MAY 1990

COMMISSION DECISIONS

05-02-90	Cyprus Empire Corporation	WEST	88-250-R	Pg. 911
05-02-90	Arnold Sharp v. Big Elk Creek Coal Co.	KENT	89-147-D	Pg. 926
05-21-90	France Stone Company	LAKE	89-92-M	Pg. 930
05-22-90	Roger L. Stillion v. Quarto Mining Company	LAKE	88-91-D	Pg. 932
05-22-90	Greenwich Collieries, Div. of Pennsylvania Mines	PENN	85-188-R	Pg. 940
05-23-90	Mid-Continent Resources	WEST	87-88	Pg. 949
05-23-90	Mountain Parkway Stone, Inc.	KENT	89-27-M	Pg. 960
05-24-90	Utah Power & Light Company, Mining Division	WEST	89-161-R	Pg. 965

ADMINISTRATIVE LAW JUDGE DECISIONS

05-02-90	Beth Energy Mines, Inc.	PENN	89-222	Pg. 975
05-03-90	Ten-A-Coal Company	WEVA	89-274	Pg. 987
05-04-90	California Lighweight Pumice, Inc.	WEST	89-317-M	Pg. 994
05-07-90	Beaver Creek Coal Company	WEST	88-191-R	Pg. 1001
05-08-90	Thomas F. Hefner, Jr. v. Texas Lehigh Cement	CENT	90-62-DM	Pg. 1010
05-08-90	Hinkle Contracting Corporation	KENT	90-5-M	Pg. 1011
05-10-90	Central Ohio Coal Company	LAKE	89-53-R	Pg. 1014
05-15-90	Walker Stone Company, Inc.	CENT	89-103-M	Pg. 1022
05-15-90	Howard Sand Company	SE	89-152-M	Pg. 1026
05-16-90	Bill Pack Land Corporation/PCR Joint Venture	WEVA	88-318	Pg. 1035
05-17-90	Bennett Trucking Co./B&S Trucking	KENT	90-29	Pg. 1038
05-17-90	Sanger Rock & Sand	WEST	88-275-M	Pg. 1044
05-22-90	Vic's Sand & Gravel Company	CENT	90-104-M	Pg. 1054
05-22-90	Lebanon Rock Incorporated	PENN	89-73-M	Pg. 1061
05-23-90	Sec. Labor for Bobby Coulter v. Cantu Materials	CENT	90-1-DM	Pg. 1078
05-23-90	R S & W Coal Company, Inc.	PENN	89-139	Pg. 1080
05-23-90	Walsenburg Sand & Gravel Company	WEST	88-184-M	Pg. 1093
05-24-90	Cantera Hipodromo, Incorporated	SE	89-103-M	Pg. 1115
05-24-90	Sec. Labor for Alonzo Walker v. Dravo Basic Materials Company, Inc.	SE	90-63-DM	Pg. 1127
05-24-90	Consolidation Coal Company	WEVA	89-234-R	Pg. 1129
05-30-90	Mountain Parkway Stone, Inc.	KENT	89-27-M	Pg. 1148

ADMINISTRATIVE LAW JUDGE ORDERS

05-04-90	Thomas McIntosh v. Flaget Fuels, Inc.	KENT	90-113-D	Pg. 1151
05-09-90	S.L. Peters Construction	SE	90-2-M	Pg. 1154
05-11-90	Otis Elevator Company	WEST	89-427	Pg. 1155
05-21-90	Faith Coal Company	SE	90-1	Pg. 1159
05-31-90	Arnold Sharp v. Big Elk Creek Coal Co.	KENT	89-147-D	Pg. 1160

MAY 1990

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

Amos Hicks v. Cobra Mining, Inc., et al., Docket No. VA 89-72-D. (Judge Weisberger, March 22, 1990)

Mettiki Coal Company v. Secretary of Labor, MSHA, Docket No. YOEK 89-19-R, YORK 89-20-R. (Judge Fauver, April 9, 1990)

Secretary of Labor, MSHA v. France Stone Company, Docket No. LAKE 89-92-M. (Judge Broderick, April 18, 1990 - Motion to Amend Settlement)

BethEnergy Mines, Inc. v. Secretary of Labor, MSHA, Docket No. PENN 89-277-R, PENN 89-278-R. (Judge Fauver, April 19, 1990)

Secretary of Labor, MSHA v. Bulk Transportation Services, Docket No. PENN 89-143. (Judge Koutras, April 20, 1990)

Secretary of Labor, MSHA v. Lanham Coal Company, Docket No. KENT 89-186. (Judge Broderick, April 30, 1990)

There were no cases filed in which review was denied.

COMMISSION DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

May 2, 1990

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	Docket Nos. WEST 88-250-R WEST 88-251-R WEST 88-331
v.	:	
CYPRUS EMPIRE CORPORATION	:	

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

DECISION

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

This proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982)("Mine Act" or "Act"), involves a citation and imminent danger withdrawal order issued by the Department of Labor's Mine Safety and Health Administration ("MSHA") to Cyprus Empire Corporation ("Cyprus"). The citation, as modified, alleges a violation of 30 C.F.R. § 75.202(a), requiring that the roof of areas where persons work or travel be supported or otherwise controlled. 1/ The imminent danger order, issued pursuant to section 107(a) of the Mine Act, arose out of the same conditions as the citation. 2/ Also at issue is whether the Secretary of Labor's

---

1/ 30 C.F.R. § 75.202(a) provides as follows:

> The roof, face and ribs of areas where persons work or travel shall be supported or otherwise controlled to protect persons from hazards related to falls of the roof, face or ribs and coal or rock bursts.

2/ Section 107(a) of the Act provides:

> If, upon any inspection or investigation of a coal or other mine which is subject to this [Act], an authorized representative of the Secretary finds that an imminent danger exists, such representative

prehearing modification of the citation and imminent danger order was proper. Commission Administrative Law Judge John J. Morris permitted the modification, concluded that Cyprus violated section 75.202(a), affirmed the imminent danger order, and assessed a civil penalty of $200. 11 FMSHRC 368 (March 1989)(ALJ). For the reasons that follow, we affirm the judge's allowance of the modification and his affirmance of the imminent danger order. We reverse the judge's finding of a violation of section 75.202(a), however, and we vacate the citation and civil penalty.

I.

Cyprus owns and operates the Eagle No. 5 Mine, an underground coal mine located in Craig, Utah. During the evening shift on Friday, May 20, 1988, Charles Moss, section foreman, observed poor roof conditions in the tailgate entry of the 16 East longwall section. The area of poor roof was immediately adjacent to Shield #126, the last shield on the longwall face. A walkway running parallel to the face and passing under the longwall's shields, including Shield #126, exited into the area of bad roof in the tailgate entry.

Moss contacted the shift foreman, Robert Pobirk, and they examined the roof. Pobirk directed Moss to string yellow "danger tape" across the end of Shield #126 to block access from the face to the area of bad roof. Pobirk also had yellow danger tape placed across the tailgate entry outby the area of poor roof conditions to block access from that direction.

On the next shift, on May 21, 1988, miners installed additional support in the "dangered off" area between the cribs that were already present. They placed two cribs to prevent the poor roof conditions from spreading further into the tailgate entry and a third crib to prevent rib sloughage. They also installed two roof jacks and two timbers. According to Pobirk, additional support was not placed in the area closest to Shield #126 because such support would have served no purpose and would have exposed the miners installing such support to the hazard of a roof fall. Tr. 91-92, 110-11.

> shall determine the extent of the area of such mine throughout which the danger exists, and issue an order requiring the operator of such mine to cause all persons, except those referred to in section [104(c)] of this title, to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such imminent danger and the conditions or practices which caused such imminent danger no longer exist. The issuance of an order under this subsection shall not preclude the issuance of a citation under section [104] of this title or the proposing of a penalty under section [110] of this title.

30 U.S.C. § 817(a).

On the evening shift on Tuesday, May 24, 1988, MSHA Inspector Phillip Gibson observed the area of poor roof adjacent to Shield #126. The previously strung yellow danger tape was still in place prohibiting travel from the longwall walkway into the area of poor roof. The danger tape in the tailgate entry was also still in place, prohibiting travel from that direction. Inspector Gibson measured the area of poor roof adjacent to Shield # 126 as being 6 feet by 6 feet 10 inches. The closest support cribs were about three feet from Shield #126. Joint Exhibit 1 shows the adversely affected area and is attached to this decision.

As a result of his observations, Gibson issued to Cyprus a section 104(a) citation, 30 U.S.C. § 814(a), alleging a violation of 30 C.F.R. § 75.202(b). 3/ The citation states:

> Loose, broken roof was present in the tailgate entry of the 16 East longwall section. The coal roof between two previously erected wooden cribs was broken and some roof had fallen to the mine floor. Two previously installed resin grouted rods with bearing plates were protruding downward about 16 inches. The roof coal had fallen from around the rods and the bearing plates. The affected area was 6 feet in length and 6 feet 10 inches in width. This condition was one of the factors that contributed to the issuance of [the imminent danger order]; therefore, no abatement time was set.

Gibson also designated the violation to be of a significant and substantial nature.

At the same time, Gibson issued a section 107(a) imminent danger withdrawal order based on the same conditions. The order states as follows:

> Condition or Practice
>
> Loose, broken roof was present in the tailgate entry of the 16 East longwall working section. The loose, broken roof (coal roof) was 6 feet in length and 6 feet 10 inches in width. The affected area was between two wooden cribs installed within 3 feet of the tailgate face shield (No. 126). A violation of 75.202(b). The operator had already dangered off the tailgate entry at the longwall face.

* * *

3/ 30 C.F.R. § 75.202(b) provides:

> No person shall work or travel under unsupported roof unless in accordance with this subpart.

Area or Equipment

> The tailgate entry of the 16 East longwall section beginning at No. 126 shield and extending outby about 10 feet.

When Inspector Gibson arrived on the surface, he called his supervisor, Clarence Daniels. They agreed that to abate the citation and order Cyprus would be permitted to continue mining in order to pass by the dangerous area. From the time the bad roof conditions were first encountered on May 20, the longwall face had advanced 16½ feet, and about 8 to 10 feet of further work would carry mining operations entirely past the area of poor roof conditions. Gibson modified the imminent danger order about two hours after it had been issued to state as follows:

> [The] Imminent Danger Order ... is hereby modified to allow mining to resume in order to mine pas[t] the affected area of the tailgate entry of the 16 East longwall section. The roof had sat so precariously on the wooden cribs in the tailgate entry, that removing them to install additional roof supports, posed a greater hazard.

Gibson imposed no special conditions or restrictions on the continued mining.

When Inspector Gibson returned to the mine the next evening, May 25, 1988, mining had progressed beyond the poor roof to a point where wooden cribs adequately contained the roof over the travelway into the tailgate entry. Therefore, he terminated the citation and order.

Cyprus contested both the citation and withdrawal order, and after the Secretary proposed a civil penalty for the alleged violation the matters were consolidated for hearing before Judge Morris. On November 18, 1988, three days before the hearing, the inspector modified the citation to allege a violation of section 75.202(a), rather than section 75.202(b). He similarly modified the withdrawal order to reflect the modification of the citation. Counsel for Cyprus was notified of the amendment on the same date, and the modifications were served on Cyprus on the day of the hearing, November 21, 1988.

At the hearing, Cyprus' counsel did not object to the modifications. Instead, he acknowledged that the Secretary's counsel had notified him approximately one month before the hearing that the citation would likely be modified to allege a violation of section 75.202(a). He also acknowledged that Cyprus was not prejudiced by the amendment. Tr. 13. The judge and the parties proceeded with the hearing on the basis of the allegation of a section 75.202(a) violation. In its posthearing brief, Cyprus nevertheless raised an objection to the modification of the citation and order.

In his decision, the administrative law judge rejected Cyprus' belated objection to the modification of the citation and order. The judge emphasized that Cyprus had conceded that the modifications had not resulted in prejudice. The judge also noted that amendment of pleadings is largely committed to the discretion of the trial judge pursuant to the standards contained in Fed. R. Civ. P. 15(a). 11 FMSHRC at 379. Accordingly, the judge approved the modification of the citation and order to allege a violation of section 75.202(a) instead of 75.202(b). Id.

The judge also affirmed the imminent danger order. He rejected Cyprus' argument that the order was invalid because entry into the cited area had been prohibited by the danger tape. The judge explained that the "purpose of a 107(a) order is not only to cause the withdrawal of miners, but to insure that they remain out of the affected area until the condition is corrected." 11 FMSHRC at 377. The judge credited the MSHA inspector's opinion that the roof condition was imminently dangerous to any miner exposed to it. 11 FMSHRC at 376. The judge noted that, although in their testimony Cyprus' witnesses did not fully embrace the inspector's opinion concerning the imminent danger, their actions in supporting the roof and dangering off the area did. 11 FMSHRC at 376. He further stated that, although no miner had entered the dangerous area while it was dangered off, "actual exposure [of] a miner to a hazardous condition is not required to find that [an] ... imminent danger exists." 11 FMSHRC at 377.

Finally, in concluding that Cyprus had violated section 75.202(a), the judge agreed with the Secretary's view that, as an acceptable alternative to roof "support," the standard's reference to a roof's being "otherwise controlled" refers to some form of "physical restraint of the defective area." 11 FMSHRC at 378-79. The judge rejected Cyprus' view that its installation of yellow danger tape constituted a "control" within the meaning of section 75.202(a). 11 FMSHRC at 379. The judge stated:

> In considering these issues I conclude that compliance with § 75.202(a) can be accomplished in several ways. Initially, as the regulation provides, the area can be supported. In the alternative, the area may be barred down. The alternative of barring down a defective area is contained in the statute and it has been a control historically used. If support and barring down are not effective (the situation here) then the regulation requires effective control. I agree with the Secretary's view that some form of physical restraint of the defective area is required.

Id.

The judge did not specifically address the question of whether the cited area was a place "where persons work or travel" within the meaning of section 75.202(a). However, in his discussion of the imminent danger order, the judge found that "under normal circumstances, the tailgate

end of the longwall would allow a miner to come directly off of the longwall into the return entry" and that "there were miners in the vicinity of the defective roof." 11 FMSHRC at 377. He also found that "no miner walked under the area of bad roof and no one went through the area while it was dangered off...." Id.

II.

Cyprus contends that the judge erred in permitting the modification of the citation and imminent danger order. Cyprus submits that the Secretary failed to explain adequately the delay in amending the documents and that the delay was unreasonable.

Although the Commission's procedural rules do not address amendment of pleadings, the Commission may properly look for guidance to Fed. R. Civ. P. 15(a) ("Rule 15(a)"). 4/ See Commission Procedural Rule 1(b), 29 C.F.R. § 2700.1(b). Under Rule 15(a), the trial court possesses considerable discretion in resolving motions seeking leave to amend pleadings. Such leave is to be freely granted in the interest of justice, and a court's determinations in this regard will not be overturned except for abuse of discretion. See, e.g., 3 J. Moore, Moore's Federal Practice Par. 15.08 (2d ed. 1989)("Moore's"). See El Paso Rock Quarries, Inc., 3 FMSHRC 35, 38 (January 1981). Among the permissible purposes of such amendments are changes in the nature of the plaintiff's claims or legal theories. E.g., Moore's, supra, Par. 15.08[3]. Delay alone, regardless of length, does not bar a proposed amendment if the other party is not prejudiced. Moore's, Par. 15.08[4]. Here, the Secretary, through her modifications, sought only to allege that a different, though substantively related, subsection of the same standard applied to the cited conditions.

Cyprus conceded at the hearing that it was not prejudiced by the modifications, and proceeded with the hearing without protest. If Cyprus was aggrieved by the amendments, it should have objected at the hearing before the judge; its objection in the post-hearing brief was not timely. Cf. A.H. Smith, 5 FMSHRC 13, 17 n. 5 (January 1983). Therefore, we hold that the judge did not abuse his discretion in allowing the modifications.

Cyprus argues that the judge erred in concluding that it violated

---

4/ Rule 15(a) states in part:

> Amendments. A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. ...

section 75.202(a) for two reasons: (1) under the cited standard the area at issue was not an area "where persons work or travel;" and (2) "dangering-off" the area is an acceptable form of "control" of the roof. Because we find the first issue dispositive, we need not reach the second.

To establish a violation of 30 C.F.R. § 75.202(a), the Secretary was required by the terms of the standard to prove that the cited area was an area "where persons work or travel." As discussed above, the judge found that "under normal circumstances, the tailgate end of the longwall would allow a miner to come directly off the longwall into the return entry." 11 FMSHRC 377 (emphasis added). What the judge did not consider, however, is whether "normal circumstances" are presented here.

The record in this case establishes that as soon as Cyprus encountered the poor roof conditions, it dangered-off the area to prevent miners from entering the area of adverse roof conditions. In doing so, Cyprus acted in accordance with accepted safe-mining practice. 5/ There is no evidence that at any time during the existence of the dangerous roof conditions, other than during the attempt to install additional roof support, any miner worked or traveled in the cited area. Indeed, the Secretary has conceded as much. 11 FMSHRC at 377; Tr. 11, 44, 49, 68-69. See also Oral Arg. Tr. 33. The Secretary also did not prove that, while the area was dangered-off, the job duties of any miners required them to enter the affected area. See, e.g., Oral Arg. Tr. 9-10, 32-34. Thus, the record establishes that the operator acted appropriately in dangering-off the area of bad roof and that no miners worked, traveled or were required to enter into the area at issue.

Importantly, we note that in the circumstances presented, the Secretary agreed with Cyprus that installation of additional roof support was neither necessary nor desirable. The Secretary also agreed with Cyprus that the safest and most appropriate course to follow in eliminating the danger was to allow continuation of the normal longwall

---

5/ For example, section 303(d)(1) of the Mine Act provides:

> If [a mine operator] finds a condition which constitutes a violation of a mandatory health or safety standard or any condition which is hazardous to persons who may enter or be in such area, he shall indicate such hazardous place by posting a "DANGER" sign conspicuously at all points which persons entering such hazardous place would be required to pass.... No person, other than an authorized representative of the Secretary or a State mine inspector or persons authorized by the operator to enter such place for the purpose of eliminating the hazardous condition therein, shall enter such place while such sign is so posted.

30 U.S.C. § 863(d)(1). (emphasis added).

mining process so as to mine past the problem area. Thus, the remedial action required by the Secretary here was nothing more than what Cyprus itself had determined was necessary in order to prevent miners from being exposed to the hazard presented: prohibiting access into the tailgate and continuing the normal mining process until mining progressed beyond the dangerous area.

In sum, we conclude that a violation of section 75.202(a) was not established because, under the circumstances of this case, the area of bad roof at issue was not an area where persons worked or traveled. Accordingly, the judge's finding of a violation is reversed, and the citation and civil penalty are vacated.

Finally, Cyprus argues that the judge erred in affirming the imminent danger withdrawal order. Cyprus argues that no persons were exposed to the hazardous roof conditions since it prohibited access to the area and that the nature of the cited roof conditions could not reasonably have been expected to cause death or serious harm before they were abated.

Preliminarily, we note that an imminent danger order need not be based upon a violation of a mandatory standard in order to be valid. See S. Rep. No. 461, 95th Cong., 1st Sess. 39 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 1317 (1978)("Legis. Hist."); Freeman Coal Mining Co., 1 IBMA 197, 207-08 (1973), aff'd, Freeman Coal Mining Co. v. IBMA, 504 F.2d 741 (7th Cir. 1974). Accordingly, despite our vacation of the citation alleging a violation of section 75.202(a), the question of the validity of the imminent danger order remains.

The Mine Act defines an imminent danger as "the existence of any condition or practice in a coal or other mine which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated." 30 U.S.C. 802(j). This definition is unchanged from the definition contained in the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 et seq. (1976)(amended 1977)(the "1969 Coal Act"). The Senate report on the Mine Act explains that the Secretary's authority to issue imminent danger orders "should be construed expansively by inspectors and the Commission." S. Rep. No. 181, 95th Cong., 1st Sess. 38 (1977), reprinted in Legis. Hist. Mine Act 626.

In discussing the concept of imminent danger, we recently stated:

> In analyzing [the] definition [of imminent danger], the U.S. Courts of Appeals have eschewed a narrow construction and have refused to limit the concept of imminent danger to hazards that pose an immediate danger. See, e.g., Freeman Coal Mining Co. v. Interior Bd. of Mine Op. App., 504 F.2d 741 (7th Cir. 1974). Also, the Fourth Circuit has rejected the notion that a danger is imminent only if there is a reasonable likelihood that it will

> result in an injury before it can be abated. Eastern Associated Coal Corp. v. Interior Bd. of Mine Op. App., 491 F.2d 277, 278 (4th Cir. 1974). The court adopted the position of the Secretary that "an imminent danger exists when the condition or practice observed could reasonably be expected to cause death or serious physical harm to a miner if normal mining operations were permitted to proceed in the area before the dangerous condition is eliminated." 491 F.2d at 278 (emphasis in original). The Seventh Circuit adopted this reasoning in Old Ben Coal Corp. v. Interior Bd. of Mine Op. App., 523 F.2d 25, 33 (7th Cir. 1975).

Rochester & Pittsburgh Coal Co., 11 FMSHRC 2159, 2163 (November 1989).

The Seventh Circuit has further recognized the importance of the inspector's judgment in issuing an imminent danger order:

> Clearly, the inspector is in a precarious position. He is entrusted with the safety of miners' lives, and he must ensure that the statute is enforced for the protection of these lives. His total concern is the safety of life and limb.... We must support the findings and the decisions of the inspector unless there is evidence that he has abused his discretion or authority. (emphasis added).

Old Ben, supra, 523 F.2d at 31; Rochester & Pittsburgh, 11 FMSHRC at 2164.

We disagree with Cyprus that because it had prohibited access to the hazardous area, the Secretary's imminent danger order was invalid. Under section 107(a) of the Act, the Secretary is responsible not only for determining the area of the mine affected by the danger and removing miners from such area but also determining when miners may safely re-enter the affected area because the conditions or practices that caused the danger no longer exist. We cannot conclude that the inspector abused his discretion in issuing an order prohibiting re-entry into the area until the hazard was eliminated. 6/

6/ Under the 1969 Coal Act, the Department of Interior's Board of Mine Operations Appeal ("Board") addressed the legal effects of an operator's voluntary withdrawal of miners upon the validity of imminent danger withdrawal orders. Clinchfield Coal Co., 1 IBMA 33 (1971); The Valley Camp Coal Co., 1 IBMA 243 (1972). In these decisions, the Board emphasized that an imminent danger withdrawal order is more extensive than the mere withdrawal of miners; it also confers jurisdiction to prohibit re-entry until it is determined that the imminent danger no longer exists. The Board accordingly held that the issuance of the withdrawal orders involved in those proceedings was proper even though the operator had voluntarily withdrawn the miners from the mine before the issuance of the orders. Clinchfield, supra, 1 IBMA at 41; Valley

The hazards of roof falls are well known. See, e.g., UMWA v. Dole, 870 F.2d 662, 664 (D.C. Cir. 1989)(citing the preamble to the promulgation of MSHA's current roof support standards, 53 Fed. Reg. 2354 (January 27, 1988)). Here, Inspector Gibson found that the roof was slanted downward, broken, and fractured. Tr. 30, 31-32. He also found pieces of roof about one foot wide and two or three feet in length on the floor. Tr. 30, 44. He found two roof bolts with bearing plates about 16 inches below the roof line. Tr. 36. He believed that the roof looked so unstable that it could fall at any time, and that if it did fall, it could cause serious physical harm or death. Tr. 31. Cyprus' witnesses also acknowledged that the roof conditions in the cited area were so bad that it was too dangerous to attempt to resupport the area. Tr. 96, 99, 111, 125. Cyprus' section foreman Moss testified that "[t]here were some huge cracks the cribs squeezed together" and that the roof "looked really heavy." Tr. 109.

Thus, we conclude that substantial evidence supports the judge's affirmance of the order. The inspector did not abuse his discretion in issuing the order to control re-entry into an area of bad roof.

Camp, supra, 1 IBMA at 248.

III.

Accordingly, we affirm the judge's action in permitting the Secretary to modify the citation and order, we reverse the judge's finding that Cyprus violated section 75.202(a), we vacate the citation and civil penalty assessed for the violation, and we affirm the imminent danger withdrawal order.

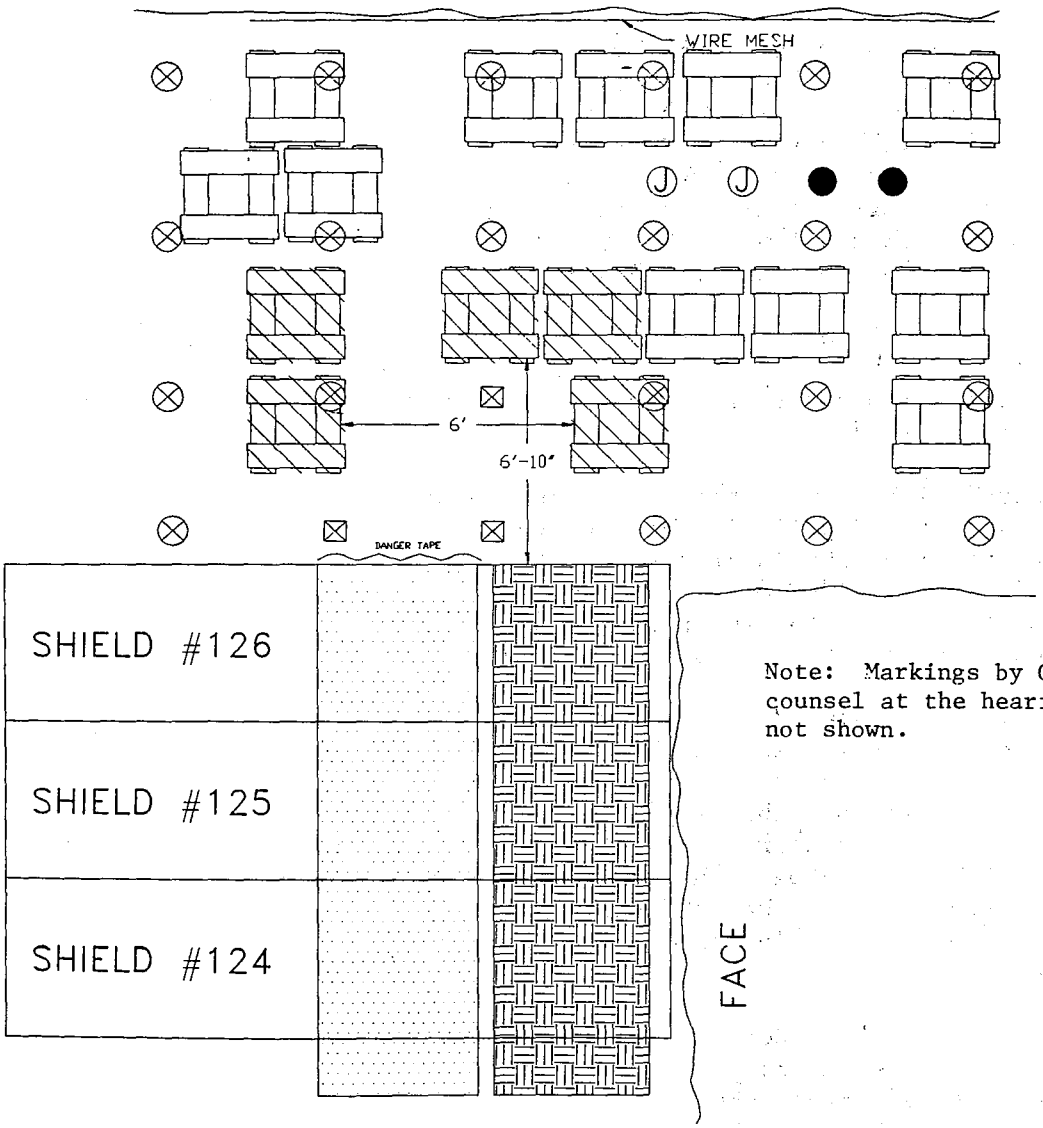
Ford B. Ford, Chairman

Joyce A. Doyle, Commissioner

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

Joint Exhibit # 1



Note: Markings by Cyprus' counsel at the hearing are not shown.

Cribs Indicated On Inspector's Drawing

Resin Roof Bolts

Resin Roof Bolts Indicated On Inspector's Drawing

Walk Way

Pan Line

Roof Jack

Timber

Joint EXHIBIT #1

West 88-250-R
West 88-251-R
West 88-321

Commissioner Backley concurring in part and dissenting in part:

I respectfully dissent from that part of the majority decision holding that no violation of 30 C.F.R. 75.202(a) occurred.

There is no factual dispute regarding this issue. The cited roof was in a highly dangerous condition. Indeed today we all conclude that the roof condition constituted an imminent danger. The gravity of the situation was such that MSHA agreed with the operator's determination that the risk involved in any remedial effort to support the roof was unacceptable. The safer course of action was to danger-off the area and mine beyond the dangerous area. This the operator did. Indeed, the record indicates that no miners ventured past the yellow tape used by the operator to danger-off the subject area.

In evaluating the legal effect of the foregoing, the majority has concluded that no violation occurred "...because, under the circumstances of this case, the area of bad roof at issue was not an area where persons worked or traveled." Slip op. at 8.

I cannot agree with this cramped construction of the cited regulation. A reasonable reading of the majority's opinion would lead one to conclude that it is now possible to immunize an area of the mine from MSHA enforcement if the area is successfully dangered-off. Whether or not the majority intends to convey that message is beside the point. In my opinion such a conclusion is wrong and dangerously contrary to Congressional intent.

I have carefully reviewed the record in this matter and find the Secretary's arguments on this issue to be compelling. The operator's action in dangering-off the area was not only "...in accordance with accepted safe-mining practice", as determined by the majority, Slip op. at 7, but was in fact mandatory. Indeed the operator's obligation under the law goes beyond merely dangering-off the hazardous area. The <u>roof</u> must be supported or controlled. In this case the cited roof was neither <u>supported</u> nor <u>controlled</u> as required by the regulation. The imminently dangerous condition was ultimately abated by mining past the cited area.

The majority, however, does not directly reach the issue of whether the roof was controlled. The majority has determined that the Secretary failed to prove that this was an area where persons worked or traveled. In so concluding, the majority has apparently rejected the well-reasoned arguments to the contrary urged by the Secretary. Specifically, the Secretary argues that ventilation and on-shift examinations required the presence of miners in the cited area. The Secretary also lists other necessary maintenance functions pertaining to the roof, water pump and water lines which would ordinarily cause miners to be in the cited area. Most significantly, the Secretary argues that under the requirements of 30 C.F.R. 75.215(a) the operator is required to

maintain a safe travelway out of the section through the subject tailgate side the longwall. In response to these arguments, Cyprus concedes that although the preshift and onshift examinations did not require miner exposure to the cited area, the weekly ventilation examination required under 30 C.F.R. 75.305 was not a factor in this case because the subject condition existed for approximately five days. Oral arg. at 9-10. We are left with the implication that had the condition existed beyond a week's time, compliance with the examination requirement would have resulted in miner exposure to the cited roof.

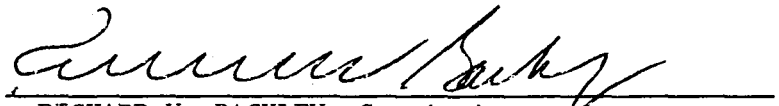
In response to the Secretary's concerns regarding necessary maintenance functions which would ordinarily cause miners to work under the cited roof, Cyprus admitted that if the cited area had not been dangered-off the installation of supplemental roof support and the maintenance of pumps "would put them into this particular area." Oral arg. 11-12.

Finally and most significantly, in responding to the Secretary's assertion that because 30 C.F.R. 75.215(a) requires that the tailgate side of the longwall be maintained as a safe travelway out of the section Cyprus cannot simply eliminate the subject tailgate entry as a place where persons work or travel, Cyprus argues that the headgate could be used as an escape route, or as a last resort, the subject tailgate could have been used since it was not physically blocked. Oral arg. at 8.

In consideration of the foregoing, it is clear that the subject tailgate was "indisputably, normally an area where persons work or travel." Sec. brief at 18, Oral arg. at 33. Accordingly, I conclude that the regulatory threshold "where persons work or travel" has been met in this case. To do otherwise, as the majority has reasoned, risks the dangerous misapprehension that compliance can be achieved with tape and board.

In reaching its conclusion of no violation, the majority places significant importance upon the fact that " ...the remedial action required by the Secretary ... was nothing more than what Cyprus itself had determined was necessary in order to prevent miners from being exposed to the hazard presented..." Slip op. at 7-8. I share that concern. I also agree that Cyprus did not fail to take remedial action. This concern however is not relevant to the issue of whether the regulation was violated. The regulation contains no such exception. The roof where persons work or travel shall be supported or otherwise controlled. The fact that MSHA and Cyprus agreed that the dangerous roof was best left undisturbed, does not in any way diminish or alter the fact that the subject roof, located as it was within 36 inches of the tailgate shield 126, was in violation of 30 C.F.R. 75.202(a). The manner in which compliance is achieved is not an element relating to the determination of whether a violation occurred. It is, however, expressly relevant in considering the appropriate amount of civil penalty to be assessed. 30 U.S.C. Section 820(i).

Accordingly, I have concluded that the subject area was clearly a place where persons work or travel and that the cited roof was not supported or controlled and that therefore a violation of 30 C.F.R. 75.202(a) occurred.



RICHARD V. BACKLEY, Commissioner

Distribution

R. Henry Moore, Esq.
Buchanan Ingersoll
58th Floor
600 Grant Street
Pittsburgh, Pennsylvania 15219

Carl C. Charneski, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd.
Arlington, VA 22203

Administrative Law Judge John Morris
Federal Mine Safety & Health Review Commission
280 Colonnade Center
1244 Speer Boulevard
Denver, Colorado 80204

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

May 2, 1990

ARNOLD SHARP	:	
	:	
v.	:	Docket No. KENT 89-147-D
	:	
BIG ELK CREEK COAL COMPANY	:	
	:	

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

DECISION

BY THE COMMISSION:

In this section 105(c)(3) discrimination proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. section 801 et seq. (1982), the Commission granted Arnold Sharp's petition seeking interlocutory review of an order of Administrative Law Judge Gary Melick issued February 16, 1990.

The subject order was issued in response to a letter, dated February 5, 1990, from Sharp to the judge. Sharp, who is appearing pro se, had requested the judge remove himself from the case because he had issued orders staying the proceedings over Sharp's objections. In the letter, Sharp expressed concern for a fair hearing and sought dissolution of the existing stay order, renewing his demand for a prompt hearing.

In his order denying Sharp's request that the stay be dissolved the judge stated:

> ... This case has indeed twice been stayed pending final disposition of criminal perjury charges against an alleged essential witness in this proceeding, Jim Meese. The Complainant himself has indeed maintained and pursued those charges. The outcome of such perjury charges could have a critical impact on the instant case and, of course, if such charges are substantiated in such criminal proceedings could indeed very well benefit the Complainant's position in this case.

February 16, 1990 Order at 2.

Thereafter Sharp filed the petition for interlocutory review which was granted.

The record developed to date indicates that, subsequent to his February 28, 1989 discharge, Sharp appeared and testified before a Commonwealth of Kentucky Department of Employment Services referee in an effort to secure unemployment compensation. Respondent's Administrative Director, Jim Meese, also testified at this hearing. Because Sharp believed Meese's testimony at that hearing to be false, he caused a criminal complaint and arrest warrant to be issued against Meese. Accordingly, on September 13, 1989, Respondent moved for a postponement of the instant action, asserting that Meese, the principal and likely only witness for respondent in the Mine Act discrimination proceeding pending before the administrative law judge, intended to assert his Fifth Amendment privilege against self-incrimination "prevent[ing] him from testifying further as to the matters surrounding the criminal case and any collateral civil matter." Motion for Postponement at 2.

Sharp filed his opposition to the motion for postponement arguing that the criminal matter has no bearing upon the discrimination matter. Sharp requested that the then scheduled hearing before the administrative law judge go forward.

The respondent filed a reply asserting:

> ... The subject matter of the unemployment hearing factually mirrors the instant proceeding. Should Mr. Meese testify in the hearing scheduled in this discrimination proceeding before the Federal Mine Safety and Health Review Commission relative to the facts surrounding Complainant's discharge, he would waive his Fifth Amendment privilege against self-incrimination. In Re: Atterbury, 316 F.2d 106, 109 (6th Cir. 1963); Anderson v. Commonwealth, Ky. App., 554 S.W. 2d 882, 884 (1977).

On September 20, 1989, the judge issued an Order of Continuance and Stay Order:

> I find upon consideration of the circumstances that the Motion for Continuance is well-founded and that it would be in the best interests of this litigation to grant a brief continuance and stay in these proceedings pending disposition of the noted criminal proceedings. This is particularly true in this case since the criminal charges involve a claim that a witness apparently essential to this case gave a false statement in a related proceeding and that criminal case is already scheduled for trial in the near future.

Order at 3.

Thereafter, on January 5, 1990, the criminal charge against Meese

was dismissed. However, on January 22, 1990, the dismissal was appealed and the criminal action remains pending. Noting these occurrences and over the objections of Sharp, the administrative law judge issued a second stay order on February 2, 1990, pending "... final disposition of the noted criminal proceedings..." Order at 1.

In determining whether a Fifth Amendment privilege is validly invoked, the judge has wide but not unlimited discretion. In exercising that discretion, however, the judge must be informed. United States v. Metz, 608 F.2d 147, 156 (5th Cir. (1979), cert. denied, 449 U.S. 821, 101 S.Ct. 80, 66 L.Ed. 2d 24 (1980); United States v. Van Deveer, 577 F.2d 1016, 1017 (5th Cir. 1978); United States v. Hart, 729 F.2d 662, 670 (10th Cir. 1984), cert. denied, 469 U.S. 1161, 105 S.Ct. 914, 83 L.Ed. 2d 927. The mere assertion of the Fifth Amendment privilege, without more does not exonerate a witness from testifying. The judge must make an informed determination of the validity of the claim. United States v. Sheikh, 654 F.2d 1057 (5th Cir. 1981), cert. denied, 455 U.S. 991, 102 S.Ct. 1617, 71 L.Ed. 2d 852.

We have thoroughly reviewed the present record and find an inadequate basis for the existing stay. The record contains only a vague indication of the exact nature of the criminal charges pending against respondent's witness Meese. More importantly, there is no clear indication as to how those charges impact upon the issues presented by Sharp's complaint of unlawful discharge in violation of section 105(c) of the Mine Act. As such, the record contains an inadequate foundation for the present acceptance of respondent's bald claim that Meese's testimony in the instant case necessarily would result in a waiver of his Fifth Amendment privilege. Further demonstration by respondent and further inquiry by the judge are required, especially in light of Sharp's right under the Mine Act to an expeditious hearing on his discrimination complaint.

Accordingly, we vacate the existing stay order and remand to the judge for further proceedings consistent with this order.

Ford B. Ford, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

Distribution

Mr. Arnold Sharp
General Delivery
Bulan, Kentucky 41722

Edwin S. Hopson, Esq.
Wyatt, Tarrant & Combs
Citizens Plaza
Louisville, Kentucky 40202

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

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

May 21, 1990

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
v.	:	Docket No. LAKE 89-92-M
	:	
FRANCE STONE COMPANY	:	

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

DIRECTION FOR REVIEW AND ORDER

BY THE COMMISSION:

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982)("Mine Act"). On April 18, 1990, Commission Administrative Law Judge James Broderick issued a decision approving a settlement agreement filed by the Secretary of Labor. In the motion the Secretary stated that the terms of the settlement had been agreed to by France Stone Company ("France Stone"). In accordance with the motion, the judge assessed civil penalties of $12,000, the amount originally proposed by the Secretary for the two citations involved in this proceeding. On April 20, 1990, however, France Stone filed with Judge Broderick a motion to amend the settlement, to approve the amended settlement, and to dismiss the proceeding. This motion asserted that the Secretary concurred in the motion. We deem France Stone's motion to constitute a timely petition for discretionary review, which we grant, and we remand this matter to the judge for further proceedings.

The judge's jurisdiction in this proceeding terminated when his decision approving settlement was issued. 29 C.F.R. § 2700.65(c). Under the Mine Act and the Commission's procedural rules, once a judge's decision has issued, relief from the decision may be sought by filing with the Commission a petition for discretionary review within 30 days of the decision. 30 U.S.C. § 823(d)(2); 29 C.F.R. § 2700.70(a). Here, France Stone's motion to Judge Broderick constitutes a request for relief from the judge's decision, and constitutes a timely filed petition for discretionary review. See, e.g., Kathleen I. Tarmann v. Int'l Salt Company, 12 FMSHRC 1, 2 (January 1990).

France Stone was not a signatory to the "settlement agreement" that it now disputes in part. France Stone's present motion suggests that the original settlement submitted to the judge may not have reflected the parties' agreement. Although France Stone's motion to amend the settlement represents that the Secretary concurs in the motion, like the first submission it is not signed by the opposing party. In this circumstance, further proceedings before the judge are necessary in order to determine the terms of the parties' settlement. Peabody Coal Co., 8 FMSHRC 1265, 1266 (September 1986).

Accordingly, the judge's Decision Approving Settlement is vacated and the matter is remanded to the judge for further appropriate proceedings.

Ford B. Ford, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

Distribution

Henry Chajet, Esq.
Jackson & Kelly
1701 Pennsylvania Ave., N.W.
Suite 650
Washington, D.C. 20006

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

Administrative Law Judge James A. Broderick
Federal Mine Safety & Health Review Commission
5203 Leesburg Pike, Suite 1000
Falls Church, Virginia 22041

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

May 22, 1990

ROGER L. STILLION	:	
	:	
v.	:	Docket No. LAKE 88-91-D
	:	
QUARTO MINING COMPANY	:	

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

DECISION

BY THE COMMISSION:

This proceeding involves a discrimination complaint filed by Roger L. Stillion, pursuant to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988)(the "Mine Act" or "Act"). The complaint alleges that Quarto Mining Co. ("Quarto") violated section 105(c)(1) of the Mine Act, 30 U.S.C. § 815(c)(1), when it denied Stillion the opportunity to participate in an inspection of the mine without a loss of pay. 1/ Following an evidentiary hearing, Commission Administrative

---

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

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

Law Judge William Fauver found that Quarto had unlawfully discriminated against Stillion in violation of section 105(c)(1), 11 FMSHRC 523 (April 1989)(ALJ), and ordered Quarto to pay Stillion back pay, interest and attorney's fees. 11 FMSHRC 875 (May 1989)(ALJ). The Commission granted Quarto's petition for discretionary review. For the reasons that follow, we affirm the judge's decision.

The events in question took place at Quarto's Powhattan No. 4 Mine, an underground coal mine located near Clarington, Ohio. In approximately September 1987, Quarto contracted with A&C Construction Co. ("A&C") to extend a gob pile located on the top of a hill at the mine. Pursuant to the contract, A&C was responsible for, among other things, removing and hauling trees, brush, and dirt. In addition, A&C subcontracted some of the work for hauling dirt. The work required A&C and its subcontractor to use haulage trucks and A&C to use other heavy equipment, such as back hoes and bulldozers. It also required A&C's employees to work in and around the same area as some of Quarto's employees.

Soon after A&C started the project, Quarto's employees complained to Ronald Winkler, a union safety committeeman, and to other union officials, about the manner in which A&C employees were driving their trucks. (The union was the representative of Quarto's employees for Mine Act purposes.) Quarto's employees were also concerned about the lack of backup alarms on the trucks and other of A&C's mobile equipment. The Quarto employees believed that they were endangered by A&C's work practices and equipment. Stillion had himself observed several of the complained of conditions.

Winkler discussed the Quarto employees' safety concerns with some of A&C's employees. He also discussed them with John Smith, Quarto's foreman for maintenance. The Quarto employees' complaints about A&C nevertheless continued. As a result, Ted Hunt, chairman of the union safety committee, placed a "Code-A-Phone" call to the Department of Labor's Mine Safety and Health Administration ("MSHA") requesting that MSHA inspect "all equipment of contractors" at the Quarto mine. Ex. Rx-1. 2/

On Friday, October 2, 1987, as a result of the Code-A-Phone

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

30 U.S.C. § 815(c)(1).

2/ Code-A-Phone is a toll-free "hot line" to the MSHA headquarters in Arlington, Virginia, that is used to request an inspection of a mine, to report safety or health problems, or to report possible violations of the mandatory safety and health standards. MSHA's policy is not to reveal the source of a Code-A-Phone request or report.

request, MSHA Inspector Frank Homko arrived at the mine to inspect the contractors' equipment. 3/ Pursuant to section 103(f) of the Mine Act, 30 U.S.C. § 813(f), Hunt served as the walkaround representative for Quarto's employees during the October 2 inspection. 4/ Percy Hawkins,

---

3/ The Code-A-Phone inspection of A&C's equipment was conducted pursuant to section 103(g) of the Act, which states in part:

> Whenever a representative of the miners or a miner in the case of a coal or other mine where there is no such representative has reasonable grounds to believe that a violation of this Act or a mandatory health or safety standard exists, or an imminent danger exists, such miner or representative shall have a right to obtain an immediate inspection by giving notice to the Secretary or his authorized representative of such violation or danger.... [A] special inspection shall be made as soon as possible to determine if such violation or danger exists ....

30 U.S.C. § 813(g).

4/ The term "walkaround" is used for convenience in reference to the rights granted miners' representatives under section 103(f) of the Mine Act, which provides:

> Subject to regulations issued by the Secretary, a representative of the operator and a representative authorized by his miners shall be given an opportunity to accompany the Secretary or his authorized representative during the physical inspection of any coal or other mine made pursuant to the provisions of subsection (a) of this section, for the purpose of aiding such inspection and to participate in pre- or post-inspection conferences held at the mine. Where there is no authorized representative, the Secretary or his authorized representative shall consult with a reasonable number of miners concerning matters of health and safety in such mine. Such representative of miners who is also an employee of the operator shall suffer no loss of pay during the period of his participation in the inspection made under this subsection. To the extent that the Secretary or authorized representative of the Secretary determines that more than one representative from each party would further aid the inspection,he can permit each party to have an equal of such additional representatives. However, only one such representative of miners who is an employee of the operator shall be entitled to suffer no loss of pay during the period of such participation under the provisions of this subsection. Compliance with this

Quarto's safety inspector, represented Quarto on this inspection.

Inspector Homko, accompanied by Hunt and Hawkins, went to the gob pile to inspect A&C's equipment. During the inspection, Hunt elaborated to Homko the concerns of Quarto employees about A&C's equipment and work practices. The inspection was cut short, however, due to an accident unrelated to the issues in this case, and Hunt was paid by Quarto for the time during which he participated in the inspection. Hunt asked Stillion to act as the miners' walkaround representative when the inspection resumed, and Stillion agreed.

On Monday, October 5, a different MSHA inspector went to the mine to investigate the unrelated accident that had occurred on October 2. (The Code-A-Phone inspection of the contractors' equipment was not scheduled to resume until October 6.) The inspector was asked by Hawkins if Quarto was responsible for paying a miners' walkaround representative who participated in an inspection of an independent contractor's work site. The inspector called the MSHA office and subsequently advised Hawkins that Quarto was not obligated to compensate such an employee walkaround representative. (Hawkins later conceded, however, that when posing the question to the inspector, he had not told the inspector of the particular safety complaints that had been lodged by Quarto's employees.)

On October 6, MSHA Inspector Gary Gaines resumed the Code-A-Phone inspection at the mine. Stillion accompanied Gaines during the inspection. Gaines introduced Stillion to A&C employees as a member of the local union and as the walkaround representative. Stillion testified that when Gaines informed A&C's employees of their right to participate in the inspection, one of the employees responded, "we [would] just as soon have somebody from the mine went because we don't know the laws anyway." Tr. 131.

On October 7 and 8, Gaines continued and concluded the Code-A-Phone inspection with Stillion accompanying him. Alan Olzer, Quarto's safety supervisor, acknowledged that, as a result of the inspection, a number of safety violations were found.

At the conclusion of the inspection, Quarto refused to compensate Stillion for the time that he had spent accompanying the inspector. 5/

> subsection shall not be a jurisdictional prerequisite to the enforcement of any provision of this [Act].

30 U.S.C. § 813(f).

5/ Quarto's refusal to pay Stillion reflected a change of company policy. For about 16 years prior to this inspection, employee representatives of miners who accompanied MSHA's inspectors during inspections of independent contractors' equipment had been paid by Quarto. After the mine was acquired by Consolidation Coal Company, the policy was changed. Although the new policy was in effect when Hunt was paid by Quarto, mine management was not yet aware of the new policy.

(Subsequently, the union reimbursed Stillion for his lost wages.) When Quarto refused to pay Stillion, he filed a complaint with the Secretary of Labor alleging discrimination in violation of section 105(c)(1) of the Mine Act. After an investigation by MSHA, Stillion was informed by the Secretary of her finding that no unlawful discrimination had occurred. Accordingly, Stillion filed a discrimination complaint on his own behalf with the Commission under section 105(c)(3) of the Act. 30 U.S.C. § 815(c)(3).

Following an evidentiary hearing, the judge issued his decision finding a violation by Quarto of section 105(c)(1). The judge concluded that Stillion was entitled to be paid by Quarto under section 103(f) of the Act. 11 FMSHRC at 527. The judge reasoned that the Code-A-Phone inspection was the type of inspection subject to the walkaround pay requirements of section 103(f). 11 FMSHRC at 526 (citing United Mine Workers of America v. FMSHRC, 617 F.2d 615 (D.C. Cir. 1982), cert. denied, 459 U.S. 927 (1982); Interpretative Bulletin, 43 Fed. Reg. 17544-46 (1978)). The judge did not rule, however, on Quarto's contention that an owner-operator should not be required under section 103(f) to pay one of its employees for acting as the miners' walkaround representative during an inspection of an independent contractor's equipment.

On review, Quarto again argues that, as an owner-operator, it was not required to reimburse Stillion for accompanying an MSHA inspector during an inspection of A&C's equipment. Quarto notes that section 103(f) states that "a representative of the operator and a representative authorized by his miners shall be given an opportunity to accompany the Secretary or his authorized representative...." (emphasis added). Quarto notes that the term "operator," as defined in the Mine Act, specifically includes independent contractors. 6/ Quarto recognizes that several entities may meet the statutory definition of "operator" at one mine site. It asserts, however, that the term "operator" is used in the singular in section 103(f), thus indicating that one operator is liable to pay walkaround compensation. Quarto submits that because the inspection was aimed at A&C's equipment, the representative of miners who should suffer no loss of pay should be an A&C employee, not an employee of Quarto. Quarto notes that it was A&C, not Quarto, that was cited by the Secretary for safety violations as a result of the inspection. Therefore, Quarto argues, Stillion was not entitled to be paid for his participation during the inspection of A&C's equipment, and Quarto did not unlawfully discriminate against him by denying him pay.

6/ Section 3(d) of the Act states:

> "operator" means any owner, lessee, or other person who operates, controls, or supervises a coal or other mine or any independent contractor performing services or construction at such time.

30 U.S.C. § 802(d).

We do not agree. Given the particular circumstances of this case, we affirm the judge's conclusion that Quarto was required to pay Stillion for his participation in the inspection at issue.

We first note that Stillion's participation in the inspection at issue meets the literal requirements for compensation under section 103(f). Quarto operates, controls, and supervises the Powhattan No. 4 Mine. 30 U.S.C. § 802(g). During the time in question, Stillion was a miners' representative within the purview of section 103(f). 30 U.S.C. § 813(f). Stillion accompanied Inspector Gaines during an inspection occurring at Quarto's mine which inspection was of the type triggering the right to walkaround compensation under section 103(f).

Furthermore, that Stillion's participation in the inspection furthered the purpose of the walkaround pay provision is clear. "The walkaround pay provision and the participation right are both aimed at the protection of the health and safety of miners - the single overriding purpose of the legislation." Magma Copper Co. v. Secretary of Labor, 645 F.2d 694, 698 (9th Cir. 1981). As the Senate Committee that by-and-large drafted the Mine Act stated, paid participation in inspections by the miners' representative "will enable miners to understand the safety and health requirements of the Act and will enhance mine safety and health awareness." Senate Committee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977 at 616-17 (1978). In addition, Congress recognized that paid participation by representatives of miners would, because of the representatives' particular knowledge of the conditions at the mine, make the inspection "much more thorough." Id. at 1054. Thus, the right of paid participation by the miners' representative provides MSHA's inspectors needed familiarity with the specific working conditions in a particular mine.

Stillion's participation in the inspection of A&C's equipment met these goals. As the judge found, the inspection of A&C's equipment on October 6, 7 and 8 arose out of the concern of Quarto's employees for their own safety. 11 FMSHRC at 525. Quarto's miners, who complained about the safety hazards associated with the use and maintenance of A&C's equipment, believed that they themselves were endangered by the use of the equipment. Their complaints led to the request for an inspection. Stillion, who had been a safety committeeman for five years, was familiar with the mine and had personally observed the suspect equipment being operated in a manner that he considered unsafe for Quarto's miners. Under these circumstances, Stillion had a right to participate in the inspection and a right to compensation from Quarto.

Quarto's argument that it should not be held liable for compensating its employee who participated in an inspection that resulted in citations being issued to A&C is inapposite in these circumstances. Here, Quarto's own employees were exposed to the hazards created by A&C's equipment. Although A&C was appropriately cited for the violations, since it was in the best position to abate the hazards complained of, that does not defeat the walkaround rights of Stillion, who served as the sole miners' representative on the inspection and who represented those Quarto miners exposed to the hazards created by A&C's

equipment.

Quarto warns that this conclusion is at odds with the purpose of the walkaround provision. It suggests that to uphold a right to compensation here means that an employee of an independent contractor could request an inspection of any part of an owner-operator's mine and be paid for participating in any resulting inspection. Quarto suggests, as an example, that a truck driver employed by A&C could request, participate in and be paid for taking part in an inspection of Quarto's preparation plant. See Quarto Br. 12-13. That is not, however, the case we are deciding today. Rather, we are deciding only that, where an owner-operator's employees are endangered by the activities of an independent contractor at the owner-operator's mine, a representative of the owner operator's employees who serves as the sole miners' representative during an inspection of the contractor's operation is entitled to compensation pursuant to section 103(f). Of course, any interpretation of section 103(f) that is inconsistent with its provisions and does not effectuate its purpose would not be upheld. See Magma Copper Co., 1 FMSHRC 1948, 1951-52 (December 1979); aff'd Magma Copper Co. v. Secretary of Labor 645 F.2d 694 (9th Cir. 1981), cert. denied, 454 U.S. 940 (1981).

For the reasons explained above, we conclude that in the circumstances of the present case Stillion had a right to walkaround pay under section 103(f). 7/

Accordingly, for the reasons stated above, we affirm the judge's decision.

Ford B. Ford, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

7/ Quarto appears to suggest that if the Commission concludes that it was required to compensate Stillion, it should nonetheless not be held liable for a violation of section 105(c) because it acted in good faith. Quarto Br. 19. The basis for Quarto's "good faith belief" appears to be the statement by the MSHA inspector that payment was not required. An operator's reliance on an incorrect legal opinion or theory does not defeat effectuation of a miner's statutory rights. Cf. Emery Mining Corp. v. Secretary of Labor, 744 F.2d 1411, 1416 (10th Cir. 1984).

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

May 22, 1990

GREENWICH COLLIERIES, DIVISION OF PENNSYLVANIA MINES CORPORATION	:	
v.	:	Docket Nos. PENN 85-188-R PENN 85-189-R PENN 85-190-R PENN 85-191-R PENN 85-192-R
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
and	:	
UNITED MINE WORKERS OF AMERICA (UMWA)	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
and	:	
UNITED MINE WORKERS OF AMERICA (UMWA)	:	
v.	:	Docket No. PENN 86-33
PENNSYLVANIA MINES CORPORATION, GREENWICH COLLIERIES	:	

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

DECISION

BY THE COMMISSION:

This consolidated contest and civil penalty proceeding, which is before the Commission on interlocutory review for a second time, arises

under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988)("Mine Act" or "Act"). This case involves orders of withdrawal issued pursuant to section 104(d)(1) of the Mine Act by the Department of Labor's Mine Safety and Health Administration ("MSHA") as the result of its investigation following a methane ignition and explosion at the Greenwich No. 1 mine, an underground coal mine operated by Greenwich Collieries, a division of Pennsylvania Mines Corporation ("Greenwich"). 1/

In Greenwich Collieries Corp., 9 FMSHRC 1601 (September 1987) ("Greenwich I"), the Commission reversed the judge's conclusion in his first decision (8 FMSHRC 1105 (July 1985)(ALJ)) that the withdrawal orders were invalid because they were issued based on an investigation after the violations had ceased to exist, and remanded to the judge for consideration of remaining issues. On remand, acting on Greenwich's motion for summary decision, the judge again invalidated the section 104(d)(1) withdrawal orders, this time on the ground that, although the violations in question had been "found" by MSHA within the 90-day time-frame mentioned in section 104(d)(1), the orders had not been issued "forthwith" within the meaning of that section. The judge therefore modified the section 104(d)(1) orders to section 104(a) citations.

1/ Section 104(d)(1) of the Act states in pertinent part:

> 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 ... 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.

30 U.S.C. § 814(d)(1).

9 FMSHRC 2051 (October 1987)(ALJ). 2/ Both Greenwich and the Secretary petitioned the Commission for interlocutory review of the judge's order granting partial summary decision, and we granted both petitions. For the reasons that follow, we affirm in result the judge's modification of the withdrawal orders and remand for further proceedings.

I.

In Greenwich I, we summarized the procedural history of this case leading to Greenwich's challenge:

> On February 16, 1984, a methane ignition and explosion occurred at the Greenwich No. 1 mine, an underground coal mine operated by Greenwich Collieries.... Three miners were killed and eleven others were injured in the explosion. [MSHA] arrived at the mine, engaged in rescue and recovery efforts, observed conditions at the site, and began an investigation of the cause of the explosion. As part of its investigation, MSHA examined the entire mine between February 25 and April 5, 1984, and between March 27 and April 27, 1984, took sworn statements from numerous individuals who participated in the recovery operations or who had information regarding the conditions in the mine prior to the explosion. The Secretary's investigators concluded that the operator's unwarrantable failure to comply with five mandatory safety standards contributed to the accident. Therefore, on March 29, 1985, MSHA Inspector

---

2/ Section 104(a) provides in part:

> 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 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].

30 U.S.C. § 814(a).

> Theodore W. Glusko issued to Greenwich the five section 104(d)(1) orders of withdrawal at issue in this case. [3/] The orders alleged that violations of various safety standards had occurred in December 1983 and January and February 1984. Each of the section 104(d)(1) orders indicated that they were based on a section 104(d)(1) citation issued to Greenwich on February 24, 1984. The orders also indicated that they were terminated at the time that they were issued. No miners were withdrawn from the mine as a result of the orders.

9 FMSHRC at 1603. In addition, the orders alleged that each violation was of a significant and substantial nature.

Following our Greenwich I remand, Greenwich contended before the administrative law judge that the orders were invalid because they had not been issued within 90 days of the issuance of the section 104(d)(1) citation upon which they were based and because they had not been issued "forthwith," within the meaning of section 104(d)(1). The judge rejected Greenwich's contention that the orders were invalid because they were not issued within 90 days of the underlying section 104(d)(1) citation. He observed that although the orders were issued approximately 13 months after the predicate section 104(d)(1) citation was issued on February 24, 1984, section 104(d)(1) requires that a section 104(d)(1) withdrawal order shall issue "[i]f ... within 90 days after the issuance of ... [a section 104(d)(1) citation], an authorized representative of the Secretary finds another violation of any mandatory health and safety standard" caused by an unwarrantable failure. 9 FMSHRC at 2054 (emphasis added). The judge noted the Secretary's assertion that evidence of each of the violations was obtained between the date of the explosion, February 16, 1984, and April 27, 1984, when formal testimony in the investigation was concluded, and he accepted as true the Secretary's allegation that the contested violations were, therefore, "found" by the Secretary within 90 days of the February 24 section 104(d)(1) citation. 9 FMSHRC at 2054.

The judge further held, however, that the orders were not issued "forthwith" within the meaning of section 104(d)(1). 9 FMSHRC at 2056. The judge stated that in common usage "forthwith" means "immediately." He reviewed the chronology of events in this matter: the orders allege violations occurring in December 1983 and January - February 1984; the explosion occurred on February 16, 1984; MSHA examined the mine between February 25 and April 5, 1984; and MSHA took testimony regarding the explosion between March 27 and April 27, 1984. He found that although MSHA "could have" issued the orders on April 27, 1984, MSHA waited until March 29, 1985, and that the 11-month delay did not demonstrate

---

3/ On March 29, 1985, the mine was subject to the provisions of section 104(d)(2) of the Mine Act. The withdrawal orders in question were nevertheless issued by the Secretary under section 104(d)(1) to "make it clear that they ... relat[ed] back to the time the violations were found." Sec. Br. to ALJ 6.

"immediacy." 9 FMSHRC at 2055.

The judge further noted that while section 104(a) provides that delay in issuing a citation "shall not be a jurisdictional prerequisite to the enforcement of any provision of [the] Act," he found no similar "saving provision" in section 104(d). 9 FMSHRC at 2056. The judge also found no indication in the Mine Act or its legislative history that the timeliness requirements of section 104(d) were not jurisdictional prerequisites to the issuance of valid section 104(d) withdrawal orders. 9 FMSHRC at 2056.

The judge concluded that a showing of prejudice was not required to invalidate section 104(d)(1) orders that are not issued "forthwith." 9 FMSHRC at 2056. He further concluded that, even if prejudice were required, he agreed with Greenwich that an 11-13 month delay in notification was "inherently prejudicial in some degree to ... [the] operator's ability to defend itself." Id. Based on the foregoing, the judge invalidated the five orders and again modified them to section 104(a) citations. 9 FMSHRC at 2056. The Secretary and Greenwich petitioned for interlocutory review, and we granted both petitions.

II.

Greenwich contends that the judge erred in holding that MSHA's failure to issue the contested orders within 90 days of the section 104(d)(1) citation did not invalidate the orders. Greenwich argues that section 104(d) focuses on the issuance of citations and orders, not the detection of the underlying violations. Thus, Greenwich asserts that the Mine Act requires that a section 104(d)(1) order must be issued within the 90-day probationary period following the date of the predicate section 104(d)(1) citation.

The Secretary asserts that the judge erred in concluding that the contested orders were invalid because they were not issued "forthwith" after the violations were "found." The Secretary argues that there is no jurisdictional time limit in section 104(d)(1) precluding issuance of withdrawal orders containing unwarrantable failure findings outside the 90-day time limit in circumstances where it takes the Secretary more than 90 days to "finalize" her "findings" and to issue the appropriate orders. The Secretary explains that here, although preliminary findings of violation were indeed made within three months of the explosion, in accident or disaster situations it may be many more months (or even years) before MSHA is able to conclude its investigation, "finally" find violations, and issue the appropriate withdrawal orders. The Secretary argues that it is contrary to the purposes of the Act to conclude that such delay precludes the Secretary from citing the operator for the unwarrantable failure violations that it committed.

The parties' raise two potentially important issues: (1) whether failure to issue section 104(d)(1) withdrawal orders within 90 days of a predicate section 104(d)(1) citation invalidates the orders; and (2) whether the judge erred in invalidating the orders because they were not issued "forthwith."

These arguments raise important issues concerning the construction and implementation of section 104(d) of the Mine Act. Upon close analysis, however, we conclude that the facts and procedural posture of this case do not squarely present the issues, and that their resolution is not required for a proper disposition of this case. Therefore, we conclude that it is prudent to reserve consideration of such questions to a future case truly presenting the issues raised.

It is important here to understand the relationship between sections 104(a) and 104(d) of the Act and, in particular, the specific purpose and structure of section 104(d). Under section 104(d) of the Act, if an inspector finds a violation and also finds that the violation is of a significant and substantial nature and resulted from an operator's unwarrantable failure to comply with a mandatory standard, a citation noting those findings is issued. For the sake of convenience, this citation, the "predicate" citation in the section 104(d) "chain," is commonly referred to as a "section 104(d)(1) citation." Nacco Mining Co., 9 FMSHRC 1541, 1545 n. 6 (September 1987). The Commission has explained, however, that a "section 104(d)(1) citation" nevertheless is a citation issued pursuant to section 104(a) of the Act containing the special findings referred to in section 104(d)(1). Utah Power & Light Co., 11 FMSHRC 953, 956-57 (June 1989).

Section 104(d)(1) provides that "[i]f, during the same inspection or any subsequent inspection ... within 90 days after the issuance of such citation," the inspector finds a further unwarrantable failure violation, a withdrawal order is to be issued under section 104(d)(1). Further, if more unwarrantable violations are found during any subsequent inspection of the mine, withdrawal orders under section 104(d)(2) of the Act are to be issued. 30 U.S.C. § 814(d)(2). The operator remains on probation, and issuance of withdrawal orders based on unwarrantable findings does not cease, until an inspection of the mine discloses no further unwarrantable failure violations. Kitt Energy Corp., 6 FMSHRC 1596 (July 1984), aff'd sub nom. UMWA v. FMSHRC, 768 F.2d 1477 (D.C. Cir. 1985). This, then, is the section 104(d) "chain."

Section 104(d) is an integral part of the Mine Act's graduated enforcement scheme, a scheme providing for "increasingly severe sanctions for increasingly serious violations or operator behavior." Nacco, supra, 9 FMSHRC at 1545, quoting Cement Division, National Gypsum Co., 3 FMSHRC 822, 828 (April 1981). Like the overall enforcement scheme of the Act, section 104(d) imposes sanctions in a graduated manner, with increasingly serious consequences. White County Coal Corp., 9 FMSHRC 1578, 1581 (September 1987). The focus of section 104(d) is upon the operator's unwarrantable conduct. Section 104(d) seeks to discourage repetition of such conduct by placing the operator on a probationary "chain." This probationary period, backed up by the threat of a withdrawal order, is "among the Secretary's most powerful instruments for enforcing mine safety." UMWA v. FMSHRC, supra, 768 F.2d at 1479.

In order to preserve the use of section 104(d) as an effective deterrent, the use of section 104(d) sanctions has been upheld in situations where unwarrantable failure violations have been detected

after they have ceased to exist, recognizing that many violations by their very nature cannot be, or are unlikely to be, observed or detected until after they occur. Emerald Mines Corp, 9 FMSHRC 1590, 1594 (September 1987), aff'd sub nom. Emerald Mines Corp. v. FMSHRC, 863 F.2d 51, 58-59 (D.C. Cir. 1988); Nacco, 9 FMSHRC at 1581-82; Greenwich I, 9 FMSHRC at 1605. The Secretary's use, in general, of section 104(d) withdrawal orders for past violations has also been upheld because such orders are the procedural vehicles specified and required by the Mine Act for alleging unwarrantable violations once a predicate section 104(d)(1) citation has been issued. White County, supra, 9 FMSHRC at 1581. The Emerald court noted that, in general, such use of section 104(d) orders is not "pointless" because it serves to place or keep the mine operator on the section 104(d) probationary chain. 863 F.2d at 57.

Here, however, the Secretary issued purported section 104(d)(1) orders, but the "orders" served none of section 104(d)'s special and important purposes. The Secretary concedes that when the contested orders were issued, the Greenwich No. 1 mine was under the section 104(d)(2) portion of the section 104(d) "chain." Nevertheless, rather than issuing the orders pursuant to section 104(d)(2), the Secretary chose instead to issue section 104(d)(1) orders "related back to the time the violations were found" or to the time of their occurrence some 13 months earlier. Sec. Br. to ALJ at 6; Sec. Br. 6. Because the enforcement action pursued by the Secretary relates the orders back 11-13 months in time, the orders had absolutely no probationary effect, either then or at the time of their actual issuance. Further, because the specific violations cited in the orders had been abated months before, the orders were terminated simultaneously with their issuance and no miners were withdrawn by these withdrawal orders. See Sec. Br. 6, 16.

Thus, the section 104(d)(1) orders challenged here served none of the special probationary or protective purposes of section 104(d). They did not affect the existing probationary section 104(d)(2) "chain"; they did not require the withdrawal of miners from the areas affected by the violations; and, because the violations had ceased to exist, they did not require the abatement of unsafe and violative conditions. In sum, with these orders the Secretary did not impose any of the special sanctions serving as the hallmark of section 104(d) action, and the orders served none of section 104(d)'s special purposes.

The important issues raised by the parties concerning the imposition of section 104(d)'s special sanctions should be considered and resolved in a case where such sanctions actually have been invoked by the Secretary. In resolving challenges to the Secretary's enforcement authority, it is important to examine the reality of the Secretary's enforcement actions. Emerald, 863 F.2d at 58. Here, under the guise of section 104(d) sanctions, the Secretary's enforcement action actually amounts to nothing more than citations of violations, which citations contain special findings of significant and substantial and unwarrantable failure. Were we to pursue here the important issues raised by the parties, we would be interpreting section 104(d) in a factual context devoid of consequential section 104(d) enforcement action. In the exercise of our prudential judicial discretion,

therefore, we conclude that resolution of such important issues under these circumstances would be unwise.

III.

Accordingly, under the circumstances of this case, the contested orders, in essence, are nothing more than section 104(a) citations containing special findings, but lacking section 104(d) effect. We therefore affirm in result the judge's modification of the orders to section 104(a) citations and we remand the matter for his determination of the merits of the violations, the significant and substantial and unwarrantable failure allegations, and, if necessary, the civil penalties to be imposed.

Ford B. Ford, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

Distribution

Linda L. Leasure
U.S. Department of Labor
Office of the Solicitor
4015 Wilson Boulevard
Suite 400
Arlington, Virginia 22203

Timothy M. Biddle, Esq.
Thomas C. Means, Esq.
Crowell & Moring
1001 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2505

Mary Lu Jordan, Esq.
Earl R. Pfeffer, Esq.
United Mine Workers of American
900 Fifteenth St., N.W.
Washington, D.C. 20005

Administrative Law Judge Roy Maurer
Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges
2 Skline, 10th floor
5203 Leesburg Pike
Falls Church, Virginia 22041

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

May 23, 1990

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. WEST 87-88
MID-CONTINENT RESOURCES, INC.	:	
and	:	
UNITED MINE WORKERS OF AMERICA (UMWA)	:	

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

DECISION

BY THE COMMISSION:

This civil penalty proceeding, brought by the Secretary of Labor under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982)("Mine Act" or "Act"), arises from a dispute between the Secretary and Mid-Continent Resources, Inc. ("Mid-Continent"), concerning section 103(f) of the Mine Act, the miner "walkaround" provision. 1/

1/ The term "walkaround" is used herein for the sake of convenience in reference to the rights granted miners' representatives under section 103(f) of the Mine Act, which provides:

> Subject to regulations issued by the Secretary, a representative of the operator and a representative authorized by his miners shall be given an opportunity to accompany the Secretary or his authorized representative during the physical inspection of any coal or other mine made pursuant to the provisions of subsection (a) of this section, for the purpose of aiding such inspection and to participate in pre- or post-inspection conferences held at the mine. Where there is no authorized miner representative, the Secretary or his authorized representative shall consult with a

I.

This proceeding arises from a citation and withdrawal order issued to Mid-Continent by the Department of Labor's Mine Safety and Health Administration ("MSHA") on May 13, 1986, charging Mid-Continent with a violation of section 103(f) of the Act. 2/ The citation stated that on May 13, 1986, Mid-Continent denied Robert Butero, allegedly a designated representative of Mid-Continent's miners, access to Mid-Continent's Dutch Creek No. 1 Mine near Redstone, Colorado, for purposes of accompanying an MSHA inspector on walkaround during the latter's inspection of the mine. About one month earlier, the United Mine Workers of America ("UMWA") had notified both MSHA and Mid-Continent, pursuant to the Secretary's Part 40 regulations, that it had been designated by two employees at the Dutch Creek No. 1 Mine as the representative of those miners under the Mine Act. Mr. Butero was listed as the specific representative of the miners. 3/ Shortly after issuance of the citation on May 13, the inspector also issued Mid-Continent a "no area affected" section 104(b) order of withdrawal, 30 U.S.C. § 814(b), alleging that Mid-Continent continued to refuse Butero the right to accompany the inspector during inspection of the

---

> reasonable number of miners concerning matters of health and safety in such mine. Such representative of miners who is also an employee of the operator shall suffer no loss of pay during the period of his participation in the inspection made under this subsection. To the extent that the Secretary or authorized representative of the Secretary determines that more than one representative from each party would further aid the inspection, he can permit each party to have an equal number of such additional representatives. However, only one such representative of miners who is an employee of the operator shall be entitled to suffer no loss of pay during the period of such participation under the provisions of this subsection. Compliance with this subsection shall not be a jurisdictional prerequisite to the enforcement of any provision of this [Act].

30 U.S.C. § 813(f).

2/ There was no evidentiary hearing in this matter. Accordingly, the statement of facts in this decision is based on the parties' pleadings and briefs and the relevant citation and order issued by MSHA.

3/ 30 C.F.R. Part 40, the regulations adopted by the Secretary governing the identification of representatives of miners at mines, sets forth filing requirements for such representatives and procedures for identification of such representatives. 30 C.F.R. § 40.1(b) defines "representative of miners" as "[a]ny person or organization which represents two or more miners at a coal or other mine for the purposes of the Act...."

mine. 4/ Prior to an evidentiary hearing before Administrative Law Judge John J. Morris, the Secretary moved to dismiss the proceeding on the ground that further investigation had disclosed that the individual in question was not a properly designated representative of miners. Mid-Continent opposed dismissal and moved for declaratory relief. Judge Morris denied Mid-Continent's request for declaratory relief and dismissed the proceeding. 10 FMSHRC 881 (July 1988)(ALJ). On review, Mid-Continent repeats its request for declaratory relief. For the reasons that follow, we deny that request and affirm the judge.

At no time during its thirty-plus years of operation has the UMWA represented employees for labor relations purposes at Mid-Continent's mines. As early as 1975, however, the UMWA attempted to become the collective bargaining representative of Mid-Continent's hourly employees when it unsuccessfully sought to have the Redstone Workers Association ("RWA") decertified as the collective bargaining representative under the National Labor Relations Act, 29 U.S.C. § 151 et seq. (1982)("NLRA"). Thereafter, the RWA continued as the employees' collective bargaining representative until 1981, when, pursuant to a representation election requested by the UMWA and conducted by the National Labor Relations Board ("NLRB"), Mid-Continent's employees voted to become nonunion. In 1986, the UMWA began another organizing campaign among Mid-Continent's hourly employees. Mid-Continent alleges that beginning in April 1986, the UMWA proceeded to use the miners' representative process provided by the Mine Act and 30 C.F.R. Part 40 as an organizing tool at the Dutch Creek #1 Mine. According to Mid-Continent, in April 1986, the UMWA caused to be filed with MSHA the form signed by two miners designating the UMWA and Mr. Butero as their representative at the mine. In September 1986, the UMWA filed another petition for representation with the NLRB. A representation election was held in December 1986 and Mid-Continent's employees again rejected representation by the UMWA.

On March 16, 1987, the Secretary filed with the Commission a civil penalty petition in connection with Mid-Continent's alleged violation of section 103(f) of the Mine Act. Mid-Continent filed an answer, and the matter was assigned to Judge Morris. In October 1987, the judge set the case for hearing. At that time, he also allowed the UMWA to intervene as a party and permitted the American Mining Congress ("AMC") to appear as amicus curiae. Prior to hearing, however, the Secretary filed a motion to withdraw the civil penalty petition and to dismiss the proceeding. The Secretary asserted that one of the two individuals who had signed the form designating Butero as the miners' representative was not an active miner at the time that the form was filed and, thus, that the designation did not comply with applicable Part 40 requirements. Therefore, according to the Secretary, Butero was not a properly designated miners' representative and Mid-Continent did not violate the Mine Act in denying him access.

Mid-Continent opposed the Secretary's dismissal request and moved

---

4/ A "no area affected" withdrawal order means that actual withdrawal of miners from the mine or an area of the mine is not required.

for declaratory relief. Mid-Continent argued that a nominal number of employees should not be permitted, under color of Part 40, to designate as a miners' representative a union that does not also represent the employees for collective bargaining purposes under the NLRA. Mid-Continent contended that the miners' representative process under the Mine Act was being improperly manipulated to facilitate organizational activity under the NLRA. Mid-Continent also asserted that it had been denied constitutional due process in the application of the Part 40 regulations to it. Mid-Continent further submitted that Butero had been given advance notice of the inspection in violation of section 110(e) of the Act. 5/ Mid-Continent alleged that Butero, who lived several hundred miles from the mine, had arrived at the mine entrance at 6:30 a.m., about the same time as the inspector and, therefore, must have been given advance notice of the inspection. Mid-Continent requested declaratory relief to the effect that section 110(e) had been violated or, alternatively, requested that the matter be referred to the Inspector General of the Department of Labor and to the Department of Justice.

The administrative law judge denied Mid-Continent's requests for declaratory relief and granted the Secretary's motion to dismiss the proceeding. The judge recognized the Commission's discretionary power to grant declaratory relief, but stated that "[t]he pivotal issue is whether the Commission should exercise its discretion and grant declaratory relief." 10 FMSHRC at 885. He concluded that, in this instance, declaratory relief was not warranted. The judge noted Mid-Continent's further contentions that permitting access to its mine by a UMWA representative would "clearly conflict" with the NLRA and that the Mine Act was being improperly manipulated to facilitate union organizational activity under the NLRA. 10 FMSHRC at 885. The judge concluded that his role was to adjudicate Mine Act issues and that Mid-Continent's appropriate avenue of relief, if any, was before the NLRB. 10 FMSHRC at 885-86. He also rejected Mid-Continent's contention that declaratory relief was necessary to explore the tensions between the asserted right of a non-employee to serve as a representative during inspections and the Act's prohibition of the giving of advanced notice of inspections. The judge stated: "[t]he date and time of regularly scheduled mine inspections, as mandated by the Act, would probably be common knowledge to any interested miner at the site." 10 FMSHRC at 886. Accordingly, the judge denied Mid-Continent's motion for declaratory relief, granted the Secretary's motion to withdraw the civil penalty petition, vacated the proposed penalty, and dismissed the

---

5/ Section 110(e) of the Mine Act states:

> Unless otherwise authorized by this [Act], any person who gives advance notice of any inspection to be conducted under this [Act] shall, upon conviction, be punished by a fine of not more than $10,000 or by imprisonment for not more than five years or both.

30 U.S.C. § 820(e).

proceeding. 10 FMSHRC at 886.

The Commission granted petitions for discretionary review filed by both Mid-Continent and amicus AMC. The AMC moved to consolidate the two petitions, and the Commission granted the motion. Subsequently, ASARCO, Inc. ("ASARCO") filed a motion seeking leave to file an amicus brief out of time, which the Secretary opposed. The Secretary also filed a motion to dismiss the AMC's petition for discretionary review on the grounds that the AMC lacked standing to petition the Commission for review of the judge's decision. On December 19, 1989, the Commission issued an interlocutory procedural order in which it concluded that the AMC had not shown a sufficiently direct and concrete interest in the proceeding or that it would be adversely affected by the outcome of the proceeding. Accordingly, we granted the Secretary's motion to dismiss the AMC's petition for discretionary review and vacated that part of the direction for review granting the AMC's petition. Mid-Continent Resources, Inc., 11 FMSHRC 2399 (December 1989). The Commission nevertheless permitted the AMC to continue in its role as an amicus, and to participate in the oral argument before the Commission. 6/ 11 FMSHRC at 2404. We also denied ASARCO's motion to file an amicus brief.

II.

In its brief on review, Mid-Continent primarily addresses the merits of the various issues that it sought to put before the judge in seeking declaratory relief, proceeding on the premise that this case is ripe for the grant of such relief. The Secretary responds essentially that this case is not an appropriate vehicle for declaratory relief as to any of the substantive issues raised by Mid-Continent because there is no actual "case or controversy" between the parties, and, even if there were a case or controversy between the parties, the judge did not abuse his discretion in denying declaratory relief under the circumstances of this case.

The Commission has recognized that it may grant declaratory relief in appropriate proceedings. Beaver Creek Coal Co., 11 FMSHRC 2428, 2430 (December 1989); Kaiser Coal Corp., 10 FMSHRC 1165, 1170-71 (September 1988); Climax Molybdenum Co., 2 FMSHRC 2748, 2751-52 (October 1980), aff'd sub nom. Climax Molybdenum Co. v. Secretary of Labor, 703 F.2d 447, 452 (10th Cir. 1983); see also Youghiogheny & Ohio Coal Co., 7 FMSHRC 200, 203 (February 1985)("Y&O"). The sources of this authority are section 105(d) of the Act, 30 U.S.C. § 815(d), empowering the Commission to "direc[t] other appropriate relief," and section 5(d) of the Administrative Procedure Act, 5 U.S.C. § 554(e)(1982)("APA"), which

---

6/ The AMC filed a petition for review of this interlocutory Commission procedural order in the United Stated Court of Appeals for the District of Columbia Circuit. AMC v. FMSHRC & Secretary of Labor, No. 90-1018 (January 19, 1990). The petition seeks review of the Commission's determination that the AMC lacked party status and of the Commission's dismissal of the AMC's petition for discretionary review.

is incorporated by reference into the Mine Act. 30 U.S.C. § 815(d). 7/

The discretionary nature of administrative declaratory relief is its paramount feature. Thus, the Tenth Circuit in Climax, supra, rejecting the operator's contention that the Commission was required to grant declaratory relief, explained that the "Commission's power to grant declaratory relief is clearly discretionary, see ... 5 U.S.C. § 554(e).... [T]he Commission is not required to grant declaratory relief unless a failure to do so would be an abuse of discretion." 703 F.2d at 452 n. 4. The Court discussed the broad boundaries of that discretion:

> [5 U.S.C. § 554(e)] of the [APA] clearly commits the power to grant declaratory relief to the sound discretion of the agency. ... See also ... 30 U.S.C. § 815(d).... In exercising its discretion, the Commission is entitled to assess the advantages and disadvantages associated with declaratory relief. Advantages include the opportunity efficiently to terminate a controversy or remove uncertainty, ... 5 U.S.C. § 554(e), while disadvantages include both the administrative burden imposed by a policy of issuing advisory opinions and the familiar problems surrounding the adjudication of abstract controversies. See Yale Broadcasting Co. v. FCC, 478 F.2d 594, 602 (D.C. Cir.), cert. denied, 414 U.S. 914 ... (1973).

703 F.2d at 452. See generally Intercity Transp. Co. v. United States, 737 F.2d 103, 108-10 (D.C. Cir. 1984). The granting of declaratory relief is committed, in the first instance, to the sound discretion of the Commission administrative law judge but his determination is subject to close review by the Commission. See generally 10A C. Wright, A. Miller & M. Kane, Federal Practice and Procedure: Civil 2d § 2759 (1983)("Wright & Miller"); 6A J. Moore, J. Lucas & G. Grother, Moore's Federal Practice Par. 57.08 (2d ed. 1987)("Moore's"). See also, e.g., United States v. State of Washington, 759 F.2d 1353, 1356-57 (9th Cir. 1985)(en banc, per curiam).

The Commission has noted that "the primary purpose of declaratory relief is to save parties from unnecessarily acting upon their own view of the law." Beaver Creek, supra, 11 FMSHRC at 2430, quoting Climax, supra, 2 FMSHRC at 2752. Additionally, for any grant of Commission declaratory relief, the complainant must show that there is an actual, not moot, controversy under the Mine Act between the parties, that the issue as to which relief is sought is ripe for adjudication, and that the threat of injury to the complainant is real, not speculative. See generally, 5 J. Stein, G. Mitchell & B. Mezines, Administrative Law

---

7/ The Commission has held, however, that 5 U.S.C. § 554(e), by itself, does not confer declaratory authority upon the Commission unless Mine Act jurisdiction otherwise obtains. Kaiser, supra, 10 FMSHRC at 1170.

§ 46.03 (1988).

Analogously, federal courts, in applying the federal Declaratory Judgment Act, 28 U.S.C. § 2201 and Fed. R. Civ. P. 57, which implements that Act, may grant declaratory relief only in the context of actual "cases and controversies." This requirement is imposed by Article III, Section 2 of the federal Constitution and by the Declaratory Judgment Act itself. See generally 10A Wright & Miller § 2757; 6A Moore's Pars. 57-11--57-13. Among other things, the Article III "case or controversy" requirement weighs against use of the declaratory process to issue advisory opinions or to resolve abstract or hypothetical problems. E.g., Maryland Casualty Co. v. Pacific Coal & Iron Co., 312 U.S. 270, 272-73, 85 L.Ed. 826, 828-29 (1941). Even more relevant to this case, Article III prohibits declaratory relief in moot cases. E.g., Barany v. Buller, 707 F.2d 285, 287 (7th Cir. 1983). As Wright & Miller state:

> The presence of a controversy must be measured at the time the court acts. It is not enough that there may have been a controversy when the action was commenced if subsequent events have put an end to the controversy or the opposing party disclaims the assertion of countervailing rights. A case is moot when the issues presented no longer are "live" or the parties no longer have a legally cognizable interest in the outcome.

10A Wright & Miller § 2757 (pp. 602-17)(footnotes omitted).

Courts have granted declaratory relief in situations where, although the events associated with the action may not have ripened into a present controversy, "one or both of the parties have taken steps or pursued a course of conduct which will result in an 'imminent and inevitable litigation, provided the issue is not settled and stabilized by a tranquilizing declaration.'" Bruhn v. STP Corp., 312 F. Supp. 903, 906 (D. Colo. 1970), quoting Borchard, Declaratory Judgments 57 (2d ed. 1941). Similarly, "when there is a substantial likelihood that an allegedly moot question will recur, the issue remains justiciable and declaratory judgment may be rendered to define the rights and obligations of the parties." 10A Wright & Miller § 2757 (pp. 617-18).

We recognize that concepts of mootness must be applied with care in the administrative setting. As the Tenth Circuit noted in Climax, the Article III "case or controversy" requirement does not literally apply to federal administrative agencies like the Commission. 703 F.2d at 451, citing Tennessee Gas Pipeline Co. v. FPC, 606 F.2d 1373, 1379-80 (D.C. Cir. 1979). The Court explained the appropriate administrative approach to questions of mootness as follows:

> [A]n agency possesses substantial discretion in determining whether the resolution of an issue before it is precluded by mootness. ... However, in exercising this discretion, an agency receives guidance from the policies that underlie the "case or controversy" requirement of article III. In

> particular, the agency's determination of mootness is informed by an examination of the proper institutional role of an adjudicatory body and a concern for judicial economy. See [Tennessee Gas Pipeline, supra]; Lucas Coal Co. v. Interior Board of Mines Operations Appeals, 522 F.2d 581, 587 (3d Cir. 1975). As a result, we conclude that an agency acts within its discretion in refusing to hear a case that would be considered moot if tested under the article III "case or controversy" requirement.

703 F.2d at 451.

This case is, in fact, moot. The Secretary vacated the underlying citation and withdrawal order and sought dismissal of the civil penalty proceeding, which relief the judge granted. The enforcement action involving that citation and withdrawal order is extinct. Therefore, at the time of the judge's order of dismissal, there was not before the Commission a live "case or controversy" between the Secretary and Mid-Continent as to the enforcement action out of which the request for declaratory relief arose.

Nevertheless, even where the Secretary seeks vacation of a contested enforcement action, a party to that action may oppose such vacation or seek declaratory relief. Y&O, supra, 7 FMSHRC at 203. The Secretary's disclaimer of countervailing rights and her willingness to dismiss the proceeding, are important factors to be taken into consideration in weighing declaratory relief. The opposing party is nevertheless entitled to establish a substantial likelihood of recurrence of the claimed enforcement harm or the imminence of repeated injury.

Here, we conclude that no such showing has been made. No course of conduct has been shown that will necessarily result in imminent or inevitable litigation with the Secretary concerning the issue raised in this proceeding. So far as this record discloses, there is no present claim by the UMWA or any other labor organization that it has been designated as representative of any of Mid-Continent's employees for walkaround purposes. In fact, the Secretary states in her brief that no notification has been filed with her pursuant to 30 C.F.R. Part 40, asserting such representation. S. Br. 10. As the Secretary asserts:

> Nor is there any basis for assuming that such a filing will be made in the foreseeable future. Since the Secretary vacated the citation [in approximately November 1987], the UMWA has not sought to reassert miners' representative status by obtaining the necessary additional authorization in the intervening time period.

Id. Mid-Continent also has not established that similar confrontations have since occurred at its mines, nor has Mid-Continent provided evidence supporting its claim that the alleged problem of nonemployee walkaround representatives is widespread in the industry.

Thus, we are left in this case with Mid-Continent's speculative concerns, which, depending as they do upon multiple contingencies and amounting to pure conjecture, do not provide the basis for declaratory relief. Beaver Creek, 11 FMSHRC at 2431, citing SEC v. Medical Committee on Human Rights, 404 U.S. 403, 406 (1972).

In Climax, the Commission noted that Climax had not abated the citation at issue and found "little reason to believe that [Climax] will expend monies on abatement or risk loss from failure to abate enforcement action by MSHA before contests of any future citations are fully litigated." 2 FMSHRC at 2753. Here, Mid-Continent did not abate the citation and was confronted with a "no-area-affected" withdrawal order. Indeed, even should the multiple speculative contingencies of which Mid-Continent complains occur, the operator has not established that it will suffer irreparable harm before contests of any future citations are fully litigated. We note that the Secretary's counsel assured the Commission at oral argument that it is the Secretary's policy to issue a "no area affected" withdrawal order when, as here, an operator refuses to comply with a citation alleging a violation of section 103(f). Oral Arg. Tr. 29. Such an order does not subject the operator to the withdrawal of miners and the attendant consequences of lost production. Counsel's assurance reiterates the official policy of the Secretary as published in the Secretary's Interpretative Bulletin, setting forth guidelines for MSHA inspectors' interpretation and application of section 103(f). 43 Fed. Reg. 14546, 14547 (1978). Thus, Mid-Continent is at no risk of production loss from failure to abate the citation. See Climax, 2 FMSHRC at 2753.

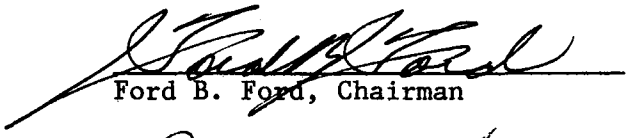
Further, given the Secretary's assurance that, in the event of an operator's failure to abate an alleged violation of section 103(f), withdrawal of miners will not ordinarily occur, it should not be expected that she would take the more extreme enforcement action of attempting to threaten to impose civil penalties upon a noncompliant operator pursuant to section 110(b) of the Act, 30 U.S.C. § 820(b), or criminal penalties pursuant to section 110(d) of the Act, 30 U.S.C. 820(d). We therefore believe that the fears in this regard expressed by counsel for Mid-Continent are not well-founded. See Oral Arg. Tr. 54.

To grant Mid-Continent's request for declaratory relief, the Commission would be required to accept a long chain of possible future contingencies. The Commission would "express legal opinions on academic theoreticals which might never come to pass." Amer. Fidelity & Cas. Co. v. Pennsylvania Threshermen & Farmers Mut. Cas. Ins. Co., 280 F.2d 453, 461 (5th Cir. 1960). We do not discern any urgent need for declaratory relief or any convincing demonstration that Mid-Continent is being forced to act at real, as opposed to hypothetical, peril.

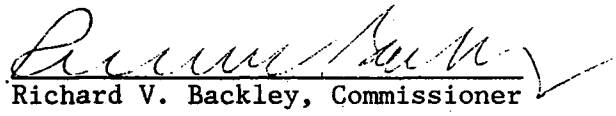
III.

Accordingly, we conclude that the judge did not abuse his discretion in denying Mid-Continent's request for declaratory relief as to the substantive issues in question. In view of this conclusion, we need not address the merits of those substantive issues.

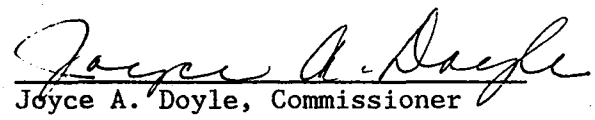
On the foregoing bases, we affirm the judge's decision in result. 8/



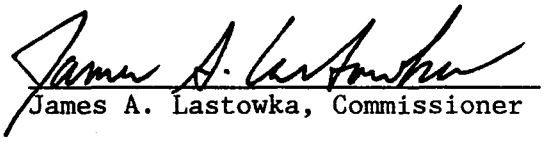
Ford B. Ford, Chairman



Richard V. Backley, Commissioner



Joyce A. Doyle, Commissioner



James A. Lastowka, Commissioner

8/ Commissioner Nelson did not participate in the consideration or disposition of this matter.

Distribution

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

Edward Mulhall, Jr., Esq.
Delaney & Balcomb
Drawer 790
Glenwood Springs, Colorado 81602

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

Charles Newcom, Esq.
Susan K. Grebeldinger, Esq.
Sherman & Howard
633 17th Street, Suite 3000
Denver, Colorado 80202

Edward M. Green, Esq.
Mark G. Ellis, Esq.
American Mining Congress
1920 N Street, N.W., Suite 300
Washington, D.C. 20036

Henry Chajet, Esq.
Jackson & Kelly
1701 Pennsylvania Ave., N.W.
Suite 650
Washington, D.C. 20006

Administrative Law Judge John J. Morris
Federal Mine Safety & Health Review Commission
1244 Speer Blvd., Suite 280
Denver, Colorado 80204

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

May 23, 1990

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. KENT 89-27-M
MOUNTAIN PARKWAY STONE, INC.	:	

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

DECISION

BY THE COMMISSION:

The issue in this civil penalty proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988)(the "Mine Act"), is whether Commission Administrative Law Judge Avram Weisberger erred in concluding that Mountain Parkway Stone, Inc. ("Mountain Parkway") did not violate 30 C.F.R. § 57.9002 (1988), a mandatory safety standard that required that "[e]quipment defects affecting safety shall be corrected before the equipment is used." 11 FMSHRC 1289 (July 1989). 1/ For the reasons that follow, we hold that the judge erred and we reverse.

Mountain Parkway operates the Staton Mine, an underground limestone mine and surface plant equipped with crushing and screening facilities, located in Powell County, Kentucky. On August 17, 1988, during a regularly scheduled inspection of the Staton Mine, Eric Shanholtz, an inspector of the Department of Labor's Mine Safety and Health Administration ("MSHA"), issued a citation to Mountain Parkway alleging a violation of section 57.9002. Inspector Shanholtz issued the

---

1/ 30 C.F.R. § 57.9002 (1988) was revised as of July 1, 1988, and transferred along with 30 C.F.R. §§ 56.9002, 56/57.9001, and 56/57.9073 to 30 C.F.R. §§ 56.14100 and 57.14100. 53 Fed. Reg. 32497, 32504 (August 1988). Sections 56.14100 and 57.14100 became effective on October 24, 1988. 53 Fed. Reg. 32496 (August 1988). Therefore, at the time of the inspection on August 17, 1988, former section 57.9002 was still in effect.

citation because he believed there were defects affecting safety in a C-50 boom truck parked at the mine. Specifically, the inspector noted that there were no stabilizing jacks on the truck. (Stabilizing jacks are outriggers that are used to support a boom truck when the boom is raised. Tr. 232.) Without such stabilizing jacks, the truck could overturn if it were "utilized in the wrong capacity." Tr. 233. Shanholtz additionally noted several hydraulic leaks in the boom controls and in the boom's left cylinder that presented both fire and slipping hazards and allowed the boom to drop. The doors of the truck were missing and the truck did not have seat belts. In Shanholtz's opinion, these conditions presented the hazard of allowing a driver to fall from the vehicle if it took a sharp turn. Shanholtz further observed that the truck did not have front or rear lights, although it was apparently used underground. Finally, Shanholtz noted that a rag was used as a gas cap on the gas tank. Shanholtz testified that the rag could act as a wick for the gas and present an explosion or ignition hazard. Tr. 232-34.

At the time of the inspection, the C-50 boom truck was parked at the mine and was not "tagged out," i.e., did not have any tags on it to indicate that it was in need of repair. Tr. 203-04. In addition, the truck was in "turn-key" condition; the only step required to start the truck was to turn the ignition key. Tr. 203-04, 249; Exhs. 8-10, 15-16.

Shanholtz testified that there were tire tracks around the truck that he believed to be fresh and that the truck had been used whenever there was a need to load. Tr. 183, 189-90. Shanholtz further testified that Gary Parks, a mechanic employed by Mountain Parkway, informed him that the truck had been used during the night shift immediately prior to the inspection of August 17, 1988. Tr. 181-82, 477. Shanholtz testified that Mr. Parks also informed him that the boom had dropped while the truck was being used to load. Tr. 239.

Based upon his observations and his discussions with Mountain Parkway employees, Shanholtz issued to Mountain Parkway a citation pursuant to section 104(a) of the Act, 30 U.S.C. § 814(a), alleging that it had violated section 57.9002 and that the violation was of a significant and substantial nature. The basis for Shanholtz's determination that the violation was significant and substantial was his finding that "[t]he likelihood of something happening was reasonably likely in that if an injury or fatality would occur, then it would be serious." Tr. 239. Shanholtz also noted that the mine operator was highly negligent because the operator should have observed the condition of the truck. After the Secretary of Labor proposed a civil penalty for the alleged violation, the matter proceeded to hearing before Judge Weisberger.

Before the judge, Mountain Parkway contended that it could not be cited for a violation of section 57.9002 because the truck was not actually being used. Mountain Parkway presented testimony by some of its employees that at the time of the August 17 inspection, the truck had not been used for a period of time. According to these witnesses, during that period five of the operator's seven employees were engaged in paving at a site 10 to 12 miles away from the mine, an activity that

did not require use of the truck, and they were not engaged in excavation at the mine, which might have required use of the truck. In its Answer to the Secretary's Petition for Assessment of Penalties, Mountain Parkway also stated that it was planning to remedy any defects on the truck prior to the resumption of excavation work at the mine.

In his decision, the judge determined, without citing any precedent, that section 57.9002 requires "safety defects to be corrected as a condition precedent to the use of the equipment" and that there could be "no violation in the absence of evidence of the equipment being used." 11 FMSHRC at 1295. The judge determined that there was no evidence that the truck "was being used" and, therefore, "dismissed" the citation. Id. 2/ The Commission granted the Secretary's subsequent petition seeking review of the judge's decision. On review, the Secretary argues that the judge misconstrued section 57.9002 and improperly vacated the citation. We agree.

In Ideal Basic Industries, Cement Division, 3 FMSHRC 843 (April 1981), the Commission construed the concept of equipment use in 30 C.F.R. § 56.9-2 (1978) which, like section 57.9002, identically provided that "equipment defects affecting safety shall be corrected before the equipment is used" (emphasis added). The Commission reviewed the evidence in order to determine whether a track mobile with a defective coupling had actually been used. After answering that question in the affirmative, the Commission explained that even if the evidence was insufficient to prove actual use of the track mobile while the coupling was defective, the mobile had been nonetheless "used" within the meaning of the standard. The Commission based the latter holding, in part, upon the fact that the equipment was located in a normal work area, was capable of being used, and had not been removed from service. 3 FMSHRC at 844-45. See also Allied Chemical Corp., 6 FMSHRC 1854, 1859 (August 1984)(similarly construing 30 C.F.R. § 57.9-2 (1978), the identical regulatory predecessor of section 57.9002).

Ideal's principles are dispositive of the issue presented in this case. The evidence that the C-50 boom truck had defects affecting safety was largely uncontroverted. The only evidence that Mountain Parkway presented to counter Shanholtz's testimony regarding the multiple defects existing on the truck was that of Charles Williams, one of its employees, who testified that he had seen stabilizing jacks on the truck close to the time of the inspection on August 17, 1988. This was insufficient to overcome Shanholtz's detailed testimony regarding the numerous equipment defects affecting safety that prompted his citation.

The judge's focus on whether the boom truck "was being used" is too narrow. Under the standard a violation occurs if equipment "is used" while in an unsafe condition. Here although the equipment was not in actual use at the time of citation, the record establishes that the

---

2/ We assume that the judge intended to vacate the citation in accordance with the provisions of section 105(d) of the Mine Act, 30 U.S.C. § 815(d).

boom truck had been used while it had the cited defects affecting safety. Shanholtz's testimony that Parks had informed him that the boom was dropping while the Mountain Parkway employees were using the truck to load was unrefuted by Mountain Parkway witnesses. Tr. 239. (Shanholtz had also testified, without contradiction, that the truck had multiple hydraulic leaks that had allowed the boom to drop. Tr. 233.)

In this instance, however, and more compelling is the undisputed evidence that, at the time of the inspection, the truck was parked in the mine in turn-key condition and had not been removed from service. In light of Ideal, supra, this evidence established use of equipment within the meaning of section 57.9002, obviating any need to show that the defective truck was in actual use at the time of the inspection. We also reject Mountain Parkway's apparent defense that it intended to remedy any defects prior to the resumption of excavation work. No evidence was presented at trial that the truck was "under repair." There was no evidence that any employee had been assigned to repair the boom truck and no evidence that anyone was actually engaged in repairing the truck on August 17, 1988, or at any other time. See, e.g., Allied Chemical, 6 FMSHRC at 1860.

Accordingly, we hold that Mountain Parkway violated section 57.9002, and conclude that the judge erred in vacating the citation in issue.

For the foregoing reasons, the judge's decision with respect to this citation is reversed and this matter is remanded for determination of the allegation that the violation was of a significant and substantial nature and for assessment of an appropriate civil penalty.

Ford B. Ford, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

Distribution

Colleen A. Geraghty, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd.
Arlington, Virginia 22203

Jeffery T. Staton, V.P.
Mountain Parkway Stone, Inc.
Route 1, Box 309-B
Stanton, Kentucky 40380

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

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

May 24, 1990

UTAH POWER & LIGHT COMPANY, MINING DIVISION	:	
v.	:	Docket No. WEST 89-161-R
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	

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

DECISION

BY THE COMMISSION:

This contest proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988)(the "Mine Act"), involves issues of whether Utah Power & Light Company, Mining Division ("UP&L") violated 30 C.F.R. § 75.400, a mandatory safety standard prohibiting accumulations of combustible materials, even if UP&L complied with the cleanup plan it established pursuant to 30 C.F.R. § 75.400-2. 1/ Also at issue are whether the alleged violation was of a

---

1/ 30 C.F.R. § 75.400, which repeats the statutory language of section 304(a) of the Mine Act, U.S.C. § 864(a), provides:

> 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.

30 C.F.R. § 75.400-2, entitled "Cleanup program," provides:

> A program for regular cleanup and removal of accumulations of coal and float coal dusts, loose coal, and other combustibles shall be established and maintained. Such program shall be available to

significant and substantial nature and whether it was caused by UP&L's unwarrantable failure to comply with the cited standard. Commission Administrative Law Judge John J. Morris concluded that UP&L violated 30 C.F.R. § 75.400 and that the violation was of a significant and substantial nature and caused by UP&L's unwarrantable failure to comply. 11 FMSHRC 710 (April 1989)(ALJ). For the reasons set forth below, we affirm the judge's finding of a violation and his finding that the violation was of a significant and substantial nature, but reverse his unwarrantable failure determination.

UP&L operates the Cottonwood Mine, an underground coal mine located in Utah. On March 20, 1989, Department of Labor Mine Safety and Health Administration ("MSHA") Inspector Donald Gibson, accompanied by Forrest Adison, UP&L's Fire Boss, and James Behling, UP&L's Safety Engineer, conducted an electrical inspection of the Cottonwood Mine. In the 9 East working section, Inspector Gibson observed a shuttle car tear down part of the line curtain located along the left rib. When Gibson looked behind the line curtain, he observed loose coal that he believed constituted an impermissible accumulation in violation of section 75.400 (n.1 supra). The mass of loose coal measured 104 feet-6 inches in length, 14 to 31 inches in depth, and 12 to 34 inches in width, and weighed approximately 500 to 800 pounds. Tr. 80. Gibson issued UP&L a withdrawal order pursuant to section 104(d)(1) of the Mine Act, 30 U.S.C. § 814(d)(1), citing a violation of section 75.400 and including significant and substantial and unwarrantable failure findings.

When Inspector Gibson and Mr. Behling arrived on the surface, Behling showed Gibson a copy of UP&L's cleanup plan established pursuant to section 75.400-2 (n.1 supra). Gibson's review of the cleanup plan did not affect his decision to issue the withdrawal order because, in his opinion, the cleanup plan conflicted with section 75.400 in that it permitted accumulations of combustible materials to exist. Gibson testified that he issued the order because, among other things, he determined that there had been production of coal in the 9 East working section on March 17, 1989, and that the cited accumulations resulting from that production had not been removed on subsequent idle shifts. He was of the opinion that there were possible ignition sources in that area and he had observed combustible float coal dust on rock-dusted surfaces. Gibson determined that, by the time the next cross-cut was driven and the loose coal would have been cleaned up under UP&L's cleanup plan (discussed below), the cited mass of coal would have almost doubled in size. Gibson was also aware of tests performed by the Department of Interior's Bureau of Mines that he believed demonstrated that similar amounts of loose coal would propagate an explosion. Exh. R-3; Tr. 106-07.

Based on these same considerations, Gibson further concluded that a hazard was created by the cited conditions, that it was reasonably likely that an injury could result from those conditions and that the injury would be of a serious nature. Accordingly, he found that the violation was of a significant and substantial nature. Gibson also

---

the Secretary or authorized representative.

determined that the alleged violation resulted from UP&L's unwarrantable failure to comply with the standard.

UP&L contested the withdrawal order and the matter proceeded to an evidentiary hearing before the judge. UP&L contended that it could not be cited for a violation of section 75.400 because it was complying with its section 75.400-2 cleanup plan and that, under that plan, it was not required to clean up the cited coal in the entry until the next connecting cross-cut was driven. Specifically, according to UP&L, its cleanup plan required that, after a continuous mining machine mines a 40-foot five-cut sequence in an entry under development, the continuous miner is to be backed up and trammed forward to clean the "first cuttings" from both sides of the 40-foot cut. Tr. 23, 174; Exh. C-3. ("First cuttings" are pieces of coal dislodged by the continuous miner when the initial development work is performed.) The plan further provided that any coal remaining behind the line curtain following the initial cleanup "will be cleaned after the connecting cross-cut is broken through to prevent the short circuiting of face ventilation." Exh. C-3; Tr. 18, 35-37, 188. UP&L explained that, on one occasion less than three months prior to Gibson's inspection, it had been cited for a violation of a mandatory safety standard when it failed to follow its cleanup plan. On January 6, 1989, UP&L had rolled up the line curtain in the Third South Section of the Cottonwood Mine in order to clean up loose coal behind the line curtain with an electric scoop before the connecting cross-cut had been driven. Tr. 198. As a result, MSHA Inspector Dick Jones issued a citation to UP&L for violation of 30 C.F.R. § 75.316, alleging that rolling up the curtain had disrupted face ventilation. Inspector Jones noted in that citation that "the approved cleanup plan states that the curtain side of the entry will not be cleaned until the connecting cross-cut has been made." Exh. C-4.

In his decision, Judge Morris determined that the largely uncontroverted testimony regarding the substantial amount of loose coal discovered by the inspector established a violation of section 75.400, citing Old Ben Coal Co., 1 FMSHRC 1954 (December 1979)("Old Ben I"). 11 FMSHRC at 727. The judge was not persuaded by UP&L's evidence that the coal was partially wet or damp noting that a fire could quickly dry damp coal. Id. The judge also rejected UP&L's reliance on its cleanup plan on the ground that "a cleanup plan developed pursuant to 75.400-2 cannot overrule the mandatory duties required in § 75.400." Id.

Crediting Inspector Gibson's relevant testimony, the judge further held that the violation was of a significant and substantial nature, citing Mathies Coal Company, 6 FMSHRC 1 (January 1984). 11 FMSHRC at 728. With respect to the unwarrantable failure issue, the judge determined that UP&L's conduct was aggravated conduct constituting more than ordinary negligence. 11 FMSHRC at 728-29. In reaching this conclusion, the judge credited testimony that MSHA and UP&L "had discussed the practice of cleaning first cuttings" (11 FMSHRC at 728), and found that UP&L could employ other adequate methods of cleanup that would not allow accumulations to exist and, unlike the rolling up the line curtain, would not sacrifice face ventilation (11 FMSHRC at 728-29).

On review, UP&L challenges the judge's findings on four grounds: (1) UP&L did not violate section 75.400, most particularly because it was complying with its section 75.400-2 cleanup plan; (2) section 75.400 is unconstitutionally vague as applied in this case; (3) substantial evidence does not support the judge's finding that the violation was of a significant and substantial nature; and (4) substantial evidence does not support the judge's unwarrantable failure finding. We consider each of these challenges in turn.

With respect to the issue of violation, the Commission previously has held that section 75.400 "is violated when an accumulation of combustible materials exists." Old Ben I, 1 FMSHRC at 1956. The Commission has further held that a violative "accumulation" exists "where the quantity of combustible materials is such that, in the judgment of the authorized representative of the Secretary, it likely could cause a fire or explosion if an ignition source were present." Old Ben Coal Co., 2 FMSHRC 2806, 2808 (October 1980)("Old Ben II").

In defining a prohibited "accumulation" for section 75.400 purposes, the Commission explained that "some spillage of combustible materials may be inevitable in mining operations. However, it is clear that those masses of combustible materials which could cause or propagate a fire or explosion are what Congress intended to proscribe." Old Ben II, 2 FMSHRC at 2808. The Commission emphasized that the legislative history relevant to the statutory standard that section 75.400 repeats "demonstrates Congress' intention to prevent, not merely to minimize, accumulations. The standard was directed at preventing accumulations in the first instance, not at cleaning up the materials within a reasonable period of time after they have accumulated." Old Ben I, 1 FMSHRC at 1957. The Commission also indicated that the inspector's judgment that a prohibited accumulation exists is "subject to challenge before the administrative law judge." Old Ben II, 2 FMSHRC at 2808 n.7. Within the context of the broadly phrased standard in question, which applies to myriad mining conditions, the inspector's judgment will be reviewed judicially by reference to an objective test of whether a reasonably prudent person, familiar with the mining industry and the protective purpose of the standard, would have recognized the hazardous condition that the regulation seeks to prevent. See, e.g., Canon Coal Co., 9 FMSHRC 667, 668 (April 1987).

Applying the foregoing principles to the record in this case, we conclude that the judge properly determined that UP&L violated section 75.400. Substantial evidence supports the judge's finding that the cited mass of loose coal constituted a prohibited "accumulation" within the meaning of the Old Ben decisions. The loose coal measured some 104 feet in length, averaged some 23 inches in width and 22 inches in depth, and weighed approximately 500 to 800 pounds. Inspector Gibson testified that this amount of loose coal would likely cause an explosion if an ignition source were present. Among other things, he relied upon Bureau of Mines' tests showing that as little as two 300-pound piles of loose coal can propagate an explosion even if an entry is adequately rock-dusted. Fire Boss Adison, who helped Gibson measure the loose coal, stated that there was an excessive amount of loose coal behind the line curtain and agreed that the condition was violative of section 75.400.

There was also uncontroverted testimony that this amount of loose coal would double in size from a length of 104 feet to approximately 210 feet by the time that the next cross-cut was driven and the loose coal cleaned up under UP&L's cleanup plan. Tr. 90-91, 97, 101-02, 140. The fact that there was some dampness in the coal did not render it incombustible and, as both the judge and inspector properly noted (11 FMSHRC at 727; Tr. 96), wet coal can dry out in a mine fire and ignite. See Black Diamond Coal Mining Co., 7 FMSHRC 1117, 1120-21 (August 1985). In light of this evidence, a reasonably prudent person familiar with the mining industry would have recognized that this relatively large amount of coal was an accumulation prohibited by section 75.400.

UP&L, however, argues that the Old Ben precedent is inapplicable because those decisions did not address the manner in which section 75.400 is to be harmonized with 75.400-2. As noted, UP&L contends that it cannot be cited for a violation of section 75.400 because it was complying with its section 75.400-2 cleanup program. We disagree. Section 75.400-2 implements section 75.400, not vice versa. A cleanup plan cannot establish procedures that allow coal and other combustible materials to accumulate in violation of section 75.400. In agreement with the judge, we hold that an operator cannot avoid a finding of violation of section 75.400 by arguing that it was merely following a section 75.400-2 cleanup plan that it had established. 2/

UP&L also points to language in MSHA's Program Policy Manual ("Manual") to the apparent effect that existing "accumulations" may be removed on a regular basis. See Exh. R-3 at 51-53. The Manual language cited by UP&L must be read in context with the Manual's explanation of the intent of section 75.400: "The intent of this Section is to prevent the accumulations of the specified combustible materials in order to reduce the dangers of mine fires and explosions." Exh. R-3 at 51 (emphasis added). More importantly, the Manual's instructions and commentary are not officially promulgated and do not prescribe rules of law binding upon the Commission. E.g., King Knob Coal Co., 3 FMSHRC 1417, 1420 (June 1981). The interpretation of section 75.400 advanced by the Secretary and adopted in the Old Ben decisions overcomes any arguable conflict posed by language in the Manual. Finally, we also reject UP&L's argument that section 75.400 is unconstitutionally vague as applied in this case. As discussed above, in light of the nature of the accumulation in question, the inspector's judgment that it constituted a prohibited accumulation satisfies an objective reasonable person test.

2/ Although a section 75.400-2 cleanup plan need not be approved by MSHA, we believe that this case illustrates the strong desirability of communication and cooperation between operators and the Secretary in the development of operators' cleanup plans. Such coordination is of great importance in ensuring the safety of miners and in implementing the policies of the Mine Act. Cf. Southern Ohio Coal Company, 10 FMSHRC 138, 143 (February 1988); Jim Walter Resources, Inc., 9 FMSHRC 903, 909 (May 1987).

Accordingly, we affirm the judge's conclusion that UP&L violated section 75.400.

We also hold that substantial evidence supports the judge's conclusion that the violation was of a significant and substantial nature. Although we agree with UP&L that the judge could have provided a more detailed analysis of this issue, he credited Inspector Gibson's testimony, which is detailed.

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

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

See also Austin Power Co. v. Secretary, 861 F.2d 99, 104-04 (5th Cir. 1988), aff'g, 9 FMSHRC 2015, 2021 (December 1987)(approving Mathies criteria). The third element of the Mathies formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is injury" (U.S. Steel Mining Co., 6 FMSHRC 1834, 1836 (August 1984)), and the violation itself must be evaluated in terms of continued normal mining operations (U.S. Steel Mining Co., Inc., 6 FMSHRC 1573, 1574 (July 1984); see also Halfway, Inc., 8 FMSHRC 8, 12 (January 1986)).

With respect to the first element, we have concluded above that the judge properly found that UP&L violated section 75.400. The second element, whether a measure of danger to safety was contributed to by UP&L's violation, is also established. The relevant legislative history demonstrates that Congress recognized that experience has proven that loose coal can propagate an explosion and must therefore be kept to a minimum. See Old Ben I, 1 FMSHRC at 1957, citing S. Rep. No. 411, 91st Cong., 1st Sess. 65, reprinted in Senate Subcommittee on Labor, Committee on Labor and Public Welfare, 94th Cong., 1st Sess., Part I Legislative History of the Federal Coal Mine Health and Safety Act of 1969, at 191 (1975). Inspector Gibson discovered loose coal in an active working area in which possible ignition sources existed, and in which burn areas had previously been discovered. The mass of coal was large and in an amount that the Bureau of Mines has found could propagate an explosion. Therefore, a "measure of danger to safety" was presented by the cited accumulation.

With respect to the third element, a reasonable likelihood of injury caused by the violation, Inspector Gibson testified that the continuous miner was generating dust and sparks and had a trailing cable with 950 volts of alternating current. Tr. 95-98, 101. He stated that other possible ignition sources in the 9 East working section, such as the trailing cables of the shuttle car and roof bolter, both of which conducted 480 volts of alternate current, could combine with the loose coal and cause an explosion. Tr. 106. Gibson also noted that there was float coal dust on rock-dusted surfaces within the area, giving it a "salt and pepper" appearance. Tr. 96. The fact that some of the coal accumulations were damp was not determinative because, as noted above, damp coal dries in the presence of fire. Inspector Gibson properly took into consideration the fact that, in the normal course of operations, the accumulation would expand from 104 feet in length to approximately 210 feet by the time that the next connecting cross-cut was driven and further cleanup undertaken. Tr. 90-91. There was also evidence in the record that burn areas had been encountered in the 9 East working section and that diesel equipment was sometimes used. Tr. 38, 43, 189, 217. The foregoing evidence supports the judge's finding that the hazard contributed to by the violation, an ignition or explosion in the active workings in question, posed a reasonable likelihood of injury to any miners working there.

The fourth element, a reasonable likelihood that the injury in question would be of a reasonably serious nature, was also established. The area in which the accumulation existed was an active working section. Gibson testified that he believed that it was reasonably likely that any injuries resulting from a fire or explosion would be serious, including burns and, possibly, a fatality. Tr. 106. Gibson's testimony on this point was uncontroverted and proves the fourth element.

We have considered other evidence in the record relied upon by UP&L that mitigates the degree of danger created by the violation. We conclude, however, that substantial evidence supports the judge's finding that the violation was of a significant and substantial nature. We turn to the judge's finding that the violation also resulted from UP&L's unwarrantable failure to comply with the standard.

In Emery Mining Corp., 9 FMSHRC 1997, 2000-04 (December 1987), and Youghiogheny & Ohio Coal Co., 9 FMSHRC 2007, 2010 (December 1987), we held that "unwarrantable failure means aggravated conduct, constituting more than ordinary negligence, by a mine operator in relation to a violation of the Act." This conclusion was based on the ordinary meaning of the term "unwarrantable failure," the purpose of unwarrantable failure sanctions in the Mine Act, the Act's legislative history, and judicial precedent. We stated that while negligence is conduct that is "inadvertent", "thoughtless," or "inattentive," conduct constituting an unwarrantable failure is conduct that is "not justifiable" or "inexcusable". Emery, supra, 9 FMSHRC at 2001.

The judge found that UP&L's decision to mine in a manner that allowed accumulations to exist amounted to an unwarrantable failure to comply with section 75.400. 11 FMSHRC at 729. The judge credited

testimony that MSHA had discussed with the operator's upper management the practice of cleaning up first cuttings. The judge rejected UP&L's argument that it was justified in relying on the prior MSHA citation which was issued when UP&L rolled up the line curtain in order to clean up loose coal. 11 FMSHRC at 728-29. The judge found that UP&L was not, in fact, faced with the choice of either rolling up the line curtain to clean up the loose coal behind it and receiving an "Inspector Jones citation" for inadequate ventilation at the face, or waiting to clean until after the cross-cut had been driven and receiving an "Inspector Gibson citation." The judge determined that UP&L could use other cleanup methods which would not violate its ventilation plan and would not allow accumulations to exist. 11 FMSHRC 728-29.

While we agree with the judge that UP&L made a conscious decision to adhere to its cleanup plan, such conduct does not rise to the level of aggravated conduct constituting more than ordinary negligence. The evidence showed that UP&L chose to follow its cleanup plan in good faith, believing that such conduct was consistent with applicable regulations. Testimony indicates that issuance of the Jones citation stating that "the approved cleanup plan states that the curtain side of the entry will not be cleaned until the connecting cross cut has been made" (emphasis added), led UP&L to believe that it should follow its cleanup plan in order to comply with the regulations. Tr. 51-52, 55, 201. The fact that seemingly conflicting MSHA policies left UP&L in doubt as to what was required for compliance with section 75.400 is a factor which militates against finding that UP&L's conduct was aggravated. King Knob, 3 FMSHRC at 1422.

Other testimony revealed that UP&L employed the cleanup methods in issue because it believed that those methods were safer than alternative procedures. Tr. 208. Bad ribs were a major source of problems at the Cottonwood Mine, and the cleanup plan adopted at the mine was one which could be used consistently throughout the mine and would decrease miners' exposure to the ribs. Tr. 207, 217. John Boylen, Mine Manager of the Cottonwood Mine, testified that the alternative of using ventilation tubing was not employed by UP&L because such a procedure would present hazards associated with the use of fans, such as those associated with the electric current provided by the cable and the possible recirculation of dust and methane. Tr. 208-09. In addition, Boylen testified that the process of hanging line curtain was safer than the process of hanging ventilation tubing. Tr. 209.

The Commission has determined that when an operator believed in good faith that the cited conduct was the safest method of compliance with applicable regulations, even if they are in error, such conduct does not amount to aggravated conduct exceeding ordinary negligence. Florence Mining Co., 11 FMSHRC 747, 752-54 (May 1989); Southern Ohio Coal Company, 10 FMSHRC 138, 142-43 (February 1988). See also Westmoreland Coal Co., 7 FMSHRC 1338, 1343 (September 1985). Here, it appears from UP&L's testimony that it adopted and followed its cleanup program in good faith, believing that it was employing the safest method of cleanup available.

The judge's reliance upon the alleged discussions between MSHA and

UP&L was misplaced. Preliminarily, we note that the judge did not set forth his findings with respect to the discussions in a manner such that we can attach much weight to them. Moreover, the record lacks sufficient or uncontradicted evidence as to the specific content of such discussions. Inspector Gibson testified that he had three discussions with UP&L regarding cleaning up first cuttings, but he did not indicate whether cleaning behind the line curtain was discussed. Tr. 94-95, 136. William Ponceroff, Supervisor of MSHA's Orangeville Field Office, testified that he had three discussions with UP&L management, including Mine Manager Boylen, regarding cleaning up first cuttings, including some discussion pertaining to cleaning up behind line curtains. Tr. 151-53, 155, 157. Boylen admitted that he had discussed cleaning up first cuttings with Ponceroff, but denied discussing cleaning up accumulations behind line curtains. Tr. 210-11. Randy Tatton, the chief safety engineer of Cottonwood Mine, who was alleged to have been present on at least one of the discussions with Ponceroff, also denied that the discussion involved cleaning first cuttings behind line curtains. Tr. 45, 155. This evidence does not support any finding that UP&L delayed the removal of the first cuttings behind the line curtain knowing that the practice was violative of section 75.400. Rather, UP&L's conduct resulted from a good faith, albeit mistaken, belief that the procedures in its cleanup plan were in compliance with section 75.400. Therefore, we conclude that substantial evidence does not support the judge's finding that UP&L's violation of section 75.400 was caused by its unwarrantable failure to comply.

For the foregoing reasons, we affirm the judge's finding that UP&L violated section 75.400 and that the violation was of a significant and substantial nature but reverse the judge's finding that UP&L's violation was the result of an unwarrantable failure to comply with the standard.

Ford B. Ford, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

Distribution

Timothy M. Biddle, Esq.
Susan E. Chetlin, Esq.
Crowell & Moring
1001 Pennsylvania Ave., N.W.
Washington, D.C. 20004

Dennis D. Clark, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd.
Arlington, VA 22203

Administrative Law Judge John Morris
Federal Mine Safety & Health Review Commission
280 Colonnade Center
1244 Speer Blvd.
Denver, Colorado 80204

ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

MAY 2 1990

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
v.	:	Docket No. PENN 89-222 A. C. No. 36-00840-03685
BETH ENERGY MINES INCORPORATED, Respondent	:	Cambria Slope Mine No. 33

DECISION

Appearances: Thomas A. Brown, Jr., Esq., Office of the Solicitor, Department of Labor, Philadelphia, Pennsylvania, for the Secretary;
R. Henry Moore, Esq., Buchanan Ingersoll, Pittsburgh, Pennsylvania, for the Respondent.

Before: Judge Weisberger

Statement of the Case

In this Civil Penalty Proceeding, the Secretary (Petitioner) seeks civil penalties for alleged violations by Respondent of 30 C.FR. § 75.301 and § 75.316. Pursuant to notice, the case was heard in Johnstown, Pennsylvania, on January 9, 1990. Gerry L. Boring and Samuel J. Brunatti testified for Petitioner. Samuel Brunatti was called to testify by Respondent. Arthur Britten, Charles F. Forst, George W. Moyer, and Nick Carpinello testified for Respondent. Respondent filed a Brief on March 9, 1990, and Petitioner filed Proposed Findings of Fact and a Brief on March 19, 1990.

Stipulations

1. Mine 33 is owned and operated by Beth Energy Mines, Inc., and subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977.

2. The Administrative Law Judge has jurisdiction over these proceedings.

3. The subject citations were properly served by a duly authorized representative of the Secretary of Labor upon agents of Beth Engergy at the dates and places stated therein, and may be admitted into evidence for the purpose of establishing the issuance, but not for the truth of the matters asserted therein.

4. Beth Engergy demonstrated good faith in the abatement of the citations.

5. The assessment of the civil penalty or civil penalties in this proceeding will not affect Beth Energy's ability to continue business.

6. The appropriateness of the penalty and the size of the operator's business should be based on the fact that Beth Energy's annual production is 9,751,620 tons and Mine 33's annual production tonnage is 2,170,006 tons.

7. The printout of the civil penalty complaint reflects the Secretary's history of violations at Mine 33.

Findings of Fact

1. On March 14, 1989, at Respondent's Cambria Slope Mine No. 33, at the end of the midnight shift, the methane monitor de-energized the power on the longwall face. The miners investigated and determined that there were excessive levels of methane present; they de-energized all the power and withdrew from the face. The power remained off during the day shift.

2. This methane had not been present at the end of the midnight shift. Arthur R. Britten, a longwall foreman at Mine 33, worked the midnight shift on March 14, 1989. As part of his normal duties, Britten inspected the longwall face for the presence of methane. During his examinations he detected no excessive levels of methane. He also took air readings at the headgate entry and obtained a normal reading of approximately 18,000 cubic feet of air per minute ("cfm").

3. Charles F. Forst was the day shift longwall foreman on March 14, 1989. When he arrived at the longwall section, the miners who had remained from Britten's crew informed him of the methane problem. Forst told his crew to proceed to the headgate side of the longwall and to remain outby the longwall face until an examination was conducted to determine the nature of the problem.

4. Forst examined the face of the longwall and found that at the No. 114 chock there was a level of 2.5 percent methane. The bottom was broken in the area of the highest methane readings.

5. Between 8:15 and 8:20 a.m., the crew from the longwall approached MSHA Inspector Gerry L. Boring, who was present to conduct an inspection, and informed him that their supervisor had instructed them to proceed to the headgate side and wait until the foreman determined the extent of the methane problem.

6. Boring entered the return entry and proceeded to the tailgate of the longwall, where he met Forst.

7. Boring and Forst proceeded to take methane readings with an approved methane detector at the bleeder evaluation point 54. A bottle sample was also taken and the detector and bottle samples revealed a reading of 4.9 percent.

8. The methane measurements taken at approximately 8:45 a.m., at chock 167 revealed 2.5 percent methane. At chock 142 a reading of 1.5 methane percent was recorded. A bottle sample taken at chock 167 revealed a reading of 2.4 percent methane.

9. Boring returned to bleeder evaluation point 54 and took a methane reading of 3.7 percent at approximately 9:05 a.m.

10. A methane reading at the regulator near bleeder evaluation point 54 revealed 4.2 percent methane, and an air reading of 20,412 C.F.M. at approximately 9:05 a.m..

11. Bill Moyer, Respondent's longwall coordinator, obtained higher methane readings by placing his methane spotter closer to the bottom. He concluded that the methane was coming from the bottom and not from the gob.

12. At approximately 9:20 a.m., Boring informed Moyer that he was issuing a section 107(a) Imminent Danger Order and posted a sign at the headgate and the tailgate closing off the longwall face.

13. At approximately 9:35 a.m., Boring took an air reading at the headgate which measured 16,254 C.F.M. and a methane reading of 0.1 percent. At approximately 9:35 a.m., Boring measured 2.4 percent methane at chock 166. Boring then traveled to the tailgate section and took an air reading of 5,880 C.F.M. and a methane reading of 0.1 percent. At approximately 10:30 a.m., Boring returned to bleeder evaluation point 54 and took a methane reading of 3.4 percent. On the morning of March 14, the combined total of air measured by Boring in the tailgate and headgate was approximately 23,000 C.F.M.

14. Boring issued Citation No. 2891347 alleging a violation of 30 C.F.R. § 75.301. Boring also issued a section 107 Imminent Danger Withdrawal Order.

15. Also on March 14, 1989, Boring issued Citation No. 2891346 alleging that the approved ventilation, methane and dust control plan (review no. 32) was not being complied with, in that a methane reading of 4.9 percent was detected inby bleeder evaluation point No. 54 at Mine 33.

16. At the time of the issuance of Citation No. 2891346 for the alleged violation of 75.316, Beth Energy had an approved ventilation system, methane and dust control plan.

17. In the most recent 6 month review of the plan prior to the citation herein, Petitioner, on January 31, 1989, approved the plan with the following language "These plans and all criteria listed under Section 75.316, 30 C.F.R. 75, shall be complied with." (Gx 7).

18. The sentence quoted in Finding No. 17 is being included by MSHA District Two in approvals of mine plans in the district.

Discussion and Conclusions of Law

A. Citation No. 2891347.

Citation No. 2891347, issued by Boring on March 14, 1989, alleges a violation of 30 C.F.R. § 75.301 in that a methane reading of 2.5 percent was detected at chock No. 167. Boring's uncontradicted testimony establishes that testing by him indicated methane readings, along the longwall panel of 2.5 percent at chock 167, 2.7 percent at chock 142, and 1.5 percent at chock 114.

30 C.F.R. § 75.301 provides as follows:

> All active workings shall be ventilated by a current of air containing not less than 19.5 volume per centum of oxygen, not more than 0.5 volume per centum of carbon dioxide, and no harmful quantities of other noxious or poisonous gases; and the volume and velocity of the current of air shall be sufficient to dilute, render harmless, and to carry away, flammable, explosive, noxious, and harmful gases, and dust, and smoke and explosive fumes. The minimum quantity of air reaching the last open crosscut in any pair or set of developing entries and the last open crosscut in any pair or set of rooms shall be 9,000 cubic feet a minute, and the minimum quantity of air reaching the intake end of a pillar line shall be 9,000 cubic feet a minute. The minimum quantity of air in any coal mine reaching each working face shall be 3,000 cubic feet a minute. The authorized representative of the Secretary may require in any coal mine a greater quantity and velocity of air when he finds it necessary to protect the health or safety of miners. In robbing areas of anthracite mines, where the air currents cannot be controlled and measurements of the air cannot be obtained, the air shall have perceptible movement.

It is Respondent's position that section 301, supra, requires at least 9,000 cubic feet of air a minute in order to achieve compliance with the mandate of the first sentence which requires velocity and volume of air sufficient to dilute and render harmless explosive gasses. Respondent refers to undisputed evidence of an airflow of 17-18,000 C.F.M. at the headgate, and argues that as such it was fully in compliance with section 75.301, supra, which is satisfied by a flow of at least 9,000 C.F.M. It further argues that section 75.301, requires only a minimum of 9,000 C.F.M. unless the Secretary requires more, and that no such requirement was imposed herein.

I do not accept the interpretation of section 75.301, supra, advocated by Respondent. I find that plain language of the first sentence of section 75.301, supra, unequivocally requires a current of air sufficient to dilute and render harmless explosive gasses.1/ The second sentence requires a "minimum of 9,000 C.F.M. reaching the last open crosscut. To hold, as urged by Respondent, that section 75.301 is fully satisfied if at least 9,000 C.F.M. is provided, would render meaningless the first sentence which requires a volume and velocity of air "sufficient to dilute and render harmless explosive gasses." Thus, an airflow exceeding 9,000 C.F.M., as on the date in issue, does not comply with section 75.301, supra, if it is not sufficient to dilute and render harmless explosive gases. As described in Boring's testimony and not contradicted by other witnesses, methane was present in concentrations close to the explosive range of 5.15 percent. As such I find that the volume and velocity of air was not sufficient to dilute and render the methane harmless, and as such 75.301, supra, was violated.2/

II.

According to Boring, the violation herein was significant and substantial. The evidence herein clearly established, that due to the concentration of methane present, there was a

1/ I reject Respondent's argument that it is not clear that section 75.301, supra, applies to methane. The Dictionary of Mining, Minerals, and Related Terms, (U. S. Department of Interior, 1968) (DMMRT), in defining methane, indicates that ". . . with air, however, it forms an explosive mixture, ..." I thus find that methane is an explosive gas and is thus within the purview of the first sentence of section 75.301, supra.

2/ The fact that Respondent's ventilation system was working to dilute the methane that was present, and the fact that the methane present might have been due to an unexpected outburst rather than an accumulation, are factors bearing on Respondent's negligence, and are discussed in paragraph 6, infra. The fact that Respondent might not have been negligent herein, does not relieve it of its responsibility for not complying with section 75.301, supra. (See, Western Fuels-Utah, Inc. v. FMSHRC 870 F.2d. 711 (D.C. Cir. 1989); Asarco Inc. - North Western Mining Dept. v. FMSHRC, 868 F.2d 1195 (10th Cir. 1989)).

violation as discussed above I, infra, which contributed to the hazard of an explosion. (See, Mathies Coal Company, 6 FMSHRC 1 (1984)). However, according to Mathies at 3-4 , supra, to be significant and substantial there must also be a reasonable likelihood that the hazard contributed to will result in an injury. In U. S. Steel Mining Co., Inc., 6 FMSHRC 1834, 1836, (1984), the Commission indicated that this element ". . . requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." The evidence fails to establish this element. The only testimony on this point is that of Boring. He acknowledged that there were no energized equipment or men in the area. When asked what the ignition source was for the methane, he responded as follows: "Well, the ignition source could be anything that would cause a spark, a roof fall, men within the area, hammers, metal to metal, anything that would occur within that given area to create a spark that would maybe ignite the methane there" (Tr. 40-41). When asked to indicate why he concluded the violation was significant and substantial, he said that ". . . if there would have been a roof fall, possibly a spark, rock to rock igniting the methane causing an explosion" (Tr. 42). He indicated that due to the concentration of methane which indicated that somewhere within the gob area there was a "volatile situation" (Tr. 42), there was a danger of an explosion and that he "felt it was likely" (Tr. 42). Since men had been withdrawn from the area, there were no energized equipment in the area, and there is no evidence of any condition making a roof fall, likely, I conclude that it has not been established that there was a reasonable likelihood of the methane being ignited. Accordingly, I conclude that it has not been esablished that the violation herein was significant and substantial. (See Mathies, supra, U. S. Steel, supra).

III.

Due to the high concentrations of methane at various points in the section, and taking into account Boring's uncontradicted opinion that the methane was volatile in the gob, I find that the violation herein constituted a high degree of gravity, mitigated by the absence of proof of the presence of reasonably likely ignition sources. The methane present on the morning of March 14, was not present when the area was examined in the proceeding, or midnight shift. Further, no methane was detected, all power in the area was de-energized by Respondent, and miners were withdrawn. Also, the volume and velocity of air present was about double the minimum required by section 75.301, supra. Further, inasmuch as the bottom of the mine, which had heaved, had the highest methane readings, it might be concluded that the methane present was the result of an outburst from the bottom and was unexpected. Accordingly, I find Respondent not to have been negligent with respond to the violation herein. Taking into account the remaining statutory factors in section 110(i) of the Act, I conclude that a penalty of $100 is appropriate.

B. Citation No. 2891346.

I.

The evidence is not controverted that on March 14, 1989, Boring took a bottle sample of methane at bleeder evaluation point 54, and the results of the testing reveled 4.5 percent methane. Boring issued a citation, in essence, alleging a violation of Respondent's ventilation plan. The ventilation plan does not contain any language setting any limit on methane at the evaluation point tested. However, in the 6 months review of the ventilation plan on January 29, 1989, the MSHA District Manager approved the plan with the following sentence: "These plans and all criteria listed under section 75.316, 30 C.F.R. 75, shall be complied with." The first sentence of section 75.316-2 provides that "This section sets out the criteria by which district managers will be guided in approving a ventilation system and dust control plan on a mine-by-mine basis." Section 75.316-2(h) provides as follow: "The methane content of the air current in the bleeder split at the point where such split enters any other split should not exceed 2.0 volume per centum."

In essence, it is Petitioner's position that the MSHA Letter of Approval of January 31, 1989, (Gx 7), informed Respondent that all the criteria set forth in section 75.316-2, supra, are to be complied with. It is further maintained by Respondent that the criteria set forth in section 316-2, supra, are mandatory, and that a district manager can not approve a ventilation plan without such criteria contained therein. Essentially, the only authority relied on by Petitioner is United Mine Workers of America, Int'l Union v. Dole, 870 F.2nd 662 (D. C. Cir. 1989). Petitioner cites United Miner Workers, supra, for the proposition, in essence, that the criteria in section 75.316, supra, were properly incorporated in the ventilation plan by the approval letter. (Gx. 7). Petitioner relies on United Mine Workers, supra, for the proposition that the district managers do not have the authority to approve ventilation plans without incorporation of the criteria in section 75.316-2, and quotes the following language from United Mine Workers, supra, at 670. ". . . if the criteria were actually incorporated into an approved plan, the Operator was bound to comply with them."

In general, the Commission has held that "In plan violation cases the Secretary must establish that the provision allegedly violated is part of the approved and adopted plan and that the cited condition or practice violates the provision." (Jim Walter Resources, Inc., 9 FMSHRC 903, at 907 (May 1987). For the reasons that follow, I find that the Secretary has not met this burden.

The main issue presented for resolution is whether the criteria set forth in section 316-2(h), can be incorporated unilaterally by the Secretary into the Respondent's ventilation plan along with all the criteria in section 75.316-2.

In Zeigler Coal Co. v. Kleppe, 536 F.2nd 398 (D. C. Cir. 1976),[3] the D. C. Circuit Court of Appeals held that violations of requirements in ventilation plans that were not in themselves promulgated as mandatory standards were nonetheless enforceable under the 1969 Coal Act. The Court reviewed the precise manner in which mandatory standards are to be promulgated pursuant section 101 of the 1969 Coal Act.[4] The Court concluded that the context of the requirement for a ventilation plan in section 303 of the 1969 Act, the wording of which has been continued in section 303 of the 1977 Act, amidst the other provisions of section 303 which set out specific standards pertaining to mine ventilation, ". . . further suggest that the plan idea was conceived for quite narrow and specific purpose." (Zeigler, supra, at 407.) The Court, in Zeigler, supra, at 407, further stated with regard to ventilation plans that they were ". . . not to be used to impose general requirements of a variety well-suited to all or nearly all coal mines, but rather to insure that there is a comprehensive scheme for realization of the statutory goals in the particular instance of each mine." The Court in Zeigler, supra, recognized that ventilation plans ". . . appear to be developed by informal negotiations between the Operator and the Secretary's representative, without any pretense of compliance with § 101." (Zeigler, supra, at 403.) In this connection the Court noted that although the plan must be approved by the Secretary, ". . . it does not follow that he has anything close to unrestrained power to impose terms." (Zeigler, supra, at 406).

In Carbon County Coal Company, 6 FMSMRC 1123, May (1984) (Carbon County I) the Commission, in analyzing Zeigler, supra, took cognizance of the notation by Carbon County that the Court in Zeigler, supra, at 407, drew a distinction between a negotiated plan requirement "'suitable to the conditions and the mining system of the coal mine' and a provision of 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." (Carbon County, I at 1125).

3/ In Zeigler, supra, which arose under the 1969 Coal Act, 30 U.S.C. § 801 et seq. (1976) (amended 1977), the Court construed section 303(0) of that Act. This provision was retained without change as 303(o) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982) (The Act).

4/ Section 101 of the 1969 Coal Act has been repeated in section 101 of the Federal Mine Safety and Health Act of 1977.

The Commission in Carbon County, I, supra, was presented with the issue of whether MSHA's insistence on the inclusion in a ventilation plan of a provision, opposed by Carbon County, for a volume of air more than "free discharge capacity," was proper. The commission, in remanding to the trial judge to consider the application of Zeigler, supra, specifically stated that it found the discussion of Zeigler, supra, "persuasive and compelling," (Carbon County I, at 1127, and held that ". . . the general principles enunciated in Zeigler apply to the ventilation plan approval and adoption process under the Mine Act." (Carbon County, I, at 1127.) In Carbon Coal Company, 7 FMSHRC 1367 (September 1985), (Carbon Country, II), the Commission, at 1370, analyzed the statutory system of the approval and adoption of ventilation plans as follows:

> The scheme for the approval and adoption of a mine specific plan supplements the nationally applicable safety and health rulemaking procedures. The bilateral approval-adoption process inherent in developing mine specific plans results from consultation and negotiation between MSHA and only the specifically affected operator, whereas the nationally applicable standards are the product of notice and comment rulemaking pursuant to section 101 of the Mine Act. 30 U.S.C. § 811. Further, the scope of a mine specific plan is restricted exclusively to the mine in which the plan will be implemented, whereas a mandatory safety or health standard applies across-the-board to all mines. (Emphasis added).

The Commission, in Carbon County, II, supra, at 1370, noted that the legislative history of the Act emphasizes the individual nature of a mine specific plan. In this connection, the Commission in Carbon County, II, supra, at 1370, quoted the following language from the Senate Committee on human resources, which reported on the bill which became the Act: "Such individually tailored plans, with a nucleus of commonly accepted practices, are the the best method of regulating such complex and potentially multifaceted problems as ventilation, roof control and the like."

In Jim Walter Resources, Inc., supra, the Commission again reiterated the bilateral process of the adoption of ventilation plans as follows: "The approval and adoption process is bilateral, and results in the Secretary and the Operator, through consultation, discussion, and negotiation, mutually agreeing to ventilation plans suitable to the specific conditions at particular mines. Zeigler v. Kleppe, 536 F.2nd 398, 406-407 (D.C. Cir. 1976); Carbon County Coal Company, 6 FMSHRC 1123 (May 1984)." (Jim Walter, supra, at 907). Further, the Commission again indicated its view with regard to the "mine-specific" nature of a ventilation plan as follows: "The ultimate goal of the approval and adoption process is a mine-specific plan with provisions understood by both the Secretary and the Operator, and in which they are in full accord." (Jim Walter, supra, at 907.)

Drawing upon the principles set forth in Zeigler, supra, Carbon County, I, supra, Carbon County, II, supra, and Jim Walter, supra, I conclude that the criteria to be set forth in a ventilation plan can not be unilaterally imposed by the Secretary.[5] I

[5] I do not find United Mine Workers, supra, relied on by Petitioner, to be dispositive of the issues raised herein. In United Mine Workers, supra, the Court was presented with the issue as to whether the criteria by which the District Manager will be guided in approving roof control plans on a mine-to-mine basis, (30 C.F.R § 75.200-6), were mandatory, so as to require the Secretary, in promulgating new replacement standards, to establish that the latter provide at least the same level of protection to miners as the old regulations. In holding in the affirmative, it clearly was not necessary for the Court to entertain the issue presented herein, i.e., whether all criteria by which District Managers will be guided in approving a ventilation plan on a mine-to-mine basis, are to be incorporated into the ventilation plan of an individual mine in the absence of any proof that the criteria are to address specific problems at the mine. As such, the Court's comments in United Mine Workers, supra, at 670, that a plan could be approved only if it conforms to the general criteria of the Regulations (30 C.F.R. § 75.200-6) are clearly dicta. Similarly, the rejection by the Court, in United Mine Workers, supra, of the Operator's argument that a plan for roof support can only impose those requirements necessary to address unique conditions peculiar to each mine, does not appear necessary to a disposition of the issues before it, as that particular issue did not have to be adjudicated. Further, in this connection, it is noted that United Mine Workers, supra, took cognizance, at 667, of the fact that the contents of any plan are ". . . determined through consultation between the mine operator and the District Manager." Also, the Court specifically noted Zeigler, supra, and did not overrule it. In this connection, the Court interpreted Zeigler, supra, as saying ". . . only that the Secretary could abuse her discretion by utilizing plans rather than explicit mandatory standards to impose general requirements if by doing so, she circumvented procedural requirements for establishing mandatory standards laid down in the Mine Act." (United Mine Workers, supra, at 671.) Further, the Court in United Mine Workers, supra, at 672, found Carbon County, II, supra, to be consistent with its interpretation of Zeigler, supra, although it rejected the argument that under either Carbon County, II, supra, or Zeigler, supra, the Secretary ". . . was in a plan precluded from requiring mine operators to incorporate measures necessary to achieve an overall level of miner protection on all pertinent aspects of roof control." The Court, in United Mine Workers, supra, at 672, concluded that Carbon County, II, supra, as Zeigler, supra, did no more than set out a ". . . warning that

(continued on page 11)

further conclude that various criteria are not to be included in a ventilation plan unless it is established that they are to address a specific problem at the mine in question. In the instant case, not only is the Secretary attempting to unilaterally impose a requirement upon Respondent in its ventilation plan, but it has not established that the requirement would address a specific problem at Respondent's mine, thus making it mine specific. To the contrary, it appears to be MSHA's policy, as indicated by the testimony of Samuel J. Brunatti, an MSHA Ventilation Specialist, to include the approval language in question in approvals of mine ventilation plans in District Two. As such, it would appear that the requirement by MSHA for Respondent, in its plan, to comply with the criteria in 75.316 to have been the result of a rote application of District Two's policy and not based upon particular conditions at Respondent's mine (See, Jim Walter, supra, at 1373). I thus conclude that the criteria set out in 30 C.F.R. § 75.316(2)(h) are not to be incorporated into Respondent's ventilation plan. As such, it has not been established that Respondent violated any of the terms of its ventilation plan. Accordingly, Citation No. 2891246 should be dismissed.6/

(Footnote 5 Continued)

the Secretary should utilize mandatory standards for requirements for universal application." Thus, I conclude that United Mine Workers, supra, does not mandate that the principles enunciated in Zeigler, supra, as found persuasive by the Commission in Carbon County, I and II, supra, and followed in Jim Walter, supra, as discussed above, infra, should not be applied in the case at bar.

6/ At the hearing, Respondent's Counsel indicated that Respondent was not contesting the Imminent Danger Withdrawal Order, No. 2891345 which had been issued on March 14, 1989. Although it has been decided herein, infra, that there was no violation of section 75.316, supra, the finding of imminent danger was also predicated upon conditions which constituted a violation of section 75.301, which have been established, (infra, I,A.). As such it is concluded that the issuance of the Withdrawal Order is sustained.

ORDER

It is ORDERED that Citation No. 2891346 be DISMISSED. It is further ORDERED that Order No. 2891345 was properly issued. It is further ORDERED that Respondent, within 30 days of this Decision, shall pay $100 as a civil penalty for the violation found herein. It is further ORDERED that Citation No. 2891347 be AMENDED to reflect the fact that the violation therein was not significant and substantial.

Avram Weisberger
Administrative Law Judge

Distribution:

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

R. Henry Moore, Esq., Buchanan Ingersoll, 600 Grant Street, 58th Floor, Pittsburgh, PA 15219 (Certified Mail)

dcp

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

MAY 3 1990

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 89-274
Petitioner	:	A.C. No. 46-05682-03505
v.	:	
	:	Ward Mine
TEN-A-COAL COMPANY,	:	
Respondent	:	

DECISION

Appearances: Javier I. Romanach, Esq., U.S. Department of Labor, Office of the Solicitor, Arlington, Virginia, for the Petitioner;
Harold S. Yost, Esq., Bridgeport, West Virginia, for the Respondent.

Before: Judge Maurer

This case is before me upon the petition for civil penalty filed by the Secretary of Labor (Secretary) pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, et seq., the "Act", charging Ten-A-Coal Company (Ten-A-Coal) with two violations of the regulatory standards found in 30 C.F.R. Part 77.

Pursuant to notice, this case was heard in Morgantown, West Virginia on January 9, 1990. Subsequently, the parties have filed post-hearing proposed findings and conclusions which I have considered along with the entire record in making this decision.

STIPULATIONS

At the hearing, the parties stipulated to the following, which I accepted (Tr. 7-8):

1. The Administrative Law Judge has jurisdiction to hear and decide this case.

2. Inspector James A. Young was acting in his official capacity as a federal coal mine inspector on May 3rd, 1989, when he issued § 104(a) Citation No. 2944252 and § 104(d)(1) Citation No. 2944253.

3. Citation o. 2944252 and Citation No. 2944253 were properly served to Respondent's agents.

4. Abatement of the condition cited in the listed citations was timely.

5. The combined proposed penalty of $800 will not adversely affect the Respondent's ability to continue in business.

6. The respondent does not dispute the facts on the proposed assessment data sheet (GX-8).

DISCUSSION WITH FINDINGS

Citation No. 2944252, issued pursuant to section 104(a) of the Act, charges a violation of the standard at 30 C.F.R. § 77.1004(b) and alleges as follows:

> A proper examination and subsequent action taken was not being performed on the 001 pit on the Ward mine site. An unsafe ground condition was observed in the high wall of the 001 coal pit, and coal was being loaded from this pit. The condition was observed by the operator and no action was taken other than loading coal.
>
> An unsafe condition in relation to safe work areas shall be corrected promptly or the area effected shall be posted. The pit was examined and no action taken to remove or post.

Citation No. 2944252 was issued as a section 104(a) citation on May 3, 1989, by MSHA Inspector James A. Young. The violative condition was abated by the operator to his satisfaction and Inspector Young terminated the citation at 12 noon on May 3, 1989. Later that day, Inspector Young went back to his office, discussed the conditions surrounding the citation with his supervisor and decided the conditions met the criteria for an unwarrantable failure. Therefore, the next day, May 4, 1989, Inspector Young modified the previously terminated Citation No. 2944252 to a section 104 (d)(1) order.

I find and conclude that the attempted modification cannot stand. The inspector no longer had the authority to modify the citation after he had terminated it. Once a citation is no longer in effect because it has been terminated, it cannot be modified. See: Old Ben Coal Co., Docket No. VINC 76-56 (June 15, 1976) (ALJ Sweeney), Appeal dismissed, IBMA 76-104 (October 19, 1981).

Citation No. 2944253, issued pursuant to section 104(d)(1) of the Act, charges a violation of the standard at 30 C.F.R. § 77.1000 and alleges as follows:

> The established ground control plan for the Ward mine 001 pit was not being complied with; in that, the high wall above this pit was not scaled back from the edge of the wall and all loose material was not removed. A required bench of 20' width was not present along the highwall above the working pit. Loose clay material was above the wall with mud mixed and water passing through this material and running into the pit. The bench provided on the highwall was only 10' and partially filled in with the clay material. Old entries were being crossed from an underground mine and part of the highwall had collapsed with only a 5' barrier left between the bench and the fall. The wall was straight up on one side without any bench present for over 40'.

There is no dispute concerning the fact that on May 3, 1989, a required bench with a width of 20 feet was not present along the highwall above the working pit in violation of the ground control plan.

The pit foreman was a Mr. Eubank and Inspector Young observed him on the day in question operating a backhoe, loading a coal truck in the bottom of the pit. At that time, Young also observed the highwall and noticed that it was not scaled back. Old underground entries from an underground mine were being crossed and part of the highwall had collapsed with a 5-foot barrier left between the bench and the wall. The wall was straight up on one side without any bench present for over forty feet. There had been four or five days of steady rain prior to this date and, due to the poor condition of the highwall, loose clay material, including rocks, was slipping over the highwall and running into the pit. Eubank admitted to Young that he had been aware of the condition of the highwall, yet he had continued to operate the backhoe because he needed to get the coal out of there.

The widest part of the bench was ten feet, but it got down to seven to eight feet in various locations. The highwall itself was in excess of sixty feet high. According to the ground control plan, the bench was required to be twenty feet wide.

Inspector Young issued section 104(d)(1) Citation No. 2944253 for a violation of 30 C.F.R. § 77.1000 because the established ground control plan for the Ward Mine 001 pit was not

being complied with - the highwall above the pit was not scaled back from the edge of the wall and a required bench of twenty foot width was not present along the highwall above the working pit.

I find that violation to have been proven as charged.

A "significant and substantial" violation is described in section 104(d)(1) of the Mine Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 C.F.R. § 814(d)(1). A violation is properly designated significant and substantial "if, based upon the particular facts surrounding the violation there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (April 1981).

In Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984), the Commission explained its interpretation of the term "significant and substantial" as follows:

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

In United States Steel Mining Company, Inc., 7 FMSHRC 1125, 1129, the Commission stated further as follows:

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

The question of whether any particular violation is significant and substantial must be based on the particular facts surrounding the violation, including the nature of the mine involved, Secretary of Labor v. Texasgulf, Inc., 10 FMSHRC 498 (April 1988); Youghiogheny & Ohio Coal Company, 9 FMSHRC 2007 (December 1987).

Inspector Young testified that due to the condition of the highwall and the lack of size of the bench a discrete hazard was created, "[t]here was water in the pit; there was falling material of varying size, some of it large, some of it very heavy; there was silt; there was water coming over the side of the wall which was continually deteriorating the condition of the wall." (Tr. 23). Young's testimony demonstrates that there was a reasonable likelihood that the hazard contributed to would result in an injury. "It was very likely [that somebody could have been struck by the falling rock, mud, etc.] because we stood there and watched it fall. We were observing it fall the whole time we were there." (Tr. 34). Finally, Young's testimony shows that there was a reasonable likelihood that the injury in question would be of a reasonably serious nature. "We have documented records in our agency of fatalities from highwalls collapsing and rocks coming over the top." (Tr. 24). Young's testimony regarding these matters is uncontradicted, very credible and I do credit it fully.

The Secretary also urges that I find this violation to be an "unwarrantable failure".

In several relatively recent decisions concerning the interpretation and application of the term "unwarrantable failure," the Commission has further refined and explained this term, and concluded that it means "aggravated conduct, constituting more than ordinary negligence, by a mine operator in relation to a violation of the Act." Emery Mining Corporation, 9 FMSHRC 1997 (December 1987); Youghiogheny & Ohio Coal Company, 9 FMSHRC 2007 (December 1987); Secretary of Labor v. Rushton Mining Company, 10 FMSHRC 249 (March 1988). Referring to its prior holding in the Emery Mining case, the Commission stated as follows in Youghiogheny & Ohio, at 9 FMSHRC 2010:

> We stated that whereas negligence is conduct that is "inadvertent," "thoughtless" or "inattentive," unwarrantable conduct is conduct that is described as "not justifiable" or "inexcusable." Only by construing unwarrantable failure by a mine operator as aggravated conduct constituting more than ordinary negligence, do unwarrantable failure sanctions assume their intended distinct place in the Act's enforcement scheme.

There is no question that the operator's actions constituted aggravated conduct. The foreman was aware of the hazardous conditions of the highwall and the bench but made no effort to correct the obvious conditions. Instead, the foreman himself proceeded to work directly under the highwall and exposed himself and the driver of the truck to the risk of death or serious injury.

Citation No. 2944253 will be affirmed in its entirety. Furthermore, considering the entire record and the criteria in section 110(i) of the Act, a civil penalty of $400, as proposed, will be assessed as appropriate to the violation and special findings.

On the same day Inspector Young also issued section 104(a) Citation No. 2944252 for a violation of 30 C.F.R. § 77.1004(b) because the operator, after observing the above described conditions surrounding the 001 pit on May 3, 1989, did not correct these conditions nor did he post the area.

It is also undisputed that the unsafe conditions of the highwall and the pit were not corrected promptly or posted as required by section 77.1004(b). Accordingly, that standard was violated.

Inspector Young's unrebutted testimony demonstrates to me that the operator's failure to promptly correct the hazardous conditions at the highwall or to post the area exposed miners to the hazards of falling rocks and mud. Young found Eubank and a coal truck driver working directly under the highwall. Young's testimony also establishes that it was reasonably likely that the hazard contributed to would result in an injury by falling rock. Young observed rocks falling into the pit near Eubank and the truck driver. Finally, Young's testimony establishes the reasonable likelihood that any injury suffered from the falling rocks was likely to be fatal or at least produce a serious injury. Therefore, I find this violation to be significant and substantial as well. Mathies Coal Co., supra.

For the reason stated earlier in this opinion, the purported order will thus be affirmed as an "S&S" section 104(a) citation.

Considering the criteria in section 110(i) of the Act and the entire record herein, along with the arguments of the parties, I find that an appropriate civil penalty for this latter violation is $200.

ORDER

1. Section 104(d)(1) Citation No. 2944253 is AFFIRMED.

2. Section 104(a) Citation No. 2944252, unsuccessfully and without effect modified to a Section 104(d)(1) Order, is AFFIRMED as an "S&S" section 104(a) Citation.

3. Ten-A-Coal Company is ordered to pay the sum of $600 within 30 days of the date of this decision as a civil penalty for the violations found herein.

Roy J. Maurer
Administrative Law Judge

Distribution:

Javier I. Romanach, Esq., Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Blvd. Rm., 516, Arlington, VA 22203 (Certified Mail)

Harold S. Yost, Esq., 126 W. Main Street, Bridgeport, WV 26330 (Certified Mail)

/ml

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

MAY 4 1990

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. WEST 89-317-M A.C. No. 04-04602-05515
v.	:	Docket No. WEST 89-360-M A.C. No. 04-04602-05516
CALIFORNIA LIGHTWEIGHT PUMICE, INC., Respondent	:	Docket No. WEST 89-394-M A.C. No. 04-04602-05520
	:	Docket No. WEST 90-21-M A.C. No. 04-04602-05521
	:	Battle Mountain

DECISION

Appearances: Nancy E. Resnick, Esq., Office of the Solicitor, U.S. Department of Labor, San Francisco, California, for Petitioner; Mr. L. Kenneth Teel, President, California Lightweight Pumice, Inc., Capistrano Beach, California, for Respondent.

Before: Judge Morris

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

After notice to the parties, a hearing commenced in Las Vegas, Nevada, on January 9, 1990. The cases involved in the hearing were Docket Nos. WEST 89-317-M, WEST 89-360-M, and WEST 89-394-M.

At the close of the hearing, respondent requested that it be permitted to present evidence as to its financial condition. In view of respondent's request, the hearing was reset to April 10, 1990. Subsequently, Docket No. WEST 90-21-M, a newly assigned case, was also set for a hearing on said date.

Prior to the hearing, the parties reached an amicable settlement. Under the terms of the settlement agreement, respondent agrees to pay the penalties originally assessed by the Secretary. The citations and the original assessments are as follows:

Docket No. WEST 89-317-M

Citation No.	Assessments
3286884	$ 84.00
3069863	300.00
3069864	500.00
3069866	300.00
TOTAL	$1,184.00

Docket No. WEST 89-360-M

3286892	$ 450.00

Docket No. WEST 89-394-M

3463508	$ 500.00
3463509	46.00
3463510	20.00
3463511	150.00
3463512	400.00
3463513	400.00
TOTAL	$1,516.00

Docket No. WEST 90-21-M

3463959	$ 600.00
3462890	600.00
3462891	68.00
3462893	50.00
3443076	500.00
3443783	400.00
TOTAL	$2,218.00

In support of their motion to approve the settlement, the parties have submitted information relating to the statutory criteria for assessing penalties as contained in 30 U.S.C. § 820(i).

I have reviewed the proposed settlement and I find it is reasonable and in the public interest. It should be approved.

Accordingly, I enter the following:

ORDER

1. The settlement agreement is approved.

2. The foregoing citations and proposed penalties are affirmed.

3. Respondent is ordered to pay to the Secretary the sum of $5,368.00 within 60 days of the date of this decision.

John J. Morris
Administrative Law Judge

Distribution:

Nancy E. Resnick, Esq., Office of the Solicitor, U.S. Department of Labor, 71 Stevenson Street, Suite 1110, San Francisco, CA 94105-2999 (Certified Mail)

L. Kenneth Teel, President, California Lightweight Pumice, Inc., 35541 Camino Capistrano, Capistrano Beach, CA 92624 (Certified Mail)

/ek

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

MAY 30 1990

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. WEST 89-317-M A.C. No. 04-04602-05515
v.	:	Docket No. WEST 89-360-M A.C. No. 04-04602-05516
CALIFORNIA LIGHTWEIGHT PUMICE, INC., Respondent	:	Docket No. WEST 89-394-M A.C. No. 04-04602-05520
	:	Docket No. WEST 90-21-M A.C. No. 04-04602-05521
	:	Battle Mountain

MOTION TO AMEND DECISION

Comes now John J. Morris, Administrative Law Judge, pursuant to Commision Rule 65(c), 29 C.F.R. § 2700.65(c), and states as follows:

1. The decision herein was issued on May 4, 1990, and the Commission has not directed the decision for review.

2. On May 21, 1990, petitioner moved that the decision be amended to include in WEST 89-317-M the settlement of Citation No. 3069865 and the penalty therefor of $400.00.

3. Petitioner states the said citation was omitted due to inadvertent clerical error.

4. Petitioner alleges respondent has stipulated to the correction of this omission. Further, the judge notes that the correction in this motion follows the disposition of the other 17 citations.

5. An amended decision is attached which incorporates Citation No. 3069865 with a penalty of $400. The total adjusted penalty is $5,768.00.

John J. Morris
Administrative Law Judge

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

MAY 30 1990

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. WEST 89-317-M A.C. No. 04-04602-05515
v.	:	Docket No. WEST 89-360-M A.C. No. 04-04602-05516
CALIFORNIA LIGHTWEIGHT PUMICE, INC., Respondent	:	Docket No. WEST 89-394-M A.C. No. 04-04602-05520
	:	Docket No. WEST 90-21-M A.C. No. 04-04602-05521
	:	Battle Mountain

AMENDED DECISION

Appearances: Nancy E. Resnick, Esq., Office of the Solicitor, U.S. Department of Labor, San Francisco, California, for Petitioner; Mr. L. Kenneth Teel, President, California Lightweight Pumice, Inc., Capistrano Beach, California, for Respondent.

Before: Judge Morris

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

After notice to the parties, a hearing commenced in Las Vegas, Nevada, on January 9, 1990. The cases involved in the hearings were Docket Nos. WEST 89-317-M, WEST 89-360-M, and WEST 89-394-M.

At the close of the hearing, respondent requested that it be permitted to present evidence as to its financial condition. In view of respondent's request, the hearing was reset to April 10, 1990. Subsequently, Docket No. WEST 90-21-M, a newly assigned case, was also set for a hearing on said date.

Prior to the hearing, the parties reached an amicable settlement. Under the terms of the settlement agreement, respondent agrees to pay the penalties originally assessed by the Secretary. The citations and the original assessments are as follows:

Docket No. WEST 89-317-M

Citation No.	Assessments
3286884	$ 84.00
3069863	300.00
3069864	500.00
3069865	400.00
3069866	300.00
TOTAL	$1,584.00

Docket No. WEST 89-360-M

3286892	$ 450.00

Docket No. WEST 89-394-M

3463508	$ 500.00
3463509	46.00
3463510	20.00
3463511	150.00
3463512	400.00
3463513	400.00
TOTAL	$1,516.00

Docket No. WEST 90-21-M

3463959	$ 600.00
3462890	600.00
3462891	68.00
3462893	50.00
3443076	500.00
3443783	400.00
TOTAL	$2,218.00

In support of their motion to approve the settlement, the parties have submitted information relating to the statutory criteria for assessing penalties as contained in 30 U.S.C. § 820(i).

I have reviewed the proposed settlement and I find it is reasonable and in the public interest. It should be approved.

Accordingly, I enter the following:

ORDER

1. The settlement agreement is approved.

2. The foregoing citations and proposed penalties are affirmed.

3. Respondent is ordered to pay to the Secretary the sum of $5,768.00 within 60 days of the date of this amended decision.

John J. Morris
Administrative Law Judge

Distribution:

Nancy E. Resnick, Esq., Office of the Solicitor, U.S. Department of Labor, 71 Stevenson Street, Suite 1110, San Francisco, CA 94105-2999 (Certified Mail)

L. Kenneth Teel, President, California Lightweight Pumice, Inc., 35541 Camino Capistrano, Capistrano Beach, CA 92624 (Certified Mail)

/ek

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

MAY 7 1990

BEAVER CREEK COAL COMPANY, Contestant	:	CONTEST PROCEEDING
v.	:	Docket No. WEST 88-191-R Citation No. 3225156
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Trail Mountain Mine No. 9 Mine ID 42-01211
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEST 88-319 A.C. No. 42-01814-03517
v.	:	Trail Mountain No. 9
BEAVER CREEK COAL COMPANY, Respondent	:	

DECISION

Appearances: Robert J. Murphy, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner/Respondent;
David M. Arnolds, Esq., Thomas F. Linn, Esq., Beaver Creek Coal Company, Denver, Colorado, for Contestant/Respondent.

Before: Judge Cetti

Statement of the Proceeding

These consolidated proceedings concern a Notice of Contest filed by the Contestant, Beaver Creek, pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d), challenging the captioned citation issued by MSHA. The civil penalty proceedings concern proposals for assessments of civil penalties filed by MSHA seeking assessments against Beaver Creek for the alleged violation stated in the citation.

After notice to the parties, the matter came on for hearing on the merits before me at Salt Lake City, Utah. Oral and documentary evidence was introduced, post-hearing briefs were filed, and the matters were submitted for decision. I have considered the arguments made on the record during the hearing in my adjudication of these matters and the post-hearing briefs filed by the parties.

ISSUES

1. Whether the condition and practice cited by the inspector constitutes a violation of 30 C.F.C. 75.1704 by Beaver Creek.

2. If the alleged violation occurred, was it a "significant and substantial" violation.

3. If a violation occurred, what is the appropriate penalty, in view of the statutory civil penalty criteria at Section 110(i) of the Act.

STIPULATIONS

The parties have agreed to the following stipulations, which I accept:

1. Beaver Creek Coal Company is engaged in mining and selling of coal in the United States, and its mining operations affect interstate commerce.

2. Beaver Creek Coal Company is the owner and operator of Gordon Creek No. 7 Mine, MSHA I.D. No. 42-01814, an underground coal mine.

3. Beaver Creek Coal Company is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 821, et seq. ("the Act").

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

5. The exhibits to be offered by Beaver Creek Coal Company and the Secretary are stipulated to be authentic, but no stipulation is made as to their relevance or to the truth of the matters asserted therein.

6. The proposed penalty will not affect Beaver Creek Coal Company's ability to continue business.

7. Beaver Creek Coal Company demonstrated good faith in abating the violation.

8. Beaver Creek Coal Company is a medium-size mine operator which had 537,321 tons of coal production in 1987.

9. The certified copy of the MSHA Assessed Violations History accurately reflects the history of this mine for the past two years prior to the date of the citation. (Joint Ex. 1)

Citation No. 3225156:

Federal Coal Mine Safety and Health Inspector Larry W. Ramey made a Triple A inspection of Beaver Creek's underground coal Mine, Gordon Creek No. 7. The inspector cited Beaver Creek for the alleged violation of 30 C.F.R. § 75.1704. This mandatory regulation essentially restates section 317(f)(1) of the Mine Act, 30 U.S.C. § 877(f)(1) and provides:

§ 75.1704 Escapeways

(Statutory Provisions)

> Except as provided in §§ 75.1705 and 75.1706, at least two separate and distinct travelable passageways which are maintained to insure passage at all times of any person, including disabled persons, and which are to be designated as escapeways, at least one of which is ventilated with intake air, shall be provided from each working section continuous to the surface escape drift opening, or continuous to the escape shaft or slope facilities to the surface, as appropriate, and shall be maintained in safe condition and properly marked. Mine openings shall be adequately protected to prevent the entrance into the underground are of the mine of surface fires, fumes, smoke, and floodwater. Escape facilities approved by the Secretary or his authorized representative, properly maintained and frequently tested, shall be present at or in each escape shaft or slope to allow all persons, including disabled persons, to escape quickly to the surface in the even of an emergency. (Emphasis added.)

Inspector Ramey, in Citation No. 3225156, described the alleged violative condition he observed as follows:

> The alternate escapeway belt entry, located in first south active section, and main conveyor belt entry was not being maintained in the condition to allow all persons, including disabled persons, to escape quickly to the surface in the event of an emergency. The following conditions did not comply with 75.1704-1A, location as follows: First south number one undercast, number nine crosscut, outby step platform to belt sixty-two inches wide, inby steps to belt sixty-two inches wide. Undercast number eight, crosscut, inby step sixty-nine inches wide to belt, outby steps sixty-nine inches to belt.

Number three, distance from eight undercast to main belt line approximately thirty feet in length, the width between the coal rib and the belt line and belt drive is fifty-two inches to forty-four inches in width. Number four, the crossunder the main belt is sixty inches wide by twenty-four and a half inches high. This condition is where the first south belt dumps on to the belt line. Num-Number five, main belt line belt check stoppings located located at number four overcast, two steel doors installed on each wall forty inches wide by sixty-three inches high. Number six, number one crosscut belt checks stopping steel door forty inches wide by sixty-three inches high. Number seven, steel located at mouth of entry, outside entrance, ninety-three inches high by forty-eight inches wide; see diagram below, not to scale.

Inspector Ramey, after reviewing the Gordon Creek mine map, determined that the main intake was the primary escapeway and the section belt line was the alternate escapeway. He went underground, accompanied by the mine's general foreman, John Perla, to inspect the first south working section. While walking the belt line outby, the inspector noted the seven different obstructions described in the citation he issued to Beaver Creek. Each of these cited obstructions were measured by both Inspector Ramey and Foreman Perla. These measurements were not disputed.

Inspector Ramey testified that the most serious obstruction was the crossunder the main belt at the place where the first south belt dumps onto the main belt line. He testified that to travel the escapeway at that area "you had to literally get down and crawl underneath the main belt to get on the other side of the main belt to continue on down toward the outside."

To travel the escapeway, the miner is required to crawl a distance of 4.5 feet under this obstruction with only a 24.5-inch clearance from the mine floor to the bottom of the main belt line.

The Secretary points out that, in addition to the 24.5-inch high crossunder the main belt, there are the other cited conditions in the alternate escapeway which included undercasts [items (1) and (2) in the citation] which required miners traveling this escapeway to ascend and descend steps after crossing platforms built over the undercasts and with a wide clearance between the coal rib and the belt drive which narrowed to only 44 inches. (No. 3 in the citation).

However, as Beaver Creek points out in its brief, Inspector Ramey's testimony was clear that he considered only one point in the escapeway, the crossunder at the main belt, designated as

No. 4 in the citation, to be an actual obstruction to passage and that he cited the other six points only because they did not meet the criteria of Section 75.1704-1(a). For instance, Mr. Ramey stated that, if the 69-inch wide steps at the No. 8 crosscut had been three inches wider, he would not have cited them, yet the three inches would have had "no bearing, very little effect," on the ability of men to pass. Mr. Ramey further agreed that the doors he cited at points 5, 6, and 7 allowed one person to pass fairly easily and that he cited them only because they failed to meet the criteria of Section 75.1704-1(a). Mr. Ramey confirmed that the crossunder was his only concern as follows:

Q. And do I understand your testimony that this is the one hazard in the citation that you recognized as an obstruction; that is, that miners would have to get down and crawl under [the crossunder] on their way up?

A. That's correct.

Mr. Ramey repeated this a short time later.

Q. Is it your testimony then, in essence, that the one obstruction was in the escapeway, which was the crossunder, and that the other points were cited because of the violation or the lack of compliance with 1704-1(a).

A. 30 CFR § 75.1704 was cited because of the 24.5-inch space that you had to get down and crawl through. The other areas mentioned here were cited because the law states that the District Manager has to approve that escapeway if an operator installs that or it should be approved by the District Manager. In my opinion, these guidelines were set out, were tested that this was the most economical and feasible way, due to the width and height, to quickly allow persons to escape out of an area.

In Secretary of Labor v. Utah Power & Light Co., No. WEST No. 87-211-R, et al., 11 FMSHRC 1926 (October 27, 1989), the commission held that the criteria set forth in 30 CFR 75.1704-1(a) aren't mandatory requirements, and the proper test for adequacy of escapeways is whether they are "maintained to insure passage at all times of any person, including disabled persons," as provided in 30 CFR 71.1704.

The panel said that 30 CFR 75.1704 establishes a "general functional test" of "passability" and doesn't impose upon operators any obligation to seek MSHA's prior approval for their escapeways.

The commission explained in footnote No. 5, that the term "passability" as used in the decision, was as an abbreviated expression for the phrase in section 75.1704, "maintained to insure passage at all times of any person, including disabled persons."

Inspector Ramey's testimony that Section 75.1704 "was cited because of the twenty-four and one-half-inch (height of the undercross of the main belt) that you had to get down and crawl," makes it clear that the real issue is whether a 24.5-inch high cross-under of the 48-inch wide main belt would insure passage at all times of any person, including a disabled person. The inde- inspector was clearly of the opinion that it did not. Upon independent review and evaluation of all the evidence, I agree with Inspector Ramey's opinion.

Based upon the undisputed measurements and the credible testimony of Inspector Ramey, I find that the 24.5-inch height of the 4.5-foot long undercross of the main belt is a hindrance that would not insure the passage at all times of any person including disabled persons, particularly in a disaster-type situation where the entry could be filled with smoke.

I find that the evidence is insufficient to conclude that the violation was significant and substantial in nature. The reasons are given below.

Beaver Creek states that its only means of abating the citation was to designate the return entry as the alternate escapeway. However, in Beaver Creek's opinion, the belt entry with its necessary obstructions was safer than the return. Beaver Creek gave four reasons for its opinion: 1) all smoke is vented to the return; 2) the belt itself provides a guide to follow in smoke while there is none in the return; 3) the return entry was longer than the belt entry; and 4) the return had seven turns at which miners could get lost in smoke. Beaver Creek asserts, therefore, that miners are more likely to get lost in the smoke in the return than they would in the belt entry.

Several months after the citation was issued, Beaver Creek performed and photographed (Exhibits 4A through 4E) a test used by MSHA for granting variance from the Section 75.1704-1(a) criteria. The test consisted of two men carrying a third man on a stretcher through all points at issue. John Perla, the mine's general foreman, took part in the test and testified that the test demonstrated that all the cited points could be passed without difficulty. He stated that they had no difficulty in

going through the (main belt) crossunder and that, although they were slowed down somewhat, the delay was "maybe seconds" but not "anything measurable." The belt was protected along each side by a rope and underneath by a guard. Beaver Creek also presented evidence that the condition cited 1) had existed for years; 2) had been inspected many times without citation; and 3) in Beaver Creek's opinion, was safer than the alternatives it had.

Beaver Creek contends that there was no violation and, even if there was one, it could not be found negligent for the above-stated reasons. Beaver Creek's contention that it was not negligent is rejected. Even assuming arguendo, negligence on the part of the enforcing agency, that negligence does not excuse an operator's negligence, nor does it preclude a finding of negligence for Beaver Creek's failure to fulfill its responsibility under 30 CFR § 75.1704. This failure was due to the operator's lack of due diligence and indifference, which is ordinary negligence.

There is merit, however, in Beaver Creek's assertion that the violation was not significant and substantial.

A violation is properly designated "significant and substantial" if, based on the particular facts surrounding that violation, there exists a reasonble likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. Cement Division, National Gypsum Co., 3 FMSHRC 822, 815 (April 1981). In Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984), the Commission explained:

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

Accord, Austin Power v. Secretary of Labor, 861 F.2d 99, 103 (5th Cir. 1988).

The third element of the Mathies formula requires "that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury,"

and that the likelihood of injury must be evaluated in terms of terms of continued normal mining operations. U.S. Steel Mining Co., 6 FMSHRC 1573, 1574 (July 1984). See also Monterey Coal Co., 7 FMSHRC 996, 1001-02 (July 1985). The operative time frame for determining if a reasonable likelihood of injury exists includes both the time that a violative condition existed prior to the citation and the time that it would have existed if normal mining operations had continued. Halfway, Inc., 8 FMSHRC 8, 12 (January 1986); U.S. Steel Mining Co., 7 FMSHRC 1125, 1130 (August 1985). The question of whether any particular violation is significant and subtantial must be based on the particular facts surrounding the violation, including the nature of the mine involved. Texasgulf, Inc., 10 FMSHRC 498, 500-01 (April 1988); Youghiogheny & Ohio Coal Company, 9 FMSHRC 1007, 2011-12 (December 1987). Finally, the Commission has emphasized that it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. U.S. Steel Mining Co., 6 FMSHRC 1834, 1836 (August 1984).

Under this precedent and based upon my independent review and evaluation of all the evidence, including the testimony of Mr. Perla, the mine foreman, I find the evidence presented is insufficient to establish that Beaver Creek's violation was significant and subtantial in nature. In particular, with regard to the third and fourth elements of the Mathies test, I find the evidence presented fails to show a reasonable likelihood that the hazard contributed to will result in an injury of a reasonable serious nature. See Rushton Mining Co. v. Secretary of Labor, No. PENN 88-99-R 11 FMSHRC 1432, 1437. (August 24, 1989).

Civil Penalty

Section 110(i) of the Act mandates consideration of six criteria in assessing a civil penalty. In compliance with the mandate, I have considered the following:

The parties stipulated the operator's business was of medium size. The mine produced 537,321 tons of coal the year prior to the issuance of the citation.

The parties stipulated that the proposed penalty would not adversely affect Beaver Creek's ability to continue in business.

Exhibit JE-1, a computer printout, indicated that within the last two years Beaver Creek was assessed 20 violations.

I find the operator's negligence to be moderate. The company should have known that the 24.5-inch height of the underpass of the main belt does not comply with the mandate of the cited safety standard.

The gravity was high. A miner or a disabled miner attempting to escape during an emergency situation could have been seriously impeded.

The company demonstrated good faith in rapidly abating this violative condition.

Everything considered, I find tht a civil penalty of $160 is appropriate for this violation.

ORDER

1. Citation No. 3225156 is modified to delete the characterization "significant and substantial" and, as modified, the citation is affirmed.

2. Contest Proceeding Docket No. WEST 88-191-R is dismissed.

3. Beaver Creek Coal Company is ordered to pay the sum of $160 within 30 days of the date of this decision as a civil penalty for the violation found herein.

August F. Cetti

August F. Cetti
Administrative Law Judge

Distribution:

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

David M. Arnolds, Esq., Thomas F. Linn, Beaver Creek Coal Company, 555 Seventeenth Street, 20th Floor, Denver, CO 80202 (Certified Mail)

/ek

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 1990

THOMAS F. HEFNER, JR., Complainant	:	DISCRIMINATION PROCEEDING
v.	:	Docket No. CENT 90-62-DM
TEXAS LEHIGH CEMENT COMPANY, Respondent	:	MD 89-121

ORDER OF DISMISSAL

Before: Judge Maurer

The Complainant, Thomas F. Hefner, Jr., requests approval to withdraw his complaint in the captioned case. He no longer desires a hearing concerning this matter. Under the circumstances herein, permission to withdraw is granted, and the case is therefore dismissed.

Roy J. Maurer
Administrative Law Judge

Distribution:

Mr. Thomas Francis Hefner, Jr., 206 Pin Oak Drive, Buda, TX 78610 (Certified Mail)

Brian S. Greig, Esq., Elizabeth Collum, Esq., Fulbright & Jaworski, 600 Congress Avenue, Suite 2400, Austin, TX 78701 (Certified Mail)

/ml

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 1990

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 90-5-M
Petitioner	:	A.C. No. 15-00099-05514
v.	:	
	:	Strunk Crushed Stone
HINKLE CONTRACTING CORP.,	:	
Respondent	:	

DECISION

Appearances: Anne T. Knauff, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee for Petitioner;
Robert M. Connolly, Esq., Stites & Harbison, Louisville, Kentucky for Respondent.

Before: Judge Melick

This case is before me upon remand by the Commission on April 4, 1990, to consider the parties' post-hearing briefs and to reevaluate the decision rendered in these proceedings on March 9, 1990, in light of those briefs.

Respondent maintains in its brief that the unguarded belt cited in this case (Citation No. 3438481) was nevertheless safe because (1) it was at or above shoulder height for any man using the adjacent walkway, (2) no one has ever been injured by the unguarded belt, (3) the height of the belt effectively served as a guard, (4) it would be impossible to fall on the belt, (5) a kill switch is not vital to safety on larger conveyors, (6) greasing, maintenance and clean-up are performed during the evening shift while the conveyor is not operating and, (7) workers were aware that the kill switch was inoperable.

I have evaluated all of the factors cited by Respondent as purportedly demonstrating the safety of the unguarded belt with an inoperable kill switch but find them to be unsubstantiated, without merit, or both. Even assuming that the belt was located at or above shoulder height for workers using the walkway this does not afford protection to the arms and hands of persons who may be caught and/or drawn into the belt. In addition, even assuming that no one had ever been

injured by the belt it cannot reasonably be inferred from such evidence under the circumstances herein that serious injuries would not occur in the future.

Moreover even assuming that the height of the belt would prevent persons from falling onto the belt the greater hazard is presented by pinch points. The bald statement that a "kill switch" is not vital to safety on larger conveyors is without evidentiary support and contrary to common sense. In addition even assuming that greasing, maintenance and clean-up were performed during the evening shift while the belt was not operating it is not disputed that the inspector himself and other persons observed by the inspector were using the walkway adjacent to the conveyor while the belt was in operation. Even assuming that workers were aware that the kill switch was inoperable the inherent hazard of the unguarded belt with an inoperable kill switch was nevertheless present.

Respondent also maintains in its brief that it was without negligence in failing to guard its conveyor and in failing to have an operable kill switch because MSHA Inspectors Erickson and Manwarring had granted them a specific exception from the application of the cited mandatory standard. If such an exception had been established by credible evidence the argument might have some merit. However, Respondent has simply failed to adequately support its allegations.

In any event, mine operators may be presumed to know the law for obtaining modification of the application of mandatory standards under section 101(c) of the Act. Likewise mine operators may be presumed to know that MSHA inspectors do not have the authority to grant exceptions or modifications to the application of mandatory standards. The negligence and unwarrantable failure findings reached in this case are therefore fully supported.

With respect to Citation No. 3438483 Respondent argues that the decision failed to taken into account the fact that it had, before the citation was issued, spent three days removing over 200 tons of rock to improve the condition of the cited highwall. Even assuming this representation were true however the evidence shows that these corrective measures were discontinued well before the job of scaling the highwall had been completed. There was no credible evidence moreover that the operator intended to resume work on the highwall. In any event the negligence findings were based in part upon the Respondent's abandonment of correcting the highwall conditions.

Under the circumstances I find no basis for amending the findings in the decision dated March 9, 1990.

ORDER

Hinkle Contracting Corporation is hereby directed to pay civil penalties of $1,350 within 30 days of the date of this decision.

Gary Melick
Administrative Law Judge

Distribution:

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

Robert M. Connolly, Esq., Stites & Harbison, 600 West Main Street, Louisville, KY 40202 (Certified Mail)

nt

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 1990

CENTRAL OHIO COAL COMPANY, Contestant	:	CONTEST PROCEEDING
v.	:	Docket No. LAKE 89-53-R Citation No. 2950074;1/20/89
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Muskingum Mine Mine ID 33-00989
SECRETARY OR LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. LAKE 89-91 A.C. No. 33-00989-03571
v.	:	Muskingum Mine
CENTRAL OHIO COAL COMPANY, Respondent	:	

DECISION

Appearances: Patrick M. Zohn, Esq., U.S. Department of Labor, Office of the Solicitor, Cleveland, OH, for the Secretary of Labor;
David A. Laing, Esq., Porter, Wright, Morris and Arthur, Columbus, OH, for Central Ohio Coal Company.

Before: Judge Fauver

The Company seeks to vacate a citation and the Secretary seeks its affirmance, with a civil penalty, under the Federal Mine Safety and Health Act of 1977, 30 C.F.R. § 801 et seq.

The pivotal issue is whether the Company's 16-mile railroad track at its surface coal mine is an "active working area" within the meaning of 30 C.F.R. § 77.1713(a).

Having considered the hearing evidence and the record as a whole, I find that a preponderance of the substantial, reliable, and probative evidence establishes the following Findings of Fact and further findings in the Discussion below:

FINDINGS OF FACT

1. Central Ohio Coal Company owns and operates a surface coal mine, known as the Muskingum Mine, which encompasses 135,000 to 140,000 acres.

2. At all relevant times, the mining process commenced with the uncovering and extraction of coal from five pit areas, from which the coal was transported by truck to the north end tipple. From the tipple, the coal was conveyed by rail to the south end preparation plant, where the coal was washed and conveyed off the mine premises.

3. The railroad connecting the north end tipple and the south end preparation plant has been in existence for about 20 years. The railroad is 16 miles long and generally runs through remote areas of the mine. It does not pass through or near any pit area.

4. The train can be operated manually or by automatic control but is manned by a train operator, called a "trip rider." 1/ He or she usually operates the locomotive for half the trip and frequently more than half the trip. When the train is on "automatic," the operator stays near the controls. At the time of the citation, the duties of the train operator included operating the train, observing the railroad track (from the locomotive) and recording hazards or track conditions warranting attention. The day shift foreman had the duty of reviewing the inspection logs prepared by the train operators.

5. On January 20, 1989, MSHA Inspector Robert Grissett issued Citation No. 2950074, alleging a violation of 30 C.F.R. § 77.1713(a), as follows:

> Records indicated that this railroad system was being examined each shift, however the examinations were not being conducted by a certified person.

1/ The company designates the train operator position as "trip rider." This seems to be a misnomer, since the employee operates the train at least half the trip, and when the train is on automatic he or she remains available to operate the controls when needed. This seems analogous to calling an airline pilot a "plane rider" because part of the time the plane is on automatic pilot or instrument control. Except for a confusing title, the train employee's job and duties are understood and not in dispute on this record. In this decision, the job is called "train operator," rather than "train rider," in the interest of closer accuracy.

6. Inspector Grissett issued the citation because the individuals examining the railroad -- the train operators -- were not certified examiners.

7. In Ohio, "certification" requires that an individual obtain a surface foreman's license by passing an examination given by the Ohio Mine Examining Board. There is no certification for the position of train operator or "train rider."

8. Inspector Grissett had been inspecting this mine for 11 years. Prior to the citation, MSHA had not required that a certified person inspect the railroad, or asked for any records pertaining to the inspection of the railroad. For at least five years preceding the citation, Inspector Grissett had not inspected the 16 miles of railroad.

9. Around January 19, 1989, MSHA offered to permit the train operators to inspect the railroad if they maintained an inspection log and if the supervisor of the railroad reviewed the log daily and rode the train once every two weeks. If the Company had agreed to this, the citation apparently would not have been issued. However, when a mutual agreement did not materialize, Inspector Grissett requested an interpretation from MSHA and subsequently concluded that the railroad was an "active working area" within § 77.1713(a) because of the presence of individuals -- such as the train operators and track crew -- working on the train or in the vicinity of the track. He equated "active working area" as used in § 77.1713(a) with "active workings" as defined in 30 C.F.R. § 77.2(a).

10. For about a month before the citation, the Company had been maintaining an inspection log filled in by the train operators. This practice was commenced at the recommendation of the Ohio Division of Mines. It was not based on any violation of Ohio mining law.

11. A track crew worked on the railroad each day. The train passed the crew twice on each roundtrip.

12. A number of derailments had occurred in recent times. These dangers gave rise to a complaint to MSHA which resulted in the subject investigation and citation.

DISCUSSION WITH FURTHER FINDINGS

The key issue is whether the 16-mile railroad is an "active working area" within the meaning of 30 C.F.R. § 77.1713(a), which provides in part:

(a) At least once during each working shift, or more often if necessary for safety, each active working area and each active surface installation shall be examined by a certified person designated by the operator to conduct such examinations for hazardous conditions and any hazardous conditions noted during such inspection shall be reported to the operator and shall be corrected by the operator.

The term "active working area" is not defined in the Act or in the regulations, but the Secretary contends it is synonymous with the definition of "active workings" in § 77.2(a), which states:

(a) "Active workings" means any place in a coal mine where miners are normally required to work or travel; ***.

The Secretary contends that, because the railroad is an area "where miners are normally required to work or travel," and the railroad is an integral part of the mine, it is necessarily an "active working area" within the meaning of § 77.1713(a). The Company submits that "active working area" is not synonymous with "active workings," that its railroad is not an active working area as that term is used in § 77.1713(a), and that safety standards with respect to the railroad are governed by Subpart Q of 30 C.F.R. Part 77, not § 77.1713(a).

Section 77.1713(a) requires that, at least once during each working shift, "each active working area and <u>each active surface installation</u> shall be examined by a certified person ... " (emphasis added). Although not defined in § 77.2, "surface installations" are the subject of considerable regulation in Subpart C of Part 77. Section 77.200, entitled "Surface Installations: General," provides that:

All mine structures, enclosures, or other facilities (including custom coal preparation) shall be maintained in good repair to prevent accidents and injuries to employees.

If "active working area" in § 77.1713(a) were synonymous with "active workings" in § 77.2(a), the reference in § 77.1713(a) to "active surface installation" would be superfluous. A statute or regulation should be construed so as to avoid making any word superfluous. <u>United States</u> v. <u>Handy</u>, 761 F.2d 1279, 1280 (9th Cir. 1985); <u>King</u> v. <u>Internal Revenue Service</u>, 688 F.2d 488, 491 (7th Cir. 1982); <u>Zeigler Coal Co</u>. v. <u>Kleppe</u>, 536 F.2d 398, 406 (D.C. Cir. 1976). As stated in

Suwannee River Finance, Inc. v. United States, 7 U.S. Cl. Ct. 556, 560 (1985):

> It is axiomatic that regulations must be interpreted to give meaning to every word, particularly where doing so leads to an entirely sensible interpretation of the provision in question.

The language of § 77.1713(a), similar language contained elsewhere in Part 77, and MSHA's own Policy Manual interpretation of § 77.1713(a) support the conclusion that "active working area" in § 77.1713(a) refers to the pit areas of surface coal mines -- in other words, the working areas where coal is mined and extracted.

Section 77.1004(a) uses the term "working areas" as follows:

> Highwalls, banks, benches, and terrain sloping into the working areas shall be examined after every rain, freeze, or thaw before men work in such areas, and such examination shall be made and recorded in accordance with § 77.1713. [Emphasis added.]

Terms such as "highwall," "bank," and "bench" are clearly associated with the "pit" areas of a surface coal mine where coal is uncovered and extracted. 2/ In § 77.1004, "working area" thus refers to the pit or mining areas of a surface coal mine. In addition, § 77.1004 provides that examinations conducted pursuant to § 77.1004 "shall be made and recorded in accordance with § 77.1713," indicating that "working areas" as used in both sections has the same meaning. Statutory or regulatory phrases are not construed in isolation. They must be construed in the context of the statute or regulation as a whole. Barnson v. United States, 816 F.2d 549, 554 (10th Cir. 1987), cert. denied, 484 U.S. 896 (1987) (citing United States v. Morton, 467 U.S. 822, 828 (1984). As stated in Barnson:

2/ A "highwall" is "the unexcavated face of exposed overburden and coal or ore in an opencast mine or the face or bank on the uphill side of a contour strip mine excavation." Bureau of Mines, A Dictionary of Mining, Minerals, and Related Terms, 543 (1968). A "bench" for purposes of a surface mine is "a ledge, which, in open-pit mines and quarries, forms a single level of operation above which mineral or waste materials are excavated from a continguous bank or bench face." Id. at 96. See also 30 C.F.R. §§ 77.1000 et seq. as evidencing that "highwalls," "banks," and "benches" are part and parcel of the "pit" or mining areas of a surface coal mine.

> Generally, when the same words are used in different sections of the law, they will be given the same meaning. [Citation omitted.]

See also Arnold v. Eastern Air Lines, Inc., 712 F.2d 899, 904 (4th Cir. 1983), cert. denied, 464 U.S. 1040 (1984) ("the canon of construction is well established that words repeated within the same statutory section have an identical meaning in the several places employed"); Tre-State Terminals, Inc., v. Jesse, 596 F.2d 752, 757 (7th Cir. 1979) (the connotation of a term in one portion of an act may often be clarified by reference to its use in others).

In its Program Policy Manual, MSHA states with respect to § 77.1713:

> MSHA will continue to require that daily on-shift examinations be made in accordance with this Section at active working areas of surface mines, active surface installations at these mines, and preparation plants not associated with underground coal mines. MSHA will not require daily on-shift examinations of the surface work areas of underground coal mines. [Emphasis added.]

MSHA's Policy Manual is consistent with the interpretation that "active working area" in § 77.1713(a) means the "pit" or "mining area" of a surface coal mine and not simply any location where miners are normally required to work or travel. This seems to be a reasonable regulatory distinction, since non-mining areas of surface mines, like the surface areas of underground mines, are generally not subject to the shift-by-shift changes that may characterize the working sections underground (e.g. methane accumulation, roof falls, inadequate ventilation) or the pit or mining areas of surface coal mines (as the result of drilling, blasting and mining operations and the presence of highwalls, benches, etc.).

This interpretation of § 77.1713(a) is consistent with the fact that MSHA did not require the Company to conduct on-shift inspections of haulage roads not located in the pit areas or on-shift inspections of the service road that runs parallel to the railroad track, even though miners work on or travel these roads. It is also consistent with the fact that for 20 years, before this citation, MSHA did not require that a certified person inspect the railroad.

Section § 77.1713 is included in "Subpart R -- Miscellaneous," which does not refer to railroads or track haulage. However, Subpart Q, entitled "Loading and Haulage," sets forth numerous mandatory safety standards with respect to loading, haulage equipment, trains and railroad tracks. See, e.q., §§ 77.1603, 77.1605(m), (n), (p), 77.1606 and 77.1607(v), (w), (y), and (z). Section 77.1606 is entitled "Loading and haulage equipment; inspection and maintenance." Section 77.1606(a) requires an inspection of mobile loading and haulage equipment by a "competent" person and § 77.1606(b) requires inspections of carriers on aerial tramways, as well as the brakes, ropes, and supports thereof.

Thus, in Subpart Q the Secretary has set forth explicit safety standards as to haulage equipment, including trains and railroads. Where she found it appropriate, the standards include the inspection of loading and haulage equipment. If the Secretary had intended that a certified person inspect a railroad track each shift, she would clearly have stated such requirement in Subpart Q and not relied upon unclear language under the "miscellaneous" subpart. For example, a logical place for such a requirement would be § 77.1606. 3/

Finally, it may be noted, § 77.1713(a) is the surface coal mine counterpart to § 75.304, which requires on-shift examinations of each "working section" of an underground coal mine. Like § 77.1713(a), § 75.304 requires that at least once during each working shift, or more often if necessary for safety, each working section shall be examined for hazardous conditions "by certified persons designated by the operator to do so." As defined in § 75.2, "working section" has a much narrower definition than "active working." 4/

3/ Section 77.1606 states in part:

"(a) Mobile loading and haulage equipment shall be inspected by a competent person before such equipment is placed in operation .***"

"(b) Carriers on aerial tramways . . . shall be inspected each shift; brakes shall be inspected daily; ropes and supports shall be inspected as recommended by the manufacturer or as physical conditions warrant. ***."

4/ Section 75.2(g)(3) defines "working section" as "all areas of the coal mine from the loading point of the section to and including the working faces."

For all of the foregoing reasons, the Secretary's attempt to equate "active working area" as used in § 77.1713(a) with "active workings" in § 77.2(a) is rejected. I conclude that § 77.1713(a) does not apply to the railroad at the subject mine. Citation No. 2959974 is therefore invalid.

CONCLUSIONS OF LAW

1. The judge has jurisdiction over these proceedings.

2. The Secretary failed to prove a violation of § 77.1713(a) as alleged in Citation No. 2959974.

ORDER

1. The Secretary's motion to correct the transcript is GRANTED.

2. Citation No. 2959974 is VACATED.

3. The civil penalty proceeding is DISMISSED.

William Fauver
William Fauver
Administrative Law Judge

Distribution:

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

David A. Laing, Esq., Porter, Wright, Morrios & Arthur, 41 S. High Street, Columbus, OH 43215 (Certified Mail)

iz

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 1990

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. CENT 89-103-M
	:	A.C. No. 14-01492-05501
v.	:	
	:	Portable No. 2
WALKER STONE COMPANY, INCORPORATED, Respondent	:	Docket No. CENT 89-158-M
	:	A.C. No. 14-00612-05502
	:	
	:	Plant C Mine

DECISIONS

Appearances: Dewey P. Sloan, Jr., Esq., Office of the Solicitor, U.S. Department of Labor, Kansas City, Missouri, for the Petitioner;
David S. Walker, President, Walker Stone Company, Incorporated, Chapman, Kansas, Pro se, for the Respondent.

Before: Judge Koutras

Statement of the Proceedings

These civil penalty proceedings concern proposals for assessment of civil penalties filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a). The petitioner seeks civil penalty assessments against the respondent for six (6) alleged violations of certain mandatory safety standards found in Part 56, Title 30, Code of Federal Regulations. The respondent filed answers and contests, and hearings were convened in Topeka, Kansas.

Issues

The issues presented in these cases are (1) whether the conditions or practices cited constitute violations of the cited mandatory safety standards; (2) whether several of the alleged

violations were "significant and substantial," and (3) the appropriate civil penalties to be assessed for the violations, taking into account the civil penalty assessment criteria found in section 110(i) of the Act.

In Docket No. CENT 89-158-M, the respondent raised a question of jurisdiction claiming that the location where the alleged violations were cited was not subject to MSHA's enforcement jurisdiction because no mining activities covered by the Act are taking place at that site.

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. Sections 110(a) and (i) of the 1977 Act, 30 U.S.C. § 820(a) and (d).

3. Commission Rules, 20 C.F.R. § 2700.1 et seq.

Findings and Conclusions

Docket No. CENT 89-103-M

In this case, the respondent was cited on January 19, 1989, for three alleged violations. Section 104(a) non-S&S Citation No. 2651871, cited an alleged violation of mandatory safety standard 30 C.F.R. § 56.13011, because of an inoperative pressure gauge on the air receiver tank of a compressed air drill. The inspector found that the violation resulted from a moderate degree of negligence, and that an injury was unlikely. The violation was abated and the citation was terminated after a new pressure gauge was installed on the compressor.

Section 104(a) S&S Citation No. 2651874, cited an alleged violation of 30 C.F.R. § 56.12025, for the failure by the respondent to provide an adequate grounding device for the 110 volt parts cleaning machine. The inspector found that an injury was reasonably likely, and that the violation resulted from a moderate degree of negligence. The violation was abated and the citation was terminated after the machine was properly grounded by the installation of a new cable equipped with a grounding conductor and proper plug.

Section 104(a) S&S Citation No. 2651877, cited an alleged violation of 30 C.F.R. § 56.12025, for the failure by the respondent to properly ground a 3 horsepower 3 phase 220 volt grinder. The inspector found that an injury was reasonably likely, and that the violation resulted from a moderate degree of negligence. The violation was abated and the citation was terminated after

the grinder was grounded properly by the installation of a grounding wire from the fuse safety switch to the grinder motor.

When the hearing in this case was convened the parties advised me that they proposed to settle the case, and the respondent conceded that the violations occurred and agreed to pay the proposed civil penalty assessments in full. In this regard, the parties stipulated to the following:

1. The respondent's portable number two plant is subject to the Act and to MSHA's enforcement jurisdiction.

2. The respondent is a small crushed stone operator who employs approximately 3 to 15 miners during the course of its mining operation.

3. Payment of the proposed civil penalty assessments will not adversely affect the respondent's ability to continue in business.

4. The respondent has no history of prior assessed civil penalties for violations of any mandatory safety or health standards.

The inspector who issued the citations was present in the court room, and he expressed his agreement with the proposed settlement disposition of this case. After careful consideration of the pleadings and arguments presented by the parties in support of the proposed settlement of this case, and pursuant to Commission Rule 30, 29 C.F.R. § 2700.30, the proposed settlement was approved from the bench (Tr. 11-20). I conclude and find that the settlement is reasonable and in the public interest, and my bench decision is reaffirmed, and the settlement IS APPROVED.

ORDER

The contested citations are AFFIRMED, and the respondent IS ORDERED to pay the following civil penalty assessments in satisfaction of the contested violations in this case:

Citation No.	Date	30 C.F.R. Section	Assessment
2651871	01/19/89	56.13011	$20
2651874	01/19/89	56.12025	$68
2651877	01/19/89	56.12025	$68

Payment is to be made to MSHA within thirty (30) days of the date of this decision and order, and upon receipt of payment, this matter is dismissed.

Docket No. CENT 89-158-M

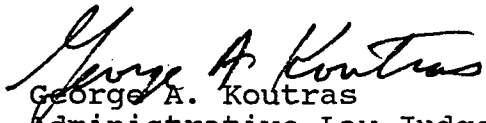
In this case, petitioner's counsel stated that he agrees with the respondent's contention that MSHA has no enforcement jurisdiction at the location where the citations were issued by the inspector during an inspection conducted on May 25, 1989. Counsel asserted that the inspection was made because the respondent had filed for a mine identification number at MSHA's request. However, a subsequent investigation by MSHA revealed that the mine previously operated at the site identified as "plant C" has been closed for 10 years and that the respondent does not conduct any crushed stone mining activities at the site and simply uses the location for an office and small shop.

Petitioner's counsel confirmed that pursuant to MSHA's enforcement policies, the activities conducted by the respondent at the location in question are not within MSHA's enforcement jurisdiction. Counsel explained that the respondent filed an MSHA legal identity form after being instructed by MSHA's Denver Office to do so and that this triggered an inspection by the inspector who assumed that there was jurisdiction. The inspector who conducted the inspection which resulted in the issuance of the citations agreed that this was in fact the case and he concurred that MSHA has no jurisdiction in this matter (Tr. 4-11).

In view of the foregoing, petitioner's counsel moved for a dismissal of this case. The motion was granted from the bench, and it is herein reaffirmed. Under the circumstances, the petitioner's previously filed motion for admission of the citations and jurisdiction is deemed moot and withdrawn.

ORDER

This case IS DISMISSED for lack of jurisdiction, and the three contested citations ARE VACATED.



George A. Koutras
Administrative Law Judge

Distribution:

Dewey P. Sloan, Jr., Esq., Office of the Solicitor, U.S. Department of Labor, Room 2106, 911 Walnut Street, Kansas City, MO 64106 (Certified Mail)

Mr. David S. Walker, President, Walker Stone Company, Incorporated, P.O. Box 563, Chapman, KS 67431 (Certified Mail)

/fb

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

MAY 15 1990

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. SE 89-152-M
Petitioner	:	A.C. No. 09-00281-05513
v.	:	
	:	Howard Mine
HOWARD SAND COMPANY,	:	
Respondent	:	

DECISION

Appearances: Michael K. Hagan, Esq., Office of the Solicitor, U.S. Department of Labor, Atlanta, Georgia, for the Petitioner;
Harold Brown, Owner, Howard Sand Company, Howard, Georgia, Pro se, for the Respondent.

Before: Judge Koutras

Statement of the Case

This proceeding concerns a proposal for assessment of civil penalty filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a), seeking a civil penalty assessment in the amount of $147 for an alleged violation of mandatory safety standard 30 C.F.R. § 56.14112. Respondent filed a timely answer and contest, and a hearing was held in Macon, Georgia. The parties waived the filing of posthearing arguments, but I have considered their oral arguments made on the record during the course of the hearing in this matter.

Issues

The issues presented in this case are (1) whether the condition or practice cited by the inspector constitutes a violation of the cited mandatory safety standard, (2) whether the violation was "significant and substantial" (S&S), and (3) the appropriate civil penalty to be assessed for the violation,

taking into account the statutory civil penalty assessment criteria found in section 110(i) of the Act. Additional issues raised by the parties are identified and disposed of in the course of this decision.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, 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.

Stipulations

The parties stipulated to the following (Tr. 4-6, Exhibit ALJ-1):

1. The respondent is engaged in a mining operation which affects commerce and it is subject to the Act.

2. The Commission has jurisdiction in this case.

3. The inspector who issued the subject citation is a duly authorized representative of the Secretary and a true and correct copy of the citation was served on the respondent.

4. The imposition of a civil penalty assessment for the violation will not affect the respondent's ability to continue in business.

5. A violation of the cited standard, 30 C.F.R. § 56.14112 existed as cited in that the drive shaft coupling on the dredge, diesel engine was not equipped with a guard at the time of the inspection (Tr. 7).

6. The violation was abated in good faith.

7. The respondent's history of prior violations, as shown on an MSHA computer print-out (exhibit P-1), is correct.

8. The respondent is a small mine operator.

9. The issues remaining for trial are the degree of negligence and the reasonableness of the proposed civil penalty assessment of $147.

Discussion

The contested section 104(a) S&S Citation No. 3432413, served on the respondent on May 17, 1989, cites an alleged violation of mandatory safety standard 30 C.F.R. § 56.14112, and the cited condition states that "The drive shaft coupling on the dredge diesel engine is not equipped with a guard."

Petitioner's Testimony and Evidence

MSHA Inspector Darrell Brennan confirmed that he inspected the respondent's sand and gravel operation on May 17, 1989, and that he issued the citation after finding that the coupling apparatus connecting the diesel engine and pump used to pump the sand from the pit was not provided with any guarding to prevent contact with persons. He stated that the engine was mounted on an elevated platform "dredge" approximately 8 feet by 12 feet. He explained that the sand is flushed from the pit walls by high pressure water hoses into the pit, and it is pumped from the pit by the pump in question. Two men are usually present doing this work.

Mr. Brennan stated that the diesel engine is approximately 4500 horsepower, and that the drive shaft coupling connecting the engine to the pump rotates at approximately 1700-1800 rpm's. He described the coupling as a "donut" shaped device which coupled the engine and pump shafts together, and he confirmed that it was not guarded at all.

Mr. Brennan stated that there was a plate steel walkway approximately 2-1/2 to 3 feet wide adjacent to the unguarded coupling. He stated that the walkway is wet and muddy, and that the two men working in the pit pumping sand would have occasion to come to the platform where the engine was located to check it, grease it, or perform maintenance work. Someone would also be required to be in the area to start up the engine and pump, and to engage the clutch, and they would also be there to shutdown the engine at the end of the work shift.

Mr. Brennan stated that the wet and muddy walkway conditions presented a slipping hazard, and given the fact that the unguarded shaft coupling turned at a high rate of speed and created a "vacuum," he believed that it was reasonably likely that someone on the slick walkway would fall directly into the unguarded coupling and suffer injuries of a reasonably serious nature, including disabling injuries. For these reasons, he concluded that the violation was significant and substantial.

Mr. Brennan confirmed that during a prior inspection of the platform "dredge" area in question on September 15, 1988, he issued a citation on the same diesel engine because one of the V-belt pinch points was not adequately guarded. Although a guard

was installed, he did not believe that it was sufficient to cover the pinch point (exhibit P-3). Mr. Brennan believed that the shaft coupling which he cited on May 17, 1989, was provided with a guard at the time of his previous inspection on September 15, 1988.

Mr. Brennan further stated that although he was not certain whether the shaft coupling in question was previously guarded, he would have issued a citation if it were not guarded. He stated that Mr. Brown did not accompany him during his inspections. He did not know whether the engine was greased while the engine was running, and he was not aware of the respondent's maintenance procedures or whether maintenance was ever performed with the engine and pump operating (Tr. 8-30).

Respondent's Testimony and Evidence

Harold Brown, respondent's owner and operator, stated that he operates four sand and gravel plants and has been in business and operated the kinds of equipment associated with his business for 60 years. He stated that MSHA inspects his operations two or three times a year, and that except for one occasion approximately 10 years ago when he was cited at another operation for failing to guard an engine shaft coupler, he has not been previously cited at the Howard Mine for a violation of this kind.

Mr. Brown confirmed that two men work in the pit pumping sand, and that the pumper is usually 60 feet away from the dredge where the unguarded engine drive coupler was located. The other person may grease the engine as required, and if there is a problem he would have to go and check the engine and pump while it is in operation. He stated that the pump operates approximately 3 hours a day, 4 days a week, and that the person who is there usually sits in his car while the pump is operating. Someone would have to start and stop the engine pump each day.

Mr. Brown conceded that the engine and pump shaft coupler cited by Inspector Brennan was not guarded, and that there was a violation of the cited standard. However, he believed that the proposed civil penalty assessment was excessive for the violation. He stated that although he was previously cited in September, 1988, he was unaware of that violation until he called his manager at that operation after he received the May 17, 1989, citation from Mr. Brennan. Mr. Brown also believed that he had a good safety and accident record, and that he has always corrected any conditions brought to his attention by the MSHA inspectors. He did not believe that the cited condition was as serious as a "pinch point" hazard (Tr. 30-47).

Findings and Conclusions

Fact of Violation

The respondent is charged with a violation of mandatory standard 30 C.F.R. § 56.14112, for failure to equip the cited drive shaft coupling on the dredge diesel engine with a guard. The standard requires that equipment guards be securely in place while machinery is being operated. The inspector confirmed that he cited section 56.14112, rather than section 56.14107, which requires the guarding of moving machine parts to protect persons from contacting couplings that can cause injury because of his recollection that the coupling was guarded during a prior inspection on September 15, 1988, but that the guard was not in place when he conducted his inspection on May 17, 1989 (Tr. 28-29).

The respondent stipulated to the fact of violation, and the inspector's unrebutted testimony establishes that the cited coupler was not guarded. Under the circumstances, I conclude and find that a violation has been established, and the citation IS AFFIRMED.

Significant and Substantial Violation

A "significant and substantial" violation is described in section 104(d)(1) of the Mine Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 C.F.R. § 814(d)(1). A violation is properly designated significant and substantial "if, based upon the particular facts surrounding the violation there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (April 1981).

In Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984), the Commission explained its interpretation of the term "significant and substantial" as follows:

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

In United States Steel Mining Company, Inc., 7 FMSHRC 1125, 1129, the Commission stated further as follows:

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

The question of whether any particular violation is significant and substantial must be based on the particular facts surrounding the violation, including the nature of the mine involved, Secretary of Labor v. Texasgulf, Inc., 10 FMSHRC 498 (April 1988); Youghiogheny & Ohio Coal Company, 9 FMSHRC 2007 (December 1987).

Inspector Brennan testified credibly that because of the slippery conditions on the steel walkway adjacent to the unguarded coupler which would be turning at a high rate of speed when the engine was in operation it was reasonably likely that someone walking along the walkway with muddy boots or shoes would fall directly into the coupler and suffer permanently disabling injuries. He also believed that a person could break his back or suffer very serious injuries if he were to contact the coupler (Tr. 14-15). The inspector confirmed that while the walkway was provided with a guardrail on the "outside," no guardrail was provided on the "inside" and someone "could get right into the motor" (Tr. 26-27).

Although Mr. Brown did not consider the hazard presented by the unguarded coupler to be a "pinch point" hazard, he agreed that the inspector was concerned that the coupling turning at 1,700 rpm's under high speed would injure anyone who contacted it. He also agreed with the inspector's belief that anyone walking on the steel walkway with slippery boots could inadvertently fall into the unguarded coupler. He also conceded that someone would walk by the location of the unguarded coupler once or twice a day (Tr. 35, 44).

In view of the foregoing, I conclude and find that the violation was significant and substantial, and I agree with the inspector's finding in this regard. Accordingly, IT IS AFFIRMED.

Size of Business and Effect of Civil Penalty Assessment on the Respondent's Ability to Continue in Business

The parties stipulated that the respondent is a small mine operator and that the civil penalty assessment for the violation will not affect the respondent's ability to continue in business. I adopt these stipulations as my findings and conclusions with respect to these issues.

History of Prior Violations

MSHA's computer print-out with respect to the respondent's compliance record for the period May 17, 1987 through May 16, 1989, reflects that the respondent paid civil penalty assessments for 31 violations, eight which were for violations of section 56.14112. I take note of the fact that 13 of these prior assessments were for non-S&S "single penalty" section 104(a) citations, and that the remaining citations were all section 104(a) "S&S" citations.

Negligence

The inspector made a finding of "moderate negligence" in this case, and the petitioner confirmed that this was the case and that the respondent is not charged with any "reckless disregard" of the cited standard (Tr. 42). I agree with the inspector's moderate negligence finding and I conclude and find that the violation was the result of the respondent's failure to exercise reasonable care.

Gravity

On the basis of my significant and substantial findings and conclusions, I conclude and find that the violation was serious.

Good Faith Compliance

The parties stipulated that the violation was abated in good faith by the respondent and I adopt this stipulation as my finding and conclusion on this issue. I have taken this into consideration in the assessment of the civil penalty for the violation in question.

Civil Penalty Assessment

In mitigation of the proposed civil penalty assessment in this case, respondent Brown asserted that he operates four plants and has never had an injury as a result of the cited unguarded equipment during MSHA inspections which have been conducted two

times a year since 1978. Mr. Brown also stated that the particular need for a coupler on the cited equipment had never previously been brought to his attention until the inspection in May, 1988, and he disagreed with the inspector's belief that the cited coupler had previously been guarded (Tr. 21, 31). Mr. Brown stated further that during his 60 years' of experience in the business, he has never had an injury at any of his operations (Tr. 32). He explained that he has operated diesel motors, couplers, and pumps similar to the one cited in this case for 60 years without an injury (Tr. 37-38). Although he conceded that he has previously been cited for violations of section 56.14112, he confirmed that none of these were for failure to guard couplers on any of his barges (Tr. 39).

Mr. Brown further confirmed that subsequent to the issuance of the citation in this case, he learned from the manager of one of his other operations that a similar coupler was cited by MSHA 10 or 12 years ago, but that this violation was never previously brought to his attention (Tr. 40).

Although the inspector confirmed that he had previously cited the same diesel engine on September 15, 1988, because a guard on the drive motor did not cover the pinch points, he conceded that the cited standard involved a judgment call as to whether the guard was sufficient and that a guard had in fact been provided.

On the basis of the foregoing findings and conclusions, and taking into account the requirements of section 110(i) of the Act, including the arguments advanced by the respondent in mitigation of the civil penalty, I conclude and find that a civil penalty assessment of $100 is reasonable and appropriate for the violation which has been affirmed.

ORDER

The respondent IS ORDERED to pay a civil penalty assessment in the amount of $100 for the violation which has been affirmed, and payment shall be made to MSHA within thirty (30) days of the date of this decision and order. Upon receipt of payment by MSHA, this matter is dismissed.

George A. Koutras
Administrative Law Judge

Distribution:

Michael K. Hagan, Esq., Office of the Solicitor, U.S. Department of Labor, Room 339, 1371 Peachtree Street, N.E., Atlanta, GA 30367 (Certified Mail)

Mr. Harold Brown, Howard Sand Company, P.O. Box 83, Howard, GA 31039 (Certified Mail)

/fb

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

MAY 16 1990

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
v.	:	Docket No. WEVA 88-318 A. C. No. 46-07006-03503
BILL PACK LAND CORPORATION, Respondent	:	Whipple Refuse File
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
v.	:	Docket No. WEVA 88-355 A. C. No. 46-06415-03502
PCR JOINT VENTURE, Respondent	:	PCR Surface

DECISION

Appearances: Ronald Gurka, Office of the Solicitor, Arlington, Virginia, for the Secretary;

Philip D. Mooney, Esq., Hamilton, Mooney, Burgess, Young and Tissue, Oak Hill, West Virginia, for Bill Pack Land Corporation,

P. Nathan Bowles, Esq., Bowles, McDavid, Graff and Love, Charleston West Virginia, for PCR Joint Venture.

Before: Judge Fauver

In these consolidated cases the Secretary seeks civil penalties for alleged violations of safety standards under the Federal Mine Safety Act of 1977, 30 U.S.C. § 801 et seq.

The cases involve a coal mine refuse pile that has been on fire for over 50 years.

The cases were called for hearing on February 13, 1990, at Charleston, West Virginia. After testimony, and the introduction and documentary evidence, the parties, with the presiding judge, had an extensive settlement conference. This

led to a settlement agreement that includes a reduced penalty for each Respondent, an agreed upon plan for extinguishing the fire, and an agreement to modify withdraw orders to permit Respondents to resume operations in accordance with the fire control and extinguishing plan.

I have considered the hearing evidence, and the documents submitted with the Secretary's motions to approve settlement, and conclude that they are consistent with the purposes of the Act.

ORDER

WHEREFORE IT IS ORDERED that:

1. The Secretary's motion to approve settlement in Docket No. WEVA 88-318 is GRANTED.

2. The Secretary's motion to approve settlement in Docket No. WEVA 88-355 is GRANTED.

3. Respondent Bill Pack Land Corporation shall comply fully with all the terms of the fire control and extinguishing plan attached to the Secretary's motion for settlement in Docket No. WEVA 88-318.

4. Respondent PCR Joint Venture shall comply fully with all the terms of the fire control and extinguishing plan attached to the Secretary's motion to approve settlement in Docket No. WEVA 88-355.

5. Subject to each Respondent's continued full compliance with such fire control and extinguishing plans, the Secretary may modify Withdrawal Order Nos. 2574254 and 2574256 to permit the Respondents, respectively, to resume operations in compliance with such plans.

6. Citation No. 2715802 and Order No. 2754254 are AFFIRMED.

7. Respondent Bill Pack Land Corporation shall pay the approved penalty of $350 within 30 days of this Decision.

8. Citation No. 2715803 and Order No. 2574256 are AFFIRMED.

9. Respondent PCR Joint Venture shall pay the approved penalty of $350 within 30 days of this Decision.

William Fauver
William Fauver
Administrative Law Judge

Distribution:

Ronald E. Gurka, Esq., Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Boulevard, Room 516, Arlington, VA 22203 (Certified Mail)

Philip D. Mooney, Esq., Hamilton, Mooney, Burgess, Young and Tissue, P.O. Drawer 1145, Oak Hill, WV 25901 (Certified Mail)

P. Nathan Bowles, Jr., Bowles McDavid Graff and Love, P.O. Box 1386, Charleston, WV 25325-1386 (Certified Mail)

iz

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 1990

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner v. BENNETT TRUCKING COMPANY, Respondent	:	CIVIL PENALTY PROCEEDING Docket No. KENT 90-29 A. C. No. 15-12602-03505 V1A Preparation Plant
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner v. B & S TRUCKING COMPANY, Respondent	:	CIVIL PENALTY PROCEEDING Docket No. KENT 90-34 A. C. No. 15-12602-03503 Q7G Preparation Plant

DECISION

Appearance: G. Elaine Smith, Esq., Office of the Solicitor, U. S. Department of Labor, Nashville, Tennessee, for the Secretary;
Susan C. Lawson, Esq., Forester, Buttermore, Turner, & Lawson, P.S.C., Harlan, Kentucky, for the the Respondent.

Before: Judge Weisberger

Statement of the Case

In these Civil Penalty Proceedings, the Secretary (Petitioner) seeks civil penalties for alleged violation of the Operator (Respondent) of 30 C.F.R. § 77.1710(i). Pursuant to notice, a Hearing was held in Johnson City, Tennessee, on March 28, 1990. At the commencement of the Hearing, Petitioner made a Motion for Summary Judgment, but indicated that she would proceed with the Hearing. A decision was reserved on the Motion. Jim Allen Tankersly testified for Petitioner. At the conclusion of the Petitioner's case, Respondent made a Motion for Judgment. After hearing arguments from both Parties on the Motion, a decision granting Respondent's Motion, was announced orally from the Bench. In light of this decision, Petitioner's Motion for Summary Judgment is denied.

Stipulations

Kent 90-29

1. Bennett Trucking Company is a Kentucky corporation which contracts with companies producing coal for resale in Interstate Commerce, and thus is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission and its administrative law judges pursuant to § 3(d) of the Act.

2. Bennett Trucking Company contracts with Manalapan Mining Company, Inc., which operates a processing plant in Harlan County, Kentucky, to perform coal hauling to, from, and within said processing plant. As of August 1989, the processing plant produced approximately 1.1 million tons of coal annually.

3. James Bennett is, and was in August 1989, a partner in Bennett Trucking Company.

4. On August 9, 1989, MSHA Inspector Jimmy A. Tankersly issued Citation No. 3163935 at the preparation plant, pursuant to § 104(a) of the Federal Mine Safety and Health Act of 1977, citing Bennett Trucking Company for a violation of 30 C.F.R. § 77.1710(i) because the Mack Coal Truck, vehicle number DM811SX, owned by Bennett Trucking Company and used to haul coal at the preparation plant, was not equipped with seat belts.

5. On August 9, 1989, MSHA Inspector Jimmy A. Tankersly issued Citation No. 3163936 at the preparation plant, pursuant to § 104(a) of the Act, citing Bennett Trucking Company for a violation of 30 C.F.R. § 77.1710(i) because the Mack Coal Truck, vehicle number DM 5855X306607, owned by Bennett Trucking Company and used to haul coal at the preparation plant, was not equipped with seat belts.

6. On August 9, 1989, MSHA Inspector Jimmy A. Tankersly issued Citation No. 3163937 at the preparation plant, pursuant to § 104(a) of the Act, citing Bennett Trucking Company for a violation of 30 C.F.R. § 77.1710(i) because the seat belt buckle on one side of the Mack Coal Truck, vehicle number DM6115zx5621, owned by Bennett Trucking Company and used to haul coal at the preparation plant, had been broken off.

7. On August 9, 1989, MSHA Inspector Jimmy A. Tankersly issued Citation No. 3163938 at the preparation plant, pursuant to § 104(a) of the Act, citing Bennett Trucking Company for a violation of 30 C.F.R. § 77.1710(i) because the Mack Coal Truck, company number 2, owned by Bennett Trucking Company and used to haul coal at the preparation plant, was not equipped with seat belts.

8. On August 29, 1989, MSHA Inspector Johnnie Smith issued Citation No. 3168465 at the parparation plant, pursuant to § 104(a) of the Act, citing Bennett Trucking Company for a violation of 30 C.F.R. § 77.1710(i) because the Mack Haul Truck, serial number DM115X6641, owned by Bennett Trucking Company and used to haul coal at the preparation plant, was not equipped with seat belts on the operator's side.

9. None of the trucks in question are vehicles required to have "rollover protective structures" (ROPS) pursuant to 30 C.F.R. § 77.403a, and none of the trucks in question are equipped, or were equipped in August 1989, with ROPS.

10. The determining factor in deciding whether the trucks in question are vehicles required to be equipped with seat belts pursuant to 30 C.F.R. § 77.1710(i) is whether or not "roll protection," as that term is defined at 30 C.F.R. § 77.2(w), is provided, and was provided in August 1989, for said trucks.

11. Each of the trucks in question is equipped, and was equipped in August 1989, with a cantilevered "cab-shield," or apron which is attached to the truck bed and extends over the cab from the truck bed, except when the bed is being unloaded.

12. Each of the five citations listed above were terminated on September 8, 1989, after seat belts were provided for each of the trucks in question.

13. The penalty assessment of $50 for each of the citations listed above (Nos. 3163935, 3163936, 3163937, 3163938, and 3168465), for a total assessment of $250, would have negligible effect on the ability of Bennett Trucking Company to continue in business.

KENT 90-34

1. B & S Trucking Company is a Kentucky corporation which contracts with companies producing coal for resale in Interstate Commerce, and thus is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission and its Administrative Law Judges pursuant to § 3(d) of the Act.

2. B & S Trucking Company contracts with Manalapan Mining Company, Inc., which operates a processing plant in Harlan County, Kentucky, to perform coal hauling to, from, and within said processing plant. As of August 1989, the processing plant produced approximately 1.1 million tons of coal annually.

3. Ray Ellis is, and was in August 1989, a surface foreman for Manalapan Mining.

4. On August 9, 1989, MSHA Inspector Jimmy A. Tankersly issued Citation No. 3163931 at the preparation plant, pursuant to § 104(a) of the Act, citing B & S Trucking Company for a violation of 30 C.F.R. § 1710(i) because the Mack Coal Truck, vehicle number IM2B128C4CA008967, owned by B & S Trucking Company and used for hauling and dumping at the preparation plant, was not equipped with seat belts.

5. On August 9, 1989, MSHA Inspector Jimmy A. Tankersly issued Citation No. 3163932 at the preparation plant, pursuant to § 104(a) of the Act, citing B & S Trucking Company for a violation of 30 C.F.R. § 1710(i) because the Mack Coal Truck, vehicle number IM2B238C4DA009196, owned by B & S Trucking Company and used to haul coal at the preparation plant, was not equipped with seat belts.

6. On August 9, 1989, MSHA Inspector Jimmy A. Tankersly issued Citation No. 3163933 at the preparation plant, pursuant to § 104(a) of the Act, citing B & S Trucking Company for a violation of 30 C.F.R. § 1710(i) because the Mack Coal Truck, vehicle number 424DM611SX, owned by B & S Trucking Company and used to haul coal at the preparation plant, was not equipped with seat belts.

7. On August 9, 1989, MSHA Inspector Jimmy A. Tankersly issued Citation N. 3163934 at the preparation plant, pursuant to § 104(a) of the Act, citing B & S Trucking Company for a violation of 30 C.F.R. § 1710(i) because the Mack Coal Truck, vehicle number IM2B128C5DA009191, owned by B & S Trucking Company and used to haul coal to the preparation plant, was not equipped with seat belts.

8. None of the trucks in question are vehicles required to have "rollover protection structures" (ROPS) pursuant to 30 C.F.R. § 77.403a, and none of the trucks in question are equipped, or were equipped in August 1989, with ROPS.

9. The determining factor in deciding whether the trucks in question are vehicles required to be equipped with seat belts, pursuant to 30 C.F.R. § 77.1710(i), is whether or not "roll protection," as that term is defined at 30 C.F.R. § 77.2(w), is provided, and was provided in August 1989, for said trucks.

10. Each of the trucks in question is equipped, and was equipped in August 1989, with a cantilevered "cab-shield," or apron which is attached to the truck bed and extends over the cab from the truck bed, except when the bed is being unloaded.

11. Each of the four citations listed above were terminated on August 29, 1989, after seat belts were provided for each of the trucks in question.

12. The penalty assessment of $42 for each of the citations listed above (Nos. 3163931, 3163932, 3163933, and 3163934), for a total assessment of $168, would have negligible effect on the ability of B & S Trucking Company to continue in business.

Testimony

Jimmy Allen Tankersly, an MSHA Inspector, testified that he issued Citation 3163935 to Respondent, alleging a violation of 30 C.F.R. § 1710(i), in that its coal trucks did not have seat belts. He indicated that the violation was significant and substantial in that if the trucks would overturn, it was reasonably likely the drivers would be injured, possibly fatally. He indicated that the Respondent was negligent in that it should have known that the pertinent regulation requires seat belts in the trucks in question. He opined that the cab shields on the trucks do provide protection and can possibly keep the cab from being crushed in the event of the truck turning over. He indicated that the cab shield is on the truck except when it dumps coal. According to Tankersly, when the trucks are dumping coal, they are moving at about 5 miles an hour or less. In essence, Counsel for Petitioner indicated that Tankersly's testimony with regard to Citation 3163935 is applicable to all the Citations issued in these cases.

Discussion and Conclusion of Law

At the conclusion of Petitioner's case, Respondent made a Motion for Judgment in its favor. After hearing argument from both Counsel, the following Bench Decision was rendered (with minor corrections of a non substantive nature):

I have heard argument and have evaluated the evidence and the testimony, and I have read the pertinent regulations. I find that the Motion was well made and the Secretary has not established her case.

The reasons are as follows: the regulation that is at issue, 30 C.F.R. § 77.1710(i), requires two elements; first of all it requires a danger of overturning and it also rquires that roll protection be provided.

With regard to the first element the Secretary must establish that there is a danger of overturning. I find specifically that the Secretary did not establish a danger of overturning. The evidence from the inspector, Mr. Tankersly, indicated that should a vehicle overturn, there would likely be an injury to a person in the vehicle. This statement falls short of establishing that there was any danger of the vehicle overturning. On that basis alone, I grant the Motion.1/

1/ See, Turner Brothers, Inc., 6 FMSHRC 1219 (May 1984) (Not cited in the Bench Decision). In Turner Brothers, supra, Judge Koutras held that section 77.1710(i) does not require seat belts for all vehicles, and that an inspector citing a violation thereunder must first make a finding that there is a danger of overturning before requiring the seat belts be installed on ROPS equipment vehicles.

I also note that with regard to the second element of section 77.7109(i), it also must be established that roll protection was provided. That term is defined in 30 C.F.R. § 77.100(w) as meaning a "framework, safety canopy, or similar protection for the operator when equipment overturns."

The term "similar protection" modifies the terms immediately preceding it, namely "framework" or "safety canopy." The item referred to as a cab shield, as depicted in Respondent's Exhibits 1 to 8, (specifically in Respondent's Exhibits 1, 7, and 4), is clearly not a portion of the cab. It is a portion of another element of the truck, which is raised when dumping coal. Certainly, when it is raised, there is a gap between this item referred to as a cab shield, and the truck itself. Thus I can not see that it's been established that the item referred to as a shield is protection similar to a framework or a safety canopy.

For these reasons, and primarily for the reason that I previously stated, i.e., that it has not been established that there has been any danger of the subject trucks overturning, I grant the Motion. Accordingly, the citations that have been issued herein, shall be dismissed.

ORDER

It is ORDERED that Citation Numbers 3163935, 3163931, 3163932, 3163936, 3163937, 3163938, 3168465, 3163933, and 3163934 be DISMISSED.

Avram Weisberger
Administrative Law Judge

Distribution:

G. Elaine Smith, Esq., Michael Roden, Esq., Office of the Solicitor, U. S. Department of Labor, 2002 Richard Jones Road, Suite B-201, Nashville, TN 37215 (Certified Mail)

Susan C. Lawson, Esq., Forester Building, First Street, Harlan, KY 40831 (Certified Mail)

dcp

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

MAY 17 1990

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 88-275-M
Petitioner	:	A.C. No. 04-01937-05505
	:	
v.	:	Docket No. WEST 89-71-M
	:	A.C. No. 04-01937-05506
SANGER ROCK & SAND,	:	
Respondent	:	Sanger Pit and Mill

DECISION

Appearances: Susanne Lewald, Esq., Office of the Solicitor, U.S. Department of Labor, San Francisco, California, For Petitioner; J.F. Baun, President, Sanger Rock and Sand, Sanger, California, pro se

Before: Judge Morris

The Secretary of Labor, on behalf of the Mine Safety and Health Administration (MSHA), charges respondent Sanger Rock & Sand (Sanger) with violating two safety regulations 1/ promulgated under the Federal Mine Safety and Health Act, 30 U.S.C. § 801 et seq. (the Act).

After notice to the parties, a hearing on the merits was held in Fresno, California on December 13, 1989.

The parties filed post trial briefs.

Threshold Issues

In support of its motion to dismiss, Sanger raises two issues.

Initially, the operator asserts MSHA did not acquire jurisdiction over it for the reason that the federal government has

---

1/ Citation No. 3076869 alleges Sanger violated 30 C.F.R. § 56.14007; Citation No. 3074994 alleges the company violated 30 C.F.R. § 56.12028.

failed to comply with Article I, Section 8, Clause 17 [2/] of the United States Constitution. Specifically, it is argued that, since the United States does not possess fee simple title to Sanger's property and since the state of California did not cede the property to the United States, then the case should be dismissed for lack of "territorial jurisdiction."

Discussion

For the purpose of this ruling, I assume the federal government does not own this property and I further assume the property has not been ceded to the federal government by the state of California. But I nevertheless conclude that Sanger's arguments are misdirected. The cited portion of the Constitution relied on is a grant of authority relating to the District of Columbia, the seat of government of the United States.

The Constitutional clause relied on by Sanger does not require that the federal government own property as a pre-condition to regulating such property.

In support of its position, Sanger relies upon United States v. Benson, 495 F.2d 475 (1974).

Benson is not controlling. In Benson the defendants therein were convicted of a robbery that was committed within the territorial jurisdiction of the United States. The territorial jurisdiction of the United States involved in the case was Fort Rucker, Alabama, a military installation. In view of this fact the federal military code, by virtue of Clause 17, was the exclusive law on the military installation.

2/ The cited portion of the Constitution provides that Congress shall have the right:

> To exercise exclusive Legislation in all cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings; ....

Since Article I, Section 8, Clause 17 is neither a grant of authority to regulate mines nor a restriction on the federal authority, it is necessary to look elsewhere in the Constitution for such authority.

The grant of authority to regulate mines rests in the "Commerce Clause" 3/ contained in Article I, Section 8, Clause 3 of the Constitution.

It is apparent, with such a grant of authority, that Congress enacted the Mine Act and defined commerce as it relates to mining. Specifically, in Section 4 of the Act, Congress stated:

> Each coal or other mine, the products of which enter commerce, or the operations or products of which affect commerce, and each operator of such mine and every miner in such mine shall be subject to the provisions of this chapter.

Further, "Commerce" is defined in the 1969 Act as follows:

> [C]ommerce means trade, traffice, commerce, transportation or communication among the several states, or between a place in a state and any place outside thereof, or within the District of Columbia, or a possession of the United States, or between points within the same state but through a point outside thereof.

The use of the phrase "which affect commerce" in the Act, indicates the intent of Congress to exercise the full reach of its constitutional authority under the commerce clause. See: Brennan v. OSHA, 492 F.2d 1027 (2d Cir. 1974); United States v. Dye Construction Co., 510 F.2d 78 (10th Cir. 1975); Polish National Alliance v. NLRB, 332 U.S. 643 (1977).

3/ The cited portion of the Constitution provides that Congress shall have the right

> to regulate Commerce with foreign Nations and among the several States, and with the Indian Tribes.

In Perez v. United States, 402 U.S. 146 (1971), it was held that Congress may make a finding as to what activity affects interstate commerce, and by doing so it obviates the necessity for demonstrating jurisdiction under the commerce clause in individual cases.

In short, mining is among those classes of activities which are regulated under the Commerce Clause and thus is among those classes which are subject to the broadest reaches of federal regulation because the activities affect interstate commerce. Marshall v. Kraynak, 457 F. Supp. 907 (W.D. Pa. 1978), aff'd, 604 F.2d 231 (3d Cir. 1979), cert. denied, 444 U.S. 1014 (1980). Further, the legislative history of the Act as well as court decisions, encourage a liberal reading of the definition of a mine found in the Act in order to achieve the Act's purpose of protecting the safety of miners. Westmoreland Coal Company v. Federal Mine Safety and Health Review Commission, 606 F.2d 417 (4th Cir. 1979). See also: Godwin v. Occupational Safety and Health Review Commission, 540 F.2d 1013 (9th Cir. 1976), where the court held that unsafe working conditions of one operation, even if in initial and preparatory stages, influences all other operations similarly situated, and consequently affect interstate commerce.

The courts have consistently held that mining activities which may be conducted affect commerce sufficiently to subject the mines to federal control. See: Marshall v. Kilgore, 478 F. Supp. 4 (E.D. Tenn. 1979); Secretary of the Interior v. Shingara, 418 F. Supp. 693 (M.D. Pa. 1978); Marshall v. Bosack, 463 F. Supp. 800, 801 (E.D. Pa. 1978). Likewise, Commission judges have held that intrastate mining activities are covered by the Act because they affect interstate commerce. See: Secretary of Labor v. Rockite Gravel Company, 2 FMSHRC 3543 (December 1980); Secretary of Labor v. Klippstein and Pickett, 5 FMSHRC 1424 (August 1983); Secretary of Labor v. Haviland Brothers Coal Company, 3 FMSHRC 1574 (June 1981); Secretary of Labor v. Mellott Trucking Company, 10 FMSHRC 409 (March 1988).

In a prior decision involving the Secretary and Sanger, Commission Judge August F. Cetti ruled against Sanger's "territorial jurisdictional" argument. Sanger Rock & Sand, 11 FMSHRC 403 (March 1989).

Sanger also argues that the state of California has its own laws and regulations that protect the safety and health of its citizens. Therefore, the federal government lacks jurisdiction in California.

This argument has been raised in a number of cases. Commission judges have consistently held that state and federal OSHA statutes do not preempt the 1977 Mine Act. See: Brubaker-Mann, Inc., 2 FMSHRC 227 (January 1980); Valley Rock and Sand Corporation, 4 FMSHRC 113 (January 1982); Black River Sand and Gravel, Inc., 4 FMSHRC 743 (April 1982); San Juan Cement Company, Inc., 2 FMSHRC 2602 (September 1980); Sierra Aggregate Co., 9 FMSHRC 426 (March 1987). I agree with these holdings, and I also note that section 506 of the 1977 Mine Act permits concurrent state and federal regulation. Under the federal supremacy doctrine, a state statute is void to the extent that it conflicts with a valid federal statute. Dixie Lee Ray v. Alantic Richfield Company, 435 U.S. 151, 55 L. Ed. 2d 179 (1978); Bradley v. Belva Coal Company, 4 FMSHRC 982, 986 (June 1982).

For the foregoing reasons, Sanger's "territorial jurisdictional" argument in support of its motion to dismiss is denied.

Sanger also asserts that the Secretary's citaions should be vacated because she has not complied with 5 U.S.C. § 552, 4/ a portion of the Administrative Procedure Act.

4/ The cited statute, a portion of the Administrative Procedure Act, provides in part as follows:

> (a) Each agency shall make available to the public information as follows:
>
> (1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public--
>
> (A) descriptions of its central and field organization and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;
>
> (B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;
>
> (C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

(footnote continued on next page)

In particular, Sanger states the inspector only presented his I.D. card at the time of the inspection. However, the I.D. card did not show his title, authority, or other relevant matters.

In dealing with its citizens, Sanger believes the government, through the federal register, must at least show the inspector's duties, delegated authority, as well as MSHA's central and field organizations.

In its post trial brief Sanger asserts that MSHA's failure to publish in the Federal Register has adversely affected it as a member of the public. Some, but not necessarily all, of the adverse effects are as follows:

(A) Representatives of the Secretary overstepping their authority with no way for the public to know what that authority is.

(B) Not knowing the "chain of command" in any government agency renders the public at an extreme disadvantage when dealing with that agency.

(C) How, where, and to whom are complaints registered in regard to misconduct by a representative of the Secretary if the organization plans are not published?

(D) Due process is most important to the public including mine operators, and without the knowledge of how that can be obtained in MSHA's scheme of operations leaves them vulnerable to the whims of various individuals.

(E) Assessments arising from unauthorized actions of agency "employees".

(F) Sanger has been subjected to possible adverse effects due to an investigation by Mr. Alvarez (MSHA inspector) during which he demanded and received company records to which he may not have had the authority to see. This investigation took place on March 3, 1989. A citation was issued and the disposition is still pending with adverse effects likely.

4/ (Continued)

(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and

(E) each amendment, revision, or repeal of the foregoing.

Sanger also attaches to its brief a federal register publication 5/ of Friday, March 31, 1978, dealing with a delegation of authority and assignment of responsibility for mine safety and health programs. However, Sanger asserts such publications do not satisfy the A.P.A.

The Secretary's contrary positions will be hereafter considered.

Discussion

Publication: Section 552(a)(1) of the A.P.A. requires each agency to separately state and publish in the Federal Register "descriptions of its central and field organization and the methods whereby the public may obtain information, make submittals or requests or obtain decisions."

An agency of the federal government is defined by 44 U.S.C. 1501. 6/ The Mine Safety and Health Administration (MSHA) is such an agency. However, MSHA has not complied with this above cited A.P.A.

The Secretary's post trial brief does not refer to any relevant publication nor has the judge located any such publication in the Register nor in its codification showing MSHA's "central and field organizations." 7/ The statutory directive is explicit as to what must be published.

5/ Federal Register, Vol. 43, No. 63.

6/ The above cited provision, as it relates to the Federal Register and the Code of Federal Regulations, contains the following definition:

> "Federal agency" or "agency" means the President of the United States, or an executive department, independent board, establishment, bureau, agency, institution, commission, or separate office of the administrative branch of the Government of the United States but not the legislative or judicial branches of the Government.

7/ Many matters under the Secretary's jurisdiction have been published in the Federal Register and recodified in the Code of Federal Regulation (CFR). See various subjects published in C.F.R. 20, 29, 30, 41, 48 and 50. Volume 30, Part I establishes MSHA's official emblem and the balance of 30 C.F.R. generally deals with mining. Included in 30 C.F.R. are the Secretary's mandatory regulations relating to mining.

Rather, the Secretary argues Sanger's defense is irrelevant because the rights afforded MSHA employees to make inspections, etc., do not constitute a delegation of any authority vested in the Assistant Secretary of Labor [for MSHA]. Particularly, the Mine Act empowers authorized employees of MSHA to engage in the activities enumerated in Section 103(a) of the Act.

I reject the Secretary's position. It is well established that statutes should be construed together. In short, the authority in the Mine Act does not override MSHA's obligation to comply with the A.P.A.

Secondly, the Secretary argues that the Office of the Solicitor (of Labor) is not a federal agency. Accordingly, the Solicitor does not promulgate rules and regulations which have general applicability and legal effect.

The judge believes this argument involves a mis-communication. A fair reading of Sanger's argument at the hearing as well as its post trial brief indicates a focus directed to MSHA, not to the Solicitor.

The Secretary also argues that Sanger has not been adversely affected by the lack of any publication.

The statute does not require that an individual be adversely affected by a failure to publish. The Secretary's case in support of that position is misplaced. In U.S. v. Fitch Oil Company, 676 F.2d 673 (1982) (Temp. Em. C.A.) appellant relied on the fact that the Department of Energy's (DOE) "audit policy" had been revoked. The appellate court held that such revocation did not vest any constitutional or statutory right in respondent oil company or its officers that would invalidate subpoenas for books, etc., previously issued. The Court ruled that the "audit policy" was not a legislative rule by designation or substance. It was intended to govern internal agency procedures and was therefore not binding on the DOE. In the instant case, except for the publication of the regulations, 30 C.F.R. § 56.14007 and 30 C.F.R. § 56.12028, no publication was made. In particular, there was no publication of MSHA's "central and field organization ... for the guidance of the public."

For a precise articulation of the applicable law I find Rowell v. Andrus, 631 F.2d 699 (1980), (10th Cir.) and United States v. Two Hundred Thousand Dollars ($200,000) in United States Currency, 590 F. Supp. 866 (1984) to be persuasive. See also, Pinkus v. Reilly, 157 F. Supp. 548, D.C.,N.J. (1957).

In Rowell the Secretary of the Interior published in the Federal Register a regulation in final form. The difficulty was the publication was entered less than 30 days before its effective date.

On appeal the 10th Circuit Court of Appeals invalidated the published rule and action thereunder because it was published less than 30 days before its effective date as required by Section 553(d) of the A.P.A., 631 F.2d at 702.

In United States v. Two Hundred Thousand Dollars ($200,000) in United States Currency, the United States Customs Department seized $200,000 at an airport. The Court invalidated the forfeiture because Customs failed to satisfy 5 U.S.C. § 552 (a)(1)(c).

In short, Customs' form should have been published in the Federal Register, 590 F.Supp. at 870, 871.

The Secretary also argues that to prevail Sanger must show actual prejudice which bears upon the violations for which the company was cited.

In the situation presented here the record does not reflect that Sanger knew MSHA's central and field organizations. If Sanger knew of the matters that should have been published, then it could hardly have asserted this defense. However, in this case Sanger claims to have been prejudiced. In Citation No. 3074994, Sanger was cited for violating 30 C.F.R. § 56.12028. 8/ One of Sanger's objections was that the company had no way of knowing nor any way to check whether it was obliged to turn over ground system testing reports to the MSHA inspector.

8/ The regulation provides:

§ 56.12028 Testing grounding systems.

Continuity and resistance of grounding systems shall be tested immediately after installation, repair, and modification; and annually thereafter. A record of the resistance measured during the most recent tests shall be made available on a request by the Secretary of his duly authorized representative.

The final argument presented by the Secretary is that the selection of Mr. Alvarez as an authorized employee of the Mine Safety and Health Administration is a matter expressly exempted from the requirements of the A.P.A.

I agree. Internal personnel rules and practices are exempt. In 5 U.S.C. § 552 (b)(2) an exception appears where the material sought "(2) related solely to the internal personnel rules and practices of an agency."

However, the main thrust of Sanger's case seeks information showing the inspector's duties, delegated authority as well as MSHA's central and field organizations. Such matters are clearly within the statutory mandate.

The Secretary's position is no doubt somewhat difficult. She is charged with enforcing the Mine Safety Act. On the other hand she is obligated to comply with the direct statutory mandate discussed herein. It is the writer's view that if the Secretary now publishes in the Federal Register such publication, if otherwise correct, could be effective 30 days thereafter. Rowell v. Andrus, supra, 631 F.2d at 705. However, such publication will not affect this operator and, for the reasons stated herein, these cases should be dismissed.

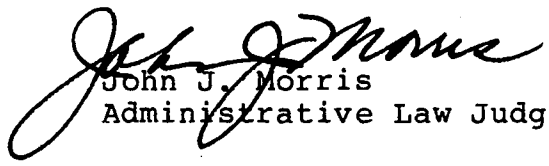
Sanger seeks an order dismissing MSHA's citations herein. Since Sanger's motion of dismissal is to be granted it is not necessary to consider any additional issues raised in the case.

ORDER

1. In WEST 88-275-M: Citation No. 3076869 and all penalties therefor are vacated.

2. In WEST 89-71-M: Citation No. 3074994 and all penalties therefor are vacated.

3. WEST 88-275-M and WEST 89-71-M are dismissed.



John J. Morris
Administrative Law Judge

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

MAY 22 1990

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 89-104-M
Petitioner	:	A.C. No. 14-00483-05505
v.	:	
	:	Vic's Sand Pit
VIC'S SAND & GRAVEL COMPANY,	:	
Respondent	:	

DECISION

Appearances: Oscar L. Hampton, III, Esq., Office of the Solicitor, U.S. Department of Labor, Kansas City, Missouri, for the Petitioner;

Before: Judge Koutras

Statement of the Case

This is a civil penalty proceeding filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a). Petitioner seeks a civil penalty assessment in the amount of $50 for an alleged violation of mandatory injury reporting standard 30 C.F.R. § 50.20, as stated in a section 104(a) Citation No. 2651810, served on the respondent by MSHA Inspector James G. Enderby, on January 25, 1989. The condition or practice cited is as follows:

> A employee of the company was seriously injured in July 1988 that required medical attention and was lost time away from work. The company did not file a MSHA Form 7000-1 within the required time for reporting. All injuries to anyone that occurs on the mine property are required to be reported to MSHA within 10 days of occurrence.

The respondent contested the citation, and pursuant to notice served on the parties, a hearing was convened in Wichita, Kansas, on April 25, 1990. The petitioner appeared, but the

respondent did not. The hearing proceeded in the absence of the respondent, and the petitioner presented testimony and evidence in support of the citation.

Issues

The issues presented in this case are (1) whether or not the respondent violated the cited standard, and if so, the appropriate civil penalty that should be imposed for the violation, and (2) whether or not the respondent's failure to appear at the hearing constitutes a waiver of its right to be further heard in this matter.

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

The Respondent's Failure to Appear at the Hearing

The record clearly establishes that the respondent received notice of the time and place of the hearing by certified mail. When its representative Vic Eisenring failed to appear, I telephoned his office in Wichita and was advised by his secretary that the respondent had mailed a check to MSHA on Friday, April 20, 1990, in payment of the civil penalty assessment and that the respondent did not attend to appear at the hearing. The petitioner's counsel informed me that he was not aware of any payment made by the respondent for the violation in question, and that his attempts to contact the respondent prior to the hearing were fruitless. Under the circumstances, the hearing proceeded in the absence of the respondent, and the petitioner presented its case.

On May 4, 1990, I issued an Order to Show Cause to the respondent (Vic Eisenring) affording him an opportunity to explain why he should not be defaulted and a summary decision entered ordering payment of the civil penalty because of his failure to appear at the hearing or otherwise inform me that he would not appear.

By letter dated May 11, 1990, the respondent filed a reply to my show-cause order. Mr. Eisenring asserted that he has paid the civil penalty assessment. With regard to his failure to appear at the hearing, Mr. Eisenring states that a family emergency prevented his appearances, and that the hearing notices

contained no instructions that he was to telephone the presiding judge if he could not appear.

The record reflects that Mr. Eisenring's office is in Wichita, and the hearing was held in that same city. When I telephoned Mr. Eisenring's office on the morning of the hearing and spoke to his secretary, she said nothing about any emergency and simply stated that Mr. Eisenring had mailed a check to MSHA in payment of the civil penalty and would not appear at the hearing. Notwithstanding the family emergency, and taking into account the fact that Mr. Eisenring's secretary informed me that he had mailed the check to MSHA on Friday, April 20, 1990, 5-days prior to the scheduled hearing, I believe it is reasonable to conclude that Mr. Eisenring did not intend to appear at the hearing.

With regard to Mr. Eisenring's failure to communicate with me, as previously noted, the hearing was scheduled in the same city where his office is located. The Amended Notice of Hearing which Mr. Eisenring received by certified mail on April 19, 1990, informed him of the location of the hearing in Wichita, and my office telephone number is listed in the notice. Notwithstanding the fact that the hearing notice did not specifically instruct Mr. Eisenring to contact the court if he did not intend to appear at the hearing, since the hearing was convened in Wichita to accommodate Mr. Eisenring, and since the hearing notice included the location of the hearing and my office telephone number, I do not find it unreasonable to expect Mr. Eisenring or his secretary to simply call my office, or the district court in Wichita where the hearing was convened, to inform me that he would not appear.

In view of the foregoing, I conclude and find that pursuant to Commission Rule 63, 29 C.F.R. § 2700.63, the respondent is in default, and that his failure to appear constitutes a waiver of his right to be further heard in this matter.

Petitioner's Testimony and Evidence

MSHA Inspector James G. Enderby testified that he conducted an inspection at the respondent's site on December 20 or 21, 1988, and noticed that one of its employees, Hollis Pridgett, was wearing a cast on his foreman. Mr. Pridgett explained that he was injured while repairing a tire in the shop. Mr. Pridgett stated that while filling a tire with air, it did not "bead" properly and it jumped off the tire stand and struck his arm and wrist causing a simple fracture to his forearm and multiple fractures to his wrist. He received medical attention and extensive surgery to his wrist and he missed several work days.

Mr. Enderby stated that Mr. Pridgett informed him that the tire belonged to the respondent and that he was preparing to put

it on his personal pick-up truck which was used for the benefit of the respondent in picking up equipment.

Mr. Enderby stated that the respondent's owner Vic Eisenring informed him that he had telephoned MSHA's office in Denver and the State workmen's compensation inspector and was told that he was not required to report the injury. Mr. Enderby stated that he reviewed the respondent's telephone records for July and August, 1988, and found no record of any long distance out-of-state calls to Denver. Mr. Eisenring could not recall who he spoke with and indicated that it may have been an "800" number. Mr. Enderby then advised Mr. Eisenring that it was his opinion that the injury had to be reported. He then advised Mr. Eisenring to fill out and file an MSHA Form 7000-1, injury report and to attach a letter to it explaining the circumstances of the injury so that his supervisor could review it and make a determination as to whether a citation should be issued because of the respondent's failure to report the injury within 10 days as required by section 50.20.

Mr. Enderby stated that during a follow-up inspection on January 25, 1989, he issued several citations and asked Mr. Eisenring whether he had mailed in the injury report which they had previously discussed. Mr. Eisenring responded that he mailed it and then left the property. Mr. Enderby then asked Mr. Eisenring's secretary, Cecilia Taylor, whether she had mailed the report and she informed him that she had not mailed the report because "it was tax time." Mr. Enderby then issued the citation. He also telephoned his office and determined that the report which Mr. Eisenring claimed he had mailed had not been received.

Mr. Enderby stated that he subsequently spoke with Mr. Eisenring about the matter and that Mr. Eisenring "used some profanities" and informed him that he "would take him to court" and contest the citation.

Mr. Enderby identified exhibit P-1 as a copy of Form 7000-1, filed by Mrs. Taylor on January 25, 1989, after the citation was issued. The report was submitted to MSHA's Denver, Colorado office, and Mr. Enderby stated that he received a copy of the report in his office on February 17, 1989. He then terminated the citation that same day. The report reflects that Mr. Pridgett was injured on July 15, 1988, while he "was working on his personal tire and was mounting the tire on a rim and the tire exploded." It also reflects that Mr. Pridgett injured his "hand-arm," missed 102 days of work, and that he "still is restricted."

Mr. Enderby stated he made a finding of "high negligence" because MSHA's policy guidelines require such a finding in cases concerning reporting violations pursuant to section 50.20, unless

there are mitigating circumstances. Mr. Enderby confirmed that there were no such mitigating circumstances in this case.

Mr. Enderby confirmed that he did not consider the violation to be "significant and substantial" because it was not reasonably likely to result in any injury. He did not believe that the respondent exhibited good faith compliance because the injury was not reported until 33 days after he had previously advised Mr. Eisenring to report it and submit an explanatory letter when he discussed the matter with him in December, 1988. In addition, the injury which occurred on July 15, 1988, was not reported until approximately 5 months later.

Findings and Conclusions

Fact of Violation

The respondent is charged with a violation of mandatory reporting standard 30 C.F.R. § 50.20, which requires a mine operator to report an occupational injury within 10 working days after its occurrence. The term "occupational injury" is defined by section 50.2(e) in pertinent part as follows:

> Any injury to a miner which occurs at a mine for which medical treatment is administered, or which results in * * * inability to perform all job duties on any day after an injury, * * *.

The evidence in this case clearly establishes that Mr. Pridgett suffered serious injuries to his arm and wrist on July 15, 1988, that he received medical treatment for his injuries, and was incapacitated and missed work for a number of days immediately following his injuries. Contrary to the respondent's assertion that the injury occurred when Mr. Pridgett was performing work on his personal tire for his pick-up, the inspector's credible testimony reflects that the truck was to be used by Mr. Pridgett in performing services for the respondent. Even if I were to accept the respondent's assertions that Mr. Pridgett was working on his own personal vehicle, the applicable definition of "occupational injury" makes no such distinctions. The evidence establishes that the injury occurred at the mine, that medical treatment was administered, and that the injury resulted in Mr. Pridgett's inability to perform his job duties on any day following his injuries. Under the circumstances, all of the criteria for reporting such an injury were met and I conclude and find that the injury was an "occupational injury" which was required to be reported by the respondent within 10 days of its occurrence. The respondent clearly did not do so. Accordingly, I conclude and find that the petitioner has established a violation of section 50.20, by a preponderance of the evidence, and the citation issued by Inspector Enderby IS AFFIRMED.

Size of Business and Effect of Civil Penalty Assessment on the Respondent's Ability to Continue in Business

Exhibit P-2, a summary of the respondent's mine production, reflects 6,267 manhours worked in Calendar Year 1988. Inspector Enderby testified that the respondent employed four persons "on site," and also used the services of two truck drivers. He considered the respondent to be a small mine operator engaged in the sand and gravel business, and he stated that the principal product is sand which is sold and used in construction, for road materials, and in the production of concrete.

The respondent failed to appear in this case. In the absence of any evidence to the contrary, I cannot conclude that the civil penalty assessed by me for the violation in this case will adversely affect the respondent's ability to continue in business.

I conclude and find that the respondent is a small mine operator, and I have taken this into consideration in assessing a civil penalty for the violation which I have affirmed.

History of Prior Violations

Exhibit P-2, a summary of the respondent's prior history of assessed violations (excluding single penalty assessments timely paid) reflects that the respondent paid civil penalty assessments for one violation in 1986, and one violation in 1987. Inspector Enderby confirmed that the respondent had not previously been charged with any reporting violations pursuant to Part 50, Title 30, Code of Federal Regulations.

I conclude and find that the respondent has a good compliance record and I have taken this into consideration in this case.

Gravity

I conclude and find that the violation was non-serious.

Negligence

Although the record in this case, including the respondent's answer, suggests that the respondent may have been informed that it was not required to report the injury, I find no credible or probative evidence to confirm or corroborate this assertion by the respondent. Further, there is no evidence to establish that the respondent ever filed the required injury report until after the inspector issued the citation on January 25, 1989.

I find the inspector's testimony that he advised Mr. Eisenring on December 20, or 21, 1988, to file the required

report to be credible. Mr. Eisenring apparently failed to follow the inspector's advice, and I find no evidence to support any conclusion that the report was timely filed. Under all of these circumstances, I agree with the inspector's high negligence finding and it is affirmed.

Good Faith Compliance

I find the inspector's testimony that he advised Mr. Eisenring of his opinion that the injury sustained by Mr. Pridgett on July 15, 1988, was required to be reported to be credible. In my view, the inspector acted reasonably and afforded Mr. Eisenring an opportunity to submit the report with an explanation as to why he had not filed it earlier. Mr. Eisenring failed to do so. Under the circumstances, I agree with the inspector's conclusion that the respondent failed to exercise good faith in timely complying with the requirements of the cited standard.

Civil Penalty Assessment

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 proposed civil penalty assessment of $50, for the violation which has been affirmed is reasonable and appropriate. Accordingly, IT IS AFFIRMED.

ORDER

If it has not already done so, the respondent IS ORDERED to pay a civil penalty assessment in the amount of $50, to MSHA within thirty (30) days of the date of this decision and order. Upon receipt of payment, this matter is dismissed.

George A. Koutras
Administrative Law Judge

Distribution:

Oscar L. Hampton, III, Esq., Office of the Solicitor, U.S. Department of Labor, Room 2106, 911 Walnut Street, Kansas City, MO 64106 (Certified Mail)

Vic Eisenring, Owner, Vic's Sand & Gravel Company, 4620 West 21st Street, Wichita, KS 67212 (Certified Mail)

/fb

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

MAY 22 1990

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. PENN 89-73-M
Petitioner	:	A.C. No. 16-00039-05505
v.	:	
	:	Lebanon Quarry
LEBANON ROCK INCORPORATED,	:	
Respondent	:	

DECISION

Appearances: Susan M. Jordan, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for the Petitioner; Robert M. Mumma II, President, Lebanon Rock, Incorporated, Harrisburg, Pennsylvania, Pro se, for the Respondent.

Before: Judge Koutras

Statement of the Case

This proceeding concerns proposals for assessment of civil penalties filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a), seeking civil penalty assessments for two alleged violations of certain mandatory safety standards found in Part 56, Title 30, Code of Federal Regulations. A hearing was held in Harrisburg, Pennsylvania, and the parties waived the filing of posthearing briefs. However, they presented oral arguments at the close of the hearing, and I have considered these arguments in the course of my adjudication of this matter.

Issues

The issues presented in this case are (1) whether the respondent violated the cited mandatory safety standards, (2) whether the violations were "significant and substantial" (S&S), and (3) the appropriate civil penalties to be assessed

pursuant to the civil penalty assessment criteria found in section 110(i) of the Act. Additional issues raised by the parties are identified and disposed of in the course of this decision.

Applicable Statutory and Regulatory Provisions

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

2. Sections 56.9006 and 56.12016, Title 30, Code of Federal Regulations.

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

Stipulations

The parties stipulated to the following (Tr. 6-7):

1. The Lebanon Quarry is owned and operated by the respondent and it is subject to the jurisdiction of the Act.

2. The presiding judge has jurisdiction to hear and decide this matter.

3. The violations were timely abated by the respondent.

4. The quarry production is approximately 200,000 tons a year. The quarry produces high calcium limestone (Tr. 28).

5. The respondent's history of prior violations, as shown by an MSHA computer print-out, reflects a favorable history of compliance.

6. Payment of the proposed civil penalty assessments will not adversely affect the respondent's ability to continue in business.

7. The respondent owns the property where the subject quarry is located and it shares the property with the Elco Concrete Company.

Discussion

The facts and evidence in this case establish that an accident occurred on May 25, 1988, at a portable limestone crushing and processing plant owned and operated by the respondent. Patrick Werth, a laborer who sometimes operated the crusher, was injured while performing work repairing the skirting on a return

belt. Mr. Werth had turned the belt off by using a push button, but he did not lock the belt out with a lock which was provided and available at the electrical switchbox location. While he was performing this work, the crusher operator and a loader operator were attempting to dislodge a rock which was stuck in the crusher jaws. The crusher and crusher take-away belt were running while this work was going on, and this was a normal and acceptable operating procedure when rocks are stuck in the crusher.

After freeing the rock, the loader operator who was helping the crusher operator, started the return belt which Mr. Werth was working on. Mr. Werth was standing on a portion of the return belt which was not visible from the location where the crusher and loader operator were working, and they could not see Mr. Werth because the view was obstructed by the belt structure and framework. No signal or warning was sounded before the return belt was started up, and since it was not locked out, Mr. Werth was drawn through a 15-inch high opening and suffered cracked vertebrae. When the crusher operator realized that Mr. Werth was on the belt when it started up, he immediately shut it down by using the same push button used by Mr. Werth to turn the belt off. The push button was located at the crusher station where the crusher and loader operator were working to free the rock.

As a result of the accident, MSHA Inspector Andrew Nawa conducted an investigation, and after completing it he issued the following citations:

Section 104(a) "S&S" Citation No. 2626303, May 26, 1988, cites an alleged violation of 30 C.F.R. § 56.12016, and the cited condition or practice is described as follows:

> The plant helper or laborer was injured while repairing the return belt conveyor skirting. The helper was on the belt while other employees were working on the primary crusher trying to free a hang-up. When the hang-up was cleared the conveyor belts were started. A lock-out system was provided but not used.

Section 104(a) "S&S" Citation No. 2626304, May 26, 1988, cites an alleged violation of 30 C.F.R. § 56.9006, and the cited condition or practice is described as follows:

> A start-up signal was not provided for the crushing plant. An employee was injured while in a confined space and not provided with adequate warning of the start-up of the plant.

Petitioner's Testimony and Evidence

Patrick Werth testified that he was employed by the respondent as a laborer and was laid off on December 17, 1989. He confirmed that he was working at the mine on May 25, 1988, when he was injured when he was caught under a brace on the return belt of the portable plant when the belt was started up while he was standing on it while repairing the belt skirting.

Mr. Werth stated that he went to the belt area to work on the belt after he had helped two other employees, Mr. Stanley Deck and Mr. Alberto Rolon, free up a rock which was stuck in the crusher jaw. He confirmed that he had shut the belt down by turning it off at a switch box which was located at the platform which was over the crusher where the work to free the rock was taking place. The switch box was approximately 100 feet from where he was working on the belt skirting. He also confirmed that he told Mr. Rolon and Mr. Deck that he was going to work on the return belt.

Mr. Werth stated that he had worked for the respondent for 9 weeks before he was injured and that he received no training during his employment. He stated that on the day he started work he was instructed to go to the crusher and that another employee told him what to do. He identified his boss during the 9 weeks of his employment as Mr. Doug Glasford, who he identified as the quarry foreman or superintendent (Tr. 14-19).

Mr. Werth stated that the entire length of the return belt on which he was working could not be seen from the starting switch box location and that the view along 10 feet of the belt was obstructed by the belt bracing (Tr. 20).

Mr. Werth stated that he suffered three cracked vertebrae when he was caught in the belt bracing and was hospitalized for 7 days. He was out of work for a year and 2 months, cannot lift heavy objects, and he sometimes has pain (Tr. 20).

On cross-examination, Mr. Werth explained what he was doing while attempting to free the rock lodged in the crusher and he confirmed that the crusher and crusher belt were both in operation. He confirmed that if the rock were freed, it would have dropped through the crusher and onto the running belt, and that it would have jammed the return belt which he had shut off when it reached that point. He conceded that the shutting down of the return belt was not normal procedure, and that normally all of the belts are started before the crusher is started (Tr. 22).

In response to further questions, Mr. Werth confirmed that operating the crusher while attempting to free the rock was normal procedure because the crusher vibration will help free the jammed rock (Tr. 25). He confirmed that he had never heard about

the belt lock out procedure and that the switch which he used to shut off the return belt was a push button on/off switch. There was no switch at the location where he was working on the return belt skirting, and in order to start and stop the belt, he would have to go to the switch located at the crusher platform (Tr. 28-29).

Mr. Werth stated that after the rock was cleared from the crusher Mr. Deck started up all of the belts after he saw the rock go down the crusher. He confirmed that Mr. Rolon quickly stopped the return belt because he knew that he was there (Tr. 30).

Andrew Nawa, self-employed, testified that he was formerly employed by MSHA as a district health specialist and left in August, 1988. He confirmed that he visited the mine on May 26, 1988, to conduct an investigation of the accident concerning Mr. Werth. He identified exhibit G-1, as the accident report which he prepared. He explained his findings and confirmed that he issued the citations in question (Tr. 31-39).

Mr. Nawa confirmed that he issued Citation No. 2626303, citing a violation of 30 C.F.R. § 56.12016, because the power switches for the belt conveyors were not locked out while Mr. Werth was performing his work (Tr. 39, exhibit G-2). He confirmed that locks were provided by the respondent in the control trailer where the electrical power switches for the plant were located. The locks were provided for the lockout system, and they were hanging on the wall. However, they were not used to lock out the belt conveyors and no warning signs were posted. The belts should have been locked out in the trailer where the off/on switch was located and at the primary crusher area by the person who shut it off (Tr. 41-42).

Mr. Nawa stated that the violation was significant and substantial because an accident occurred and that if a belt starts up and moves when someone is not expecting it, he could sustain injuries ranging from a pinched finger to a fatality. He stated that there is "a vast history of accidents of people getting hurt that way." Since the accident occurred, the likelihood of injury was high (Tr. 42).

Mr. Nawa stated that he based his high negligence finding on the fact that an order had been issued approximately a month earlier at the site for failure to use a lockout system which was available. He believed that the order was served on Elco Concrete Products, but that the management at the site was aware of what transpired (Tr. 43).

Mr. Nawa confirmed that he issued Citation No. 2626304, citing a violation of section 56.9006, for the failure by the respondent to provide and use a start-up signal before starting

the conveyor belts (Tr. 43). Petitioner's counsel asserted that the cited standard has been redesignated as section 56.14201, as part of Title 30, Code of Federal Regulations, effective July 1, 1989 (Tr. 45, exhibit G-4). Counsel confirmed that the standard in effect at the time the citation was issued is essentially the same, and the respondent agreed (Tr. 45-46).

Mr. Nawa stated that he cited a violation of section 56.9006, because the accident occurred when Mr. Werth was in a position where he could not be seen from the location of the start-up switch and no signal system was provided. He confirmed that the entire length of the belt was not visible from either of the two belt start-up positions and that he personally determined that this was the case and that no warning systems were installed on any of the belts (Tr. 47-48).

Mr. Nawa confirmed that the violation was significant and substantial because the accident occurred, the lack of a start-up signal can result in serious accidents, and he was personally aware of injuries resulting from the lack of such a signal. There was always a risk that someone will be caught in moving machinery because they are not aware that it is going to move. If a signal were used, a person would have time to stay clear of the moving equipment (Tr. 48).

Mr. Nawa stated that he made a finding of moderate negligence because start-up signals were in use in other places at the facility, and he was not sure that the respondent was aware of the need for a signal at the cited portable plant (Tr. 49).

On cross-examination, Mr. Nawa confirmed that the prior order was served on Elco Concrete Products and not on Lebanon Rock, and he conceded that he was not sure about who the management personnel were who were operating at the same facility as the respondent. However, he believed that there was continuity among the same individuals and companies who operated at the site. He stated that when he went to the site to investigate the accident a lady serving as the scale master was vague as to who was in charge of the respondent's operation and that 20 minutes passed before anyone appeared and identified themselves as the respondent's superintendent (Tr. 51-52).

In response to further question, Mr. Nawa confirmed that Mr. Werth was not trained in the use of the lockout system, and he doubted that Mr. Rolon and Mr. Deck received any training (Tr. 60).

MSHA Metal/Non-Metal Inspector Elwood Frederick, testified that he terminated Citation No. 2626304, after the respondent installed a signal belt on the crusher oil pump to signal when it was started and a siren which also sounded when the conveyor belt system was started up. Mr. Frederick confirmed that he had

previously inspected the respondent's plant in March, 1988, and that he issued a combined section 107(a) order and 104(a) citation to Elco Concrete Products, Inc., citing a violation of section 56.12016, for failing to lock out the primary crusher main conveyor belt before performing work on the belt skirts (exhibit G-5).

Mr. Frederick stated that the respondent and Elco operated at the same quarry location and that the respondent owned the land. He explained that prior to March, 1988, there was no distinction between the two operations and they were conducted by the same family, namely, the family of Mr. Mumma, the respondent's owner. Referring to his notes and an MSHA conference work sheet which were attached to a copy of his order/citation, Mr. Frederick stated that Mr. Doug Glasford was identified as the respondent's plant superintendent, and that Mr. Richard Allwein was identified as Elco's superintendent. He explained that during his inspections of the quarry site, he encountered problems in identifying the specific family members or individuals who were responsible for the respondent's and Elco's operations, and that this was caused by a split among the family who had interests in both operations. As a result of these problems, Mr. Frederick assigned an MSHA independent contractor ID Number to Elco so that he could distinguish it from the respondent's operation. He stated that Elco operated at the front of the quarry site, and that the respondent operated to the rear of the property near the quarry (Tr. 68-77).

On cross-examination, Mr. Frederick confirmed that during his inspection on March 24, 1988, Mr. Glasford informed him that he was the respondent's plant superintendent. Mr. Frederick also confirmed that Mr. Allwein had worked at the quarry site for a long time. He also believed that the respondent and Elco were a part of a company known as Pennsy Supplies, in which Mr. Mumma had an interest (Tr. 77-79).

Respondent's Testimony and Evidence

Robert M. Mumma II, respondent's president, explained the operation of the plant portable crusher system which is used to process high calcium limestone. He stated that when the plant was originally purchased and installed, it was a complete "turn-key" package which he believed included a belt alarm for the crushing unit in question. He produced a copy of a March 2, 1987, proposal from the plant manufacturer and supplier which includes the operational specifications for all of the portable crushing plant equipment (exhibit R-1). Referring to paragraph two on page two of the specifications concerning the secondary crushing unit, Mr. Mumma pointed out that they include an "oil pressure/temperature alarm switch."

Mr. Mumma stated that according to normal operating procedures all maintenance on the crushing plant is performed while the plant is down and not in operation. He stated that when the crusher unit is operating, all of the belt conveyors are supposed to be running and that Mr. Werth should not have shutdown the return belt with the "on-off" switch which he used, and that this switch is intended to be used only in emergencies.

Mr. Mumma confirmed that he owns 50 percent of Lebanon Rock and that his late father's "estate" owns 50 percent of the company. He also confirmed that he has no interest in Elco Concrete, but that other family members have a controlling interest in that company. He also confirmed that he has an interest in several other inter-locking companies which he identified as Pennsy Supply and "999".

Mr. Mumma denied that Mr. Glasford was employed by Lebanon Rock as a superintendent or foreman, and he characterized him as a "consultant" who worked on customer problems and other company administrative matters. He confirmed that Mr. Glasford may have interviewed prospective employees, including Mr. Werth. Mr. Mumma confirmed that he had no knowledge as to whether the respondent had any written safety rules and procedures, or any written training program (Tr. 110-135).

Mr. Werth was called in rebuttal by MSHA, and he stated that Mr. Glasford hired him for his job with the respondent and supervised his work "most of the time." Mr. Werth confirmed that he knew Mr. Barnett, but denied that Mr. Barnett ever supervised or instructed him as to his job duties (Tr. 136-139).

Findings and Conclusions

Fact of Violation - Citation No. 2626303

The respondent is charged with a violation of mandatory safety standard 30 C.F.R. § 56.12016, which provides as follows:

> Electrically powered equipment shall be deenergized before mechanical work is done on such equipment. Power switches shall be locked out or other measures taken which shall prevent the equipment from being energized without the knowledge of the individuals working on it. Suitable warning notices shall be posted at the power switch and signed by the individuals who are to do the work. Such locks or preventive devices shall be removed only by the persons who installed them or by authorized personnel.

The failure to deenergize electrically powered equipment and to lock out power switches before any mechanical work is done on

the equipment has been consistently held to constitute a violation of mandatory safety standard 30 C.F.R. § 57.12016, and the identical standard section 56.12016, applicable to surface metal and nonmetal mines. See: MSHA v. Adams Stone Corporation, 7 FMSHRC 692, 706-707, (May 1985); MSHA v. FMC Corporation, 4 FMSHRC 1818, 1821-22 (October 1982), petition for Commission review denied, November 16, 1982; MSHA v. Greenville Quarries, Incorporated, 9 FMSHRC 1390, 1428 (August 1987); North American Sand and Gravel Company, 2 FMSHRC 2017 (July 1980); Brown Brothers Sand Company, 3 FMSHRC 734 (March 1981); Ozark-Mahoning Company, 11 FMSHRC 859 (May 1989), aff'd by the Commission on March 21, 1990; Price Construction Company, 7 FMSHRC 661 (May 1985).

MSHA's credible and unrebutted evidence clearly establishes that the crusher return belt on which Mr. Werth was standing and working at the time of the accident was not locked out. The belt is an electrically powered piece of equipment, and although it was deenergized by Mr. Werth by the use of a push button, it was not locked out at the main power switch as required by section 56.12016. Further, there is no evidence that the respondent took other measures to prevent the return belt from being energized and started without the knowledge of Mr. Werth while he was working on it. Under all of these circumstances, I conclude and find that MSHA has established a violation by a preponderance of the evidence, and the citation IS AFFIRMED.

Fact of Violation - Citation No. 2626304

The respondent is charged with a violation of mandatory safety standard 30 C.F.R. § 56.9006, which provides as follows:

> When the entire length of a conveyor is visible from the starting switch, the operator shall visually check to make certain that all persons are in the clear before starting the conveyor. When the entire length of the conveyor is not visible from the starting switch, a positive audible or visual warning system shall be installed and operated to warn persons that the conveyor will be started.

Section 56.9006 requires the installation and use of a positive audible or visual warning system for a conveyor belt when the entire length of the conveyor is not visible from the starting switch. The purpose of this requirement is to provide a warning to persons that the conveyor will be started. In this case, the credible and unrebutted testimony of Mr. Werth and Inspector Nawa establishes that the portion of the return belt on which Mr. Werth was standing was not visible from the starting switch which was located at the crusher station where the loader and crusher operator were working and from where the return belt was started up after the rock was cleared from the jaws of the

crusher. The evidence also establishes that Mr. Werth could not be seen from that location.

In the answer filed by the respondent on June 14, 1989, Mr. Mumma took the position that a start-up horn or signal would not have been activated since the primary crusher was never shutdown at the time Mr. Werth was performing work on the belt. During the course of the hearing, Mr. Mumma pointed out that the crusher equipment supplier's proposal and specifications for crushing units include an oil pressure and temperature alarm system and switches, and he explained that when the crusher unit is started up the crusher unit alarm will sound until the oil pressure is increased to a workable level. He suggested that this alarm satisfies the requirements of the standard.

I take note of the fact that the crusher specifications includes an electrical turnkey system wired to the main electrical generator source of power located and mounted in a plant trailer. However, I find no provisions for any alarms or warning devices installed on the belt conveyor components. The specifications include a remote start/stop button located on the work platform adjacent to the primary crusher and feeder to allow the plant operator to control the feed to the jaw crusher.

Inspector Nawa testified that the entire length of the return belt was not visible from the control switch located at the crusher platform area where the crusher and loader operator were working to free the rock and that Mr. Werth was not in view while he was standing on that portion of the belt which could not be seen from the crusher platform location. Mr. Nawa confirmed that there was no signal system in effect to warn Mr. Werth that the return belt conveyor would be started by use of the switch located at the crusher platform.

Inspector Frederick, the individual who terminated the violation, testified that he did so after the respondent installed a signal bell on the crusher unit oil pump to signal when it was started, and also installed a siren which sounded when the conveyor belt system was started. A copy of the violation notice of termination issued by Inspector Frederick reflects the installation of these devices.

Although Mr. Mumma's testimony suggests that the crusher unit alarm system was initially installed on the crusher unit as part of the turnkey installation of the portable plant, the fact remains that the return conveyor belt, which could be turned on and off by use of a remote push button "on-off" switch located at the crusher unit work platform, was not provided with an alarm, or equipped to sound an audible alarm or warning when that belt conveyor was again started up after it was turned off. Section 56.9006, requires the installation and use of such a warning device when the entire length of the conveyor belt is not visible

from the starting switch. Under the circumstances, I conclude and find that MSHA has established a violation by a preponderance of the evidence, and the citation IS AFFIRMED.

Significant and Substantial Violations

A "significant and substantial" violation is described in section 104(d)(1) of the Mine Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 C.F.R. § 814(d)(1). A violation is properly designated significant and substantial "if, based upon the particular facts surrounding the violation there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (April 1981).

In Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984), the Commission explained its interpretation of the term "significant and substantial" as follows:

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

In United States Steel Mining Company, Inc., 7 FMSHRC 1125, 1129, the Commission stated further as follows:

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

The question of whether any particular violation is significant and substantial must be based on the particular facts surrounding the violation, including the nature of the mine involved, Secretary of Labor v. Texasgulf, Inc., 10 FMSHRC 498

(April 1988); Youghiogheny & Ohio Coal Company, 9 FMSHRC 2007 (December 1987).

I conclude and find that both of the citations issued by Inspector Nawa involved significant and substantial violations of the cited standards. The failure to lock out the power switch to the conveyor belt resulted in serious injuries to Mr. Werth who was standing on the belt conveyor performing work. He suffered several broken vertebrae, was hospitalized, and missed many months of work. Although the belt had been shutdown by means of a push button, the power was not locked out, and when it was started up again, Mr. Werth was drawn into the belt conveyor support bracket opening and was injured. The accident could not have occurred if the power switch had been locked out with the locks which were available in the switch trailer. The seriousness of the hazard was exacerbated by the fact that Mr. Werth had received no safety training and was not informed about the lockout procedures.

The failure to provide an audible belt conveyor start-up signal contributed to the accident and injuries. If such a signal were in use when the belt was started, Mr. Werth may have had an opportunity to jump off the belt and avoid the serious injuries which he sustained. In addition, the evidence establishes that while working on the belt conveyor, Mr. Werth was out of the view of the two individuals who were working to free the rock from the crusher. Although Mr. Werth had helped work to free the rock shortly before the accident, after he left the platform area, further communications were not maintained, and the belt was started without any prior signal to warn Mr. Werth, who was out of the view of the person who started it. In such situations, it is reasonably likely that accidents of the kind which occurred in this case will happen, with resulting injuries of a reasonably serious nature. Under all of these circumstances, I conclude and find that the inspector's significant and substantial findings with respect to both violations was clearly justified, and they ARE AFFIRMED.

Size of Business and Effect of Civil Penalty Assessments on the Respondent's Ability to Continue in Business

The evidence in this case reflects that the respondent is a small limestone mine operator, and the parties have stipulated that the payment of the civil penalty assessments for the violations in question will not adversely affect the respondent's ability to continue in business.

History of Prior Violations

An MSHA computer print-out concerning the respondent's history of prior violations reflects that for the period May 26, 1986 through May 25, 1988, the respondent made payment in the

amount of $336 for six assessed violations, none of which are for violations of the mandatory standards cited in this case. The parties have stipulated that the respondent has a favorable history of compliance, and I agree and adopt this as my finding and conclusion on this issue.

Good Faith Compliance

The parties stipulated that the respondent timely abated the violations in good faith. I adopt this stipulation as my finding and conclusion on this issue.

Gravity

In view of my significant and substantial (S&S) findings, I conclude and find that both of the violations were serious. The failure to lock out the return belt on which Mr. Werth was working when it was started resulted in serious injuries to Mr. Werth. Further, the failure by the respondent to provide an audible or visual warning system for the crusher belt system, particularly the return belt conveyor where Mr. Werth was working, contributed to the accident and resulting injuries. The portion of the belt where Mr. Werth was standing was not visible from the crusher station and Mr. Werth could not been observed by the person who started up the belt. If a signal or warning had been installed and used, Mr. Werth may have had an opportunity to jump clear of the belt, and he probably would not have been injured.

Negligence

Citation No. 2626304, 30 C.F.R. § 56.9006

The inspector found that this violation was the result of moderate negligence on the part of the respondent. I agree with this finding and conclude and find that the violation resulted from the respondent's failure to exercise reasonable ordinary care.

Citation No. 2626303, 30 C.F.R. § 56.12016

Inspector Nawa based his "high negligence" finding on the fact that the respondent had been previously cited for a violation of section 56.12016, by Inspector Frederick on March 24, 1988, after he observed the plant operator preparing to work on some belt skirts without locking out the belt power switch. However, the evidence establishes that this prior violation was served on Elco Concrete Products, Inc., and it is not included as part of the respondent's history of prior violations. Conceding that this is the case, the petitioner nonetheless suggests that because the respondent's superintendent, Doug Glasford, was present when the prior violation was issued, and was aware of the

circumstances, the respondent had constructive notice of the violation and the conditions cited, and should have taken appropriate steps to enforce its lockout procedures at the time of the accident involving Mr. Werth.

Inspector Frederick testified that prior to his inspection, the quarry was operated by Mr. Mumma's family and there was no distinction between Lebanon Rock and Elco Concrete. Mr. Frederick believed that Mr. Mumma had an interest in both operations, but due to certain "inter-family" differences and "turmoil" following the death of Mr. Mumma's father, he had difficulty in identifying any specific family members or management officials who were responsible for each of these operations. He explained that a separate MSHA Mine ID number was assigned to Elco Concrete in order to distinguish it from the respondent's operation, and a notation on an MSHA "conference sheet" which is attached to a copy of the citation issued by Mr. Frederick (exhibit G-5) reflects that "two different operations" were being conducted at the quarry site.

Mr. Frederick further testified that Mr. Glasford was serving as the respondent's superintendent at the time of his inspection and that he was with him when he observed the violative conditions. Mr. Frederick confirmed that Mr. Glasford was also present at the "closeout meeting" following his inspection and that the violation and lockout procedures were discussed with him and a representative of Elco Concrete. The conference worksheet reflects that Mr. Glasford was present on March 29, 1988, as the representative of the respondent.

Mr. Mumma denied any ownership interest in Elco Concrete Products Inc. He explained that he has a 14 percent interest in a holding company known as "999", which owns Pennsy Supply Company, and that Pennsy owns Elco Concrete. Mr. Mumma also denied that Lebanon Rock and Elco Concrete ever operated as a single entity at the quarry site, and he further explained that prior to 1985, the quarry was owned by the Corson Lime Company, and that his family was not involved in that operation. He testified that Lebanon Rock Company was established in 1985, and purchased the property and began mining high calcium limestone, and that Elco Concrete began mining dolomite at the site during the spring of 1988 (Tr. 127-128).

Mr. Mumma identified his quarry superintendent as Mr. Gerald Barnett and the record establishes that the contested citations were served on Mr. Barnett. Further, Inspector Nawa's accident report of May 25, 1988, identifies Mr. Barnett as the quarry superintendent at that time. Mr. Werth confirmed that he knew Mr. Barnett, but he denied that Mr. Barnett ever supervised him or instructed him as to his job duties. Mr. Werth further testified that he was hired by Mr. Glasford, and that Mr. Glasford was his "boss."

Mr. Mumma denied that Mr. Glasford was an employee of Lebanon Rock, and he characterized him as a "consultant" who handled sales and administrative matters and who was paid by the day or hour based on his billings. He stated that Mr. Glasford may have been associated with Lebanon Rock for 4 or 5 months, but was not at the site full time. Conceding that Mr. Glasford may have interviewed Mr. Werth for employment, Mr. Mumma stated that either he or Mr. Barnett hired Mr. Werth through the payroll department. He conceded that Mr. Glasford was on the property when the two citations were issued and that he "must have been contending (sic) to work there" (Tr. 130).

Mr. Mumma took the position that Mr. Werth deviated from normal operating procedures by shutting down the belt while the other two employees were attempting to free the rock which had lodged in the jaws of the crusher. Mr. Mumma argued that the respondent provided the proper locks, but that in his attempts to do "something beneficial for the company," Mr. Werth violated company policy concerning the normal operating procedures for shutting down the equipment (Tr. 154).

With regard to the prior violation issued by Inspector Frederick, Mr. Mumma took the position that the respondent should not be held accountable for this violation since it was served on Elco Concrete Products, Inc. Mr. Mumma asserted that Mr. Glasford was not given a copy of the previously issued violation, was not given any information in this regard, and had nothing to transmit to the respondent, and that he simply "overheard a verbal conversation" (Tr. 156). Mr. Mumma further asserted that if the prior violation had been served on the respondent, he would have received a copy in his office and would have been informed about the violation and would have had an opportunity to take appropriate action by immediately reviewing the plant operational procedures with his employees. Mr. Mumma suggested that since he had no prior knowledge of the previous violation, he should not be penalized for any negligence. He also expressed some doubts as to whether Mr. Werth actually informed Mr. Rolon and Mr. Deck that he was going to perform work on the belt which was started up and resulted in his injuries (Tr. 154-159).

The respondent's reliance on Mr. Werth's alleged negligence as a defense to the citation is rejected. The petitioner's position on this issue is correct, and I conclude and find that the respondent may be held strictly liable and accountable for the violation regardless of any fault by one of its employees. Although any negligence by Mr. Werth may be considered in mitigation of any civil penalty assessments for the violations which have been affirmed in this case, I cannot conclude that the evidence establishes that Mr. Werth was negligent. His credible and unrebutted testimony establishes that he received no training

and was not aware of any lockout procedures. The respondent's suggestion that Mr. Werth may not have notified Mr. Rolon and Mr. Deck that he was going to work on the belt which was started up and caused his injuries is likewise rejected. Mr. Rolon and Mr. Deck were not called to testify in this case and I find Mr. Werth to be a credible witness and I believe his unrebutted testimony.

The record in this case establishes that the prior violation issued by Inspector Frederick was in fact served on Elco Concrete Products under its own MSHA Mine ID number, and as previously noted, it is not included in the respondent's history of prior violations. Under the circumstances, I find some merit in the respondent's argument that it should not be penalized for the negligence attributable to Elco. With regard to Mr. Glasford's knowledge of the prior violation, and the respondent's constructive notice of the violative conditions, since Mr. Glasford was not called to testify, his managerial role with respect to the respondent's operation at the time this violation was issued, as testified to credibly by Inspector Frederick, remains unrebutted. Although I find Mr. Mumma's testimony concerning Mr. Glasford's status believable, I am not totally convinced that Mr. Glasford was not informed about the prior cited conditions. Nor am I convinced that Mr. Glasford did not occupy a managerial position with the respondent, and I credit Mr. Werth's testimony that Mr. Glasford was his boss.

Apart from any knowledge by the respondent with respect to the prior violation, I conclude and find that the evidence and testimony presented in this case, taken as a whole, supports a finding of a high degree of negligence by the respondent for the citation in question. Although Mr. Mumma asserted that had he been informed of the prior violation, he would have taken appropriate steps to review the plant operational procedures with his employees, he conceded that he had no knowledge of the existence of any written company safety rules and procedures. Mr. Mumma did not rebut the fact that Mr. Werth was not trained, and he acknowledged that he had no knowledge of the existence of any company training program (Tr. 132). He simply believed that Mr. Werth had been assigned to Mr. Rolon for training, and that Mr. Barnett was responsible for overseeing the operation of the plant. However, Mr. Rolon and Mr. Barnett were not called to testify, and in the absence of any testimony from these key employees, Mr. Werth's unrebutted and credible testimony establishes that he was not trained and had no knowledge of any lockout procedures.

Mr. Mumma's acknowledgement of the fact that the respondent provided the locks for use by its employees, establishes a strong inference that it was aware of the requirements of the cited standard, and Mr. Mumma conceded that he was aware of these requirements (Tr. 90). I believe that it is not unreasonable to

expect the respondent to insure that Mr. Werth was trained, or otherwise made aware of the existence of the locks, including the necessity for using them to lock out a belt before he performed any work. Further, given the fact that Mr. Werth was working with Mr. Rolon, an individual who Mr. Mumma stated was supposed to train Mr. Werth, and who knew that Mr. Werth was working on the belt, I can only conclude that the respondent failed to take reasonable steps to adequately supervise Mr. Werth's work, and that its failure to do so contributed to the accident which resulted in serious injuries to Mr. Werth. Under all of these circumstances, I conclude and find that the violation was the result of a high degree of negligence on the part of the respondent, and the inspector's finding in this regard IS AFFIRMED.

Civil 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 reasonable and appropriate for the violations which have been affirmed:

Citation No.	Date	30 C.F.R. Section	Assessment
2626303	05/26/88	56.12016	$1,000
2626304	05/26/88	56.9006	$ 800

ORDER

The respondent IS ORDERED to pay the civil penalty assessments for the violations in question, and payment is to be made to MSHA within thirty (30) days of the date of this decision and order. Upon receipt of payment, this matter is dismissed.

George A. Koutras
Administrative Law Judge

Distribution:

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

Mr. Robert M. Mumma II, President, Lebanon Rock, Inc., P.O. Box 1531, Harrisburg, PA 18105 (Certified Mail)

/fb

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

MAY 23 1990

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), ON BEHALF OF BOBBY COULTER, Complainant	:	DISCRIMINATION PROCEEDING
	:	Docket No. CENT 90-1-DM
	:	MD 89-38
v.	:	Sheppard Pit
CANTU MATERIALS, INC., Respondent	:	

DECISION

Before: Judge Broderick

By order issued March 23, 1990, I found Respondent in default for failure to file an answer to the complaint of discrimination filed by the Secretary on behalf of Bobby Coulter, and for failure to respond to an order of show cause issued January 11, 1990.

Because of Respondent's default, I found that it had violated section 105(c)(1) of the Act in discharging Bobby Coulter on or about March 13, 1989, for activity protected under the Act. I ordered Respondent to expunge its records of any references to the discharge of Bobby Coulter, and to pay to the Secretary a civil penalty in the amount of $600. I further ordered Respondent to pay Bobby Coulter full back pay and other benefits from the date of his discharge until the date he resumed full employment, with interest on the back pay calculated in accordance with the formula contained in 54 Fed. Reg. 2226 (January 19, 1989), and to pay Complainant the expenses associated with this litigation.

I directed the Secretary to submit a statement of the amount claimed as back pay with interest and the amount of litigation expenses. On May 14, 1990, the Secretary filed a Statement of Amount Claimed, a copy of which was served on Respondent May 10, 1990. No litigation expenses are claimed. Respondent has not replied to the Statement. Therefore, I accept the Secretary's statement of the amount of back pay less interim earnings from March 13, 1989, until he resumed full employment April 8, 1989.

ORDER

Therefore, IT IS ORDERED:

1. The findings and orders issued March 23, 1990, are AFFIRMED.

2. Respondent shall pay to Complainant within 30 days of the date of this decision the sum of $912.31 representing lost wages and interest as follows:

Back wages 3/13/89 to 3/20/89	$280.00
Withheld wages	217.00
Wage differential 3/20/89 to 4/7/89	206.25
Travel expenses	205.52
Interest 3/13/89 to 4/7/89	5.54
	$912.31

James A. Broderick
Administrative Law Judge

Distribution:

Jack F. Ostrander, Counsel for Safety and Health, U.S. Department of Labor, Office of the Solicitor, 525 S. Griffin Street, Suite 501, Dallas, TX 75202 (Certified Mail)

Cantu Materials, P.O. Box 425, Eagle Lake, TX 77434 (Certified Mail)

slk

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

MAY 23 1990

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. PENN 89-139
Petitioner	:	A.C. No. 36-01818-03524
v.	:	
	:	R S & W Drift
R S & W COAL COMPANY, INC.,	:	
Respondent	:	

DECISION

Appearances: Mark V. Swirsky, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for the Petitioner; Randy Rothermel, R S & W Coal Company, Inc., Klingerstown, Pennsylvania, Pro se, for the Respondent.

Before: Judge Koutras

Statement of the Case

This proceeding concerns a proposal for assessment of civil penalty filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a), seeking a civil penalty assessment in the amount of $300, for an alleged violation of mandatory training standard 30 C.F.R. § 48.5(a). Respondent filed a timely answer and contest, and a hearing was held in Reading, Pennsylvania. The parties waived the filing of posthearing briefs, and I have considered their oral arguments made on the record during the course of the hearing in this matter.

Issues

The issues presented in this case are (1) whether the condition or practice cited by the inspector constitutes a violation of the cited mandatory safety standard, (2) whether the violation was "significant and substantial" (S&S), and (3) the appropriate civil penalty to be assessed for the violation,

taking into account the statutory civil penalty assessment criteria found in section 110(i) of the Act. Additional issues raised by the parties are identified and disposed of in the course of this decision.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977; 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.

Stipulations

The parties stipulated that the respondent is a small coal mine operator employing eight miners, and that its annual production is 3,300 tons. They also agreed that payment of the proposed civil penalty assessment will not adversely affect the respondent's ability to continue in business (Tr. 4).

Discussion

The contested section 104(a) S&S Citation No. 2677716, served on the respondent on November 15, 1988, cites an alleged violation of mandatory training standard 30 C.F.R. § 48.5(a), and the cited condition or practice is described as follows:

> Darin Schwartz, determined to be a new miner, was observed working in the skidmore rock tunnel underground portion of the mine. A discussion with Mr. Schwartz revealed that he had received little of the required 40 hours of new miner training.
>
> The company's approved training plan dated 12-18-87 states "32 hours of new miner training will be given at the Schuylkill County Mine Safety Training Center and all 40 hours of training will be completed before new employee is assigned work duties underground."
>
> This citation is issued in conjunction with 104(g)(1) Order No. 2677715 for violation of 114 of the Act.

In conjunction with the citation, the inspector also issued a section 104(g)(1) "S&S" Order No. 2677715, on November 15, 1988, withdrawing the cited untrained miner from the mine. The order states as follows:

Darin Schwartz, observed performing laborer duties in the skidmore rock tunnel in the underground portion of the mine has not received the requisite safety training as stipulated in section 115 of the Act. Mr. Schwartz has been determined to be a new miner hired by this company 11-15-88, who has received little or none of the required 40 hours of new miner training. In the absence of such training, Darin Schwartz, laborer, is declared to be a hazard to himself and others and is to be immediately withdrawn from the mine until he has received the required training.

A citation (No. 2677716) for violation of 30 C.F.R. § 48.5(a), has been issued in conjunction with this order.

Petitioner's Testimony and Evidence

MSHA Inspector Dennis L. Myers testified that he inspected the respondent's mine on November 15, 1988, and was accompanied by Mr. Randy Rothermel, the foreman. Mr. Rothermel informed him that miner Walter Wehry was working underground. After proceeding underground to the working section, Mr. Myers found that miner Darren Schwartz was working with Mr. Wehry loading coal into a buggy. Mr. Schwartz informed Mr. Myers that this was his first day on the job underground and that he had worked for 1 week at another contract mine operation. Mr. Schwartz also informed Mr. Myers that he had received no training (Tr. 13-16).

Mr. Myers stated that he asked Mr. Schwartz if he knew what a "three piece set" was, and he replied that he did not. Mr. Myers explained that this was one of the methods of roof control which may be used at the respondent's mine and that it is a subject usually covered in the 40-hour training given to new miners. Mr. Myers confirmed that he also asked Mr. Schwartz about the mine roof control and ventilation plans, and that he had no knowledge of the plans (Tr. 17-18).

Mr. Myers stated that Mr. Rothermel was present while he questioned Mr. Schwartz and stated that he was training Mr. Schwartz. Mr. Myers then informed Mr. Rothermel that he could not train Mr. Schwartz because he was not listed as a trainer or instructor in the respondent's training plan. Mr. Rothermel informed Mr. Myers that he was a trainer at a previous mining operation and Mr. Myers informed Mr. Rothermel that Mr. Schwartz would have to be withdrawn from the mine because he had not been trained (Tr. 19).

Mr. Myers stated that Mr. Rothermel telephoned MSHA's district supervisor for education and training, Charles Moore, from his office and inquired as to why he was not listed as an instructor. Mr. Myers stated that he informed Mr. Moore that

pursuant to the respondent's training plan new miners had to be trained at the Schuylkill County Vo-Tech facility, and that the approved training instructor was Mr. Richard Rothermel, Randy's brother, and the respondent's president and foreman. Mr. Myers confirmed that Richard Rothermel was listed on the MSHA ID form which he reviewed, but that Randy Rothermel was not. After speaking with Mr. Moore, Mr. Myers issued the citation and withdrawal order and served them on Randy Rothermel (Tr. 22).

Mr. Myers stated that he discussed the respondent's training plan with Mr. Rothermel and advised him to have it updated and that he could request technical assistance from MSHA. Mr. Myers stated that he had no knowledge that the respondent had ever requested prior assistance from MSHA regarding the training plan. He confirmed that Mr. Schwartz left the property and that when he next returned to the mine on December 6, 1988, Mr. Schwartz was not there (Tr. 22).

Mr. Myers confirmed that he cited a violation of section 48.5(a), because he considered Mr. Schwartz to be a new miner, and he determined through his conversation with Mr. Schwartz and Mr. Rothermel that Mr. Schwartz was an untrained inexperienced miner (Tr. 23).

Mr. Myers stated that the violation was significant and substantial because there was a very good possibility that an inexperienced miner working underground would be exposed to an injury to himself and other miners (Tr. 24). Mr. Myers confirmed that he made a finding of "high negligence" because Mr. Rothermel had previously served as a training instructor and knew that as a new employee Mr. Schwartz could not go underground without any training. Mr. Myers found no mitigating circumstances, and he believed that the respondent could have made other arrangements to train Mr. Schwartz and should have contacted MSHA to assist him before the citation and order were issued (Tr. 24).

Mr. Myers identified a copy of the respondent's approved training plan which lists Richard Rothermel as the approved instructor, and he confirmed that the plan was in effect at the time the citation and order were issued, and that Randy Rothermel produced the plan for his review (Tr. 25, exhibit P-10). Mr. Myers confirmed that he has never seen a 1985 training plan which was identified as exhibit P-7 (Tr. 26). Mr. Myers confirmed that Mr. Schwartz was withdrawn from the mine because he had not received 40 hours of new miner training before he was assigned work duties (Tr. 26).

<u>On cross-examination</u>, Mr. Myers explained why he believed Mr. Schwartz was exposed to mine hazards while working underground without the benefit of training (Tr. 27-29). Mr. Myers confirmed that the respondent submitted another training plan to MSHA's district office in Wilkes-Barre approximately a week or

2-weeks prior to the hearing in this case, but that he was not familiar with the specifics of that plan (Tr. 32). Mr. Myers identified some MSHA training materials produced by Mr. Rothermel, and Mr. Rothermel pointed out that the information reflects that on-the-job training "is best" (Tr. 34).

Mr. Myers confirmed that Richard Rothermel was not at the mine on November 15, 1988, and that Randy Rothermel said nothing about Richard being involved in any training for Mr. Schwartz. Mr. Myers stated that Randy Rothermel simply informed him that he was training Mr. Schwartz "on the job" (Tr. 42). Randy Rothermel did not indicate that Mr. Wehry was training Mr. Schwartz (Tr. 43).

Mr. Myers confirmed that assuming that he was qualified to administer training, Randy Rothermel could administer the training. However, the applicable approved mine training plan only listed Richard Rothermel as the qualified training instructor (Tr. 44). Mr. Myers confirmed that he found no MSHA training form 5023 for Mr. Schwartz, and that this form is required to be filled out by Vo-tech showing the dates of the training and the training which was administered and received by the miner (Tr. 47).

Mr. Myers conceded that Mr. Schwartz may have received some on-the-job training during the time he was underground on the day of the inspection, but that he was required to have a full 8 hours of training on-the-job and 32 hours of additional training prior to performing any work underground and that this is specified in the respondent's training plan (Tr. 48-50).

MSHA Supervisory Inspector Dean W. Updegrave confirmed that he is Inspector Myers' supervisor, and after reviewing the citation and order issued by Mr. Myers, he agreed that they were properly issued (Tr. 61). Mr. Updegrave stated that approximately 3 days after the citation and order were issued, Randy Rothermel came to his office and informed him that he could train Mr. Schwartz because he was listed as an approved training instructor on the mine training plan. Mr. Updegrave stated that he then reviewed his file and a copy of the training plan with Mr. Rothermel and informed him that his name did not appear on the plan as a trainer. Mr. Rothermel then stated "well, it was on, somebody took it off" (Tr. 62).

Mr. Updegrave stated that he informed Mr. Rothermel that Mr. Schwartz would have to have 32 hours of classroom training time and 8 hours "introduction to the work environment" before he was assigned a job (Tr. 62). Mr. Rothermel then requested that the training plan be changed. Mr. Updegrave then reviewed the mine legal identity report and found that Randy Rothermel was not listed as one of the mine partners, and that only Richard Rothermel and Mr. Wehry were listed as partners. Randy Rothermel

then informed Mr. Updegrave that he was a partner, and Mr. Updegrave gave him blank copies of the legal identify form and advised him to file them in order to have him listed as a partner. He also advised Mr. Rothermel to request a change in the training plan if he so desired (Tr. 63).

Mr. Updegrave stated that prior to the inspection by Mr. Myers, Richard Rothermel visited his office to discuss the mine training plan. Richard requested that Randy Rothermel's name be deleted from the plan because he was not a qualified instructor. Richard Rothermel informed Mr. Updegrave that he did not have the facilities at the mine to train new employees and opted to have them trained at the Vo-tech school for the 32 hours of classroom training. The new plan was accordingly changed and approved by MSHA, and it listed Richard Rothermel as the approved trainer, and it provided that 32 hours of training would be conducted at the Vo-tech school (Tr. 65-66; exhibits P-10, P-8, and P-9). Mr. Updegrave identified exhibit P-11 as a copy of a letter dated December 18, 1987, advising the respondent that the new training plan had been approved (Tr. 68). He also identified a copy of a letter from Richard Rothermel submitting information concerning the revision and addendum to his approved training plan (Tr. 68-70, exhibit P-12). Mr. Updegrave confirmed that Randy Rothermel was not involved in these modifications and revisions of the mine training plan (Tr. 71).

Mr. Updegrave confirmed that the respondent filed a new training plan with MSHA's Pottsville office approximately a week prior to the hearing and Richard Rothermel informed him that he did not want Randy Rothermel to be included in the plan as a training instructor. Mr. Updegrave also confirmed that he has not received any new mine legal identity forms from Randy Rothermel (Tr. 71).

Mr. Updegrave confirmed that pursuant to the respondent's prior 1985 training plan, all of the 40-hour new miner training could be done at the mine site (Tr. 91).

Respondent's Testimony and Evidence

Darren Schwartz testified that prior to the day of the inspection by Mr. Myers, he worked at another mine for a week. He confirmed that the day of the inspection was his first day of work at the respondent's mine. He stated that he had shoveled coal underground for 4 hours before the inspector came underground, and that he had shoveled 25 scoops of coal. He confirmed that Mr. Rothermel pointed out several safety things to him when he first went underground (Tr. 94-96).

Mr. Schwartz stated after he came to the surface, Mr. Myers would not permit him to do any surface work until he was trained at the Vo-tech school. He confirmed that he completed his

surface training on May 25, 1989, and his underground training on July 28, 1989 (Tr. 100).

Randy Rothermel testified that at the time of the inspection he was not aware of the 1987 training plan and was only familiar with the one he filled out in 1985. He stated that the 1985 plan permitted him to train newly employed miners, and that the pending plan revision would allow him to do this again.
Mr. Rothermel could not explain why he was not aware of the 1987 plan (Tr. 107). He explained that he works one shift and his brother Richard works another shift, and that the mine plans are continuously being changed and that he has "a drawer full of them" (Tr. 108).

On cross-examination, Mr. Rothermel stated that the mine was working two shifts in 1985 and 1987, and that the mail was received at a company office away from the mine site. He stated that his brother works the third shift from 10 p.m. to 5:00 a.m. and comes to the mine 6 days a week, and that he works the first shift from 7:00 a.m. to 2:00 p.m. (Tr. 111). He stated that he lives 3 or 4 miles from his brother, and that they spoke to each other "all the time away from the mine." He stated that his brother never told him that he had changed the mine legal identity information, and he believed that he did so because a share of the mine was sold to his brother in 1987 or 1988.
Mr. Rothermel confirmed that he has always owned a share of the mine (Tr. 112).

Mr. Rothermel confirmed that he took Mr. Schwartz underground, explained some things to him, and that he was in the company of one of the other mine partners. He did not believe that Mr. Schwartz was performing any work duties, and that he was only shoveling coal (Tr. 115-116). He asserted that he intended to train Mr. Schwartz that day, and that he had been underground for 4-hours prior to the inspector's arrival, and if the inspector had not arrived he would have trained Mr. Schwartz for the remainder of the day (Tr. 119). He conceded that he was not with Mr. Schwartz all of the time, but spent 2 hours with him underground before leaving to conduct other business (Tr. 119-120). However, he communicated with Mr. Schwartz over the intercom (Tr. 121).

Mr. Updegrave was recalled and he confirmed that in the event Vo-tech cannot train a newly employed miner at any given time, the respondent could have contacted MSHA's district manager for a waiver to permit him to allow one of MSHA's training specialists to conduct the training. He also indicated that the Vo-tech facility has an evening training program to allow miners to timely complete their training (Tr. 123).

Mr. Updegrave confirmed that the Vo-tech training is scheduled when there are 10 or more persons to be trained, but there

are times when only two people are in class. He again confirmed that Richard Rothermel informed him that he did not have the time to train miners at the mine and since he wanted to send them to Vo-tech, he submitted a change for his plan (Tr. 124). Mr. Updegrave explained the newly submitted training plan by Richard Rothermel (Tr. 126-130).

Findings and Conclusions

Fact of Violation

The respondent in this case is charged with a violation of the training requirements found in 30 C.F.R. § 48.5(a), because of its failure to provide training for newly employed miner Darren Schwartz, as required by section 48.5(a) and the respondent's approved mine training plan. Section 48.5(a), requires that each new miner receive no less than 40 hours of training before he is assigned to any work duties, and approximately 8 hours of this training is required to be given at the mine site.

Mr. Randy Rothermel agreed that MSHA's training regulations require a new miner to receive no less than 40 hours of training before he is assigned to any work duties (Tr. 31). However, he took the position that MSHA's training materials which were recently given to him reflect that on-the-job training is the "best" method for training miners, and that pursuant to his plan, training may be given "on site" and that it is not necessary that it be given at the local county Vo-tech facility (Tr. 35).

MSHA's counsel pointed out that pursuant to the respondent's applicable training plan, Richard Rothermel may administer part of the new-miner training, and that Vo-tech is an alternative source for administering the training. He further pointed out that all training must be administered by a qualified instructor and that the plan provisions list where the training is to be administered for each of the subjects covered by the plan (Tr. 36-40). He confirmed that pursuant to the plan, certain portions of the training may be done at the mine by a qualified instructor and certain portions may be done at the Vo-tech facility (Tr. 41).

Mr. Rothermel asserted that he had no knowledge of the training plan relied on by Mr. Myers prior to the inspection, and that he was only familiar with the prior 1985 plan which lists him as an instructor (Tr. 51). Mr. Rothermel and the inspector confirmed that the applicable plan was found in an envelope in a desk drawer in the mine office with various other papers, including the mine ventilation and roof-control plans and that "it took us a little bit to find them" (Tr. 29).

Mr. Rothermel stated that he did not want to train new miners at the Vo-tech school, and that if the new plan is approved, miners will be trained at the mine (Tr. 77-78, 89). He took the position that even though Mr. Schwartz was underground, "he was shoveling coal and I don't consider that work" (Tr. 79-80). He also took the position that Mr. Schwartz was receiving training at the time he was found underground by Inspector Myers (Tr. 81). He also expressed concern that the training administered at the Vo-tech facility is not given at all times, and that newly employed miners must wait for months before they are hired in order to be trained.

The evidence adduced in this case clearly establishes that the cited miner in the employ of the respondent at the time of the inspection in question was a newly employed inexperienced miner who had not received the requisite training pursuant to the respondent's MSHA approved training plan. The respondent's suggestion that the cited miner was not performing any work underground at the time he was found by the inspector is rejected. The evidence establishes that the untrained miner was shoveling and loading coal, and his own testimony attests to the fact that he had been underground for approximately 4 hours shoveling and loading coal. Under the circumstances, I conclude and find that the petitioner has established a violation by a clear preponderance of all of the credible and probative evidence in this case, and the contested citation IS AFFIRMED. I also conclude and find that the withdrawal of the untrained miner was proper in the circumstances.

Significant and Substantial Violation

A "significant and substantial" violation is described in section 104(d)(1) of the Mine Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 C.F.R. § 814(d)(1). A violation is properly designated significant and substantial "if, based upon the particular facts surrounding the violation there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (April 1981).

In Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984), the Commission explained its interpretation of the term "significant and substantial" as follows:

> In order to establish that a violation of a mandatory safety standard is significant and substantial under National Gypsum the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard--that is, a measure of danger to safety-contributed to by the

violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

In United States Steel Mining Company, Inc., 7 FMSHRC 1125, 1129, the Commission stated further as follows:

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

The question of whether any particular violation is significant and substantial must be based on the particular facts surrounding the violation, including the nature of the mine involved, Secretary of Labor v. Texasgulf, Inc., 10 FMSHRC 498 (April 1988); Youghiogheny & Ohio Coal Company, 9 FMSHRC 2007 (December 1987).

Inspector Myers' based his "S&S" finding on his belief that an inexperienced and untrained miner working underground would be exposed to an injury to himself and to other miners and that mining is a very hazardous occupation (Tr. 23-24). He explained that during the time he was underground, Mr. Schwartz would have been in a confined area with coal cars moving back and forth, and in the event of a derailment "he could very well get hurt" if he were struck by one of the cars. Although Mr. Myers indicated that Mr. Schwartz was "off to the side" of the coal chute while loading coal, he stated that when he was shoveling and cleaning up the coal he was directly under the coal chute, and that the coal buggies moved back and forth while they were being loaded. In the event one of the chute poles broke loose, the coal could have rolled out and over the chute board and caught Mr. Schwartz.

Mr. Rothermel contended that he intended to train Mr. Schwartz underground on the day of the inspection, and although Mr. Schwartz was underground for 4 hours before he was found by the inspector, Mr. Rothermel conceded that he was only with him for 2 hours underground. Mr. Rothermel also indicated that he "explained some things" to Mr. Schwartz while he was underground with him, and that Mr. Schwartz was in the company of one of the mine partners. However, there is no evidence that the partner was training Mr. Schwartz, nor is there any evidence that

Mr. Schwartz was doing anything other than shoveling and loading the coal.

Mr. Schwartz confirmed that he was shoveling coal that had run out over the coal buggy. He confirmed that Mr. Rothermel pointed out to him that he should kept "his arms and legs inside" while going inside the mine, showed him where the escape route was, and pointed out the mine intercom to him (Tr. 95-96). Although Mr. Schwartz indicated that he had worked at another mine operation for a week prior to his first day of employment with the respondent, there is no evidence or information of record as to the extent of his work at the other facility, nor is there any evidence as to whether the hazards presented at previous place of employment were similar or different from those presented at the respondent's underground mine.

I conclude and find that Inspector Myers' credible and unrebutted testimony supports a reasonable conclusion that as an untrained, inexperienced miner, Mr. Schwartz's presence in the respondent's underground mine without the benefit of the required training exposed to him a reasonable likelihood of serious injury. Under the circumstances, I conclude and find that the inspector's "S&S" finding was reasonable and proper in the circumstances, and IT IS AFFIRMED.

Size of Business and Effect of Civil Penalty Assessment on the Respondent's Ability to Continue in Business

The parties stipulated that the respondent is a small mine operator and that the civil penalty assessment for the violation will not affect the respondent's ability to continue in business. I adopt these stipulations as my findings and conclusions with respect to these issues.

History of Prior Violations

Exhibit P-14, a computer print-out concerning the respondent's history of assessed violations, reflects that the respondent paid $144 in civil penalty assessments for four violations issued during the period from November 15, 1986 through November 14, 1988. All of the violations were section 104(a) citations, and the respondent was not previously cited for any training violations. I conclude and find that the respondent has a good compliance record and I have taken this into consideration in assessing the civil penalty for the violation which has been affirmed.

Good Faith Compliance

Mr. Schwartz was immediately removed from the mine and left the property after the citation and order were issued. The inspector terminated the citation after he returned to the mine

and determined that Mr. Schwartz was no longer employed by the respondent. Absent any evidence to the contrary, I conclude and find that the violation was abated in good faith.

Gravity

In view of my "S&S" findings and conclusions, I conclude and find that the failure by the respondent to train Mr. Schwartz before putting him to work underground constituted a serious violation of the cited standard.

Negligence

Inspector Myers based his "high negligence" finding on the fact that Mr. Randy Rothermel had previously served as a training instructor and should have known that as a newly employed miner, Mr. Schwartz could not go underground prior to receiving the training required by the respondent's approved training plan which was in effect at the time of the inspection. The inspector believed that Mr. Rothermel should have attempted to contact MSHA for assistance, or made other arrangements to train Mr. Schwartz prior to the issuance of the citation and order.

Although I am convinced that Mr. Rothermel was aware of the training requirements, it seems obvious to me from the record in this that there is a serious lack of communication between the Rothermel brothers with respect to their own training programs and plans, as well as their respective authority with regard to the operation of the mine. MSHA's supervisory Inspector Updegrave, who was in contact with Richard Rothermel concerning certain proposed revisions to the training plan, confirmed that Randy Rothermel was not a party to those discussions. Randy Rothermel was apparently oblivious to the fact that his brother had deleted his name as the approved training instructor, and had not included his name as one of the mine operators in MSHA's mine identification papers.

Although I find it difficult to believe that Mr. Randy Rothermel was totally oblivious to the fact that the 1985 mine training plan had been revised and replaced by a new plan which was approved in December, 1987, the testimony of Inspector Myers indicating that the new plan was in an envelope in a desk drawer in the mine office, and that it took some time to find it, and Inspector Updegrave's testimony that the MSHA letter informing the respondent of the new plan was addressed to Richard Rothermel, and that Randy Rothermel was not involved in the changes made in the new plan, lends some credence to Randy Rothermel's plea of ignorance of the new plan. However, given the fact that both Rothermel brothers apparently have an ownership interest in the mine and are equally accountable for the violation, I cannot conclude that the respondent may be absolved from any negligence for the violation. Further, upon review of

the 1985 and 1987 training plans in question, I find that the only substantial change is the designation of Richard Rothermel, rather than Randy Rothermel, as the approved and qualified training instructor. Both plans require 40 hours of training for new miners with less than 1 year experience during the previous 3 years, and I conclude and find that the respondent knew, or had reason to know, that Mr. Schwartz had to be completely trained before he was allowed to work underground. I reject Randy Rothermel's belated and self-serving explanation that he was training Mr. Schwartz on the very day that the inspector found him underground. Under the circumstances, I conclude and find that the inspector's "high negligence" finding was not unreasonable, and IT IS AFFIRMED.

Civil Penalty Assessment

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 petitioner's proposed civil penalty assessment of $300 for the violation which has been affirmed is reasonable and appropriate, and IT IS AFFIRMED.

ORDER

The respondent IS ORDERED to pay a civil penalty assessment in the amount of $300 for the violation in question. Payment shall be made to MSHA within thirty (30) days of the date of this decision and order, and upon receipt of payment, this matter is dismissed.

George A. Koutras
George A. Koutras
Administrative Law Judge

Distribution:

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

Mr. Randy Rothermel, R S & W Coal Company, Inc., R.D. #1, Box 36, Klingerstown, PA 17941 (Certified Mail)

/fb

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

MAY 23 1990

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. WEST 88-184-M A.C. No. 05-04311-05501
v.	:	Ross Pit
WALSENBURG SAND & GRAVEL COMPANY, Respondent	:	Docket No. WEST 88-214-M A.C. No. 05-03920-05504
	:	Vezzani Pit

DECISION

Appearances: Margaret A. Miller, Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, For Petitioner;
Ernest U. Sandoval, Esq., Walsenburg, Colorado, For Respondent.

Before: Judge Cetti

These cases are before me upon the petition for civil penalties filed by the Secretary of Labor pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. Section 801 et seq., the "Act," charging Walsenburg Sand & Gravel Company (Walsenburg) with a violation of 13 safety standards found in Title 30 of the Code of Federal Regulations, Part 56, for surface metal and non-metal mines.

Walsenburg filed a timely answer to the Secretary's proposal for penalty. After notice to the parties the matter came on for hearing before me at Pueblo, Colorado. Oral and documentary evidence was introduced, post-hearing briefs filed, and the matter was submitted for decision.

The general issues before me are whether Walsenburg violated the cited regulatory standards, whether or not certain alleged violations were significant and substantial as alleged, and if violations are found, what is the appropriate civil penalty to be assessed in accordance with Section 110(i) of the Act.

Walsenburg, at all relevant times herein, owned or leased and operated three sand and gravel pits in the general vicinity of Walsenburg, Colorado. Two of the pits, the Ross Pit and Vezzani Pit, were inspected by Federal Mine Inspector Lyle K. Marti. The inspector issued two citations for alleged violations of regulatory standards at the Ross Pit and 11 citations for alleged violations of regulatory standards at the Vezzani Pit.

Docket No. WEST 88-214-M

Background Information

Lyle K. Marti, a federal mine inspector, in his inspection of the Vezzani pit, was accompanied by Gary M. Vezzani, Vice-President of Walsenburg. The Vezzani Pit is a small intermittent seasonal operation. Raw material is extracted from the earth and processed. At the pit there is a crusher with screening facilities, a maintenance shop, and a hot plant. The pit is in operation from time to time when the operator has need for the products processed there. On the day of the inspection the plant and crusher were not operating and only one employee was at the site.

As a result of the inspection, Inspector Marti issued 11 citations. Four of the citations involved guards for moving machine parts. Three of the guard-related citations involve alleged violations of 30 C.F.R. § 56.14001 for failure to properly guard exposed moving machine parts which may be contacted by persons and which may cause injury to persons. The other guard-related citation was for the alleged violation of 30 C.F.R. § 56.14006 which requires guards to be securely in place while machinery is being operated. The other seven citations involve alleged violations of electrical equipment standards.

Stipulation

The parties stipulated that each of the 11 citations accurately describes what Inspector Marti observed during his inspection of the Vezzani Pit. (Consequently, I quote from each citation the condition or practice observed by Inspector Marti.)

Citation No. 3065798

This citation alleges a 104(a) S&S violation of 30 C.F.R. § 56.14001. The citation describes the condition observed by Inspector Marti as follows:

> The chain and gear sprocket to the tail pulley on the feeder belt conveyor of the Cedar Rapids Crusher was not guarded against personal contact.

Inspector Marti testified that the chain and gear sprocket could easily be contacted by persons doing cleaning or maintenance work in the area. Such a contact could result in the loss of a finger, an arm, or a hand.

Mr. Marti testifed that he could tell from the shininess of the teeth of the sprocket, which is created by movement of the chain, that the machinery had been operated during the week or two before the inspection. Gary Vezzani would not tell him when the machinery was last operated.

Inspector Marti discussed this violation with Gary Vezzani who told him, "We don't have men in that area when this machinery is in operation."

Citation No. 3065799

This citation alleges a 104(a) S&S violation of 30 C.F.R. § 56.14001. The condition observed by Inspector Marti is stated in the citation as follows:

> The drive shaft and its couplings to the roller drum on the Cedar Rapids Crusher, SN 100861, was not guarded against personal contact that would cause injury to the person.

The cited standard, 30 C.F.R. § 56.14001 provides as follows:

> Gears; sprockets; chains; drive, head, tail, and takeup pulleys; flywheels; couplings; shafts; sawblades; fan inlets; and similar exposed moving machine parts which may be contacted by persons and which may cause injury to persons, shall be guarded.

Inspector Marti stated that the revolving drive shaft had couplers and keyways that could catch your clothing and wrap you into it, or you could fall against it. A person making contact could sustain serious bodily injury.

Inspector Marti testified that the rotating drum had a smoothness which reflected a shine that indicated the crusher had operated within the past 48 hours. In addition, he also noticed that along the wheels, along the rims, and on the frame of the crusher, there was a build-up of some very light material.

Citation No. 3065884

This citation charges a Section 104(a) S&S violation of 30 C.F.R. § 56.14001. The stipulation of the parties established that Inspector Marti observed the following condition during his inspection which he described in the citation as follows:

> The tail pulley on the Plains Radial Stacker Conveyor with equipment # 72-8430 was not guard [sic] to prevent contact that could cause a serious injury to the person.

Inspector Marti testified that there was no guard to prevent a person reaching in between the roller and the self-cleaning tail pulley and making contact with the pinch point. A guard should have extended below the frame and extended forward so an employee could not reach in behind and get caught in the pinch points. If one got caught in the pinch point, it could cause serious bodily harm or death. The height of the top of the belt around the tail pulley is approximately 48 inches above the ground and the bottom of the belt approximately 30 inches above the ground. The sheen on the bars of the tail pulley indicated that it had been operated recently. If it had not been operated recently, it would have had a dull-looking finish rather than a sheen.

Citation No. 3065800

This citation charges a Section 104(a) S&S violation of 30 C.F.R. § 56.14006 as follows:

> The guard for the chain drive and gear sprockets of the tail pulley on the Peerless belt conveyor, SN: 2566 was not kept in place.

30 C.F.R. § 56.14006 provides as follows:

> Except when testing the machinery, guards shall be securely in place while machinery is being operated.

Mr. Marti testified that the guard was not in place. The guard was lying beside the frame of the belt conveyor exposing the idle pulley, drive pulley, and the pulley chain of this conveyor. This machinery was not being tested while the inspector was at the site.

The guard was partially buried by loose material that came off the conveyor indicating to the inspector that the machinery had been operated the previous day. There were no tracks in and around the area showing where anyone had made adjustments or had been testing. There was in fact nothing to test in the area. The inspector would expect an employee to be near or around the sprocket and pulley since the area must be kept "cleaned out" in order for the tail pulley and the belt to operate properly. It is quite common not to shut a plant down just to clean up around the tail pulley. Inspector Marti testified it is also common for maintenance people to go ahead and grease the bearing while the machinery is being operated. This is why all moving machinery parts that a person can contact must be guarded.

Electrical Citations

The seven remaining citations charge violations of a number of regulatory standards involving electrical equipment. The parties stipulated that each of these seven citations accurately describes the condition observed by Inspector Marti during his inspection of the Vezzani Pit.

Citation No. 3065795

This citation alleges a Section 104(a) non-S&S violation of 30 C.F.R. § 56.12005, as follows:

> The electrical power cable (Triangle PWC Inc. #814 Type SO) to the motor on the radial stacker belt conveyor (Plains equipment number 72-8430) was installed across the top of the roadway whereby vehicles running over it could cause possible internal damage to its conductor. The power cable was not bridged nor protected by other means.

The cited safety standard, § 56.12005, provides as follows:

> Mobile equipment shall not run over power conductors, nor shall loads be dragged over power conductors, unless the conductors are properly bridged or protected.

Inspector Marti testified that the power cable was lying across the roadway next to the crusher. The power cable ran from the control panel to the radial stacker. The power cable was not bridged nor protected. This cable was a power conductor with four cables inside of it. Three of the conductors are hot and one is a ground conductor. It was obvious from the mobile equipment tracks he observed that mobile equipment was running over this cable. It appeared to the inspector that the roadway was used every day that the crusher was operating. The power conductor went from the distribution panel over to the radial stacker belt conveyor, a distance of approximately one hundred feet.

Citation No. 3065881

This citation alleges a Section 104(a) S&S violation of 30 C.F.R. § 56.12025 which reads as follows:

> The electric motor, (3-phase, 440 VAC, 7½ HP) mounted on the frame of Pearless belt conveyor SN: 2566, was not frame-grounded with a continuous ground conductor to its source of power.

30 C.F.R. § 56.12025 provides as follows:

> All metal enclosing or encasing electrical circuits shall be grounded or provided with equivalent protection. This requirement does not apply to battery-operated equipment.

Inspector Marti testified that the electrical three-phase motor mounted on the frame of the Peerless belt conveyor was not grounded with a continuous ground conductor to its power source. There was no ground conductor whatsoever attached to the motor. Should a fault occur, the frame of this motor would become energized. If someone came in contact with this equipment, one would receive a shock which could be serious and even fatal. The motor was wired for 440 volts. It was a 7½ HP motor that would take 9.2 to 11 amps at normal operation. The equipment is outdoors so that on some days it would be dry and on some days it would be wet. When the ground is wet or damp you could receive a "higher degree" of shock.

Citation No. 3065882

This citation alleges a Section 104(a) S&S violation of 30 C.F.R. § 56.12030 as follows:

> The power cable (4/8 type SU) male plug on the end next to the Peerless belt conveyor had a bare conductor exposed at the male plug clamp fitting.

The cited safety standard provides as follows:

> When a potentially dangerous condition is found it shall be corrected before equipment or wiring is energized.

Inspector Marti testified that he observed a bare phase conductor on the power cables's male plug on the end next to the Peerless belt conveyor. He stated that this is a potentially dangerous condition since a person coming in contact with the bare conductor could receive a serious shock. Normally, you would not expect to see the conductor at all if it was installed properly. The wiring on the machinery is a three-phase system that involves 440 volts. The length of the bare exposed area was less than a quarter of an inch. (See photo Ex. 13). Inspector Marti said that the violation was visible to anyone working in that area. However, the small length of the bare segment (¼ inch) will be taken into consideration in my evaluation of the gravity of the violation and the penalty to be assessed.

Citation No. 3065883

This citation alleges a Section 104(a) S&S violation of 30 C.F.R. § 56.12008 and reads as follows:

> The power cable leading out the bottom of the 30 amp, 3-phase safety disconnect box mounted on the generator control panel was not provided with a fitting to prevent strain on the conductor termination and the conductor installation from possible [sic] be cut on the metal edge causing an electrical shock hazard.

The cited safety standard, 30 C.F.R. § 56.12008, provides as follows:

> Power wires and cables shall be insulated adequately where they pass into or out of electrical compartments. Cables shall enter metal frames of motors, splice boxes, and electrical compartments only through proper fittings. When insulated wires, other than cables, pass through metal frames, the holes shall be substantially bushed with insulated bushings.

Inspector Marti testified that the citation accurately describes what he observed. A fitting should have been installed in the opening in the center of the box. The purpose of the fitting is to secure and protect the phase conductors from hitting against the metal sides of the opening. The fitting prevents the metal from cutting the insulation and creating an electrical hazard. If the insulation were cut, it would cause a fault creating the hazard of an electrical shock. It would energize not only the box but the entire frame and everything hooked to it.

Citation No. 3065885

This citation alleges a Section 104(a) S&S violation of 30 C.F.R. § 56.12013 and reads as follows:

> The electrical power cable (leading to the electric motor mounted on the frame of Peerless belt conveyor and with SN: 2566) was not spliced properly. It was not made mechanically strong, insulated to that of the original, nor was it provided with damage protection on the outer jacket of the original cable.

The cited safety standard, 30 C.F.R. § 56.12013 provides as follows:

> Permanent splices and repairs made in power cables, including the ground conductor where provided, shall be:
>
> (a) Mechanically strong with electrical conductivity as near as possible to that of the original;
>
> (b) Insulated to a degree at least equal to that of the original, and sealed to exclude moisture; and

(c) Provided with damage protection as near as possible to that of the original, including good bonding to the outer jacket.

Inspector Marti testified that the citation accurately describes the condition he observed. The individual conductor had just one or two wraps of electrical tape over the individual conductors. There were 3-phase conductors and one ground conductor. The splice allowed moisture to seep in and did not provide the same damage protection or mechanical strength as near as possible to that of the original. If someone stepped on the splice, he could receive a serious shock that could be fatal depending on the amount of voltage and the condition of the ground at the time.

Citation No. 3065886

This citation charges a Section 104(a) non-S&S violation of 30 C.F.R. § 56.12028, and reads as follows:

> A record of continuity and resistance of the plant electrical grounding system was not available for review.

The cited safety standard, 30 C.F.R. § 56.12028 provides as follows:

> Continuity and resistance of grounding systems shall be tested immediately after installation, repair, and modification; and annually thereafter. A record of the resistance measured during the most recent tests shall be made available on a request by the Secretary or his duly authorized representative.

Inspector Marti testified that he asked Gary Vezzani, who accompanied him on his inspection, for the record of the resistance measured during the most recent testing of the continuity and resistance of the grounding system. Mr. Vezzani told him a record of the electrical ground check was not available.

Citation No. 3065887

This citation charges Walsenburg with a Section 104(a) non-S&S violation of 30 C.F.R. § 56.12018, and reads as follows:

> The safety fuse disconnect boxes on the generator set control panel board were not labeled to show which unit they control.

The cited safety standard, 30 C.F.R. § 56.12018, provides as follows:

> Principal power switches shall be labeled to show which units they control, unless identification can be made readily by location.

Inspector Marti testified that the labeling on the disconnect power switches to motor control and other crushing facilities were not labeled to show which unit they controlled. Identification could not be made readily by location.

Walsenburg's case

Other than the federal Mine Inspector Lyle K. Marti, the only witness to testify at the hearing was Louis Vezzani, owner and operator of Walsenburg, and the Vezzani Pit. Walsenburg's primary defense to all the violations at the Vezzani Pit was as follows:

1. On the day of inspection the plant was not operating.

2. The plant was last in operation approximately two weeks before Mr. Marti's inspection.

3. Even though the cited equipment may have been hooked up (the generator with its panel box, the Peerless conveyor, and the Plains conveyor), it had never been in operation at the pit.

Mr. Vezzani, when asked who hooked the equipment up from the generator to the motors of the conveyors, responded in the following manner:

> A. I don't have any idea. Probably one of the men. One of the crusher men. I don't know.
>
> I'm not even sure they were hooked up.
>
> Q. Well, Mr. Marti testified that they were hooked up. Do you disagree with that?
>
> A. I can't disagree with that. I don't know that.

Q. So, if they were hooked--wouldn't it make sense that they were hooked up from the generator to the motor because they would want to be used?

A. Yes, if they hooked them up, I'm sure that's the reason for it. They might have just hooked them up to see if the motors would run on them. I don't know. I wasn't there when they did that. If anybody did that.

Q. They have to operate the motors to see if they run, is that correct?

A. Yes. The electric motors, yes.

Mr. Vezzani testified that he closed the Vezzani Pit approximately two weeks before Mr. Marti's inspection. The Secretary points out that 30 C.F.R. § 56.1000 requires an operator to notify MSHA of the commencement of operations as well as temporary or permanent closures. The operator must also indicate whether the operation will be continuous or intermittent. Walsenburg's legal identity report indicated that at the time of the inspection the Vezzani pit was an open mine operated on an intermittent basis. There was no closure on file with MSHA. On the date of inspection the pit was an open mine, subject to inspection. The fact that the machinery at the Vezzani Pit was not actually in operation on the day of inspection is legally irrelevant.

It appears from the record that Mr. Marti is an experienced and well-qualified federal mine inspector. Based upon his observation of the appearance and condition of the machinery and the surrounding area at the time of his inspection, he was of the opinion that the plant had been in operation a short time prior to his inspection, and that while it was in operation it was in the same violative condition that he observed at the time of his inspection and noted in the citations and testimony.

I credit the testimony of Inspector Marti and, on the basis of the stipulation of the parties and testimony of Inspector Marti, I find there was a violation of the regulatory standard specified in each of the citations issued for violation at the Vezzani Pit.

The Ross Pit

The Ross Pit is a sand and gravel pit that was leased by Walsenburg to provide the gravel Walsenburg needed for a highway project. Walsenburg subcontracted with the Southway Construction Company of Alamosa to bring one of its portable crushers to the Ross Pit and crush the aggregate at the pit. On January 26,

1988, Mr. Marti, a federal mine inspector, made an inspection of the Ross Pit. As a result of that inspection he issued two citations to Walsenburg.

Citation No. 3065898

This citation charges Walsenburg with a Section 104(a) non-S&S violation of 30 C.F.R. § 56.1000. The citation reads as follows:

> The Operator (Walsenburg Sand & Gravel) started mining operations at the Ross Pit during the week of Jan. 25, 1988. This mine site is located in Pueblo County, State of Colorado. The operator failed to give notification of commencement of operation to Rocky Mountain District Manager of Mine Safety and Health Administration.

The cited regulatory standard, 30 C.F.R. § 56.1000 provides as follows:

> The owner, operator, or person in charge of any metal and nonmetal mine shall notify the nearest Mine Safety and Health Administration and Metal and Nonmetal Mine Safety and Health Subdistrict Office before starting operations, of the approximate or actual date mine operation will commence. The notification shall include the mine name, location, the company name, mailing address, person in charge, and whether the operations will be continuous or intermittent.
>
> When any mine is closed, the person in charge shall notify the nearest subdistrict office as provided above and indicate whether the closure is temporary or permanent.

Inspector Marti testified that on January 18, 1988, he received notification from Southway Construction Company (Southway) of their intention to move a portable gravel crusher into the Ross Pit and begin crushing operations. Inspector Marti could find no computer listing of the legal identity of the Ross Pit. Consequently, he went to the pit to make an inspection. At the pit he talked to Darrell Yohn, the foreman for Southway, who told him that they had a contract with Walsenburg to crush 130,000 tons of material at the pit. Southway has portable crushers with a portable identification number. Inspector Marti talked to Louis Vezzani, the President of Walsenburg, during his inspection of the Ross Pit and informed him that he was in vio-

lation of 30 C.F.R. § 56.1000 for his failure to fill out a legal identity report and notify the MSHA District management of commencement of operation at the Ross Pit. Mr. Vezzani opened his briefcase and gave the inspector the needed legal identification report and notification. The legal identity report was dated January 23, 1989. Since the report was given to MSHA after operations had begun, there was a violation of 30 C.F.R. § 56.1000. The minimum penalty of $20 was appropriately assessed for this violation.

Mr. Marti testified that during his January 26, 1988, inspection of the Ross Pit, he observed an Allis-Chalmer dozer owned and operated by Walsenburg. He talked to the dozer operator Carl Pfaffenhauser, who informed him that he was employed by Walsenburg and that Mr. Vazzani would soon be arriving at the Ross Pit.

Mr. Darrell Yohn, the foreman for Southway, informed the inspector that Walsenburg had leased the 20 acres that included the Ross Pit. At the time of his inspection, the subcontractor Southway was operating their portable crusher at that pit. There were two other employees there who informed him they were employed by Walsenburg. They were working with the Allis-Chalmer dozer. They were stripping - taking off and pushing aside the overburden material from the material that was to be crushed. Mr. Yohn told Mr. Marti that they started working at the pit during the week of January 18. Mr. Marti testified that the legal identity report which was handed to him by Mr. Louis Vizzani during his January 26, 1988, inspection of the Ross Pit showed that Walsenburg was the operator of the Ross Pit.

Citation No. 3065900

This citation charges Walsenburg with a 104(a) S&S violation of 30 C.F.R. § 56.9022. The citation reads as follows:

> The outer bank of the elevated roadway into the Ross Pit was not provided with a berm or guard. For approximately 175 feet the outer edge of the roadway drop-off 3-18 feet approximately. The hazard is increased by it being only 8-11 feet wide and also the weather condition.

The cited regulatory standard, 30 C.F.R. § 56.9022, provides as follows:

> Berms or guards shall be provided on the outer bank of elevated roadways.

Inspector Marti testified the only access to the pit was a narrow dirt road approximately 180 feet long that leads up to the crusher and the excavation site of the Ross Pit. The road's elevated incline to the top was approximately 150 to 160 feet long. In order to maneuver on this narrow road, the inspector used a four-wheel drive. He talked to Darrell Yohn, foreman for Southway Construction Company, who told him that it was the only available road for employees to get in and out of the work site at the Ross Pit. It was also used as a haul road to bring in water and fuel.

Foreman Yohn told him that under Southway's contract with Walsenburg, it was Walsenburg's responsibility to see that the road was bermed. Mr. Yohn told Inspector Marti him that the day before the inspector arrived at the Ross Pit, Walsenburg almost lost the flatbed and the dozer tractor it was hauling over the edge of the elevated road. Southway had to hook on to the flatbed with their front-end loader to assist in pulling the equipment up the grade. Inspector Marti stated that he examined the area and saw tire tracks in the mud that indicated that the vehicle had gone off the edge of the road. There were no berms or guardrails installed on the road. MSHA normally requires that the berm be placed to the axle-height of the largest vehicle that is being used on the mining property. The natural repose drop-off of the elevated road varied in height up to approximately 18 feet. If a vehicle went off the road it could roll over and drop 18 feet.

Inspector Marti testified that since the roadway was used by Southway as well as Walsenburg he informed foreman Yohn that if the citation were not abated by construction of the berm, the citation would be replaced by an order which would close the road and no one could go in or out of the Ross Pit.

The inspector testified that he served the citation on Mr. Vezzani and explained to him the date by which the violation had to be abated. There was a timely abatement of the violation by Southway.

Mr. Marti testified that the violation was significant and substantial in nature. He explained that the hazard created by lack of a berm on the road is that it would allow a vehicle that got too close to the edge, to go over. He stated that if a vehicle dropped off the elevated portion of the road "there was a high degree of bodily injury all the way from a permanent injury to a fatality." In the inspector's opinion there was a reasonable likelihood of an accident.

The inspector testified that this was the only road used during the two days he was at the Ross Pit making the inspection. He observed one of Walsenburg's maintenance vehicles come to the pit when they had a problem with the dozer.

Louis Vezzani, President of Walsenburg, testified that in October 1987 he entered into a contract with the State Highway Department for a highway job near Pueblo. In order to do the job Walsenburg needed a rock pit that could supply the needed gravel. Walsenburg subleased the Ross Pit in October 1987 and proceeded to apply to the Mine Land Reclamation Board for a permit to mine gravel at the Ross Pit. Mr. Vezzani testified that the permit was issued to him on January 25, 1988.

Walsenburg subcontracted the crushing of the gravel at the Ross Pit to Southway Construction Company of Alamosa.

Mr. Vezzani testified that he does not know when Southway moved its equipment into the Ross Pit. He did not know whether Southway built any roads at the Ross Pit.

Mr. Vezzani testified that he had nothing to do with the elevated road that was cited. At the time of the inspection they already had a 36-foot wide road at the west end of the pit that they were going to use to haul gravel out. He admitted that some of the employees on his crew may have driven up the cited road. He himself drove up the elevated road several times in Walsenburg's company pickup and looked at the pit. He had no employees working at the Ross Pit at the time of the inspection. He owned several Allis-Chalmers dozers but did not have a dozer at the pit. When Mr. Vezzani was asked if the person on the grader at the Ross Pit was telling Inspector Marti the truth when he said he worked for Walsenburg, Mr. Vezzani replied, "I don't have any way of knowing that. I don't know." Asked if Foreman Yohn was being honest when he told the inspector that Southway was not responsible for the overburden or the dozer, Mr. Vezzani replied, "I can't answer it. Mr. Yohn will have to answer that. I'm sorry."

Mr. Vezzani testified that he always drove to the Ross Pit in his company pickup. He drove there at least once every day, sometimes using the cited elevated road. However, Walsenburg did not haul any material out of the pit until three months after the inspection. Walsenburg's answer, filed October 27, 1988, states, "Our haul road is 30 feet wide on the west end of the pit <u>built in time for haulage purposes</u>." (Emphasis supplied).

Mr. Vezzani testified that when Walsenburg got its permit from the Mine Land Reclamation to start operations at the Ross Pit on January 25, 1988, Southway had already moved in with its mobile crusher and had been crushing for several days.

On cross-examination, Mr. Vezzani testified that he had an employee by the name of Carl Pfaffenhauser. He was Vezzani's blade operator on the highway project, which commenced in October of 1987. Asked if he had loaned any of his employees to Southway to work at the Ross Pit, Mr. Vezzani replied, "To my knowledge, no." Mr. Vezzani went on to explain that some time in late February or early March of 1988, he "laid some of his employees off for a three-week period and they could have worked for Southway during that time."

Inspector Marti was recalled and testified that at the time of his inspection the cited elevated roadway was the only road into the Ross Pit. However, when he returned to terminate the citation a month later, he observed that after the inspection another road had been constructed along the west side of the pit.

Discussion

Inspector Marti is an experienced, well-qualified inspector. I credit his testimony. Some of the evidence he presented was hearsay, but it was, in my opinion, reliable hearsay. Based upon the testimony of Inspector Marti, I find that Walsenburg violated the provisions of 30 C.F.R. § 56.9022 as alleged in the citation issued.

Even assuming arguendo, that Walsenburg made very little use of the cited elevated roadway, the citation was properly issued to Walsenburg. The language employed by Congress in drafting the Mine Act, the legislative history of the Act, and several court of appeals decisions show that the Secretary can cite the operator, the independent contractor, or both, for violations committed by the independent contractor. Mine operators are "absolutely liable for violations by independent contractors." Harman Mining Co. v. FMSHA, 671 F.2d 794 (4th Cir. 1981).

The prime question for consideration in determining a violation of the Mine Act is whether the alleged condition existed at the mine. The Fifth Circuit has held that "if the Act or its regulations are violated, it is irrelevant whose act precipitated the violation or whether or not the violation was found to affect safety; the operator is liable," Allied Products Co. v. FMSHRC, 666 F.2d 890,894 (5th Cir. 1982).

The legislative history of the Mine Act confirms that Congress clearly intended the Secretary to have broad discretion to cite either owners or independent contractors or both for violations involving independent contractors. In the Senate report on the bill that ultimately became the Mine Act, the Committee on Human Resources stated the following:

> In enforcing this Act, the Secretary should be able to issue citations, notices, and orders, and the Commission should be able to assess civil penalties against such independent contractors as well as against the owner, operator, or lessee of the mine. The Committee notes that this concept has been approved by the federal circuit court in Bituminous Coal Operators' Ass'n. v. Secretary of the Interior, 547 F.2d 240 (C.A. 4, 1987).

(S. Rep. No. 95-181, 95th Cong., 1st Sess. 14 (1977).) Thus, Congress intended to enable, but not to require, enforcement against independent contractors. Further, this language makes clear that the Secretary is authorized to cite owner-operators for their independent contractors' violations. The passage also expressly endorses Bituminous Coal Operators' Ass'n (BCOA) v. Secretary of Interior, 547 F.2d 240 (4th Cir. 1977), holding that under the Coal Act, the Mine Act's predecessor statute, the Secretary could cite owners, contractors, or both for the contractors' violation.

The second significant passage from the legislative history appears in the Conference Committee Report on the Mine Act.

That report contains the following explanation:

> The Senate bill modified the definition of "operator" to include independent contractors performing services or construction at a mine. This was intended to permit enforcement of the Act against such independent contractors and to permit the assessment of penalties, the issuance of withdrawal orders, and the imposition of civil and criminal sanctions against such contractors who may have a continuing presence at the mine. [Emphasis added.]

(S. Conf. Rep. No. 95-461, 95th Cong., 1st Sess. 37 (1977).) Again this language shows a congressional intention only to permit enforcement against independent contractors not require it.

A number of court of appeals decisions have uniformly construed the Mine Act as granting the Secretary broad discretionary authority. The Third Circuit considered the Mine Act's legislative history, as well as the BCOA decision, in determining whether under the Mine Act the Secretary has discretion to hold owners responsible for certain independent contractors' activities. In National Industrial Sand Ass'n. v. Marshall, 601 F.2d 689 (1979), a group of operators challenged a regulation requiring them to provide training in mine safety and health to the employees of some of their independent contractors. The owner-operators argued that, because the Mine Act's definition of "operator" includes independent contractors, the Secretary must enforce the regulation against independent contractors, rather than owners, where the contractors control the job being performed. The court held that the inclusion of both owners and independent contractors in the definition endowed the Secretary with discretion to assign responsibility to either. 601 F.2d at 703. In reaching this conclusion, the court referred with approval to the reasoning of the BCOA decision that the Coal Act's definition of operator gave the Secretary discretion to enforce the Act against owners or contractors for the contractors' violations. 601 F.2d at 702. The court also examined the legislative history accompanying the Mine Act and concluded that, when Congress amended the definition of "operator" to include independent contractors, "Congress was clearly concerned with the permissive scope of the Secretary's authority, not with the mandatory imposition of statutory duties on independent contractors." 601 F.2d at 703.

In Harman Mining Co. v. FMSHRC, supra, Harman, an owner-operator, challenged a withdrawal order issued to it for an incident involving Norfolk and Western Railroad, its independent contractor. The Fourth Circuit rejected Harman's argument that the Secretary should have cited the independent contractor, reasoning: "Even assuming, however, that Norfolk and Western had some degree of culpability, the Secretary had discretionary authority to cite Harman for the violation." 671 F.2d at 797. The court ruled that under both the Coal Act and the Mine Act "mine owners are absolutely liable for the violations by independent contractors," and cited with approval the reasoning of BCOA on joint and several liability. In addition, the court decided that the Secretary had exercised his discretionary authority in an "appropriate manner" in issuing the citation against Harman.

Similarly, in Cyprus Industrial Minerals Co. v. FMSHRC, 664 F.2d 1116 (9th Cir. 1981), the Ninth Circuit rejected an

operator's claim that the employment of an independent contractor removed the operator from liability under the Mine Act. The court noted that the addition of the term "independent contractors" to section 3(d) of the Mine Act did not require the Secretary to cite only the independent contractor; rather, the addition permitted the Secretary to cite the independent contractor, the operator, or both. 664 F.2d at 1119. The court concluded that the Secretary "did not abuse his discretion" by citing the owner-operator. 664 F.2d at 1120.

Thus, the language employed by Congress in drafting the Mine Act, the legislative history of the Act, and several court of appeals decisions show that the Secretary can cite the owner-operator, the independent contractor, or both, for violations committed by the independent contractor. The decision as to whom to cite is of a discretionary nature. In this case the Secretary exercised her discretion and acted within the scope of that discretion by citing the Walsenburg, even if we assume arguendo that the cited elevated road at the Ross Pit was used primarily by Southway and very little by Walsenburg.

Significant and Substantial

A violation is properly designated "significant and substantial" if, based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to by the violation will result in an injury or illness of a reasonably serious nature. Cement Division, National Gypsum Co., 3 FMSHRC 822, 815 (April 1981). In Mathis Coal Co., 6 FMSHRC 1, 3-4 (January 1984), the Commission explained:

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

Accord, Austin Power v. Secretary of Labor, 861 F.2d 99, 103 (5th Cir. 1988).

The third element of the Mathies formula requires "that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury," and that the likelihood of injury must be evaluated in terms

of continued normal mining operations. U.S. Steel Mining Co., 6 FMSHRC 1573, 1574 (July 1984). See also Monterey Coal Co., 7 FMSHRC 996, 1001-02 (July 1985). The operative time frame for determining if a reasonable likelihood of injury exists includes both the time that a violative conditon existed prior to the citation and the time that it would have existed if normal mining operations had continued. Halfway, Inc., 8 FMSHRC 8, 12 (January 1986); U.S. Steel Mining Co., 7 FMSHRC 1125, 1130 (August 1985). The question of whether any particular violation is significant and substantial must be based on the particular facts surrounding the violation, including the nature of the mine involved. Texasgulf, Inc., 10 FMSHRC 498, 500-01 (April 1988); Youghiogheny & Ohio Coal Company, 9 FMSHRC 1007, 2011-12 (December 1987). Finally, the Commission has emphasized that it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. U.S. Steel Mining Co., 6 FMSHRC 1834, 1836 (August 1984).

Under this precedent and based upon my independent review and evaluation of all the evidence, including the photographs that are in evidence and the physical location of each hazard, I find the evidence presented is insufficient to establish that any of Walsenburg's violations were significant and substantial in nature. In particular, with regard to the third element of the Mathies test, I find the evidence presented is insufficient for me to conclude that a reasonable likelihood existed that the hazard contributed to by any one of the violations will result in a serious injury. In support of this finding it should be noted that the undisputed evidence in this case establishes that this pit operated intermittently and that when it was in operation, only two or three employees operated the facility. Exposure to the hazardous violative condition was not high. Louis Vezzani testified that during the 25 years the Vezzani plant was in operation, they never had a lost-time injury. His testimony was undisputed. Upon evaluation of the evidence I find that, while the violations were serious, there is insufficient evidence to conclude that there was a reasonable likelihood that the hazard contributed to by the violation would result in a serious injury.

Motion of Both Parties Denied

The Secretary made a motion for default judgment because Respondent failed to serve her with a copy of respondent's answer. The answer was filed by the operator, Louis Vezzani, not by his counsel. The Secretary's counsel did not know Respondent

was represented by counsel until she received Respondent's reply to my prehearing order. The Secretary was provided with a copy of the answer and the Secretary's motion for default was denied. Respondent moved for sanctions and for dismissal of all citations on grounds that the Secretary did not serve him with a copy of her reply to the prehearing order and again because she filed her post-hearing brief a few days late. I have considered the matter and I deny all motions. There is no meritorious reason why these cases should not be decided on the merits.

Civil Penalty Assessment

Section 110(i) of the Act mandates consideration of six criteria in assessing a civil penalty. In compliance with the mandate, I have considered the following:

The operator's sand and gravel business was of small size. Both the Ross Pit and the Vezzani Pit were small intermittent operations.

In the absence of any evidence to the contrary, I find that proposed penalties would not adversely affect Walsenburg's ability to continue in business.

Exhibit P-7, a computer printout, indicated that, within the two years prior to the inspection of both the Ross and Vezzani pits, Walsenburg was assessed no violations. This is a good history.

I find the operator's negligence to be moderate. The gravity was high. The guard-related violations, the electricity-related violations, and the elevated roadway violation were serious and could have resulted in serious bodily harm or death, even though the evidence is insufficient to conclude that there was a reasonable likelihood that the hazard they contributed to would result in an injury.

The company demonstrated good faith in its abatement of the violations.

Everything considered, I assess civil penalties which I find appropriate for each violation as follows:

Citation No.	30 C.F.R. No.	Penalty Assessed
3065795	56.12005	$20.00
3065798	56.14001	40.00
3065799	56.14001	40.00
3065800	56.14006	40.00
3065881	56.12025	40.00
3065882	56.12030	25.00
3065883	56.12008	30.00
3065884	56.14001	40.00
3065885	56.12013	50.00
3065886	56.12028	20.00
3065887	56.12018	20.00
3065898	56.1000	20.00
3065900	56.9022	50.00
	Total	$435.00

ORDER

1. Citation Nos. 3065798, 3065799, 30657800, 3065881, 3065882, 3065883, 3065884, 3065885, and 3065900 are modified to delete the characterization "significant and substantial" and, as modified, the citations are affirmed.

2. Citation Nos. 3065795, 3065886, 3065887, and 3065898 are affirmed.

Walsenburg Sand & Gravel Company is ordered to pay the sum of $435 within 30 days of the date of this decision as a civil penalty for the violations found herein.

August F. Cetti
Administrative Law Judge

Distibution:

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

Ernest U. Sandoval, Esq., P.O. Box 541, Walsenburg, CO 81089 (Certified Mail)

ek/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 24 1990

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. SE 89-103-M
Petitioner	:	A.C. No. 54-00298-05504
v.	:	
	:	Cantera Hipodromo Mine
CANTERA HIPODROMO, INCORPORATED,	:	
Respondent	:	

DECISION

Appearances: William G. Staton, Esq., Office of the Solicitor, U.S. Department of Labor, New York, New York, for the Petitioner;
Antonio Ortiz Brunet, President, Cantera Hipodromo, Canovanas, Puerto Rico, Pro se, for the Respondent.

Before: Judge Koutras

Statement of the Case

This is a civil penalty proceeding filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a), seeking a civil penalty assessment in the amount of $178, for an alleged violation of mandatory safety standard 30 C.F.R. § 56.11001. The respondent filed an answer denying the violation, and a hearing was held in San Juan, Puerto Rico. The parties did not file posthearing briefs, but I have considered their oral arguments made in the course of the hearing in this matter.

Issues

The issues presented in this proceeding are (1) whether the respondent has violated the standard as alleged in the proposal for assessment of civil penalty, (2) whether the alleged violation was "significant and substantial" (S&S), and (3) the appropriate civil penalty to be assessed against the respondent for

the violation based upon the civil penalty assessment criteria found in section 110(i) of the Act.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, 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, 20 C.F.R. § 2700.1 et seq.

Discussion

The contested section 104(a) "S&S" Citation No. 3049732, was issued on October 19, 1988, and it cites an alleged violation of mandatory safety standard 30 C.F.R. § 56.11001. The cited condition or practice states as follows:

> No safe means of access was provided to the drive belt of vibrator #2. This area is visited for maintenance, the height from the ground is about 9 feet.

Petitioner's Testimony and Evidence

MSHA Supervisory Mine Inspector Juan Perez testified as to his experience, and he confirmed that he has served as an inspector for 15 years. He stated that he made a courtesy visit to the respondent's stone processing plant on August 27, 1987, when it was initially constructed, and that he did so at the request of the respondent. He confirmed that the plant was not producing during his visit and that he inspected the equipment and informed the respondent that a platform was required around the perimeter of the No. 2 vibrator in order to provide a safe means of access for personnel who would be performing periodic greasing and maintenance for the unit.

Mr. Perez explained the operation of the rock crushing and sizing plant, and produced a sketch of the No. 2 vibrator, which reflects how it appeared during his courtesy visit without the platform, and how it appeared during his compliance inspection on October 19, 1988, with a platform on one side of the No. 2 vibrator (exhibit P-1).

Mr. Perez stated that the No. 2 vibrator was approximately 9 feet high from ground level to the platform area, and that the unit itself was approximately 3 feet high. The distance from the top of the unit to the ground below was 12 feet. Mr. Perez confirmed that while MSHA usually recommends that a work platform be completely installed around all sides of a vibrator unit at other similar plants, he accepted the respondent's installation of a work platform, with guard rails, around two sides and rear

of the unit, and that this provided a safe means of access to the unit when maintenance is being performed (photographic exhibits R-5 and R-6).

Mr. Perez confirmed that when he inspected the plant on October 19, 1988, respondent's plant supervisor Ramon Rondon was with him. Mr. Perez stated that he observed that one platform with a handrail was installed along the left side of the unit, and that the platform with handrails which should have been installed on the right side of the unit was lying on the ground away from the unit in an area where the grass had grown around it, and it appeared to be in a rusty condition (photographic exhibit R-1).

Mr. Perez stated that Mr. Rondon informed him that he was having problems with the No. 2 vibrator screens which were located inside the unit, but that the unit was required to process and size some of the stone which was dumped into it by means of a conveyor belt. Mr. Rondon further informed him that he intended to continue using the unit even though he was experiencing some mechanical problems with the screen devices. Mr. Perez stated that he observed some stockpiled stone materials on the ground, and he assumed that the materials had been recently processed through the No. 2 vibrator.

Mr. Perez stated that maintenance work and greasing had to be performed on the vibrator on a daily basis, or at least two times a week, and that the lack of a work platform on both sides of the unit did not provide a safe means of access for at least one of the maintenance personnel who performed this work. Mr. Perez believed that the lack of a platform exposed the maintenance man to a danger of falling 9 feet to the ground if he were on a ladder performing work on the side of the unit without the platform, and at least 12 feet to the ground if he were on top of the unit attempting to perform some work on the unit. Mr. Perez further believed that it was reasonably likely that a fall would occur, and that if it did, the individual would likely suffer lost work day injuries of a reasonably serious nature. Under all of these circumstances, Mr. Perez concluded that the violation was significant and substantial.

Mr. Perez confirmed that he based his moderate negligence finding on the fact that the respondent intended to install the required platform and had installed a platform with handrails along one side of the vibrator unit (Tr. 14-42).

On cross-examination, Mr. Perez confirmed that although his experience does not include maintenance work on vibrators, he has observed the greasing and maintenance work performed from platforms on similar units. Mr. Perez further confirmed that while he did not know how long the vibrator screen was not in an operational condition, he believed that the problems experienced by

Mr. Rondon with the screening devices occurred on the day of his inspection.

Mr. Perez stated that he spoke to Mr. Ortiz during the afternoon of his inspection, and he confirmed that Mr. Ortiz informed him that the new No. 2 vibrator unit had arrived at the dock and would be brought to the site and installed by the end of the week.

Mr. Perez stated that during his inspection on October 19, 1988, he observed a wooden ladder at the plant and that Mr. Rondon informed him that the ladder was sometimes used to grease and service the No. 2 vibrator unit. Since the ladder reached only to the middle of the unit, Mr. Rondon further informed him that someone would climb to the top of the unit from the platform which was on one side of the unit in order to grease or service it. Under these circumstances, Mr. Perez believed that the use of a ladder, and climbing to the top of the unit, presented a falling hazard to the individual using these means of access to reach and service the No. 2 vibrator and screens.

Mr. Perez stated that he observed no one performing any greasing or maintenance work on the vibrator on the day of his inspection, and he observed no grease fittings from the unit to the ground. He also confirmed that the vibrator gears were intact on the machine and he did not observe any of the machine parts shown in photographic exhibits R-2, R-3, and R-4, on the ground.

Mr. Perez confirmed that the same No. 2 vibrator unit was cited by MSHA Inspector Roberto Torres Aponte during a previous inspection on March 30, 1988, and that the citation was issued pursuant to section 56.11001, because a platform was not installed around the unit to provide a safe means of access for maintenance work on the unit (Tr. 53-63).

MSHA Inspector Alexandro Baptista confirmed that he terminated the October 19, 1988, citation issued by Inspector Perez, and that he did so after finding that platforms with guard rails had been installed around three sides of the No. 2 vibrator. Mr. Baptista also confirmed that the No. 1 vibrator unit was also equipped with a platform and guard rails (Tr. 75-77).

Antonio Ortiz Brunet, respondent's president, stated that he operates three plants, and he described them as a sand plant, a stone quarry plant, and the portable stone crushing, sizing, and processing plant which was inspected by Inspector Perez on October 19, 1988. Mr. Ortiz confirmed that he requested Mr. Perez to visit the plant when it was being constructed, and he did not dispute the need for work platforms to provide a safe means of access for the No. 2 vibrator unit. Mr. Ortiz stated that he has always done what was required of him to comply with

the law and MSHA's requirements, and to insure the safe operation of his plant.

Mr. Ortiz stated that he contested the citation because he was not happy with the action taken by Inspector Perez. He explained that he informed Mr. Perez that the plant was not in operation because the No. 2 vibrator was inoperative and that a new vibrator, which was at the dock, would be installed within a few days and that the platforms would also be installed at the same time. After the vibrator and platforms were installed, Mr. Ortiz stated that he called Mr. Perez and invited him to the plant to verify the installation, but that Mr. Perez declined to come to the plant and informed him that he did not have the time.

Mr. Ortiz confirmed that the top of the vibrator was 12 feet above ground level, and that the vibrator was approximately 4 feet high. He conceded that only one platform was installed along one side of the vibrator on October 19, 1988, and that the other platform had been removed and was on the ground. Mr. Ortiz stated that the vibrator was being dismantled in anticipation of the installation of the new one which he had purchased. He stated that the vibrator was not in operation on the day of the inspection because of the inoperative screens and that it had not been in operation for approximately 4 weeks prior to the inspection. He stated further that the vibrator gears had been removed from the unit prior to the inspection, and he produced three photographs of the old parts which he said were on the ground (exhibits R-2, R-3, and R-4). He indicated that the gears were removed while both platforms were in place, and that the platform which was not in place and on the ground when Inspector Perez observed it had been taken down while the vibrator unit was being dismantled. He confirmed that he was not at the plant everyday, but tries to visit it once a week.

Mr. Ortiz stated that during the time the vibrator was inoperative, he sold the materials which had been previously processed and stockpiled through the plant. He agreed that if the plant were in operation the citation would be justified. However, since the plant was down and could not operate with the broken vibrator, he did not believe that the citation issued by Mr. Perez was justified, and he considered the inspector's action as unfair (Tr. 78-99).

Inspector Perez was recalled, and he confirmed that when he observed the No. 2 vibrator on October 19, 1988, it was intact and no gears or other parts were removed, and he observed no evidence of any repair work. He further confirmed that he spoke with plant superintendent Rondon who informed him that there had been a problem with the vibrator that morning and that only half of the plant was operating. The superintendent in no way indicated that the plant had been down for 4 weeks (Tr. 101-102). Mr. Perez believed that the plant was in operation the previous

weeks because of the coloring of the stockpiled crushed rock. He stated that after he had finished his inspection, and while discussing the results with Mr. Rondon, Mr. Ortiz informed him about the vibrator problem (Tr. 103).

Plant Superintendent Ramon Rondon testified that on the day of the inspection work was being performed on the ball bearings and pulleys of the screening machine. He explained that crushing could not be done because the vibrating screen was stuck (Tr. 109-111). Mr. Rondon confirmed that the vibrator was shutdown on the day of the inspection. He explained that the vibrator and screen were working on the morning of the inspection, but that when they became stuck that same morning, the vibrator was shutdown. He also indicated that the vibrator was operational 11-days prior to the inspection (Tr. 112-113). The vibrator was working the day of the inspection, but when some of the parts broke, the plant was shutdown (Tr. 116).

Findings and Conclusions

Fact of Violation

The respondent is charged with a violation of mandatory safety standard 30 C.F.R. § 56.11001, for failure to provide a safe means of access for the No. 2 vibrator at its crushed stone screening and processing plant. Section 56.11001, provides as follows: "Safe means of access shall be provided and maintained to all working places."

The evidence in this case establishes that Inspector Perez had previously made a "compliance assistance" visit to the plant in August 1987, during which time he advised the respondent of the need for a platform to provide access to all sides of the vibrator where maintenance work was required to be done on the equipment. Upon his return to the plant site on October 19, 1988, to perform a regular plant inspection, Inspector Perez found that a platform had been installed around one side of the vibrator but not on the other side where greasing and other maintenance work was required to be performed. Mr. Perez found the platform, with guard rails attached, which should have been installed around the rest of the vibrator, lying on the ground, and it appeared to have been there for some time. Under these circumstances, and since one side of the vibrator lacked a platform which would provide a safe means of access for maintenance personnel, Mr. Perez issued the citation.

The respondent's president, Antonio Ortiz Brunet, did not dispute the need for work platforms on both sides of the No. 2 vibrator to provide a safe means of access for maintenance personnel, nor did he dispute the fact that only one platform had been installed on one side of the vibrator on the day of the

inspection, and that the other platform had been removed and was lying on the ground.

In his defense, Mr. Ortiz maintained that at the time of the inspection, the cited vibrator was not in operation because of some inoperative screens, and that it had not been in operation for approximately 4-weeks prior to the inspection. He also maintained that the vibrator gears had been removed, and that the vibrator was being dismantled in anticipation of replacement by a new one which had arrived on the island and was awaiting delivery from the dock to the plant. Since the plant was down and could not operate with a broken vibrator, Mr. Ortiz believed that the citation was not justified, particularly when he informed the inspector that the vibrator was being replaced by a new one.

The question of whether or not the vibrator was in operation at the time of the inspection is relevant to the question of whether or not the situs of the violation was a "working place" covered by section 56.11001, and it is also relevant to the gravity or seriousness of the violative condition. The fact that the respondent purchased a new replacement vibrator prior to the inspection, and that it intended to install it, may not serve as a defense to the violation, but it may be considered as evidence of the respondent's good faith compliance.

Mr. Ortiz' testimony that the vibrator was inoperative on the day of the inspection, and that the plant was down, and had not operated for 4 weeks, is in direct conflict with the testimony of Inspector Perez, and the respondent's own witness, plant superintendent Ramon Rondon. Mr. Perez testified that he personally observed the cited vibrator on the day of his inspection and that it was intact and the gears had not been removed. Mr. Perez saw no evidence of any repair work taking place, and he testified that Mr. Rondon informed him on the day of the inspection that the vibrator may have experienced some problem earlier in the week, and that it did develop a problem on the morning of the inspection, but at least half of the plant was still in operation at that time. Mr. Rondon testified that although some maintenance work was being performed on the screening machine on the morning of the inspection, the vibrator in question had been in operation that morning, but it subsequently developed a problem and the plant had to be shutdown. Mr. Rondon also testified that the vibrator had been operational at least 11-days prior to the inspection.

Mr. Ortiz argued that a photograph of the vibrator gear, which also shows the date of the newspaper depicted in the photograph, establishes that the vibrator was not installed, and that the plant was down on the day before the inspection (Tr. 105). Although the inspector indicated that Mr. Ortiz was not with him when he visited the plant during his inspection, Mr. Ortiz stated

that he was there in the afternoon (Tr. 105). He also stated that he tried to visit the plant at least once a week.

I have examined the photographs of the vibrator gears which Mr. Ortiz claims had been removed prior to the day of the inspection (Exhibits R-2, R-3, and R-4). Apart from the photographs, Mr. Ortiz produced no documentation or maintenance records to establish when the vibrator gears were removed and sent to the shop for maintenance. Photographic exhibit R-3, is dated in ink on the reverse side, and the dates "7-22-1988" and "7-19-1988" appear. No further explanation was forthcoming from Mr. Ortiz with respect to these dates. Assuming the photographs were taken in July, 1988, this would have been some 3-months prior to the issuance of the citation on October 19, 1988, and any suggestion that the gears had been removed and the plant was down as early as July, 1988, would be contrary to the testimony by Mr. Ortiz that the plant was down for 4-weeks prior to the inspection. It would also be contrary to the testimony of Mr. Rondon that the vibrator and plant were in operation as early as 11-days prior to the inspection, and indeed, on the morning of the inspection. It is impossible to decipher the date of the newspaper shown in photographic exhibit R-2, even with a hand-held magnifying glass. Under the circumstances, I have given little evidentiary weight to the photographs in question.

After careful consideration of all of the evidence and testimony in this case, I find the testimony of Inspector Perez and Mr. Rondon to be more credible than that of Mr. Ortiz. Based on the testimony of Mr. Perez and Mr. Rondon, I conclude and find that the vibrator and plant were in operation on the morning of October 19, 1988, when the inspection was conducted by Mr. Perez, and Mr. Ortiz' assertion to the contrary is rejected. I further conclude and find that the cited vibrator location which lacked a platform to provide a safe means of access for maintenance and service personnel was a "working place" within the meaning of the cited standard, and that the petitioner has established a violation by a preponderance of the evidence. Accordingly, the citation IS AFFIRMED.

Significant and Substantial Violation

A "significant and substantial" violation is described in section 104(d)(1) of the Mine Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 C.F.R. § 814(d)(1). A violation is properly designated significant and substantial "if, based upon the particular facts surrounding the violation there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (April 1981).

In Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984), the Commission explained its interpretation of the term "significant and substantial" as follows:

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

In United States Steel Mining Company, Inc., 7 FMSHRC 1125, 1129, the Commission stated further as follows:

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

The question of whether any particular violation is significant and substantial must be based on the particular facts surrounding the violation, including the nature of the mine involved, Secretary of Labor v. Texasgulf, Inc., 10 FMSHRC 498 (April 1988); Youghiogheny & Ohio Coal Company, 9 FMSHRC 2007 (December 1987).

Based on the evidence and the credible testimony of Inspector Perez, I conclude and find that the violation posed a discrete falling hazard and constituted a significant and substantial violation. The intent of the cited standard section 56.11001, is to provide a safe means of access for mine personnel who are required to service equipment or to routinely check it during its operation. In this case, the lack of a platform deprived mine personnel of a safe mans of access to the equipment. Inspector Perez determined that the vibrator required either daily or weekly maintenance, and that maintenance personnel who were required to service the equipment would reasonably likely be exposed to a hazard of falling approximately 9 feet to the ground below. If this occurred, it would be reasonably likely that a person would suffer more than just "first aid" type

of injuries (Tr. 33-34). He explained that without the platform as a safe means of access to the vibrator, anyone servicing the equipment would have to climb on top of it to service it or perform maintenance work, and that usually one person performs this task (Tr. 35). Mr. Perez confirmed that plant superintendent Rondon informed him that an employee was required to service the vibrator, and that without the platform, the person doing the work accessed the equipment by climbing on top of it from a nearby walkway (Tr. 43, 49-51).

In view of the foregoing, I conclude and find that the petitioner has established by a preponderance of the evidence that the violation was significant and substantial. Accordingly, the inspector's finding in this regard IS AFFIRMED.

Size of Business and Effect of Civil Penalty on the Respondent's Ability to Continue in Business

The evidence reflects that the respondent operates a sand plant, a stone quarry plant, and a portable rock processing plant where the violation in question took place. The respondent's total annual production was approximately 51,071 man-hours, and the facility where the citation was issued worked 17,440 man-hours annually. The respondent employs a total of 11 employees (Tr. 13).

The respondent's President, Antonio Ortiz Brunet described the facility in question as a stone crushing and sizing plant producing and processing stone which was sold and used to make asphalt, concrete, and cement blocks.

I conclude and find that the respondent is a small crushed stone mine operator, and absent any evidence to the contrary, I further conclude and find that the civil penalty assessment for the violation in question will not adversely affect the respondent's ability to continue in business.

Good Faith Compliance

Inspector Perez fixed the abatement time as October 23, 1988, and Mr. Ortiz confirmed that the new No. 2 vibrator unit was installed within 3 or 4 days after the citation was issued. Inspector Perez confirmed that Mr. Ortiz telephoned him later in the week after the citation was issued and informed him that the new vibrator had been brought to the facility and installed with the platform around three sides.

Although the record reflects that the citation was terminated on December 27, 1988, Inspector Perez agreed that the respondent exercised good faith compliance in timely abating the condition and providing a safe means of access to the No. 2 vibrator. I conclude and find that the respondent timely

corrected the cited condition in good faith within the time fixed by Inspector Perez, and I have taken this into consideration in assessing the civil penalty for the violation in question.

History of Prior Violations

The petitioner did not submit any information with respect to the respondent's compliance record or prior history of violations. However, MSHA's proposed civil penalty assessment includes an MSHA Form 1000-179, which reflects that the respondent had eight assessed violations for the 24-month period prior to the issuance of the contested citation on October 19, 1988. One of those prior violations is a section 104(a) "S&S" Citation No. 3050735, issued on March 30, 1988, citing a violation of 30 C.F.R. § 56.11001, for the failure of the respondent to provide a safe means of access for the same No. 2 vibrator screen unit which is the subject of the contested citation in this case. Under the circumstances, although I cannot conclude that the respondent has a particularly poor compliance record, I have considered the fact that the respondent was cited a second time for the identical condition 7 months after the first violation which was issued on March 30, 1988.

Negligence

Inspector Perez confirmed that he based his moderate negligence finding on the fact that the respondent intended to comply with section 56.11001, and had installed one of the platforms which provided some access to at least one side of the No. 2 vibrator at the time of his compliance inspection of October 19, 1988.

Mr. Ortiz testified that at the time the citation was issued the new No. 2 vibrator which he had purchased at a cost of $38,000, exclusive of spare parts, which cost an additional $10,000, was at the receiving dock and had not as yet been delivered to the site for installation. Mr. Ortiz testified further that the old vibrator was causing problems and the new one had been ordered as a total replacement. Under the circumstances, I agree with the inspector's moderate negligence finding, and I conclude and find that the violation resulted from the respondent's failure to exercise reasonable care by removing part of the platform and leaving it off of the No. 2 vibrator unit until the new one was taken to the plant site and installed.

Gravity

In view of my significant and substantial (S&S) findings, I conclude and find that the violation was serious.

Civil Penalty Assessment

On the basis of the foregoing findings and conclusions, and taking into account the civil penalty assessment criteria found in section 110(i) of the Act, I conclude and find that the petitioner's proposed civil penalty assessment in the amount of $178, for the violation in question, is reasonable and appropriate, and IT IS AFFIRMED.

ORDER

The respondent IS ORDERED to pay a civil penalty assessment in the amount of $178 for the violation which has been affirmed in this case. Payment is to be made to the petitioner within thirty (30) days of the date of this decision and order, and upon receipt of payment, this matter is dismissed.

George A. Koutras
Administrative Law Judge

Distribution:

William G. Staton, Esq., Office of the Solicitor, U.S. Department of Labor, 201 Varick Street, Room 707, New York, NY 10014 (Certified Mail)

Mr. Antonio Ortiz Brunet, President, Empresas Ortiz Brunet, Inc., Box 1839, Guaynabo, PR 00657-1839 (Certified Mail)

/fb

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

MAY 24 1990

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), ON BEHALF OF ALONZO WALKER, Complainant	:	DISCRIMINATION PROCEEDING
	:	Docket No. SE 90-63-DM
	:	MD 90-03
v.	:	R & S Material
DRAVO BASIC MATERIALS COMPANY, INC., Respondent	:	

DECISION

Appearances: William Lawson, Esq., Office of the Solicitor, U.S. Department of Labor, Birmingham, AL, for the Secretary,

R. Henry Moore, Esq., Buchanan Ingersoll Professional Corporation, Pittsburgh, PA, for the Respondent.

Before: Judge Fauver

On April 24, 1990, a hearing was held on the Secretary's Application for Temporary Reinstatement under § 105(c) of the Federal Mine Safety and Health Act of 1977, 30 C.F.R. § 801 et seq.

Following oral argument, a decision was entered from the bench. This decision confirms the bench decision.

I find that the evidence establishes a prima facie case of a successor-in-interest relationship between R & S Materials, Inc., (predecessor) and Dravo Basic Materials Company, Inc., (successor).

The hearing evidence satisfies the Secretary's burden of showing that the complaint by Alonzo Walker was not frivously brought. This finding is made without ruling in any way on the merits of the case.

ORDER

WHEREFORE IT IS ORDERED that, pending a final decision on the complaint of discrimination, Respondent, Dravo Basic Materials Company, Inc., shall immediately reinstate Alonzo Walker to the position he held at subject mine immediately before his discharge on January 10, 1990, or to a similar position, at the same rate and overtime pay, shift assignment, and with such other employment benefits that he would be receiving had he not been discharged. Provided: the parties may agree to an economic reinstatement (pay without physical reemployment) if they file a signed agreement to such reinstatement with the signed consent of Alonzo Walker.

William Fauver
William Fauver
Administrative Law Judge

Distribution:

William Lawson, Esq., Office of the Solicitor, U.S. Department of Labor, 2015 2nd Ave., N. 201, Birmingham, AL 35203 (Certified Mail)

R. Henry Moore, Esq., USX Tower, 57th Floor, 600 Grant Street, Pittsburgh, PA 15219 (Certified Mail)

Mr. Alonzo Walker, 3305 Lincoln Drive, Selma, AL 36701 (Certified Mail)

iz

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

May 24, 1990

CONSOLIDATION COAL COMPANY, Contestant	:	CONTEST PROCEEDINGS
	:	Docket No. WEVA 89-234-R
v.	:	Citation No. 3114001; 5/31/89
	:	Docket No. WEVA 89-235-R
	:	Citation No. 3114002; 5/31/89
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Docket No. WEVA 89-236-R
	:	Citation No. 3114003; 5/31/89
	:	Docket No. WEVA 89-237-R
	:	Citation No. 3114004; 5/31/89
	:	Docket No. WEVA 89-238-R
	:	Citation No. 3103921; 6/1/89
	:	Docket No. WEVA 89-239-R
	:	Citation No. 3103922; 6/1/89
	:	Docket No. WEVA 89-240-R
	:	Citation No. 3103923; 6/1/89
	:	Docket No. WEVA 89-241-R
	:	Citation No. 3103924; 6/1/89
	:	Docket No. WEVA 89-242-R
	:	Citation No. 3103925; 6/1/89
	:	Docket No. WEVA 89-243-R
	:	Citation No. 3103926; 6/1/89
	:	Docket No. WEVA 89-244-R
	:	Citation No. 3103927; 6/1/89
	:	Docket No. WEVA 89-245-R
	:	Citation No. 3103928; 6/1/89
	:	Blacksville No. 1 Mine
	:	Mine ID 46-01867

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS Docket No. WEVA 90-3 A. C. No. 46-01867-03815
v.	:	Blacksville No. 1 Mine
CONSOLIDATION COAL COMPANY, Respondent	:	Docket No. WEVA 90-8 A. C. No. 46-01318-03901
	:	Robinson Run No. 95

DECISION

Appearances: Henry Chajet, Esq., Jackson & Kelly, Washington, D.C.; and Walter J. Scheller, III, Esq., Consolidation Coal Company, Pittsburgh, Pennsylvania, for the Contestant-Respondent; Page H. Jackson, Esq., Office of the Solicitor, U. S. Department of Labor, Arlington, Virginia, for the Respondent-Petitioner.

Before: Judge Merlin

The above-captioned twelve notices of contest have been filed by the operator, Consolidation Coal Company, pursuant to section 105(d) of the Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d), (hereinafter referred to as the "Act" or the "Mine Act"), challenging the validity of citations issued to it by the Secretary of Labor under section 104(a) of the Act, 30 U.S.C. § 814(a), which allege violations of 30 C.F.R. § 50.30-1(g)(3). 29 C.F.R. § 2700.20 et seq. Docket No. WEVA 90-3, as captioned above, is the Secretary's petition for the assessment of civil penalties filed in accordance with section 105(d) supra, and sections 110(a) and (i) of the Act, 30 U.S.C. § 820(a), and (i), for the assessment of civil penalties in the amount of $250 apiece for the violations disputed in the notices of contest. 29 C.F.R. § 2700.25 et seq. Docket No. WEVA 90-8 is a petition filed by the Secretary seeking penalties of $250 each for twelve additional 104(a) citations, also based upon alleged violations of 30 C.F.R. § 50.30-1(g)(3).

On January 24, 1990, I issued an order upholding the validity of Part 50 and determining that penalties could be assessed for violations thereunder. On February 14, 1990, I denied the operator's request to certify my order for interlocutory appeal. By order dated March 8, 1990, the Commission denied the operator's request for interlocutory appeal. Thereafter on March 22, 1990, a prehearing conference was held with counsel and on April 30, 1990, the parties submitted stipulations

of law and fact together with supporting briefs. On May 16, 1990, counsel appeared at oral argument.

The issue presented for resolution is whether the operator violated 30 C.F.R. § 50.30-1(g)(3) as charged, and if so, the appropriate amount of civil penalties to be assessed.

Section 103(d), 30 U.S.C. § 813(d), sets forth the record-keeping provisions of the Mine Act as follows:

> (d) All accidents, including unintentional roof falls (except in any abandoned panels or in areas which are inaccessible or unsafe for inspections), shall be investigated by the operator or his agent to determine the cause and the means of preventing a recurrence. Records of such accidents and investigations shall be kept and the information shall be made available to the Secretary or his authorized representative and the appropriate State agency. Such records shall be open for inspection by interested persons. Such records shall include man-hours worked and shall be reported at a frequency determined by the Secretary, but at least annually.

Part 50 of the Secretary's regulations, 30 C.F.R. Part 50, provides in pertinent part as follows:

> **Subpart A--General**
>
> § 50.1 Purpose and scope.
>
> This Part 50 implements sections 103(e) and 111 of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. 801 et seq., and sections 4 and 13 of the Federal Metal and Nonmetallic Mine Safety Act, 30 U.S.C. 721 et seq., and applies to operators of coal, metal, and nonmetallic mines. It requires operators to immediately notify the Mine Safety and Health Administration (MSHA) of accidents, requires operators to investigate accidents and restricts disturbance of accident related areas. This part also requires operators to file reports pertaining to accidents, occupational injuries and occupational illnesses, as well as employment and coal production data, with MSHA, and requires operators to maintain copies of reports at relevant mine offices. The purpose of this part is to implement MSHA's authority to investigate, and to obtain and utilize information pertaining to, accidents, injuries, and illnesses occurring or originating in mines. In utilizing information received under Part 50, MSHA will develop rates of injury occurrence (incident rates or IR), on the basis of 200,000 hours

of employee exposure (equivalent to 100 employees working 2,000 hours per year). The incidence rate for a particular injury category will be based on the formula:

IR=no. of cases x 200,000
hours of employee exposure

MSHA will develop data respecting injury severity using days away from work or days of restricted work activity and the 200,000 hour base as criteria. The severity measure (SM) for a particular injury category will be based on the formula:

SM=sum of days x 200,000
hours of employee exposure

* * * * *

Subpart C--Reporting of Accidents, Injuries, and Illnesses

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

(a) Each operator shall maintain at the mine office a supply of MSHA Mine Accident, Injury, and Illness Report Form 7000-1. These may be obtained from MSHA Metal and Nonmetallic Mine Health and Safety Subdistrict Offices and from MSHA Coal Mine Health and Safety Subdistrict Offices. Each operator shall report each accident, occupational injury, or occupational illness at the mine. The principal officer in charge of health and safety at the mine or the supervisor of the mine area in which an accident or occupational injury occurs, or an occupational illness may have originated, shall complete or review the form in accordance with the instructions and criteria in §§ 50.20-1 through 50.20-7. * * *

* * * * *

Subpart D--Quarterly Employment and Coal Production Report

§ 50.30 Preparation and submission of MSHA Form 7000-2--Quarterly Employment and Coal Production Report.

(a) Each operator of a mine in which an individual worked during any day of a calendar quarter shall complete a MSHA Form 7000-2 in

accordance with the instructions and criteria in § 50.30-1 * * *.

* * * * *

§ 50.30-1 General instructions for completing MSHA Form 7000-2.

* * * * *

(g) Employment, Employee, Hours, and Coal Production-- * * * * *

(3) Total employee-hours worked during the quarter: Show the total hours worked by all employees during the quarter covered. Include all time where the employee was actually on duty, but exclude vacation, holiday, sick leave, and all other off-duty time, even though paid for. Make certain that each overtime hour is reported as one hour, and not as the overtime pay multiple for an hour of work. The hours reported should be obtained from payroll or other time records. If actual hours are not available, they may be estimated on the basis of scheduled hours. Make certain not to include hours paid but not worked.

Citation No. 311400 which is the citation in the notice of contest WEVA 89-234-R and the first citation in the penalty petition WEVA 90-3, is representative of all citations involved in this matter. It cites a violation of 30 C.F.R. § 50.30-1(g)(3).[1] In describing the condition or practice Citation No. 311400 provides as follows:

Evidence gathered during a Part 50 Audit of this mine indicates that the operator significantly over reported Employee Hours on the Quarterly Employment and Coal Production Report (Form 7000-2) for the forth [sic] quarter of calendar year 1988. According to management 3/4 of an hour is turned in each day for each employee which covers time spent on mine property before and after work hours.

The parties have submitted the following stipulations:

1. Consolidation Coal Company ("Consol") is the owner and operator of the Blacksville No. 1 Mine located in Monongalia County, West Virginia.

---

[1] Each citation in the notices of contest and in the two penalty petitions deals with a different calendar quarter in one of the two Consolidation mines involved.

2. Consol is the owner and operator of the Robinson Run No. 95 Mine located in Harrison County, West Virginia.

3. Consol, the Blacksville No. 1 Mine, and the Robinson Run No. 95 Mine are subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (hereinafter "the Mine Act").

4. The Mine Safety and Health Administration, United States Department of Labor, (hereinafter "MSHA") has been the agency responsible for the enforcement of the Mine Act.

5. All of the citations at issue in these matters were issued by a duly authorized representative of the Secretary of Labor and properly served upon Consol, and can be resolved together upon the basis of these joint stipulations.

6. The Administrative Law Judge and the Federal Mine Safety and Health Review Commission have jurisdiction of these cases pursuant to Sections 105 and 113 (d) of the Mine Act, 30 U.S.C. §§ 815, 823 (d).

7. With respect to the issues previously decided by the Administrative Law Judge in his Order dated January 24, 1990, the parties agree that they will not brief or reargue them at this time, but that they are preserved for appeal. Nothing contained herein shall serve to waive said issues or be alleged or deemed an admission against Consol or the Secretary with respect to said issues.

8. The violations alleged in the individual citations were abated by Consol within the time set for abatement.

9. Copies of the subject citations are authentic and may be admitted into evidence.

10. 30 C.F.R. § 50.20 requires, inter alia, that mine operators and independent contractors, submit a MSHA Form 7000-1 (MSHA Mine Accident, Injury, and Illness Report Form) to MSHA within ten days after any accident, occupational injury, or occupational illnesses occurs at the mine or is diagnosed as having originated at the mine.

11. 30 C.F.R. § 50.20 requires such reporting regardless of whether the event occurs during, before, or after a scheduled shift, and, in the case of an accident, regardless of whether the individual injured is a miner or employee of the mine operator.

12. 30 C.F.R. § 50.30 requires each operator of a mine and independent contractors, which had any individual working any day at the mine during the calendar quarter, to submit a completed

MSHA Form 7000-2 ("Quarterly Employment and Coal Production Report").

13. Data from Forms 7000-1 and 7000-2 are used to calculate the MSHA injury incidence rate pursuant to the formula set forth at 30 C.F.R. § 50.1. MSHA calculates such MSHA injury incidence rates for each mine, each mine operator, each state, each MSHA District and Subdistrict office, and on a national basis, using this formula.

14. The hours reported on Form 7000-2 are also used by MSHA to calculate a "tons per hour worked" figure for the coal industry on a national basis. On occasion, MSHA has used such information to calculate a "tons per hour worked" figure for individual mines. The calculations of "tons per hour worked" statistics has no relationship to MSHA's statutory safety mission and is done only as a public informational service. Consol maintains that such use is not relevant to this case.

15. With respect to Consol, the hours reported on Form 7000-2 are not used for any statutory or regulatory purpose other than the calculation of an incidence rate. With respect to all independent contractors and operators of mines other than coal mines, MSHA uses the hours reported from Form 7000-2 for purposes of 30 C.F.R. Part 100. Such Part 100 use is not applicable to Consol. Consol maintains that such Part 100 use is irrelevant to this case.

16. The incidence rate is used by MSHA as one method to analyze injury and illness trends and allocate inspection resources.

17. In addition to the calculation of incidence rates, MSHA uses the information obtained from the Form 7000-1 to: (a) determine whether an accident should be investigated; (b) analyze injury and illness trends by type, occupation or location; and (c) allocate inspection resources and to focus inspections.

18. Accidents and occupational injuries occurring to miners off mine property, such as a coal truck driver injured in an accident on a public highway, are not subject to the reporting requirements of 30 C.F.R. § 50.20.

19. MSHA does not require, and Consol has not recorded time spent on mine property by nonemployee visitors such as inspectors, manufacturer's representatives, or representatives of miners on nonscheduled shifts. Consol maintains that lack of reporting time estimates on MSHA Form 7000-2 for representatives of miners on nonscheduled shifts stems from an oversight if MSHA utilizes injuries of such personnel for incidence rate calculations.

20. The Secretary's accident and injury computer data summaries list events reported pursuant to 30 C.F.R. § 50.20(a) by mine site, occupation, activity of injured, location of accident and equipment involved. The abstracts do not specify the time of the event, whether the event occurred on shift or off shift, or whether the employee was being paid when the event occurred. There are some occupations and certain time periods at the Blacksville No. 1 Mine and Robinson Run No. 95 Mine for which injuries did not occur in 1986, 87 and, 88. The following are summaries of the summaries for the mines and years during which the citations in this case were issued.

(a) At the Blacksville No. 1 Mine, for calendar year 1988, Consolidation Coal Company reported a total of fifty-one (51) reportable incidents; fourteen (14) of the reportable incidents were accidents without injuries; twenty-eight (28) were underground injuries to miners and foremen; three (3) were surface injuries to miners and foremen; and six (6) were compensation awards for occupational illnesses. While the location where some of the events which occurred were unknown, none of the reported injuries specified that they occurred at the bathhouse or the parking lot.

(b) At the Robinson Run No. 95 Mine, for calendar year 1988, Consolidation Coal Company reported a total of seventy-eight reportable Part 50 incidents. Fifteen (15) of the reportable incidents were accidents without injuries; forty-eight (48) were underground injuries to miners and foreman; four (4) were surface injuries; and eleven (11) were compensation awards for occupational illnesses. While some of the locations where the events occurred were unknown, one (1) of the reported injuries specified that it occurred at the bathhouse. The miner injured at the bathhouse was the "shower room employee" who was injured while cleaning the shower room. The time of the incident was unknown.

(c) At the Blacksville No. 1 Mine, for calendar year 1987 Consolidation Coal Company reported a total of seventy-eight (78) reportable incidents. Fourteen (14) of the reportable incidents were accidents without injuries; one was a non-occupationally related cardiac arrest; forty-three (43) were underground injuries; three (3) were surface injuries; and fourteen (14) were compensation awards for occupational illnesses. While the location of some of the injuries was unknown, one (1) of the reported injuries specified that it occurred at the bathhouse when an employee was struck in the head by a falling basket.

(d) At the Robinson Run No. 95 Mine, for calendar year 1987 Consolidation Coal Company reported a total of one hundred thirty incidents. Thirty-two (32) of the reportable incidents were accidents without injuries; fifty-two (52) were underground

injuries, ten (10) were surface injuries; thirty-six (36) were compensation awards for occupational illnesses. While some of the reported injuries occurred at unknown areas of the mine, one (1) of the reported injuries specified that it occurred at the lamp house. The miner injured at the lamp house got cleaning solution in his eyes while cleaning his protective glasses. One (1) of the reported injuries also specified that it occurred at the "bath unit". The miner in the bath unit injured his back while crawling on a screen. None specified that they occurred at the parking lot of the mine.

(e) At the Blacksville No. 1 Mine, for calendar year 1986 Consolidation Coal Company reported a total of forty-five (45) incidents. Fifteen (15) of the reportable incidents were accidents without injuries; fifteen (15) were underground injuries; three (3) were surface injuries; and, fourteen (14) were compensation awards for occupational illnesses. While some of the injuries occurred at unknown locations of the mine, none (0) of the reported injuries specified that they occurred at the bathhouse or parking lot of the mine.

(f) At the Robinson Run No. 95 Mine, for calendar year 1986 Consolidation Coal Company reported a total of seventy-two (72) incidents. Fifteen (15) of the reported incidents were accidents without injuries, nineteen (19) were underground injuries; four were surface injuries; thirty-four (34) were compensation awards for occupational illnesses. While some of the reported incidents occurred at unknown locations, one (1) of the reported injuries specified that it occurred at the bathhouse. The miner injured at the bathhouse was taking a shower when he struck his head on the shower water valve causing a laceration.

21. Examples of pre and post "shift" occupational injuries at the Blacksville No. 1 Mine and the Robinson Run No. 95 Mine during the years 1986, 1987, and 1988, that have been reported by Consol to MSHA, pursuant to 30 C.F.R. § 50.20, by the filing of MSHA Forms 7000-1, and used to calculate Consol's incidence rates, include:

MINE	DATE	EMPLOYEE	INCIDENT DESCRIPTION
Robinson Run[1]	9/19/86	George Sandy	pre-shift; fell in parking lot; broke arm

[1] [Footnote 1 of the Stipulations] Consol has informed Counsel that this injury was reported on a Form 7000-1. The injury does not appear on the Secretary's accident and injury computer data summary referred to in Stipulation 20. Counsel have not been able to resolve this discrepancy.

Blacksville	4/07/87	John Raines	pre-shift; falling basket in bathhouse; laceration; sutures
Robinson Run	8/10/87	Mark Wentz	pre-shift; cleaning solution in eye; lost time
Robinson Run	9/18/86	W.D. McKinney	post-shift; showering in bathhouse; lacerations to right ear

22. Violations of mandatory safety or health MSHA standards at the Mine, caused by Consol employees, subject Consol to MSHA citations regardless of whether they occur during, before or after a scheduled shift. For purposes of MSHA jurisdiction and to promote a safe work place, Consol considers all employees to be on duty and subject to Consol's rules and policies whenever they are on mine property.

23. Whenever its employees are on mine property Consol considers such time to be "exposure time" during which defined injuries and illness are reportable to MSHA.

24. Consol requires that employees report to work prior to the beginning of their scheduled shift so that they can be fully prepared to begin their shift by obtaining necessary equipment or clothing (e.g., lamps, self-rescuers, dust sampling pumps).

25. Consol requires that employees remain on mine property after the end of their scheduled shift to return equipment and materials prior to departing from mine property.

26. While scheduled shift duration is eight hours in length, actual shift time can vary by 10-15 minutes, more or less, depending upon variables such as transportation availability or crew readiness.

27. The amount of pre and post shift time that employees spend on mine property is variable at Consol's mines, and at other mine sites, and no accurate record is kept of such time by Consol.

28. Hourly employees are not paid for pre and post shift exposure time on mine property and estimates of such time are not used for wage calculations.

29. Consol complies with 29 C.F.R. Part 516 and 29 C.F.R. § 1904.21. Consol maintains that such fact is irrelevant to this case.

30. Salaried employees at Consol's Blacksville No. 1 Mine and Robinson Run No. 95 Mine are paid a predetermined salary bi-weekly, based on working five scheduled shifts per week. These salaried employees are estimated to be on the mine site an average of 1.5 hours per shift in excess of their scheduled eight hour shifts. This 1.5 hours includes exposure time spent in work activities and at the bathhouse and the parking lot, before and after scheduled shifts.

31. Consol maintains payroll records of the number of days worked by its salaried employees, but such records are solely for the purpose of payroll calculations and tracking absenteeism, sick leave and vacation time. The records do not reflect actual time worked or time spent at the mine site.

32. To arrive at its estimate of hours to be reported on MSHA Form 7000-2 for salaried employees, Consol determines their reportable hours by multiplying the number of scheduled shifts at which salaried employees were present, times 8 scheduled hours plus 1.5 average additional on site hours [reportable hours = shifts present x(8+1.5)].

33. MSHA has not issued citations for violations of 30 C.F.R. § 50.30 based on Consol's calculations of salaried employee hours on MSHA Form 7000-2 for the Blacksville No. 1 Mine and Robinson Run No. 95 Mine.

Because Consol's payroll records do not reflect actual hours of salaried employees, MSHA has always accepted for salaried employees at the Blacksville No. 1 Mine and the Robinson Run No. 95 Mine an estimate of reportable hours on Form 7000-2. The citations at issue in this proceeding are not predicated upon the hours reported by Consol for salaried personnel.

34. Consol maintains payroll records of 8 hour shifts scheduled, and overtime pay due for each hourly employee at the Blacksville No. 1 Mine and the Robinson Run No. 95 Mine. These records indicate, inter alia, the eight hour shift the hourly employee was scheduled to work; whether the employee was present during the shift; and the total number of hours to be paid, including overtime due. If the hourly employee(s) did not appear for the scheduled shift, the record indicates the reason, and whether the employee is to be compensated for that time. Such records are prepared solely for the purpose of payroll calculations, tracking absenteeism, sick leave and vacation time and do not reflect actual time worked or time spent at the mine site.

35. To arrive at its estimate of hours to be reported on MSHA Form 7000-2 for hourly employees, Consol determines their mine site exposure hours by multiplying the number of scheduled shifts during which the employees were present, times the 8 scheduled shift hours plus the number of overtime hours to be

paid, plus .75 hour of average time on the site in excess of scheduled shift time and overtime paid [Reportable hours=shifts present x(8+overtime hours+.75)].

36. For both hourly employees and salaried employees the time paid or scheduled shifts do not, accurately reflect time actually worked since they do not account for the idle periods that are paid (e.g., lunch or awaiting transportation). Similarly, time paid or scheduled shifts do not reflect pre and post shift time spent on mine property.

37. The estimated 45 minute component of hourly employee exposure was determined by surveying a number of experienced and competent Consol officials who had observed employees at these Consol mines. The estimate constitutes Consol's best estimate of actual exposure time before and after scheduled shifts.

38. When the 45 minute estimate is combined with the scheduled shift time and overtime component, these components reflect the number of hours that Consol believes each hourly employee spends at the mine site on a daily basis.

39. MSHA maintains that since March 9, 1978, it has consistently interpreted the language of 30 C.F.R. § 50.30-1(g)(3) to require the reporting of hours recorded on payroll records or other time records, such as time clocks, if those records were available. MSHA also maintains it has consistently allowed the submission of estimated hours as reportable hours only when payroll records or other records do not reflect actual hours worked. Counsel for the Secretary has no knowledge of any citation or order having previously issued for reporting pre and post shift time on MSHA Form 7000-2. Consol maintains that, among other things, the documents referred to in Stipulations 40 and 41 evidence inconsistent interpretation of reportable hours.

40. On November 7, 1975, the Mining Enforcement and Safety Administration issued a memorandum addressing the American National Standards Institute (ANSI) Z-16.1 (1967) and its role as "an integral part of a uniform system for developing statistics by MESA. . . ."

41. MSHA has published a series of Information Reports interpreting the provisions of 30 C.F.R. Part 50. (hereinafter, called "Guidelines") None of the Guidelines were published in the Federal Register but they were distributed to mine operators. From March 1978 until December 1986 the Guidelines contained a definition of employee hours that provides as follows:

> "Employee hours" constitutes the total number of hours worked by all employees during the quarter covered. Include as employees those

> in operating, production, maintenance, transportation, mine office, supervision and administration. Overtime hours are to be reported on a straight time basis, i.e. actual exposure time only must be reported.

This definition was deleted by the December 1986 Guidelines. The December 1986 Guidelines, distributed to mine operators including Consol in January 1987, added a new sentence to the repetition of 30 C.F.R. § 50.30-1(g)(3):

> Do not include time spent on mine property outside of regularly scheduled shifts, i.e. bathhouse, parking lot, etc.

42. Prior to the decision in Freeman United Coal, 6 FMSHRC 1577 (1984), Consol and other mine operators reported hours for hourly employees by reporting hours paid, including idle time and lunch time, but not pre and post shift exposure time spent on mine property. Prior to this change in reporting practices Consol and other operators did not report pre and post shift injuries since the operators considered them non-occupationally related. Prior to the change in reporting practices, Consol and other mine operators reported estimated time for salaried employees.

43. After the Review Commission's decision in Freeman United Coal, 6 FMSHRC 1577 (1984), Consol and other operators initiated reporting of pre and post shift incidents and exposure time hours on mine property.

44. Consol did not make any inquiry to the Secretary as to the effect of the Freeman United Coal decision on the reporting requirements of 30 C.F.R. § 50.30. The Secretary did not issue any policy memorandum or other instructions to the industry regarding the effect of the decision. The Secretary did not make any inquiry of Consol regarding the effect of the decision. The Secretary asserts that the Freeman United Coal decision had no effect upon the reporting requirements of 30 C.F.R. § 50.30 and thus no inquiries or pronouncements were appropriate.

45. Consol did not inform the Secretary that it had changed the method by which it determined reportable hours for purposes of 30 C.F.R. § 50.30-1(g)(3) until MSHA inspectors inquired about the discrepancy between payroll records and the Form 7000-2s during the conduct of the audit which resulted in the issuance of the citations in this case.

46. The Secretary has insufficient knowledge to accept or deny that the components reported by Consol reflect the actual time spent by hourly employees on mine property each day. Accordingly, the parties stipulate that, for the disposition of

these cases, the Chief Administrative Law Judge can assume that these components when combined reflect the actual time spent by hourly employees at the Blacksville No. 1 Mine and the Robinson Run No. 95 Mine on the days when they are at the mine site.

47. Consol is a large coal mine operator and generally has an average history of violations under the Mine Act for a mine operator of its size.

48. The parties stipulate that, for the disposition of these cases, the Chief Administrative Law Judge can find that: (a) the proposed penalties, while not agreed to by the parties, will not affect Consol's ability to stay in business; and (b) the citations were abated in good faith. The parties are unable to stipulate as to the degree of negligence, if any, involved in causing the alleged violations.

However, Consol maintains that the change in its reporting practice was undertaken consistent with the advice of counsel and the Secretary has no evidence to the contrary.

49. The Parties agree that the Administrative Law Judge should take judicial notice of the documents referred to in these stipulations and include them in the record of this case.

Upon review I have determined that the stipulations submitted by the parties provide an appropriate and adequate basis upon which to decide this case. Accordingly, the stipulations are hereby ACCEPTED.

As set forth above, section 50.30-1(g)(3) requires each employer under the Mine Act to report total hours worked by all employees. The regulation subsequently directs that hours reported be obtained from payroll or other time records. Based upon the record before me, I conclude that MSHA has consistently interpreted 50.30(g)-1(3) to require reporting of hours recorded on payroll records or other time records whenever such records are available. As set forth in the stipulations, MSHA informational guidelines have been changed in certain respects, but not in a manner crucial to the determination of what constitutes employee hours worked for reporting purposes (Stipulation 41). The inclusion as employees of those in operation, maintenance, etc. was deleted in the 1986 Program Circular (Gov't. Exh. 1). Also, a new instruction was adopted in the 1986 Program Circular telling employers not to include time spent on mine property outside of regularly scheduled shifts (Gov't. Exh. 1, p. 15). However, the instruction to obtain hours worked from payroll or other time records is the same in the 1978 manual (Gov't. Exh. 6, p. 16), the 1980 manual (Gov't. Exh. 7, p. 15) and the 1986 manual (Gov't. Exh. 1, p. 15). It is this provision which I find determinative.

I have carefully reviewed the operator's argument that the proper construction of the regulations would include in hours worked, unpaid hours spent on mine property (Operator's brief pp. 8-13). I do not find the operator's representations persuasive in light of the fact that until 1984 it accepted the Secretary's views and reported employee hours in the manner prescribed by the Secretary (Stipulation 43). I recognize that because of the Commission's decision in Freeman Mining Company, 6 FMSHRC 1577 (July 1984), the operator began to report off-shift on-site accidents under section 50.20 of the regulations, supra, which it had not done previously (Stipulation 42). However, I do not believe the Freeman decision justifies changing the interpretation of section 50.30-1(g)(3) regarding hours worked, when this is the interpretation the Secretary always has followed. In this connection, I bear in mind that the Commission has been admonished that deference is due the Secretary's interpretation of her own regulations. Brock v. Cathedral Bluffs Shale Oil, Co., et. al., 796 F.2d 533, 538 (D.C. Cir. 1986). Secretary of Labor v. Cannelton Industries, 867 F.2d 1432, 1435 (D.C. Cir. 1989). Secretary of Labor v. Western Fuels-Utah,____ F.2d ____ (D.C. Cir. April 6, 1990). Therefore, the operator's ex parte attempt to redefine hours worked by adding thereto 45 minutes per shift cannot be allowed.

A contrary result is not warranted because salaried workers are treated differently than hourly workers. Section 50.30-1(g)(3) provides that where actual hours are not available, they may be estimated on the basis of scheduled hours. The parties agree that salaried employees are paid a predetermined bi-weekly salary based on 5 scheduled shifts per week and that for purposes of reporting hours under section 50.30-1(g)(3) the operator adds, and the Secretary accepts, 1.5 hours per shift (Stipulations 30, 32, 33). The operator asserts that salaried and hourly employees should be treated the same and that since the Secretary accepts the operator's estimate of an extra 1.5 hours per shift for reporting of hours of salaried employees under 50.30-1(g)(3), it should accept the operator's estimate of 45 minutes per shift for hourly employees (Operator's brief pp. 12, 13). This argument cannot be accepted. It overlooks the fact that although payroll records for hourly employees may not be completely accurate insofar as hours worked are concerned (e.g. lunchtime, pre and post shift times), these records by and large do reflect the time hourly employees work and are paid, whereas this is not true of salaried employees. As the operator itself admits, renumeration of salaried employees is the same regardless of whether they work 8 hours or 15 hours a day (Operator's brief p. 12, Hearing Tr. 51-54). In allowing estimates for salaried employees for whom there are no records of actual hours worked, section 50.30-1(g)(3) is consistent with general principles. American National Standards Institute (ANSI) A2.2.2., p. 10 (1977); 3.2(2), p. 12 (1967). See also Solicitor's letter dated May 17, 1990.

In light of the foregoing, I find violations existed in the subject cases.

By no means, however, is this the end of the inquiry essential to proper consideration and disposition of the matters presented. The Mine Act requires not only that a finding be made whether or not a violation existed, but in addition directs that attention be given to six criteria, including gravity and negligence, for determining the appropriate amount of penalty to be assessed. Section 110(i) of the Act, supra. Accordingly, the nature, character and extent of these violations must be evaluated.

The subject cases are unusual because appraisal of the criteria, most particularly gravity, leads to what is in fact the heart of the dispute between the parties. The Solicitor admits the violations are not serious, but he does not adequately explain why (Solicitor's brief p. 30, Hearing Tr. pp. 39-41). A determination of the seriousness of the violations requires examination of the use to which the hours reported under § 50.30-1(g)(3) are put. The parties agree that the hours reported under § 50.30-1(g)(3) on Form 7000-2 together with accidents reportable under § 50.20 on Form 7000-1 are used in the formula set forth in § 50.1, supra, to arrive at the injury incidence rate for each mine and mine operator (Stipulation 13). The parties further agree that insofar as Consol is concerned the hours reported under § 50.30-1(g)(3) are used only for inclusion in the formula (Stipulation 15). Despite the Solicitor's representations to the contrary at the oral argument (Hearing Tr. 17-20, 66-69), I believe that because of the data fed into it, the formula in § 50.1 produces an inherently flawed injury incidence rate. The numerator of the equation consists of accidents reportable whenever they occur on the mine site regardless of when they happen, i.e. on-shift, pre-shift or post-shift. The denominator of the formula, however, is employee exposure hours which is equated by the Secretary with the hours worked as reported under § 50.30 (Stipulations 12, 13; Solicitor's brief pp. 23-25; Hearing Tr. 16-17). As explained above, the § 50.30 hours are paid, on shift hours. Accordingly, the numerator and denominator are mismatched with the former premised upon place but the latter predicated upon time and place. The operator's objection to the product of this formula as skewed data is well-taken (Operator's brief pp. 22-26).

The parties agree that for 1986-1988 there were only four off-shift reportable incidents at the two mines involved in these cases (Stipulation 21). The Solicitor does not specifically argue the formula should be upheld because these incidents are de minimis, but his statements seem to imply this (Solicitor's brief p. 25, footnote 10; Hearing Tr. 15). I am unconvinced because a three year sampling of only two mines is an

insufficient basis upon which to conclude that the infirmities in the formula are of no account. Indeed, the parties have agreed that the formula is a basis upon which MSHA directs its investigative resources as well as analyzes illness and injury trends (Stipulation 16).

That the formula is flawed is further demonstrated by the Solicitor's agreement that I may assume for purposes of deciding these cases that the 45 minutes added to hours worked by the operator reflect the time actually spent at the mine by hourly employees (Stipulation 46). If therefore, there were mutuality in the components of the formula, the incidence rate would be substantially affected, because the addition of 45 minutes would constitute almost a 9% increase in the denominator of the formula.

The Solicitor's representation that the injury incidence rate under the Mine Act is comparable to that under the Occupational Safety and Health Act, 29 U.S.C. 651 et seq., (hereafter referred to as "OSHA"), must be rejected (Solicitor's brief pp. 23-25). The incidence rate under OSHA like that under the Mine Act is arrived at by dividing the number of injuries by hour worked. Recordkeeping Guidelines for Occupational Injuries and Illnesses, Sept. 1986 (Gov't Exh. 3, p. 59). But the definition and application of these terms are far different under OSHA than under the Mine Act. Reportability of accidents under OSHA is not determined solely by reference to the work site as it is under the Mine Act. Rather under OSHA there is a rebuttable presumption of reportability applicable to accidents that occur on an employer's premises, but when the event happens off the premises reportability is determined by an evaluation of whether the activities were work related (Gov't Exh. 3, pp. 32, 34-35). In addition, events occurring on the parking lot or in recreational facilities are not reportable under OSHA. The other factor in the incidence equation, i.e., exposure hours, also is treated differently under OSHA than the Mine Act. Although employee hours worked are determined under OSHA initially by reference to payroll records, the concept is expanded in determining exposure hours (Gov't Exh. 3, A-4, p. 54). Thus the OSHA manual directs that:

> The figure for hours worked should reflect the actual hours of work-related exposure for all employees. If injuries and illnesses experienced during a particular activity are recordable, then the employee's time spent in the activity should be included in the hours worked estimate. Work-related exposures include most of the employees' activities on the employers' premises as well

> as situations off premises where the employees are engaged in job tasks or are there as a condition of employment.

(Gov't. Exh. 3, A-5, p. 54).

Accordingly, under OSHA there is a correlation between reportable events and the time during which they occur. It is just this correlation which is missing in the § 50.1 formula under the Mine Act. The Solicitor's assertion that "actual hours of work-related exposure" applies only to paid time, is unsupported and therefore, rejected (Solicitor's brief p. 24, footnote 9; Hearing Tr. 35-36).

If the Secretary can achieve such correlation and balance under OSHA, it is difficult to see why she cannot do so under the Mine Act. I recognize that Stipulation 46 which agrees that the 45 minutes estimated by the operator accurately reflects time spent on mine property by hourly employees, has been entered into only for purposes of these cases. However, as a general matter composition of a meaningful formula for an injury incidence rate under the Mine Act would appear to be the Secretary's responsibility, at least in the first instance, rather than the operator's.

In sum therefore, the only effect of the operator's failure to report hours worked as defined by the Secretary under § 50.30-1(g)(3) is that these hours were not included in the § 50.1 formula. Because the formula as presently written and applied produces flawed data, I find the violations are nonserious and technical in nature. Indeed, what the violations highlight is the need for the Secretary to revisit the issues posed by those sections of the reporting regulations involved in these cases.

There is no question that after the Freeman decision the operator intentionally changed its reporting of hours worked under § 50.30-1(g)(3) by adding 45 minutes to each shift and that it did not tell the Secretary what it was doing (Stipulations 43, 44 and 45). As set forth above, I appreciate the dilemma the operator found itself in because of the flawed incidence rate formula. However, this is no excuse for the operator's actions. Whatever difficulties may be presented by the Secretary's interpretation of the Act and regulations, no operator is free to take the law into its own hands by deciding for itself what the law means and how it can best be applied. The egregious nature of the operator's conduct is augmented by the clandestine nature of its activities. The operator could have openly challenged the Secretary's position immediately after the Freeman decision. Instead, it chose to act in secret until the Secretary found out. This operator which is one of the largest in the mining industry, certainly knows better. Accordingly, I find negligence was high.

The other criteria have been stipulated. The violations were abated in a timely manner; prior history is average; size is large; and imposition of penalties herein will not affect the operator's ability to continue in business (Stipulations 8, 47, 48).

It is ORDERED that the documentary exhibits (Gov't Exh. 1-8 and Operator's Exh. 1 and 2) be ADMITTED.

It is further ORDERED the operator's motion to strike be DENIED.

It is further ORDERED that insofar as the existence of violations and a finding of high negligence are concerned the Secretary's motion for summary judgment be GRANTED.

It is further ORDERED that a penalty of $100 be ASSESSED for each of the 24 violations involved in these cases.

It is further ORDERED that the operator PAY $2,400 within 30 days from the date of this decision.

Paul Merlin
Chief Administrative Law Judge

Distribution:

Henry Chajet, Esq., Jackson & Kelly, Consolidation Coal Company, Suite 650, 1701 Pennsylvania Avenue, N.W., Washington, D. C. 20006 (Certified Mail)

Walter J. Scheller, Esq., Consolidation Coal Company, Consol Plaza, 1800 Washington Road, Pittsburgh, PA 15241 (Certified Mail)

Page H. Jackson, Esq., Office of the Solicitor, U. S. Department of Labor, Room 516, 4015 Wilson Boulevard, Arlington, VA 22203 (Certified Mail)

Mr. Steven Solomon, UMWA, Box 370, Cassville, WV 26527 (Certified Mail)

Robert Stropp, Esq., UMWA, 900 15th Street, N.W., Washington, DC 20005 (Certified Mail)

Lawrence Beeman, Director, Office of Assessments, U. S. Department of Labor, 4015 Wilson Boulevard, Arlington, VA 22203 (Handcarried)

/gl

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

MAY 30 1990

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 89-27-M
Petitioner	:	A.C. No. 15-15676-05511
v.	:	
	:	Staton Mine
MOUNTAIN PARKWAY STONE,	:	
INCORPORATED,	:	
Respondent	:	

DECISION ON REMAND

Before: Judge Weisberger

STATEMENT OF THE CASE

On May 23, 1990, the Commission issued a decision pursuant to the Secretary's petition to review my decision in this matter issued on July 14, 1989. In essence, the Commission found that Respondent violated 30 C.F.R. § 57.9002 as alleged in a citation issued by MSHA Inspector Eric Shanholtz on August 17, 1988. (Mountain Parkway Stone, Inc., 12 FMSHRC, (Slip op., May 23, 1990)). The Commission reversed by decision with respect to the vacation of the citation in issue, and remanded the matter ". . . for determination of the allegation that the violation was of a significant and substantial nature and for assessment of an appropriate civil penalty." (Mountain Parkway Stone, Inc., supra, at 4).

I.

In its decision, the Commission noted Shanholtz's detailed testimony regarding the numerous equipment defects affecting safety that prompted his citation. (Mountain Parkway Stone, Inc., supra, at 3). It further found that "The evidence that the C-50 boom truck had defects affecting safety was largely uncontroverted" (Mountain Parkway Stone, Inc., supra, at 3). The Commission summarized the largely uncontroverted testimony of Shanholtz with regard to the various defects affecting safety, and the hazards of these defects as follows:

Specifically, the inspector noted that there were no stabilizing jacks on the truck. (Stabilizing jacks are outriggers that are used to support a boom truck when the boom is raised. Tr. 232.) Without such stabilizing jacks, the truck could overturn if it were "utilized in the wrong capacity." Tr. 233. Shanholtz additionally noted several hydraulic leaks in the boom controls and in the boom's left cylinder that presented both fire and slipping hazards and allowed the boom to drop. The doors of the truck were missing and the truck did not have seat belts. In Shanholtz's opinion, these conditions presented the hazard of allowing a driver to fall from the vehicle if it took a sharp turn. Shanholtz further observed that the truck did not have front or rear lights, although it was apparently used underground. Finally, Shanholtz noted that a rag was used as a gas cap on the gas tank. Shanholtz testified that the rag could act as a wick for the gas and present an explosion or ignition hazard. Tr. 232-34. (Mountain Parkway Stone, Inc., supra, at 2).

Shanholtz opined that the violation herein was significant and substantial based on his finding that "[t]he likelihood of something happening was reasonably likely in that if an injury or fatality would occur, then it would be serious." Tr. 239. Shanholtz indicated that illness and injury was reasonably likely to occur because "just accumulation of the defects in themselves presented a reasonable likelihood of an injury occurring" (sic) Tr. 238. He essentially agreed with the counsel for petitioner that, with regard to each of the dangers he testified to that were involved in each of the defects he cited, the dangers would be reasonably likely to occur.

I find, based on Shanholtz's basically uncontradicted testimony, as noted by the Commission, that with regard to the defects he noted, which constituted a violation of section 57.9002, supra, there were discrete safety hazards contributed to by the violation herein. (See, Mathies Coal Company, 6 FMSHRC 1, 3 (1984)). In order for the violation herein to be considered significant and substantial, it also must be established, as set forth in Mathies, supra, at 3-4, that there was "a reasonable likelihood that the hazard contributed to will result in an injury." The Commission in Consolidation Coal Company, 6 FMSHRC 189, 193 (1984), explained that this element "embraces a showing of a reasonable likelihood that the hazard will occur, because, of course, there can be no injury if it does not."

Although Shanholtz described the hazards involved in each of the safety defects in question, and concluded that these were reasonably likely to occur, he did not provide the basis for this conclusion. Nor does the record contain sufficient facts to

support this conclusion. Thus, I find that it has not been established that the hazards involved in the various safety defects were reasonably likely to occur. As such, it must be concluded that it has not been established that the violation herein was significant and substantial (Mathies, supra, Consolidation Coal, supra).

II.

The testimony of Shanholtz is essentially uncontradicted with regard to the existence, at the date of the inspection, of numerous defects in different parts of the truck in question. Also uncontradicted is Shanholtz's testimony, as summarized above (I., infra), with regard to the specific hazards attendant upon the various safety defects. Also the Commission noted that the record establishes that the truck had been used while it had the cited safety defects. I thus conclude that the violation herein was of a moderately high level of gravity. Taking into account the remaining statutory factors set forth in section 110(i) of the Act, as stipulated to by the parties, as well as the history of violation as indicated by Exhibit 1, I conclude that a penalty of $98 is proper for the violation found herein.

ORDER

It is ORDERED that within 30 days of this decision, Respondent shall pay $98 as a penalty for the violation of Citation No. 3253338.

Avram Weisberger
Administrative Law Judge

Distribution:

Colleen A. Geraghty, Esq., Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Boulevard, Room 516, Arlington, VA 22203 (Certified Mail)

Mr. Jeffery T. Staton, Vice President, Mountain Parkway Stone, Inc., Route 1, Box 309-B, Stanton, KY 40380 (Certified Mail)

/fb

ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041
703-756-6232

May 4, 1990

THOMAS J. MCINTOSH,	:	DISCRIMINATION PROCEEDING
Complainant	:	
v.	:	Docket No. KENT 90-113-D
	:	MSHA Case No. BARB CD 90-06
FLAGET FUELS, INC.,	:	
Respondent	:	No. 1 Surface

ORDER DENYING RESPONDENT'S REQUEST
TO DISMISS COMPLAINT

Statement of the Case

This proceeding concerns a complaint of discrimination filed by the complainant against the respondent pursuant to section 105(c)(3) of the Federal Mine Safety and Health Act of 1977. The complainant alleges that he was discharged by the respondent from his employment as a bulldozer operator on or about December 8, 1989, because of his refusal to operate a bulldozer he reasonably and in good faith believed to be unsafe and because he had voiced safety complaints about said bulldozer to the respondent's vice-president.

The respondent has filed an answer to the complaint denying that it discharged the complainant or discriminated against him in violation of the Act. With regard to the complainant's jurisdictional pleading at paragraph three (3) of his complaint, the respondent takes the position that the complaint is untimely and states that it "specifically controverts jurisdiction of the Commission for failure to meet the statutorily prescribed filing deadline." Respondent requests that the complaint be dismissed with prejudice.

Although the Act provides that a discrimination complaint must be filed within 30 days after receipt of the Secretary's written determination that no violation has occurred, and the Commission's proposed rule changes as published in the Federal Register on February 12, 1990, 55 Fed. Reg. 4853-4866, will include the same statutory time limit, under the Commission's present rules of procedure there is no time limit for filing such a complaint. The applicable present rules provide as follows:

§ 2700.40 Who may file.

(a) The Secretary. A complaint of discharge, discrimination or interference under section 105(c) of the Act, 30 U.S.C. § 815(c), shall be filed by the Secretary after an investigation under section 105(c)(2) of the Act, if he finds that a violation of section 105(c)(1) of the Act has occurred.

(b) Miner, representative, or applicant for employment. A complaint of discharge, discrimination or interference under section 105(c) of the Act, may be filed by the complaining miner, representative of miners, or applicant for employment if the Secretary determines that no violation has occurred.

§ 2700.41 When to file.

(a) The Secretary. A complaint of discharge discrimination or interference shall be filed by the Secretary within 30 days after his written determination that a violation has occurred.

(b) Miner, representative, or applicant for employment. A complaint of discharge, discrimination or interference under section 105(c) of the Act, may be filed by the complaining miner, representative of miners, or applicant for employment if the Secretary determines that no violation has occurred.

The pleadings reflect that the complainant timely filed his complaint with MSHA on December 11, 1989. By letter dated January 26, 1990, and received by the complainant on February 1, 1990, MSHA advised the complainant that based on a review of the information gathered during its investigation of his complaint, it concluded that a violation of section 105(c) of the Act had not occurred. The complainant then filed the instant complaint with the Commission by letter and enclosure dated March 5, 1990, and the complaint was docketed on March 9, 1990.

It has been held that the time limitations found in section 105(c) of the Act are not jurisdictional. See: Christian v. South Hopkins Coal Company, 1 FMSHRC 126, 134-136 (April 1979); Bennett v. Kaiser Aluminum & Chemical Corporation, 3 FMSHRC 1539 (June 1981); Secretary v. 4-A Coal Company, Inc., 8 FMSHRC 905 (June, 1986); Buelke v. Thunder Basin Coal Company, 11 FMSHRC 240 (February, 1989).

In the following cases, the Commission held that the failure by miners to timely file discrimination complaints for time periods ranging from 60 days to 7 months after the events complained of should not be barred, and the complaints were

permitted. See: Gary M. Bennett v. Kaiser Aluminum & Chemical Corp., 2 MSHC 424 (1981); Charles J. Frazier v. Morrison-Knudsen, Inc., 2 MSHC 2057 (1981); Rex Allen v. UNC Mining & Milling, 2 MSHC 2089 (1981); Richard C. Johnston v. Olga Coal Co., 2 MSHC 2247 (1981).

The respondent makes no claim that it has been prejudiced by the complainant's slight delay in filing his complaint with the Commission after receiving notification from MSHA that it did not intend to pursue his case further, and I cannot conclude that any such delay has deprived the respondent of a fair and meaningful opportunity to defend against the claim of alleged discrimination.

ORDER

In view of the foregoing, the respondent's request to dismiss the complaint IS DENIED, and this case will be scheduled for a hearing on the merits in the near future at a time and place convenient to the parties.

George A. Koutras
Administrative Law Judge

Distribution:

Tony Oppegard, Esq., Appalachian Research & Defense Fund of Kentucky, Inc., P.O. Box 360, Hazard, KY 41701 (Certified Mail)

Rick L. Thomas, Esq., Flaget Fuels, Inc., 825 High Street, Hazard, KY 41701 (Certified Mail)

/fb

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

May 9, 1990

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. SE 90-2-M
	:	A.C. No. 38-00052-05502 S3N
v.	:	
	:	Langley Plant & Mine
S.L. PETERS CONSTRUCTION, CO., Respondent	:	

ORDER DENYING PROPOSED SETTLEMENT

SHOW CAUSE ORDER

Neither the Motion to Approve Settlement filed May 7, 1990, nor the attached documentation support a finding that a violation of the cited standard (30 C.F.R. § 56.14104) in fact did occur. In addition the Secretary's Accident Investigation Report concludes that "[t]here were no violations of 30 C.F.R., Regulations and standards applicable to metal and nonmetal mining and milling operations in reference to welding on inflated tire/run assemblies."

Wherefore the Motion to Approve Settlement is denied. The Secretary is hereby ordered to show cause on or before May 25, 1990, why this Civil Penalty Proceeding should not be dismissed. See Co-op Mining Co., 2 FMSHRC 3475 (1980).

Gary Melick
Administrative Law Judge
(703) 756-6261

Distribution:

Stephen J. Simko, Jr., Esq., U.S. Department of Labor, Office of the Solicitor, 1371 Peachtree Street, N.E., Atlanta, GA 30367 (Certified Mail)

J. Carroll Bryant, Esq., P.O. Drawer 496, Aiken, SC 29802 (Certified Mail)

nt

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

May 11, 1990

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. WEST 89-427
	:	A.C. No. 42-01944-03502 B70
v.	:	Cottonwood Mine
OTIS ELEVATOR COMPANY, Respondent	:	

ORDER

This order addresses petitioner's motion to compel discovery on the grounds that respondent's responses to her requests were evasive, incomplete and unresponsive. Respondent has filed in opposition to petitioner's motion.

The issues presented are as follows:

I

Request for Admission No. 4: Please admit that said electrician Billy Syddall on or about February 9, 1989, was employed by Otis Elevator Company to test, maintain, repair and trouble shoot the elevator system located at the Cottonwood Mine, Emery County, Utah operated by Utah Power and Light Company.

Response: Respondent denies that Billy Syddall was an electrician. Respondent does not know what petitioner means by the term "employed" as it is used in this admission request. On February 8, 1989, Mr. Syddall found that unqualified persons including MSHA inspectors and mine electricians were operating the elevators in an unsafe manner. Respondent believes no elevator work was performed on February 9, 1989.

Discussion

In Request for Admission No. 1, Otis admitted that Billy Syddall was an "employee" of Otis but Otis now claims Syddall was not "employed" in the mine on February 9, 1989.

In view of these assertions Otis should either admit or deny request for admission No. 4.

The judge recognizes that the requests herein do not establish that Syddall was an "electrician". However, Otis' present response is inadequate.

Accordingly, petitioner's motion to compel is granted and respondent is ordered to answer Request for Admission No. 4 within 20 days of the date of this order.

II

> Request for Admission No. 5: Please admit that on or about February 9, 1989, that said Billy Syddall, an employee of Otis Elevator Company, was not a "qualified person" as that term is defined at 30 C.F.R. § 77.103.
>
> Response: Respond admits that Mr. Syddall does not carry a green mine electrician's card and nor has he taken any tests administered for mine electricians. Mr. Syddall is a highly qualified elevator mechanic and has completed all requirements to be a journeyman mechanic.

Discussion

The cited regulation, section 77.103, is an extensive regulation setting forth in what manner an individual can be a "qualified person."

The answer of respondent is not responsive. Respondent can either admit or deny that Billy Syddall is a qualified person. Since the request for admission refers to 30 C.F.R. § 77.103, respondent can cite the particular portion of the regulation respondent relies on in support of its position.

In its response Otis states that petitioner's request No. 5 is improper because it calls for an admission of law and not fact. However, Rule 33, F.R.C.P., in many instances has allowed such interrogatories as they serve a useful purpose of narrowing the issues. Wright and Miller § 2167.

Accordingly, petitioner's motion to compel is granted and respondent is ordered to answer request for admission No. 5 within 20 days of the date of this order.

III

Request for Production No. 2: Please produce for the period of February 9, 1988, to February 9, 1989, any and all service logs, work orders, time cards, repair and maintenance orders complied by Billy Syddall and performed at the Cottonwood Mine, Emery County, Utah operated by the Utah Power and Light Company on the elevator system at that mine.

Response: Respondent objects to this request on the grounds that it is ambiguous, overly broad, and seeks documents for a period of time which is not relevant to the issues in controversy. The only issue in this case concerns the events related in the citation. To the extent the request goes further it is in the nature of a fishing expedition. Beyond that, it seeks documents which may be the private property of Mr. Syddall.

Discussion

Citation No. 3416117 herein alleges electrician Billy Syddall was not qualified person. Further, his duties required testing and trouble shooting the elevator system. The citation was issued on February 9, 1989.

Petitioner's request of documents for a year prior to the date of the citation is reasonably calculated to lead to admissible evidence. The period of time for which the documents are sought is reasonable.

I am unable to see how service logs, work orders, time cards, repair and maintenance orders could be the private property of any employee.

The relevancy of the information sought is apparent. Namely, did an unqualified person perform duties at the mine. The records sought also seem to be normal records maintained in the course of any business involving a maintenance contract.

Otis states it is prepared to defend against allegations the regulation was violated on February 9, 1989, but it objects to the Secretary's "fishing expedition." As indicated above, the evidence sought may be relevant to establish a violation on February 9, 1989.

Accordingly, petitioner's motion to compel is granted and respondent is ordered to produce the documents requested in Request No. 2 within 20 days of the date of this order.

John J. Morris
Administrative Law Judge

Distribution:

Robert J. Murphy, Esq., Office of the Solicitor, U.S. Department of Labor, 1585 Federal Office Building, 1961 Stout Street, Denver, CO 80294

W. Scott Railton, Esq., Reed, Smith, Shaw & McClay, Otis Elevator Company, 1200 18th Street, N.W., Washington, D.C. 20036

/ot

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041
703-756-6232

May 21, 1990

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. SE 90-1
Petitioner	:	A.C. No. 40-02701-03532
v.	:	
	:	Goforth Mine
FAITH COAL COMPANY,	:	
Respondent	:	

ORDER DENYING REQUEST FOR CONTINUANCE OF HEARING

On May 18, 1990, the petitioner's counsel called my office and left a message requesting a continuance of the hearing scheduled in this matter in Chattanooga, Tennessee on June 7, 1990. The stated reason for the request is that counsel has to be available in another matter for depositions on June 7, 1990, and he seeks a rescheduling of the hearing to later in June or July, 1990.

The notice of hearing in this matter was mailed to the parties on March 30, 1990, and I assume that the referenced depositions were scheduled after that date. In any event, in this case, the petitioner is seeking a $54 civil penalty assessment for the alleged failure by the respondent to submit certain valid respirable dust samples. The respondent contends that the samples were taken and timely mailed. The issues do not appear to be complex, and I see no reason why the Regional Solicitor cannot assign this case to another attorney for trial. Further, I see no reason why counsel of record in this case cannot reschedule the depositions for another time.

The presiding judge's trial docket is full through the month of August, 1990, and taking into account other case assignments, this case would not be tried until the fall if it were to be continued. I simply cannot conclude that such a delay is warranted.

In view of the foregoing, the request for a continuance IS DENIED, and the hearing will proceed as scheduled.

George A. Koutras
Administrative Law Judge

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

MAY 31 1990

ARNOLD SHARP, Complainant	:	DISCRIMINATION PROCEEDING
v.	:	Docket No. KENT 89-147-D
BIG ELK CREEK COAL COMPANY, Respondent	:	PIKE CD 89-08

DECISION AND ORDER REINSTATING STAY

Appearances: Arnold Sharp, Bulan, Kentucky, pro se;
Edwin S. Hopson, Esq., Wyatt, Tarrant & Combs, Louisville, Kentucky for Respondent.

Before: Judge Melick

This Discrimination Proceeding under Section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, is before me following interlocutory review by the Commission remanding the case on May 2, 1990, for evidentiary proceedings to determine whether the Respondent's Motion for Stay should be reinstated. The history of these proceedings, as summarized by the Commission, is set forth below:

> The record developed to date indicates that, subsequent to this February 28, 1989, discharge, Sharp appeared and testified before a Commonwealth of Kentucky Department of Employment Services referee in an effort to secure unemployment compensation. Respondent's Administrative Director, Jim Meese, also testified at this hearing. Because Sharp believed Meese's testimony at that hearing to be false, he caused a criminal complaint and arrest warrant to be issued against Meese. Accordingly, on September 13, 1989, Respondent moved for a postponement of the instant action, asserting that Meese, the principal and likely only witness for Respondent in the Mine Act discrimination proceeding pending before the administrative law judge, intended to assert his Fifth Amendment privilege against self-incrimination "prevent[ing] him from testifying further as to the matters surrounding the criminal case and any collateral civil matter." Motion for Postponement at 2.

Sharp filed his opposition to the motion for postponement arguing that the criminal matter has no bearing upon the discrimination matter. Sharp requested that the then scheduled hearing before the administrative law judge go forward.

The respondent filed a reply asserting:

> ...The subject matter before the unemployment hearing factually mirrors the instant proceeding. Should Mr. Meese testify in the hearing scheduled in this discrimination proceeding before the Federal Mine Safety and Health Review Commission relative to the facts surrounding Complainant's discharge, he would waive his Fifth Amendment privilege against self-incrimination. In Re: Atterbury, 316 F.2d 106, 109 (6th Cir. 1963); Anderson v. Commonwealth, Ky. App., 554 S.W. 2d 882, 884 (1977).

On September 20, 1989, the judge issued an Order of Continuance and Stay Order:

> I find upon consideration of the circumstances that the Motion for Continuance is well-founded and that it would be in the best interests of this litigation to grant a brief continuance and stay in these proceedings pending disposition of the noted criminal proceedings. This is particularly true in this case since the criminal charges involve a claim that a witness apparently essential to this case gave a false statement in a related proceeding and that criminal case is already scheduled for trial in the near future. Order at 3.

Thereafter, on January 5, 1990, the criminal charge against Meese was dismissed. However, on January 22, 1990, the dismissal was appealed and the criminal action remains pending. Noting these occurrences and over the objections of Sharp, the administrative law judge issued a second stay order on February 2, 1990, pending" ...final disposition of the noted criminal proceedings..." Order at 1.

The evidence adduced at subsequent expedited hearings in London, Kentucky confirms the undisputed representations by counsel for Respondent in connection with his motions for continuance. Mr. Sharp in his complaint herein alleges discharge and discrimination in violation of section 105(c)(1) of the Federal Mine Safety and Health Act of 1977 (Mine Act) in retaliation for his previously successful Mine Act litigation against the Respondent. Among the acts of alleged unlawful harassment and retaliation and claimed evidence of ill-will toward him are 12 instances of purported false statements by Respondent's administrative director, James Meese. In particular, and of special relevance to this proceeding, Sharp alludes to four allegations of false swearing by Mr. Meese before the Commonwealth of Kentucky Unemployment Insurance Commission with respect to: (1) the filing of a worker's compensation claim, (2) investigation of the accident giving rise to the alleged filing of the worker's compensation claim, (3) the number of days off experienced by Arnold Sharp, and (4) the firing by the company employing the defendant of Ralph Patrick. (See Statement of Appeal, page 6-Respondent's Motion Exhibit No. 1).

The record shows that on August 11, 1989, Arnold Sharp also initiated a criminal complaint in the Kentucky courts against Meese by charging that on June 12, 1989, Meese "unlawfully made a false statement while under oath to the Commonwealth of Kentucky unemployment division". An arrest warrant was thereafter issued to Mr. Meese charging him with the offense of "false swearing" under KRS 523.040.[1]

These charges were subsequently dismissed at a preliminary hearing before a judge of the Perry County District Court and the Perry County attorney thereafter appealed that dismissal to the Perry County Circuit Court.

---

[1] KRS (Kentucky Revised Statutes) 523.040 provides as follows:

> False Swearing. - (1) A person is guilty of false swearing when he makes a false statement which he does not believe under oath required or authorized by law. (2) false swearing is a class B misdemeanor.

The crime of false swearing under Kentucky law is distinguished from perjury in that the false statement need not be material to prove the offense.See Commonwealth v. Thurman, 691 S.W. 2d 213 (Kentucky, 1985).

While the initial criminal charging documents do not set forth any specific acts of "false swearing", the Commonwealth Attorney in his brief on appeal, specified four acts of "false swearing" which had been identified to him by Mr. Sharp. They were purportedly made at a hearing before the Kentucky Unemployment Insurance Commission as follows: (1) The filing of a worker's compensation claim, (2) investigation of the accident giving rise to the alleged filing of the worker's compensation claim, (3) the number of days off experienced by Arnold Sharp, (4) the firing by the company employing the defendant of Ralph Patrick (Statement of Appeal at page 6 - Respondent's Motion Exhibit No. 1).

These alleged acts of "false swearing" are identical to four of the twelve charges of false testimony alleged by Sharp to be evidence of harassment, ill-will, and discrimination as well as evidence of an unlawful discharge under Section 105(c) of the Mine Act in this case. Such evidence would therefore be relevant and admissible in these proceedings. Mr. Sharp continues to assert that this evidence is essential to his discrimination case herein. At the hearing Sharp stated "all the issues are going to be brung [sic] up in the case because that's what they say they fired me on which he outright lied." (Tr. 32)

At the evidentiary hearing, counsel for Respondent, as he previously stated in connection with his motions for continuance, again stated that James Meese would be an essential witness and probably the only witness, for the defense against Sharp's allegations. On this issue the following colloquy occurred at the hearing:

The Court: *** What is the essence of your defense?

Mr. Hopson: Are you asking what are the facts that we intend to prove or who we would prove--

The Court: Yes, what are the facts you intend to prove.

Mr. Hopson: We intend to prove that Mr. Sharp under the absentee policy had incurred sufficient discipline, had been put on notice that his job was in jeopardy--

The Court: For what?

Mr. Hopson: For absenteeism. And had gotten to the point where he was on probation for absenteeism when he incurred a very suspicious injury for which

we sought a medical release in order to obtain medical information. He flat refused to supply that release. We were unable to get further medical information and as a result of that virtual insubordination, as well as his overall poor attendance record, he was terminated. Now, Mr. Meese is the only witness that has knowledge of those facts. He's the only one we have that can testify to those facts.

The Court: Why is that? What is his position? What are his duties and responsibilities in relation to these charges?

Mr. Hopson: He is director of administration for this company which at the time of Mr. Sharp's discharge had only 80 employees. It's not a big company. he had personnel function as well as various other administrative duties.

The Court: And it was his action and his determinations that led to Mr. Sharp's discharge?

Mr. Hopson: That's correct. He tracked the absenteeism. He, in fact, wrote Mr. Sharp the warnings, he wrote Mr. Sharp the discharge letter. (Tr. 14-16)

In addition Mr. Meese testified at the hearing that in his capacity as administrative director of Respondent, Big Elk Creek Coal Company, he oversees the administrative and personnel functions for the company. He testified that he alone was responsible for tracking employee attendance and absenteeism including Mr. Sharp's. He was the only company witness at the cited unemployment proceeding and the only person knowing the "full scope" of the case. In addition Meese was the person who made the final decision to discharge Sharp and purportedly is the only person with firsthand knowledge of all the reasons for Sharp's discharge.

The relationship between the criminal charges against Meese and the testimony needed from Meese in the defense of this case was further explored in the following colloquy:

[by Mr. Hopson] Mr. Meese, I'd like you to turn now to a document in the Exhibit which is

marked as Respondent's Exhibit 1 to this motion which is a document toward the end of the Exhibit some 10 to 15 pages from the end of the Exhibit called Statement of Appeal and it's tendered by the Perry County Attorney. Do you see that? If you would, turn to page six of that document. In the first document. In the first full paragraph of that document there are four items listed pertaining to the false swearing allegations: (a) the filing of a workers' compensation claim; (b) investigation of the accident giving rise to the alleged filing of the worker's compensation claim; (c) the number of days off experienced by Arnold Sharp; (d) the firing by the company employing the Defendant of Ralph Patrick. My question, Mr. Meese, is did the investigation of the accident giving rise to the alleged filing of the workers' compensation claim involve you? Did you do it?

[Mr. Meese] Yes.

Is that involved in your review of the facts which led to Mr. Sharp's termination?

[Mr. Meese] Yes.

And (c), the number of days off experienced by Arnold Sharp, did the number of days off experienced by Mr. Sharp play any part in the decision to terminate him?

[Mr. Meese] Yes.

And (d) the firing by the company employing Defendant and Ralph Patrick, did the question of whether Mr. Patrick was fired or he quit an issue or is it an issue in the discrimination case which is before the Commission in some way?

I'm not sure--could it be an issue?

Yes.

I'm not sure I follow the question.

Was there any question in the unemployment proceeding raised regarding unfair treatment of Mr. Sharp and whether he was singled out?

I don't recall.

The Court: Was Mr. Patrick, he was apparently fired?

Mr. Hopson: Your Honor, that's an issue in the criminal case. The contention by Mr. Sharp is that he quit. I believe the testimony in the unemployment case was that he was fired and it's related to I believe absenteeism or something. And that is one of the things that Mr. Meese is now charged with in the criminal case.

The Court: Was testifying allegedly falsely in the unemployment compensation proceeding about the basis for Mr. Patrick's separation from the company?

Mr. Hopson: That's correct.

The Court: It is maintained by Mr. Sharp that this case was not the same as his case?

Mr. Hopson: That is my understanding.

The Court: And the company apparently took the position that it was the same?

Mr. Hopson: That's my understanding, Your Honor.

The Court: I see. It would be evidence according to Mr. Sharp that he was treated differently than this other gentleman for similar circumstances?

Mr. Hopson: I believe that's correct.

The Court: All right.

Q33 Mr. Meese, if I ask you questions regarding the basis for Mr. Sharp's termination and the events which led up to that and your investigation of all that in a discrimination proceeding before the Commission before this criminal case is resolved, what would your response be?

A I've been advised by counsel to plead the Fifth Amendment, my Fifth Amendment right, until this criminal matter is cleared up. (Tr. 41-44)

This testimony is not disputed. It is apparent therefore that the factual evidence giving rise to both Sharp's allegations of Section 105(c) violations and the allegations of criminal "false swearing" initiated by Sharp

before the Kentucky Criminal Courts are intertwined and in significant respects, identical. It may also reasonably be inferred from his testimony that Meese would decline in these proceedings to answer any questions relating to the criminal charges now pending before the Kentucky courts and that he would assert his privilege against self incrimination under the Fifth Amendment to the United States Constitution.

The Fifth Amendment provides that "[n]o person ... shall be compelled in any criminal case to be a witness against himself ..." U.S. Const. Amend. V. It is well-established that this privilege is applicable to administrative proceedings. Murphy v. Waterfront Commission of New York Harbor, 378 U.S. 52 (1964); Roach v. NTSB, 804 F.2d 1147 (10th Cir. 1986) cert. denied 108 S. Ct. 1732 (1988). In order to sustain the privilege the trial judge need only determine that the implications of the question posed or the evidence demanded, considered in the setting in which it arises, might lead to injurious disclosures. Only if the incriminating effects are not evident is it proper to require some explanation from the witness of his fear of incrimination. Hoffman v. U.S., 341 U.S. 479, 486-87 (1950). Obviously it would defeat the purpose of the privilege to require the witness to disclose in explanation of the fear of prosecution the very facts about which he or she is entitled to keep silent, so the scope of the privilege is quite broad. Hoffman, supra at page 488. Specifically, the witness cannot be compelled to produce testimony which could involve the direct disclosure of guilt for past acts. Glickstein v. U.S., 222 U.S. 139 (1911).

The determination of whether the assertion of the Fifth Amendment privilege is proper ordinarily arises during trial and in fact can only, in the final analysis, be determined on a question-by-question basis. Here the issue arises in the context of a request for a stay pending final resolution of criminal charges against a key defense witness for "false swearing". On the basis of the undisputed record herein it is clear that in order to defend itself from the charges of discrimination under Section 105(c) of the Act the Respondent corporation will necessarily have to call James Meese as a witness. Indeed Respondent concedes that without Meese, it likely could not defend itself and would have to sustain a decision by default.

It is also clear from the undisputed record that questions relevant and material to this case would likely be posed to Mr. Meese at any trial on the merits and that the

potentially incriminating effects of such questions would be obvious. Hoffman, supra. It would therefore defeat the purpose of the privilege to require Mr. Meese to make further disclosure in explanation of his fear of prosecution.

In U.S. v. Wilcox, 450 F.2d 1131 (5th Cir., 1971) the Court stated, in an analagous situation, as follows:

> And so when a witness is asked a question that could show that he had already committed a crime i.e., perjury at a prior trial, his refusal to answer is permissible almost by the definition of self-incrimination. He is still criminally accountable for his perjury, but he may not be convicted out of his own mouth over his claim of privilege. Thus the aphorism that one cannot take the Fifth Amendment on the ground that if he testifies he will perjure himself applies only as an excuse for not testifying initially. It does not mean that having once testified, the Fifth Amendment is not available to avoid giving further testimony which might expose the witness to substantial risk of prosecutions growing out of the prior testimony.

See also U.S. v. Prior, 381 F. Supp. 870 (1974).

Thus it is clear that if trial on the merits of this case would proceed now before final disposition of the criminal charges against Mr. Meese, Meese would assert his privilege in response to material questions and the mine operator would be unable to fairly defend itself. There is accordingly a conflict between the interest of the Complainant in a prompt trial of his 105(c) complaint and the corporate mine operator's right to defend itself. Faced with a similar conflict the U.S. Court of Appeals, Federal Circuit in Afro-Lecon, Inc. v. U.S., 820 F.2d 1198 (Fed. Cir. 1987), applied a balancing test for determining whether a stay of the civil proceedings should be granted.[2]

---

[2] See also U.S. v. Kordel, 397 U.S. 1 (1970); K.J.F. Fabrics, Inc. v. U.S., 651 F. Supp. 1437 (Ct. Int. Trade 1986); Paul Harrigan and Sons, Inc. v. Enterprise Animal Oil Co., 14 F.R.D. 333 (E.D. Pa. 1953); and U.S. v. U.S. Currency, 626 F.2d 11 (6th Cir. 1980) in support of the proposition that a stay of a civil action in favor of a related criminal proceeding is appropriate when a corporation's employees are unable to testify in the civil proceeding because they have been charged in a related criminal action.

In Afro-Lecon, the General Services Administration Board of Contract Appeals had refused the corporation's motion for a stay of the civil appeal and required the corporation to respond to its order to compel discovery from the corporation. The corporation had sought a stay because its key witnesses such as officers, former employees, and consultants were advised by counsel not to participate in responding to the Board's order on the basis of their Fifth Amendment rights against self-incrimination. The Board, in its decision denying stay, had noted that the refusal of crucial witnesses of the corporation to testify made it impossible for the corporation to comply with the Board's previous order.

While noting that the Constitution does not require a stay of civil proceedings pending the outcome of criminal proceedings, the Court held that the Board should balance the interest of the corporation in a stay against the possible prejudice to the appellee arising from the potential loss of important evidence because of the stay. The Court noted that the corporation's interest in the stay was strong since its officers and employees claimed the Fifth Amendment. The court in Afro-Lecon, remanded to the Board for a determination of whether the corporation's plant manager could properly claim a real and appreciable risk of self-incrimination.

Similarly, the Commission has remanded this proceeding for a determination of the propriety of Meese's Fifth Amendment claim. As I have already found, Meese's risk of self-incrimination in this case is clear as is the likelihood of his assertion of the privilege at any trial on the merits. In applying the Afro-Lecon balancing test to the present case, it is clear that a further stay is warranted. As in Afro-Lecon, the corporation herein has a strong interest in staying this action until Meese's criminal charges are resolved and he is available to testify. Without Meese's testimony, it would be deprived of its right to have a meaningful opportunity to defend itself.

In balancing Sharp's interest in avoiding delay arising from a stay of this action I conclude that the Fifth Amendment privilege and the corporation's right to defend itself should take precedence. See Vardi Trading Co. v. Overseas Diamond Corp., 1987 U.S. Dist. LEXIS 8580, slip op. at 4 (S.D.N.Y. 1987) (Attached hereto as Appendix A). There is not even a suggestion that evidence would be lost as a

result of any delay. Moreover since Sharp and Meese appear to be the only material witnesses in this action, since similar evidence appears to have been preserved in transcripts from other proceedings and in other written records and since the criminal proceeding will likely entail many of the same factual issues, it is unlikely that any evidence would be lost.

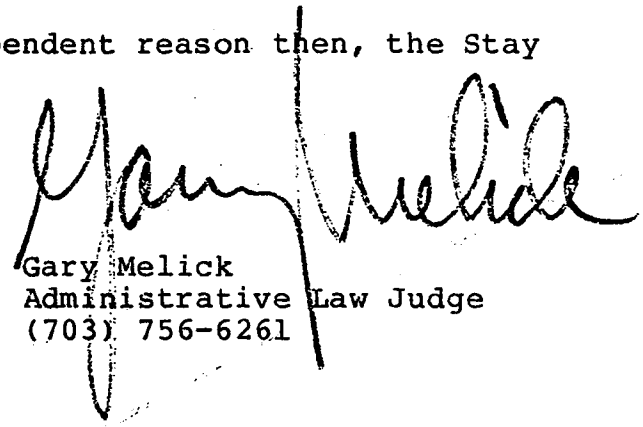
In addition, the recrod shows that Sharp has already collected unemployment benefits for at least a portion of the period of lost wages since his discharge and, if successful in this proceeding, would be entitled, with certain exclusions, to backpay with interest. It may also reasonably be inferred that Respondent would in any event appeal any adverse decision thereby delaying any final disposition. It is also significant to note in this case that it is Sharp who has initiated and pursued the criminal action giving rise to the delay herein. It would be particularly inequitable therefore to permit him to now proceed in this action while the operator cannot defend itself.

Accordingly the Stay Order previously issued in this case is hereby reinstated to remain in effect until such time as the criminal charges pending against James Meese (Case No. 90-X-001 in the Perry County Circuit Court Commonwealth of Kentucky) have become final.

There are also other compelling reasons for not immediately proceeding to trial in this case but to await final resolution of the criminal charges. Conviction of the mine operator's key witness for "false swearing" could provide significant evidence demonstrating lack of credibility. Rule 609, Federal Rules of Evidence; 33 Fed. Proc. L. Ed. Witnesses §§ 80:105 - 80:118. Indeed in some jurisdictions conviction of such an offense is so devastating to witness credibility that the witness is completely barred from even giving testimony under oath.

It is my judgment that such evidence is so potentially critical and significant to this case in light of the singular importance of the testimony of Mr. Meese, that trial on the merits of this case should in any event not proceed until final resolution of those criminal charges. As the Commission has often stated, one of the important functions of the administrative law judge is the assessment of witness credibility. See e.g., Robinette v. United Castle Coal Co., 3 FMSHRC 803 (1981); Secretary o.b.o. Bush v. Union Carbide Corp., 5 FMSHRC 993 (1983); Bjes v. Consolidation Coal Co., 6 FMSHRC 1411 (1984). It is therefore important that the trial judge independently exercise that judgment and properly consider that factor in regulating the course of the hearing.

For this additional and independent reason then, the Stay Order must be reinstated.



Gary Melick
Administrative Law Judge
(703) 756-6261

Distribution:

Mr. Arnold Sharp, General Delivery, Bulan, KY 41722 (Certified Mail)

Edwin S. Hopson, Esq., Wyatt, Tarrant & Combs, Citizens Plaza, Louisville, KY 40202 (Certified Mail)

nt

Services of Mead Data Central

14TH CASE of Level 1 printed in FULL format.

Vardi Trading Company, Plaintiff, v. Overseas Diamond Corporation and Harold Arviv, individually, Defendants

No. 85 Civ. 2240 (CSH)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

1987 U.S. Dist. LEXIS 8580

September 22, 1987, Decided; September 23, 1987, Filed

OPINIONBY: [*1]

HAIGHT

OPINION:
MEMORANDUM OPINION AND ORDER

HAIGHT, District Judge:

In this civil action based upon diversity of citizenship n1 defendants moved for an order staying the proceedings until the resolution of criminal charges pending against them in Florida arising out of the same or related commercial transactions. Plaintiff opposed the stay, and subsequently moved for summary judgment pursuant to Rule 56 F.R.Civ.P. Defendants contend that the prayed-for stay should embrace plaintiff's summary judgment motion.

n1 According to the pleadings, plaintiff Vardi Trading Company is a New York partnership maintaining its principal place of business in New York City. Defendant Overseas Diamond Corporation is a foreign corporation, maintaining its principal place of business in Miami, Florida. Defendant Harold Arviv is a citizen and resident of Toronto, Canada.

For the reasons which follow, I grant defendant's motion for a stay of these civil proceedings, and deny plaintiff's motion for summary judgment without prejudice to subsequent renewal.

I.

Plaintiff alleges that at the pertinent times it was engaged in business as an importer and wholesale distributor of precious gems. Complaint, para. [*2] 5. The complaint further alleges that "heretofore and prior to April 12, 1983" plaintiff sold quantities of rubies and sapphires to the corporate defendant, Overseas Diamond Corporation. Id., paras. 7, 8. The individual defendant, Harold Arviv, is alleged to be the principal of Overseas, and the guarantor of 90 promissory notes executed by Overseas in favor of plaintiff to pay for the gems. Id., paras. 7, 12, 21.

Plaintiff's motion for summary judgment, filed and served subsequent to defendant's motion for a stay, proceeds on the theory that plaintiff delivered the contracted-for gems to Overseas and has not been paid for them. Summary judgment is sought against Overseas on the promissory notes, and against Arviv on his guarantees.

rvices of Mead Data Central

This civil action was commenced on March 21, 1985.

On September 21, 1984 the State Attorney for Broward County, Florida filed in the Circuit Court for the Seventeenth Judicial Circuit of Florida a criminal information n2 against a number of entities and individuals. The defendants include Overseas and Arviv. In essence the defendants are charged with participating in a racketeering enterprise and over-arching fraudulent scheme referred to as "The [*3] Gemstone Enterprise." Arviv is charged with incorporating Overseas "for the purpose of supplying inferior grade gemstones" to the victims of a "boiler room" operation. The information alleges that Arviv incorporated Overseas for that illicit purpose on or about September 19, 1980. The information further alleges that "beginning on or about December 1, 1980 and continuing on or about May 31, 1983, HAROLD ARVIV and RICHARD PRICE did supply inferior grade gemstones through OVERSEAS DIAMOND CORP." to victims of the scheme. Information No. 84-10703 CFA at p. 49.

n2 So styled in the copy attached to the motion papers. Defendants call the charging instrument an "indictment."

Defendants contend, and plaintiff does not appear to dispute, that gems sold by plaintiff to overseas constitute a portion of the gems which Overseas and Arviv are accused of utilizing in violation of the Florida criminal statutes.

Arviv has given a deposition in the case at bar. However, when the questioning focused upon the true value of the gems Overseas purchased from plaintiff, Arviv asserted his fifth amendment privilege.

In these circumstances, defendants move for a stay of this litigation pending resolution [*4] of the criminal charges in Florida, and plaintiff moves for summary judgment on the promissory notes and guarantees given to secure payment for the gems it sold to Overseas.

II.

It is apparent that the true value of the gems sold by plaintiff to defendants is a central issue in both the criminal and civil cases. To convict defendants on the criminal charges, the prosecution must presumably prove that defendants knowingly and willfully sold "inferior grade gemstones" to third parties at prices in excess of their true value. On the other hand, in the civil case defendants would presumably defeat plaintiff's claim for the purchase price in the sale from plaintiff to Overseas if the proof demonstrated that the gems were of a quality inferior to that contemplated by the contract.

In any event, the issue of valuation is sufficiently intertwined among the two cases to entitle defendants to a stay of the civil proceedings. Defendants are simply not in a position to make factual averments with respect to the gems' value while the criminal charges against them are pending. Arviv's reliance upon the fifth amendment during a deposition taken on October 8, 1985, during the pendency of the criminal [*5] information, was justified. The same principle extends to defendant's resistance to plaintiff's motion for summary judgment. During the pendency of the criminal charges defendants cannot, consistent with their constitutional privilege, be required to say anything on the key issue of valuation. The fifth amendment is a privilege of broad application. "It can be asserted in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory; and it protects

against any disclosures that the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used." Kastigar v. United States, 406 U.S. 441, 444, 45 (1972) (footnotes omitted).

A stay of these civil proceedings constitutes a necessary and hence appropriate safeguard of defendants' fifth amendment privilege. Defendants cannot, consistent with that privilege, be compelled to choose between waiving it, or suffering the practical equivalent of a judgment by default in the civil case. I appreciate that the stay will result in inconvenience and delay to the plaintiff, but under settled authority the fifth amendment privilege takes precedence. See, [*6] e.g., Diemstag v. Bronsen, 49 F.R.D. 327, 328 (S.D.N.Y. 1970). The cases cited by plaintiff are factually inapposite.

Conclusion

For the foregoing reasons, and in the exercise of my discretion, I grant defendant's motion for a stay of all proceedings in the case at bar, including further discovery and resolution of plaintiff's motion for summary judgment, pending trial or other disposition of the criminal charges in Florida.

Plaintiff's motion for summary judgment is accordingly denied on the present record, without prejudice to renewal when the basis for the stay no longer exists.

Defendants' counsel are directed to advise the Court and plaintiff's counsel by letter every three months, beginning on November 1, 1987, with respect to the status of the criminal proceedings against defendants in Florida.

In the interim, the Clerk of the Court is directed to place this case upon the Suspense Docket.

It is So Ordered.