or 60 feet away from the trailer and the bulldozer was in that same area away from the trailer. He also confirmed that the cylinders were not "being ready to be used."

It seems clear to me from the inspector's testimony that the cylinders in question were not being transported or being used by anyone at the time the inspector made his observations. Since he did not speak to the mechanics, he acted on pure assumptions and speculations which are unsupported by any credible evidence. Further, although his citation narrative gives the impression that the two mechanics were using the cylinders, the facts show otherwise.

In further explanation as to why he issued the citation, Inspector Boatright stated that the cylinders were "just sitting there" (Tr. 190). He believed that they were being "stored" (Tr. 191), and his citation states that they were on a portable welding machine. He also stated that if the gauges are not on the cylinders, or if the cylinders are not being used, then he would consider that they are "stored" (Tr. 190). He confirmed that the cylinders in question had no gauges or hoses when he observed them.

In response to questions from respondent's counsel, Mr. Boatright conceded that the normal storage area for full and empty cylinders is at the mine office located over a half a mile away from the area of the trailer (Tr. 191). He also indicated that prior to the day he cited the cylinders, whenever he had occasion to observe the trailer or a mechanics truck, the valves and gauges were always protected by covers if they were on the cylinders (Tr. 191).

The question presented here is whether or not MSHA has established that the cited cylinders were "stored" within the meaning of section 77.208(e). If they were, the next question is whether or not on the facts here presented, the cylinders were required to have protective valve covers.

After careful review and consideration of all of the testimony and evidence adduced in this case, I conclude that the two cylinders in question were stored at the time the inspector observed them. While it may be true that they were not located at the normal storage area, they were on a portable welding machine, in an upright position and were not in use. I conclude that in their location, they were stored, and that the valve covers should have been on them. The citation is AFFIRMED.

Significant and Substantial Violations

Docket No. CENT 83-40

Citation No. 2076868

Inspector Boatright's citation concerning the inoperable backup alarm on the 777 rock haul truck states that four front-end loaders, two dozers, three haul trucks, and four persons on foot were in the pit area when the truck was operated in reverse.

Mr. Boatright stated that the work shift started at 7:00 a.m., and that he cited the truck at 9:30 a.m. The inoperable alarm was the result of a loose wire, and the truck was immediately taken out of service. He conceded that the alarm could have been working before he cited it, and he conceded that wires do become loose.

Based on all of the facts and circumstances which prevailed at the time of the issuance of this citation, I cannot conclude that MSHA has established that the violation was significant and substantial. Apart from the fact that the inspector observed no one working behind the truck when it was being loaded, the evidence here establishes that until its arrival at the pit loading area, the truck was always driven in a forward mode along a rather wide and clearly defined route. In addition, the two loaders used to load the truck, as well as the other loaders which were cleaning the coal away from the loading area, were all equipped with operable backup alarms which were sounding while being operated in reverse. The loaders loading the coal were operating at the same area where the truck would back up to be loaded, and I cannot conclude that the operators were exposed to any hazards.

With regard to the four men who Inspector Boatright stated were on foot, I cannot conclude that their duties required them to be positioned to the rear of the truck while it backed up to be loaded. Inspector Boatright conceded that he included these men in his citation because it was possible that "somebody within the pit area may possibly stray within the hazard zone" (Tr. 38). This could be true of any violation of this kind. However, in order to support an "S & S" violation, I believe that an inspector should rely on facts which reasonably indicate a likelihood of injury during the normal mining and loading process. Here, the inspector's beliefs that an accident or injury was likely to occur is sheer speculation. Accordingly, his "S & S" finding is unsupported, and it is VACATED.

Citation No. 2076869

Inspector Boatright issued this citation after finding that the front horn on another 777 rock haul truck was inoperative. The condition was abated within an hour or so of the issuance of the violation, and the condition was caused by a loose wire. The inspector cited the violation as "S & S" because he was concerned that an individual or a piece of equipment could inadvertently stray in front of the moving truck, and the truck driver would have no way of sounding his horn.

While it is true that the truck in question was in otherwise good condition, had operative brakes, and traveled approximately five miles an hour while going up and down the pit ramp, it is also true that while driving to and from the pit area, the truck would be moving faster, and the driver could encounter unexpected pedestrian and vehicular traffic in and around his route of travel. Without an operative horn, the driver would be unable to warn such obstacles in his path, and a collision would likely occur. Regardless of whether the truck were empty or full, I believe one can reasonably conclude that in the event of

a collision, personal injuries or equipment damage would likely result. Under the circumstances, I conclude and find that the violation is significant and substantial, and the inspector's finding in this regard is AFFIRMED.

Docket No. CENT 83-55

Citation No. 2076969

Inspector Boatright issued this citation after finding that a Caterpillar rock haul truck used to haul top soil from the pit to the reclamation area had an inoperative front horn. He was concerned that a collision with other equipment might result in personal injuries or equipment damage.

While it is true here that the area where the other equipment noted in the inspector's citation was an area where the cited truck in question would normally be stopped during the loading process, once the truck left that area it could very well encounter other equipment while on its way to the reclamation area. Without an operative front-horn to warn other vehicular traffic, any resulting collision would likely result in injury to the vehicle operator or to the truck or other equipment. Accordingly, the inspector's "S & S" finding is AFFIRMED.

Citation No. 2076972

Inspector Boatright believed that the cylinder citation was a significant and substantial violation because "if it continued to stay there, I'd say it would be reasonably likely that something would happen with the equipment there." Based on his other testimony as to all the circumstances which prevailed at the time he observed the cylinders, particularly the fact that the cylinders were stored and secured in an upright position with a chain, were not being used, were isolated from the two mechanics, and were far removed from any other equipment, I cannot conclude that it was reasonably likely that any injury or accident would occur. In short, I can find no evidence to support the inspector's conclusion that the violation was significant and substantial. Accordingly, his finding in this regard is VACATED.

Citation No. 2076973

Inspector Boatright's citation concerning the inoperative backup alarm on the 988 front-end loader states that "three persons were on foot working in the pit where the loader was being operated." He testified that the loader was loading coal out of the pit and into the truck, and that it operated forward and in reverse during this loading process. He believed it was "possible and reasonably likely" that a foreman and two workers who were cleaning coal with shovels close to the loader would be in the path of the loader while it operated in reverse.

On cross-examination, Mr. Boatright stated that at no time did the loader operator operate the machine more than 5 miles an hour, at no time did he see anyone behind the machine, and, in fact, he stated that at all times the employees were either in front or on the side of the machine.

When asked to explain his "significant and substantial" finding, Mr. Boatright stated that he believed "it would be reasonably likely if this loader continued to operate like this and backed over someone, that you would have a serious accident or fatality."

When asked to explain why he believed an accident or injury would occur since no one would have any business being in the area where the loader was operating, Mr. Boatright stated that he would have no way of knowing whether anyone would be walking through the area on foot while leaving the pit. He also indicated more than once that had he permitted the loader to continue to operate with an inoperable backup alarm, that it would have caused an accident in the event it backed over someone.

I can take judicial notice of the fact that if a loader backed over someone, it would likely cause a serious injury. However, I believe that the question of whether a violation is significant and substantial should be based on a reasonable likelihood of an accident based on the actual conditions which prevailed at the time the inspector observes the condition which prompts him to issue a citation.

On the facts of this citation, the inspector has not established that the foreman and the two coal shovelers were in close proximity to the loader, or that their duties required them to be in close proximity to the truck or behind it when it backed up. I am convinced that he included the "three persons on foot" in the citation because he could never insure that they would not stray or wander behind the loader. I find this to be rather speculative, particularly when he conceded on close cross-examination that the three persons he had in mind had no business being in the immediate area where the loading was being done, and that respondent's employees had clearly defined duties and responsibilities. Under the circumstances, I conclude that the inspector's "S & S" finding is unsupportable, and it is VACATED.

Citation No. 2076978

This citation was issued after the inspector found that the parking brake on a coal haulage truck was inoperative and would not hold the truck when the brake was tested by "setting it" while the empty truck was parked on an incline. The inspector was concerned about a possible injury in the event the truck were parked on an incline and "got away" and ran into something.

Although the inspector here had the driver park the truck on an incline so that he could test the parking brake, there is no evidence that during the normal course of any shift during which the truck is used is it ever parked on an incline. The inspector conceded that the truck is parked on level ground during the lunch break, and that at the end of the working shift it is parked on level ground in a row with other trucks. Although the inspector alluded to the fact that there are some pit areas which are not on level ground, there is absolutely no evidence that the truck in question would ever be stopped or parked in any of these areas. As a matter of fact, the inspector conceded that the haul truck in question is seldom parked during the working shift. Under these circumstances, I cannot conclude that it was reasonably likely that an accident or injury would result from the faulty parking brake during the normal working shift when the truck is used. Absent any reasonable showing that the truck would at any time be parked on an incline, I cannot conclude that it would be likely that the truck would roll and collide with another vehicle while it was parked on level ground. Under the circumstances, the inspector's "S & S" finding is VACATED.

During the course of the hearing, respondent's counsel interposed objections with respect to the admissibility of certain MSHA exhibits concerning certain laboratory testing results in connection with the dust citations issued in Dockets CENT 83-51 and CENT 83-54 (Tr. 84-128). However, the objections were later withdrawn after the parties stipulated and agreed that the two dust citations were not "significant and substantial" violations (Tr. 263-265).

Additional Findings and Conclusions. Dockets CENT 83-40, 83-51, 83-54, 83-55.

Gravity

Citation 2076871, concerning an inoperative portable fire extinguisher on the D-10 bulldozer, involved a low degree of gravity since the record shows that other extinguishers were available nearby, and the bulldozer had a built-in fire suppression system. The inoperative front horn on the 777 rock haulage truck is a serious citation because the driver would be unable to signal anyone in the event of an emergency of sudden appearance of traffic or miners in the path of the truck. The remaining citation for an inoperative back-up alarm on another 777 haulage truck presented a low degree of gravity since I have concluded that no one would likely be exposed to injury (CENT 83-40).

I find that the lack of an operable horn on the haul truck was a serious violation (2076969). As for the remaining citations in this docket, I find that the conditions cited constituted

a low degree of gravity. While the cited bulldozer (2076970) had no portable fire extinguisher, other operable extinguishers were readily available nearby. The inspector confirmed that the 14-G road grader was seldom operated in reverse, and he found a low degree of gravity for the inoperable back-up device. The circumstances surrounding the cylinder citation reflects that no one was in jeopardy of any harm or injury, and I have concluded that the inoperative parking brake and the inoperative alarm on the 988 front-end loader would not likely lead to any injuries (CENT 83-55).

I cannot conclude that the two dust citations issued in these dockets were serious violations. The inspector agreed to change his initial "S & S" findings to "non-S & S". Apart from this, with regard to Citation 2007403, Inspector Cameron confirmed that he found quartz present in only one sample, but that other samples were in compliance and he did not send them to the laboratory because there was insufficient quartz weight gain to show any substantial presence of quartz.

With regard to Citation 2007402, the citation was extended several times as work progressed to achieve abatement, and the respondent finally installed pressurized air conditioned cabs for its drills. However, absent any detailed testimony concerning the seriousness of the cited dust concentrations, the affected occupations, etc., I have no basis for concluding that the citation here was serious (CENT 83-51 and 83-54).

Good Faith Compliance

Inspector Boatright testified that the respondent was always cooperative in correcting any condition or practice which has been cited as violations in these proceedings, and while mine management did not always agree with him, all of the cited conditions or practices were always corrected (Tr. 141). Mr. Boatright confirmed that the respondent exhibited good faith compliance by abating all of the citations which he issued either within the time fixed by him or in advance of this time (Tr. 43-44). Accordingly, I conclude that respondent exhibited good faith in achieving abatement for all of the cited violations in these proceedings, and this is reflected in the civil penalties assessed for the violations.

Negligence

Inspector Boatright testified that the respondent's surface mining operations are by their very nature "pretty dusty", and that dust, mud, and dirt does clog the truck horns and alarms, thereby causing them to malfunction. He also confirmed that "on the whole", the respondent has a "pretty good safety program", and conducts a "pretty good operation" (Tr. 55-56).

After careful examination of all of the testimony and evidence in this case, I conclude and find that all of the violations which have been affirmed in these proceedings resulted from the respondent's failure to take reasonable care to prevent the cited conditions or practices. I further conclude that all of the violations resulted from ordinary negligence.

History of Prior Violations

Respondent's history of prior violations is reflected in several computer print-outs produced by MSHA concerning the history of paid violations at the Welch #1 Mine, the Heavner #1 Mine, and the No. Two Mine, for the periods March 21, 1981, through June 5, 1983. The information submitted shows that the respondent has made payment for a total of 17 violations issued during these time periods.

Considering the inspector's testimony, as well as the information reflected in the computer print-outs, I cannot conclude that the respondent's prior compliance record is such as to warrant any increases in the civil penalties otherwise assessed by me in these proceedings.

Size of Business and Effect of Civil Penalties on the Respondent's Ability to Continue in Business

I conclude that respondent is a medium sized operator, and that the penalties assessed for the violations which have been affirmed will not adversely affect its ability to remain in business.

Penalty Assessments

On the basis of the foregoing findings and conclusions, and taking into account the requirements of section 110(i) of the Act, I conclude and find that the following civil penalty assessments are appropriate for the citations which have been affirmed:

Docket No. CENT 83-40

<u>Citation No.</u>	<u>Date</u>	<u>30 CFR Section</u>	<u>Assessment</u>
2076868	3/21/83	77.410	\$50
2076869	3/21/83	77.1605(d)	\$80
2076871	3/21/83	77.1109(c)(1)	\$20

Docket No. CENT 83-51

<u>Citation No.</u>	<u>Date</u>	<u>30 CFR Section</u>	<u>Assessment</u>
2007403	5/3/83	71.101	\$35

Docket No. CENT 83-54

<u>Citation No.</u>	<u>Date</u>	<u>30 CFR Section</u>	<u>Assessment</u>
2007402	3/15/83	71.101	\$35

Docket No. CENT 83-55

<u>Citation No.</u>	<u>Date</u>	<u>30 CFR Section</u>	<u>Assessment</u>
2076969	6/6/83	77.1605(d)	\$70
2076970	6/6/83	77.1110	\$30
2076971	6/6/83	77.410	\$30
2076973	6/6/83	77.410	\$40
2076978	6/6/83	77.1605(b)	\$50
2076972	6/6/83	77.208(e)	\$35

ORDER

Respondent IS ORDERED to pay the civil penalties assessed above, in the amounts shown for each of the citations, and payment is to be made to the petitioner within thirty (30) days of the date of these decisions. Upon receipt of payment, these proceedings are dismissed.

Docket No. CENT 83-52. Findings and Conclusions.

This docket concerns five citations issued by MSHA Inspector Johnny M. Newport on May 17, 1983, after an inspection at the respondent's Welch #1 Mine. All of the citations are "non S & S" citations issued pursuant to section 104(a) of the Act.

Citations 2076408, 2076411, and 2076412 were all issued for violations of mandatory safety standard 30 CFR 77.410, after the inspector found that two front-end loaders and a grader operating in the pit area were equipped with automatic warning devices that would not give an audible alarm when the equipment was operated in reverse.

Citation 2076409 was issued after the inspector found that a front-end loader operating in the pit area was equipped with an inoperative horn. Citation 2076410 was issued because a grader operating in the pit area was equipped with a discharged fire extinguisher.

At the hearing, the parties proposed to settle this case by the respondent making full payment for the proposed initial assessments in the amount of \$100 for all of the citations. In support of this proposed settlement disposition, petitioner's counsel pointed out that the inspector found low negligence and gravity, that no miners were found to be on foot in any of the areas concerning the inoperable back-up devices and horn, and

that three operational fire extinguishers were readily available in the area where the grader with the discharged extinguisher was operating. Further, petitioner's counsel asserted that the respondent has a good compliance record for an operation of its size.

In addition to the foregoing, the record establishes that three of the citations were abated within 10 or 15 minutes, one within 30 minutes, and one within an hour or so of its issuance. Further, all of the inoperable devices apparently involved loose wires which were corrected as soon as they were brought to the attention of the pit superintendent.

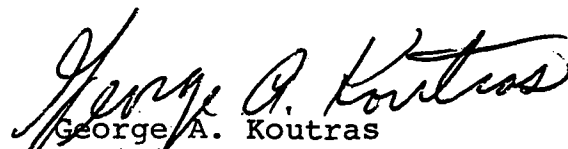
Conclusion

After careful consideration of all of the information of record, including the pleadings and arguments made on the record in support of the proposed settlement, I conclude and find that it is reasonable. Accordingly, pursuant to 29 CFR 2700.30, IT IS APPROVED.

ORDER

Respondent IS ORDERED to pay civil penalties in the following amounts within thirty (30) days of the date of this decision, and upon receipt of payment by the petitioner, this case is dismissed.

<u>Citation No.</u>	<u>Date</u>	<u>30 CFR Section</u>	<u>Assessment</u>	<u>Settlement</u>
2076408	5/17/83	77.410	\$ 20	\$ 20
2076409	5/17/83	77.1605 (d)	\$ 20	\$ 20
2076410	5/17/83	77.1110	\$ 20	\$ 20
2076411	5/17/83	77.410	\$ 20	\$ 20
2076412	5/17/83	77.410	\$ 20	\$ 20
			<u>\$100</u>	<u>\$100</u>


George A. Koutras
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FALLS CHURCH, VIRGINIA 22041

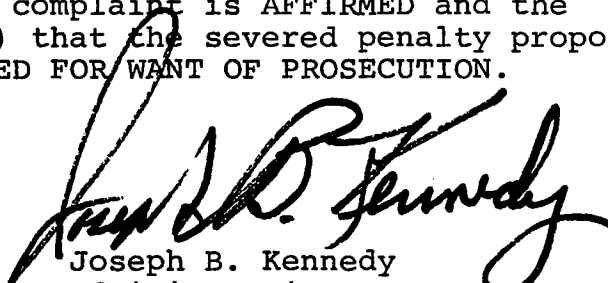
MAY 10 1984

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 83-97-D
ON BEHALF OF	:	
JAMES M. CLARKE,	:	MSHA Case No. VINC-CD-83-09
Complainant	:	
v.	:	T. P. Strip
	:	
T. P. MINING, INC.,	:	
Respondent	:	

ORDER OF DISMISSAL

Before: Judge Kennedy

The Solicitor having failed and refused to comply with my order to provide an amended complaint in support of the penalty proposal that was severed from the discrimination complaint, it is ORDERED that (1) the order approving settlement of the discrimination complaint is AFFIRMED and the complaint DISMISSED and (2) that the severed penalty proposal be, and hereby is, DISMISSED FOR WANT OF PROSECUTION.


Joseph B. Kennedy
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
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MAY 11 1984

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. PENN 84-2
Petitioner	:	A.C. No. 36-00963-03525
v.	:	
	:	Mathies Mine
MATHIES COAL COMPANY,	:	
Respondent	:	

DECISION APPROVING SETTLEMENT

Before: Judge Merlin

On April 9, 1984, the Solicitor filed a Motion for Decision and Order Approving Settlement in the above-captioned case. The one violation at issue was originally assessed at \$2,000. The settlement proposed by the parties is for \$1,500.

Order No. 2104294 was issued for violation of 30 C.F.R. § 75.200, for failure to comply with the approved roof control plan. Sacrifice coal was being mined when a roof fall occurred which covered the continuous miner and entrapped the operator for approximately 1 hour and 10 minutes.

The Solicitor submits that the \$500 reduction from the original assessment is warranted in view of the uncertainties of litigation and after detailed consideration of the six statutory criteria. The operator's negligence was assessed as high. Subsequent investigation revealed two mitigating factors regarding the level of negligence. First, the roof control plan was not being complied with in that sacrifice stumps of coal required to be left in place were mined. However, the Solicitor points out that the roof control plan does not specify a size for the sacrifice stumps that must be left unmined. Second, prior to the coal being mined from the cited area, there existed a "weak wall" condition at that location. In order to remove this potential hazard, the operator mined coal from the front stump of the sacrifice coal and eliminated the "weak wall" condition. This "weak wall" posed a potential hazard in particular to the miners recovering the crib by the cited area. Given these two factors, the Solicitor asserts that the negligence of the operator is reduced, and accurately reflected by the proposed reduction in the civil penalty.

The Solicitor also considered gravity and the probability of harm associated with the violation. It was reasonably likely that the aforementioned mining of the sacrifice coal stump would have exposed the continuous miner operator to potential injury due to the roof fall.

The operator demonstrated a good faith effort to abate the violation. The operator reviewed the roof control plan with all miners involved in retreat mining and the violation was abated within the required time period.

I accept the Solicitor's representations and accordingly, the proposed settlement is hereby approved.

ORDER

The operator is hereby ORDERED to pay \$1,500 within 30 days of this decision.

A handwritten signature in black ink, appearing to read "Paul Merlin". The signature is fluid and cursive, with a large initial "P" and "M".

Paul Merlin
Chief Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

2 SKYLINE, 10th FLOOR

5203 LEESBURG PIKE

FALLS CHURCH, VIRGINIA 22041

MAY 11 1984

WESTMORELAND COAL COMPANY,	:	CONTEST PROCEEDING
Contestant	:	
	:	Docket No. WEVA 82-340-R
v.	:	Order No. 2002585; 7/15/82
	:	
SECRETARY OF LABOR,	:	Docket No. WEVA 82-341-R
MINE SAFETY AND HEALTH	:	Order No. 2002586; 7/15/82
ADMINISTRATION (MSHA),	:	
Respondent	:	Docket No. WEVA 82-342-R
	:	Order No. 2002587; 7/15/82
UNITED MINE WORKERS OF	:	
AMERICA,	:	Docket No. WEVA 82-343-R
Respondent	:	Order No. 2002588; 7/15/82
	:	
	:	Docket No. WEVA 82-344-R
	:	Order No. 2002589; 7/15/82
	:	
	:	Docket No. WEVA 82-345-R
	:	Order No. 2002590; 7/15/82
	:	
	:	Docket No. WEVA 82-346-R
	:	Order No. 2002591; 7/15/82
	:	
	:	Docket No. WEVA 82-347-R
	:	Order No. 2002592; 7/15/82
	:	
	:	Docket No. WEVA 82-348-R
	:	Order No. 2002593; 7/15/82
	:	
	:	Docket No. WEVA 82-349-R
	:	Order No. 2002594; 7/15/82
	:	
	:	Docket No. WEVA 82-350-R
	:	Order No. 2002595; 7/15/82
	:	
	:	Docket No. WEVA 82-351-R
	:	Order No. 2002596; 7/15/82
	:	
	:	Docket No. WEVA 82-352-R
	:	Order No. 2002597; 7/15/82
	:	
	:	Ferrell No. 17 Mine
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 83-73
Petitioner	:	A. C. No. 46-02493-03504
	:	
v.	:	Docket No. WEVA 83-143
	:	A. C. No. 46-02493-03515
WESTMORELAND COAL COMPANY,	:	
Respondent	:	Ferrell No. 17 Mine

DECISION APPROVING SETTLEMENT
AND DISMISSING NOTICES OF CONTEST

Before: Judge Steffey

Counsel for both the Secretary of Labor and Westmoreland Coal Company (WCC) filed on April 20, 1984, in the above-entitled proceeding a motion for approval of settlement and for dismissal of the notices of contest. Under the parties' settlement agreement, WCC has agreed to pay reduced civil penalties totaling \$38,000 instead of the civil penalties totaling \$55,040 proposed by MSHA.

In orders issued in this proceeding on May 4, 1983, and August 2, 1983, I consolidated the civil penalty issues raised in Docket Nos. WEVA 83-73 and WEVA 83-143 with the issues raised in the notices of contest which seek review of 13 withdrawal orders issued on July 15, 1982, under the unwarrantable-failure provisions of section 104(d) of the Federal Mine Safety and Health Act of 1977. The aforesaid order of May 4 also granted in part motions for summary decision filed by WCC and, in doing so, vacated all 13 of the withdrawal orders as having been issued in error under section 104(d) of the Act. The order of May 4 held, however, that the violations alleged by MSHA in the 13 orders survived vacation of the orders so that the 13 violations would have to be considered on their merits in the civil penalty cases (Island Creek Coal Co., 2 FMSHRC 279 (1980), and Van Mulvehill Coal Co., Inc., 2 FMSHRC 283 (1980)). The parties' settlement agreement renders moot the issues raised in the notices of contest and makes it appropriate for me to grant the motion for dismissal of the notices of contest, as hereinafter ordered.

Section 110(i) of the Act lists six criteria which are required to be considered in determining civil penalties. The proposed assessment sheet in the official file in Docket No. WEVA 83-143 shows that WCC produces about 5,866,000 tons on an annual basis which supports a finding that WCC is a large operator. Consequently, to the extent that civil penalties are based on the criterion of the size of the operator's business, the penalties should be in an upper range of magnitude.

There is no information in the official file or in the motion for approval of settlement pertaining to the operator's financial condition. The Commission held in Sellersburg Stone Co., 5 FMSHRC 287 (1983), that if an operator supplies no facts regarding its financial condition, a judge may find that an operator is able to pay civil penalties. In the absence of any facts to support a contrary conclusion, I find that WCC's ability to continue in business will not be adversely affected by the payment of civil penalties. Therefore, no civil penalties

in this proceeding need to be reduced under the criterion of whether the payment of penalties would cause the operator to discontinue in business.

The proposed assessment sheet in the official file in Docket No. WEVA 83-73 shows that WCC had less than .3 of a violation per inspection day when its history of previous violations is evaluated under the assessment procedures used by MSHA, as described in 30 C.F.R. § 100.3(c). When an operator has less than .3 of a violation per inspection day, MSHA assigns zero penalty points under section 100.3(c). There are no facts in the record to show that MSHA incorrectly evaluated the criterion of WCC's history of previous violations. Consequently, none of the penalties to be assessed in this proceeding need to be increased under the criterion of the operator's history of previous violations.

Three criteria remain to be considered, namely, negligence, gravity, and whether the operator demonstrated a good-faith effort to achieve rapid compliance after the violations were cited. The circumstances involved in the citing of the 13 violations involved in this proceeding are unique so that all three of the remaining criteria should be borne in mind in light of the facts hereinafter discussed.

An explosion occurred on November 7, 1980, in the 2 South Section of WCC's Ferrell No. 17 Mine. Five miners were killed in the explosion. Immediately after rescue and recovery operations had been completed, the 2 South Section was sealed off and MSHA has not yet completed its physical inspection of the 2 South Section. Although other sections of the mine were allowed to produce coal after MSHA's investigation was completed, except for the sealed off 2 South Section, the motion for approval of settlement (p. 2) states that the Ferrell No. 17 Mine is presently closed in its entirety and that it is doubtful if the 2 South Section will ever be reopened.

The motion for approval of settlement states that WCC, without regard to its potential civil and criminal liability, cooperated fully in the investigations of the disaster. Subsequently, WCC and several of its employees were indicted for violations of the Act with respect to the explosion. WCC ultimately pleaded guilty to 16 violations and paid a total of \$600,000 in fines. As part of the disposition of the criminal charges, WCC also made \$475,000 in charitable contributions for improved health care, the education of physicians, and safety training in Boone County, West Virginia, where the Ferrell No. 17 Mine is located.

The 13 violations involved in this proceeding were all written on July 15, 1982, by an inspector in Arlington, Virginia, on the basis of his examination of sworn statements obtained by

MSHA's investigators in December 1980. The alleged violations pertain to conditions which the inspector thought contributed to the explosion which occurred on November 7, 1980. MSHA proposed large penalties ranging from \$5,000 to \$10,000 for six of the alleged violations and all of those violations are alleged in the proposal for assessment of civil penalty filed in Docket No. WEVA 83-143. MSHA proposed the large penalties in Docket No. WEVA 83-143 under section 100.5 of its assessment procedures which specify that MSHA may waive the use of the formula described in section 100.3 and propose penalties under section 100.5 by making narrative findings pertaining to the six criteria. The remaining seven violations were alleged by MSHA in the petition for assessment of civil penalty filed in Docket No. WEVA 83-73. The penalties proposed for those seven violations range from \$420 to \$655 and were determined by assigning penalty points as described in section 100.3 of MSHA's assessment procedures.

While the discussion above is helpful for an understanding of how the alleged violations in this proceeding were cited and how the penalties were proposed, it does not specifically show why WCC's agreement to pay \$38,000 in civil penalties, as opposed to the \$55,040 in civil penalties proposed by MSHA, is justified when evaluated under the six criteria. That sort of showing cannot be demonstrated without making a specific examination of the violations which were alleged. I shall briefly consider each of the alleged violations under the docket number in which the respective civil penalties were proposed by MSHA.

Docket No. WEVA 83-143

As previously indicated above, all of the alleged violations were cited in orders written pursuant to section 104(d) of the Act. Since I have already found in my order issued May 4, 1983, that all 13 of the orders are invalid, they will hereinafter be discussed as vacated orders, but the violations alleged in the orders survived the vacation of the orders because they could have been issued as valid citations pursuant to section 104(a) of the Act (Island Creek Coal Co., 2 FMSHRC 279 (1980), and Van Mulvehill Coal Co., Inc., 2 FMSHRC 283 (1980)).

Vacated Order No. 2002586 alleged a violation of section 75.316 because permanent stoppings had been replaced by plastic stoppings and the plastic stoppings had not been properly maintained. MSHA believed that the improperly maintained stoppings may have prevented air from going to the 2 South Section where the explosion occurred. MSHA proposed a maximum penalty of \$10,000 for the aforesaid violation and WCC has agreed to pay in full that proposed penalty. Since WCC is paying the maximum penalty permitted by the Act, no discussion is required to justify the settlement proposal with respect to the violation alleged in vacated Order No. 2002586.

Vacated Order No. 2002587 alleged a violation of section 75.316 because WCC had failed to follow its approved ventilation plan by not providing crosscuts at or near the face of each entry before the entries were abandoned. The order states that there is no evidence to show that it was unsafe to develop the required crosscuts. MSHA considered the violation to have been serious, to have been associated with a high degree of negligence, and proposed a penalty of \$5,000 which WCC has agreed to pay in full. Inasmuch as MSHA properly proposed a large penalty which WCC has agreed to pay in full, no discussion is required to justify acceptance of the settlement proposal with respect to vacated Order No. 2002587.

Vacated Order No. 2002588 alleged that a violation of section 75.316 occurred because WCC had frequently failed to keep in a closed position the ventilation doors which had been installed in 1 South between 1 East and 1 West. MSHA considered the violation to have been very serious, to have been associated with a high degree of negligence, and proposed a penalty of \$8,000, whereas WCC has agreed to pay a reduced penalty of \$2,500. A reduction is justified in this instance because the language used in citing the violation speaks of "numerous occasions during the course of last year" when the doors were not closed. If a hearing had been held, it is doubtful that MSHA would have been able to prove that the doors were open at the time the explosion occurred so as to support a finding that failure to keep the doors closed specifically contributed to the cause of the explosion.

Vacated Order No. 2002589 alleged a violation of section 75.305 because WCC's section foreman admitted that he did not examine at least one entry of each intake and return air course in its entirety when he made a weekly examination for hazardous conditions. The section foreman traveled in the track entry and made intermittent examinations of the intake and return entries. MSHA considered the violation to have been very serious, to have been associated with a high degree of negligence, and proposed a penalty of \$8,000, whereas WCC has agreed to pay a reduced penalty of \$2,500. A substantial reduction is warranted in this instance because the section foreman's failure to examine the intake and return entries in their entirety during a weekly inspection could hardly be shown to have directly contributed to the explosion.

Vacated Order No. 2002590 alleged a violation of section 75.303 because WCC's personnel were not making preshift examinations on each shift prior to the entrance of miners into 2 South for the purpose of removing mining equipment during a 2-week period in late August and early September 1980. MSHA considered the violation to have been extremely serious, to have been

associated with a very high degree of negligence, and proposed a penalty of \$10,000, whereas WCC has agreed to pay a reduced penalty of \$6,000. A reduction in the proposed penalty in this instance is also warranted because no facts are given in the file or MSHA's narrative findings which show how a failure to make a preshift examination during a 2-week period in August and September would have contributed to an explosion which occurred on November 7, 1980.

Vacated Order No. 2002593 alleged a violation of section 75.303 because WCC's personnel failed on November 7, 1980, to make an inspection for methane and oxygen deficiencies in the 2 South Section within 3 hours before five miners entered that section for the purpose of retrieving some track rails. The miners entered the 2 South Section about 1:55 a.m. and were killed by the explosion which occurred a short time later. MSHA considered the violation to have been extremely serious, to have been associated with a very high degree of negligence, and proposed a maximum penalty of \$10,000 which WCC has agreed to pay in full. WCC's agreement to pay the proposed maximum penalty makes it unnecessary to discuss the matter of whether the settlement proposal may be accepted with respect to the violation alleged in vacated Order No. 2002593.

Docket No. WEVA 83-73

Vacated Order No. 2002585 alleged a violation of section 75.322 because WCC's personnel had made a change in ventilation on October 27, 1980, which materially affected the main air current. MSHA assessed a penalty under the provisions of section 100.3 by assigning a maximum number of points under the criteria of negligence and gravity which resulted in a proposed penalty of \$655, whereas WCC has agreed to pay a reduced penalty of \$250. A reduction in the proposed penalty is justified in this instance because there is nothing in the order to show that a change in ventilation on October 27, 1980, contributed to the explosion which occurred over a week afterwards. Also the change in ventilation involved stopping one out of two fans. There is nothing to show that only one fan was being used on November 7, 1980, when the explosion occurred.

Vacated Order No. 2002591 alleged that a violation of section 75.314 occurred because WCC's personnel frequently failed to make the required examinations in idle and/or abandoned areas not more than 3 hours before miners who check and install pumping equipment entered such areas to work. MSHA assigned a maximum number of penalty points under the criteria of negligence and gravity and proposed a penalty of \$655, whereas WCC has agreed to pay a reduced penalty of \$250. The parties' agreement to reduce the penalty in this instance is also justified because the order fails to explain how the alleged violation contributed to the occurrence of the explosion on November 7, 1980.

Vacated Order No. 2002592 alleged a violation of section 75.303 because WCC's personnel failed to make the required pre-shift examination of haulageways and travelways within 3 hours preceding the oncoming shift. The order states that inspections of haulageways and travelways were made, but the examinations were made at the start of the shift while the miners were on their way to the working sections. MSHA assigned less than the maximum number of penalty points under the criteria of negligence and gravity and proposed a penalty of \$420, whereas WCC has agreed to pay a reduced penalty of \$200. A reduction in the proposed penalty is warranted in this instance because the order shows that WCC's personnel did make examinations of the haulageways and travelways before miners began working, but did not make the examinations at the required time.

Vacated Order No. 2002594 alleged a violation of section 75.303 because WCC's personnel failed on November 7, 1980, to make a preshift examination in the 3 East off 2 North Section within 3 hours before miners entered that section. MSHA assigned a maximum number of penalty points, and almost a maximum number of penalty points, under the criteria of negligence and gravity, respectively, and proposed a penalty of \$500 which WCC has agreed to pay in full. MSHA properly proposed a penalty of \$500 because the failure to perform the preshift examination occurred on the same day as the explosion even though the failure to make the preshift examination, in this instance, did not pertain to the 2 South Section where the explosion occurred.

Vacated Order No. 2002595 alleged that a violation of section 75.303 occurred because WCC's personnel failed to make a preshift examination in the 1 East Section on October 24, 1980, before miners entered that section to recover belt structures. MSHA assigned the maximum number, and almost the maximum number, of points under the criteria of negligence and gravity, respectively, and proposed a penalty of \$500 which WCC has agreed to pay in full. MSHA properly proposed the penalty in this instance and WCC's agreement to pay the full amount should be approved.

Vacated Order No. 2002596 alleged a violation of section 75.301 because the rescue team, while recovering the bodies of five miners killed by an explosion, found water which was within 12 inches of the mine roof in the No. 2 entry. The inspector who wrote the order speculates that the water may have contributed to the inadequate ventilation which resulted in the explosion. MSHA assigned a maximum number of penalty points under the criteria of negligence and gravity and proposed a penalty of \$655, whereas WCC has agreed to pay a reduced penalty of \$200. A reduction in the penalty is warranted in this instance because the person who wrote the order is speculating about whether water observed in an entry after occurrence of an explosion contributed to the cause of the explosion. The explosion could have caused a pump to stop working or could have broken a

waterline which could have produced the accumulation of water. Payment of a substantial penalty ought to be based on more than mere speculation.

Vacated Order No. 2002597 alleged a violation of section 75.1106 because one of WCC's miners used a cutting torch on November 6, 1980, in the 1 East belt entry near the mouth of 2 South Section. He failed to use a fireproof enclosure and a qualified person did not test continuously for methane while the torch was being used. MSHA assigned the maximum number of penalty points under the criteria of negligence and gravity and proposed a penalty of \$655, whereas WCC has agreed to pay a reduced penalty of \$100. The reduced penalty is warranted in this instance because large penalties have been assessed in this proceeding primarily on the basis of whether a given violation may have contributed to the cause of the explosion which occurred on November 7, 1980. The torch was used on the day preceding the explosion and there is nothing in the file to show that a torch had been used on the 2 South Section at the time the explosion occurred. Moreover, section 75.1106 provides for the use of a fireproof enclosure "whenever practicable". The order does not say that use of a fireproof enclosure is practicable when the miner using the torch is cutting down belt conveyor hangers, as was being done in this instance. Finally, use of a torch in a belt entry, which has a neutral split of intake air, is not as hazardous as it would be if the torch had been lighted in a return entry or at the working faces.

I find, on the basis of the foregoing discussion of the six criteria, that the motion for approval of settlement should be granted and that the settlement agreement should be approved.

The motion for approval of settlement stresses the fact that WCC demonstrated good faith in cooperating in the investigation of the explosion and in making a large voluntary charitable contribution to improve health and safety in Boone County, West Virginia. I believe that those are additional reasons which support acceptance of the settlement agreement.

Another point which should be emphasized is that all of the alleged violations were cited in orders written on July 15, 1982, by an MSHA inspector who reviewed sworn statements obtained in December 1980 by MSHA's investigators. If a hearing had been held, those sworn statements would have had to have been reexamined by the parties and any party who might have wished to controvert anything in a sworn statement would have had the burden of trying to find witnesses with vivid memories who could recall details of events which occurred nearly 4 years ago.

In such circumstances, acceptance of a settlement is preferable to holding a hearing, especially when it is considered that WCC has agreed to pay substantial penalties totaling \$38,000.

WHEREFORE, it is ordered:

(A) The joint motion for approval of settlement is granted and the settlement agreement is approved.

(B) Pursuant to the parties' settlement agreement, Westmoreland Coal Company, within 30 days from the date of this decision, shall pay civil penalties totaling \$38,000 which are allocated to the respective alleged violations as follows:

Docket No. WEVA 83-73

Vacated Order No. 2002585 7/15/82 \$ 75.322 ...	\$ 250.00
Vacated Order No. 2002591 7/15/82 \$ 75.314 ...	250.00
Vacated Order No. 2002592 7/15/82 \$ 75.303 ...	200.00
Vacated Order No. 2002594 7/15/82 \$ 75.303 ...	500.00
Vacated Order No. 2002595 7/15/82 \$ 75.303 ...	500.00
Vacated Order No. 2002596 7/15/82 \$ 75.301 ...	200.00
Vacated Order No. 2002597 7/15/82 \$ 75.301 ...	<u>100.00</u>
Total Settlement Penalties in Docket No.	
WEVA 83-73	\$ 2,000.00

Docket No. WEVA 83-143

Vacated Order No. 2002586 7/15/82 \$ 75.316 ...	\$10,000.00
Vacated Order No. 2002587 7/15/82 \$ 75.316 ...	5,000.00
Vacated Order No. 2002588 7/15/82 \$ 75.316 ...	2,500.00
Vacated Order No. 2002589 7/15/82 \$ 75.305 ...	2,500.00
Vacated Order No. 2002590 7/15/82 \$ 75.303 ...	6,000.00
Vacated Order No. 2002593 7/15/82 \$ 75.303 ...	<u>10,000.00</u>
Total Settlement Penalties in Docket No.	
WEVA 83-143	\$36,000.00

Total Settlement Penalties in This
Proceeding \$38,000.00

(C) The motion for dismissal of the notices of contest is granted and the 13 notices of contest filed by Westmoreland Coal Company in Docket Nos. WEVA 82-340-R through WEVA 82-352-R are dismissed.

Richard C. Steffey
Richard C. Steffey
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

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

MAY 11 1984

MARJORIE ZAMORA, : DISCRIMINATION PROCEEDING
Complainant :
v. : Docket No. WEST 83-48-D
: DENV CD 83-9
UNITED STATES FUEL COMPANY, :
Respondent : King 4, King 5 and King 6

DECISION

Appearances: Marjorie Zamora, Vernal, Utah, pro se;
Barry D. Lindgren, Esq., Mountain States Employees
Counsel, Inc., Denver, Colorado,
for Respondent.

Before: Judge Vail

STATEMENT OF THE CASE

Complainant filed this proceeding under section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, et seq. (the Act), claiming that she was discharged by respondent because of safety related activity protected under the Act. Initially, complainant filed a complaint of discriminatory discharge with the Secretary of Labor under section 105(c)(2) of the Act. The Secretary, after investigation, declined to prosecute the complaint. Complainant then brought this proceeding directly against respondent under section 105(c)(3) of the Act.

A hearing on the merits was held in Price, Utah on August 25, 1983. Complainant appeared pro se; respondent appeared through counsel. Both parties filed post-hearing briefs. Based on the evidence presented at the hearing and considering the contentions of the parties, I make the following decision. To the extent that the contentions of the parties are not incorporated in this decision, they are rejected.

STATUTORY PROVISIONS

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

No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the

exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this chapter because such miner, representative of miners, or applicant for employment has filed or made a complaint under or related to this chapter, 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. ...

Section 105(c)(2) of the Act, provides in pertinent part as follows:

Any miner or applicant for employment or representative of miners who believes that he has been discharged, interfered with, or otherwise discriminated against by any person in violation of this subsection may, within 60 days after such violation occurs, file a complaint with the Secretary alleging such discrimination....

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

Within 90 days of the receipt of a complaint filed under paragraph (2), the Secretary shall notify, in writing, the miner, applicant for employment, or representative of miners of his determination whether a violation has occurred. If the Secretary, upon investigation, determines that the provisions of this subsection have not been violated, the complainant shall have the right, within 30 days of notice of the Secretary's determination, to file an action in his own behalf before the Commission, charging discrimination or interference in violation of paragraph (1). ...

FINDINGS OF FACT

1. United States Fuel Company ("respondent") is a subsidiary of Sharon Steel Corporation. It operates three coal mines near Hiawatha, Utah employing approximately 465 employees; supervisory and underground (Transcript at 65).

2. Marjorie Zamora ("complainant") started working for respondent as an underground miner in July 1977. After four months she was given the job as instructor and after a year and a half was designated training supervisor which position she held until November 2, 1982 when she was discharged (Tr. at 11, 12).

3. William C. Vrettos is respondent's manager of industrial relations and is responsible for personnel, office administration, payroll, safety, and training. In January 1981, Lou Mele was the Director of Safety and Training. Under his supervision were the complainant, as supervisor of training, and Gary Lauflin, supervisor of safety. Mele terminated his employment with respondent in August 1981 and thereafter the complainant and safety supervisor reported directly to Vrettos (Tr. at 139).

4. During the latter part of 1981, Vrettos and the complainant had several meetings where they discussed the objectives of the training department for the forthcoming year (1982). Vrettos proposed a rough outline of what the objectives of the department would be and complainant ultimately submitted a written plan outlining specific objectives and completion dates which was approved by Vrettos (Exhibit R-1 and Tr. at 139-141).

5. In March 1982, Vrettos met with complainant to review the first quarter results of the 1982 action plan for the training department. He determined that complainant had not been following the plan and "specifically" told her that they were to adhere to the plan "without exception" (Tr. at 142).

6. In April 1982, complainant entered the miners bath house at the Middlefork mine and heard several miners discussing with representatives of the Safety Department a request that the miners sign their 5000-23 task training forms. Three miners maintained they had not received the task training indicated on the forms (Tr. at 14). Complainant told the representatives of the Safety department that the miners were right and that the forms should not be shown or exposed to other miners in the bath house. The following day complainant met with representatives of the Safety department and Vrettos and stated that the 5000-23 task training forms were to be kept secure and private and that the forms were being filled out wrong (Tr. at 16 and 17). Vrettos told complainant she was being "pretty hard on safety" and criticized her for being an improper supervisor (Tr. at 16). Vrettos agreed to a class being held for teaching supervisors how to fill out the miners task training forms. This class was scheduled and held on April 22, 1982 (Tr. at 21 and Exhs. C-1, C-2, C-3 and C-4).

7. Complainant scheduled emergency medical technician training (EMT) for May and June 1982, and volunteered to teach the classes (Exh. C-5). Vrettos offered to contact doctors for the sessions but requested an outline of what was to be covered. Complainant furnished photocopies of pages from her manual which Vrettos rejected as not adequate to inform the doctors of what was required of them. Complainant then offered to get the

doctors to appear at the classes but found on contacting them that they were busy so the classes were delayed further into the summer. Complainant was criticized by Vrettos for this delay and also for not keeping the training room cleaned up. This room was being used by Vrettos for supervisory training during the same period as complainant's EMT classes (Tr. at 29-31).

8. Complainant was requested by Vrettos on the May 1982 training report to furnish July and August 1982 schedule of all training planned. Vrettos wrote on the bottom of the form "I will schedule the instructor class." Complainant set up an instructors class for August 1982. She requested in a letter dated July 28, 1982, film from the Heart Association to be used in the training. Due to a party scheduled one day in August and the Mine Rescue Contest, which complainant had to attend, employees from the Safety Department did not attend the instructor's class until the 24th of September, 1982. As a result, complainant was required to ask for an extension on the date she was to return the film to the Heart Association (Tr. at 34, 35 and Exhs. C6-C7).

9. In June 1982, as a result of several miners asking the complainant about annual retraining, she went through her files and listed those miners who would require such retraining (Exh. C-9). Vrettos had indicated that upon submission of a list of such miners, they would be scheduled to come in on complainant's shift for retraining rather than have her return to the mine during that particular miner's shift. Vrettos argued with complainant about how to set the annual retraining classes so that it would not cause confusion as to who was trained. Finally, by September 1982, Vrettos agreed to allow complainant to set up the classes for the tippie and surface miners as she suggested. However, due to deer season and other interferences such as mixup on dates, only half of the miners scheduled attended the session. This put the matter 50 percent behind schedule (Tr., at 44).

10. In September 1982, an internal auditor of Sharon Steel Corporation did an audit of several of respondent's administrative functions that included safety, training, and personnel records. As to the training department, two areas were noted to be deficient. Training records (5000-23 forms) were incomplete for many underground miners based upon a random sample. Also, as to mine rescue requirements, the respondent was not in compliance with the law by not having two full teams ready to provide mine rescue service to the respondent (Exh-R-2 and Tr. at 147-148).

11. On October 14, 1982, complainant was requested to come to Vrettos' office for a meeting. Vrettos and Richard Graeme,

respondent's vice president and general manager, were present. Complainant was presented a letter signed by Vrettos indicating that projects in the 1982 action plan had not been completed despite oral and written directions. Complainant was demoted from training supervisor to training instructor and warned that unless her performance and accountability improved significantly in the very near future, her employment with U.S. Fuel would be jeopardized. Complainant was to report to Vrettos for the balance of 1982 and then to the Safety Training Supervisor upon notice in 1983. Salary level would remain at its present level without reduction in lieu of any raise for the next twelve months. The letter stated the following instructions;

The Training Department's goals through the rest of 1982 are to complete the followings responsibilities:

1. As asked for since July, a schedule of the Annual Retraining by mine and individual is to be completed by Friday, October 22, 1982. If the schedule is altered you are to communicate the changes to myself within 24 hours.
2. All Maintenance Training records are to be updated, organized and reviewed with me on October 22nd. The format was given to you in October after written requests in September.
3. Your efforts to keep Task Training updated have been very unsuccessful and you have not followed by direct instruction on auditing. You will complete a monthly audit of all personnel on the property and update the Task Training form by the last day of each month. To conclude your audit, a formal notification is to be made to each respective mine foreman or department head as to the Task Training (by individual) which needs to be made. Monthly you will note if the mine foreman has completed the task training or not. You are to continue to publish the Task Training list monthly.
4. The Training Room has continued to appear unsightly. The Training Room appearance is most important to setting impressions of an operations. In the future, no training materials or tools are to be left out of the storage area more than four hours before or after training takes place. A plan is to be put into effect by October 29th to identify and store all materials and equipment used for training including a diagram of the plan. On the 29th of Oct. a tour of the new layout and storage is to be given to myself and other interested parties explaining the changes and instructions for

others to follow when using the training room facilities. A list of "RULES" for everyone's use is to be posted on the incoming door. And a list of all equipment is to be provided.

5. "Communicator" was not published in the third quarter. A November edition and a December edition is to be published giving all writers a two week notice of deadline. This communication device has become more effective with each publication and your editorial guidelines are very successful. Timely publication is important.

6. A Task Training check list for each classified equipment operation is to be made by March of 1983. The first two will be reviewed on November 12th...shuttle car and roof bolter. These are to be combination JSA and procedure guidelines for supervisors to use in Task Training new employees.

7. The Mine Rescue training requirements and monthly guidelines are to be outlined for 1982/83 as previously requested by October 29th in formal letter format to myself for review. Changes to the program are to be communicated to me in advance of the training session.

8. In general your time at U.S. Fuel is not used affectively to accomplish Training's objectives. In the future, all secretarial typing and copying requirements are to be channeled through me 24/48 hours in advance of need. Your time as a Training Instructor is too valuable to be repeatedly used on these items.

9. On Fridays of each week, we will review a written report of your last weeks schedule and accomplishments as well as your coming weeks schedule. Please follow the Monthly Report format (which is now being replaced by the weekly report). Please include a monthly updated calendar of events weekly.

10. Electrical Training Program. Due in June, 1982 please provide an electrical training course outline for an effective 40 hour class. The sessions are to be in two hour modules including identification of materials, aids, handouts and instructors of the course.

11. Publish monthly an update of all state and federal certifications on the property to all mine foreman and above. Include in your last weeks meeting with myself.

These instructions are not to overshadow your many accomplishments since you have been at U.S. Fuel. You have helped and assisted the organizational effort in many ways. It is most important that you restrict your efforts to the priorities listed in this letter to assure the Training function is accomplished.

/s/ William C. Vrettos
William C. Vrettos
Manager, Industrial Relations
(Exh. C-10)

cc: R. Graeme

12. On October 20, 1982, complainant contacted Frank Roybal and Mark Garcia of the Union Safety Committee at the bath house for King 4 and 5 mine. She told them of her problems with training and asked if they wanted to get it "straightened out" by calling in the Mine Safety and Health Administration (MSHA). Later, complainant had a conversation with George Hillas, financial secretary of the union, and Hillas asked if there was some way that the company and safety committee could get together to straighten out the problems with training. Hillas did not feel that the employees or the company could afford to be "hassled" by MSHA at that time (Tr. at 53).

13. On October 28, 1982, complainant and Vrettos discussed the annual retraining class scheduled for November 1, 1982. Complainant had prepared an outline of what she intended to cover during the course (Exh. R-3). Vrettos suggested that complainant cover certain items including three suggested by Gary Barker, respondent's general supervisor, including roof and rib control plan, sanders be inspected on the mantrip, and the ventilation plan. Vrettos also told complainant that she was to cover the 10 points for surface miners required to be covered in annual retraining under the union contract (Tr. 159-162). Also, Vrettos proposed that Keith Thomas teach the class on the rib and roof control plan (Tr. at 164).

14. On November 1, 1982, Vrettos attended the annual retraining course scheduled that day and taught by the complainant. She had a pile of 5000-23 forms on her desk in which were two forms she claimed were improper. After going through the training plan, complainant informed Vrettos that there was "a possible faulty certification in the pile." Vrettos asked complainant to give him the forms which she refused to do unless there were members of the union safety committee there. Frank Guisman, a member of the union safety committee was summoned to the class and Vrettos and Guisman took the forms to be copied (Tr. at 54-56). Vrettos had been present throughout the day except for 10 to 20 minutes when he left the room to have copies made of the task training forms.

15. At the end of the day, he met with complainant and Richard Graeme and reviewed the adequacy of the training the complainant had given that day. Vrettos went through the outline for the class and told the complainant that she had not adequately covered many of the items including check in and out procedures, mining plans, mining cycle was not covered, fire extinguishers, and the rib and roof control plan was covered in less than 10 minutes time. This was the part of the course that was supposed to be taught by Keith Thomas as discussed by Vrettos and complainant at their October 28th meeting (Tr. at 169-170). As a result of this discussion, Vrettos concluded that complainant was not keeping proper records and not doing a proper job of training and informed her that he was going to suspend her and audit the files. Vrettos asked for complainant's keys to all of the files and requested that she come back to the office on the next day (Tr. at 178).

16. On the following morning, Vrettos, with two secretarial employees, took random samples of the records for face bosses, electricians, and newly hired employees and found that 8 of 22 employees had not had orientation training forms completed and placed in their files which meant they should not be working underground. 13 of 26 new employees did not have timbering or belt tests training completed so should not have been released to general labor underground. There were very few electrical certifications, mine certifications, mine foreman or fire boss certifications in the records. Of 10 to 15 experienced miners, records were reviewed and it was found that 40 percent of the tasks they were classified in had no forms on record showing that they had been task trained (Tr. at 179).

17. A meeting was held on the day following the audit of the training department records. Vrettos, Miners' Union International and district safety representative, district president, and safety committee chairman were present. Also, Gary Lauflin was in attendance and conducted the meeting. The records from the audit of the training department were made available to the people in attendance after Lauflin had reviewed what they revealed. The Union representatives chose not to review these records (Tr. at 180). The safety supervisor contacted MSHA and asked if it was permissible to use College of Eastern Utah instructors to complete annual retraining for the miners. The College of Eastern Utah has a mining department with MSHA qualified instructors. Permission was given by MSHA for respondent to do this (Tr. at 181).

18. On November 2, 1982, Vrettos met with complainant and informed her of the results of the audit. and told complainant he was changing her suspension to a termination as of that date. The "blue slip" given to complainant read "improper insufficient work

performance." Later on Vrettos called complainant and asked if she wished to "quit." Complainant's response was "No, you fired me and we'll leave it there" (Tr. at 182).

19. On November 27, 1982, complainant filed a discrimination complaint with the Utah Anti-Discrimination Division alleging she was fired because of her sex and age (56) and replaced with a male who was younger and less experienced. The matter was settled by a written agreement dated January 19, 1983 wherein the respondent agreed to revise complainant's personnel file from "poor work performance" to "resigned for personal reasons", expunge file of any and all comments related to this charge, provide neutral references, and discontinue its appeal action against complainant's request for unemployment compensation (Exh. R-4).

DISCUSSION

Under the analytical guidelines established in Secretary on behalf of Pasula v. Consolidation Coal Corp., 2 FMSHRC 2786 (October 1980), rev'd on other grounds sub nom., Consolidation Coal Corp. v. Marshall, 663 F. 2d 1211 (3rd Cir. 1981), and Secretary on behalf of Robinette v. United Castle Coal Company, 3 FMSHRC 803 (April 1981), a prima facie case of discrimination is established if a miner proves by a preponderance of the evidence that (1) she engaged in protected activity and (2) the adverse action against her was motivated in any part by that protected activity. If a prima facie case is established, the operator may defend affirmatively by proving that the miner would have been subject to the adverse action in any event because of his unprotected conduct alone. See NLRB v. Transportation Management Corp., ____ U.S. ____, 76 L.Ed. 2d 667 (1983). Also, see Secretary on behalf of Patricia Anderson v. Stafford Construction Company and Federal Mine Safety and Health Review Commission, F. 2d ____ (D.C. Cir. 1984), stating that an agency like the Commission has ample authority to adopt the Pasula burden of proof allocation. See Borch v. FMSHRC, 719 F. 2d 194, 196 (6th Cir. 1983).

In the case at issue here, Complainant alleges she was fired or discharged from her position as training instructor for respondent because she stated at the annual retraining session on November 1, 1982, that the training plan was not being followed and that "fraudulent" certification of training was issued for training not given or was inadequate. Also, that this was a culmination of a problem between complainant and William Vrettos, her immediate supervisor, which started in April 1982 (Complainant's Brief at p. 1).

I find that when the complainant asserted that there were some inadequate certifications of training of miners on their 5000-23's both in April 1982 and on November 1, 1982, during the

retraining class, she was engaged in activity that is protected under the Act. The facts show that complainant was sufficiently concerned about the 5000-23 forms to contact Vrettos and employees of the safety department about this (Finding No. 6). On October 20, 1982, she also contacted members of the miner's union safety committee and advised them of her problems with training. At this time the complainant asked if the union officials thought the matter should be referred to MSHA. The union's response was that it should be worked out with the company at that particular time rather than involve MSHA (Finding No. 12).

The specific question is whether complainant's discharge was in any way or part motivated by or retaliation for the above protected activity. If so, a prima facie case is proven and the burden shifts to respondent to demonstrate by a preponderance of the evidence that the complainant would have been discharged even if she had not engaged in the protected activity.

Respondent presents two arguments: 1) That complainant's termination was not motivated in any part by her protected activity. 2) If it were found that respondent was motivated in part in discharging complainant for her protected activity, she would have also been terminated for her unprotected activities alone (Respondent's Brief at 6 and 9).

I find that the complainant has failed to show that she was fired by reason of her protected activity under the Act. The preponderance of the most credible evidence shows that complainant was discharged for her failure to adequately perform the duties assigned her as respondent's training supervisor. Also, timeliness of completion of tasks under the year's (1982) action plan was obviously a cause for conflict and discord between complainant and Vrettos. This is evident from the various documents admitted as exhibits in this case which describe the dissatisfaction of complainant's immediate supervisor with her job performance (Exhs. C-1, C-5, C-10, R-1, R-3).

The undisputed evidence shows that a 1982 action plan was discussed and agreed upon between Vrettos and complainant in the latter part of 1981 (Exh. R-1). The most credible evidence shows that complainant failed to follow or meet the requirements of the plan by March, 1982. At a meeting between complainant and Vrettos, he informed her that she had not met the deadlines or performed the tasks set out and was in the future to adhere to it "without exception" (Finding No. 5). Also, at meetings between Vrettos and complainant in May and the second week in July 1982, and then weekly thereafter into the fall, Vrettos "tried to get Marge to follow the plan." (Tr. at 142). The parent company's internal audit in September 1982 found deficiencies in the training department indicating a "lack of timely follow-up to document the training conducted on hourly employees, noncompliance

with MSHA regulation requiring the documentation on both safety and task training", and other suggestions that management should adopt in training procedures (Exh. R-2). Based on this audit, Vrettos met with complainant on September 15, 1982, and established a two week deadline for auditing task training records to have them be in compliance with company and MSHA regulations. This was not completed as requested and the deadline was extended to October 10, 1982 which again was not met. Vrettos then assigned the job of auditing the underground mines to the Safety Department while complainant was assigned the job of auditing surface employees. Complainant had not performed her part of the task by October 28, 1982 (Tr. at 149-154).

As a result of the above continuing concern over the training department, Vrettos met with complainant on October 14, 1982 and outlined his criticisms of her performance. This was reduced to writing (Exh. C-10). Complainant was demoted from supervisor to training instructor and given written job responsibilities and deadlines (Finding No. 11). Also, complainant was advised that her job with respondent was in "jeopardy".

On October 28, 1982, Vrettos again met with complainant and indicated she was failing to furnish required weekly reports of her performance and also discussed the forth-coming annual retraining session. Vrettos gave her specific instructions as to what he wanted covered and that other employees were to instruct certain parts of the course. After his attendance at the meeting, Vrettos met with complainant and expressed displeasure with her performance and compliance with his instructions. Following an audit of the training department records on the following morning, Vrettos discharged complainant.

Complainant contends that much of the above occurred because of Vrettos attempt to make her job difficult, if not impossible to perform, to create a paper-trail rather than give proper training, and transfer her duties from training to other individuals not qualified (Complainant's Brief p. 1). Also, the charge is made by complainant that Vrettos was upset because of her "exposure" in the November 1, 1982 retraining session of "fraudulent certification" of task training forms. Whether or not Vrettos was "upset" over this is not the issue here. The specific issue is whether complainant was discharged because of these complaints. I do not find the evidence in this case supports complainant's argument. The facts as detailed above, show that when complainant indicated to Vrettos her concern regarding task training, he arranged for such a training class to be taught by complainant (Tr. at 144 and Exh. C-1 and C-2). This incident showed that Vrettos responded in April 1982 in a positive manner to complainant's concerns.

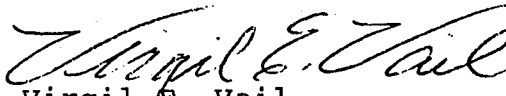
Further, prior to complainant's statements made at the annual retraining class on task training, Vrettos had already indicated complainant's job was in jeopardy, not due to her protected activity, but rather, her failure to perform her duties of supervisor of the training department in a satisfactory manner. I am persuaded by the overwhelming weight of evidence that respondent fired the complainant for her unprotected conduct alone.

CONCLUSIONS OF LAW

1. Respondent at all times pertinent to this case was the operator of mines subject to the provisions of the Federal Mine Safety and Health Act of 1977.
2. I have jurisdiction over the parties and subject matter of this proceeding.
3. Complainant failed to show by a preponderance of the evidence that she was fired because of any activity protected under the Act.

ORDER

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


Virgil E. Vail
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

May 11, 1984

KITT ENERGY CORPORATION,	:	CONTEST PROCEEDING
Contestant	:	
v.	:	Docket No. WEVA 84-92-R
	:	
SECRETARY OF LABOR,	:	Citation 2262913; 11/29/83
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Kitt No. 1 Mine
Respondent	:	

DECISION

Appearances: Bronius K. Taoras, Esq., for Kitt Energy Corporation, Contestant;
Jonathan Kronheim, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Respondent.

Before: Judge Merlin

This case is a Notice of Contest filed on December 27, 1983, by Kitt Energy Corporation under Section 105(d) of the Act, 30 U.S.C. § 815(d) to review a citation dated November 29, 1983, issued by an inspector of the Mine Safety and Health Administration (hereinafter referred to as "MSHA") under Section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1). By Notice of Hearing dated January 13, 1984, this case was set for hearing on March 13, 1984. The hearing was held as scheduled.

At the hearing, the parties agreed to the following stipulations:

- (1) The applicant is the owner and operator of the subject mine.
- (2) The mine is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977.
- (3) The Administrative Law Judge has jurisdiction of this case pursuant to Section 105 of the 1977 Act.
- (4) The inspector who issued the subject order was a duly authorized representative of the Secretary of Labor.

- (5) A true and correct copy of the subject order was properly served upon the operator in accordance with the 1977 Act.
- (6) A copy of the subject order is authentic and may be admitted into evidence for the purpose of establishing its issuance, but not for the truthfulness or relevance of any statement asserted therein.
- (7) Inspector Tulanowski conducted an inspection of the Kitt No. 1 Mine on November 29, 1983.
- (8) In the course of his inspection, Mr. Tulanowski discovered two areas as described in the subject order along the C Mains No. 2 belt where float coal dust was present in the belt entry.
- (9) The float coal dust was present only on the floor, and not on the roof or ribs or on the equipment in the entry.
- (10) The float coal dust described in the order constituted a violation of 30 C.F.R. § 75.400.
- (11) The subject mine is classified as a gassy mine, liberating 2,400,000 cubic feet of methane per 24 hours.
- (12) Section 104(d)(1), Citation No. 2263047, issued on November 2, 1983, is the procedural basis for the order which is the subject of this proceeding.

Section 304(a) of the Act, 30 U.S.C. § 814(a), which also appears in 30 C.F.R. § 75.400, provides as follows:

Coal dust, including float coal dust deposited on rock dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on electric equipment therein.

The subject Order No. 2262913 describes the violative condition or practice as follows:

There was float coal dust (black in color) deposited on the rock-dusted surface of the mine floor, beginning at survey station No. 48 + 39.83 C-Mains No. 2 Conveyor belt, and extending for a distance of approximately 600 feet inby and beginning at the tailpiece and extending for a distance of approximately 600 feet outby. This condition was reported in the preshift examiner's book since the 11-14-83. John Helms, Mine Foreman.

The validity of the underlying citation was upheld in a decision dated March 23, 1984 (WEVA 84-60-R). As set forth above, the parties have stipulated that a violation existed as described in the order. The issue remaining for resolution with respect to the validity of this (d)(1) order is, therefore, unwarrantable failure. Old Ben Coal Company, 1 FMSHRC 1954, 1959 (1979). Unwarrantable failure exists where the operator failed to correct conditions it knew or should have known existed or which it failed to correct because of a lack of due diligence or because of indifference or lack of reasonable care. Zeigler Coal Company, 7 IBMA 280 (1977).

It was reported in the preshift books that from November 14 to November 28 the belt needed dusting (Tr. 15). The operator's witnesses allege that the entry "needs dusted" in the preshift and onshift reports did not refer to float coal dust. However, this entry was the only one ever made to describe the condition of the belt. The onshift report for the very shift on which the order was issued contained an entry "needs dusted". The operator has stipulated the existence of float coal dust in this instance. (Tr. 6) A review of all of the evidence renders more persuasive the inspector's testimony, that based upon his experience the entry "needs dusted" in the preshift and on shift books indicated the presence of float coal dust (Tr. 60-66).

In addition, in more than three fourths of the reports, it was also recorded that there was work in progress (Tr. 16-17, 60). Mr. Phares, the belt cleaner who was working the midnight shift when the subject order was issued, testified about his work on the belt during this two week period (Tr. 126, 158-161). Each day he dragged the belt and worked on the areas which needed float dust cleared away (Tr. 126). He also checked the drive for splices, rock dusted the drive, checked the take up rollers, and made sure that the drive was running safely and water was correctly put on the belts (Tr. 134). Mr. Phares testified that there was a belt cleaner on another shift, Mr. Carr, who had been working the afternoon shift before the order was issued (Tr. 127, 149). Mr. Phares and Mr. Carr rotated shifts (Tr. 127). Mr. Carr did not testify and the witnesses who did testify did not know exactly what his duties were or how much time he spent cleaning the belt (Tr. 127, 149-150, 249-250).

As demonstrated by the preshift books and the testimony at the hearing, this is not a case where the operator did not work on the belt. The record shows that work was done on the belt throughout the period, but it also shows that the work done was never enough to entirely clean up the belt. Mr. Phares testified that on one occasion, he had been able to clean the entire belt up to the tailpiece in

one day's time but only on the clearance side (Tr. 158-161). Moreover, Mr. Phares told the mine foreman and the section foreman that the belt was in bad condition, it was hard for him to keep up with the amount of dust on the belt, and dusting was needed and it would be nice if he had some help (Tr. 138-142, 166-167). The mine foreman came by nearly every day so he actually knew the condition of the belt (Tr. 162). The section foreman admitted that prior to November 28, Mr. Phares had said a number of times he could not do the belt by himself (Tr. 238). The section foreman testified that he did not give Mr. Phares any help because he thought Mr. Phares was doing a good job (Tr. 239). Mr. Phares may have been doing a good job in that he was doing all that could reasonably be expected of him. However, as shown by the condition found by the inspector and admitted by the operator, and as demonstrated by Mr. Phares' testimony, he was not able to clean the entire beltline by himself. Despite the fact that Mr. Carr may have spent some time cleaning the belt on another shift, the entire length of the beltline was not cleaned. The operator should have put men on the belt, in addition to Mr. Phares and Mr. Carr, sufficient to completely clean it. The operator's failure to do so in the face of its actual knowledge of the belt's condition constituted unwarrantable failure.

A separate and distinct basis for finding unwarrantable failure exists because of the operator's failure to clean up the belt on November 28. Mr. Phares testified that at the end of the November 28 midnight shift, i.e. 8:00 a.m. on that morning, he told the mine foreman the belt was in bad shape and needed dusting (Tr. 28-29, 141). There is some conflict in the evidence over what, if anything, the operator did in the intervening two shifts to clean up the belt. Mr. Phares testified that when he returned the next night, it looked like very little had been done (Tr. 145-146, 164). The operator's evidence indicated that some portion of the belt may have been cleaned between Mr. Phares' work on the November 28 midnight shift and his work on the November 29 midnight shift (Tr. 225-229). But this evidence is not clear because there was confusion between the witnesses over the location of certain points in the belt entry (Tr. 79-83, 189-191). Moreover, the only work that could have been done in the interval between Mr. Phares' two midnight shifts would have had to have been done by Mr. Carr on the afternoon shift of November 28, but the operator's section foreman did not know what Carr did on that shift (Tr. 250). In any event, on the morning of November 28, management personnel were told by Mr. Phares that the belt was in bad shape and needed dusting. In light of this information, the operator should have investigated the situation and taken

action to have it completely cleaned up once and for all. Here again, Mr. Phares may have had some help from Mr. Carr, the extent of which cannot be determined on this record, but whatever the extent of such help, it was insufficient because the belt was not completely cleaned. Old Ben Coal Corporation, supra.

In light of the foregoing, the subject order is Affirmed and the operator's Notice of Contest is Dismissed.

A handwritten signature in black ink, appearing to read "Paul Merlin". The signature is stylized with a large, sweeping "P" and "M".

Paul Merlin
Chief Administrative Law Judge

Distribution:

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/nw

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

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

MAY 14 1984

FMC CORPORATION,	:	CONTEST PROCEEDING
Contestant	:	
v.	:	Docket No. WEST 81-100-RM
	:	Citation/Order No. 577120;
SECRETARY OF LABOR,	:	11/12/80
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	FMC Mine
Respondent	:	
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 80-140-M
Petitioner,	:	A.C. No. 48-00152-05013
	:	Docket No. WEST 80-477-M
	:	A.C. No. 48-00152-05025
v.	:	Docket No. WEST 81-233-M
	:	A.C. No. 48-00152-05041 I
FMC CORPORATION	:	Docket No. WEST 81-289-M
Respondent	:	A.C. No. 48-00152-05047 I
	:	
	:	FMC Mine

Appearances: John A. Snow, Esq., VanCott, Bagley, Cornwall & McCarthy, Salt Lake City, Utah, for Contestant/Respondent; Robert J. Lesnick, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Respondent/Petitioner.

Before: Judge Vail

STATEMENT OF THE CASE

These consolidated cases arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. In the four civil penalty cases, the Secretary seeks to have a civil penalty assessed for an alleged violation of a mandatory safety standard. Docket No. WEST 81-100-RM is a request for review by FMC Corporation (FMC) of Citation No. 577120 issued for an alleged violation of 30 C.F.R. 57.3-22. Docket No. 81-233-M is the civil penalty proceeding pertaining to Citation No. 577120 contained in WEST 81-100-RM, and on motion of FMC, was consolidated with WEST 81-233-M.

An evidentiary hearing was held in Green River, Wyoming. Based upon the entire record and considering all of the arguments of the parties, I make the following decision. To the extent that the contentions of the parties are not incorporated in this decision, they are rejected.

ISSUES

The principal issues presented in this proceeding are: (1) whether respondent has violated the provisions of the Act and implementing regulations as alleged in the proposal for assessment of civil penalties filed herein; and, if so, (2) the appropriate civil penalty that should be assessed against the respondent for the alleged violations upon the criteria as set forth in section 110(i) of the Act. Additional issues raised by the parties are identified and disposed of in the course of this decision.

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

STIPULATIONS

The parties stipulated to the following:

1. FMC does not contest the jurisdiction of Federal Mine Safety and Health Act in any of the above consolidated cases.
2. FMC mine would be considered a large operation.
3. The history of past violations would neither cause an increase or decrease in the amount of a civil penalty assessed in these cases.
4. The assessment of a civil penalty would not affect FMC's ability to continue in business.
5. FMC exhibited good faith in the abatement of the issued citations considered in these consolidated cases.

Docket No. WEST 80-477-M

During an inspection of the No. 8 shaft-sinking project at respondent's FMC mine, MSHA inspector Fred Hanson issued a type 107(a) order No. 337405 alleging a violation of 30 C.F.R. § 57.19-128 which reads as follows:

Mandatory. Ropes shall not be used for hoisting when they have: (a) More than six broken wires in

any lay. (b) Crown wires worn to less than 65 percent of the original diameter. (c) A marked amount of corrosion or distortion. (d) A combination of similar factors individually less severe than those above but which in aggregate might create an unsafe condition.

The inspector stated in the order that a section of the hoist rope, approximately 30 feet in length above the bucket, had numerous broken wires and a considerable amount of distortion. He stated that this created a hazard to personnel working below in the shaft. In a subsequent action, the inspector changed the "part and section" designation in the order to a 30 C.F.R. § 57.19-128(d).

Hanson testified that after bringing the rope to the surface it was cleaned with a solvent. He observed approximately 30 feet of the rope was in "very poor shape" with more than 6 broken wires in a lay. ^{1/} The crown wires were very worn with some wires sticking out (Transcript at 11-12). Melvin Jacobson, MSHA Field Office Supervisor, testified that he observed the rope on the day the citation was issued and opined that the rope was in a severe "state of affairs" with broken wires and abrasions (Tr. at 29).

A section of the rope was cut off, tagged, and sent to MSHA Technical Support Staff in Denver, Colorado for examination. In a document dated November 1, 1980, Roy L. Jameson, safety specialist, reported that from the results of the wire rope analysis and a tensile test, it was concluded that this rope specimen was appropriately removed from service because of severe deterioration. The service life of the rope specimen was considered to have exceeded a safe margin of safety for man hoisting (Exh. P-6).

Respondent argues that the petitioner failed to prove by a preponderance of the evidence that a violation of the cited standard occurred. Julius Jones, respondent's safety manager, testified that after the rope had been pulled from the shaft and placed on the ground, he ran a rag over it and found no broken wires. This is an accepted practice used to check for broken wires in a rope (Tr. at 33-34 and Exh. R-1). David Jones, respondent's safety director, testified that he did not observe

^{1/} Lay. The direction, or length, of twist of the wires and strands in a rope. Zern. d. The length of lay of wire rope is the distance parallel to the axis of the rope in which a strand makes one complete turn about the axis of the rope. Bureau of Mines U.S. Dept of Interior, A Dictionary of Mining, Mineral and Related Terms (1968).

distortion in the rope and after unraveling the strands, found some broken wires but less than six in a single lay (Tr. at 57). Also, a measurement showed that wear of the crown wires was less than 35 percent (Tr. at 57-58).

After careful consideration of all the evidence in this case, I find that the petitioner failed to prove that the condition of the cited rope was a violation of 30 C.F.R. § 57.19-128(d). The specific issue is whether there was a violation of subsection (d) of standard § 57.19-128. That is, were there a combination of factors, less severe than the three listed factors, that might create an unsafe condition. In light of the petitioner's evidence, I do not find that he has proven such a combination of factors. Also, I find that the (d) portion of the standard to be too vague, indefinite, and uncertain to give the respondent notice of what is required to determine when the rope should be replaced.

The testimony as to the condition of the rope is conflicting and confusing. Jameson reported that under microscopic examination, he found crack initiations and crown wear. Although there is considerable general information in his report dated November 1, 1980 (Exh. 6), and the supplement thereto, the specifics do not show a violation of any of the first three provisions of the standard. There was no showing of 6 broken wires in a lay although there was testimony that crack initiations be considered evidence of broken wires.

Also, no distortion was alleged to exist in the tested wire, although some corrosion was found. At the most, the report lacked clarity. The conclusion stated the writer's opinion that the rope should be removed from service due to deterioration. I find no mention of deterioration in the standard as grounds for citing an operator.

Jameson appeared at the hearing and testified regarding his report and stated that the tensile test of the rope had no direct relationship to the possibility of breakage of the rope. It will only tell you whether the rope will break at a higher or lower strength than that assigned in the catalogue listing of its tensile strength (Tr. at 43). The balance of Jameson's testimony failed to explain where in his report it proved a violation of any of the three specific items listed as (a)(b) and (c) under the standard was indicated. It must be assumed from this evidence that the violation occurred under (d).

Petitioner's witnesses testified that the rope was unsafe based upon generalizations. These statements would, in combination, allude to paragraph (d) of the standard which states that conditions less severe than the three specific findings might create an unsafe condition. I find this part of the standard vague and difficult to apply. Any number of situations and conditions come to mind that might create an unsafe condition.

My concern is that such a provision is not specific enough to put the operator on notice as to what the requirement is as to when a hoist rope should be removed from service if it does not meet the first three provisions of the standard. Apparently, the same concerns were recognized by the drafters of these standards as 57.19-128 was rewritten and new standards adopted effective January 24, 1984. These standards are now designated 30 C.F.R. § 57.19-24. There is not a reference in this standard similar to (d) in § 57.19-128, and the term might has been abandoned in the new adopted standard.

Regarding the issue of vagueness in standards or regulations, the Commission has authority to determine the validity of standards under the 1977 Act. See Sewell Coal Company, 2 MSHC 1345 (1981), Alabama By-Products Corporation, 2 MSHC 1981 (1982). In order to pass constitutional muster, a statute or standard adopted thereunder, cannot be "so incomplete, vague, indefinite or uncertain, that men of common intelligence must necessarily guess at its meaning and differ as to its application." Connolly v. Gerald Constr. Co., 269 U.S. 385, 391 (1926). Rather, "laws (must) give the person of ordinary intelligence a reasonable opportunity to know what is prohibited so that he may act accordingly." Grayned v. City of Rockford, 408 U.S. 109, 108-109 (1972).

Therefore, in this case the question is whether the operator would know what section (d) of the cited standard required of him. I find that the wording of this section would be difficult to interpret and follow. Also, the drafters of the replacement regulations recently adopted felt the same way and chose not to adopt a similar provision. Therefore, Citation No. 337405 is vacated.

Docket No. WEST 80-140-M

In this case, petitioner issued four citations and proposed penalties therefore as follows:

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. Standard</u>	<u>Proposed Penalty</u>
576186	8/15/79	57.12-18	\$210.00
575778	8/16/79	57.15-5	255.00
337305	8/17/79	57.16-6	30.00
337306	8/17/79	57.9-2	305.00

Citation Nos. 575778 and 337306

At the hearing of this case, the parties stipulated that a deposition would be taken of the inspector issuing citation Nos.

575778 and 337306 and furnished to the Judge in order that a decision could be rendered. On April 20, 1984, the petitioner filed a motion to withdraw the proposal for penalties for the mine inspector who issued the citations is not now employed by MSHA and unavailable to provide testimony in support of the citations. The respondent has filed no opposition to this motion and therefore the two citations are vacated.

Citation No. 576186

MSHA inspector Gerry Ferrin issued citation No. 576186, while on a regular inspection, for an alleged violation of 30 C.F.R. § 57.12-18 ^{2/} due to the respondent's failure to have a label on a main power switch to show which piece of equipment it controlled. Ferrin testified that identification of which piece of equipment was controlled by the switch could not be identified by its location from the distribution center it was attached (Tr. at 6). The hazard in this case was that a maintenance mechanic or or electrician working on the particular piece of equipment involved could tag or lock out the wrong switch through mis-identification and receive an electrical shock (Tr. at 6, 7). There is nominally 480 volts involved here. The equipment serviced by this particular switch and cable was a fan.

The respondent did not present any evidence or submit a brief in this case. I find that a violation of § 57.12-18, as alleged did occur. The operator was negligent in failing to properly label the switch involved here. The gravity is that a serious injury could occur to a miner including death as a result of such a failure to provide proper labeling. The operator abated the citation in good faith by labeling the male portion of the plug at the bitter end of the trailing cable that fits into the distribution box (Tr. at 12, 15). I find the proposed penalty of \$210.00 is reasonable in this case.

Citation No. 337305

MSHA inspector Martin Kovick, during a regular inspection of respondent's surface operation issued Citation No. 337305 wherein

^{2/} 57.12-18 Mandatory. Principal power switches shall be labeled to show which units they control, unless identification can be made readily by location.

he alleged a violation of 30 C.F.R. § 57.16-6 ^{3/}. Kovick testified that he observed a Union Pacific Railroad Company ("Union Pacific") truck near the respondent's load-out area with acetylene tanks standing in the back of the truck with the gauges or regulators on them. The standard requires that when compressed gas cylinders are transported or stored, the regulators (valves) are to be removed and covers are to be put on (Tr. at 21).

Respondent presented testimony at the hearing that the mine site involved in this citation is located on property it leases from Union Pacific and that the railroad's property "pretty much" surrounds respondent's leasehold (Tr. at 28). Robert L. May, respondent's surface safety supervisor, stated that Union Pacific employees and vehicles have a right of entry onto and across the respondent's property including a key to the main gate. Respondent did not produce at the hearing, or subsequent thereto as agreed to at the hearing, a copy of the document or lease agreement covering Union Pacific's rights on respondent's leased property.

Respondent argued that they had entered into the lease agreement prior to the Federal Mine and Safety Act being adopted and that the Union Pacific is not subject to the Act. Also, the Union Pacific retained an exclusive right to right-of-way over the leased property and is not subject to control by respondent (Tr. 31).

The specific issue is whether the violation cited in this case was the responsibility of the respondent. I find that the petitioner has failed to prove that the mine operator in this case is responsible for the Acts of the Union Pacific employees. The facts show that the alleged violation of § 57.16-6 did occur on mine property under the control of respondent. Also, the parties agree that the compressed gas cylinders were in a truck owned by Union Pacific and operated by their employees. There is no evidence, or does the petitioner contend, that the Union Pacific is an agent or independent contractor for the mine operator. Therefore, the provisions of the Act and regulations that apply to these two situations are not applicable here.

I am unable to find any provision of the Act or its regulations, or prior decisions by the Commission or the Courts, which gives direction as to whether the mine operator should be

^{3/} 57.16-6 Mandatory. Valves on compressed gas cylinders shall be protected by covers when being transported or stored, and by a safe location when the cylinders are in use.

held responsible for all acts on the mine property which violate the Act. In El Paso Rock Quarries, Inc., 1 FMSHRC 35, 32, (1981) the Commission considered the issue of whether the operator may be held liable when its customers or employees of its customers do not comply with mandatory safety standards. In this case, the parties were "rock pickers" who are not employees of the operator but were allowed on the mine property as customers or employees of customers to break up rock blasted loose by the operator and subsequently collected in a truck and hauled away. The Commission affirmed Judge Moore's decision that the "rock pickers" are miners in accord with section 3(g) of the Act which defines "miner" as "any individual working in a coal or other mine."

I find a definite distinction between the customers in the El Paso, case and other decisions involving independent contractors and haulers of materials and the Union Pacific employees in this case. Here, the truck was only passing through the mine property on its way to other Union Pacific property. It would be stretching the usual liberal interpretation of the Act too far to find the employees of Union Pacific in this instance "miners" and, as such, subject to the mandatory standards. Such an interpretation would impose a requirement on the operator to be responsible and check all vehicles that entered on its property for whatever reason. I do not believe there is sufficient control of the Union Pacific employees in this case to justify such an interpretation.

I find that the petitioner has failed to prove a violation here against respondent and Citation No. 337305 is dismissed.

Docket No. WEST 81-289-M

Citation No. 576979 was issued to respondent on September 8, 1980, and charges a violation of 30 C.F.R. § 57.9-37 as a result of a maintenance jeep being parked on a grade without the wheels being blocked or turned into the rib. The jeep rolled forward pinning a miner against the belt control box. The accident resulted in injuries to the miner. The cited standard provides as follows:

Mandatory. Mobile equipment shall not be left unattended unless the brakes are set. Mobile equipment with wheels or tracks, when parked on a grade, shall be either blocked or turned into a bank or rib; and the bucket or blade lowered to the ground to prevent movement.

Respondent does not deny that the accident occurred or the violation of the standard cited. Instead, respondent contends that the penalty proposed by the Secretary is too high. In support of this argument, respondent contends it was their policy to require that all mobile equipment, when parked on a grade, have chocks placed behind the wheels and that it be turned into the rib. Kim Curtis, the miner involved in the accident in this

case, testified that he was told by his supervisor, that any time he got off the mantrip (jeep), to make sure to put blocks behind the wheels. This conversation occurred approximately two weeks prior to the accident. Curtis admitted that there were blocks available on the jeep. However, he was only going to stop for a half minute and didn't set the blocks (Tr. at 8, 9).

The facts in this case shows that respondent's employee Curtis was negligent in failing to follow the procedure for parking vehicles on a grade. Also, the gravity of the violation is high as evidenced by the resulting injuries to the miner and potential for death that could result. However, the facts also show that the respondent had required that its miners follow the procedures outlined in the standard. Curtis testified that as a result of a similar accident which had occurred earlier, his supervisor had told him that any time he got off the mantrip, to make sure he put the blocks behind the wheels (Tr. at 7).

It is well-settled that under the Mine Act, an operator is liable without fault for violations of the Act and mandatory standards committed by its employees. Allied Products Co. v. FMSHRC, ___ F. 2d ___, No. 80-7935, 5th Cir. Unit B (Feb. 1, 1982). In Southern Ohio Coal Company, 4 FMSHRC 1464, (August 1982), the Commission reversed an administrative law judge's decision holding that the negligence of rank-and-file non-supervisory employees may be directly imputed to the operator for the purpose of penalty assessment. The Commission stated as follows: "However, where a rank-and-file employee has violated the Act, the operator's supervision, training and disciplining of its employees must be examined to determine if the operator has taken reasonable steps to prevent the rank-and-file miner's violative conduct. Nacco, supra, 3 FMSHRC at 850-851."

The only evidence presented in this case regarding this point indicates that Curtis's supervisor had instructed him to follow the procedures outlined in the standard as late as two weeks prior to the accident (Tr. at 6). Based on this, I find that the penalty proposed by the Secretary should be reduced. I find a penalty of \$100.00 is reasonable in this case.

Docket No. WEST 81-233-M and
Docket No. WEST 81-100-RM

Citation No. 577120 was issued on November 12, 1980 as a result of an accident on November 6, 1980 involving a rock that fell and struck a miner. The citation alleged a violation of 30 C.F.R. § 57.3-22 which states as follows:

Mandatory. Miners shall examine and test the back, face, and ribs of their working places at the beginning of each shift and frequently thereafter. Supervisors shall examine the ground conditions during daily visits to insure that proper testing and ground

control practices are being followed. Loose ground shall be taken down or adequately supported before any other work is done. Ground conditions along haulage-ways and travelways shall be examined periodically and scaled or supported as necessary.

The condition or practice described in the above citation reads as follows: "A miner working in 20 cross-cut of #4 room in 7 CM Panel was injured when a rock about 42 inches long, 20 inches wide and from 10 to 4 inches thick fell from the roof striking (sic) him in the upper back. The roof was approx. 7 1/2 feet above the floor. The miner stated that he checked this rock at the beginning of the shift but did not continue to check it or support it. Approx. two hours after checking the rock it fell and struck him. This man's foreman had not been in this area during the shift prior to the accident. The shift started about 0001 hours 11/6/80 and the accident happened about 0240 hours 11/6/80. The miner arrived at his working place at approximately 0045 hours 11/6/80. The miner stated that he had sounded the rock but had not tried to scale it down." The citation was abated by holding a safety meeting and everybody was cautioned about working under bad ground and the proper way to scale and support.

As a result of the issuance of the above citation, respondent filed a notice of contest which is docketed at WEST 81-100-RM and has been consolidated with the penalty proceeding WEST 81-233-M. In the request for review, respondent requested that the citation be vacated.

The facts in the above consolidated cases are not basically in dispute. I find that on November 6, 1980, Ivan Miller, respondent's employer, commenced work at the FMC mine at 12:00 midnight. For six months, Miller, as part of a crew, was working in a section of the mine described as 7 CM Panel of the mine, and on the night of the accident, in 20 cross-cut of #4 room. Miller had been working in this same area for the preceding six months and during that time, was in the area 3 or 4 times a week and the only shift working in the area during that time (Tr. 7). Miller testified that he entered the mine at midnight and after loading up the welder, it took approximately one and a half hours to get to the area where he was to work (Tr. at 23).

The area where the roof fall occurred was in an established part of the mine and the roof had been bolted. Miller stated that he examined the roof by "sounding" it and barred down some loose rocks (Tr. at 6). Miller did not know where the rock that struck him fell from so did not know if he barred that area.

Miller testified that he started cutting with a welding torch on a steel plate and continued working for approximately an hour to an hour and a half, after his arrival at the location, when a rock fell and struck him in the back causing injuries. He also stated that he had frequently checked the roof while he was working (Tr. at 8).

MSHA Inspector William Potter testified that he went to the FMC mine to investigate this accident shortly after it was reported by the respondent. When he arrived at the location underground, the injured miner had been removed to the hospital. He examined the site and concluded that the rock that struck the miner had fallen from a point right over where the miner was working. Potter stated that he would call the location where the rock had fallen from as the "brow." (Tr. at 48).

There is some testimony by Potter in this case that a crack had existed in the area from where the rock fell for a period of time and that Miller and other miners whose names he did not know had indicated that they had tried unsuccessfully in the past to bar this down (Tr. 46). I reject this as being unsupported by the most credible evidence of record. First, it is denied by the injured miner Miller who testified at the hearing that he did not know where the rock fell from. Also, the other sources of information was based on reference to statements made by unidentified miners who were present during the investigation but did not testify at the trial. No testimony of any witness corroborated this information and fails to refute the testimony of Miller.

Based on the most credible evidence in this case, I find that petitioner, has not proven a violation by respondent of § 57.3-23 in this case. This was not a new section of the mine but rather an established area where the injured miner had been working for six months. Miller was an experienced underground miner and familiar with the conditions in a trona mine such as the FMC mine. The evidence is not disputed that Miller examined the roof of the area upon arrival and, in fact, barred down some loose before he began his work. He also checked the roof "frequently" while he worked. Potter testified that he thought checking the roof on a basis of every 45 minutes to an hour would be sufficient (Tr. at 33, 34). It is not determined here what more the respondent, or its employee, could have done to have prevented this accident. The procedure for supporting the roof in this area of the mine is to use roof bolts on four foot centers. This had been done. For a dangerous looking rock or area, that cannot be barred down, timbering is used. However, the credible evidence does not establish that such a situation existed in this case. I therefore ORDER that Citation No. 577720 be vacated.

ORDER

1. In Docket No. WEST 80-477-M Citation No. 337405 is VACATED.

2. In Docket No. WEST 80-140-M, Citation Nos. 575778 and 337306, in accordance with motion by petitioner to withdraw its petitions for penalties, are DISMISSED. Citation No. 576186 is affirmed and a penalty of \$210.00 is assessed. Citation No. 337305 is DISMISSED.

3. In Docket No. WEST 81-289-M, Citation No. 576979 is affirmed and a penalty of \$100.00 is assessed.

4. In Docket Nos. WEST 81-233-M and WEST 81-100-RM, Citation No. 577720 is vacated.

Respondent is ordered to pay a civil penalty in the total amount of \$310.00 within 40 days of the date of this decision.

Virgil E. Vail

Virgil E. Vail
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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MAY 14 1984

LAWRENCE L. EVERETT, : DISCRIMINATION PROCEEDING
Complainant :
v. : Docket No. YORK 83-6-DM
INDUSTRIAL GARNET EXTRACTIVES, : MSHA Case No. CD 83-58
Respondent :

DECISION

Appearances: Lawrence L. Everett, West Paris, Maine, pro se;
Carol A. Guckert, Esq., Portland, Maine, for
Respondent.

Before: Judge Broderick

STATEMENT OF THE CASE

Complainant filed this case, contending that he was discharged on June 21, 1983, from the position of electrician which he had with Respondent because of activity protected under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. Respondent denied that Complainant's discharge was related to protected activity. Respondent filed certain interrogatories on Complainant, some of which were answered and some of which Complainant refused to answer. Respondent moved to dismiss the complaint on March 12, 1984, because of Complainant's failure or refusal to answer the interrogatories. I withheld my ruling on the motion. At this time, I Deny the motion because Respondent failed to establish any prejudice resulting from the refusal to answer the interrogatories in question.

Pursuant to notice, the case was heard in Auburn, Maine, on March 22, 1984. The case was consolidated for hearing with the case of Forrie W. Everett v. Industrial Garnet Extractives, Docket No. YORK 83-7-DM, but since the cases involve separate alleged discriminatory discharges, they are being decided separately. Complainant and Forrie W. Everett testified on Complainant's behalf; George B. Robinson, Deborah Hartness, Bruce Sturdevant, Thomas Scott Hartness, Donald Berry, Daniel Abbott and Richard Kusheba testified on behalf of Respondent. The parties were afforded the opportunity of filing posthearing briefs. Complainant filed such a brief; Respondent did not.

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

FINDINGS OF FACT

Complainant was employed by Respondent beginning in February, 1982, as a plant electrician. He had been an electrician for 12 to 14 years, and his most recent previous position was as an electrician for a mobile home manufacturer. When he began with Respondent, he was paid \$5.00 per hour.

Complainant found the Respondent's plant to be in "a total shambles;" he had no material to work with and told Scott Hartness, the Vice President for production who had hired him, that he could not work under the conditions. Hartness assured him that he would see that whatever Complainant needed would be made available to him. An account was opened at an electric supply company and a hardware store and Complainant was authorized to buy materials and supplies.

Complainant understood that he was responsible to Hartness alone. However, for about 1 month in the Spring of 1983, Wally Hinch was made maintenance foreman, and at other times Bruce Sturdevant was given authority over both production and maintenance employees. Sturdevant never told Complainant that he was his supervisor and Scott Hartness did not specifically inform Complainant that Sturdevant was his boss. Complainant regarded Hartness as his supervisor and continued to discuss maintenance problems directly with him.

Complainant discussed safety problems in the plant with Hartness regularly, and on several occasions submitted written reports of unsafe conditions. The conditions were discussed but "that was about the end of it."

In July, 1982, an MSHA inspection team visited the facility. Complainant went through the mill with them. A number of electrical problems were pointed out and several citations were issued. Complainant was directed by Hartness to remedy the problems.

On June 20, 1983, a front-end operator, Danny Abbott, was working on a machine when it was started by another employee. Abbott had failed to lock out the machine. He told Complainant about it and Complainant told Sturdevant. Sturdevant "didn't want to talk about it. Just turned around and walked away" (Tr. 19). Complainant then notified Hartness of the incident. Hartness told Sturdevant to "make sure he understands to lock the machinery out" (Tr. 99). Respondent was apparently having

a problem with employees concerning lockouts and more lockout tags had recently been ordered. Complainant had special responsibility in this connection since he was an electrician, and had given lectures to employees on electrical lockouts.

After the incident involving Danny Abbott, but still about midmorning, Complainant was working on the engine of a fork truck. He found a short circuit, "a wiring mess" (Tr. 20), and in tracing the wires, he blew a number of fuses. He finally ran out of fuses. He worked on the truck past dinner time. Sturdevant told Complainant "look we've got to have that fork truck, it's the only one we've got and I don't care how you get it, but get it between all the other things" (Tr. 21).

Complainant punched out for dinner and drove his truck to the hardware, got the needed fuses and returned to the mill. He had a cup of coffee and sandwich; then he punched in, put the fuse back in the fork truck and had it running before the fork truck operator returned. He finished out the shift at about 5:00 p.m., and went home.

Respondent paid its employees during their lunch time and beginning in the Spring of 1983 notified all employees that they were to remain on the company premises during lunch. Thereafter, a number of employees complained to Sturdevant and Hartness that Complainant continued to leave the premises to eat lunch. Hartness specifically told Complainant that he was not to leave at lunch time. Wally Hinch also told him and Complainant objected with choice expletives to this direction. During the afternoon of June 20, Sturdevant told Hartness that Complainant had left again for lunch and that the other employees thought Complainant was being treated with special favor. At the end of Complainant's shift, Hartness told him "I've had some complaints lodged against you." Hartness then turned to talk to another employee and Complainant left for home.

On June 21, 1983, when Hartness came to work about 20 minutes before 7, Sturdevant told him that he "pulled [Complainant's] time card" (Tr. 102), which meant that he fired him. When Complainant arrived that morning, Hartness told him "Bruce pulled your time card . . . for leaving company property during lunch hour" (Tr. 102).

Complainant then handed Hartness a written list of safety complaints alleging that lock out procedures are not being followed or enforced, general housekeeping is "practically nonexistent," safety railings and catwalks are missing, a number of unsafe electrical practices were permitted in the mill, and

there was excessive dust in the air when the plant was operating. Hartness handed the written statement to Sturdevant. Sturdevant and Hartness wanted to talk about why Complainant left the company property the previous day; Complainant wanted to talk about his written complaint. Finally Complainant said that he did not want to be bothered with this petty bullshit and that Hartness and Sturdevant could take the job and shove it.

When he was discharged, Complainant earned \$6.50 per hour. He remained off work following his discharge until September 17, 1983, when he began working for Cornwall Industries as a maintenance electrician and mechanic. He earns \$5.30 per hour. He does not seek to be reinstated in his position with Respondent.

ISSUES

1. Whether Complainant's discharge was motivated in any part by activities protected under the Mine Safety Act?
2. If it was, whether Respondent established that it would have discharged him in any event for unprotected activities alone?
3. If Complainant's discharge was in violation of the Act, what remedies is he entitled to?

CONCLUSIONS OF LAW

In order to establish a prima facie case of discrimination under section 105(c) of the Mine Act, a Complainant bears the burden of production and proof to show (1) that he engaged in protected activity and (2) that an adverse action against him was motivated in any part by the protected activity. Secretary on behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2786 (October 1980), rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3rd Cir. 1981), and Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 803 (April 1981). In order to rebut a prima facie case, an operator must show either that no protected activity occurred or that the adverse action was in no part motivated by protected activity. If an operator cannot rebut the prima facie case in this manner, it may nevertheless affirmatively defend by proving that (1) it was also motivated by the miner's unprotected activities, and (2) that it would have taken the adverse action in any event for the unprotected activities alone. The operator bears a burden of proof with regard to the affirmative defense. Haro v. Magma Copper Co., 4 FMSHRC 1935, 1937 (November 1982). The ultimate burden of persuasion that illegal discrimination has occurred does not shift from the Complainant. Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC at 818 n. 20. The Supreme Court recently approved the

National Labor Relations Board's virtually identical analysis for discrimination cases arising under the National Labor Relations Act. NLRB v. Transportation Management Corp., 76 L.Ed. 2d 667 (1983). See also Boich v. FMSHRC, 719 F.2d 194 (6th Cir. 1983) (approving the Commission's Pasula-Robinette test).

It is clear that Complainant was concerned about safety at the mill, particularly electrical safety. It is also clear that there were unsafe conditions and practices at the mill. Complainant's personality was abrasive, particularly toward his supervisors, and they reacted against his abrasiveness. Part of the reaction, particularly that of Sturdevant, seems to have been the result of Complainant's bringing up safety matters. The proximity to the discharge of Complainant's remonstrance to Sturdevant about the Danny Abbott lock-out problem, (a protected activity) "is itself evidence of an illicit motive." Secretary of Labor v. Stafford Construction Company and FMSHRC, No. 83-1566, slip op. at 13 (D.C. Cir. April 20, 1984). I conclude, therefore, that Complainant's discharge was motivated in part by activity protected under the Mine Safety Act.

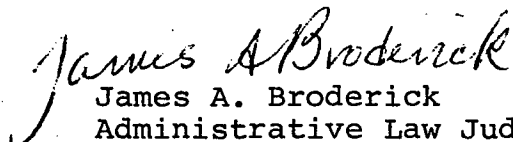
Other factors, however, played a part in the decision to discharge Complainant. The evidence establishes that he frequently violated the company rule that employees remain on the premises during lunch time - this resulted in numerous complaints from other employees who felt that Complainant was given favorable treatment because of personal friendship with Sturdevant. Complainant also had and voiced a negative attitude about the company: He expressed the hope that the company would go bankrupt or that it would be shut down by the State environmental authority. At a supervisors meeting on June 17, 1983, a number of supervisors complained that Complainant "had become a source of trouble with the other men . . . [and] has been causing moral (sic) problems by telling everyone that Central Maine Power was going to shut us down; the DEP was going to shut us down . . . he was constantly telling the other men that IGE [Respondent] was never going to make it and other disparaging remarks" (Respondent's Exh. 2). I conclude, therefore, that in discharging Complainant, Respondent was also motivated by his unprotected activities.

Did Respondent establish by a preponderance of the evidence that it would have discharged Complainant regardless of his protected activity? The stated reason for the discharge was Complainant's leaving the company premises during lunch time. In fact, he did and had done so in the past and was reprimanded for it a number of times. He obviously believed the rule was petty and flouted it. Whether the rule was petty or not, the

the flouting of it was causing dissention among the employees and undermining the authority of Sturdevant and Hartness. A complicating factor, however, is the fact that Complainant was authorized to leave the property to purchase supplies and he did so regularly. It is clearly established that he both purchased supplies and took lunch time when he left on June 20. The supervision in the plant was lax and erratic. Scott Hartness was "at times vague" (Tr. 80) according to Sturdevant. Complainant contends that his discharge was unfair and unreasonable. The fairness and reasonableness of discharging Complainant under the circumstances is not an issue which I have authority to resolve, however. However unfair or unreasonable discharging Complainant may have been, I conclude that the preponderance of the evidence establishes that Complainant would have been discharged for unprotected activity alone, namely violating the company rule concerning the lunch hour and undermining employee morale. Therefore, no violation of section 105(c) of the Act has been established.

ORDER

Based upon the above findings of fact and conclusions of law, the complaint and this proceeding are DISMISSED for failure to establish a violation of section 105(c) of the Act.


James A. Broderick
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

MAY 15 1984

Lonnie Jones, : Discrimination Proceeding
Complainant :
v. : Docket No. KENT 83-257-D(A)
: :
D & R Contractors, : MSHA Case No. BARB CD 83-19
Respondent :

DECISION

Appearances: Jeffrey A. Armstrong, Esq., Appalachian
Research and Defense Fund of Kentucky,
Inc., Barbourville, Kentucky, for
Complainant;
Larry E. Conley, Esq., Williamsburg,
Kentucky, for Respondent.

Before: Judge Melick

This case is before me upon the complaint of Lonnie Jones under section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act", alleging that he was discharged from the partnership known as D & R Contractors on April 25, 1983, in violation of section 105(c)(1) of the Act.¹ Mr. Jones had charged in his initial complaint before this Commission that he had been unlawfully discharged on that date as an employee of Mingo Coal Co., Inc. However, by decision dated March 8, 1984, it was held that Jones had not been employed by Mingo Coal Company, and that no representative or agent of Mingo Coal Company was involved in the discharge of Jones from D & R Contractors. That complaint was accordingly dismissed. Lonnie Jones v. Mingo Coal Co., Inc., 6 FMSHRC 632.

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

"No person shall discharge * * * or cause to be discharged or otherwise interfere with the exercise of the statutory rights of any miner * * * in any * * * mine subject to this Act because such miner * * * has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent * * * of an alleged danger or health violation in a * * * mine * * * or because of the exercise by such miner * * * on behalf of himself or others of any statutory right afford by this Act."

In order for the Complainant to establish in this case a prima facie violation of section 105(c)(1) of the Act, he must prove by a preponderance of the evidence that he engaged in an activity protected by that section and that his discharge or removal from D & R Contractors was motivated in any part by that protected activity. Secretary, ex rel David Pasula v. Consolidation Coal Company, 2 FMSHRC 2786 (1980), reversed on other grounds, sub nom Consolidation Coal Company v. Secretary, 663 F.2d 1211 (3rd. Cir. 1981). See also NLRB v. Transportation Management Corporation, 76 L.Ed.2d 667 (1983), affirming burden-of-proof allocations similar to those in the Pasula case, and Boich v. FMSHRC, 719 F.2d 194 (6th Cir. 1983).

In this case, Mr. Jones has alternatively asserted that he was discharged on the afternoon of April 25, 1983, because he had refused to continue working overtime after working a 10-hour shift. At hearing, Jones alleged that he arrived at the Mingo coal mine for work at about 7:15 on the morning of the 25th and worked until approximately 5:00 p.m. with only a one-half hour break for lunch. He further alleged that he had a headache and the flu that day and was therefore not feeling well. He thus claims that when the "foreman", Ron Perkins, approached him that afternoon about working overtime, he declined believing it would be hazardous. Jones claims that when he was discharged later that afternoon by Perkins, that action was based upon his refusal to work any additional overtime, a work refusal protected by the Act. A miner's exercise of the right to refuse work is a protected activity under the Act so long as the miner entertains a good faith, reasonable belief that to work under the conditions presented would be hazardous. Robinette v. United Castle Coal Company, 3 FMSHRC 803 (1981). See also Eldridge v. Sunfire Coal Company, 5 FMSHRC 408 (1983).

Timeliness of Filing.

It is not disputed that Lonnie Jones was removed from D & R Contractors on April 25, 1983, and that he filed his complaint of unlawful discrimination with the Federal Mine Safety and Health Administration (MSHA) on May 10, 1983, alleging that both Mingo Coal Company and D & R Contractors violated his section 105(c) rights. By letter dated June 13, 1983, MSHA notified Mr. Jones of its determination that a violation of the Act had not occurred. Allowing 5 days for mailing of the above letter, it may be presumed in the absence of any contrary evidence that Mr. Jones received notice of the determination on June 18, 1983. Jones did not, however, seek to join D & R Contractors in his complaint before this Commission until August 22, 1983,

some 35 days beyond the 30 day filing deadline set forth in section 105(c)(3) of the Act. D & R Contractors thereafter opposed the motion for joinder on the grounds that it was not timely filed.

I find, however, for the reasons set forth below that the delay in joining D & R Contractors was excusable. The delay, consisting of only 35 days, was brief and no legal prejudice has been demonstrated. I note, moreover, that D & R Contractors was cited in the initial complaint to MSHA filed by Mr. Jones and that it was therefore then given notice of action contemplated against it under section 105(c) of the Act. Accordingly, D & R Contractors would be expected at that time to have begun preparation of its defense of this matter including the preservation of evidence.

I also find that Jones could reasonably have been confused as to the proper entity to proceed against. As a layman of limited education, it is understandable that he may have been confused as to the legal niceties of his employment relationship. Until Mingo Coal Company filed its initial responsive pleading asserting as one of its defenses that Jones was a partner of D & R Contractors and that that entity was entirely responsible for any violations under the Act, it is understandable that Jones may not initially have joined D & R Contractors in this proceeding. It is also significant that the referenced pleading of Mingo Coal Company was itself filed untimely on August 17, 1983, and that the motion for joinder was filed only 5 days thereafter, on August 22, 1983. Within this framework, the motion for joinder of D & R Contractors, filed some 35 days beyond the deadline set forth in section 105(c)(3) of the Act, is deemed to have been timely filed.²

The Merits.

² This determination of timeliness overrules a previous determination made at hearing. The decision at hearing was made on the erroneous miscalculation that the delay in filing the motion for joinder of D & R Contractors had been filed some 14 months late. When the error was discovered by the undersigned, D & R Contractors was given opportunity to present additional evidence and to cross-examine witnesses who had appeared at the hearings in this case. It is noted that counsel for D & R Contractors was present throughout the hearings and that D & R Contractors waived the opportunity to present additional evidence and/or to cross-examine witnesses.

The issue on the merits is whether Mr. Jones' refusal to continue to work overtime under the circumstances herein was an activity protected by section 105(c) of the Act and, if so, was his removal from the partnership D & R Contractors motivated in any part by that protected activity. Whether the activity was protected depends on whether Jones entertained a "reasonable, good faith belief that a hazard" existed at the time he refused to continue working overtime. Robinette, supra, at page 810. In Robinette, the Commission defined the good faith requirement as an "honest belief that a hazard exists." In explaining the "reasonableness" portion of the test, the Commission rejected the adoption of a stringent rule requiring "objective, ascertainable evidence" to corroborate the validity of the miners' fear. Robinette, at p. 811. The Commission held that the "reasonableness" test may be met through evidence establishing "that the miners' honest perception was a reasonable one under the circumstances." See also Secretary on behalf of Pratt v. River Hurricane Coal Company, 5 FMSHRC 1529 (1983) and Harc v. Magma Copper Co., 4 FMSHRC 1935 (1982). On the facts of this particular case, I do indeed find that Mr. Jones entertained a good faith, reasonable belief that to continue working in his condition would have been unsafe.

It is not disputed that Jones had worked from 7:15 on the morning of April 25, until about 5:00 p.m. that day with only a one-half hour break for lunch. Furthermore, it is not disputed that during the course of that almost 10-hour work shift, Jones was performing a variety of strenuous physical tasks in the difficult environment of a 26-inch seam of "low coal." These activities included setting timbers, dragging water pumps, shoveling coal from the ribs, hauling a 75 pound coal drill and its cable, untangling the cable, pushing a 60 pound box of dynamite, drilling and blasting, rock dusting with 50 pound bags of rock dust, and setting ventilation curtains. Jones maintains that by 5:00 p.m., he was so tired he could "hardly get around" and his ability to concentrate was "not too good." The dangers existing for miners and particularly for a shot firer handling explosives under such conditions are obvious.

As the shot firer, Jones was also exposed to blasting powder. It is not disputed that continued exposure to the chemicals in blasting powder may induce headaches and that Jones had such a headache. Jones also felt "lousy" that day because he was still recovering from the flu. The duplicate certificate in evidence shows that on April 14, 1983, Jones had in fact been treated for the flu by R. D. Pitman, M.D.

Accordingly, when Perkins asked Jones to continue working overtime after the mining crew had already completed a

10-hour shift, Jones refused and purportedly told Perkins that he was too tired and that "somebody might get hurt bad." Indeed, Perkins himself conceded at hearing that the crew could have safely worked only 9 or 10 hours on the day at issue and acknowledged that when he asked Jones to continue working overtime, Jones had already worked a 10-hour shift. Within this framework of evidence, it is apparent that Mr. Jones entertained a reasonable good faith belief that to continue working overtime under the conditions presented did indeed pose a safety hazard to himself and to the other miners working with him. His refusal to continue working overtime therefore constituted a protected activity within the scope of section 105(c)(1) of the Act.

In his posthearing brief, Perkins does not appear to dispute that Jones' refusal to continue working overtime was based on a reasonable good faith belief of a safety hazard, but claims that Jones failed to testify or present any other evidence that he communicated to Perkins or to any of the other partners that his work refusal was based on a matter of safety. In Secretary on behalf of Dunmire and Estle v. Northern Coal Company, 4 FMSHRC 126 (1982); the Commission stated that "[w]here reasonably possible a miner refusing to work should ordinarily communicate, or at least attempt to communicate, to some representative of the operator his belief in the safety or health hazard at issue." The purpose of the rule is to assist in "weeding out work refusals infected by bad faith." Secretary on behalf of Dunmire and Estle, supra, at p. 134. Accordingly, when the bona fides of a work refusal is not challenged, as it is not in this case, and where the representative of the operator acknowledges the existence of the safety hazard at issue, as Perkins did in this case, the communication requirement is superfluous.

In any event, contrary to the Respondent's allegations, the Complainant did in fact testify that in response to Perkin's request to continue working overtime he said "Buddy . . . I can't. I'm too tired. I might forget something around here. Somebody might get hurt bad" (Tr. 119). I find this testimony to be credible. There is, first of all, a credible factual basis to support Jones contention that after the 10-hour work shift he was suffering fatigue and a headache and that he was still recovering from the flu when Perkins asked him to work additional overtime. Perkins himself acknowledged that 9 or 10 hours was "a good day's work" and indicated that to go beyond that might be unsafe. In addition, the working relationship among the "partners" was such that it would reasonably be expected that Jones would not have simply refused to work without offering some explanation. Under the circumstances, even though I find

that it is not necessary for the Complainant to have met the requirements of the communication rule, I find that he has nevertheless met those requirements in this case.

The Complainant must also show in setting forth a prima facie case that his discharge was motivated in any part by the protected activity. It may reasonably be inferred from the timing of Jones' discharge only minutes after his refusal to continue working overtime, that it was indeed motivated by the protected activity. See Secretary on behalf of Anderson v. Stafford Construction Co., et al., No. 83-1566, D.C. Cir. April 20, 1984. There is no question that Ron Perkins, the person who discharged Jones, knew of Jones' protected activity and it may also reasonably be inferred that Perkins was hostile toward that protected activity because it had a direct negative impact on his earnings.

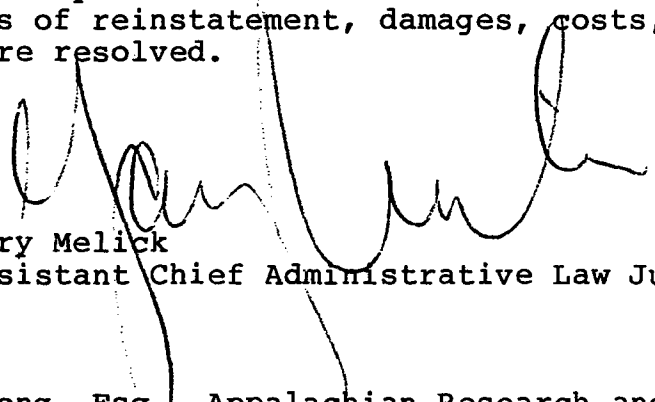
There was, moreover, no credible "non-protected" reason advanced for Jones' discharge. Perkins testified that he fired Jones because of his bad work habits, because Jones wanted only to do the job of "tamping" and would not volunteer to do anything else and because Jones would grumble about working. In spite of these alleged serious deficiencies, however, Perkins had laid off two other miners only a short time before Jones' discharge. There is, moreover, no evidence that Perkins had previously warned Jones of these allegedly bad habits or discussed these problems with the other "partners" before the April 25th removal. Perkins' claims are indeed devoid of any corroboration and I find them to be without credibility. It is clear that Jones' discharge was motivated entirely by his protected activity. Accordingly, I find that Mr. Jones was discharged by D & R Contractors in violation of section 105(c)(1) of the Act.

ORDER

1. The parties are hereby ordered to confer regarding the possibility of settlement concerning reinstatement, costs, damages, and attorneys' fees in this case and to report to the undersigned in writing on or before May 25, 1984, concerning the results of such discussions.

2. In the event the parties are unable to reach a settlement of these matters, they are to submit to the undersigned on or before May 25, 1984, a statement of undisputed facts relating to the issues of reinstatement, costs, damages, and attorneys' fees, and to indicate the specific matters remaining in dispute.

3. This decision is not a final disposition of this case and no final disposition will be rendered until such time as the issues of reinstatement, damages, costs, and attorneys' fees are resolved.



Gary Melick
Assistant Chief Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

2 SKYLINE, 10th FLOOR

5203 LEESBURG PIKE

FALLS CHURCH, VIRGINIA 22041

MAY 15 1984

PYRO MINING COMPANY,	:	CONTEST PROCEEDING
Contestant	:	
	:	Docket No. KENT 84-87-R
v.	:	Order No. 2338185; 1/24/84
	:	
SECRETARY OF LABOR,	:	Docket No. KENT 84-88-R
MINE SAFETY AND HEALTH	:	Order No. 2338186; 1/24/84
ADMINISTRATION (MSHA),	:	
Respondent	:	Pyro No. 9 Slope
	:	William Station

DECISION

Appearances: William M. Craft, Assistant Safety Director, Sturgis, Kentucky, for Contestant; Darryl A. Stewart, Esq., Office of the Solicitor, U. S. Department of Labor, Nashville, Tennessee, for Respondent.

Before: Judge Steffey

A hearing in the above-entitled consolidated proceeding was held on February 28, 1984, in Evansville, Indiana, pursuant to section 105(d), 30 U.S.C. § 815(d), of the Federal Mine Safety and Health Act of 1977. I consolidated for hearing with the issues raised by the notices of contest the civil penalty issues which will be raised when the Secretary of Labor files a proposal for assessment of civil penalty with respect to the two violations of 30 C.F.R. § 75.200 alleged in Order Nos. 2338185 and 2338186. No decision by me on the civil penalty issues will be made, however, until the operator has had an opportunity to participate in the civil penalty procedures described in Part 100 of Title 30 of the Code of Federal Regulations, as hereinafter explained.

At the conclusion of presentation of evidence by both parties, I rendered a bench decision, the substance of which is set forth below:

The parties stipulated at the beginning of the hearing that each order, No. 2338185 and No. 2338186, issued on January 24, 1984, properly alleged a violation of section 75.200, and that the inspector had correctly noted in each order that

the violation was "significant and substantial". 1/ Having made the aforesaid stipulation, the contestant stated that the only point which was being contested at the hearing was whether the violations should have been cited under section 104(d) of the Act in unwarrantable failure orders, rather than in citations, written under section 104(a), which could also have been used to designate the violations as being "significant and substantial". 2/

1/ The phrase "significant and substantial" comes from section 104(d)(1) of the Act which reads as follows:

"(d)(1) If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this Act. If, during the same inspection or any subsequent inspection of such mine within 90 days after the issuance of such citation, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsection (c) to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated. [Emphasis supplied.]

2/ The Commission recently sustained the Secretary of Labor's practice of issuing citations with an indication on the face of the citations that the violations being cited are "significant and substantial" (Consolidation Coal Co., 6 FMSHRC 189 (1984)). Section 104(a) reads as follows:

"Sec. 104. (a) If, upon inspection or investigation, the Secretary or his authorized representative believes that an operator of a coal or other mine subject to this Act has violated this Act, or any mandatory health or safety standard, rule, order, or regulation promulgated pursuant to this Act, he shall, with reasonable promptness, issue a citation to the operator. Each citation shall be in writing and shall describe with particularity the nature of the violation, including a reference to the provision of the Act, standard, rule, regulation, or order alleged to have been violated. In addition, the citation shall fix a reasonable time for the abatement of the violation. The requirement for the issuance of a citation with reasonable promptness shall not be a jurisdictional prerequisite to the enforcement of any provision of this Act."

The parties' stipulation enables me to skip from a detailed consideration of the first three findings, namely, (1) that violations occurred, (2) that they did not cause an imminent danger, and (3) that they were "significant and substantial", which have to be made before an order can be issued under section 104(d)(1), to the ultimate question of whether the violations were caused by an unwarrantable failure of the operator to comply with section 75.200.

My conclusion as to whether there was an unwarrantable failure will be based largely on the findings of fact which are set forth below:

1. Inspector James E. Franks went to the Pyro No. 9 Slope, William Station Mine on January 24, 1984, to check on a roof fall which had occurred. While he was in the mine, he went to the No. 5 Unit and specifically to the last open crosscut between the Nos. 4 and 5 entries. At that time, he issued two unwarrantable-failure orders. The first one was Order No. 2338185 which described the violation of section 75.200 as follows (Exh. 1):

The approved roof-control plan (dated 8/12/83, page 4, par 12(C)) was not being followed on the No. 5 Unit, ID No. 005, in that the last open crosscut between Nos. 5 and 4 entries (100 feet inby spad No. 1380, #5 entry) was unsupported for an area of approximately 15 ft. long by 20 ft. wide and the area had not been dangered off, so as to warn persons that the area was unsupported.

2. The provision in the operator's roof-control plan which the inspector believed was violated was paragraph 12C which reads as follows (Exh. 2, page 4):

All places where the roof is not supported shall have conspicuous markers or signs or reflective sticks suspended from the roof placed outby the unsupported roof.

3. The inspector also wrote Order No. 2338186, pursuant to section 104(d)(1) of the Act, describing a second violation of section 75.200 as follows (Exh. 3):

The last open crosscut between Nos. 5 and 4 entries (100 ft. inby spad No. 1380 #5 entry) No. 5 Unit, ID No. 005, was cut through in the middle and cleaned up, and the area (15 ft. long by 20 ft. wide) was unsupported and the evidence indicated crosscut had been rock dusted, cable for the roof bolter was all the way through the unbolted crosscut, and the tire prints of a piece of equipment,

probably the roof bolter, was present in the rock dust all the way through the unbolted (unsupported) crosscut, one or more persons had traveled through the unsupported area.

4. The inspector testified that there was a roof-bolting machine in the crosscut between the Nos. 4 and 5 entries. He stated that the fact that the roof-bolting machine was in the entry at the time he wrote both withdrawal orders was immaterial in determining whether there was a violation of paragraph 12C of the roof-control plan because the inspector's interpretation of that paragraph is that the company is required to hang the specified warning devices as soon as a place is cleaned up, regardless of whether the roof-bolting machine and its operator are immediately available to go into the place that has been cleaned up, for the purpose of installing roof bolts. The inspector believed that the warning devices were required even if an ongoing production shift is in progress. The inspector believed that it was especially bad that the warning devices had not been placed in the crosscut in this instance because no active production was going on in the No. 5 Unit at the time he wrote the order, although some maintenance or nonproductive work was being performed.

5. Contestant presented three witnesses, but the testimony of two of them is especially noteworthy. The first one was a mechanic named Henry Michael Dennis who had been asked by Ken Reed, a boss on the third shift, to do some work on a roof-bolting machine in a crosscut between the Nos. 4 and 5 entries. When Dennis went to the place to do the work, he found that the roof-bolting machine was being used in the crosscut, but it was situated under what Dennis characterized as unstable-looking rocks in the roof. Therefore, Dennis asked that the roof-bolting machine be backed towards the No. 5 entry. At that point, Dennis went to the repair shack to get some parts. When he returned, he found the roof-bolting machine closer to the No. 4 entry than it was to the No. 5 entry, although when he had left the roof-bolting machine, it had been closer to the No. 5 entry than it was to the No. 4 entry. Since Dennis had not seen the roof-bolting machine moved, he did not know whether it went under unsupported roof to be on the side closest to the No. 4 entry. In any event, he did the work on the brakes and the torquing device of the machine that he had come there to perform.

6. The other significant witness presented by the company was Ronnie Presley who was normally assigned to the group of miners who clean up roof falls. On the morning of January 24, 1984, the day on which the orders were issued, Presley had been requested by John Greenwell, a day-shift foreman, to go to Pyro No. 5 Unit and perform any roof bolting which needed to be done in any area which had been cleaned up but left unsupported.

Presley first installed bolts in the face area and then moved down to the crosscut between the Nos. 4 and 5 entries. After he had installed two rows of bolts in the crosscut, Dennis, as indicated in Finding No. 5, supra, asked Presley to move the roof-bolting machine back towards the No. 5 entry. When Presley did so, he observed some places in the roof at the new location which did not look particularly stable for the performance of maintenance work under them. Without thinking about the safety factor involved, he inadvertently pulled the roof-bolting machine the remainder of the way through the crosscut. In doing so, he passed under unsupported roof. Because of Presley's inadvertent act, the roof-bolting machine was near the No. 4 entry in the crosscut when Dennis came back to work on the machine.

7. Presley admitted during his testimony that he had violated the roof-control plan, or section 75.200, by going under unsupported roof. He stated that when he came out of the mine that same day, he was reprimanded for his violating the roof-control plan and company policies. He was also suspended for 1 day because of the violation.

Docket No. KENT 84-87-R

At the conclusion of the evidentiary presentations, contestant's representative reiterated his belief that while violations, as the company had conceded, had occurred, he did not think that the company's complicity rose to the level of negligence which is required to support a finding of an unwarrantable-failure violation. The company's representative placed in the record as Exhibits B through O references to various administrative law judges' decisions. I have no disagreement with those decisions which seem to follow acceptable definitions of unwarrantable failure. I am not aware of a Commission decision which provides any changes in the definition of unwarrantable failure given by the former Board of Mine Operations Appeals in its decision in Ziegler Coal Co., 7 IBMA 280 (1977), in which the Board defined the identical provision of unwarrantable failure in section 104(c) of the Federal Coal Mine Health and Safety Act of 1969 as follows (7 IBMA 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. The inspector's judgment in this regard must be based upon a thorough investigation and must be reasonable.

In applying the above definition to the first order, No. 2338185, the Secretary's counsel stated that there was a violation of a mandatory safety standard since there is a provision in contestant's roof-control plan which states that there must be a posting of conspicuous marking devices. He further noted that a violation of the roof-control plan is a violation of a mandatory standard, or a violation of section 75.200 because that section requires each operator to file and follow the provisions of a roof-control plan.

I have no reason to disagree with the aforesaid portion of the Secretary's argument, but some refinement should be made in his conclusion to the effect that any time there is a violation of a safety standard, the violation in and of itself constitutes ordinary negligence. In Southern Ohio Coal Co., 4 FMSHRC 1459 (1982), the Commission distinguished between relying upon the acts of a rank and file miner for the purpose of finding that a violation occurred as opposed to relying upon the acts of a rank and file miner for the purpose of imputing negligence to the operator. In other words, an operator is liable for the occurrence of a violation without regard to fault (U. S. Steel Corp., 1 FMSHRC 1306 (1979)), but the negligence of a rank and file miner should not be imputed to the operator for the purpose of assessing penalties.

In any event, the above observations do not quite reach the point that I must make a ruling upon because I must determine whether the facts in this proceeding show that contestant's failure to hang the required warning devices was caused by a lack of due diligence or because of indifference or lack of reasonable care. Contestant's representative made an argument based upon the provisions of paragraph 12 of the roof-control plan which reads as follows (Exh. 2, page 4):

12. Before the side cuts are started, the roof in the area from which it is turned shall be supported with permanent supports according to the approved plan. Except where old workings are involved, mine openings shall not be holed through into unsupported areas. Before a mine opening holes through into a permanently supported entry, room, or crosscut, it shall be examined from both sides. The intersection so created shall be considered unsupported and be immediately endangered off with conspicuous markers or signs suspended from the roof at

each end of the crosscut and no work shall be done in or inby (except for setting two temporary supports and making a gas check) such intersection until either;

- A. The newly created opening is permanently supported or
- B. The newly created opening is timbered off with at least one row of timbers installed on not more than 5 foot centers across the mouth of the open crosscut. Where crosscuts are driven from both sides and holed through, it will not be considered an intersection but conspicuous signs shall be suspended from the roof. Once set, the jacks or posts shall not be removed until other supports are installed in the area.
- C. All places where the roof is not supported shall have conspicuous markers or signs or reflective sticks suspended from the roof placed outby the unsupported roof.

Contestant's representative argues that paragraph 12 requires warning devices to be installed "immediately" in the circumstances described in the first part of paragraph 12, but contestant contends that the word "immediately" is not used in subparagraph C relied upon by the inspector. Contestant's representative asked the inspector about the lack of the word "immediately" in subparagraph C and the inspector agreed that the circumstances described in the first part of paragraph 12 did not exist at the time Order No. 2338185 was written. Therefore, the inspector said that the word "immediately", as used in the first part of paragraph 12, did not apply to the violation of subparagraph C which the inspector believed was violated. In the inspector's opinion, the installation of the warning devices was required by the roof-control plan irrespective of whether the word "immediately" appeared in that subparagraph.

The Secretary's counsel contradicted contestant's argument by pointing out that subparagraph C clearly states that "[a]ll places where the roof is not supported shall have conspicuous markers, or signs, or reflective sticks suspended from the roof." The Secretary's counsel contended that as soon as the company sees an unsupported place, no matter where it is, the company is required to hang the markers. He argued that it is the existence of the unsupported roof which requires the markers and that they are required even if the word "immediately" does not appear before the provision requiring the warning devices to be installed.

I think that the Secretary's counsel is probably correct in making the aforesaid argument because subparagraph C definitely

requires installation of the warning devices at "all places where the roof is not supported". Despite the discussion above, I was impressed by the fact that contestant's representative is an experienced person in dealing with procedures in underground mines, and he stated that it is simply not the practice, for example, if they are working at the face, to install warning devices. In fact, he said that at the face, there is no way that a person would be likely to walk under unsupported roof when there is a roof-bolting machine engaged in putting up roof bolts.

The important aspect of contestant's argument is that a roof-bolting machine was being used in the crosscut at the time the inspector wrote the order. Contestant's argument is that the roof-bolting machine was there with its lights on and the operator was working on the machine. The existence of the roof-bolting machine and its operator would, contestant claims, have served as a warning that there was unsupported roof in the area or the roof-bolting machine would not have been there.

The inspector's testimony controverted the above argument by pointing out that the order was written with respect to a different situation from that which prevails at the face because a person can walk through a crosscut, but cannot walk through the solid coal which one encounters at the face. Consequently, the possibility does exist, according to the inspector, that even if the roof-bolting machine is operating in a crosscut, some miner may walk past the machine without considering whether or not the roof-bolting machine is doing actual supporting work in a place which has been cleaned up but which has not yet been permanently supported. The roof-bolting machine operator himself is engaged in important and dangerous work and he is not paying any particular attention to other persons in the mine who might be ordered to do work which could cause them to go past his machine under unsupported roof before he would notice that they had exposed themselves to the hazard of a possible roof fall.

The inquiry as to whether contestant showed a lack of due diligence or a lack of reasonable care has to be decided on the narrow question of whether contestant should have hung the required conspicuous markers in the crosscut as soon as the coal was loaded out. The evidence shows that contestant did not intend to send the roof-bolting machine into the crosscut immediately for the purpose of installing permanent supports. The work of supporting the roof was eventually done on an idle shift and the foreman who sent the miner to do the roof supporting treated it as "catch-up" work. The evidence shows, therefore, that contestant did not with due diligence hang the conspicuous markers which were required to be installed by paragraph 12C of its roof-control plan.

It is true that there was no foreman on the section when the inspector wrote the order, but I think that there must have been a foreman on the section when the crosscut was cleaned up and when the coal was removed from the mine. It was under that foreman's jurisdiction that the required conspicuous markers should have been hung. So he was the one who showed a lack of due diligence in seeing that the markers were hung. The duty of hanging markers should not have been left to the preshift examiner who apparently did hang some warning devices, or at least Exhibit C shows that he did some endangering off in the No. 5 Unit. The point is that before the preshift examination was made, the conspicuous markers should have been installed.

The language used by the former Board was failure to do something because of indifference or lack of reasonable care. I do not like to say that contestant has indifference because other evidence indicates that contestant is not generally indifferent about safety, but I think that there was a lack of due diligence and of reasonable care on the part of the foreman in this instance. Therefore, I agree with the inspector that an unwarrantable failure occurred when contestant failed to put up the conspicuous markers described in Order No. 2338185 which will hereinafter be affirmed.

Docket No. KENT 84-88-R

The next matter to be considered is whether the violation cited in Order No. 2338186 was properly alleged in an unwarrantable failure order because contestant has already stipulated that the violation of section 75.200 alleged in the order did occur. Therefore, it is again necessary to consider whether contestant showed a lack of due diligence or a lack of reasonable care with respect to the inspector's claim that one or more persons went under unsupported roof.

Originally this case raised the question of whether the inspector had properly inferred that there was a violation of section 75.200 because he saw that a cable had been dragged through a crosscut and that tracks of a roof-bolting machine appeared in a crosscut under an area of unsupported roof. The inspector concluded from his observations that there was no way the machine could have gone through the crosscut having unsupported roof without passing beneath the unsupported roof.

If contestant had not presented its witnesses in this case, I would have been confronted with the aforesaid preliminary question of whether the inspector's inferences had been properly drawn. Contestant's presentation of Ronnie Presley as a witness, however, eliminated any need to decide any question about inferences because Presley, as noted in Finding Nos. 6

and 7, supra, testified that he, without giving proper consideration to safety regulations or company policy, did inadvertently tram the roof-bolting machine through the crosscut beneath unsupported roof. That same day Presley was reprimanded and suspended for 1 day for having violated both section 75.200 and company policy. Presley testified that he had been warned not to go under unsupported roof, but that in an effort to get the roof-bolting machine into a secure place for maintenance work to be performed on it, he had inadvertently forgotten about the fact that he was passing under roof in which permanent roof bolts had not yet been installed.

In the circumstances described above, it would be improper for me to conclude that management showed a lack of due diligence or that the second violation of section 75.200 occurred because of indifference or lack of reasonable care. In this instance, I am reminded of the Commission's decision in Nacco Mining Co., 3 FMSHRC 848 (1981). In that case, the Commission held that no negligence should be imputed to the operator when a section foreman who had always followed safety regulations and who had always been a very careful foreman, for some reason acted in an aberrant fashion, and went under unsupported roof which fell and caused his death. The Commission stated in that case that it could not hold the company to have been guilty of negligence because the company could not have anticipated that the foreman would act as he did.

I believe that the events leading up to the writing of Order No. 2338186 are very similar to those which existed in the Nacco case because in this case Presley acted in a wholly unexpected manner by tramping his roof-bolting machine through an unsupported area without giving due thought. Contestant reprimanded him for his careless act and suspended him for it on the same day that it happened.

Contestant's evidence shows that it did not condone Presley's action. If the inspector had known all the facts now in the record of this proceeding, he would perhaps not have cited the violation in an unwarrantable-failure order. In any event, I believe the facts given above support a conclusion that the violation of section 75.200 cited in Order No. 2338186 did not occur because of a lack of due diligence or because of indifference or a lack of reasonable care. Therefore, the violation of section 75.200 cited in Order No. 2338186 was improperly alleged as an unwarrantable-failure violation pursuant to section 104(d)(1) of the Act. Order No. 2338186 will hereinafter be modified to a citation.

Civil Penalty Issues

Contestant filed a motion for an expedited hearing in this proceeding. The motion was granted and a hearing was held on

February 28, 1984, which was as early as the parties' schedule would permit. The bench decision could not be issued in final form until the transcript was received and the transcript was not received until May 1, 1984. During the period between the hearing and receipt of the transcript, MSHA's Office of Assessment proposed penalties of \$1,000 each for the violations of section 75.200 cited in Order Nos. 2338185 and 2338186. A copy of contestant's answer to the proposed assessment was received by me on April 3, 1984. In that letter contestant stated that "* * * Order No. 2338185 was vacated and Judge Steffey indicated he would assess the penalty on Order No. 2338186."

On April 13, 1984, I received a copy of the Assessment Office's reply to contestant's interpretation of the outcome of the hearing held in this proceeding. The pertinent part of the Assessment Office's reply is set forth below:

As the Administrative Law Judge (ALJ) has vacated Order No. 2338185, the civil penalty will be voided. Your letter of March 29, will be considered a request to contest the civil penalty on Order No. 2338186 so that the ALJ has jurisdiction to decide on the civil penalty. In the future, you should file a separate request (blue card) for a hearing on the civil penalty, even though you have previously contested the validity of the order or citation.

It is obvious from contestant's letter to the Assessment Office that contestant did not understand my rulings with respect to the civil penalty issues. My order providing for hearing issued on February 17, 1984, explained on page 2 that the civil penalty issues were being consolidated for purpose of receipt of evidence pertaining to the six criteria, but that order and my opening remarks at the hearing stated as follows (Tr. 2):

* * * I have consolidated for hearing with the issues raised by the notices of contest the civil penalty issues which will be raised when and if the Secretary of Labor files a proposal for assessment of civil penalty with respect to the two violations of section 75.200 alleged in Order Nos. 2338185 and 2338186. No decision by me on the civil penalty issues, however, will be rendered until such time as the operator has had an opportunity to participate in the civil penalty procedures described in Part 100 of Title 30 of the Code of Federal Regulations.

My bench decision contained the following discussion of the civil penalty issues (Tr. 156-157):

I don't normally in one of these cases convert orders to citations because I simply find that no unwarrantable failure occurred and therefore it's an invalid order. But in this case, the civil penalty portion of the case is still pending because the proposal for assessment of civil penalty hasn't been filed yet. I want the company to have the benefit of conference before I assess the penalty. Therefore, in this instance, when my decision comes out, I shall convert the Order 2338186 to a citation, checking the S and S portion of the citation. Therefore, unless the Department of Labor appeals my decision and gets me reversed on the conversion of the order to a citation, the Secretary will propose a penalty for a citation in this instance, instead of an order.

I shall hereinafter explain for contestant's benefit what procedures should be followed with respect to the civil penalty aspects of the proceeding. Since this was probably contestant's first exposure to a consolidated notice-of-contest and civil penalty proceeding, I am not surprised that some confusion exists as to what my bench decision held, particularly when it is realized that contestant did not have a copy of the transcript or bench decision when it wrote its letter to the Assessment Office.

The first aspect of contestant's letter to the Assessment Office which needs to be corrected is the fact that my bench decision stated that I would vacate Order No. 2338186 and would convert the order to a citation because the violation survived the vacation of the order (Island Creek Coal Co., 2 FMSHRC 279 (1980), and Van Mulvehill Coal Co., Inc., 2 FMSHRC 283 (1980)). The length of the hearing was considerably reduced by contestant's having stipulated at the commencement of the hearing (Tr. 4) that both violations had occurred and that both could appropriately be considered as "significant and substantial" violations. In such circumstances, it is especially true in this proceeding that the violation would survive my finding that no unwarrantable failure existed with respect to Order No. 2338186.

The quotation from the Assessment Office's reply to contestant's letter shows that the Assessment Office was under the erroneous impression that my bench decision had not only vacated Order No. 2338185 but had also held that no violation of section 75.200 had been proven. The Assessment Office's reply is correct, however, in stating that it is necessary for a proposal for assessment of civil penalty to be filed with the Commission before I have a case before me which gives me jurisdiction to assess a penalty on the basis of the record made in this proceeding.

In order that no confusion will continue to exist with respect to the civil penalty issues, I shall further explain the procedure which I would expect the Assessment Office and contestant to follow in order to dispose of the civil penalty issues. The Assessment Office has already proposed penalties with respect to Order Nos. 2338185 and 2338186 under Assessment Control No. 15-13881-03520, but that proposed assessment included proposed assessments for Citation Nos. 2074792, 2074793, and 2338327. If the Assessment Office fails to sever the proposed assessments for Order Nos. 2338185 and 2338186 from the other three citations, the civil penalty case may end up before me with three alleged violations to be considered which were not the subject of the hearing held with respect to Order Nos. 2338185 and 2338186. Therefore, I would suggest that the Assessment Office propose penalties for the violations of section 75.200 alleged in Order Nos. 2338185 and 2338186 under an assessment control number which would include only those two orders. Additionally, the proposed assessment should refer to No. 2338186 as a citation issued under section 104(a) of the Act instead of an order issued under section 104(d)(1) of the Act. The new citation designation would be with the "significant and substantial" block checked on it.

If the Assessment Office is agreeable to the above suggestion, the amended proposed assessment should be resubmitted to contestant for its consideration. Contestant should bear in mind that it is entitled to ask for a conference with respect to Order No. 2338185 and Citation No. 2338186 just as it would with respect to any other proposed assessment. If contestant, however, wishes to have me assess a penalty for both Order No. 2338185 and Citation No. 2338186, it should file a "blue card" with respect to both the order and the citation. Contestant is also free to pay the proposed penalty for either or both the violations. If contestant elects to pay the penalty for one violation, it may do so, and then file a blue card with respect to the violation for which it wishes to have me assess the penalty. After the Solicitor's Office has filed a proposal for assessment of civil penalty with respect to one or both of the violations which contestant did not elect to pay at the Assessment Office level, contestant should, as usual, file an answer to the proposal for assessment of civil penalty. In that answer, contestant should state that a hearing has already been held by me with respect to the violations alleged in Order No. 2338185 and Citation No. 2338186 and that the civil penalty case should be forwarded to me for the purpose of assessing a penalty (or penalties) on the basis of the hearing record made in this proceeding.

I believe that the discussion above should enable the Assessment Office and contestant to dispose of the procedural steps required for dealing with all civil penalty issues.

WHEREFORE, it is ordered:

(A) The notice of contest filed by Pyro Mining Company in Docket No. KENT 84-87-R is denied and Order No. 2338185 issued January 24, 1984, pursuant to section 104(d)(1) of the Act, is affirmed.

(B) The notice of contest filed by Pyro Mining Company in Docket No. KENT 84-88-R is granted and Order No. 2338186 issued January 24, 1984, under section 104(d)(1) of the Act, is vacated insofar as it purports to have been issued as an unwarrantable-failure order and is modified to a citation issued under section 104(a) of the Act with a designation of a "significant and substantial" violation.

(C) The civil penalty issues are severed from this consolidated proceeding for disposition under Part 100 of Title 30 of the Code of Federal Regulations, with the understanding that if Pyro Mining Company files a request for hearing (or blue card) with respect to either or both violations alleged in either Order No. 2338185 or Citation No. 2338186, the proposal for assessment of civil penalty with respect to the request for hearing will be forwarded to me for assessment of a penalty (or penalties) based on the record in this proceeding.

Richard C. Steffey
Richard C. Steffey
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

MAY 16 1984

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 83-82
Petitioner	:	A.C. No. 33-01869-03504
v.	:	
	:	Getz Strip
GETZ COAL SALES, INC.,	:	
Respondent	:	

DECISION

Appearances: Patrick M. Zohn, Esq., Office of the Solicitor,
U.S. Department of Labor, Cleveland, Ohio, for
Petitioner.

Before: Judge Koutras

Statement of the Case

This is a civil penalty proceeding initiated by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a), seeking civil penalty assessments for four alleged violations of certain mandatory safety standards promulgated pursuant to the Act. Respondent filed a timely contest and requested a hearing. A hearing was convened in Youngstown, Ohio, on April 12, 1984. Although the petitioner appeared at the hearing, respondent's counsel did not.

As a result of the failure by respondent's counsel to appear, the hearing proceeded without him, and the respondent was held to be in default. Further, in view of this respondent's past history of failing to appear at scheduled hearings, with absolutely no effort on its part to advise the court of its non-appearance, and in view of this respondent's flagrant disregard and obvious contempt for the Commission and its Administrative Law Judges, the respondent has been certified to the Commission for appropriate disciplinary sanctions pursuant to Commission Rule 80, 29 CFR 2700.80. In addition, in view of counsel's contumacious conduct in failing to appear at the hearing pursuant to notice, he too has been certified to the Commission for appropriate disciplinary action.

Issues

The principal issue presented in these proceedings are (1) whether respondent has violated the provisions of the Act and implementing regulations as alleged in the proposal for assessment of civil penalty filed, and, if so, (2) the appropriate civil penalty that should be assessed against the respondent for the alleged violations based upon the criteria set forth in section 110(i) of the Act. Additional issues raised are identified and disposed of where appropriate in the course of this decision.

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

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, Pub. L. 95-164, 30 U.S.C. § 801 et seq.
2. Section 110(i) of the 1977 Act, 30 U.S.C. § 820(i).
3. Commission Rules, 29 C.F.R. § 2700.1 et seq.

Discussion

This case concerns four section 104(a) citations issued by MSHA Inspector James A. Boyle, during the course of an inspection of the respondent's mine on May 16, 1983, and the cited conditions and practices follow below.

Citation No. 2067133, cites a violation of mandatory safety standard 30 C.F.R. 77.1710(i), and describes the following condition or practice:

Seatbelts were not provided for the Caterpillar D9G bulldozer (Serial No. 66A 11107) where there is a danger of overturning and where roll protection (ROPS) is provided. Kenny Doren was operating the bulldozer at the 002-0 pit, stripping overburden under the supervision of Roy Cusick, foreman.

Citation No. 2067134, cites a violation of 30 C.F.R. 77.1606(c), and states the following condition or practice:

An equipment defect affecting safety was present on the caterpillar D9G bulldozer (serial #66A11107), in that the operator cab doors were not maintained in a working condition. The left cab door was held closed with a tarp strap, the latch was missing. The right cab door was held open with a tarp strap, the inside door handle was missing. Kenny Doren was operating the bulldozer at the 002-0 pit, stripping overburden.

Citation No. 2067135, cites a violation of 30 C.F.R. 77.1710(i), and states the following condition or practice:

Seatbelts were not provided for the Caterpillar 90G bulldozer (Serial No. 66A10646), where there is a danger of overturning and where roll protection (ROPS) is provided. Dave Henry was operating the bulldozer at the 002-0 pit, stripping overburden, under the supervision of Roy Cusick, foreman.

Citation No. 2067136, cites a violation of 30 C.F.R. 77.1606(c), and states the following condition or practice:

An equipment defect affecting safety was present on the Caterpillar D9G bulldozer (Serial No. 66A 10646), in that the operator's cab doors were not maintained in a working condition. The left cab door latch was missing and the latch was bad, had to be held shut with a piece of wire. Dave Henry was operating the bulldozer at the 002-0 pit, stripping overburden, under the supervision of Roy Cusick, foreman.

Petitioner's Testimony and Evidence

MSHA Inspector James A. Boyle, testified as to his background and experience as a surface mining inspector, and he confirmed that on May 16, 1983, he inspected the Getz Strip Mine, located in the Lisbon, Ohio, area, and owned and operated by Roland A. Getz (Tr. 20-22). He also confirmed that he inspected two Caterpillar D9G bulldozers and that he issued four citations for certain conditions which he found which were in violation of the cited mandatory safety standards (Exhibits P-3 through P-6; Tr. 46).

Mr. Boyle testified that the bulldozers were operating in the 002 pit area stripping overburden, and he described the terrain and conditions under which they were operating. He confirmed that no seatbelts were provided for the cited bulldozers, and that they were both equipped with ROPS (Tr. 23-27).

Mr. Boyle indicated that the area where the bulldozers were observed stripping was "fairly level." However, he also indicated that the cited bulldozers were continuously required to travel up and down a ramp area in order to dispose of the material which they were mining, and that while the area is sometimes slippery when wet, on the day he cited the violations, it was dry (Tr. 25). He described the ramp as being 150 to 155 feet long, with an open end, and he stated that one side would be against the spoil, and the other side would be "open." He also indicated that the distance from the top of the ramp down into the pit was 50 to 70 feet, but that on the day in question it was probably 50 feet (Tr. 28).

Mr. Boyle conceded that while the bulldozers were operating in the pit there would be no danger of their overturning. However, since they had to travel the ramp area during their normal operation, there would be a danger of overturning on the ramp (Tr. 29). He went on to describe the conditions he cited, and he confirmed that the cited equipment was not equipped with the required seatbelts, and that the door on one of the bulldozers had a missing latch and was secured by a strap, and the doors on the other bulldozers were not maintained in proper working order in that the latch and door handle was missing and had to be held shut with a piece of strap (Tr. 30-32). Although the actual mechanical operation of the dozers was not affected, Mr. Boyle believed that the cited conditions did affect the safety of the operators (Tr. 32-34).

In response to further bench questions, Mr. Boyle stated that the reason he did not fill in the "negligence" and "gravity" blanks on the face of the citations which he issued is that since he found that the violations were not "significant and substantial," his instructions were that he was not to fill out those blanks when he issues "non-S&S" violations (Tr. 36-37)

With regard to the conditions of the door latches which he cited, Inspector Boyle was of the opinion that the operators would have difficulty in getting out of the equipment in the event it overturned, and since the bulldozers have hydraulic

lines which run under the machine in the area where the operators are seated, in the event that the transmission got hot and the lines ruptured, there could be a fire, and the operator wouldn't notice it until it spread to where he was seated (Tr. 32-33).

Findings and Conclusions

In view of the respondent's failure to appear at the hearing pursuant to notice, I have considered this as a waiver of his right to be heard on the record and to defend against the violations, and I held him in default. While Commission Rule 63, 29 C.F.R. 2700.63, requires that a show cause order be issued before a party is held in default for failing to answer an order by the Judge, under the circumstances of this case, respondent is not prejudiced by my not issuing such an order. Rule 2700.63(b) authorizes a judge to enter summary civil penalty dispositions where a respondent is in default, and based on this respondent's long history of ignoring notices, orders, and other Commission findings, any further notices to the respondent would simply be fruitless.

Since the respondent failed to appear at the hearing, I have decided this case on the basis of the evidence and testimony presented by the petitioner in support of the citations. After consideration of the un rebutted testimony of Mr. Boyle, as well as the evidence and arguments made by the petitioner in support of its case, I conclude and find that the petitioner has established the fact that the violations occurred as stated by the inspector in the citations which he issued. Accordingly, the citations are all AFFIRMED.

I take note of the fact that one of the purported reasons for the respondent's counsel failing to appear at the hearing is that since the four citations were "single penalty assessments" totalling \$80, counsel apparently believed that it was not "worth the litigation effort." However, it is clear that I am not bound by MSHA's proposed initial "single penalty assessments" of \$20 for each of the violations in question. Pursuant to section 110(i) of the Act, penalty assessments imposed by the Commission's judges in a contested case docketed before the Commission, are based on the judge's de novo consideration of all of the facts and circumstances surrounding the cited conditions or practices, as well as the six statutory criteria set forth in the Act.

Even if I were to affirm the inspector's findings that these violations were not "significant and substantial," the fact that MSHA imposed an "automatic" initial penalty assessment in the amount of \$20 under its regulatory scheme found in Part 100, Title 30, Code of Federal Regulations, is not binding on me. I may reject or accept such an assessment depending on the facts and circumstances presented in any given case. Further, based on my consideration of the evidence and testimony of record, I may also accept or reject the findings by the inspector that the violations were not "significant and substantial," and may modify the citations to reflect these de novo findings.

When asked to explain why he did not consider the cited conditions or practices to be "significant and substantial," Inspector Boyle responded as follows (Tr. 37):

MR. ZOHN: And I believe, and of course, Mr. Boyle could correct me if I'm wrong, he saw the bulldozers on the floor of the pit, rather than on the ramp. And, that the danger of overturning, in almost all cases, is when they push up onto the open, up onto the ramp and as they're backing down onto the open side, they have a tendency to back down faster, so, that's the greatest danger of overturning, is when they are operating on the ramp, which is a common occurrence, or a frequent occurrence, operating in the pit.

JUDGE KOUTRAS: All right. Now, if that's the case, then, again, why wouldn't these be significant or substantial?

MR. ZOHN: Well, that was one of my questions, following up.

BY MR. ZOHN:

Q. If you had to cite these conditions over again, would you have cited them as non S and S, or would you have given them a higher degree of danger?

A. Well, there again, if those two bulldozers were working where there was a definite time that there would be an overturn, say both of them were coming down the ramp, you could make them S and S, then, yeah.

Q. So, in operating on--

A. See, that was one of the biggest things when we went to this non S and S, is where do you draw the line. We've been criticized because we cited a bulldozer out, doing reclamation, that there was no other equipment or persons around.

JUDGE KOUTRAS: I may have been the Judge that did that to you; but, anyway go ahead.

THE WITNESS: But, anyhow, they say, well, you cited them for say, a backup alarm, and there was no one in the area, there was never a hazard, and you made it S and S. But a lot of inspectors base that, the afternoon shift, he may be working in an area where's six people involved. So we cited him in the spoils for a non S and S citation, and that afternoon, he'd be in an area where there would be other equipment and people involved. So, you have to draw the line, and see where this equipment is working and the potential, that, afternoon you definitely know he'll be in another area. So there's where, I think, this whole thing on this S and S, and non S and S, has really confused a lot of us.

BY MR. ZOHNN:

Q. I, another question, in that respect, of the classification of these violations; do you, in fact, now have the opportunity to inspect this mine as frequently as you did, say--

A. No. See, there's another thing that certain type mines are getting in, what we refer to, as a pattern on these two inspections a year now. They'll look at their calendar and say, well, it's April, he's due, and we'll fix things up; where the other five months of the year, he won't. And it's really hurt the safety and health part of it, on these only two inspections.

* * * * *

BY MR. ZOHNN:

Q. Okay. So were these bulldozers operating on the ramp, during the course of that day? Would they be operating on--

A. Yes. One would. And see when you have--

JUDGE KOUTRAS: Excuse me, you say one would?

THE WITNESS: One was, and then, the other was ripping, and then, when he gets so much ripped, then they'd both be pushing off this.

JUDGE KOUTRAS: Okay.

BY MR. ZOHN:

Q. Did you see them operating up on the incline, at all?

A. Yeah.

Q. All right. Based upon your observations of them operating on the incline, would you have issued them now as S and S citations?

A. I'd have to check the area first, and see how much of a danger there was. Now, these can be, these ramps can be anywhere from forty foot wide to seventy foot wide, and if they're both going up the middle, there is no danger there, but one time or another, the ones on the edge, there is a danger there then.

MR. ZOHN: I don't have any further questions, your Honor.

JUDGE KOUTRAS: Okay. What the, do you recall what the widths of the ramps were, on these days?

THE WITNESS: I think those, the ramps, that day, were in the neighborhood of forty to fifty feet wide.

Significant and Substantial

On the facts of this case, I conclude and find that the violations cited by Inspector Boyle were significant and substantial. His testimony is that the two bulldozers operated on a daily basis in the pits, and while it is true that at the time he observed them they were running on fairly level terrain, he also indicated that they traveled up and down an inclined ramp, and that there was a danger of overturning. Further, in the event of an accident, or overturning, Mr. Boyle further testified that the condition of the cab

doors, the lack of proper latches, and one or more missing handles, would likely trap the operators in the cabs in the event the equipment overturned, and that they would have difficulty in getting out of the equipment. Given these circumstances, I conclude and find that it was reasonably likely that an injury would result from the cited conditions or practices. Accordingly, the violations are modified to reflect that they were significant and substantial, and the inspector's initial findings to the contrary are rejected.

Gravity

I find that all of these citations constitute serious violations. Failure to provide seatbelts and the lack of door handles on the operator's cab, presented a serious hazard to the equipment operator in the event of an accident. If the bulldozers were to overturn, the lack of seatbelts would likely throw the operators out of the cab, and the lack of adequate door handles would prevent their escape from the vehicles in the event of an emergency, particularly if the overturned equipment were to come to rest on the one "good-side" of the cab.

Negligence

Inspector Boyle believed that the respondent's negligence with respect to the condition of the doors on the cited bulldozers was moderate. He stated that with the older bulldozers, while it was difficult to obtain parts such as door handles, he still allowed them to be operated (Tr. 34; 36). Mr. Boyle also confirmed that the foreman was aware that seatbelts were required (Tr. 29). I conclude and find that the violations resulted from ordinary negligence on the part of the respondent.

Good Faith Compliance

Inspector Boyle confirmed that abatement was achieved in a timely manner by the respondent, and the door handles were replaced (Tr. 29; 34-36). He also confirmed that seatbelts were installed. Under the circumstances, I conclude and find that the respondent timely abated the cited conditions and practices, and insofar as the citations are concerned, abated them in good faith.

History of Prior Violations

Exhibits P-1 and P-2, are computer print-outs of the respondent's history of prior violations for the period May 16, 1981 through May 15, 1983, and prior to May 16, 1981. Prior to May 16, 1981, the respondent was assessed for a total of 17 citations, two of which were paid. For the period May 16, 1981, through May 15, 1983, respondent was assessed for two citations, and they remain unpaid.

Based on the respondent's past compliance record, as reflected in the print-outs, I cannot conclude that it is per se a bad record of compliance warranting additional increases in the civil penalties which I have assessed for the four violations which have been affirmed. What I have difficulty comprehending is why this respondent, with an otherwise good compliance record, consistently ignores and flaunts the law after he has abated the conditions, and seeks to be heard through the hearing process.

Size of Business and Effect of Civil Penalties on The Respondent's Ability to Continue in Business

The record reflects that the respondent is a small strip mine operator. Absent any evidence to the contrary, and in view of the respondent's failure to appear and argue otherwise, I cannot conclude that the civil penalties assessed by me for the citations which have been affirmed will adversely affect the respondent's ability to continue in business.

During his closing argument on the record, petitioner's counsel requested a substantial increase in the initial penalty assessments proposed for these violations, and he did so on the basis of the evidence and testimony which indicated that the bulldozers in question were operating in areas where there was a danger of overturning, that no seatbelts at all were provided, and that the lack of adequate door handles and latches would entrap the operators if the vehicles were to overturn. Counsel also agreed that I was not bound by the initial MSHA assessments made for these violations, and he alluded to the fact that the respondent has a history of flaunting the law (Tr. 47-48).

Petitioner's counsel also moved that in view of the failure of the respondent or his counsel to appear in this proceeding, that I refer the matter to the Commission for appropriate disciplinary action pursuant to the Commission's rules. In support of his motion, counsel argued that the respondent has an obvious contempt for these proceedings, that this is not the first time he has failed to appear at a hearing, and that in each instance where other Commission

Judges have ordered payments of civil penalties, or that respondent answer show-cause or other orders, he has flagrantly disregarded them. Counsel also stated that the respondent has made no payments for any civil penalties ordered by the Commission Judges in past proceedings, and that the Department of Labor has sought injunctions against the respondent for non-payment of penalties in the United States District Court (Tr. 12-15; 48-50). Petitioner's counsel also stated that the respondent and his foremen treat MSHA inspectors with general disrespect and that the respondent attempts to avoid the law rather than obey it (Tr. 16).

In support of his assertion that the respondent has flagrantly disregarded the authority and jurisdiction of the Commission, petitioner's counsel alluded to several prior decisions and orders issued by me, by Chief Judge Merlin, and Judges Broderick and Melick, and a discussion of these follow below:

In MSHA v. Getz Coal Sales, Inc., VINC 79-60-P, decided by me on August 7, 1980, 2 FMSHRC 2172, respondent Roland Getz failed to appear at a hearing convened in Warren, Ohio, and he did so without prior notice that he would not appear. He simply ignored the notice, and my personal telephone call to him the morning of the hearing. In that case, he specifically requested a hearing, and did not even give me the courtesy of a telephone call that he would not appear. He was defaulted, and an order was entered that he pay the assessed civil penalty of \$75.

In MSHA v. Getz Coal Sales, Inc., LAKE 80-396, Judge Broderick entered a default order on February 9, 1981, requiring the respondent to pay a penalty of \$26 for his failure to file an answer or otherwise respond to the Judge's show-cause order. Judge Merlin issued a similar default order on May 13, 1983, in MSHA v. Getz Coal Sales, Inc., LAKE 83-4, and ordered the respondent to make an immediate payment of \$46.

In MSHA v. Getz Coal Sales, Inc., LAKE 83-86, Judge Melick approved a settlement motion calling for the respondent to pay a \$30 assessment in satisfaction of a citation initially assessed as \$42, and in that case, as well as the others noted above, petitioner's counsel states that respondent has made absolutely no payments, and has simply ignored the orders issued by the Judges.

Respondent's Failure to Appear at The Hearing

The record in this case reflects that both the respondent and his counsel received notice of the hearing scheduled in this case, and the postal certified mailing receipts which are part of the record attest to that fact. Respondent received my original hearing notice issued on January 16, 1984, and his counsel received the amended notice issued March 22, 1984, advising him of the specific hearing site. These notices were issued well in advance of the scheduled hearing on April 12, 1984.

In addition to the written notices served on the respondent and his counsel, petitioner's counsel advised me that he personally spoke with respondent's counsel on the day before the hearing and advised him that he should appear. When counsel failed to appear the morning of the hearing, I personally telephoned his office and was advised by his clerical staff that he was away, but that he was aware of the fact that this matter was scheduled for hearing. Given these circumstances, it seems clear to me that respondent and its counsel had ample notice of the hearing, yet they flagrantly ignored the notices and orders.

Although respondent Roland Getz has a history of obvious contempt for these legal proceedings, and apparently derives some vicarious pleasure by thumbing his nose at the Department of Labor, as well as the Commission, I fail to understand and comprehend counsel Neal S. Tostenson's conduct in ignoring the notices served on him in this proceeding. As a member of the Bar, I would think that he would be cognizant of his ethical responsibilities as counsel of record in these proceedings, and act accordingly. If counsel conducted his practice in this manner while before a United States District Court, he would more than likely find himself in contempt of court. Lacking such contempt powers, I do have the discretion to certify the matter to the Commission for possible disciplinary action under its rules, and I may also consider referring the matter to the local bar where counsel is admitted to practice.

After careful consideration of the motion made by petitioner's counsel to certify this matter, IT IS GRANTED, and the matter will be certified to the Commission for consideration of appropriate disciplinary action under 29 C.F.R. 2700.80.

Penalty Assessments

On the basis of the foregoing findings and conclusions, and considering the statutory criteria found in section 110(i) of the Act, I conclude and find that the following civil penalties are reasonable and appropriate for the violations which have been affirmed.


<u>Citation No.</u>	<u>Date</u>	<u>30 CFR Section</u>	<u>Assessment</u>
2067133	5/16/83	77.1710(i)	\$135
2067134	5/16/83	77.1606(c)	175
2067135	5/16/83	77.1710(i)	135
2067136	5/16/83	77.1606(c)	175
			<u>\$620</u>

ORDER

Respondent IS ORDERED to pay the civil penalties in the amounts shown above within thirty (30) days of the date of this decision, and payment is to be made to MSHA.

IT IS FURTHER ORDERED THAT:

In view of the circumstances surrounding the respondent's apparent flagrant disregard for the authority and jurisdiction of the Commission, and in view of Counsel Neal S. Tostenson's failure to appear at the scheduled hearing pursuant to notice duly served on him, the matter is referred to the Commission pursuant to Rule 80, 29 CFR 2700.80. See: Secretary of Labor ex rel. Roy A. Jones v. James Oliver & Wayne Seal, FMSHRC Docket No. NORT 78-415, March 27, 1979; Canterbury Coal Co., 1 FMSHRC 335 (May 1979); Secretary of Labor v. Co-Op Mining Company, 1 FMSHRC 971 (July 1979) (Disciplinary Proceeding No. D-79-2).


George A. Koutras
Administrative Law Judge

Distribution:

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Mr. Roland A. Getz, President, Getz Coal Sales, Inc., 8310 Hoffee Road, Lisbon, OH 44432 (Certified Mail)

/ejp

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 1984

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 83-65
Petitioner	:	A.C. No. 29-00096-03506
v.	:	
	:	McKinley Mine
THE PITTSBURG & MIDWAY COAL	:	
MINING CO.,	:	
Respondent	:	

DECISION

Appearances: Jordana W. Wilson, Esq., Office of the Solicitor,
U.S. Department of Labor, Dallas, Texas, for
Petitioner;
John A. Bachmann, Esq., Denver, Colorado, for
Respondent.

Before: Judge Broderick

STATEMENT OF THE CASE

The Secretary seeks a civil penalty for one alleged violation of a mandatory standard, that contained in 30 C.F.R. § 77.202. Pursuant to notice, the case was heard in Albuquerque, New Mexico on April 17, 1984. Forester Horne and Harold Shaffer testified on behalf of Petitioner, and Petitioner called Frank Scott, a representative of Respondent as a witness. Frank Scott and Gary Cope testified on behalf of Respondent. At the conclusion of the testimony, counsel orally argued their respective positions on the record, and waived their right to file post-hearing 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 owner and operator of a surface coal mine in McKinney County, New Mexico, known as the McKinney Strip Mine.

2. Respondent is a large operator.
3. Respondent's history of previous violations is small. A penalty otherwise appropriate should not be increased because of the history.
4. A penalty in this case will not have any effect on Respondent's ability to continue in business.
5. On June 9, 1983, Federal Mine Inspector Forester Horne inspected the subject mine and issued Citation No. 2071336 alleging a violation of 30 C.F.R. § 77.202.
6. The tipple control room at the subject mine is on the top floor of the coal transfer building and is about 80 feet from the surface. The coal comes in the transfer building and its transferred to the stacker belt. Coal dust results from this operation.
7. The tipple control room is about 20 feet by 15 feet. It contains two panels or boxes, one known as the main crusher panel or main breaker box, and the other called the heat trace box or panel. The former is about 6 feet high and 2 feet wide. The latter is about 2 feet by 2 feet.
8. The main crusher panel contains a motor starter, with an overload relay, a transformer and numerous wires.
9. The heat trace panel contains a number of circuit breakers.
10. On June 9, 1983, there was an accumulation of coal dust in the main crusher panel and the heat trace panel. The dust on the base of each panel measured approximately one-eighth of an inch. It was black in color. There was dust on the equipment within each box although most of it had settled to the base. The dust was not in suspension.
11. The dust had come up through the floor of the room and around the conduits under the panels.
12. The condition described in Finding No. 10 was such that it would have taken 2 to 3 days to accumulate. It was apparent to visual observation.
13. In the normal operation of the main crusher panel and the heat transfer panel, no ignition source, arc or spark is created.

14. In the event of a phase to phase or phase to ground fault within one of the panels, an ignition could be created. If an ignition occurred, it could put the dust accumulation in suspension and an explosion could result.

REGULATION

30 C.F.R. § 77.202 provides as follows: "Coal dust in the air of, or in, or on the surfaces of, structures, enclosures, or other facilities shall not be allowed to exist or accumulate in dangerous amounts."

ISSUES

1. Whether Respondent allowed coal dust to exist or accumulate in dangerous amounts in the panels in the tippie control room of the subject mine on June 9, 1983?

2. If so, what is the appropriate penalty for the violation?

CONCLUSIONS OF LAW

1. Respondent is subject to the provisions of the Federal Mine Safety and Health Act of 1977 in the operation of the subject mine, and I have jurisdiction over the parties and subject matter of this proceeding.

2. The condition described in Finding of Fact No. 10 constituted a violation of the mandatory safety standard contained in 30 C.F.R. § 77.202.

DISCUSSION

The critical issue in this case is whether the coal dust accumulations existed "in dangerous amounts." There are few cases interpreting this phrase. But see Consolidation Coal Company, 3 FMSHRC 318 (1981) (ALJ); Secretary v. Co-op Mining Company, 5 FMSHRC 1041 (1983) (ALJ). Whether an accumulation is dangerous depends upon the amount of the accumulation and the existence and location of sources of ignition. The greater the concentration, the more likely it is to be put into suspension and propagate an explosion. I accept the inspector's testimony as to the amount of the accumulation and conclude that it was significant. It is true that there were no bare wires or any equipment that would cause arcing or sparking without some equipment failure or defect. But there was energized electrical facilities present and faults or failures in such facilities are common occurrences. I conclude that if the extent of the accumulation is such that it is black in color, and if potential ignition sources are present, the accumulation exists in a dangerous amount.

3. The violation was moderately serious. An ignition was unlikely to occur, but if it did, serious injuries would result.

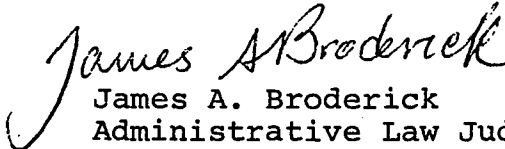
4. The violation resulted from Respondent's negligence. Respondent knew or should have known of its existence and cleaned it up.

5. The violation was abated promptly and in good faith.

6. Considering the criteria in section 110(i) of the Act, I conclude that an appropriate penalty for the violation is \$400.

ORDER

Based upon the above findings of fact and conclusions of law, Respondent is ORDERED to pay the sum of \$400 within 30 days of the date of this decision for the violation found herein to have occurred.


James A. Broderick
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

MAY 17 1984

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 83-248
Petitioner	:	A. C. No. 15-13881-03504
	:	
v.	:	Docket No. KENT 84-72
	:	A. C. No. 15-13881-03514
PYRO MINING COMPANY,	:	
Respondent	:	Pyro No. 9 Slope
	:	William Station
	:	
	:	Docket No. KENT 84-71
	:	A. C. No. 15-11408-03518
	:	
	:	Pride Mine

DECISION

Appearances: Darryl A. Stewart, Esq., Office of the Solicitor,
U. S. Department of Labor, Nashville, Tennessee,
for Petitioner;
William M. Craft, Assistant Safety Director,
Sturgis, Kentucky, for Respondent.

Before: Judge Steffey

A hearing was convened in the above-entitled proceeding on February 28, 1984, in Evansville, Indiana, pursuant to section 105(d), 30 U.S.C. § 815(d), of the Federal Mine Safety and Health Act of 1977.

The parties were given an opportunity to discuss settlement prior to the convening of the hearing. As a result of their discussion, a settlement of all issues was achieved. Under the parties' settlement agreement, respondent will pay reduced penalties totaling \$734 instead of the penalties totaling \$1,684 proposed by the Mine Safety and Health Administration. Some aspects of the parties' settlement agreement are unique in that the parties asked me to modify a citation issued under section 104(d)(1) to a citation issued under section 104(a), as hereinafter fully explained.

Section 110(i) of the Act lists six criteria which are required to be considered in determining civil penalties. The proposed assessment sheets in the official files show that

respondent produces approximately 2,813,000 tons of coal annually. That production figure supports a finding that respondent operates a relatively large coal business and that penalties should be in an upper range of magnitude insofar as they are determined under the criterion of the size of the operator's business.

Respondent did not present any evidence at the hearing pertaining to its financial condition. The Commission held in Sellersburg Stone Co., 5 FMSHRC 287 (1983), that if an operator fails to introduce any data pertaining to its financial condition, a judge may presume that the operator is able to pay penalties. In the absence of any information in the record to support a contrary conclusion, I find that payment of penalties will not cause respondent to discontinue in business and that it is unnecessary to reduce any penalties because of the operator's financial condition.

All of the proposed assessment sheets indicate that, during the 24 months preceding the citing of the violations alleged in this consolidated proceeding, respondent was cited for such a few violations of the mandatory health and safety standards, that MSHA assigned zero penalty points under the penalty assessment formula described in 30 C.F.R. § 100.3(c). Therefore, no penalty assessed in this proceeding needs to be increased under the criterion of respondent's history of previous violations.

Each of the proposed assessment sheets shows, with one exception, that all assessments proposed by MSHA have been reduced by 30 percent pursuant to section 100.3(f) because respondent demonstrated a good-faith effort to achieve compliance within the time for abatement given by the inspectors in their citations. The one exception occurred with respect to Citation No. 2337388 and special circumstances pertain to that citation as hereinafter explained.

The above discussion of four of the six criteria is applicable to all penalties proposed by MSHA in this proceeding. The remaining two criteria of negligence and gravity are hereinafter considered in an evaluation of each violation alleged in each docket number.

Docket No. KENT 83-248

The proposal for assessment of civil penalty in Docket No. KENT 83-248 seeks to have penalties assessed for three alleged violations. Citation No. 2217774 alleged a violation of section 75.202 because the roof in the vicinity of the air shaft had been resupported after the occurrence of a roof fall, but the inspector believed that additional supports in the form of cribs

were needed because of the adverse conditions which existed in the area. The Assessment Office considered the violation to have been moderately serious, to have been associated with a low degree of negligence, and proposed a penalty of \$50 which respondent has agreed to pay in full (Tr. 4). Inasmuch as the roof had been resupported after the roof fall, but had not been supported as well as the inspector believed to be desirable, it appears that the Assessment Office proposed a reasonable penalty and that respondent's agreement to pay the full amount should be approved.

Citation No. 2217821 alleged a violation of section 75.1303 because a misfired shot had not been removed from the left rib of the No. 1 entry before mining was conducted in by the misfired shot. The Assessment Office considered the violation to have been moderately serious, to have been associated with a low degree of negligence, and proposed a penalty of \$50 which respondent has agreed to pay in full (Tr. 4). I would normally expect the failure to remove a misfired shot to be a more serious violation than it was considered to be in this instance, but the Assessment Office assigned penalty points under section 100.3 for the criteria of negligence and gravity exactly as those criteria had been evaluated by the inspector who wrote the citation. The inspector was present when the misfired shot was removed and was in a position to observe the circumstances surrounding the violation better than anyone else. In such circumstances, I find that the penalty was properly proposed and that respondent's agreement to pay the full amount should be approved.

Citation No. 2217824 alleged a violation of section 75.202 because brows in the vicinity of overcasts in the track, belt, and return entries needed additional support. The Assessment Office considered the violation to have been moderately serious, to have been associated with ordinary negligence, and proposed a penalty of \$74 which respondent has agreed to pay in full (Tr. 5). The Assessment Office assigned penalty points in accordance with the evaluation made by the inspector who wrote the citation. He was in a position to determine the seriousness of the violation and to appraise the operator's degree of negligence. Therefore, I find that the penalty was properly proposed and that respondent's agreement to pay the penalty in full should be approved.

Docket No. KENT 84-71

The proposal for assessment of civil penalty filed in Docket No. KENT 84-71 seeks assessment of a penalty for a single violation of section 75.604 which was alleged in Citation No. 2337395 because five splices in the trailing cable attached to the cutting machine were not effectively insulated and sealed

to exclude moisture. The Assessment Office assigned penalty points in accordance with the inspector's evaluation of negligence and gravity. Therefore, I find that the penalty of \$85 was properly proposed and that respondent's agreement to pay the penalty in full (Tr. 5) should be approved.

Docket No. KENT 84-72

The proposal for assessment of civil penalty filed in Docket No. KENT 84-72 seeks assessment of penalties for six alleged violations of the mandatory health and safety standards. Two of the citations (Nos. 2337926 and 2337927) alleged violations of section 75.400. The Assessment Office assigned penalty points in accordance with the inspector's evaluation of negligence and gravity. The inspector considered the violation alleged in Citation No. 2337927 to be more serious than the one alleged in Citation No. 2337926 because he believed that the loose coal accumulations described in Citation No. 2337927 exposed more persons to injury than the accumulations described in Citation No. 2337926. The inspector considered that both violations were associated with ordinary negligence. Respondent has agreed to pay in full the proposed penalties of \$74 and \$91 for the violations alleged in Citation Nos. 2337926 and 2337927, respectively. I find that the penalties were properly proposed and that respondent's agreement to pay the penalties in full should be approved.

Citation No. 2337929 alleged a violation of section 75.517 because the insulation on the trailing cable to the cutting machine had been damaged sufficiently to expose bare conductor wires. The inspector considered the violation to have been serious and to have been associated with a high degree of negligence. His evaluation resulted in a proposed penalty of \$112 under the assessment formula in section 100.3. Respondent has agreed to pay the proposed penalty in full (Tr. 8). I find that the penalty was properly proposed and that respondent's agreement to pay the penalty in full should be approved.

Respondent's answer to the Secretary's proposal for assessment of civil penalty filed in Docket No. KENT 84-72 withdrew respondent's request for a hearing with respect to the violation of sections 75.604 and 75.701 alleged in Citation Nos. 2337944 and 2337945, respectively. Respondent's withdrawal of its request for hearing has the technical effect of leaving the matter before me for approval because section 110(k) of the Act provides that a proposed penalty which has once been contested so as to bring it before the Commission cannot be compromised, mitigated, or settled without the approval of the Commission. Both of the violations pertained to creation of shock hazards because of poor insulation in one instance and lack of a frame

ground in the other instance. The inspector considered both violations to have been moderately serious and to have been associated with ordinary negligence. His evaluations resulted in proposed penalties for each violation of \$74 which respondent has agreed to pay in full (Tr. 7). I find that the penalties were properly proposed and respondent's agreement to pay the penalties in full should be approved.

The final violation to be considered in Docket No. KENT 84-72 is a violation of section 75.316 alleged in Citation No. 2337388 which was written pursuant to the unwarrantable-failure provisions of section 104(d)(1) of the Act. The Assessment Office waived application of the penalty formula described in section 100.3 with respect to the violation alleged in Citation No. 2337388 and proposed a penalty of \$1,000 on the basis of narrative findings written pursuant to section 100.5. At the hearing, counsel for the Secretary of Labor stated that he had discussed with the inspector who wrote Citation No. 2337388 the conditions surrounding his writing of the citation and the Secretary's counsel said that the citation incorrectly implies that the cutting machine was not equipped with water sprays when, in fact, it was so equipped. The Secretary's counsel also stated that respondent's management was in the process of advancing the waterline at the time the citation was written. Additionally, the Secretary's counsel stated that, while the ventilation and dust control plan does specify that the cutting machine has to be equipped with four water sprays, the plan does not specifically state that the machine can be used only if the waterline is connected to the machine.

The Secretary's counsel stated that even though it would make little sense to have water sprays on a machine without having them connected to a waterline, he believed the ambiguous wording of the plan had caused the violation to be rated as much more serious than it was. In such circumstances, the Secretary's counsel moved that I modify the citation to a citation written pursuant to section 104(a) of the Act and that the modified citation should be written without checking the block on the face of the citation indicating that the violation was a significant and substantial violation (Tr. 9-11).

I believe that the Secretary's counsel provided sufficient reasons to justify the grant of his motion that I modify Citation No. 2337388 from one issued pursuant to section 104(d) to a citation issued pursuant to section 104(a). The inspector who wrote the citation did not consider the violation to have been very serious because he evaluated the gravity of the violation to be the same as has previously been discussed above when penalties of \$50 have been proposed by the Assessment Office for violations in citations written pursuant to section 104(a).

The only reason the Assessment Office waived the provisions of section 100.3 and proposed a penalty of \$1,000 under section 100.5 was that the inspector believed that a high degree of negligence was involved. The explanation given by the Secretary's counsel, however, indicates that respondent's ventilation and dust control plan is ambiguous as to the question of attachment of the waterline to the cutting machine in the face area. Since the ventilation and dust control plan contains ambiguous language which makes it inappropriate to find that respondent's management was necessarily indifferent or showed a lack of due diligence in having the cutting machine connected to the waterline, I believe that the citation was improperly issued under the unwarrantable-failure provisions of the Act and that the citation should be modified, as hereinafter ordered, to a citation issued under section 104(a) of the Act.

When the parties stated that they had not agreed upon a specific penalty for the alleged violation of section 75.316, but had only agreed that the citation should be modified to a citation issued pursuant to section 104(a) without a designation of significant and substantial, I noted that I had written a decision 1/ in which I held that the Commission and its judges are not bound by the provisions of section 100.4 2/ so as to be required to assess a penalty of only \$20 if we have before us a civil penalty proceeding involving a citation issued under section 104(a) without a designation that the violation is significant and substantial. 3/

Citation No. 2337388, as modified, cites a violation of section 75.316 because the cutting machine was being used without having the waterline connected to it. The parties have stipulated that the violation was not significant and substantial,

1/ U. S. Steel Mining Co., Inc., Docket Nos. WEVA 82-390-R, et al., issued April 30, 1984, pages 19-25.

2/ 30 C.F.R. § 100.4 provides, in pertinent part, as follows: "An assessment of \$20 may be imposed as the civil penalty where the violation is not reasonably likely to result in a reasonably serious injury or illness, and is abated within the time set by the inspector. * * *"

3/ The Commission held in Consolidation Coal Co., 6 FMSHRC 189 (1984), that MSHA's inspectors may designate on a citation written pursuant to section 104(a) of the Act that a violation is "significant and substantial". That phrase is derived from section 104(d) (1) of the Act which specifies that an inspector must find that any violation cited pursuant to section 104(d) " * * * is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard * * *"

or of a nature which could have been expected to cause an injury of a reasonably serious nature as the term "significant and substantial" has been defined by the Commission in National Gypsum Co., 3 FMSHRC 822 (1981). In such circumstances, only a very small portion of the penalty should be assessed under the criterion of gravity. Most of the penalty should be assessed under the criteria of the operator's size and the fact that ordinary negligence must be considered to have been associated with failure to attach the waterline prior to using the machine even if the ventilation plan did not specifically state that attachment of the waterline was a prerequisite for using the machine to cut coal. I have previously stated above that no penalty in this proceeding should be increased under the criterion of history of previous violations. The penalty should not be increased under the criterion of good-faith abatement because the violation was corrected within the 30-minute period allowed for abatement by the inspector. Therefore, I believe that a penalty of \$50 should be assessed for the violation of section 75.316 alleged in Citation No. 2337388.

WHEREFORE, for the reasons hereinbefore given, it is ordered:

(A) The parties' motion for approval of settlement is granted and the settlement agreement is approved.

(B) The motion made by counsel for the Secretary of Labor for modification of Citation No. 2337388 is granted and Citation No. 2337388 dated August 19, 1983, is modified to a citation issued under section 104(a) of the Act without a designation of significant and substantial.

(C) Pursuant to the parties' settlement agreement and the grant of the parties' other requests in this proceeding, Pyro Mining Company shall, within 30 days from the date of this decision, pay civil penalties totaling \$734.00 which are allocated to the respective alleged violations as follows:

Docket No. KENT 83-248

Citation No. 2217774 4/18/83 \$ 75.202	\$ 50.00
Citation No. 2217821 4/20/83 \$ 75.1303	50.00
Citation No. 2217824 4/22/83 \$ 75.202	<u>74.00</u>
Total Settlement Penalties in Docket	
No. KENT 83-248	\$174.00

Docket No. KENT 84-71

Citation No. 2337395 9/27/83 \$ 75.604	\$ <u>85.00</u>
Total Settlement Penalties in Docket	
No. KENT 84-71	\$ 85.00

Docket No. KENT 84-72

Citation No. 2337388	8/19/83	\$ 75.316	.....	\$ 50.00
Citation No. 2337926	10/25/83	\$ 75.400	.....	74.00
Citation No. 2337944	10/25/83	\$ 75.604	.....	74.00
Citation No. 2337927	10/26/83	\$ 75.400	.....	91.00
Citation No. 2337945	10/27/83	\$ 75.701	.....	74.00
Citation No. 2337929	10/28/83	\$ 75.517	.....	<u>112.00</u>
Total Settlement and Assessed Penalties				
in Docket No. KENT 84-72				\$475.00

Total Settlement and Assessed Penalties
in This Proceeding \$734.00

Richard C. Steffey
Richard C. Steffey
Administrative Law Judge

Distribution:

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

William M. Craft, Assistant Safety Director, Pyro Mining Company, P. O. Box 267, Sturgis, KY 42459 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

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

MAY 22 1984

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 80-312-M
Petitioner	:	A.C. No. 29-00166-05005
v.	:	
	:	Nash Draw Mine
DUVAL CORPORATION,	:	
Respondent	:	

DECISION

Appearances: Eloise V. Vellucci, Esq., Office of the Solicitor,
U.S. Department of Labor, Dallas, Texas,
for Petitioner;
Lina S. Rodriguez, Esq., Bilby, Shoenhair,
Warnock & Dolph, Tucson, Arizona,
for Respondent.

Before: Judge Morris

This case, heard under the provisions of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., (the "Act"), arose from an inspection of respondent's Nash Draw Mine. The Secretary of Labor seeks to impose civil penalties because respondent allegedly violated two safety regulations promulgated under the Act.

Respondent denies that any violations occurred.

After notice to the parties, a hearing on the merits was held in Carlsbad, New Mexico on November 2, 1983.

The parties filed post trial briefs.

Issues

The issues are whether respondent violated the regulations; if so, what penalties are appropriate.

Stipulation

The parties stipulated as to certain evidence and they further agreed that the size of respondent's Nash Draw mine is 179,041 man hours. The company's total size is 5,773,849 annual man hours (Tr. 10).

The two citations here allege respondent violated Title 30, Code of Federal Regulations, Section 57.19-120 and Section 57.11-50.

Citation 162288 provides as follows:

57.19-120 Mandatory. A systematic procedure of inspection, testing, and maintenance of shaft and hoisting equipment shall be developed and followed. If it is found or suspected that any part is not functioning properly, the hoist shall not be used until the malfunction has been located and repaired or adjustments have been made.

Citation 162289, provides as follows:

57.11-50 Mandatory. Every mine shall have two or more separate, properly maintained escapeways to the surface from the lowest levels which are so positioned that damage to one shall not lessen the effectiveness of the others. A method of refuge shall be provided while a second opening to the surface is being developed. A second escapeway is recommended, but not required, during the exploration or development of an ore body.

In addition to separate escapeways, a method of refuge shall be provided for every employee who cannot reach the surface from his working place through at least two separate escapeways within a time limit of one hour when using the normal exit method. These refuges must be positioned so that the employee can reach one of them within 30 minutes from the time he leaves his workplace.

Summary of the Evidence

MSHA's evidence: Sidney Kirk, a supervisory mine inspector, testified for MSHA (Tr. 14-17).

At approximately 11:30 a.m. on January 9, 1980 Inspector Kirk received a call from Marvin Nichols, his supervisor. The supervisor advised him that respondent was having hoisting control problems on the No. 5 hoist at the Nash Draw mine. Nichols had told the company the oncoming miners should not go underground until the malfunction was corrected (Tr. 18). In the interim the company was directed to inform the MSHA office in Carlsbad of any developments (Tr. 18).

About 3:30 p.m., respondent's representative Merle Elkins called Inspector Kirk. He indicated the electrical malfunction was continuing. Elkins stated he was familiar with sections

57.19-120 and 57.11-50 (Tr. 19). Kirk said they should consider the impact of the regulations before putting any miners underground. Kirk also inquired about the 3 p.m. shift. When he learned the miners had gone underground, he immediately went out to the mine (Tr. 19).

At the mine Kirk learned from supervisor MaGraw, and others, that the No. 5 hoist would operate on man speed but not on ore or automatic speeds (Tr. 20, 22, 50). Ore speed is automatic and much faster. Man speed requires manual control. The hoist control system permits the operator to twist a handle to convert to man from ore speed (Tr. 20). Man speed runs about 650 feet per minute. This is about 200 to 250 feet per minute slower than ore speed (Tr. 19, 20). McGraw felt he was in compliance with the regulations because there were ladderways in each shaft. They could be used as an escape device from the 900 foot level (Tr. 21).

At Kirk's request the skif was automatically loaded. When the hoistman applied power to raise the skif it started creeping down. Brakes were required. In the meantime the company electricians continued checking various components in the control box cabinet (Tr. 22, 23).

MaGraw declined to bring the miners out without an MSHA order. Kirk obliged. The citation issued at 1737 hours states respondent was in violation of Section 57.19-120 (Tr. 23-25, Exhibit C2). The company was cited because if a fire or a blowout occurred underground, a second escapeway was not available. After the inspector arrived at the mine the company contended the hoist would operate on manual. But it went backwards instead of coming up the shaft (Tr. 26, 27).

The hoisting logs reflected these malfunctions had been re-occurring since about 2 a.m., on January 8. (Tr. 27, 28). There had been a full shift on January 9 and the company was 3 to 4 hours into the afternoon shift when the imminent danger order was issued (Tr. 27, 28).

The other mine shaft, the regularly used man shaft, incorporates the exhaust ventilation system. In the event of an underground catastrophe, such as a detonation, fire, or smoke accumulation or blowout the 13 or 15 miners could not exit via the intake shaft because of the hoist malfunction (Tr. 28, 29, 35).

Citation 162289 was issued because respondent did not have a second escapeway since the hoist was inoperative (Tr. 30-33). Management contended the ladders furnished the second escapeway.

But the inspector felt that was insufficient. This is because Section 57.11-55 provides that an incline in excess of 300 feet shall be provided with emergency hoisting equipment (Tr. 33)

Inspector Kirk returned to the mine about 1:00 p.m. but, contrary to expectations, the hoist was not then functioning correctly. The inspector modified the citation to permit some miners to go underground to load the skif so it could be tested. The citation was terminated at 2 a.m. the following day (Tr. 39, 40, 64, 67).

The inspector did not observe any miners being hauled out by the No. 5 hoist. Nor was any attempt made to do so. The workers were brought out via the No. 6 shaft after the imminent danger order was issued (Tr. 53, 62). The statutory definition of imminent danger is contained in 30 U.S.C. 802(j). The withdrawal order was issued here because of the electrical problems. While the miners were underground there was but a single exit (Tr. 55).

MSHA's policy is this: If a malfunction occurs, they will allow the shift below to stay underground provided the miners do not open any new ground. But the policy prohibits the next shift from going underground. The miner's representative must concur in any decision of the miners to remain underground (Tr. 69).

Norman Gonder, John Solar, John Magraw, Jack Hunt, and Harry Awbrey testified for respondent.

The Nash Draw mine, an underground potash mine, is mined by the roof and pillar method. The potash exists in a salt formation. The formation is relatively safe since the potash is in a noncombustible ore body. In addition the formation is non-gassy, is without water, and requires no timbers for support. While the mine has won safety awards there have been roof falls, blowouts and fatalities at the mine (Tr. 77, 78, 100, 101).

The hoists (No. 5 and No. 6) are in separate shafts about 300 feet apart. The No. 5 is a counterbalance system with two separate hoist conveyances (Tr. 87-89, 95, 96, Exhibit R2A, R4). The No. 6 shaft is large enough to accommodate a vehicle (Tr. 92, 93).

The shafts extend as deep as the 900 foot level. To reach the ore a miner goes down two more slopes, an additional 170 vertical feet (Tr. 98).

In July 1983 Warren Traweck, the 40 year old assistant safety director climbed out of the mine via the ladders. The climb took 39 minutes. He stated that he took his time and didn't hurt himself (Tr. 99, 103). In an emergency you could

climb out in about 20 to 25 minutes (Tr. 105). If the hoist was operating on man speed a miner could get up the shaft in about a minute (Tr. 104-105).

John Solar, respondent's electrician, and others started working on the No. 5 hoist when it broke down. He worked all day and part of the next night to correct the malfunction (Tr. 110-112). The malfunction of No. 5 did not affect the No. 6 hoist. The hoists are controlled by separate motors (Tr. 111, 112). In checking the system Solar had to occasionally turn off the power. Solar never permitted anyone to operate the equipment while they were checking it (Tr. 113-115, 124). Escapeways include the No. 6 hoist and the ladders in the No. 5 and No. 6 shafts (Tr. 114).

On the day the citation was issued there was no fire underground nor were any miners in danger (Tr. 115, 116). Solar identified respondent's weekly maintenance log on the No. 5 hoist (Tr. 117, 118, 123, Exhibit R9). The hoistman checks out equipment and Solar performs the maintenance. A mechanic also performs various periodic equipment checks (Tr. 119, 120).

The No. 5 hoist would still run by hand controls and miners could be brought out with that control. But the hoist wouldn't run right on automatic (Tr. 125). If a malfunction occurred when on automatic you could turn it off by hand (Tr. 125). Miners could still be brought out if you were operating it by hand (Tr. 125, 128). The hoist was not malfunctioning other than when it was in the automatic mode (Tr. 128).

John Magraw, respondent's manager for mine development, did not prohibit the 3 p.m. shift from going underground (Tr. 134). He felt there was no danger to the miners (Tr. 134, 135).

Jack H. Hunt, respondent general superintendent, was aware they were having intermittent hoist problems. He called the MSHA Dallas office about 11:00 a.m. (Tr. 142-145). Marvin Nichols (MSHA) told Hunt it is normal procedure to finish the shift being worked but not to lower the next shift (Tr. 146). About 3:15 p.m. Hunt directed that Sid Kirk, at MSHA's local office, be advised of the situation (Tr. 147). Hunt and Kirk discussed the hoist problem. Kirk was displeased that the second shift had gone underground (Tr. 149).

At no time did Hunt see any miners being hauled by the No. 5 hoist (Tr. 153).

After Kirk arrived he indicated he would not abate the citation unless he tested the skif with a load. Accordingly, Kirk modified his order to permit a foreman and a few workers to go underground to place some ore in the pocket (Tr. 153, 154).

If the No. 6 hoist malfunctioned while the miners were underground the miners could have used the ladders in the No. 5 and No. 6 shafts (Tr. 156, 157). Hunt was not aware of any miners using the No. 5 hoist after the malfunction (Tr. 159).

Harry Awbrey, respondent's chief electrician, didn't find too much wrong with the electrical equipment. He checked the directional relays and latched them back. Except for low voltage the equipment seemed normal (Tr. 182, 183).

The No. 5 hoist operates on DC current. This automatic static regulated hoist is exceedingly complicated. In contrast, the No. 6 hoist operates on AC current and requires lower voltage than the No. 5 hoist (Tr. 184).

It was established that the problem was not with the hoist but with the incoming Public Service Company voltage from a temporary transformer. The No. 5 hoist is so sensitive that it triggered out from the voltage drop when the current fluctuated. Hoist No. 6 is not as sensitive. Public Service Company replaced the temporary transformer with a permanent one (Tr. 186-188).

Discussion

As a threshold matter respondent contends that by virtue of 30 C.F.R. § 57.19 no violation of § 57.19-120 can be sustained. In short, respondent claims that Citation 162288 must be vacated.

The regulation relied on by respondent reads:

§ 57.19 Man hoisting.

The hoisting standards in this section apply to those hoists and appurtenances used for hoisting persons. However, where persons may be endangered by hoists and appurtenances used solely for handling ore, rock, and materials, the appropriate standards should be applied.

Emergency hoisting facilities should conform to the extent possible to safety requirements for other hoists, and should be adequate to remove the persons from the mine with a minimum of delay.

Respondent's argument lacks merit. While the No. 5 hoist is primarily a production hoist it is uncontroverted that the hoist had been identified as a "second escapeway" in the company's escape plan (Tr. 51, 82-83). This causes the No. 5 hoist to be an apparatus "used for hoisting persons" within the meaning of 30 C.F.R. § 57.19.

A credibility issue focuses on whether the hoist was used before the malfunction was repaired. On this issue I credit Inspector Kirk's testimony. His review of the hoisting logs indicated that the hoist began to malfunction on January 8, continued through the night of January 9, and when he issued the MSHA withdrawal order the company was 3 to 4 hours into the afternoon shift (Tr. 27, 28).

This evidence is further confirmed by the obvious fact that a production crew and a preparation crew were underground when the withdrawal order was issued. But when Inspector Kirk wanted to test the hoist at 9 p.m. on January 9 there was no available ore. It was then necessary to modify his withdrawal order to permit four employees to go below to muck the ore so the hoist could be loaded and retested. The ore had no doubt been removed by the No. 5 production hoist. In view of this finding I necessarily reject the company electrician's testimony to the contrary (Tr. 108, 112-114).

Exhibits R9, R10, and R11 do not assist respondent's position. These exhibits are copies of entries from notebooks entitled "5 and 6 Hoist Log Book Electrical"; "Hoist Safety" and "Hoist and Ropes-Log." Respondent's case is not aided because none of these exhibits reflect the use or non-use of the No. 5 hoist during this incident. I particularly note that the inspector as well as the company's chief electrician referred to the hoisting logs. The "records would show that it hoisted ore" (Tr. 27, 28, 195, 196).

Respondent's post trial brief pivots on certain facets. Initially, it is asserted that at no time during this incident did any miners use the No. 5 hoist. I completely agree with respondent's statement of the evidence. However, Section 57.19-120 applies to any malfunction regardless of whether the hoist lifted miners.

Respondent's brief further asserts once it became apparent that the hoist was malfunctioning it was not used for any purpose other than testing. This point has been reviewed and ruled against respondent.

For the foregoing reasons I conclude that the hoisting regulation applies to respondent's production hoist. In addition, I find that the hoist was used in production before the malfunction was located and repaired.

Citation 162288 should be affirmed.

Civil Penalty

The six criteria for assessing a civil penalty are set forth in 30 U.S.C. § 820(i).

Following the statutory directives I find that the evidence reflects that in the two years before this citation respondent was assessed 18 violations at the Nash Draw Mine (Exhibit C1). The penalty, as proposed, appears appropriate in relation to the stipulated size of the respondent. The negligence of the operator was high inasmuch as it continued to use the hoist after the malfunctioned occurred. When a company fails to introduce any financial data a judge may presume that payment of a penalty will not cause the company to discontinue in business. Buffalo Mining Company 2 IBMA 226 (1973); Associated Drilling, Inc., 3 IBMA 164 (1974). The gravity of the violation was not severe since no miners used the No. 5 hoist. The Secretary's Office of Assessments did not credit respondent with any statutory good faith. I concur in the disallowance of that credit. Respondent's evidence indicates that the hoist was malfunctioning the day after the inspection. Further, the records would show they hoisted ore during this time (Tr. 195, 196).

On balance I deem that the proposed penalty of \$395 is appropriate and it should be affirmed.

Citation 162289 alleges a violation of Section 57.11-50.

In essence the regulation requires that an operator shall maintain at least two separate escapeways. In addition, such escapeways shall be so positioned that damage to one shall not lessen the effectiveness of the other.

The evidence established that there were two separate ladder escapeways in each shaft. The shafts were not interconnected and they were 300 feet apart. Accordingly, damage to one could not lessen the effectiveness of the other.

The Secretary's post trial brief asserts that Section 57.11-50 must be construed in conjunction with Section 57.11-55, which provides:

57.11-55 Mandatory. Any portion of a designated escapeway which is inclined more than 30 degrees from the horizontal and that is more than 300 feet in vertical extent shall be provided with an emergency hoisting facility.

The Secretary's argument runs along these lines: Section 57.11-50 requires that the escapeways be "properly maintained." This means they must have an emergency hoisting facility. Since the hoisting facility in the No. 5 shaft was not operative a violation occurred.

I disagree with the Secretary's theory. The requirements of Section 57.11-55 cannot be transposed as a requirement for Section 57.11-50. If the Secretary had wished to do so he could

have charged respondent with violating Section 57.11-55. Possibly he did not do so because no evidence deals with the incline of the escapeway from the horizontal, an essential feature of Section 57.11-55.

The cases relied on by the Secretary do not support his position. In Peggs Run Coal Co., Inc., 5 IBMA 144 (1975) and Consolidated Coal Co. v. Mine Workers, 3 FMSHRC 405 (1981) the designated escapeways were inadequate because of accumulated water, a faulty roof, and minimal clearance in the passageway. No such situation exists here.

The Secretary has failed to establish a violation of Section 57.11-50. Accordingly, Citation 162289 and all proposed penalties should be vacated.

Briefs

The solicitor and respondent's counsel have filed excellent detailed briefs which have been most helpful in analyzing the record and defining the issues.

In connection with Citation 162289 respondent's brief contains an extensive recital of the regulatory and legislative history of 30 C.F.R. 57.11-50. Since I do not find a violation of that regulation I do not reach that particular issue.

To the extent that the briefs here are inconsistent with this decision, they are rejected.

Order

Based on the findings of fact and conclusions of law stated herein, I enter the following order:

1. Citation 162288 and the proposed penalty of \$395 are affirmed.
2. Citation 162289 and all proposed penalties therefor are vacated.


John J. Morris
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

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MAY 22 1984

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. PENN 83-115
Petitioner	:	A.C. No. 36-03425-03518
v.	:	
	:	Docket No. PENN 83-116
U.S. STEEL MINING COMPANY,	:	A.C. No. 36-03425-03519
INC.,	:	
Respondent	:	Docket No. PENN 83-148
	:	A.C. No. 36-03425-03525
	:	
	:	Docket No. PENN 83-155
	:	A.C. No. 36-03425-03526
	:	
	:	Docket No. PENN 83-156
	:	A.C. No. 36-03425-03527
	:	
	:	Docket No. PENN 83-157
	:	A.C. No. 36-03425-03528
	:	
	:	Maple Creek No. 2 Mine

DECISION

Appearances: Thomas A. Brown, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Petitioner; Louise Q. Symons, Esq., United States Steel Corporation, Pittsburgh, Pennsylvania, for Respondent.

Before: Judge Melick

These cases are before me upon the petitions for civil penalty filed by the Secretary pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act," for violations of regulatory standards. The general issues before me are whether U.S. Steel Mining Company, Inc., (U.S. Steel), has violated the regulations as alleged, and, if so, whether those violations are of such a nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard i.e. whether the violations are "significant and substantial." If violations are found, it will also be necessary to determine the appropriate penalty to be assessed.

Docket No. PENN 83-115. The one citation in this case, No. 2013930, charges a violation of the standard at 30 C.F.R § 75.701-5 and specifically alleges as follows:

Separate clamps were not provided for the electrical and frame grounds to attach the grounds to the DC grounding medium (mine rail), which were serving the two Ricks water pumps located along the Cherokee haulage at 40 split; the pumps were receiving power from the energized 550 volt DC trolley system. All four ground wires were attached to one clamp.

The cited standard provides as follows: "The attachment of grounding wires to a mine track or other grounded power conductor will be approved if separate clamps, suitable for such purpose, are used and installed to provide a solid connection."

Respondent does not dispute that a violation occurred as charged, but argues that the violation was not "significant and substantial." In order to establish that a violation of a mandatory safety standard is "significant and substantial" the Secretary must prove: (1) the underlying violation of a mandatory safety standard, (2) a discrete safety hazard--that is, a measure of danger to safety--contributed to by the violations, (3) a reasonable likelihood that the hazard contributed to will result in an injury, and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature. Secretary v. Mathies Coal Company, 6 FMSHRC 1 (1984).

According to Inspector Okey Wolfe of the Federal Mine Safety and Health Administration, (MSHA), the cited ground wires were attached to a single clamp which was, in turn, attached to the rail. Wolfe observed that such clamps may loosen from normal rail traffic and that in the event of a derailment would easily separate. He observed that should the clamp come off of the rail, the frames of both water pumps would become energized and an individual could be shocked or electrocuted. The hazard was increased by the wet conditions in the vicinity of the pumps.

Gary Stevenson, an electrical engineer for U.S. Steel testified that so long as all of the grounds were connected, there would be no hazard, but conceded that if any of those connections came loose, there would indeed be a hazard. Within this framework of evidence, I have no difficulty concluding that the violation meets the "significant and

substantial" criteria set forth in the Mathies decision. Accordingly, I find the violation was "significant and substantial" and constituted a serious hazard.

Inasmuch as it required an affirmative act to connect the wires onto one clamp, and that this type of violation had been previously cited at this mine, I find that the operator was also negligent.

Docket No. PENN 83-116. Two citations were brought within this docket. Citation No. 2000148 charges a violation of the standard at 30 C.F.R. § 75.503 and specifically alleges as follows:

Changes required to be made on six service machine 115 V.8.C. single phase control cable connector to maintain permissibility for the longwall mining system have not been made. A letter from Service Machine Company dated June 28, 1982, was sent to the mine advising them of the changes to be made. It cannot be verified whether management received notification or not.

MSHA Inspector James Potiseck conceded that he could not verify that the mine operator had received notice of the necessary modification either from MSHA or from the Service Machine Company prior to the issuance of his citation. Indeed, Potiseck admitted that the letter in evidence (Government Exhibit No. 9) supposedly informing U.S. Steel of the required changes was sent to the wrong address. The district electrical engineer for U.S. Steel, Gary Stevenson, testified that after receiving the citation, he had been unable to locate anyone who had received the noted letter.

Within this framework of evidence, it is clear that U.S. Steel did not receive notice of the change in the permissibility requirements for the cited longwall mining unit. Without such prior notice, there can be no violation. Accordingly, the citation is vacated.

Citation No. 2102668 alleges a violation of the standard at 30 C.F.R § 75.517 and charges specifically as follows:

The trailing cable serving the Fletcher twin boom roof bolter at the 6 Flat 19 room section (ID013) was not adequately insulated and fully protected. There had been damage to the cable and the outer jacket had been cut open for a distance of 23 inches of which

4 inches was not taped at all and the remainder of the area had four places where the tape had deteriorated and the ground wires were exposed.

The cited standard requires, as here relevant, that power wires and cables shall be insulated adequately and fully protected. According to Inspector Okey Wolfe, the ground wires could be seen inside of the cable jacket for the 4 inches that had not been taped. In addition, within the taped area, one of the phase wires was exposed. The tape itself had also deteriorated exposing the ground wires. According to Wolfe, the wires carried 440 volts alternating current and posed a shock hazard to persons handling the cable. Ordinarily, it would be necessary for a person to handle the cable as the roof bolter is moved to a new entry.

According to U.S. Steel electrical engineer Gary Stevenson, no hazard exists so long as the inner insulation is intact. He also pointed out that the ground wires alone, even if exposed, posed no hazard. Stevenson conceded, however, that he did not know whether the inner insulation in the exposed area was in fact intact. Under the circumstances I accept the testimony of Inspector Wolfe, who actually observed the exposed wires and the deteriorated condition of the trailing cable and I accordingly find that there was a "significant and substantial" violation of the cited standard. Mathies, supra. The testimony of Inspector Wolfe that the condition was not difficult to observe is undisputed and accordingly, I also find that the operator was negligent in failing to detect and correct the violation.

Docket No. PENN 83-148. U.S. Steel does not challenge the existence of the violations charged in the two citations at issue in this case, but contests only the "significant and substantial" findings associated therewith. Citation No. 2011291 charges a violation of the operator's ventilation plan under the standard at 30 C.F.R. § 75.316. The citation reads as follows:

There was a violation of the approved ventilation, methane, and dust control plan in No. 29 room of 6 Flat 28 room section. There were no jacks or boards and posts installed behind the canvas check in 29 room. The check (temporary stopping) was loose and not reasonably air tight and was not directing all of the air to the working face of No. 31 room.

The cited provisions of the operator's roof control plan provide as follows: "Approved brattice cloth spadded or nailed to the roof and sides with supporting framework consisting of brattice, boards, posts, two by fours, or roof jacks [shall be] used to direct air towards the working places." Samuel Cortis, U.S. Steel's district chief mine inspector, conceded that the cited temporary stopping was not supported as required by the plan and that some air was indeed escaping under the canvas curtain. He observed, however, that 8,400 cubic feet per minute of air was reaching the working face of the No. 31 room when only 5,000 cubic feet per minute was required by the ventilation plan.

MSHA Inspector Robert Swarrow conceded that although air was leaking through the cited stopping, more than the legally required amount of air was ventilating the working faces. Swarrow further conceded that any temporary stopping will leak some air and that stoppings are not required to be airtight. He nevertheless concluded that the violation was "significant and substantial" because "you might not get sufficient ventilation to clear the faces of methane gas." Methane testing at the time revealed no more than .5 percent methane present.

While there was admittedly a violation of the ventilation plan, since the amount of air reaching the working faces exceeded the requirements of the plan by 3,400 cubic feet per minute, I cannot find that the violation was either serious or "significant and substantial." If indeed more than 8,400 cubic feet per minute of air is deemed to be necessary for ventilating the working faces, then MSHA should require that the ventilation plan be amended to require that amount of air. The failure of the mine operator to have detected and corrected this violation during preshift examinations, demonstrates, however, that it was negligent.

Citation No. 2104283 alleges a violation of the standard at 30 C.F.R. § 75.503 and reads as follows: "The Kersey battery powered tractor at the 6 Flat 28 room section (ID002) was not being maintained in permissible condition. Locks were not being used to prevent the plugs from coming loose from the battery case." The parties stipulated and agreed at hearing that the facts concerning this alleged violation were nearly identical to the facts relating to a violation charged in another case pending before the undersigned judge (Docket No. PENN 83-166, Citation No. 2102678) and that the decision in that case should govern the disposition of the instant citation. The determination in that case that the violation was "significant and substantial"

and caused by the operator's negligence is accordingly incorporated herein by reference.

Docket No. PENN 83-155. Citation No. 2103162 charges a violation of the standard at 30 C.F.R. § 75.516 and alleges as follows: "The power wires serving power to the car spotter at 2 Flat tippie A track were in contact with combustible material as they were hung on wooden header blocks and wooden cribs [and were] also in contact with coal ribs and wires were energized." Respondent does not dispute that a violation occurred as charged but argues that it was not "significant and substantial."

According to MSHA Inspector Alvin Shade, there were no breaks in the wire insulation and no tension in the wire. There was, in addition, about 3 feet of clearance between the rail cars and the roof where the wire was strung. According to U.S. Steel District electrical engineer Gary Stevenson, the insulation on the wire was rated for 600 volts, whereas the wire itself was carrying only 120 volts. In addition, according to Stevenson, there was such low current in the wire that even assuming that the insulation had been removed, the heat generated would be about the same as an ordinary light bulb and therefore would be unlikely to ignite either coal or wood. This evidence is not disputed by MSHA and, accordingly, I find that the hazard associated with the admitted violation was minimal. The violation was not "significant and substantial." Mathies, supra. I find, however, that the mine operator was negligent since the violation required an affirmative act and was plainly visible to a preshift examination.

Citation No. 2103073 alleges a violation of the standard at 30 C.F.R. § 75.503 and, more particularly, charges as follows: "The chain drive conveyor for the longwall in the 6 Flat 11 room section MRV001 was not maintained in permissible condition. There was an opening in excess of .005 in present between the plain flange joint of junction box for the electrical drive motor of the chain drive conveyor." The Respondent again does not dispute that a violation occurred as charged but argues that the violation was not "significant and substantial."

According to the undisputed testimony of MSHA Inspector Francis Wehr, there was indeed an opening in the junction box in excess of .005 of an inch. The box was located 8 to 10 feet from the longwall shear. According to his undisputed testimony, the Maple Creek No. 2 Mine is classified as a "gassy mine" because it emanates 1,000,000 cubic feet of methane over a 24-hour period. With the cited opening in the junction box, methane could leak inside and, assuming an

arc or spark, could explode. At the time of the citation, there was ample intake air in the area and only .1 percent of methane detected. No mining operations were being performed at the time.

Mine foreman and longwall coordinator Joseph Hann testified for the operator that ordinarily 18,000 to 20,000 cubic feet of air per minute flushes the cited area of any methane. In addition, according to Hann, there had never been any methane reported at the cited location. He also pointed out that if the ventilation fan would fail, the longwall machinery would stop automatically.

In essential respects the testimony of Inspector Wehr is not disputed. It is clear that the existence of methane is unpredictable and that the cited mine was considered to be "gassy." The hazard of an explosion or fire and associated injuries under the circumstances, was therefore reasonably likely. The violation was accordingly, "significant and substantial" and serious. Mathies Coal Company, supra. I further find that the operator was negligent in failing to detect the violation.

Citation No. 2103078 alleges a violation of the standard at 30 C.F.R. § 75.200 and more particularly charges as follows:

There were three 6 foot conventional [roof bolts] along the B track haulage road of Cherokee that were missing or dislodged. (1) Between 61-62 chute a[n] 8 foot by 8 foot area of unsupported roof that was loose and drummy, (2) At 47 chute an area of unsupported mine roof of 6 feet by 8-1/2 feet of mine roof that the roof was loose and drummy, (3) At 47 chute an area of 6 feet by 9-1/2 feet of unsupported mine roof that was solid when tested."

The cited standard provides in part that the roof and ribs of all active underground roadways, travelways and working places shall be supported or otherwise controlled adequately to protect persons from falls of the roof or ribs. The Respondent again does not dispute that a violation occurred as charged but argues that the violation was not "significant and substantial."

Indeed, the facts as alleged in the citation are not disputed. According to MSHA Inspector Francis Wehr, the roof in two of the cited areas was loose and drummy sounding and this indicates that the roof strata is not tightly

laminated and there may be gaps in the strata. According to Wehr, loose conventional roof bolts allow the strata to separate and create a hazard roof falls. The cited roof conditions were in the busy haulage area.

According to Wayne Croushore, mine foreman, it was unlikely that the roof would fall "right away." He observed that he and the inspector stood beneath the cited conditions to take measurements and that accordingly, he thought the condition was not unsafe. Croushore also pointed out that the preshift examination is performed while moving on a jeep and it is therefore difficult to see loose and/or missing roof bolts.

Within this framework, I conclude that the violation was "significant and substantial" Mathies, supra. I also find the operator to have been negligent in failing to detect the cited conditions. It is no defense that the conditions were difficult to observe while moving in a jeep. The proffered defense only points out the need for a more thorough preshift examination.

Citation No. 2104446 alleges a violation of the standard at 30 C.F.R. § 75.701-5 and charges as follows: "Separate clamps were not provided for the frame ground and the electrical return ground for the lights in the dinner hole of the 8 Flat 6 RN section 001. Both wires were on same clamp." The cited standard provides as follows: "The attachment of ground wires to a mine track or other grounded power conductor will be approved if separate clamps, suitable for such purpose, are used and installed to provide a solid connection."

The Respondent again does not dispute that a violation occurred as charged but argues that the violation was not "significant and substantial." According to Inspector Wehr, if the clamp separates from the rail, either from a derailment or vibration, there is a potential for shock, electrocution or burns to miners touching metal baskets in the dinner hole. According to electrical engineer Gary Stevenson, there would be no hazard if the wires attached to the clamp became separated. In his opinion, if there were a derailment, the wires would most likely separate or break. Stevenson did not, however, deny that there would be a shock hazard should the wires remain connected upon the separation of the clamp. Under the circumstances, I find that the violation was "significant and substantial" and serious. Mathies, supra. Based on the undisputed testimony of Inspector Wehr that the cited condition was highly visible and that it required an affirmative act to place both wires on a single clamp, I also find that the operator was negligent.

Citation No. 2104449 alleges a violation of the standard at 30 C.F.R. § 75.503 and charges more particularly as follows:

The Joy continuous mining machine SNJM274 was not maintained in permissible condition in the 6 Flat 28 room section MNV002. One of the left headlights was not securely fastened to frame of the machine and the other headlight was provided with a locking device, but did not lock the screw type lens cover in place.

Respondent again does not dispute that a violation occurred as charged but alleges that the violation was not "significant and substantial." The hazard associated with the violation was described by Inspector Wehr as allowing the lens to loosen through vibration and allow methane into the light compartment. The methane could explode from an arc or spark inside the compartment and allow the flame path to escape. Clearly such an explosion could cause fatalities. Wehr also observed that high levels of methane have been liberated in the vicinity of the area cited and indeed the operator had previously been cited for an "imminent danger" having 1.5 percent levels of methane in the No. 28 room section. Wehr also observed that it is not unusual for arcing and sparking to occur within the light compartments because of vibration from the continuous mining machine. Wehr pointed out that although he charged two separate violations in the citation, he was asserting that only the loose lens was "significant and substantial" and that only it presented an explosion hazard.

The mine foreman did not dispute Wehr's assessment of the hazard and conceded that the continuous mining machine has "quite a bit of vibration while mining coal." According to electrical engineer Gary Stevenson, there "should be" no arcing or sparking in the headlights of the continuous miner because there is ordinarily a "firm and tight connection." Stevenson admitted, however, that if the lens cover did back off and there was arcing in the presence of methane at combustible levels, there would indeed be a hazard.

Within this framework of evidence, I conclude that the violation was indeed "significant and substantial" and a serious hazard. I agree, moreover, with the undisputed testimony of Inspector Wehr that the cited condition should have been discovered during the required electrical examinations. Accordingly, I also find the operator negligent.

Docket No. PENN 83-156. Citation No. 2103100 alleges a violation of the standard at 30 C.F.R. § 75.503 and more particularly charges as follows: "The Kersey battery powered tractor Serial No. 76158 at the 6 Flat 19 room section (ID013) was not being maintained in a permissible condition. Locks were not provided to prevent the plugs from coming loose from the battery box receptacles."

At hearing the parties agreed and stipulated that the facts surrounding this alleged violation were nearly identical to another violation presently before the undersigned judge in Docket No. PENN 83-166, Citation No. 2102678. The parties further agreed that the determination in that proceeding should be incorporated by reference and be determinative of the disposition of this citation. Since I have found that the violation charged in Citation No. 2102678 was "significant and substantial" and caused by the operator's negligence those findings are likewise incorporated herein by reference.

Docket No. PENN 83-157. At hearing, the Secretary requested to withdraw Citation No. 2104224 based on the discovery that a suitable lifting jack had indeed been provided for the No. 65 eight ton locomotive being operated at the 105B track and that accordingly, there was no violation of the standard at 30 C.F.R. § 75.1403. Based on the Secretary's representation, the undersigned approved of the withdrawal. Accordingly, Citation No. 2104224 is vacated.

The Secretary also moved at hearing for a settlement of Citation No. 2104225 and the operator agreed to pay the proposed civil penalty of \$91 in full. Based on the representations and documentation presented at hearing, I find that the proposal for settlement is in accord with the provisions of section 110(i) of the Act, and, accordingly, I approve the settlement.

In determining the appropriate penalties to be assessed in the various cases before me, I am also considering the evidence that the operator abated all of the cited conditions in a timely manner and in good faith, that the operator is large in size, and that the operator had a fairly substantial history of violations, including violations of a number of the standards cited herein.

ORDER

The U.S. Steel Mining Company, Inc., is ordered to pay the following civil penalties within 30 days of the date of this decision:

Docket No. PENN 83-115

Citation No. 2013930 \$ 250

Docket No. PENN 83-116

Citation No. 2000148 vacated
Citation No. 2102668 250

Docket No. PENN 83-148

Citation No. 2011291 100
Citation No. 2104283 206

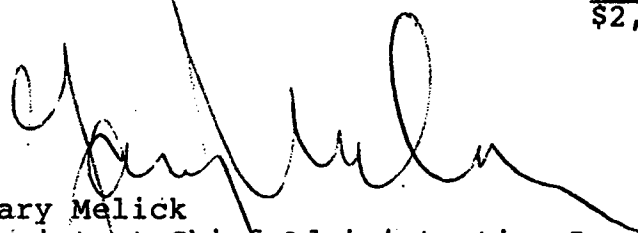
Docket No. PENN 83-155

Citation No. 2103162 126
Citation No. 2103073 400
Citation No. 2103078 400
Citation No. 2104446 126
Citation No. 2104449 400

Docket No. PENN 83-156 206

Docket No. PENN 83-157

Citation No. 2104224 vacated
Citation No. 2104225 91
\$2,555


Gary Melick
Assistant Chief Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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MAY 22 1984

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. PENN 83-151
Petitioner	:	A.C. No. 36-00970-03520
v.	:	
	:	Docket No. PENN 83-166
U. S. STEEL MINING COMPANY,	:	A.C. No. 36-00970-03518
INC.,	:	
Respondent	:	Docket No. PENN 83-167
	:	A.C. No. 36-00970-03523
	:	
	:	Maple Creek No. 1 Mine

DECISION

Appearances: Thomas Brown, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Petitioner; Louise Q. Symons, Esq., United States Steel Corporation, Pittsburgh, Pennsylvania, for Respondent.

Before: Judge Melick

These cases are before me upon the petitions for civil penalty filed by the Secretary, pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act" for violations of regulatory standards. The general issues before me are whether U.S. Steel Mining Company, Inc., (U.S. Steel), has violated the regulations as alleged, and, if so, whether those violations are of such a nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard i.e. whether the violations are "significant and substantial." If violations are found, it will also be necessary to determine the appropriate penalty to be assessed.

DOCKET NO. PENN 83-151. As amended at hearing, Citation No. 2102679 charges a violation of the standard at 30 C.F.R. § 75.1714-2(c) and specifically alleges as follows: "Gary Gamon shuttle car operator was observed on the seven flat eight room section ID014 without the 1 hour filter type self-rescue device which was determined to be approximately 140 feet away." The cited standard provides as follows: "Where the wearing or carrying of the self-rescue device is hazardous to the person, it shall be placed in a readily

accessible location no greater than 25 feet from such person."

Respondent does not dispute that a violation occurred as charged, but argues that the violation was not "significant and substantial." In order to establish that a violation of a mandatory safety standard is "significant and substantial," the Secretary must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard--that is, a measure of danger to safety--contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature. Secretary v. Mathies Coal Company, 6 FMSHRC 1 (1984).

Inspector Okey Wolfe of the Federal Mine Safety and Health Administration (MSHA) testified that during the course of his inspection of the Maple Creek No. 1 Mine on January 24, 1983, he observed the shuttle car operator, Gary Gamon, 140 feet from his shuttle car without his one-hour-filter-type-self-rescue device. Gamon had left it on the shuttle car. It is not disputed that under the cited standard the self-rescue device could properly have been removed from the miner's belt and placed on the shuttle car (because of its potential for bruising the miner while working the shuttle car) so long as the device remained within 25 feet of the miner. The violation was "significant and substantial" according to Wolfe, because of the hazard to the miner of suffocation from carbon dioxide resulting from fire and smoke. He thought it reasonably likely that a fire could occur anywhere outby the cited section from sources such as coal, pumps or trolley wires and noted that protective measures must be taken quickly in the presence of carbon dioxide.

Joseph Ritz, ventilation foreman, accompanied Wolfe during this inspection. Ritz thought it "highly unlikely" for fire or smoke to occur at the mine. According to Ritz, the shuttle car operator left his machine to assist with line brattice and could be expected to have been away from his equipment for only 10 minutes. Ritz opined, moreover, that it would have taken the operator only 10 to 15 seconds to return to his shuttle car for his self-rescue device and that would have been as fast as retrieving it from his belt.

Even assuming, however, that the miner could have sprinted the 140 feet to his shuttle car as fast he could have removed the self-rescuer from its container on his belt, it is reasonably likely that, as a result of an explosion, fire or dense smoke the miner's path to his shuttle

car could very well be obstructed. Under these circumstances, the failure to have his self-rescuer readily accessible could prove fatal. Under all the circumstances, I find that the violation was "significant and substantial."

According to Inspector Wolfe, Respondent had never previously been cited for a violation of the cited standard and in his opinion, the individual miner had forgotten to take his self-rescuer with him. Wolfe's determination of relatively low negligence is accordingly appropriate.

CITATION NO. 2103095. The operator does not dispute that the cited violation did in fact occur. The parties agreed and stipulated at hearing that the same hazard existed concerning this citation as existed with respect to Citation No. 2102678 in Docket No. PENN 83-166. Since I have found infra that the latter violation was indeed "significant and substantial" the violation herein is also "significant and substantial" and constituted a serious hazard. Relying upon the negligence findings relating to Citation No. 2102678 I find correspondingly that the operator was also negligent herein.

DOCKET NO. PENN 83-166

CITATION NO. 2012691. At hearing, the Secretary requested to withdraw and vacate this citation because the inspector who cited the conditions had died and alternative evidence was deemed insufficient to support the citation. Under the circumstances, the request was granted and the citation is accordingly vacated.

CITATION NO. 2102678. The operator does not dispute the existence of the violation cited herein, and challenges only the "significant and substantial" findings associated therewith. The citation charges a violation of the standard at 30 C.F.R. § 75.503 and more particularly alleges as follows: "The Kersey battery powered tractor, serial No. 76-153, approval No. 26-2213-11 was not being maintained in a permissible condition at the seven flat eight room section ID014. The plugs to the battery tray were not locked to prevent the plugs from coming loose."

The cited standard requires that the "operator of each coal mine shall maintain in permissible condition all electric face equipment required by sections 75.500, 75.501, 75.504 to be permissible which is taken into or used in by the last open crosscut of any such mine." The Secretary contends, and the operator does not dispute, that the provisions of 30 C.F.R. § 18.41(f) are incorporated by reference into this citation. Section 18.4(f) states as follows:

"For a mobile battery-powered machine, a padlock to the receptacle will be acceptable in lieu of an interlock provided the plug is held in place by a flouted ring or an equivalent mechanical fastening in addition to the padlock. A connector within a padlock enclosure will be acceptable."

MSHA Inspector Okey Wolfe testified that during the course of his inspection of the No. 1 Mine, on January 24, 1983, he observed the cited battery-powered tractor without the padlock specified in the cited regulation. Wolfe observed that if the threaded plugs powering the tractor had become unthreaded, the 250 volt cable could pull out of the machine thereby creating an arc. He noted that the No. 1 Mine was subject to section 103(i), spot inspections under the Act because of its high liberation of methane. Wolfe accordingly opined that there was a reasonable likelihood for such an arc to result in a methane explosion.

The operator's witness Don Basile, conceded that if the plug connection should become loose while the equipment was operating under load, then an arc could indeed occur. He thought, however, that since the arc would have to travel 6 or 7 inches before entering the outside atmosphere, the chances of an explosion were remote. Basile further stated that he had never seen a sleeve or collar loosen sufficiently to permit the plug to become disconnected.

Particularly in light of the gassy classification of the Maple Creek No. 1 Mine, I find that the arcing hazard presented by the unsecured plug was quite serious and constituted a "significant and substantial" violation. I find that I must also agree with Inspector Wolfe's assessment of negligence in this case, inasmuch as it was obvious in this case that the padlocks had not been secured in an appropriate manner and that this was a frequent type of violation at this mine.

DOCKET NO. PENN 83-167

CITATION NO. 2104362. This citation alleged a violation of a safeguard notice issued pursuant to 30 C.F.R. § 75.1403 on July 31, 1973. It charges that "the No. 31 eight ton locomotive being operated by Bill Wiles on the eight flat 56 room track was not provided with a suitable lifting jack." The specific safeguard notice dated July 31, 1973, (Government Exhibit No. 2) stated in part that a 13-ton locomotive was not equipped with a suitable lifting jack and bar in the eight flat section and that all locomotives in the mine shall be equipped with suitable lifting jacks and bars. It is not disputed that the locomotive cited in this case did not in fact have a suitable lifting jack or bar.

According to MSHA Inspector Francis Wehr, Sr., the locomotive and rail cars used in the No. 1 Mine frequently derailed. Individual rail cars weighed 2 or 3 tons empty and up to 12 tons loaded. He observed that in the event of a derailment and the absence of an available jack and bar, a person pinned beneath a car or the locomotive could not readily be rescued. Wehr observed that although a "rerailer" was available on the locomotive, it is necessary to move the cars and locomotive for it to operate. With a jack and bar, it is not necessary that the locomotive or cars be moved horizontally--an important distinction. The jack in this case was located about 1,000 feet from the locomotive. Wehr opined that even if the location of the jack were known, it would have taken at least 10 minutes to have retrieved it.

According to transportation foreman, Ira Seaton, the miner assigned to the locomotive told him that the jack was only five blocks away (estimated at 425 feet). The miner said he had used the jack at that location and intended to retrieve it after loading coal.

Particularly in light of the frequent derailments at the No. 1 Mine, and the grave dangers posed by the heavy equipment used on the track, I find the cited violation to be "significant and substantial." Particularly in light of the history of derailments and other similar violations at this mine, I find that the operator was negligent in failing to enforce its policy of requiring jacks and bars on the locomotives.

CITATION NO. 2011298. This citation alleges a violation of the standard at 30 C.F.R. § 75.503 and specifically charges as follows: "The Fletcher roof bolting machine operating in nine flat left straight was not maintained in permissible condition in that the hose conduit and the outer jacket for the fluorescent lights was damaged, exposing the insulated power wire securing electrical power to the lights." It is not disputed that to meet the "permissibility" requirements of the cited standard the operator must maintain the cited equipment in compliance with the standards set forth in 30 C.F.R. Part 18.

In this case the cited roof bolter had been the subject of an MSHA approved field modification under 30 C.F.R. § 18.81. (Operator's Exh. No. 1). These modifications must conform to the requirements of Subpart B of Part 18 of the regulations. See 30 C.F.R. § 18.81(b). Subpart B of Part 18, and specifically section 18.39 (i.e. 30 C.F.R. § 18.39) requires in part that "hose conduit shall be provided for

mechanical protection of all machine cables that are exposed to damage." Apparently in keeping with that requirement, U.S. Steel requested, and MSHA approved, in the field modification the use of "MSHA approved conduit" (Operator's Exh. No. 1, p. 5) for the power cable between the junction box and the light here cited. According to the undisputed evidence, however, the hose conduit for that power cable had been damaged thereby exposing the insulated power wire inside. Since the required hose conduit was not being maintained in a "permissible" condition a violation of 30 C.F.R. § 503 therefore existed.

I must agree, however, with the Secretary's position at hearing, that the violation was not "significant and substantial." It is undisputed that the entire illumination system on the roof bolter was deemed "intrinsically safe" by MSHA. Accordingly, even should the cable become severed, there was no capability of a methane ignition. The violation is accordingly also of low gravity. I find that the operator was, however, negligent in failing to detect the violation in light of the undisputed evidence that the condition had existed for at least a week.

In determining the appropriate penalties to be assessed in this case, I am also considering evidence that the operator abated all of the cited violations in a timely manner, that the operator is large in size, and that the operator had a fairly substantial history of violations, including violations of several of the standards cited.

ORDER

Citation No. 2012691 is vacated. The U. S. Steel Mining Company, Inc., is ordered to pay the following civil penalties within 30 days of the date of this decision:

DOCKET NO. PENN 83-151

Citation No. 2102679	\$ 200
Citation No. 2103095	220

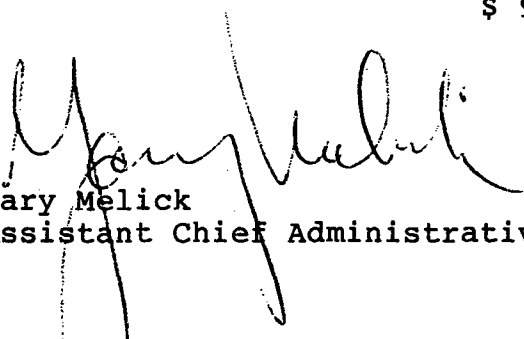
DOCKET NO. PENN 83-166

Citation No. 2102678	220
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DOCKET NO. PENN 83-167

Citation No. 2011298
Citation No. 2104362

100
250
\$ 990



Gary Melick
Assistant Chief Administrative Law Judge

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