MAY 1991

COMMISSION DECISIONS

ADMINISTRATIVE LAW JUDGE DECISIONS

ADMINISTRATIVE LAW JUDGE ORDERS

MAY 1991

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

Secretary of Labor, MSHA v. Beech Fork Processing, Inc., Docket No. KENT 90-398. (Judge Broderick, April 3, 1991)

Island Creek Coal Company v. Secretary of Labor, MSHA and UMWA, Docket No. VA 91-47-R, etc. (Judge Koutras, April 3, 1991)

Secretary of Labor, MSHA v. Pigeon Branch Coal Company, Docket No. WEVA 90-266. (Default Decision of Chief Judge Merlin on January 24, 1991)

Secretary of Labor, MSHA v. Cyprus Plateau Mining Corporation, Docket No. WEST 91-44, etc. (Judge Morris, April 15, 1991)

Secretary of Labor, MSHA v. James D. McMillen, Docket No. WEVA 90-200. (Default Decision of Chief Judge Merlin on October 19, 1990)

Secretary of Labor, MSHA v. Lloyd Logging, Inc., Docket No. WEST 91-14-M. (Default Decision of Chief Judge Merlin on April 3, 1991)

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

Rochester & Pittsburgh Coal Company v. Secretary of Labor, MSHA, Docket No. PENN 88-284-R, etc. (Judge Maurer, April 1, 1991)

Ricky Hays v. Leeco, Inc., Docket No. KENT 90-59-D. (Judge Koutras, April 19, 1991)

COMMISSION DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

May 7, 1991

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket Nos. KENT 89-161-R
v.	:	KENT 89-163-R
	:	KENT 90-39
ARCH OF KENTUCKY, INC.	:	

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

DECISION

BY THE COMMISSION:

In this consolidated contest and civil penalty proceeding under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988) ("Mine Act"), the issues are whether Commission Administrative Law Judge William Fauver erred in finding that Arch of Kentucky ("Arch") violated two mandatory underground coal mine safety standards: 30 C.F.R. § 75.1725(c), requiring that repairs on machinery not be performed until the power is off, except where machinery motion is needed to make adjustments [1] and 30 C.F.R. § 75.1722(c), mandating that guards be in place when operating machinery, except when testing the machinery. [2] 12 FMSHRC 536 (March 1990)(ALJ). The Commission granted Arch's petition for discretionary review. For the reasons that follow, we affirm the judge's decision.

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[1] 30 C.F.R. § 75.1725(c) provides:

> (c) Repairs or maintenance shall not be performed on machinery until the power is off and the machinery is blocked against motion, except where machinery motion is necessary to make adjustments.

[2] 30 C.F.R. § 75.1722(c) provides:

> (c) Except when testing the machinery, guards shall be securely in place while machinery is being operated.

This case arises out of a fatal accident that occurred on April 18, 1989, at Arch's High Splint No. 2 Mine in Harlan County, Kentucky. The accident occurred when a tram chain on a continuous miner broke, throwing a connecting link approximately 12 feet through the air. The chain link hit David Funk, the maintenance foreman, in the throat and severed an artery, resulting in his death. An investigation of that accident gave rise to the two citations at issue in this proceeding.

At the time of the accident, the continuous mining machine was being repaired under the direction of Mr. Funk. He and his crew of five miners were attempting to repair the right side planetary gear box on the continuous miner. In order to remove the gear box, the planetary (pinion) shaft, which extends through the gear box had to be removed.

The planetary shaft extends through a planetary sprocket which turns the chain that propels the continuous miner. When the machine is in operation, the tram chain is normally covered by a guard but, at the time of the accident, the guard was open in order to provide access to the shaft and sprocket.

To allow repairs, the continuous miner was taken out of production, deenergized, jacked up, and properly blocked. The crew was unable to remove the planetary gear box, however, because the splines [3] of the planetary shaft were stuck on the planetary sprocket. An attempt to remove the shaft was first made by inserting a roof bolt into the end of the shaft and hitting the roof bolt with a sledge hammer to knock out the shaft. This procedure was unsuccessful. Funk then decided to try to shear the splines off the shaft by rotating the shaft back and forth using the tram motor with the sprockets and tram chain attached. He instructed the crew to stand away from the continuous miner, for what apparently he believed to be a safe distance. Funk himself stood approximately 12 feet away from the chain. In order to permit observation of the shaft, the guard was not put back in place.

Funk told the continuous miner operator to tram the motor back and forth (i.e., in forward and reverse). After approximately 15 or 20 times, the tram chain broke. A connecting link from the chain was thrown, hitting Funk's neck and severing his neck artery, causing death.

Following an investigation of the accident, the Mine Safety and Health Administration ("MSHA") issued citations to Arch charging violation of sections 75.1725(c) and 75.1722(c). The first citation alleged that repair work was performed on the continuous miner while the power was on, when the right tram motor was run in forward and reverse to strip the teeth off of the pinion shaft. The second citation alleged that the continuous miner was operated without a guard thereby exposing moving parts, the tram chain and

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[3] A spline is a groove or rib on a shaft. Bureau of Mines, U.S. Department of the Interior, A Dictionary of Mining, Mineral and Related Terms 1056 (1968).

sprockets.

Before the judge, Arch argued that it did not violate section 75.1725(c) because the regulation allows machinery motion when such motion is necessary to make adjustments to the machinery. Similarly, Arch argued that the guarding provision at section 75.1722(c) contains an exception to the guarding requirement when there is a need to observe and test the effectiveness of adjustments. Arch further argued that to deny the applicability of either of the above exceptions would deprive it of adequate notice of the meaning of the exceptions and thus would be violative of due process protections and would defeat the rulemaking requirements of the Mine Act. The Secretary argued that neither the adjustments nor the testing exception applied. She contended that Funk used an unsafe method in trying to strip the planetary shaft and that this procedure had nothing to do with "making adjustments" or "testing" equipment.

Judge Fauver sustained the violations alleged in the citations. 12 FMSHRC at 539. Specifically, the judge stated:

> The facts indicate that Mr. Funk tried to take a shortcut "which proved to be completely unsafe" (Stipulation, ¶ 13). He chose a dangerous practice that is not sanctioned either as making machine "adjustments" or as "testing" machinery within the meaning of § 75.1725(c) or § 75.1722(c). A continuous miner is not designed to shear the splines from the planetary shaft by using the torque of the tram motors. Attempting to use it for such purpose did not qualify as an "adjustment" or "testing" exception to the cited safety standards.

Id. The judge also found that Funk was "highly negligent in endangering himself and his crew by using an unsafe and highly dangerous practice." Id.

On review, Arch argues that the judge erred in finding a violation of section 75.1725(c), on grounds that the "adjustments" exception in the regulation is applicable to the facts of this case. Arch argues that Funk was using machinery motion to adjust the shaft.

Arch also argues that the judge erred in finding a violation of section 75.1722(c), because the "testing" exception in the regulation is applicable. Arch argues that its efforts to dislodge the shaft from the planetary gear was a matter of testing to see if the shaft could be dislodged in this fashion and that Funk felt it was necessary to observe the action of machine power on the shaft. Arch additionally argues that section 75.1722(c) is inapplicable because the hazard here (a part unexpectedly breaking from, and flying out of, equipment) is not the hazard that the regulation was designed to prevent, i.e., persons getting so close that they may contact moving machinery.

Arch further argues that the judge erred in deciding that the "adjustments" and "testing" exceptions were inapplicable on the basis of an

after-the-fact determination that the procedure "proved to be completely unsafe." Arch finally argues that to deny the applicability of the "adjustments" and "testing" exceptions would violate its right to due process and defeat the rulemaking requirements of the Mine Act. Arch thus takes the position that it did not have advance notice of any prohibited conduct.

I.

We first examine whether the "adjustment" exception in section 75.1725(c) applies to the facts of this case. We hold that the procedure being used by Arch was not an "adjustment" under section 75.1725(c). Accordingly, we find that the judge properly determined that Arch violated the regulation.

We agree with the judge that Funk's attempted use of the torque of the tram motor to shear the splines of the planetary shaft did not qualify as an "adjustment" under the regulation. "Adjustment" is defined as "a means ... by which things are adjusted one to another." Webster's Third New International Dictionary (Unabridged) at 27 (1986) ("Webster's"). Arch was not engaged in the activity of adjusting parts to one another. We agree with the Secretary that Funk was attempting to destroy the planetary shaft by stripping its splines and removing it altogether from the continuous miner. Even Arch does not dispute that a continuous miner is not designed to shear the splines from the planetary shaft by using the torque of the tram motor. Arch's argument that Funk's procedure was "mak[ing] adjustments" under section 75.1725(c) must be rejected.

The purpose of section 75.1725(c) is to "prevent, to the greatest extent possible, accidents in the use of [mechanical] equipment." See 38 Fed. Reg. 4976, 4977 (February 23, 1973). A safety standard should be construed to effectuate its purpose. See, e.g., Homestake Mining Co., 4 FMSHRC 146, 147-49 (February 1982). The manifest intent of the regulation is to restrict repair of machinery while the power is on. Although the power may be on "where machinery motion is necessary to make adjustments," Arch's attempted application of the exception to the facts of this case does not comport with the fundamental protective goals of the standard or of the Mine Act itself. Indeed, there is substantial evidence in the record to support the judge's finding that the procedure being used was unsafe. See MSHA's Accident Report at 5. [4] We therefore agree with the Secretary's reasonable interpretation and application of the "adjustments" exception.

We next address whether the safety standard, including the adjustment exception, provided Arch with fair notice of the conduct required. It is well settled that to afford fair notice, a mandatory safety standard cannot be "so incomplete, vague, indefinite or uncertain that [persons] of common

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[4] The parties agreed that MSHA's Accident Report correctly stated the facts of the case. Stip. 5. The Accident Report states that the accident occurred because maintenance was being performed on the continuous miner in an unsafe manner. Accident Report at 5.

intelligence must necessarily guess at its meaning and differ as to its application." Ideal Cement Company, 12 FMSHRC 2409, 2416 (November 1990), citing Alabama By-Products Corp., 4 FMSHRC 2128, 2129 (December 1982) (citations omitted). This Commission has held:

> [I]n interpreting and applying broadly worded standards, the appropriate test is not whether the operator had explicit prior notice of a specific prohibition or requirement, but whether a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the specific prohibition or requirement of the standard.

Ideal Cement Company, 12 FMSHRC at 2416. See also Alabama By-Products Corp., 4 FMSHRC at 2129, citing Voegele Co., Inc. v. OSHRC, 625 F.2d 1075 (3rd Cir. 1980). [5] Applying this test to the facts of this case, we conclude that the reasonably prudent person familiar with the mining industry would have recognized that the contemplated procedure was prohibited by section 75.1725(c). Thus, we see no due process problems stemming from Arch's asserted lack of notice. See Alabama By-Products Corp., 4 FMSHRC at 2129.

II.

We next address whether the "testing" exception in section 75.1722(c) applies to the facts of this case. We hold that the procedure being used by Arch was not "testing" as contemplated by the standard. Accordingly, we find that the judge properly determined that Arch violated section 75.1722(c).

We agree with the judge that Mr. Funk's attempts to shear the splines from the planetary shaft did not qualify as testing under section 75.1722(c). Webster's defines "test" (in its verb form) as "to examine for ... physical defect." Webster's at 2362. Arch was not examining the continuous miner for physical defects or attempting to determine if the continuous miner or its components were functioning safely. Funk knew that the planetary gear box was malfunctioning and in need of repair, and that, in order to repair it, the gear box had to be removed. He had determined that the shaft had to be removed in order to remove the gear box and that the splines of the planetary shaft were stuck on the planetary sprocket. Arch's characterization of its tramming of the motor back and forth in an effort to shear the splines and dislodge the shaft as a "test" of whether

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[5] Cf. Ryder Truck Lines, Inc. v. Brennan, 497 F.2d 230, 233 (5th Cir. 1974); Cape & Vineyard Division of the New Bedford Gas and Edison Electric Light Co. v. OSHRC, 512 F.2d 1148, 1152 (1st Cir. 1975); American Airlines v. Secretary of Labor, 578 F.2d 38, 41 (2nd Cir. 1978) (adopting similar reasonably prudent person test under the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 et seq.).

this procedure would work does not comport with the meaning of the word "test" as used in the standard. Therefore Arch's argument that Funk was "testing" must be rejected.

The purpose of section 75.1722(c) is to prevent accidents in the use of equipment. See 38 Fed. Reg., supra, at 4977. The clear language of the regulation manifests an intent to require guards to be in place while machinery is being operated. Although a guard may be open when "testing," Arch's attempt to fit the procedure being used here into that exception does not comport with the fundamental protective ends of the standard. We therefore agree with the Secretary's reasonable interpretation and application of the "testing" exception.

We next address Arch's argument that guarding standards are designed to prevent the hazard that can result when a miner gets so close to exposed moving machine parts that he may contact a moving part. Arch argues that there is no requirement designed to prevent injury resulting from a part flying out of the machine. We reject Arch's argument.

Section 75.1722(a) states that "[g]ears; sprockets; chains; ... shafts; ... and similar exposed moving machine parts which may be contacted by persons, and which may cause injury to persons shall be guarded." (emphasis added.) Arch argues that this highlighted language limits application of section 75.1722(c) to situations where "persons get so close that they may contact moving machinery." Brief at 10. Arch thus contends that there was no violation of section 75.1722(c) because in this case there was no miner-initiated contact with moving machinery parts. We disagree.

Since there were chains, sprockets and other moving parts that could be contacted by persons and cause injury, the machine parts involved here required a guard pursuant to section 75.1722(a). Because a guard was required by subsection (a), that guard was required by subsection (c) to be in place whenever the machine was in operation except when the machine was being tested. The fact that the injury was not caused by a miner initiating contact with the moving part is irrelevant.

Finally, we reject Arch's argument that the safety standard did not provide Arch with fair notice of the conduct required. The reasonably prudent person familiar with the mining industry and the protective purpose of the standard would have recognized the requirement of the standard. Thus, we conclude that Arch has not been deprived of due process under the Mine Act.

III.

Accordingly, the judge's decision is affirmed.

Richard V. Backley, Acting Chairman

Joyce A. Doyle, Commissioner

Arlene Holen, Commissioner

L. Clair Nelson, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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May 22, 1991

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket Nos. YORK 89-19-R
v.	:	YORK 89-20-R
	:	YORK 89-42
METTIKI COAL CORPORATION	:	

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

DECISION

BY THE COMMISSION:

This consolidated contest and civil penalty proceeding arises under the Federal Mine Safety & Health Act of 1977, 30 U.S.C. § 810 et seq. (1988) (the "Mine Act" or "Act"). It involves the validity of a withdrawal order and two citations issued by the Secretary of Labor to Mettiki Coal Corporation ("Mettiki") based on the improper functioning of the lockout device on the No. 34 circuit breaker ("breaker"), controlling the power to the motor for the raw coal silo conveyor belt ("No. 34 belt") of the Mettiki General Preparation Plant. The withdrawal order and citations were issued during an inspection by the Mine Safety and Health Administration ("MSHA") following MSHA's receipt of a complaint alleging that the No. 34 breaker could be turned on even if it were locked out.

Administrative Law Judge William Fauver affirmed both citations. He concluded that the violations were serious and were the result of a high degree of negligence, but that they were not of a significant and substantial nature. Mettiki Coal Co., 12 FMSHRC 722 (April 1990)(ALJ). He modified the imminent danger withdrawal order issued under section 107(a) [1]

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[1] Section 107(a) of the Mine Act provides, in pertinent part:

> If, upon any inspection or investigation of a coal or other mine which is subject to this [Act], an authorized representative of the Secretary finds that an imminent danger exists, such representative shall determine the extent of the area of such mine throughout which the danger exists, and issue an order requiring the operator of such mine to cause all persons, except those referred to in section

of the Mine Act to a failure to abate withdrawal order issued under section 104(b) [2] of the Act. Id. For the reasons set forth below, we reverse the judge's conclusion that Mettiki violated section 104(b). We affirm the violations alleged in the citations, but reverse the judge's conclusion that the violations were the result of Mettiki's gross negligence.

I.

Factual and Procedural Background

Mettiki operates a coal preparation plant in Garrett County, Maryland. The No. 34 breaker, which controls the power to the motor for the No. 34 belt, is located in a building adjacent to the raw coal silo. This breaker is on the motor control panel and is clearly marked. The handle for the breaker's switch is rectangular with a point at one end and is turned in a circular motion to one of three designated settings: on, off, or reset. The settings are clearly marked with white lettering on a red background. The handle turns within a metal collar or retaining ring, which completely encircles the handle and setting designations. This collar has a notch cut in it opposite the "off" designation. Thus, when the breaker is in the off

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> [104(c)], to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such imminent danger and the conditions or practices which caused such imminent danger no longer exist.

30 U.S.C. § 817(a).

[2] Section 104(b) provides:

> If, upon any follow-up inspection of a coal or other mine, an authorized representative of the Secretary finds (1) that a violation described in a citation issued pursuant to subsection (a) of this section has not been totally abated within the period of time as originally fixed therein or as subsequently extended, and (2) that the period of time for the abatement should not be further extended, he shall determine the extent of the area affected by the violation and shall promptly issue an order requiring the operator of such mine or his agent to immediately cause all persons, except those persons referred to in subsection (c) of this section, 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(b).

position, the blunt end of the handle is located at this notch. A slide bar is recessed inside the handle at the blunt end. When the switch is in the off position, this slide bar can be partially pulled out of the handle and through the notch. If this procedure is followed, the switch cannot be turned from the off position. The slide bar has a slot in the middle to enable a padlock to be attached, preventing anyone without a key from turning on the power.

About three years before the contested order and citations were issued, a new breaker for the No. 34 belt was installed at the same location in the existing panel. Apparently the breaker was physically smaller than the previous breaker. As a consequence, the switch handle did not protrude out of the motor control panel sufficiently to allow the slide bar to clear the notch in the collar. At that time, part of the slide bar was cut away with a hack saw so that the slide bar could be pulled through the notch and the switch could be locked out.

On November 29, 1988, MSHA received a complaint that the No. 34 breaker could be turned on while locked out. MSHA Inspector Kerry George was sent to investigate. At the time of the inspection, the preparation plant and surface belts, including the No. 34 belt, were idle for scheduled maintenance. Two miners were making mechanical repairs on the speed reducer, a type of gear box, for the No. 34 belt. When Inspector George arrived at the control panel, the No. 34 breaker was tagged out and locked out. Clarence "Ted" Bowman, the surface electrician, was asked to try to turn the breaker on with the lock in place. After the men working on the speed reducer were no longer at the belt, Bowman attempted to turn on the breaker. He could not do so on his first try. He then pushed the slide bar into the switch handle about one quarter of an inch with the lock still in place. As a result, the slide bar apparently could clear the notch in the collar and he was able to turn on the No. 34 breaker without removing the lock. Turning on the breaker did not restore power to the belt.

Inspector George issued an imminent danger withdrawal order alleging that the "main breaker for the belt drive at the raw coal silo had been modified to the point that when the breaker was locked out the lock could be bypassed." Gov. Exh. 4. The order was issued at 8:50 a.m. on November 30, 1988 and the condition was abated at 9:50 a.m. on that same day when "a new switch was installed eliminating the hazard." Id.

Inspector George issued citation No. 3110339 which charged a violation of 30 C.F.R. 77.507 [3] for the condition described in the imminent danger order ("lockout citation"). Gov. Exh. 3. Inspector George also issued

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[3] Section 77.507, entitled "Electric equipment; switches" provides:

> All electric equipment shall be provided with switches or other controls that are safely designed, constructed, and installed.

Citation No. 3110340 which charged a violation of 30 C.F.R. 77.502 [4] for not properly conducting monthly electrical examinations of the No. 34 breaker ("electrical examination citation"). Gov. Exh. 2. The citations were abated within an hour. The parties agree that both citations were abated in good faith.

In his decision, the judge concluded that "the defective lock out device did not create an imminent danger." 12 FMSHRC at 727. The judge modified the section 107(a) imminent danger order to a section 104(b) failure to abate order. The judge concluded that the "inspector could have issued a § 104(b) order withdrawing the breaker from service until the defective lock out device was corrected" because of Mettiki's failure to remove the breaker from service once the defective condition was known by the electrical examiner. Id. The judge further concluded that such a withdrawal order is "implied" because the electrical examination standard cited requires that potentially dangerous equipment be removed from service with the result that "no abatement time need be allowed in a citation for this type violation." Id.

The judge sustained the lockout citation. He concluded that the No. 34 breaker is a switch, as that term is used in the standard, that the lockout device is an integral part of the switch and that, in violation of the standard, the switch was not safely installed. 12 FMSHRC 724. He determined that Mettiki's failure to replace the lockout device constituted gross negligence since the electrical examiner knew that the switch was defective. Although he determined that the violation was not of a significant and substantial nature ("S&S"), he concluded that the violation was serious for the purpose of determining the civil penalty. 12 FMSHRC 727, 728-29.

The judge also sustained the electrical examination citation which charged a violation of section 77.502. The judge found that the electrical examiner knew that the lockout device was defective and knew that the breaker could be turned on while padlocked. 12 FMSHRC 725. He determined that the examiner's "attitude and failure to report the lock out defect and remove the breaker from service demonstrates gross negligence" and that this negligence was imputable to Mettiki. 12 FMSHRC 725-26. The judge held that the violation was not S&S but that it was serious. 12 FMSHRC 727-28.

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[4] Section 77.502 entitled "Electric equipment; examination, testing and maintenance" provides:

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

II.

Disposition of Issues

A. Section 104(b) Withdrawal order

As stated above, the judge determined that the conditions found by Inspector George did not constitute an imminent danger, but he modified the order of withdrawal to a section 104(b) order. The judge erred in so modifying the withdrawal order in this case.

First, the judge did not have the authority to modify the imminent danger order to a section 104(b) order. Inspector George did not charge Mettiki with a violation of section 104(b) of the Mine Act. That section provides, in part:

> If ... an authorized representative of the Secretary finds ... that a violation described in a citation issued pursuant to subsection (a) has not been totally abated within the period of time as originally fixed therein or as subsequently extended ... he shall determine the extent of the area affected by the violation and shall promptly issue an order requiring the operator of such mine or his agent to immediately cause all persons ... 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(b). It was the judge who made the specified findings and who, through modifications of the imminent danger order issued by Inspector George, in essence issued the section 104(b) order. Commission administrative law judges are not authorized representatives of the Secretary and do not have the legal authority to charge an operator with violations of section 104 of the Mine Act.

Sections 104(h) and 105(d) of the Mine Act authorize the Commission to modify an order issued under section 104, and section 107(e) authorizes the Commission to modify an order issued under section 107(a). The Commission has concluded that this authority "is conferred in broad terms" and that it "extends under appropriate circumstances, to modification of 104(d)(1) withdrawal orders to 104(d)(1) citations." Consolidation Coal Co., 4 FMSHRC 1791, 1794 (October 1982). In that case, the 104(d)(1) order contained the requisite special findings (unwarrantable failure and significant and substantial findings), but the underlying 104(d)(1) citation had been previously modified to a section 104(a) citation. The Commission held that the judge had the authority to modify the 104(d)(1) order to a 104(d)(1) citation so long as fair notice was provided and the operator was not unfairly prejudiced. 4 FMSHRC at 1795. The Commission emphasized, however, that the necessary special findings were contained in the order as issued so that "the judge was not adding new findings to 'create' a

104(d)(1) citation." 4 FMSHRC at 1796. Thus, allegations contained in an order of withdrawal, such as the fact of violation or special findings, survive the vacation of the order. As a consequence, modification of an order is the appropriate means of assuring that such allegations do survive. 4 FMSHRC at 1794 n. 9; Southern Ohio Coal Co., 10 FMSHRC 138, 143-44 (February 1988).

In this case, modification is not appropriate because the judge added new findings to "create" a 104(b) order. The findings necessary to establish an imminent danger are quite different from the findings to establish a 104(b) order. As discussed below, the allegations contained in Inspector George's order that survived the judge's determination that no imminent danger existed do not support a violation of section 104(b). Thus, the judge's modification was beyond the authority conferred on him under sections 104(h), 105(d), and 107(e) of the Mine Act.

The modification was also improper for a second, independent reason. The facts in this case do not support the issuance of a section 104(b) order. Before a 104(b) order can be issued, an inspector must find that the violation described in the underlying citation "has not been totally abated within the period of time originally fixed therein or as subsequently extended." Inspector George did not set a time for abatement for the citations, the citations were abated within one hour of their issuance, and the parties stipulated that the citations were abated in good faith. Exhs. G-2, G-3; Tr. 5.

In addition, the Commission has held that in order to establish a prima facie case that a section 104(b) order is valid, the Secretary must prove that "the violation described in the underlying section 104(a) citation existed at the time the section 104(b) withdrawal order was issued." Mid-Continent Resources, Inc., 11 FMSHRC 505, 509 (April 1989). Here, the citations were quickly abated so that neither the Secretary nor the judge could have made these findings.

The judge concludes that no abatement time was required in a citation for this type of violation. But even assuming that the inspector could have issued a 104(b) order, he did not and the facts do not demonstrate that such an order can be implied. Moreover, it is not disputed that the violations were abated within an hour and that Mettiki "demonstrated good faith ... in attempting to achieve rapid compliance after notification of [the] violation." 30 U.S.C. § 820(i).

For the reasons set forth above, the judge's modification of the withdrawal order issued by Inspector George is reversed and the order of withdrawal is vacated.

B. Lockout Citation

As a preliminary matter, it is important to recognize that Mettiki was not required to have the No. 34 breaker locked out at the time of Inspector George's inspection. The Secretary's surface electrical standards, Subpart F-J of Part 77 of 30 C.F.R. (sections 77.500-77.906), contain only one

standard requiring the use of lockout devices. Section 77.501 provides in pertinent part that "[d]isconnecting devices shall be locked out and suitably tagged" by persons performing "electrical work ... on electric distribution circuits or equipment."

Electrical work was not in progress at the time of MSHA's inspection. Two miners were making non-electrical repairs to the speed reducer [5] for the No. 34 belt at the time of the inspection. Mechanical repairs are covered by section 77.404(c), which provides, in pertinent part, that "[r]epairs or maintenance shall not be performed on machinery until the power is off and the machinery is blocked against motion." A lock out of the equipment or circuit is not required. Thus, when mechanical repairs are being made to mechanical equipment and there is no danger of contacting exposed energized electrical parts, MSHA requires only that the power be turned off and the machinery be blocked against motion.

We now turn to our analysis of the safety standard cited by the inspector. Section 77.507 provides that "[a]ll electric equipment shall be provided with switches or other controls that are safely designed, constructed, and installed." This regulation is exactly the same as the interim mandatory standard enacted by Congress in section 305(o) of the Mine Act. 30 U.S.C. § 865(o). The legislative history of the interim mandatory standard states:

> This section requires that electric equipment be provided with switches or other safe control[s] so that the equipment can be safely started, stopped, and operated without danger of shock, fire, or faulty operation.

S. Rep. No. 411, 91st Cong., 1st Sess. 68, 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 194 (1975) ("Coal Act Legis. Hist.").

In the Program Policy Manual ("Manual"), the Secretary states:

> The intent of this section [77.507] is to require that all control devices be fully enclosed to prevent exposure of bare wires and energized parts. Improvised starting methods such as plug and receptable devices, trolley taps and trolley wire "stingers" that are used to start or stop electric

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[5] A speed reducer is a "train of gears, totally enclosed for mine work, placed between a motor and the machinery which it will drive, to reduce the speed with which power is transmitted." Bureau of Mines, U.S. Department of Interior, Dictionary of Mining, Mineral and Related Terms, 1052 (1968). A speed reducer is not electric equipment, thus the use of the word "power" in this definition refers to mechanical power.

motors are examples of noncompliance with this provision.

Manual, Volume V, Part 77, p. 176. [6]

The judge concluded that Mettiki violated the safety standard because the "lock out device on the No. 34 breaker was not safely installed in that it did not prevent turning the breaker on when it was padlocked." 12 FMSHRC at 724. He stated that this condition presented a safety hazard in violation of section 77.507.

The citation was not issued by the inspector or affirmed by the judge on the basis that the breaker was not locked out, but rather because the lockout device did not work. Mettiki argues that the lockout device is not a "switch or other control" because the cited slide bar was a mechanical device with no electrical function. As a consequence, it maintains that section 77.507 did not apply to the malfunctioning slide bar lockout device.

The judge did not hold that the slide bar is a switch but that the lockout device "is an integral part of the switch, essential to control the switch when locking out is required by a safety regulation." 12 FMSHRC 724. The Secretary's interpretation of the term "switch" to include safety components that do not directly control the flow of electricity advances the goals of the Mine Act and is not inconsistent with its plain language. We give weight to the Secretary's interpretation of the standard in this case because it is reasonable, consistent with the purposes of the Mine Act and is supported by substantial evidence. [7] We conclude that the term switch includes the slide bar lockout device.

The next issue is whether Mettiki violated the cited standard. Mettiki argues that this safety standard is designed to protect miners from the hazards associated with an electrically defective switch. It points to the Senate Report, which states that the standard requires that equipment be provided with switches "so that the equipment can be safely started,

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[6] The title page of the Manual states that the "MSHA Program Policy Manual is a compilation of the Agency's policies on the implementation and enforcement of the Federal Mine Safety and Health Act of 1977 and Title 30 Code of Federal Regulations and supporting programs." The D.C. Circuit has stated that while the Manual may not be binding on the agency, "[w]e consider the MSHA Manual to be an accurate guide to current MSHA policies and practices." Coal Employment Project v. Dole, 889 F.2d 1127, 1130 n.5 (D.C. Cir. 1989).

[7] The legislative history of the Mine Act provides that "the Secretary's interpretation of the law and regulations shall be given weight by both the Commission and the courts." S. Rep. No. 181, 95th Cong., 1st Sess. 49 (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 637 (1978).

stopped, and operated without danger of shock, fire, or faulty operation." Coal Act Legis. Hist. at 194. It maintains that it is undisputed that the switch could be turned on and off safely without presenting any danger of shock, fire or faulty operations. It further argues that since the Secretary's regulations do not require that a breaker be equipped with a lockout device and the failure to have such a device would not violate section 77.507, then having a modified lockout device cannot be deemed to violate the safety standard. Finally, it contends that the Secretary's Manual supports its interpretation because the Manual states that the "intent" of the standard is to require that all switches be fully enclosed to prevent exposure of energized parts and to prevent the use of improvised starting methods.

The Secretary argues that because the standard requires that switches be safely installed, the improper and unsafe installation of the No. 34 breaker violated the standard. She contends that the No. 34 breaker was not "safely installed" in violation of section 77.507 because the modification that was made to the slide bar "negated the operation of the safety device." Sec. Br. 7. She states further that the Manual is only a guide for inspectors and does not discuss every hazard to which the standard applies.

The word "install" means "to set up for use or service." Webster's Third International Dictionary (Unabridged) at 1171 (1986). The No. 34 breaker was installed by physically attaching it to the panel and connecting the electrical conductors. Part of the installation included, in this instance, modifying the lockout device. Mettiki states that it was safely installed because, as an electrical device, it worked as it was designed. The Secretary maintains that it was not safely installed because the lockout device on the switch did not function as it was designed.

Section 77.501 requires that electric equipment be locked out whenever electrical work is performed. Lockout devices are essential to comply with the standard. Thus, switches to be used to lock out electric equipment must be equipped with functioning lockout devices so that the required lockout can be undertaken. It is not unreasonable for MSHA to be concerned about defective lockout devices on electric circuits because miners' lives are at risk. It is also not unreasonable for the Secretary to interpret section 77.507 to require that pertinent switches be installed with functioning lockout devices.

Mettiki argues, however, that the standard is unenforceably vague as applied to the facts of this case, because it was not given fair warning of the conduct required. In instances of broadly worded standards, the Commission has determined that adequate notice is provided if the conduct at issue is measured against what a "reasonably prudent person, familiar with the mining industry and the protective purpose of the standard, would have provided in order to meet the protection intended by the standard." See, e.g., Canon Coal Co., 9 FMSHRC 667, 668 (April 1987); Quinland Coals, Inc., 9 FMSHRC 1614, 1617-18 (September 1987). A standard cannot be "so incomplete, vague, indefinite or uncertain that [persons] of common intelligence must necessarily guess at its meaning and differ as to its application." Alabama By-Products Corp., 4 FMSHRC 2128, 2129 (December

1982)(citation omitted). In interpreting and applying broadly worded standards, the appropriate test is not whether the operator had explicit prior notice of a specific prohibition or requirement, but whether a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the specific prohibition or requirement of the standard. Ideal Cement Company, 12 FMSHRC 2409, 2416 (November 1990).

Mine operators, including Mettiki, are on notice that electric circuits and equipment must be locked out whenever electrical work is performed. Operators are also on notice that electric equipment must be equipped with safely installed switches. In addition, operators should know that switches used to lock out circuits and equipment must be installed with lockout devices that function properly. A reasonably prudent person would have recognized that the standard required that the No. 34 breaker, a switch used by Mettiki to lock out the belt motor circuit, be equipped with a functioning lockout device and that the improperly installed lockout device on the switch was in violation of section 77.507.

Mettiki had designated the No. 34 breaker as the "disconnecting device" to be locked out when required by section 77.501. It is clear that the device was defective. Consequently, a reasonably prudent person would be put on notice that the protective purpose of the standard required that the defective lockout device be replaced or repaired.

We now turn to the question of whether the violation was caused by Mettiki's gross negligence. The judge reached the following conclusion with respect to Mettiki's negligence:

> The surface electrician, who was also the electrical examiner, was responsible for the safety of this equipment. He knew about the defect but did not repair it. His continued failure to replace the lock out device constituted gross negligence, in violation of § 77.507.

12 FMSHRC at 724.

Bowman is the hourly employee who was assigned to conduct the monthly electrical inspections. He knew that the slide bar of the switch had been modified, but it is difficult to determine from the record when he first became aware that this modification could allow the lockout device to be bypassed. His testimony is ambiguous. There is evidence in the record to support a finding that, at the time the citation was issued, he did not know that the lockout device could be bypassed and there is evidence to support the finding made by the judge.

The Commission is bound by the substantial evidence test when reviewing an administrative law judge's decision. 30 U.S.C. § 823(d)(2)(A)(ii)(I). Donald F. Denu v. Amax Coal Co., 12 FMSHRC 602, 610 (April 1990). Substantial evidence means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Consolidation

Edison Co. v. NLRB, 305 U.S. 197, 229 (1938). Nevertheless, "substantiality of evidence must take into account whatever in the record fairly detracts from its weight." Universal Camera v. NLRB, 340 U.S. 474, 488 (1951).

We conclude that substantial evidence supports the judge's conclusion that Bowman knew the lockout device could be defeated. It appears from his testimony that while he knew the lockout device could be defeated, he did not believe that this defect created a safety hazard because turning on the breaker would not energize the system. The record establishes that "many independent actions would be required to cause injury due to the defective lock out device." 12 FMSHRC 726. The judge concluded that such independent actions would include "1) ignoring the warning tag and padlock; 2) turning the breaker on; 3) reactivating the emergency pull cord on No. 34 belt; 4) starting the two outby belts in order to start No. 34 belt; and 5) ignoring the sirens that would sound before a belt is started." 12 FMSHRC 727. In addition, Bowman stated that nobody would turn on a breaker with a lock and danger tag on it unless "they mean to do you some harm to start with." Tr. 114, 125. Thus, the record indicates that Bowman knew that a miner could purposefully bypass the lockout device on the breaker, but that he did not report it because he did not think it would cause any safety problems.

The Commission has not precisely defined what constitutes ordinary, high or gross negligence. Typical definitions of gross negligence include: "the intentional failure to perform a manifest duty in reckless disregard of the consequences;" "an act or omission respecting legal duty of an aggravated character as distinguished from a mere failure to exercise ordinary care;" "indifference to present legal duty and to utter forgetfulness of legal obligations;" and "a heedless and palpable violation of legal duty." Black's Law Dictionary (5th ed), 931-32 (1979). In Eastern Associated Coal Corp., 13 FMSHRC 178, 187 (February 1991), the Commission stated:

> "Highly negligent" conduct involves more than ordinary negligence and would appear, on its face, to suggest unwarrantable failure. Thus, if an operator has acted in a highly negligent manner with respect to a violation, that suggests an aggravated lack of care that is more than ordinary negligence.

The facts in this case do not present highly negligent conduct or gross negligence. Mettiki modified the slide bar on the switch in order to enable the breaker to be locked out. It required the breaker to be locked out whenever work was being performed on the belt even though the Secretary only requires a lock out when electrical work is being performed. A number of independent steps are required to energize the No. 34 belt, including the resetting of the emergency pull cord at the belt. The modified lockout device functioned, in that a lock could be placed on the device to lock it out. The lockout device could be purposefully defeated, however, by jiggling the device while turning the switch.

The electrical examiner knew that the device could be defeated, but

apparently he believed that nobody else knew it. He also knew that turning on the breaker would not energize the circuit because other miners are required to take independent actions at other locations to energize the system.

The record does not indicate that any electrical work requiring the switch to be locked out was performed on the circuit during the period of time that the modified lockout device was in place. The Secretary did not attempt to prove that Mettiki relied upon the modified lockout device to comply with the lockout requirements of section 77.501. Thus, as far as the record before us discloses, the modified lockout device was used only in situations where there was no legal duty to lock out the circuit. Although the Secretary was not required to prove a violation of section 77.501 in order to establish a violation in this case, the fact that she did not show that Mettiki relied upon the defective lockout device to fulfill its obligations under the Mine Act is a factor to be considered when determining the degree of negligence.

Moreover, the language of section 77.507, when read together with the Secretary's interpretation in the Manual, "made it difficult and confusing for a reasonable operator to know the true standard of care imposed by [section 77.507], and, hence, whether it was in a state of violation or compliance." King Knob Coal Co., 6 FMSHRC 1417, 1422 (June 1981). The Manual states that the intent of the standard is to require that switches be enclosed "to prevent exposure of bare wires and energized parts." Manual, Volume V, Part 77, p. 176. Although Mettiki did not show actual reliance on the Manual, "confusion caused by the Manual interfered with [Mettiki's] ability to ascertain the true standard of care and therefore placed it in a position where it could have believed it was in compliance." King Knob, 6 FMSHRC at 1422. Thus, even though Bowman knew that the lockout device could be defeated, he could have reasonably believed that the defect was not out of compliance with the safety standard or the Mine Act. Penalizing Mettiki with a finding of gross negligence for confusion caused by MSHA would be "unfair and harsh." Id.

We conclude that the violation of section 77.507 was caused by Mettiki's ordinary negligence. Mettiki was negligent in failing to test the lockout device at the time the new breaker was installed to determine if it functioned properly. In addition, Bowman was negligent in failing to report the defect to Mettiki and in failing to replace or repair the breaker after he discovered the defect.

Based on the above considerations, we vacate the judge's gross negligence finding and remand the proceeding to the judge to assess an appropriate penalty.

C. Electrical Examination Citation

Mettiki did not properly seek review of the judge's holding that it violated the requirements of section 77.502. Citation No. 3110340 alleges that the monthly electrical examinations were not being conducted properly because the examiner did not report that the lockout device could be

bypassed. The judge upheld the citation.

In its petition for discretionary review, Mettiki seeks review of that portion of the judge's decision "modifying the operator's negligence from moderate to high with respect to § 104(a) Citation No. 3110340." PDR at pg. 1. The petition does not elsewhere seek review of the judge's determination that Mettiki violated section 77.502. Review by the Commission is limited to issues raised by the petition for discretionary review, 30 U.S.C. § 823(d)(2)(A)(iii), or directed for review by the Commission on its own motion, 30 U.S.C. § 823(d)(2)(B). Consequently, this issue is not before the Commission. See Odell Maggard v. Chaney Creek Coal Co., 9 FMSHRC 1314, 1315 n.2 (August 1987).

With respect to Mettiki's negligence, the judge held that "Mr. Bowman's attitude and failure to report the lock out defect and remove the breaker from service demonstrates gross negligence, in violation of § 77.502." 12 FMSHRC at 725. The judge's finding of negligence is based on his finding that Bowman knew about the defect and his belief that Bowman's actual knowledge established gross negligence. For the reasons discussed with respect to the lockout citation, the judge's conclusion that the violation was caused by Mettiki's gross negligence is reversed. Given the fact that Bowman could have reasonably believed that the modification made to the lockout device did not violate section 77.507, his failure to report the defect does not constitute gross negligence. King Knob, 6 FMSHRC at 1422. We conclude that Bowman's failure to report the defect and remove it from service was thus the result of his ordinary negligence.

The judge further held that Bowman's negligence could be imputed to Mettiki, because he was Mettiki's "designated person to conduct electrical examinations of surface electrical equipment." 12 FMSHRC at 726. Mettiki argues that the judge erred as a matter of law. For the reasons set forth in Rochester & Pittsburgh Coal Co., 13 FMSHRC 189 (February 1991), the judge's conclusion that Bowman's negligence is imputable to Mettiki is affirmed. Consequently, we vacate the judge's gross negligence finding and remand the proceeding to the judge to assess an appropriate penalty.

(D) Civil Penalty.

Mettiki asserts that the judge did not properly consider the six statutory criteria set forth in section 110(i) when he assessed the civil penalties. Specifically, it alleges that he ignored the fact that the parties stipulated that both violations were abated in good faith and that he erroneously determined that the violations were the result of its gross negligence.

The judge did not discuss the good faith criterion of section 110(i) in assessing the civil penalties. 30 U.S.C. § 820(i). In modifying the imminent danger order to a failure to abate order, the judge apparently determined that the violations were not abated in good faith. The parties stipulated that the violations were abated in good faith. Tr. 5; Sec. Br. to Judge at 2. The evidence supports the stipulation.

Section 110(i) requires the Commission to consider all six criteria set forth in that section "in assessing civil monetary penalties." 30 U.S.C. § 820(i). See, Pyro Mining Co. v. FMSHRC, 3 BNA MSHC 2057, 2059, 785 F.2d 310 (Table) (6th Cir. 1986); Sellersburg Stone Co. v. FMSHRC, 736 F.2d 1147, 1152-53 (7th Cir. 1984). The judge erred in failing to consider and enter findings with respect to the good faith criterion. We conclude that Mettiki abated both violations in good faith. We remand this proceeding to the judge to assess appropriate civil penalties.

III.

Conclusion

For the foregoing reasons, we reverse the judge's conclusion that Mettiki violated section 104(b) of the Mine Act and we vacate the order of withdrawal. We affirm the judge's determination that Mettiki violated section 77.507, but we reverse his gross negligence finding. We also reverse the judge's finding that Mettiki's violation of section 77.502 was the result of its gross negligence. We hold that both violations were the result of Mettiki's ordinary negligence and that Mettiki abated these violations in good faith. Accordingly, we remand this proceeding for reconsideration of appropriate civil penalties.

Richard V. Backley, Acting Chairman

Joyce A. Doyle, Commissioner

Arlene Holen, Commissioner

L. Clair Nelson, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

May 23, 1991

FLORENCE MINING COMPANY	:	
	:	
v.	:	Docket Nos. PENN 91-347-R
	:	through
SECRETARY OF LABOR,	:	PENN 91-432-R
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
and	:	
	:	
HELVETIA COAL COMPANY	:	
	:	
v.	:	Docket Nos. PENN 91-226-R
	:	through
SECRETARY OF LABOR,	:	PENN 91-346-R
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
and	:	
	:	
KEYSTONE COAL MINING	:	
CORPORATION	:	
	:	
v.	:	Docket Nos. PENN 91-451-R
	:	through
SECRETARY OF LABOR,	:	PENN 91-626-R
MINE SAFETY AND HEALTH	:	PENN 91-644-R
ADMINISTRATION (MSHA)	:	through
	:	PENN 91-701-R
and	:	
	:	
ROCHESTER AND PITTSBURGH	:	
COAL COMPANY	:	
	:	
v.	:	Docket Nos. PENN 91-627-R
	:	through
SECRETARY OF LABOR,	:	PENN 91-638-R
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
and	:	
	:	
CYPRUS EMPIRE CORPORATION	:	
	:	
v.	:	Docket No. WEST 91-327-R
	:	
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	

and	:	
	:	
TWENTYMILE COAL COMPANY	:	
	:	
v.	:	Docket Nos. WEST 91-328-R through WEST 91-334-R
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	
and	:	
	:	
CYPRUS SHOSHONE COAL CORPORATION	:	
	:	
v.	:	Docket No. WEST 91-335-R
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	
and	:	
	:	
CYPRUS-PLATEAU MINING CORPORATION	:	
	:	
v.	:	Docket Nos. WEST 91-336-R through WEST 91-346-R
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	

ORDER

On May 9, 1991, counsel for the Secretary of Labor filed with the Commission a Petition for Interlocutory Review in the above matters. See 29 C.F.R. § 2700.74. The Secretary has subsequently filed a Motion to Dismiss her Petition. As grounds for approval of voluntary dismissal, the Secretary indicates that the Commission Administrative Law Judge to whom these matters have recently been assigned has issued an Order Staying Discovery that "essentially grants the Secretary the relief" sought in her Petition. S. Mot. at 2. Upon consideration of the Secretary's request to withdraw her Petition, it is granted and this interlocutory proceeding on review is dismissed.

For the Commission:

Richard V. Backley
Acting Chairman

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

May 23, 1991

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. WEVA 90-200-M
JAMES D. McMILLEN, Employed by Shillelagh Mining Company	:	

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

ORDER

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988)("Mine Act" or "Act"). The case involves the Secretary of Labor's allegations, pursuant to section 110(c) of the Mine Act, 30 U.S.C. § 820(c), that James D. McMillen, as an agent of the corporate mine operator, Shillelagh Mining Company ("Shillelagh"), knowingly authorized or carried out nine violations of mandatory standards at the Shillelagh mine. On October 19, 1990, Commission Chief Administrative Law Judge Paul Merlin entered an Order of Default against Mr. McMillen for failure to answer the Secretary's Petition for Assessment of Civil Penalty and the judge's Order to Show Cause. The judge assessed the civil penalty of $6,000 proposed by the Secretary. The Commission has received a letter from McMillen's counsel requesting reopening of this matter. For the reasons that follow, we vacate the default order and remand this case for further proceedings.

On May 30 and June 1, 1989, the Department of Labor's Mine Safety and Health Act ("MSHA") issued one citation and eight withdrawal orders to Shillelagh, pursuant to section 104(d) of the Act, 30 U.S.C. § 814(d), for nine alleged violations of mandatory standards at its mine, one involving a fatal roof fall accident. On April 30, 1990, MSHA issued McMillen a notification of a proposed civil penalty of $6,000 for the nine violations, alleging that, as Shillelagh's agent, he had personally authorized or carried out the violations. McMillen filed a "Blue Card" request for a hearing. However, he did not file an answer to the Secretary's subsequent civil penalty petition, nor did he respond to the judge's August 3, 1990 Order to Show Cause.

On May 6, 1991, some six months after the judge's default order, the Commission received from McMillen's counsel a letter seeking the reopening of this matter. Counsel requests that the Commission treat the letter as a petition for discretionary review. The letter indicates a number of serious personal problems that allegedly led to McMillen's failure to file timely responsive pleadings in this matter and requests relief from default.

The judge's jurisdiction in this matter terminated when his default order was issued on October 19, 1990. 29 C.F.R. § 2700.65(c). McMillen did not file a timely petition for discretionary review of the judge's decision within the 30-day period prescribed by the Mine Act. 30 U.S.C. § 823(d)(2)(A)(i); see also 29 C.F.R. § 2700.70(a). Nor did the Commission direct review on its own motion within this 30-day period. 30 U.S.C. § 823(d)(2)(B). Thus, under the Act, the judge's decision became a final decision of the Commission 40 days after its issuance. 30 U.S.C. § 823(d)(1). Under these circumstances, we deem McMillen's submission to be a request for relief from a final Commission order, incorporating a late-filed petition for discretionary review. See, e.g., Transit Mixed Concrete Co., 13 FMSHRC 175, 176 (February 1991). We conclude that the record supports the reopening of this matter, and we proceed to consider McMillen's request for substantive relief.

Relief from a final Commission judgment on the basis of mistake, inadvertence, surprise, or excusable neglect is available to a party under Fed. R. Civ. P. 60(b)(1) & (6). 29 C.F.R. § 2700.1(b) (Federal Rules of Civil Procedure apply, "so far as practicable" and "as appropriate," in absence of applicable Commission rules). In appropriate circumstances, a party's personal problems may form the basis for relief under Rule 60(b). Here, it is asserted that McMillen's serious personal problems adversely affected his ability to comply with his filing responsibilities in this matter. It appears that for a period of time in this matter McMillen also may have proceeded without benefit of counsel. The filing delay is serious but we are mindful of the consideration that this is a section 110(c) proceeding involving the proposed assessment of civil penalties against McMillen personally.

We conclude that McMillen may have set forth a colorable excuse for his failure to respond in a timely manner to the Secretary's civil penalty petition and the judge's Order to Show Cause. We are unable to evaluate the ultimate merits of McMillen's assertions on the basis of the present record, but will permit McMillen to present his position to the judge, who shall determine whether final relief from the default order is warranted. See, e.g., A.H. Smith Stone Co., 11 FMSHRC 2146, 2147 (November 1989).

Accordingly, we grant the Petition for Discretionary Review, vacate the default order, and remand this matter for proceedings consistent with this order.

Richard V. Backley, Acting Chairman

Joyce A. Doyle, Commissioner

Arlene Holen, Commissioner

L. Clair Nelson, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

May 29, 1991

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. WEST 91-14-M
LLOYD LOGGING, INC.	:	

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

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. (1988)("Mine Act"). On April 3, 1991, Commission Chief Administrative Law Judge Paul Merlin issued an Order of Default finding respondent Lloyd Logging, Inc. ("Lloyd") in default for failure to answer the Secretary of Labor's civil penalty proposal and the judge's order to show cause. The judge assessed Lloyd the civil penalty of $1,411 proposed by the Secretary. For the reasons explained below, we vacate the judge's default order and remand for further proceedings.

An inspector of the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Lloyd 14 citations alleging violations of various safety regulations. Upon preliminary notification by MSHA of the civil penalties proposed for these alleged violations, Lloyd filed a "Blue Card" request for a hearing before this independent Commission. On November 15, 1990, counsel for the Secretary filed a proposal for penalty assessment. When no answer to the penalty proposal was filed, Judge Merlin issued an order to show cause on January 17, 1991. No response was received. On April 3, 1991, the judge issued an order finding Lloyd in default for failure to answer the Secretary's civil penalty proposal and his show cause order.

By letter to Judge Merlin, filed April 18, 1991, Lloyd states that it understood the case to have been settled in December 1990. Lloyd attaches a letter from the Secretary, dated November 27, 1990, which proposed settlement of the case for a total of $837 in penalties, striking one citation, and indicating a willingness on the part of the Secretary to prepare the necessary documents for submission to the judge to request settlement approval. Lloyd also attaches a letter dated December 7, 1990, indicating its acceptance of the proposal and requesting the Secretary to proceed with the necessary documents. On May 13, 1991, the Secretary filed

with Judge Merlin a letter stating that a misunderstanding had occurred when the parties reached settlement. The Secretary states her belief that Lloyd had concluded that the Secretary would take care of any necessary filings for settlement approval. The Secretary requests that Lloyd be given an opportunity to proceed in this case and that the order of default be vacated.

The judge's jurisdiction in this proceeding terminated when his default order was issued on April 3, 1991. 29 C.F.R. § 2700.65(c). Due to clerical inadvertence, the Commission did not act on Lloyd's April 18 papers within the required statutory period for considering requests for discretionary review and the judge's decision became a final decision of the Commission 40 days after its issuance. 30 U.S.C. § 823(d)(1). We conclude that the record supports reopening of this matter, and we proceed to consider the parties' requests for substantive relief.

Relief from a final Commission judgment or order on the basis of inadvertence, mistake, surprise or excusable neglect is available to a party under Fed. R. Civ. P. 60(b)(1) & (6). 29 C.F.R. § 2700.1(b)(Federal Rules of Civil Procedure apply, "so far as practicable" and "as appropriate," in absence of applicable Commission rules). See, e.g., Danny Johnson v. Lamar Mining Co., 10 FMSHRC 506, 508 (April 1988). Lloyd and the Secretary agree that the parties reached settlement of this matter prior to issuance of the judge's default order, and that Lloyd's default resulted from his belief that the Secretary was to file the necessary settlement approval papers. We conclude that this matter should be remanded to the judge, in order to afford the parties the opportunity to present their settlement to him for his review. See, e.g., Transit Mixed Concrete Company, 13 FMSHRC 175 (February 1991).

For the foregoing reasons, we vacate the judge's default order and remand this matter to the judge for appropriate proceedings.

Richard V. Backley, Acting Chairman

Joyce A. Doyle, Commissioner

Arlene Holen, Commissioner

L. Clair Nelson, Commissioner

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 1 1991

SOUTHERN OHIO COAL COMPANY, Contestant	:	CONTEST PROCEEDING
v.	:	Docket No. WEVA 90-287-R
	:	Order No. 3111174; 7/10/90
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Martinka No. 1 Mine

DECISION

Appearances: Rebecca J. Zuleski, Esq., FURBEE, AMOS, WEBB & CRITCHFIELD, Morgantown, West Virginia, for the Contestant;
Glenn M. Loos, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for the Respondent.

Before: Judge Koutras

Statement of the Case

This proceeding concerns a Notice of Contest filed by the contestant pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, challenging the legality of section 104(b) Order No. 3111174, issued by an MSHA inspector at the captioned mine on July 10, 1990. A hearing was held in Morgantown, West Virginia, on March 21, 1991, and the parties appeared and participated fully there. They were also afforded an opportunity to file posthearing briefs.

Issue

The principal issue in this case is whether or not the contested order was properly issued and whether or not the inspector acted reasonably in not extending the abatement time.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq.

2. Section 104(b) of the Act, 30 U.S.C. § 814(b).

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

Stipulations

The parties stipulated to the following (Exhibits ALJ-1 and ALJ-2):

1. Southern Ohio Coal Company is owner and operator of the Martinka Mine which is the subject of this proceeding.

2. Operations of the Martinka Mine are subject to the Mine, Safety and Health Act of 1977, as amended, 30 U.S.C. § 801 et seq.

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

4. The Federal Mine Safety and Health Inspector Charlie Thomas was acting in his official capacity when he issued Citation Number 3306619 and its modifications.

5. A true copy of Citation Number 3306619 and its modifications were served upon the Mine Operator or its agent as required by the Act.

6. Federal Mine Safety and Health Inspector Frank Bowers was acting in his official capacity when he issued Order Number 3111174 to Martinka Mine on July 10, 1990.

7. A true copy of Order Number 3111174 was served upon the Mine Operator and/or its agent as required by the Act.

8. The parties are in agreement that the issue to be established at the hearing is if a safety and/or health hazard was present due to the condition of the steel spool(s)/drum(s) on the Bucyrus-Erie dragline, Model Number 30-B, Serial Number H.D. 125739, owned by Bunner Construction Company and leased to Southern Ohio Coal Company-Martinka Mine. In light of said decision regarding said issue, if the Section 104(b), Order Number 3111174 was properly or improperly issued by MSHA Inspector Frank Bowers to Southern Ohio Coal Company-Martinka Mine on July 10, 1990.

Discussion

On June 11, 1990, MSHA Inspector Charles Thomas issued a section 104(a) "S&S" Citation No. 3306619, charging the contestant with an alleged violation of mandatory safety standard 30 C.F.R. § 77.404. The cited condition or practice is described as follows:

> On the surface the Bucyrus Erie dragline has two (2) cable (wire rope) spools cut into with a cutting torch. The wire rope for the left spool has a mashed place with severed wires and a cable strand of wire partially cut into. The machine was removed from service by Richard Haught, surface supt.

Inspector Thomas fixed the abatement time as 8:00 a.m., June 13, 1990. However, on June 15, 1990, he extended the abatement time to 8:00 a.m., June 18, 1990, and the justification for this extension states as follows:

> A new wire rope has been installed on the left spool of the Bucyrus Erie dragline. There is a question as to whether the cable (wire rope) spools needs to be changed out at this time. Therefore, additional time is granted to investigate this matter.

On June 19, 1990, Inspector Thomas modified the citation and extended the abatement time to 8:00 a.m., June 28, 1990. Although the inspector makes reference to "Citation No. 3306620, issued 6/1/90," he was in fact modifying Citation No. 3306619. The modification notice reflects that the abatement time was extended so that the contestant could correct the following conditions which were observed by the inspector and included in the modified notice:

-- The steel rope that operates the gantry has broken wires at 2 locations. The Rope is pitted and has flat places. The gantry is a 5/8 inch rope and a 3/4 inch sheave.

-- The groved (sic) drums were so badly worn that the cable would not spool properly. Load line drum and bucket drum.

-- Bolts were being used in lieu of pins to secure the bucket. One of the bucket clevis (sic) pin is backed out and one is badly worn for the bucket line.

-- Wedges are not used where wire ropes are terminated on the bucket. Dump cable on bucket has 3 severed strands of wire.

-- Sheave wheel for bucket trip has the center bushing missing and securing pin badly worn. Cat tram chains have numerous keep (sic) missing on both sides.

On June 29, 1990, Inspector Thomas extended the abatement time to 8:00 a.m., July 9, 1990, for the following reasons: "The operator has parts on order to repair the Bucyrus Erie dragline, and should be on mine site the next few days, and repairs completed within a week once the parts are received."

On July 10, 1990, MSHA Inspector Frank D. Bowers, issued a section 104(b) Withdrawal Order No. 3111174, citing a violation of mandatory safety standard 30 C.F.R. § 77.404, and ordering the withdrawal of the dragline in question. The inspector made reference to, and relied on, the previously issued section 104(a) Citation No. 3306619, issued on June 11, 1990, and his order states as follows: "Bunner Construction who owns and leases the Bucyrus Erie dragline to the Martinka #1 Mine will repair all the conditions found defective on the dragline except for the wire spool drums."

As part of its contest, the contestant took the position that the condition of the dragline wire spool drums did not result in the dragline being in an unsafe condition. The contestant noted that although the inspector cited a violation of section 77.404, it presumed that he intended to cite a violation of section 77.404(a), which provides as follows: "Mobile and stationary machinery and equipment shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately."

In its answer, respondent MSHA took the position that the order was properly issued and that it "represents a violation of a mandatory safety standard."

MSHA Inspectors Thomas and Bowers were unavailable for the hearing. Mr. Thomas was in the hospital, and Mr. Bowers was attending a training session out of town. MSHA presented the testimony of Inspector Edwin W. Fetty, who accompanied Inspector Thomas during his inspections of June 18-20, and 29, 1990, in support of its case. The contestant presented the testimony of the mine accident prevention officer Paul S. Zanussi, and expert witness Frank Greb in support of its case.

With regard to the initial June 11, 1990, Citation No. 3306619, issued by Inspector Thomas, the evidence adduced at the hearing reflects that the two cited dragline cable spools were not "cut into with a cutting torch." The evidence establishes that the drum was cut into two separate pieces by the manufacturer, and then re-assembled according to the appropriate specifications. Inspector Fetty agreed that the separation and

reassembly of the drum did not render it unsafe, and there is no evidence to the contrary. Accordingly, the only alleged violative condition with respect to the June 11, 1990, citation is that stated in the second sentence with respect to the condition of the wire rope.

With regard to the modified citation issued by Mr. Thomas on June 19, 1990, the evidence establishes that at the time the disputed section 104(b) order of July 10, 1990, was issued by Inspector Bowers, all of the enumerated cited conditions, except for the alleged condition of the drum, were corrected by the contestant.

Subsequent to the hearing, and after the close of the record in this matter, the parties initiated a conference with me and advised me that they reached a mutually agreeable settlement of this matter, and they filed a joint motion seeking approval of their proposed settlement disposition of the case. With regard to the settlement, the parties agree that the contested section 104(b) order should be vacated, and the contestant has agreed to withdraw its contest. The parties further agree that the modified citation issued by Inspector Thomas on June 19, 1990, will be further modified to delete the following alleged condition:" The grooved drums were so badly worn that the cable would not spool properly. Load line drum and bucket drum." The contestant agrees to accept the modified citation and to pay a civil penalty assessment of $375, in satisfaction of the citation. Although a formal civil penalty proceeding has yet to be initiated and finalized, and jurisdiction has not vested in the Commission, the parties wish to memorialize their mutual understanding and agreement with respect to the civil penalty proceeding.

Conclusion

After careful review and consideration of the pleadings, the testimony and evidence adduced at the hearing, and the motion filed by the parties with respect to the proposed settlement disposition of this matter, I conclude and find that it is reasonable and in the public interest. Accordingly, the motion IS GRANTED, and the settlement IS APPROVED.

ORDER

IT IS ORDERED that:

1. The modified section 104(a) Citation No. 3306619, issued by Inspector Charles Thomas on June 19, 1990, is further modified in accordance with the agreement reached by the parties to delete any reference to the alleged violative condition of the cited dragline drums.

2. Southern Ohio Coal Company will accept responsibility and liability for the aforementioned section 104(a) modified citation, as further modified pursuant to the agreement of the parties.

3. Section 104(b) Order No. 3111174, issued by Inspector Frank D. Bowers on July 10, 1990, IS VACATED.

4. The contestant's motion to withdraw its contest IS GRANTED, and this matter IS DISMISSED.

George A. Koutras
Administrative Law Judge

Distribution:

Rebecca J. Zuleski, Esq., FURBEE, AMOS, WEBB & CRITCHFIELD, Suite 4, 5000 Hampton Center, Morgantown, WV 26505 (Certified Mail)

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/fb

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

MAY 3 1991

CONSOLIDATION COAL COMPANY, Contestant	:	CONTEST PROCEEDING
v.	:	Docket No. WEVA 90-296-R
	:	Order No. 3314669; 8/1/90
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	Blacksville No. 1 Mine
Respondent	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	CIVIL PENALTY PROCEEDING
Petitioner	:	Docket No. WEVA 91-48
v.	:	A.C. No. 46-01867-03865
	:	Blacksville No. 1 Mine
CONSOLIDATION COAL COMPANY, Respondent	:	

DECISION

Appearances: Page H. Jackson, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for the Secretary of Labor (Secretary); Walter J. Scheller, Esq., Pittsburgh, Pennsylvania, for Consolidation Coal Company (Consol)

Before: Judge Broderick

STATEMENT OF THE CASE

Consol filed a notice of contest challenging a withdrawal order issued under section 104(b) of the Mine Act on July 31, 1990, for failure to abate a citation issued under section 104(a) on the same day. The Secretary seeks a civil penalty for the violation alleged in the citation. The civil penalty docket includes three other citations for which penalties are sought. Prior to the commencement of the hearing in this case, the Secretary moved on the record for approval of a settlement concerning the three violations: Citation 3314062 alleges a violation of 30 C.F.R. § 75.1003(c) because of inadequate guarding of a trolley wire. It was assessed at $355. The parties propose that the significant and substantial finding be deleted, and that the penalty be reduced to $213; Consol's portal buses have a covered, insulated top, and it is unlikely that the failure to guard the trolley wire would result in injury.

Citation 3314064 charges a violation of 30 C.F.R. § 75.202(a). It was assessed at $720, and Consol agrees to full payment. Citation 3314072 alleges a violation of 30 C.F.R. § 75.1003(c). It was assessed at $265. The parties propose that the significant and substantial finding be deleted and that the penalty be reduced to $159.

Pursuant to notice, the cases were consolidated and called for hearing in Morgantown, West Virginia, on April 18, 1991. Raymond Ash and Joseph Migaiolo testified on behalf of the Secretary. John Weber, Wen H. Su, Willis Fansler, and John Morrison testified on behalf of Consol. The record was kept open for possible rebuttal evidence by the Secretary.

On April 23, 1991, the Secretary filed a motion to approve a settlement with respect to the remaining violation and the contest proceeding. Consol agrees to pay in full the proposed penalty of $828, and the Secretary agrees to a vacation of the section 104(b) withdrawal order. I have considered the motion in the context of the testimony at the hearing, and in the light of the purposes of the Mine Act, and conclude that it should be approved.

Accordingly, **IT IS ORDERED:**

1. The Notice of Contest in Docket No. WEVA 90-296-R is **GRANTED** and order of withdrawal 3314669 issued July 31, 1990, is **VACATED.**

2. Within 30 days of the date of this decision, Consol shall pay to the Secretary of Labor, the following civil penalties:

CITATION	AMOUNT
3314062	$ 213
3314064	720
3314072	159
3314665	828
TOTAL	$1920

James A. Broderick
Administrative Law Judge

Distribution:

Walter J. Scheller, Esq., Consolidation Coal Company, 1800 Washington Road, Pittsburgh, PA 15241 (Certified Mail)

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slk

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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MAY 3 1991

THOMAS J. MCINTOSH, Complainant	:	DISCRIMINATION PROCEEDING
v.	:	Docket No. KENT 90-113-D
	:	MSHA Case No. BARB CD 90-06
FLAGET FUELS, INC., Respondent	:	No. 1 Surface Mine

DECISION

Appearances: Tony Oppegard, Esq., Appalachian Research & Defense Fund of Kentucky, Inc., Lexington, Kentucky, for the Complainant.

Before: Judge Koutras

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, 30 U.S.C. § 815(c)(3). The complainant filed his initial complaint with the Mine Safety and Health Administration (MSHA), and after completion of an investigation of the complaint, MSHA advised the complainant by letter dated January 26, 1990, and received by the complainant on February 1, 1990, that the information received during the investigation did not establish any violation of section 105(c) of the Act. Thereafter, the complainant filed a complaint with the Commission.

The respondent filed a timely answer denying any discriminatory discharge, and after denial of its motion to dismiss on the ground that the complaint was untimely filed, the case was docketed for hearing in Hazard, Kentucky, on August 20, 1990. The respondent's subsequent motion for a continuance was granted, and the case was redocketed for hearing on November 27, 1990. The respondent's counsel withdrew from the case, and the scheduled hearing was again continued on motion by the complainant, and the case was subsequently heard in Hazard, Kentucky, on March 14, 1991. The complainant appeared, but the respondent did not, and the hearing proceeded in its absence. The postal

service certified mailing receipts reflect that the respondent has received all notices and amended notices of hearing issued in this matter, but it has filed no explanation for its failure to appear at the hearing or to otherwise defend the complaint.

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.

Issues

The issues in this case include the following: (1) whether the complainant was engaged in protected activity when he complained about the bulldozer in question and refused to operate it because he believed it was unsafe; (2) whether his work refusal was reasonable; and (3) whether he timely communicated his safety complaints to mine management or to the respondent.

Applicable Statutory and Regulatory Provisions

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

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

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

Complainant's Testimony and Evidence

Thomas J. McIntosh, the complainant in this case, testified that he had worked for the respondent for 1 year and 4 months before he was discharged on December 8, 1989, for "for refusing to run an unsafe dozer." At the time of his discharge he was working at the respondent's Kentec stripping operation which is located in Perry County, and he was employed as a bulldozer operator doing reclamation work at the site. He worked the day shift from 7:00 a.m. to 5:00 p.m., and he explained the work that he was performing with the Caterpillar DSL bulldozer (Tr. 13-16).

Mr. McIntosh confirmed that he worked at the Kentec location for 5 months prior to his discharge and that he operated the bulldozer the entire time. Mr. McIntosh stated that when he was initially assigned the bulldozer he learned that it had a bad oil leak and he needed to check the transmission oil level closely because the machine "would fly out of gear with you" (Tr. 17). He explained the operation of the transmission, and he stated

that when the machine was operated on a steep grade, the transmission oil would either go to the rear or the front and the transmission "starts sucking air and it will fly out of neutral" (Tr. 18). When this occurred, he had no control over the machine because the loss of oil pressure results in "freewheeling," and if he were in first gear going up a slope and the transmission slips out of gear, the machine "just automatically goes backward with you" and "could very easily jar you off of it" because it was an open-cab dozer (Tr. 20). Since the oil pressure brakes work in tandem with the transmission, "you can mash them as hard as you want to and it won't slow down until you get off of the slope or level out" (Tr. 21).

Mr. McIntosh stated that he experienced a problem with the bulldozer flying out of gear during the entire 5 months he was at the Kentec site, and since there were other employees always working around him, he believed that the condition of the bulldozer posed a danger to himself and other employees (Tr. 21). He confirmed that he complained about the condition of the dozer four times to his foreman Randall Smith, and asked him to repair it. Mr. Smith would tell him that he "would get to it as soon as he could," but that the problem was never repaired. However, he and the mechanic Lewis Baker attempted to find the oil leaks, and repaired one or two of them, but the major leak was never repaired and he had to overfill the transmission oil while working on a steep grade (Tr. 23).

Mr. McIntosh stated that the last day he worked at the site was on December 1, 1989, when he was operating the dozer doing reclaiming work. He was pushing a load of dirt up a deep slope and when he was approximately 20 feet from the top of the slope, the machine "hung up in gear on me and sat there and just jumped right straight up and down and dug two big trenches there" (Tr. 24). He tried to put the gear shift in neutral by hitting it with his foot because the transmission was stuck in forward gear, and it went into reverse and he "went about 175 or 180 feet, flying" in a backward direction down the slope and was not in control of the machine (Tr. 25). After the machine leveled out at the bottom of the slope he was able to stop it with both feet on the brake pedals (Tr. 26).

Mr. McIntosh stated that the incident scared him and after telling Mr. Baker what had happened they began working on the problem for approximately an hour and a half. In order to get the shifting lever out of neutral they had to bend it and cut a piece out of the shifting housing. This temporary repair was done so that he cold finish his work that day, and until the machine could be fixed properly. He confirmed that Mr. Baker found the problem, and that four bushings were needed to hold the gear shifting lever straight so that it would not wobble. After continuing to work on a smaller slope area, the transmission started sticking and hanging in gear again, and he could not stop

the machine again as it proceeded down the slope, and he again believed that he and everyone around him were in danger (Tr. 30-32). He confirmed that the machine weighs 32 tons, and is 26 or 27 feet long with a blade 18 feet wide and 5 feet high. There were generally four or five people working near him sowing seeds and doing other work. However, these people were not behind his machine because he warned them to stay out from behind him because he did not know when the machine would fly out of gear (Tr. 34-35).

Mr. McIntosh stated that after regaining control of the dozer after the second incident on December 1, at the Kentec site, he trammed it to the level service area and parked it and shut it down because it was unsafe. Mr. Baker had left the site earlier to go to another job, and there were no other mechanics at the site. After he parked the machine, production superintendent Tim Fugate and reclamation engineer Glen Blevins arrived, and he told Mr. Fugate about the problem with the dozer. Mr. Fugate told him to "use your judgment. You know the machine, what is safe and what is not" and told him to get together with the mechanic to find out the problem and that he (Fugate) would order any parts that were needed to repair the machine. Mr. McIntosh told Mr. Fugate that Mr. Baker already knew about the machine gear problem, but that he would tell him to buy the parts. Mr. McIntosh subsequently told one of the laborers who was going to the other site where Mr. Baker was working about what Mr. Fugate had told him (Tr. 38).

Mr. McIntosh stated that his next scheduled day of work was Monday, December 4, 1989. He called in and spoke with "parts man" Fitz Steele, and asked him whether the dozer had been repaired. Mr. Steele informed him that parts were on order but that the machine had not been repaired. Mr. McIntosh did not work that day, and called in again on Tuesday, December 5, and was again informed by Mr. Steele that the dozer had not been repaired. Mr. McIntosh did not work that day either, and he confirmed that he received no pay for both days because he is only paid when he works. He confirmed that he would have gone to work if the dozer had been repaired (Tr. 38-39).

Mr. McIntosh stated that he next reported for work on Wednesday, December 6, and he arrived 5 or 10 minutes before 7:00 a.m., to find out if the dozer had been repaired. He spoke to his foreman Randall Smith and explained his prior problems and incidents with the machine. Mr. Smith asked him if he was going to operate the dozer that day and Mr. McIntosh informed Mr. Smith that he would run it when it was repaired. Mr. Smith explained to him that Mr. Baker would be at another job all day and that there were no other mechanics at the Kentec site. Mr. McIntosh then left the site and went home, and he confirmed that he would have worked if the dozer had been repaired.

Mr. McIntosh stated that he next reported for work on Thursday morning, December 7, and spoke with Mr. Smith again. Mr. Smith confirmed that the dozer had not been repaired, and Mr. McIntosh again informed him that he would run it when it was repaired. Mr. Smith then told Mr. McIntosh that "he wasn't going to pay me to sit in my truck while someone else done my job" (Tr. 43). Mr. McIntosh confirmed that he did not know whether anyone else operated the dozer during the days it was out of repair and he did not stay at the site to find out (Tr. 43-43)

Mr. McIntosh stated that after speaking with Mr. Smith on December 7, he left the site and went to the respondent's office in Hazard and spoke with company vice-president Glen Phillips. He confirmed that he told Mr. Phillips about the problems with the dozer and the prior incidents with the machine on the slopes. Mr. McIntosh confirmed that this was the first time he spoke with Mr. Phillips and that Mr. Phillips told him that he was not aware of the problem with the dozer but would check into it (Tr. 46-47).

Mr. McIntosh stated that he next reported for work on Friday, December 8, and since there was an ice storm that day, he and foreman Smith were the only ones at work because they had four-wheel drive vehicles. Mr. Smith pulled his vehicle next to Mr. McIntosh's and stated "You went and talked to Glen Phillips, haven't you?" Mr. McIntosh confirmed to Mr. Smith that he had spoken with Mr. Phillips. Mr. McIntosh stated that Mr. Smith's "face turned real red and he got mad there," and when he asked Mr. Smith whether he was going to repair the dozer, Mr. Smith replied "no, and furthermore, you no longer have a job here" (Tr. 47). Mr. McIntosh then left the site and again went to Hazard to speak with Mr. Phillips. Mr. Phillips acknowledged that he knew that Mr. McIntosh had been fired by Mr. Smith, but informed him that he had to back up his foreman, and since he was told that he (McIntosh) was a good worker, he (Phillips) would give him a good recommendation (Tr. 48).

Mr. McIntosh stated that prior to his discharge by Mr. Smith, he had never had any disciplinary problems with the respondent, and had never been disciplined or warned about his job performance. He confirmed that he got along fine with Mr. Smith and the rest of the foremen, always did his work assignments, and never refused to perform any assignment prior to December 1, when he parked the dozer (Tr. 48). Mr. McIntosh confirmed that Mr. Smith alone fired him, and that Mr. Phillips simply told him that he would have to back Mr. Smith up and he said nothing to him about what Mr. Smith may have told him about why he fired him (Tr. 49-50). Mr. McIntosh also confirmed that during his conversations with Mr. Smith during December 6 through 8, Mr. Smith never told him that he would repair the dozer or that the machine had been checked out and was safe to operate (Tr. 50). Mr. McIntosh further confirmed that the only reason

for his refusal to operate the dozer was the fact that it was flying out of gear and sticking in gear (Tr. 51).

Mr. McIntosh confirmed that he earned $8 an hour straight time, and time-and-a-half, or $12 an hour, for overtime which he earned on occasions. He stated that it took him about a month to find another job, made a diligent effort to find work after his discharge, and he identified several coal companies where he tried to find work. He worked for Vires Coal Company, but left after he was called back to Arch Minerals where he worked from August until October 26, 1990, when he was laid off again (Tr. 52-53). Mr. McIntosh confirmed that he had no reason to believe that Mr. Phillips did not give him a good work recommendation, and that he (McIntosh) did not tell other potential employers that he had been fired, and Mr. Phillips did nothing to prevent him from getting work. Mr. McIntosh confirmed that he was out of work for a month or so subsequent to his discharge, and has been out of work and drawing unemployment since October 26, 1990 (Tr. 55). He confirmed that the respondent's operation was non-union, and that he had no medical insurance, leave, or other benefits, other than his pay check (Tr. 58).

Mr. McIntosh confirmed that he had trouble with the dozer during the 5-month period prior to his discharge, and that the conditions worsened during the week before he was fired. He also confirmed that he had not refused to operate the dozer earlier because "they probably would have fired me. And I had to keep on working. I have got a family to support" (Tr. 58). He did not know if Mr. Smith would have fired him if he had not spoken to Mr. Phillips (Tr. 59). He confirmed that Mr. Smith never said anything to him about calling in on Monday and Tuesday, December 4, and 5, rather than reporting for work (Tr. 60). Mr. McIntosh believed that one of the reasons Mr. Smith fired him was because he complained to Mr. Phillips about the dozer, and his conclusion in this regard is based on the fact that Mr. Smith "turned as red as pickled beet," and "got real mad and real nervous and started jerking around" when he confirmed that he had spoken to Mr. Phillips (Tr. 61). Mr. McIntosh confirmed that other than his complaints to mine management, he did not report the dozer condition to any MSHA or state inspectors (Tr. 61).

Lewis Baker, testified that he was formerly employed by the respondent as a mechanic for 2 years until approximately June, 1990, when he was laid off. He worked at the respondent's Brown's Fork and Kentec sites, and worked with Mr. McIntosh at the Kentec job doing reclamation work. He confirmed that Mr. McIntosh was having problems with the dozer that he was operating and told him that it was "hanging in gear." Mr. Baker further confirmed that the gear shifter bushings on top of the transmission were worn out and that he had to adjust the linkage and bend the shifter because it was sticking when the gears were worked. He stated that part of the shifting housing of the

dashboard had to be cut out to allow the shifter to go forward into neutral gear. The dozer operator has to be able to put the machine in neutral, and if he cannot "it will go over a cliff with you. You can back over a highwall or anything with it" (Tr. 67).

Mr. Baker stated that prior to the time that he and Mr. McIntosh worked on repairing the dozer, it had been leaking oil for over a month and that "when it leaks down so low and get on a slope or anything, your transmission won't pick it up. Your pump won't pump. It goes just like it is out of gear and you ain't got no brakes" (Tr. 68). He confirmed that the repairs that he and Mr. McIntosh made to the dozer were temporary repairs and that he needed bushings to take the slack out of the transmission linkage so that it could be adjusted. He confirmed that the required bushings were ordered by Fitz Steel (Tr. 70).

Mr. Baker stated that the day that he and Mr. McIntosh repaired the dozer at the Kentec site was his last day of work at that location because he was called to the Brown's Fort site to do mechanic work after people were laid off there. He returned to the Kentec site for one day a month later after Mr. McIntosh was fired to pull the transmission out of the dozer that Mr. McIntosh had problems with and it was sent to Western Branch Diesel to be rebuilt. Mr. Baker confirmed that he never received or installed the bushings which had been ordered for the dozer in question (Tr. 71-72).

Mr. Baker confirmed his "hearsay" understanding that Mr. McIntosh was fired for refusing to operate the dozer because it was hanging in gear, and that Mr. Smith informed him that he fired Mr. McIntosh for refusing to run the dozer, and that Mr. McIntosh had told him that it was unsafe to run. Mr. Baker believed that the dozer was unsafe to run and he stated that he would not have operated it in the condition that it was in (Tr. 75).

Fitz Steele, a witness subpoenaed but not called to testify by the complainant, was called as a witness by the presiding judge. Mr. Steele stated that he was formerly employed by the respondent at the Brown's Fork site, and that he did not work with Mr. McIntosh at the Kentec site. Mr. Steele stated that he was the "parts man" responsible for taking equipment orders from the mechanics who worked at both sites and ordering the parts. He "guessed" that he had ordered parts for the dozer operated by Mr. McIntosh at the Kentec site in December, 1989, and he confirmed that he gave a copy of an order for parts to the MSHA investigator who investigated Mr. McIntosh's complaint (Tr. 77-79, exhibit C-A).

Mr. Steele confirmed that there was only one D8 dozer at the Kentec site, and he believed that the "Roller A" part shown on

the order invoice dated December 11, 1989, was for that dozer. Mr. Steele could not specifically remember whether or not Mr. McIntosh ever complained to him about the dozer, but he recalled "something about a linkage, something like I had ordered because it was something that goes on top of the transmission, about shifting, something like that" (Tr. 80). Mr. Steele also stated that while he was not sure, Mr. McIntosh "come over and said that he had told Randall that Randall needed to get the parts but now, I hadn't heard about it" (Tr. 80).

Mr. Steele stated that when he previously worked at the Kentec site sometime in 1988 or 1989, he saw the dozer in question every day and commented "I hated that dozer. I hated all of their equipment, to tell you the truth" (Tr. 81). He confirmed that he had never operated the dozer, but could tell its condition by looking at it.

Complainant's Arguments

The complainant's counsel waived the filing of any posthearing brief and was allowed an opportunity to make an oral closing argument at the conclusion of the hearing (Tr. 85-87). Counsel argued that the uncontradicted evidence in this case establishes that the complainant had a problem with the bulldozer flying out of gear for several months prior to December 1, 1989, when it began sticking in gear and creating a safety hazard because of the inability of the complainant to control the machine. As a result of this problem, the complainant slid backwards down two slopes. Although the mechanic (Lewis Baker), made some temporary repairs on December 1, the problem reoccurred later in the day, and it became necessary for the complainant to park the machine.

Complainant's counsel pointed out that December 1, was the last day that the complainant worked, and that the testimony of the mechanic establishes that no repairs were made to the bulldozer during the week preceding the complainant's discharge on December 8, 1989. Counsel concludes that the complainant had a reasonable, good faith belief for parking the dozer on December 1, and that the belief remained reasonable and in good faith during the following week because the complainant was never told that any repairs had been done, nor did he assume that any repairs had been made to the machine. As further evidence of the complainant's good faith and reasonableness, counsel cites the fact that the complainant travelled 25 miles to Hazard to complain to company vice-president Phillips that the dozer had not been repaired and that he wanted it repaired, and that Mr. Phillips advised him that he would look into the problem.

Counsel asserted that when the complainant reported for work on December 8, the first thing that was brought up by foreman Smith in an angry tone of voice was the fact that the complainant had spoken with vice-president Phillips. Counsel concludes that

Mr. Smith was upset that the complainant had gone over his head and that this was part of the reason why he discharged the complainant that day. Counsel points out that at no time during December 6, through 8, did Mr. Smith ever indicate that the dozer was safe to operate, that any repairs had been made, or that it was in any different condition other than what the complainant had left it a week earlier. Counsel argued that it is clear from the case law that when a miner makes a good faith, reasonable safety complaint, the mine operator has a corresponding duty to address the complaint. In the instant case, counsel concludes that the respondent failed to address the complainant's safety complaint and that foreman Smith discharged the complainant for his work refusal and for complaining to Mr. Phillips, and that this action was in violation of section 105(c) of the Act.

Findings and Conclusions

In order to establish a prima facie case of discrimination under section 105(c) of the Mine Act, a complaining miner bears the burden of production and proof to establish (1) that he engaged in protected activity and (2) that the adverse action complained of was motivated in any part by that activity. Secretary on behalf of Pasula v. Consolidation Coal Company, 2 FMSHRC 2768 (1980), rev'd on other grounds sub nom. Consolidation Coal Company v. Marshall, 663 F.2d 1211 (3d Cir. 1981); Secretary on behalf of Robinette v. United Castle Coal Company, 3 FMSHRC 803 (1981); Secretary on behalf of Jenkins v. Hecla-Day Mines Corporation, 6 FMSHRC 1842 (1984); Secretary on behalf of Chacon v. Phelps Dodge Corp., 3 FMSHRC 2508, 2510-2511 (November 1981), rev'd on other grounds sub nom. Donovan v. Phelps Dodge Corp., 709 F.2d 86 (D.C. Cir. 1983). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no way motivated by protected activity. If an operator cannot rebut the prima facie case in this manner it may nevertheless affirmatively defend by proving that (1) it was also motivated by the miner's unprotected activities alone. The operator bears the burden of proof with regard to the affirmative defense. Haro v. Magma Copper Company, 4 FMSHRC 1935 (1982). The ultimate burden of persuasion does not shift from the complainant. Robinette, supra. See also Boich v. FMSHRC, 719 F.2d 194 (6th Cir. 1983); and Donovan v. Stafford Construction Company, No. 83-1566 D.C. Cir. (April 20, 1984) (specifically-approving the Commission's Pasula-Robinette test). See also NLRB v. Transportation Management Corporation, ____ U.S. ___, 76 L.ed.2d 667 (1983), where the Supreme Court approved the NLRB's virtually identical analysis for discrimination cases arising under the National Labor Relations Act.

Direct evidence of actual discriminatory motive is rare. Short of such evidence, illegal motive may be established if the facts support a reasonable inference of discriminatory intent.

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

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

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

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

> As we emphasized in Pasula, and recently re-emphasized in Chacon, the operator must prove that it would have disciplined the miner anyway for the unprotected activity alone. Ordinarily, an operator can attempt to demonstrate this by showing, for example, past discipline consistent with that meted to the alleged discriminatee, the miner's unsatisfactory past work record, prior warnings to the miner, or personnel rules or practices forbidding the conduct in question. Our function is not to pass on the wisdom or fairness of such asserted business justifications, but rather only to determine whether they are credible and, if so, whether they would have motivated the particular operator as claimed.

Mr. McIntosh's Protected Activity

It is clear that Mr. McIntosh had a right to make safety complaints about any equipment which he believed presented a safety hazard, and that under the Act, these complaints are protected activities which may not be the motivation by mine management for any adverse personnel action against him; Secretary of Labor ex rel. Pasula v. Consolidation Coal Co.,

2 FMSHRC 2786 (October 1980), rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3d Cir. 1981), and Secretary of Labor ex rel. Robinette v. United Castle Coal Co., 3 FMSHRC 803 (April 1981). Safety complaints to mine management or to a section foreman constitutes protected activity, Baker v. Interior Board of Mine Operations Appeals, 595 F.2d 746 (D.C. Cir. 1978); Chacon, supra. The miner's safety complaints must be made with reasonable promptness and in good faith, and be communicated to mine management, MSHA ex rel. Michael J. Dunmire and James Estle v. Northern Coal Company, 4 FMSHRC 126 (February 1982); Miller v. FMSHRC, 687 F.2d 194, 195-96 (7th Cir. 1982); Sammons v. Mine Services Co., 6 FMSHRC 1391 (June 1984).

A miner has the right under section 105(c) of the Act to refuse to work if he has a good faith, reasonable belief that his continued work involves a hazardous condition. Pasula, supra, 2 FMSHRC at 2789-96; Robinette, supra, 3 FMSHRC at 807-12; Secretary v. Metric Constructors, Inc., 6 FMSHRC 226, 229-30 (February 1984); aff'd sub nom. Brock v. Metric Constructors Inc., 766 F.2d 469, 472-73 (11th Cir. 1985). However, where reasonably possible, a miner refusing work ordinarily must communicate or attempt to communicate to some representative of the operator his belief that hazardous conditions exists. In a number of safety related "work refusal" cases, it has been consistently held that a miner has a duty and obligation to communicate his safety concerns to mine management in order to afford the operator with a reasonable opportunity to address them. See: Secretary ex rel. Paul Sedgmer et al. v. Consolidation Coal Company, 8 FMSHRC 303 (March 1986); Simpson v. Kenta Energy, Inc. & Roy Dan Jackson, 8 FMSHRC 1034, 1038-40 (July 1986); Secretary on behalf of Dunmire & Estle v. Northern Coal Co., 9 FMSHRC 992 (June 1987); Miller v. FMSHRC, 687 F.2d 194, 195-97 (7th Cir. 1982) (approving Dunmire & Estle communication requirement); Sammons v. Mine Services Co., 6 FMSHRC 1391 (June 1984); Charles Conatser v. Red Flame Coal Company, Inc., 11 FMSHRC 12 (January 1989), review dismissed Per Curiam by agreement of the parties, July 12, 1989, U.S. Court of Appeals for the District of Columbia Circuit, No. 89-1097).

In Gilbert v. Sandy Fork Mining Company, 12 FMSHRC 177 (February 1990), on remand from Gilbert v. FMSHRC, 866 F.2d 1433 (D.C. Cir. 1989), rev'd Gilbert v. Sandy Fork Mining Co., 9 FMSHRC 1327 (1987), it was held that a violation of section 105(c) is established when a miner has a reasonable, good faith belief that certain work conditions are hazardous, communicates that belief to mine management, and management does not address his safety concerns in a manner sufficient to reasonably quell his fears.

As indicated earlier, the respondent received the notice of the hearing by certified mail, but failed to appear at the

hearing to defend the complaint, and no one purporting to represent the respondent appeared at the hearing. Although three individuals who identified themselves as employees of the respondent appeared at the hearing (Tim Fugate, Glen Blevins, and Randall Smith), it was not clear who instructed them to appear, and none of these individuals purported to represent the respondent in this matter. Further, they entered no appearances in any representative capacity for the respondent, and they were not called to testify in this matter. In view of the respondent's failure to appear, or to otherwise inform me that it did not intend to appear, the hearing proceeded in its absence, and the complainant put on its case. Under the circumstances, I conclude and find that the respondent has waived its right to be heard further in this matter and I have rendered my decision on the basis of the testimony and evidence adduced by the complainant in support of his case.

The credible testimony of the complainant McIntosh, corroborated by mechanic Baker, establishes that the bulldozer operated by Mr. McIntosh on December 1, 1989, had a mechanical problem and was in need of repair in order to render it safe to operate. The evidence clearly establishes that the transmission and gear system problems attested to by Mr. McIntosh resulted in the machine moving unexpectedly backwards and out of control while Mr. McIntosh was operating the machine on a slope. Mr. McIntosh and Mr. Baker made some temporary repairs to the machine so that Mr. McIntosh could complete his work. However, after putting the machine back into operation, the problem reoccurred, and the machine again moved backwards down the slope and out of control. Mr. McIntosh then concluded that the machine was unsafe to operate and that to continue to operate it under the condition that it was in would place him and other employees who were working near the machine at risk. Mr. McIntosh then stopped work, trammed the machine to a level area, and shut it down and parked it. Under all of these circumstances, I conclude and find that Mr. McIntosh had a reasonable good faith belief that to continue to operate the bulldozer under the condition that it was in on December 1, 1989, ("flying out of gear" and the transmission "sticking and hanging in gear") would expose him and other miners working around him to dangerous safety hazards and injuries if he (McIntosh) were propelled out of the machine or if the machine struck anyone while it was out of control.

The credible testimony of Mr. McIntosh further establishes that on Monday, December 4, 1989, his next scheduled work day, and again on Tuesday, December 5, 1989, Mr. McIntosh telephoned the mine to inquire as to whether or not the bulldozer in question had been repaired. After he was informed that parts were on order, but that the dozer had not been repaired, Mr. McIntosh did not report for work on either day. Had the dozer been repaired, Mr. McIntosh would have reported for work. However, since he was informed that it had not been repaired, I find that it was not

unreasonable for Mr. McIntosh to conclude that the machine was in the same unsafe condition as it was when he shut it down and parked it the previous Friday, December 1, 1989. Under the circumstances, I conclude and find that Mr. McIntosh's refusal to report for work on these 2 days to operate the dozer was reasonable, and that his decision in this regard was prompted by his safety concerns and a reasonable good faith belief that to operate the dozer before repairs were made would place him at risk and expose him to possible injury.

The credible testimony of Mr. McIntosh further establishes that he reported for work on Wednesday, and Thursday, December 6, and 7, 1989, and spoke with his foreman Randall Smith. Mr. McIntosh explained his prior problems with the dozer to Mr. Smith, and after learning that the dozer had not been repaired, Mr. McIntosh informed Mr. Smith that he would not operate the machine until it was repaired, and Mr. McIntosh did not work either day, but he was ready to work if the machine had been repaired. Under the circumstances, I conclude and find that Mr. McIntosh's continued refusal to operate the dozer in question until it was repaired and rendered safe was reasonable and that his decision in this regard was based on a reasonable good faith belief that to operate the machine before it was repaired would place him at risk. I further conclude and find that Mr. McIntosh's refusal to operate the dozer during the period December 4, through December 7, 1989, until it was repaired, and his decision to shut down and park the dozer on December 1, 1989, constituted protected work refusals pursuant to the Act.

Mr. McIntosh's credible and uncontroverted testimony further establishes that he timely communicated his safety complaint or safety concern with respect to the unsafe condition of the dozer in question to mine management prior to his discharge by foreman Smith on Friday, December 8, 1989. Mr. McIntosh's initial complaints concerned a leaky transmission condition which resulted in a loss of oil and oil pressure, causing the transmission "to fly out of gear," and which resulted in a "free-wheeling" of the machine. This was communicated to foreman Smith at least a month or more prior to December 1, 1989, and although Mr. Smith assured Mr. McIntosh that the problem would be addressed, the machine was never repaired. Mr. McIntosh's subsequent complaints about the condition of the dozer were communicated to production superintendent Fugate and reclamation engineer Blevins on December 1, 1989, after Mr. McIntosh shut down and parked the machine, and again on December 6, and 7, 1989, when he went to the work site and informed foreman Smith about the condition of the dozer and advised him that he would not operate the machine until the repairs were made. Mr. McIntosh's further safety complaint communication to mine management was made on December 7, 1989, when he visited the respondent's office and informed vice-president Phillips about the condition of the dozer.

There is no evidence that Mr. McIntosh was ever offered other work in lieu of operating the dozer in question, and his uncontroverted testimony establishes that he was always ready, willing, and able to work and operate the machine if it had been repaired. Further, Mr. McIntosh's credible and uncontroverted testimony establishes that at no time during their conversations on December 6, through 8, 1989, did Mr. Smith ever indicate to Mr. McIntosh that he would repair the dozer or that it had been checked out and found safe to operate. Although there is some evidence that the dozer gear bushings may have been ordered, mechanic Baker confirmed that the parts were never received or installed. Although Mr. Baker confirmed that he and Mr. McIntosh had made some temporary repairs to the dozer on December 1, 1989, before the machine was shut down and parked, he confirmed that no permanent repairs were ever made to the machine and that the transmission was subsequently removed for rebuilding after Mr. McIntosh was discharged. Mr. Baker also believed that the unrepaired dozer was unsafe to operate and he confirmed that he would not have operated it in the condition that it was in.

Under all of the aforesaid circumstances, I conclude and find that Mr. McIntosh's safety complaint and concern with respect to the hazardous condition of the dozer which he was expected to operate was timely communicated to mine management and that management had a reasonable opportunity to address his safety concerns and timely repair the dozer. I further conclude and find that Mr. McIntosh's safety communications met the requirements enunciated by the Commission in Secretary on behalf of Dunmire and Estle v. Northern Coal Co., 4 FMSHRC 126 (February 1982), Secretary on behalf of John Cooley v. Ottawa Silica Company, 6 FMSHRC 516 (March 1984); and Gilbert v. Sandy Fork Mining Company, supra.

Based on the credible and uncontroverted testimony of Mr. McIntosh, I conclude and find that Mr. Smith discharged him on December 8, 1989, in part because of his refusal or failure to operate the dozer in question. I further conclude and find that there is a strong unrebutted inference, based on Mr. McIntosh's credible testimony concerning Mr. Smith's demeanor and agitated state at the time he discharged him, that Mr. Smith also decided to discharge Mr. McIntosh because he had spoken to company vice-president Phillips and complained to him about the dozer. Inasmuch as Mr. McIntosh had a protected right under the Act to refuse to operate the dozer under the circumstances which prevailed at the time of the discharge, and since he also had a further protected right to complain to Mr. Phillips about the unsafe condition of the dozer, I further conclude and find that Mr. McIntosh's discharge was illegal and in violation of section 105(c) of the Act. Accordingly, his discrimination complaint IS SUSTAINED.

ORDER

1. Respondent IS ORDERED to reinstate Mr. McIntosh to his former position with full backpay and benefits, with interest, at the same rate of pay, on the same shift, and with the same status and classification that he would now hold had he not been unlawfully discharged.

2. Respondent IS ORDERED to expunge from Mr. McIntosh's personnel file and/or any company records any reference to his discharge of December 8, 1989.

3. Respondent IS ORDERED to reimburse Mr. McIntosh for all reasonable expenses incurred by him in the institution and prosecution of his discrimination complaint, including reasonable attorney fees.

At the close of the hearing in this matter on March 14, 1991, the complainant was afforded an opportunity to file his request for relief and his counsel stated that he would file a statement of back pay and attorney fee petition within thirty (30) days (Tr. 93). As of this date, no such filing has been forthcoming. Under the circumstances, I retain jurisdiction in this matter until the remedies due the complainant are finalized. Until these determinations are made, and pending a finalized dispositive order by the undersigned presiding judge, my decision in this matter is not final. Counsel for the complainant IS ORDERED to file his relief petition immediately upon receipt of this decision.

George A. Koutras
Administrative Law Judge

Distribution:

Tony Oppegard, Esq., Appalachian Research & Defense Fund of Kentucky, Inc., 630 Maxwelton Court, Lexington, KY 40508 (Certified Mail)

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 8 1991

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. KENT 91-49
	:	A. C. No. 15-13920-03681
v.	:	
	:	Docket No. KENT 91-82
PYRO MINING COMPANY, Respondent	:	A. C. No. 15-13920-03683
	:	
	:	Pyro No. 9 Wheatcroft
	:	
	:	Docket No. KENT 91-83
	:	A. C. No. 15-14492-03574
	:	
	:	Baker Mine

DECISION

Appearances: W. F. Taylor, Esq., Office of the Solicitor, U. S. Department of Labor, Nashville, Tennessee, for the Secretary of Labor (Secretary);
Catherine Behrens, Esq., Sturgis, Kentucky, for Pyro Mining Company (Pyro).

Before: Judge Broderick

Pursuant to notice, the above cases were called for hearing on the merits in Nashville, Tennessee, on April 30, 1991. The parties submitted on the record a motion to approve a settlement in all of the three dockets as follows:

Docket No. KENT 91-49

1. Citation 3420624. Pyro agrees to withdraw its contest and pay the assessed penalty ($1500).

2. Order 3420687. Pyro agrees to withdraw its contest and to pay the assessed penalty ($1500).

3. Citation 3545776. The Secretary agrees to vacate the citation.

4. Citation 3545901. Pyro agrees to withdraw its contest and pay the assessed penalty ($229).

5. Citation 3545832. This citation charges a violation of 30 C.F.R. § 75.402 because of inadequate rock dust outby the feeder. It was designated a significant and substantial violation. The Secretary agrees to modify the citation to a nonsignificant and substantial violation and reduce the penalty from $213 to $20 on the ground that the area cited was 350 feet from the face and no ignition sources were present.

6. Citation 3545902 charges a violation of 30 C.F.R. § 75.512 because a scoop was on charge and the lids not secured. The Secretary agrees that the negligence should have been rated as low rather than moderate. Pyro agrees to pay the assessed penalty ($175).

Docket No. KENT 91-82

1. Citation 3545906 charges a violation of 30 C.F.R. § 75.807 because of improper placement of a high voltage cable. It was designated as a significant and substantial violation. The Secretary agrees to modify the citation to a nonsignificant and substantial violation because the cable had no breaks and presented no likelihood of injury. Pyro agreed to pay the assessed penalty ($178).

2. Citation 3545840. Pyro agrees to withdraw its contest and to pay the assessed penalty ($335).

Docket No. KENT 91-83

1. Citation 3421446. Pyro agrees to withdraw its contest and pay the assessed penalty ($178).

2. Citation 3421445 charges a violation of 30 C.F.R. § 75.316 because of an inoperative water spray. It was designated as a significant and substantial violation. The Secretary agrees to modify the citation to a nonsignificant and substantial violation because miners were not exposed in the cited area. Pyro agrees to pay the assessed penalty ($178).

3. Citation 3421448. Pyro agrees to withdraw its contest and pay the assessed penalty ($178).

4. Citation 354530. Pyro agrees to withdraw its contest and pay the assessed penalty ($206).

I have considered the motion in the light of the criteria in Section 110(i) of the Act and conclude that it should be approved.

ORDER

Accordingly, it is **ORDERED:**

1. Citation 3545776 is **VACATED.**

2. Citations 3545832, 3545906, 3421445 are **MODIFIED** to charge nonsignificant and substantial violations.

3. Pyro shall within 30 days of the date of this Decision pay to the Secretary the following civil penalties:

ORDER/CITATION	30 C.F.R.	AMOUNT
3420624	75.1325(c)(1)	$1500
3420687	75.400	1500
3545901	75.517	229
3545832	75.402	20
3545902	75.512	178
3545906	75.807	178
3545840	75.400	335
3421446	75.1722(b)	178
3421445	73.316	178
3421448	75.316	178
354530	75.316	206
	TOTAL	$4680

James A. Broderick
James A. Broderick
Administrative Law Judge

Distribution:

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

Catherine Behrens, Esq., Pyro Mining Company, P. O. Box 289, Sturgis, KY 42459 (Certified Mail)

Mr. Clifford D. Burden, Director of Safety & Training, Pyro Mining Company, P. O. Box 267, Sturgis, KY 42459 (Certified Mail)

dcp

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

MAY 8 1991

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), ON BEHALF OF WILLIAM R. BROCKMAN, Complainant	:	DISCRIMINATION PROCEEDING
	:	Docket No. WEST 91-21-DM
	:	
	:	MD 89-62
v.	:	
	:	Sun Valley Plant
CALMAT COMPANY, Respondent	:	

DECISION

Appearances: Lisa A. Gray, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Complainant;
Anne Morris, Esq., Los Angeles, California, for Respondent.

Before: Judge Lasher

This matter came on for hearing on April 9, 1991, in Ontario, California. At commencement of hearing, the parties announced that a settlement had been reached resolving the litigation in question. At this time, counsel for the parties entered into a prepared statement setting forth their agreement and the bases therefor and such statement was read into and made part of the record. The accord reached by the parties appeared reasonable and consistent with the purposes of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, et seq., and such was approved on the rcord from the bench. That bench decision is here affirmed. In summary, the Respondent conceded, solely for the purposes of this mine safety proceeding, that a violation of Section 105(c) of the Mine Act occurred and agreed to pay a civil penalty therefor in the sum of $1000.00. My approval of this settlement is here affirmed, and the penalty stipulated is here assessed.

ORDER

Respondent, if it has not previously done so, shall pay to the Secretary of Labor within 30 days from the issuance date of this decision the sum of $1000 as and for the civil penalty above assessed.

Upon payment of such penalty, this proceeding shall be deemed **DISMISSED.**

Michael A. Lasher, Jr.
Administrative Law Judge

Distribution:

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

William R. Brockman, 10260 Plainview #12, Tujunga, CA 91042 (Certified Mail)

Anne Morris, Esq., 3200 San Fernando Road, Los Angeles, CA 90065 (Certified Mail)

Mr. Frank D'Orsi, Corporate Safety Director, P.O. Box 2950, Terminal Annex, Los Angeles, CA 90051 (Certified Mail)

ek

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

MAY 6 1991

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. WEVA 90-201
	:	A.C. No. 46-07527-03515 A
v.	:	
	:	Sparky No. 2 Mine
ROBERT ZIEGLER, EMPLOYED BY ALAMOSA MINING, INC., Respondent	:	

DECISION

Appearances: J. Philip Smith, Esq., Office of the Solicitor U.S. Department of Labor, Arlington, Virginia for the Petitioner;
Forrest H. Roles, Esq., Smith, Heenan and Althen, Charleston, West Virginia for Respondent.

Before: Judge Melick

This case is before me upon the petition for civil penalty filed by the Secretary of Labor pursuant to section 110(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § et seq., the "Act."[1] The Secretary charges herein that Robert Ziegler, as an agent of a corporate mine operator, namely Alamosa Mining, Inc., (Alamosa) knowingly authorized, ordered, or carried out a violation of the mandatory safety standard at 30 C.F.R. § 75.303(a), by the corporate operator as alleged in Order No. 3334178.

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[1]Section 110(c) of the Act reads as follows:

> Whenever a corporate operator violates a mandatory health or safety standard or knowingly violates or fails or refuses to comply with any order issued under this Act or any order incorporated in a final decision issued under this Act, except an order incorporated in a decision issued under subsection (1) or section 105(c), any director, officer, or agent of such corporation who knowingly authorized, ordered, or carried out such violation, failure, or refusal shall be subject to the same civil penalties, fines and imprisonment that may be imposed upon a person under subsection (a) and (d).

Order No. 3334178 reads in relevant part as follows:

Management failed to enter (3) obvious violations on the main belt haulage system in the mine examiner's book kept on the surface on 08-21-89. The belt was examined by a certified fire boss representing mine management. These conditions was [sic] known or should have been known. (a proper preshift examination was not made)

The cited standard, 30 C.F.R. § 75.303(a), reads as follows:

Within 3 hours immediately preceding the beginning of any shift, and before any miner in such shift enters the active workings of a coal mine, certified persons designated by the operator of the mine shall examine such workings and any other underground area of the mine designated by the Secretary or his authorized representative. Each such examiner shall examine every working section in such workings and shall make tests in each such working section for accumulations of methane with means approved by the Secretary for detecting methane, and shall make tests for oxygen deficiency with a permissible flame safety lamp or other means approved by the Secretary; examine seals and doors to determine whether they are functioning properly; examine and test the roof, face, and rib conditions in such working section; examine active roadways, travelways, and belt conveyors on which men are carried, approaches to abandoned areas, and accessible falls in such section for hazards; test by means of an anemometer or other device approved by the Secretary to determine whether the air in each split is traveling in its proper course and in normal volume and velocity; and examine for such other hazards and violations of the mandatory health or safety standards, as an authorized representative of the Secretary may from time to time require. Belt conveyors on which coals is carried shall be examined after each coal-producing shift has begun. Such mine examiner shall place his initials and the date and time at all places he examines. If such mine examiner 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, and shall notify the operator of the mine. 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. Upon completing his examination, such mine examiner shall report the results of his examination to a person, designated by the operator to receive such reports at a designated station on the surface of the mine, before other persons enter the underground areas of such mine to work in such shift. Each such mine examiner shall also record the results of his examination with ink or indelible pencil in a book approved by the Secretary kept for such purpose in an area on the surface of the mine chosen by the operator to minimize the danger of destruction by fire or other hazard, and the record shall be open for inspection by interested persons.

Ziegler argues in his post hearing brief that certain testimony of an MSHA inspector regarding the absence of entries in the mine examiner book (also known as the fire boss book) was inadmissible as contrary to the "Best Evidence Rule" as incorporated in Rule 1002, Federal Rules of Evidence. Commission Rule 60(a), 29 C.F.R. § 2700.60(a), governs the admissibility of evidence in Commission proceedings however and that rule states that "[r]elevant evidence that is not unduly repetitious or cumulative is admissible". There is no dispute that the challenged testimony consisted of relevant evidence and that it was neither repetitious nor cumulative. Accordingly it was properly admitted at trial. It is noted moreover that Federal Rule 1002 is not in any event applicable to testimony that books, or records have been examined and found not to contain any reference to a designated matter. 11 Moore's Federal Practice § 1002.01-.02.

Ziegler also argues in his brief that the evidence does not support the charges that the corporate operator was named "Alamosa Mining, Inc." as alleged in the Amended Petition. To the contrary however, the Legal Identity Report (Exhibit G-1), required to be filed by the mine operator, clearly shows the identity of the operator to be "Alamosa Mining, Inc." The proof therefore is clearly sufficient to support the allegations.

The undisputed evidence of record also establishes the existence of the cited violation. Jerry Sumpter, an inspector for the Federal Mine Safety and Health Administration, testified without contradiction that he was inspecting the Sparky No. 2 Mine on August 21, 1989, when he observed the existence of what he deemed to be "obvious" violations of mandatory standards that had not been reported before the shift at issue in the mine examiner's book for preshift examinations.

More specifically Sumpter testified that he arrived at the subject mine at about 7:00 a.m. and, observed that the belt was

running but the miners had not yet proceeded underground. He examined the mine examiner's books between 7:00 and 8:00 a.m., and found that Ziegler, who was the mine superintendent, had countersigned the examiner's book for this oncoming shift but no conditions were reported on the page corresponding to that particular date and shift.

The miners proceeded underground at around 8:00 a.m. and Sumpter followed shortly thereafter. As Sumpter was travelling along the belt haulage line with Ziegler he observed "very black" coal spillage on the structure and along the side some 24 inches wide, 2 to 4 inches deep and extending for about 1,700 feet. He also observed coal dust lying on top of rock dust over a linear distance of 600 feet.

Sumpter also found a violation of Alamosa's ventilation system and methane dust control plan under the mandatory standard at 30 C.F.R. § 75.316. In particular, Sumpter noted that at the tail piece the check curtain was torn down and lying on the tight side of the belt haulage allowing air coming up the belt haulage to be directed toward the working faces where miners were then inby working.

Finally Sumpter testified concerning the existence of what he deemed to be a violation of the standard at 30 C.F.R. § 75.1100-2(b) in that a 200 foot section of waterline was not provided for the section tail piece along the belt haulage system and the water was turned off at the main water line valve.

It is undisputed that the violative coal dust conditions had existed for a week and, that the box curtain had been down and that the water line had been absent since the last move of the tail piece. Sumpter testified that Ziegler admitted that he was aware that the water line was too short and that he did not have the manpower to move it. Sumpter examined the book entries through the preceding August 19, and found no reports of any of the three violative conditions. He also found that Zieglar had signed the books as mine examiner. Sumpter further noted that there were no initials, dates and times of preshift examinations found underground as required by the cited standard. In this regard Ziegler stated that he "must have forgotten" to do this.

According to Alamosa President Harry Cooke, Jr., Ziegler was superintendent of the subject mine around the period August 21, 1989, and had complete responsibility for its operations. Ziegler also had the authority to keep necessary supplies and, if Cooke was not present, Ziegler had the authority to order necessary supplies.

Mr. Ziegler testified in defense that he had been a supervisor in various mining operations for about 25 years and during that time only one person suffered any lost-time injury

while working under his supervision. Ziegler also testified that his wife had recently died of cancer and that he owed approximately $8,000 in hospital bills as a result of his wife's illness. He testified that he owns his home, a 1979 car, a 1979 truck and no other significant property. He also testified that he was not employed and had last worked in June 1990. Ziegler further testified that a "doctor's office" found that he had "black lung".

The evidence in this case clearly supports the charges that the Respondent, Robert Ziegler, indeed was an agent of a corporate mine operator and that he knowingly carried out a violation a mandatory safety standard (i.e. the standard at 30 C.F.R. § 75.303(a)) by signing the preshift examiner's book on August 21, 1989, while knowing of the existence of at least one violative condition required to have been reported (i.e. the insufficient water line) and by failing to report conditions that were so obvious that he should have known of their existence and should therefore have reported such other conditions, i.e. excessive coal dust and the downed curtain.

The Commission defined the term "knowingly," in Kenny Richardson v. Secretary of Labor, 3 FMSHRC 8 (1981), 689 F.2d 632 (6th Cir. 1982), cert denied, 461 U.S. 928 (1983) as follows:

> "Knowingly", as used in the Act, does not have any meaning of bad faith or evil purpose or criminal intent. Its meaning is rather that used in contract law, where it means knowing or having reason to know. A person has reason to know when he has such information as would lead a person exercising reasonable care to acquire knowledge of the fact in question or to infer its existence ... We believe this interpretation is consistent with both the statutory language and the remedial intent of the coal Act. If a person in a position to protect employee safety and health fails to act on the basis of information that gives him knowledge or reason to know of the existence of a violative condition, he has acted knowingly and in a manner contrary to the remedial nature of the statute. 3 FMSHRC 16.

The facts of this case clearly meet this definition.

The violation was also serious in that by failing to report such conditions, the miners were permitted to work in the presence of at least three distinct hazardous conditions any one of which, according to the undisputed evidence, could have led to reasonably serious injuries. The evidence suggests that Ziegler demonstrated good faith in attempting to achieve rapid compliance after notification of the violation. There is no evidence that he has been charged with any previous violations under

section 110(c) of the Act.

The remaining criteria under section 110(i) of the Act i.e. the size of the business of the operator charged and "the effect on the operator's ability to continue in business" are of questionable relevance to these proceedings under section 110(c). However I find that the ability of the individual Respondent under section 110(c) to pay a civil penalty may appropriately be considered in determining the amount of the penalty. In this case it is indeed undisputed that the Respondent is unemployed and has been unemployed since June 1990, that he has significant debts from the recent hospitalization of his now deceased wife and that his significant assets appear to be limited to his house and two 1979 vehicles. Under the circumstances I find that a civil penalty of $100 is appropriate.

ORDER

Robert Ziegler is directed to pay a civil penalty of $100 within 30 days of the date of this decision.

Gary Melick
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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MAY 9 1991

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. KENT 90-194
	:	A. C. No. 15-02709-03724
v.	:	
	:	Docket No. KENT 90-208
PEABODY COAL COMPANY, Respondent	:	A. C. No. 15-02709-03728
	:	Camp No. 1
	:	
	:	Docket No. KENT 90-441
	:	A. C. No. 15-07166-03634
	:	
	:	Sinclair Slope UG #2

DECISION

Appearances: Thomas A. Grooms, Esq., Office of the Solicitor, U. S. Department of Labor, Nashville, Tennessee, for the Petitioner;
David R. Joest, Esq., Peabody Coal Company, Henderson, Kentucky, for the Respondent.

Before: Judge Weisberger

Statement of the Cases

In these cases, which were consolidated for a hearing, the Secretary (Petitioner) seeks civil penalties for alleged violations by the Operator (Respondent) of various mandatory safety standards. Subsequent to notice, the cases were scheduled for hearing in Nashville, Tennessee, on January 28-29, 1991. At the hearing Harold M. Gablin, Steve Henshaw, and Donald Wayne Ervin testified for Petitioner. Jim Ricketts, Brad Williams, and William Plum testified for Respondent. Respondent filed a Post Hearing Brief on March 11, 1991. Petitioner filed a Brief and Argument on April 8, 1991.

Docket No. KENT 90-441

At the hearing, Petitioner indicated that it would be vacating Citation No. 3416852. Accordingly, this Citation is dismissed.

Subsequent to the hearing, on April 16, 1991, Petitioner filed a Joint Motion to Approve Settlement. In the Motion, Petitioner indicated that Order No. 3416856 is to be vacated. Accordingly, it is **DISMISSED.**

In addition, the Joint Motion seeks approval of a reduction in penalty from $288 to $20 for a violation set forth in Citation No. 3421270. I have considered the representations and documentation submitted along with the Motion, and conclude that the proposed penalty of $20 is appropriate for the violation charged, and it is approved.

Docket Nos. KENT 90-194 and KENT 90-208

I. Order No. 3419559 (KENT 90-194)

a. Violation.

On February 1, 1990, MSHA Inspector Harold M. Gablin performed an inspection of Respondent's Camp No. 1 Mine. He testified that in the First Main North belt entry, he observed coal dust that extended the full width and length of the belt.[1]/ Gablin also indicated that the accumulation was in the cross-cuts and that essentially it was "very black" (Tr. 148). He described the material that had accumulated as not being spillage and consisting of fine dust. Gablin testified that he measured the depth of the coal dust accumulation and it measured between a 1/4 to 1/2 inch. Gablin issued a 104(d)(1) Order alleging an accumulation of coal dust, including float coal dust in violation of 30 C.F.R. § 75.400 which, as pertinent, proscribes the accumulation of coal dust including float coal dust deposited on rock dusted surfaces.

Donald Wayne Ervin, the Chairman of the Safety Committee, who accompanied Gablin on his inspection on February 1, testified that he observed Gablin measure the depth of the accumulation, and corroborated that it was 1/4 to 1/2 inch deep. Ervin further indicated that he also observed float dust in the cross-cuts and the dust was dry and extended throughout the belt.

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[1]/ Based on the testimony of Gablin, I conclude that the width of the belt was 20 feet. Gablin indicated that the length of the belt was 4000 feet. Jim Ricketts, Respondent's mine foreman for the third shift, indicated that the belt extended 4500 feet. Brad Williams, Respondent's mine foreman for the day shift testified that the length of the belt was 5600 feet. I conclude that the belt extended at least 4000 feet.

William Plum, Respondent's belt foreman on the day shift, indicated that on the date of Gablin's inspection, he did not observe any accumulations 1/4 to 1/2 inch deep. Brad Williams, Respondent's mine foreman on the day shift, indicated that the accumulation was not as deep as 1/4 of an inch. I place more weight on the testimony of Gablin, as corroborated by Ervin, with regard to the depth of the accumulation, inasmuch as he (Gablin) actually measured it. Both Plum and Williams described the material as gray and not black. However, Williams stated that a gray color indicates that ". . . it's getting dust accumulation" (Tr. 264). Ricketts indicated that there was coal dust and rock dust, but did not contradict the specific testimony of Gablin, that there was float coal dust rib to rib the entire length of the belt line. Also, Plum indicated that the worst area of the accumulation was between the No. 12 cross-cut and the header. Since the centers of the cross-cuts are 70 feet apart, the length of this area is approximately 840 feet. I conclude that it has been established that on February 1, 1990, there was an accumulation of float coal dust in violation of Section 75.400, supra.

b. Unwarrantable Failure.

According to Gablin, because of the extent of the accumulation which extended the entire width of the entry, the depth of the accumulation, and the fact that the entry was dry, he concluded that the accumulation had been in existence for at least 30 days.

Steve Henshaw, a belt examiner employed by Respondent on the day shift, indicated that on January 25, 1990, he performed a preshift examination of the belt entry in question, and that the Preshift Mine Examiner's Report (Examiner's Report) contains the following notation: "clean track side 54-52, 49-48, 43-30, dust tail 21 & 12-drive . . . " (Government Exhibit 7, page 1). He said that on January 25, 1990, he had observed black float dust from the tail through cross-cut 21 and from cross-cut 12 to the drive, and the material extended from rib to rib. He testified that the following day the spillage and float dust was still there. The Examiner's Report for the day shift of January 26, contains the following notation for the belt entry at issue, "dust belt." (Government Exhibit 7, Page 8). Henshaw indicated that the condition was getting worse daily, and on January 30, he continued to observe float coal dust. The Mine Examiner's Report for the day shift January 30, 1990, contains the following notation for the First North belt. ". . . clean track side 54-52 & 49-48 & 53-40 & 34 & 1/2 & 32 & 1/2-30 & float dust at bottom roller, dust all, . . . " (Government Exhibit 7, Page 24). Henshaw testified that the following day on January 31, the accumulations of coal and float dust were still there. He indicated that the condition of the belt with regard to dust was the same on January 31, as it was on January 30. The preshift

Mine Examiner's Report for January 31, day shift states as follows: "clean areas listed 1-30-90, dust belt . . ." (Government Exhibit 8, Page 32).

Jim Ricketts, the mine foreman for the third shift, midnight to 8:00 a.m., (a nonproduction shift), essentially indicated that unless there is a "trouble spot," or a hazard, each of Respondent's approximately 7 to 10 miles of belt line is dusted in a "cycle" (Tr. 241). He indicated that in a normal cycle each belt would be rock dusted every 2 weeks. He indicated that on the midnight to 8:00 a.m. shift February 1, 1990, he finished rock dusting the two North belt and thus, according to his normal cycle, would have rock dusted the First North belt the following night.

The Preshift Mine Examiner's Report for the 4:00 p.m. to midnight shift for January 25, 1990, does not contain any notation of dust or the need to clean the First North entry. The second shift Daily and On-shift Report (for January 25, 1990) indicates as follow: "cleaned on spillage 1st N." (Government Exhibit 7, Page 5). The Daily and On-shift Report for the second shift January 29, 1990, contains the following notation: "cleaned on spillage 1 N." (Government Exhibit 8, Page 21). The second shift Daily and On-shift Report for January 30, 1990, contains the following notation: "cleaned on spillage 1st N." (Government Exhibit 8, Page 28). The Preshift Mine Examiner's Report for the 4:00 p.m. to 12:00 midnight shift for January 31, contains the follow note: "1 N-cont. clean on track side." (Government Exhibit 8, Page 35).

In order for it to be found that the violation herein resulted from Respondent's unwarrantable failure the evidence must establish that there was aggravated conduct on the part of Respondent. (Emery Mining Corporation, 9 FMSHRC 1997 (1987)). For the reasons that follow, I conclude that the record establishes that Respondent's conduct did indeed reach this level.

Based on my observations of the demeanor of Gablin in this regard, and because his testimony has not been specifically contradicted or impeached, I accept his testimony that on February 1, there was an accumulation of coal that extended across the width of the entry and continued for its entire length. Further, the testimony of Gablin that he measured the accumulation, and it was at a depth of between 1/4 to 1/2 half inch, has been corroborated by Ervin. Respondent did not adduce any evidence of any measurements taken that contradict Gablin's testimony. Hence, based upon the extent of the accumulation, its depth, and fine consistency, as indicated by Gablin and Henshaw, I conclude that the accumulation had existed for at least a few days prior to February 1, 1990.

It is significant that, as evidenced by the Preshift Mine Examiner's Report (Government Exhibit 7), and as explained by Henshaw, in his testimony, he advised Respondent, on January 25, 26, 30, and 31, of the need to clean and dust the belt. Further, in the Examiner's Report of January 10, the areas noted by him to be cleaned on the track side between cross-cuts 30 to 32 1/2, 34 1/2, 48 to 49, and 52 to 54, were the same areas previously noted on January 25. Additionally, on January 31, Henshaw specifically noted to clean the areas previously listed on January 30.

The weight of the evidence fails to establish that Respondent paid heed to Henshaw's notations, and cleaned the accumulations in question. There are notations in the Examiner's Report for the second shift, on January 25, 29 and 30, that indicates as follows: "clean on spillage," (Government Exhibit 8, Pages 5, 21, 28) for the First North, and on January 31, as follows: "1 N cont. cleaned on track side." (Government Exhibit 8, Page 35). However, Respondent did not adduce the testimony of any witness who had personal knowledge as to exactly what cleaning, if any, was performed in the First North belt. Also, there is no evidence that any cleaning had been performed during the third or nonproduction shift, i.e., midnight to 8:00 a.m. Indeed, Ricketts, the foreman of that shift, could not establish the last time, prior to February 1, 1990, that the First North was cleaned. Although the need to clean or dust was not noted on the Presift Mine Examiner's Report of the 4:00 p.m. to midnight shift of January 25, 26, 30, and 31, the conclusion is inescapable that Respondent failed to take action to eliminate the accumulations, in spite of having been notified by Henshaw, who was termed by Brad Williams, Respondent's day foreman, as being the ". . . an awful good belt walker, probably the best belt walker we've got" (Tr. 267).[2]/

I find that Respondent's failure to take action, in spite of being repeatedly informed by Henshaw of the need to clean or dust, is not mitigated to any great extent by testimony from Ricketts and Williams that, in contrast to Henshaw's customary practice, he neither personally advised Ricketts and Williams of the need to dust and clean, nor did he underline or otherwise highlight any of his notations on the dates in question. For all these reasons I conclude that it has been established that the violation herein resulted from Respondent's unwarrantable failure (See Emery, supra).

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[2]/ Also, Ricketts testified that the Preshift Mine Examiner's Report is examined prior to a shift in order to correct hazards that are noted, and that Henshaw is "thorough" and accordingly the first report he looks at is Henshaw's. (Tr. 245).

II. Citation No. 3419558 (KENT 90-208)

a. Violation

On February 1, 1990, Gablin issued to Respondent a Section 104(d)(1) citation, inasmuch as he had observed 17 frozen and damaged belt rollers in the First North belt line. Specifically, he indicated that on February 1, "I seen rollers that were partly worn in two, that they were worn completely in two, . . ." (Tr. 125). He indicated that the roller at cross-cut 42 1/2 was frozen.

It was Gablin's testimony that he spit on two rollers and he heard "frying" (Tr. 55-56). Ervin also spit on a roller and "it sizzled" (Tr. 228). Ervin testified that he observed damaged rollers when he accompanied Gablin on his inspection on February 1. He indicated that some rollers were "stuck, just not rolling at all, and the bottom roller was turning into the bottom" (Tr. 230). He also said that the cylinders of one or two of the rollers had "worn" to the extent that the cylinder had separated into two parts (Tr. 230). Also, according to Ervin the "bearings were out" (Tr. 229) on some rollers and one or two were running on the spindle.

William Plum, Respondent's belt foreman for the day shift, testified that he changed the rollers at Gablin's direction on February 1. He indicated that he could not find anything wrong on some of the rollers that Gablin had him replace. According to Gablin there were no rollers that he could tell were frozen. However not much weight was accorded this conclusion, as he stated on cross-examination that when he changed the rollers the belt was not running, and it cannot be ascertained if a roller is hot or frozen if the belt is not running. Also, it is noted that he indicated that two rollers were broken in two.

It was Gablin's testimony, which has not been rebutted, that a hot, damaged, or frozen roller can cause friction which can lead to a fire.

I thus conclude that it has been established that at least two rollers were broken in two, two were worn, one was frozen, and two were hot. Thus, the record supports a finding that Respondent herein did violate 30 C.F.R. § 75.1725(A), as alleged in the Citation. 30 C.F.R. § 75.1725(a) requires that machinery and equipment be maintained in safe operating condition, and if they are in an unsafe condition, they shall immediately be removed from service.

b. Unwarrantable Failure

Gablin testified that a frozen roller could happen within a shift. However, in essence, he indicated that if a roller is hot or damaged to the extent that the belt is running on the shaft, there is an indication that this condition has been in existence for a week or longer. I note in this connection that Gablin indicated that he did see the belts running on the shaft, although he did not recall how many he saw. As explained by the testimony of Henshaw and as evidenced by the Examiner's Report (Government Exhibit 7), Respondent was advised of a hot middle insert at cross-cut 45 on January 25, 26, and 30. A hot middle insert, at cross-cut 51, was noted on the day shift Examiner's Report on January 30 and again on January 31.[3]/ Also, Henshaw in his Preshift Mining Examiner's Report noted rollers designated as MI51 and BSI 38 1/2 on January 25, 26, and 30. On January 31, he noted "hot" BSI 38 1/2.[4]/ (Government Exhibit 8, Page 32) There is no evidence that Respondent took any action to fix or replace the rollers cited repeatedly by Henshaw, nor those indicated by him repeatedly to be "hot." Essentially for the reasons stated in the discussion of Order No. 3419559, I do not find sufficient circumstances to have mitigated Respondent's lack of action herein. Inasmuch as Respondent had been made aware of the hot rollers and other rollers set forth in a Preshift Mine Examiner's Report, under the heading "hazardous conditions," and had failed to correct same, I conclude that the violation herein was as the result of Respondent's unwarrantable failure (See Emery, supra.)

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[3]/ It is significant to note that the Citation issued to Respondent alleges as follow: "51 top center frozen and hot" (emphasis added).

[4]/ The Citation issued to Respondent lists "38 1/2 top center hot" and "51 top center frozen and hot." among the violative conditions. It is also significant to note that Henshaw, in his reports of January 30 and 31, under the heading Violations and other Hazardous Conditions Observed and Reported, listed "MI 41 1/2." (Government Exhibit 8, Page 24, 32). The Citation at issue lists "41 1/2 top center roller." Also, Henshaw's report of January 25, 26, 30 and 31, lists "BSI 54" as a hazardous condition. (Government Exhibit 8, Page 8, 24, 32). The Citation lists "54 top center."

III. Citation No. 3419558 and Order No. 3429559 Significant and Substantial

According to Gablin, the violative conditions cited in both Citation No. 3419558 and Order No. 3419559 are significant and substantial. For the reason that follow, I agree.

As set forth above, infra, the record has established a violation of Section 75.1725, supra, in that, on February 1, 1990, there were two hot rollers, two rollers that were in two pieces, and one or two rollers rolling on their spindle. Due to the heat and friction generated by these conditions a discrete safety hazard of heating and sparks was thereby contributed to. Indeed, although Ervin could not recall if he saw sparks, it was Gablin's testimony that he did see sparks at cross-cut 51 from either a belt roller or a frame. In addition, according to Ervin, one belt roller was turning in coal dust. Gablin testified that the belt between cross-cuts 29 and 30 was dragging in coal dust, raising coal dust in suspension. He also said that other belts were also rolling in dust.[5]/ The hazard of the belt turning in dust was exacerbated by the fact, as testified to by both Ervin and Gablin, that the entry was dry. Given all these conditions, I conclude that there was reasonable likelihood that the hazard of a fire or explosion contributed to by the presence of extensive amounts of coal dust, as well as the rollers not being in a safe condition, would result in an injury of a reasonably serious nature, especially considering the effects of the resulting carbon monoxide, as testified to by Gablin. Based upon the above, I conclude that it has been established that the violations herein cited in Citation No. 3419558 and Order No. 3419559 were significant and substantial.

IV. Citation No. 3419558 and Order No. 3419559 Penalties

a. Citation No. 419558

Due to the extensive amounts of float coal dust accumulation, its consistency, and the presence of ignition sources discussed above, infra, and considering that there was dust in suspension between cross-cuts 29 and 30 and at cross-cut 50, I conclude that the violation herein cited in Citation No. 3419558 was of a high level of gravity. Essentially, based

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[5]/ I find the testimony of Plum that the belt was running in a "heated bottom" (Tr. 276, sic.) consisting of clay, inadequate to rebut the specific testimony of Gablin that the belt between the 29 and 30 cross-cut was dragging in coal dust. Also, I note that Plum testified that in two places the belt was in contact with the float coal dust that was mixed with fire clay.

upon the same factors set forth above, (**II.b.**, infra, I conclude that Respondent's negligence herein was high. Taking into account the remaining factors set forth in Section 110(i) of the Act, as stipulated to by the Parties, I conclude that a penalty of $1000 is appropriate for the violation cited in this Citation.

b. Order No. 3419559

The record establishes specifically, that there were two hot rollers at 38 1/2 and 51 cross-cuts, two rollers that had been broken in two, and one or two rollers that were rolling on their spindle. In general, Gablin testified that two other rollers were damaged or frozen, but did not specify the exact nature of the damage. Although his Citation listed various rollers, he could not specify the exact unsafe problem with regard to the rollers cited. Taking into account the fact, as explained above, **III.**, infra, that damaged rollers could produce heat and sparks, and taking into account the extensive amounts of coal dust and dust in suspension, I conclude that the violation herein was of a high level of gravity. Further, based upon essentially the same reason set forth above, **II**(b), infra, I conclude that Respondent herein acted with a high degree of negligence. I conclude that a penalty of $1000 is proper for the violation found herein.

ORDER

It is **ORDERED** that Respondent shall, within 30 days of this Decision, pay $2020 as a civil penalty for the violations found herein.

It is further **ORDERED** that Citation No. 3416852 and Order No. 3416856 be **DISMISSED.**

Avram Weisberger
Administrative Law Judge

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MAY 9 1991

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. PENN 90-80
	:	A.C. No. 36-07630-03503
v.	:	
	:	Mine Hill Strip
RANDY COAL COMPANY, Respondent	:	

DECISION APPROVING SETTLEMENT

Before: Judge Koutras

The petitioner has filed a motion pursuant to Commission Rule 30, 29 C.F.R. § 2700.30, seeking approval of a proposed settlement of this matter. The initial proposed civil penalty assessment for the contested violation is $98, and the respondent has agreed to settle the matter by paying a civil penalty assessment of $78. In support of the proposed settlement, the petitioner has submitted information pertaining to the six statutory civil penalty assessment criteria found in section 110(i) of the Act, a discussion of the violation in question, and a reasonable justification for the reduction of the initial proposed civil penalty assessment. I conclude and find that the proposed settlement is reasonable and in the public interest. The motion IS GRANTED, and the settlement IS APPROVED.

ORDER

The respondent IS ORDERED to pay a civil penalty assessment in the amount of $78 in satisfaction of the violation in question. 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.

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 9 1991

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. VA 90-44
Petitioner	:	A. C. No. 44-05415-03563
v.	:	
	:	No. 1 Mine
BLACKFOOT COAL COMPANY, INC.,	:	
Respondent	:	

DECISION APPROVING SETTLEMENT

Before: Judge Broderick

On May 8, 1991, the Secretary filed a motion for approval of a settlement reached by the parties in this case. The violations were originally assessed at $4273, and the parties proposed to settle for $3273.

The docket contains three citations and a 104(d)(1) order issued following a nonfatal roof fall accident. The fall caused a fractured pelvis of a continuous mining machine helper. Citation No. 3351176 charged a violation of 30 C.F.R. § 75.203 because a pillar block had been mined in excess of the maximum width allowed by the Roof Control Plan. The violation was assessed at $2000. The motion proposes a reduction to $1500 because (1) the inspector's diagram does not accurately reflect the condition that existed in that it shows more coal having been removed than was actually the case; (2) the violation concerns the condition of the pillar block between entries 5 and 6; the roof fall occurred between entries 4 and 5. Order No. 3351928 charged a violation of 30 C.F.R. § 75.220 because posts or timbers had not been installed as required by the Roof Control Plan. The violation was assessed at $2000. The motion proposes a reduction to $1500 because it appears that the posts or timbers were not designed to and would not prevent a roof fall. The other three citations were originally assessed at $91 each, and the motion proposes that the assessed amount be paid. I have considered the motion in the light of the criteria in Section 110(i) of the Act, and conclude that it should be approved.

Accordingly, the settlement is **APPROVED** and Respondent is **ORDERED TO PAY** the sum of $3273 within 30 days of the date of this Decision.

James A. Broderick
Administrative Law Judge

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Mr. Sam Blankenship, President, Blackfoot Coal Company, Inc., P. O. Box 1802, Bristol, VA 24203 (Certified Mail)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FALLS CHURCH, VIRGINIA 22041

MAY 9 1991

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), ON BEHALF OF DOUGLAS B. TUTTLE, Applicant	:	DISCRIMINATION PROCEEDING
	:	Docket No. WEVA 91-621-D
	:	HOPE CD 91-08
v.	:	Huffman Surface Mine
A & M TRUCKING COMPANY, Respondent	:	

DECISION

Appearances: Tina Gorman, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for the Applicant;
Edward Dooley, Esq., Middlesboro, Kentucky, for the Respondent.

Before: Judge Melick

This case is before me upon the request for hearing filed by A & M Trucking Company (A & M) under section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act," and under Commission Rule 44(b), 29 C.F.R. § 2700.44(b), to contest the Secretary of Labor's Application for Temporary Reinstatement on behalf of miner Douglas B. Tuttle:

These proceedings are governed by Commission Rule 44(c). That rule provides as follows:

> The scope of a hearing on an application for temporary reinstatement is limited to a determination by the Judge as to whether the miner's complaint is frivolously brought. The burden of proof shall be upon the Secretary to establish that the complaint is not frivolously brought. In support of his application for temporary reinstatement the Secretary may limit his presentation to the testimony of the complainant. The respondent shall have an opportunity to cross-examine

any witnesses called by the Secretary and may present testimony and documentary evidence in support of its position that the complaint is frivolously brought.

This scheme of procedural protections, including the statutory standard of proof provided by section 105(c)(2) of the Act, to an employer in temporary reinstatement proceedings far exceeds the minimum requirements of due process as articulated by the Supreme Court in Brock v. Roadway Express, Inc., 481 U.S. 252 (1987). See JWR v. FMSHRC, 920 F.2d 738 (11th Cir. 1990).

Within this framework of law it is clear that the determination of whether the Secretary's application on behalf of a miner was frivolously brought (the functional equivalent of a "reasonable cause to believe" standard) is to be made on the basis of evidence adduced at, and as of the time of, the hearing before the Commission Administrative Law Judge under Rule 44(c).

The complaint of discrimination accompanying the Secretary's application herein alleges that the discriminatory firing of Mr. Tuttle took place on December 17, 1990. The accompanying affidavit required by Commission Rule 44(a), certifies, however, that the act of discrimination took place on January 31, 1991, and the credible evidence adduced at hearing shows that Mr. Tuttle performed no work for A & M after December 11, 1990. [1] It is clear, in particular from the last computer-printed "weigh ticket" corresponding to the No. 120 haulage truck Tuttle had been operating on the evening shift that Tuttle last worked for A & M on December 11, 1990 (Exhibit R-5). Further, it is not disputed that the truck drivers working for A & M received their pay twice a month with the first paycheck (covering the first of the month through the 15th of the month) due on the 25th of the month. From the undisputed testimony of A & M foreman Ronnie Williams, it is clear that after Tuttle had terminated his work relationship with A & M, he came to the mine site sometime before December 25, 1990, requesting his final paycheck. Since the check due on December 25th would correspond to work performed between December 1 through December 15, and admittedly this was his last paycheck, it is clear that Tuttle did not work for A & M after December 15, 1990. As Williams explained at hearing, if Tuttle had hauled coal after December 15th, he would not have been paid until January 10, 1991. Indeed Tuttle himself acknowledges that he went to the mine site on December 21st to pick up this final paycheck and that December 25th would have been the normal corresponding payday.

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[1] The Secretary's counsel represented at hearing that the affidavit was incorrect, but she has not submitted any corrective affidavit.

Given these serious conflicts, I am compelled to conclude that there is no reasonable cause to believe that any discharge or any other discriminatory event occurred as alleged in either the complaint or the affidavit. [2] Accordingly, I cannot find that the complaint was not "frivolously brought." Commission Rule 44(c), supra; JWR v. FMSHRC, 920 F.d 738 at p. 747 (11th Cir. 1990).

However, even assuming, arguendo, that the Secretary had properly charged that the discriminatory event occurred on December 11, 1990, the individual complainant's allegations in his own testimony at hearing fail to state a claim cognizable under the Act. Since the allegations of discrimination are facially insufficient, it cannot be said that the complaint herein was not frivolously brought.

A miner's refusal to perform work is protected under section 105(c)(1) of the Act, if it is based on a reasonable, good faith belief that the work involves a hazard. Pasula v. Consolidation Coal Company, 2 FMSHRC 2786 (1980), reversed on other grounds, sub nom. Consolidation Coal Company v. Marshall, 663 F.2d 1211 (3d Cir. 1981); Secretary on behalf of Robinette v. United Castle Coal Company, 3 FMSHRC 803 (1981). According to the complainant, on what turned out to be his last day of work, he first pre-tripped (pre-shifted) the No. 120 haulage truck he was to operate that evening. He observed that it had been "down" the day before and new brakes had been installed. After driving his first load to the dumping location, he noted that the brakes would not hold on an incline and accordingly reported that the brakes needed adjustment.

A & M representative Anthony Mayes stated that he overheard Tuttle complain on his radio that he had to use his hand brake to stay on the slope so Mayes directed Tuttle to return to the truck lot and have the brakes adjusted. Mayes then followed Tuttle to the lot. According to Tuttle, Mayes first told him to exchange his truck for truck No. 129 then changed his mind and told him to take truck No. 127. Tuttle testified that as he began "pre-tripping" truck No. 127 he heard the air leaking out. According to Tuttle, the air was leaking so badly that when he released the parking brake, the release button would not remain in the released position but would kick back out because of insufficient air pressure. Indeed, according to Tuttle, the

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[2] The Respondent also disputes the Secretary's assertion that Tuttle was an employee rather than an independent contractor and maintains that independent contract miners are not entitled to the section 105(c) protections. In light of the decision herein, it is not necessary to reach these questions.

brakes were locked to such an extent that the truck could not be moved.

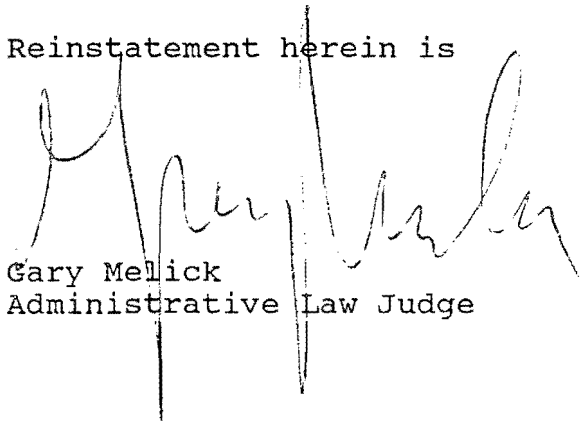
While denying that there was any leak in the air brake system of truck No. 127 and that Tuttle had ever pre-shifted the truck that night, Mayes corroborated Tuttle's testimony that when the air pressure is inadequate the parking brake will set itself and completely lock the brakes. Indeed, according to Mayes, once the brakes lock up you must repair the air leak before you can ever move the truck again.

According to Tuttle, after he pre-tripped the truck he told Mayes that the truck was unsafe. Mayes purportedly then told Tuttle to drive it or go home. Finally, after Tuttle allegedly refused to drive it he asked Mayes if he should return for his regular shift the next day. Mayes purportedly responded that if he did not drive the truck that shift he was not to return. Tuttle testified that he thereafter went home, believing that he had been fired.

While Mayes generally denies this version of events, and indeed the allegations are not completely rational, it is not necessary to resolve these conflicts since I find Tuttle's allegations to be facially insufficient in any event to state a claim under the "work refusal" analysis. Indeed, according to the credible evidence of record it would have been mechanically impossible for the truck to have been driven in its alleged condition. The parking brakes would have been locked and the truck could not have been moved until the air leak was repaired. The truck could not have been operated without repairs and Tuttle therefore faced no hazard. Accordingly, Tuttle could not have entertained a good faith, reasonable belief in a hazard and there is no basis on this record for a violation under section 105(c)(1) of the Act. Therefore, it must be concluded that the complaint was indeed frivolously brought.

ORDER

The Application for Temporary Reinstatement herein is denied.



Gary Mellick
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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2 SKYLINE, 10th FLOOR
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FALLS CHURCH, VIRGINIA 22041

MAY 13 1991

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. LAKE 91-11 A.C. No. 11-00585-03769
v.	:	
	:	Mine No. 10
PEABODY COAL COMPANY, Respondent	:	

DECISION

Appearances: Miguel J. Carmona, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois, for the Petitioner;
David S. Hemenway, Esq., Thompson & Mitchell, St. Louis, Missouri for the Respondent.

Before: Judge Melick

This case is before me upon the petition for civil penalty filed by the Secretary of Labor pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act," charging the Peabody Coal Company (Peabody) with two violations of mandatory standards and proposing civil penalties of $2,700 for those violations. The general issue before me is whether Peabody violated the cited regulatory standards and, if so, the appropriate civil penalty to be assessed in accordance with section 110(i) of the Act.

Citation No. 3035886, issued pursuant to section 104(d)(1) of the Act, alleges a violation of the mandatory standard at 30 C.F.R. § 75.517 and charges as follows:[1]

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[1]Section 104(d)(1) of the Act reads as follows:

> 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 significant 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

> The trailing cable supplying direct current power to the #21 Shuttle car had been damaged to the extent that a bare wire was visible. The cable had a nick in it 31 inches long exposing the bare wire and had been partially covered with black tape. This tape did not provide adequate insulation to the wire. 17 similar violations have been issued thus far in fiscal year 1990, and 26 were issued in fiscal year 1989. In the past, these similar violations of 75.517 have been discussed with mine management and the operator knows a problem with repeat violations exists at this mine.

The citation was subsequently modified as follows: "section 1, item 8, is hereby modified to include the physical location of No. 21 shuttle car which is the 1-east, 3-south, 6-east, main south (006) coal producing unit."

The cited standard, 30 C.F.R. § 75.517, provides that "power wires and cables, except trolley wires, trolley feeder wires, and bare signal wires, shall be insulated adequately and fully protected".

Peabody admits the violation charged herein but maintains that it was not "significant and substantial" nor the result of "unwarrantable failure". It further maintains that it was not negligent in causing the violation.

The observations by Inspector Edward Banovic of the Federal Mine Safety and Health Administration (MSHA) regarding the violation are not disputed but only his conclusions regarding gravity, negligence and whether the violation was "significant

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cont'd fn. 1

> unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this Act. If, during the same inspection or any subsequent inspection of such mine within 90 days after the issuance of such citation, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsection (c) to be withdrawn from,a nd to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.

and substantial" and due to the "unwarrantable failure" of the operator to comply with the standard. During the course of a regular underground inspection on May 10, 1990, Inspector Banovic examined the cable to the cited shuttle car and immediately noticed a cut in the cable exposing bare wires inside. Banovic's testimony that the damaged area and the bare exposed wires were readily visible is unchallenged. There had been some black tape placed over a portion of the cut but the cut in the cable extended beyond the taped area. In any event it was not an approved tape for insulation purposes. According to Banovic the power cable to the shuttle car was energized when he arrived in the unit and when he asked to examine the cable the Respondent elected to operate the car to unspool the cable.

Banovic concluded that the 300 volts of direct current power supplied to the shuttle car through the cable made it reasonably likely that someone coming in contact with the shuttle car would suffer fatal injuries. He noted that the cable to the car had been energized and that, when unspooled, the defective part of the cable lay on the mine floor. Banovic also noted that as the cable would be rewound it could come into contact with the metal frame of the shuttle car. According to Banovic, persons walking by, such as a foreman, touching the machine and persons carrying the cable would therefore be exposed to a shock hazard reasonably likely to result in fatal injuries. Banovic also opined that the cable could cause a fire within the reel compartment of the shuttle car thereby in this manner also creating a "significant and substantial" hazard. Within this evidentiary framework it is clear that the violation was indeed serious and "significant and substantial". Mathies Coal Company, 6 FMSHRC (1984). The credible expert testimony of MSHA supervisory Inspector Lonnie Conner fully corroborates these findings.

In reaching these conclusions I have not disregarded Peabody's claims that it had an inspection policy that would have resulted in discovery of the defective cable. Absent evidence of actual effective enforcement of such a policy however I can give but little weight to this self-serving declaration.

Banovic also opined that the violation was the result of "unwarrantable failure" and high negligence. He based his conclusion upon evidence that the cut in the cable was obvious and that it had been improperly covered with tape which failed to provide adequate insulation and which was even in violation of the operator's own corrective procedures. He inferred from this evidence that the damage to the cable should therefore have been known to the operator and that, in addition, inadequate and improper action had been taken in an attempt to correct the problem. I agree. Clearly, this evidence shows that the operator knew or should have known of this condition and that it failed to abate the condition because of a lack of due diligence, indifference or lack of reaonsable care. Quinland Coals, Inc.

10 FMSHRC 705 (1988). As the Commission stated in that case this formulation describes aggravated conduct constituting more than ordinary negligence within the meaning of the Emery Mining Corp., 9 FMSHRC 1997 (1987) decision.

In reaching his negligence findings Banovic also relied upon evidence of Peabody's repeated violations of the same mandatory standard over the recent past. In this regard Supervisory Inspector Conner observed that there had been 18 citations at this mine for violations of the mandatory standard at issue during fiscal year 1990 up to the date of the instant citation, May 10, 1990, (Exhibit P-4). All of these violations involved defective power cables and most specifically involved defective trailing cables. Moreover four of the violations were found in the two months preceding the instant violation. While those violations occurring most closely in time to the instant violation are most significantly related to the issue of negigence herein I find all of the violations to be sufficiently related in time to be probative on the issue of operator negligence herein. Clearly such a definitive pattern of repeated similar violations over a relatively brief period of time shows in itself such indifference and lack of reasonable care as to constitute such gross negligence and aggravated acts and/or omissions as to warrant the "unwarrantable failure" findings herein. Youghiogheny and Ohio Coal Company, 9 FMSHRC 2007 (1987).

Conner further testified that he conducted several meetings with management of the subject mine in March, June and November 1989 emphasizing the problems of these repeated violations. According to Mine Superintendent William Raetz, following the November meeting with MSHA officials, he met with his supervisory personnel and orally instructed them to physically walk and check their trailing cables before operation of equipment. There is no evidence however that this practice was actually thereafter followed and indeed a succession of violations of the same standard continued after this meeting. Thus, in spite of specific notice of these problems Peabody failed to take effective corrective action. This too is evidence demonstrating aggravated conduct and omissions. Under the circumstances the evidence separately and collectively warrants a finding of gross negligence and "unwarrantable failure". Emery Mining Co., supra; Youghiogheny and Ohio Coal Co., supra; Quinland Coals, Inc., supra.

Order No. 3035889, also issued pursuant to section 104(d)(1) of the Act, alleges a "significant and substantial" violation of the standard at 30 C.F.R. § 75.400 and charges as follows:

> Accumulations of coal and coal dust were present under the 7th west belt at the transfer point of the 2nd north belt line. There were two piles of coal 15 feet

long and 30 inches high rubbing the belt and rollers were turning in coal. The drive of the 2nd north had coal dust and coal packed in it rubbing the belt and packed up to 24 inches high on the drive roller. Two piles were present between the head roller and drive roller 30 inches high and 4 feet wide by 4 feet long.

The standard at 30 C.F.R. § 75.400 requires that "[c]oal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on electric equipment therein." Peabody also admits this violation but maintains that it was neither a serious violation nor was it the result of high negligence or "unwarrantable failure".

Inspector Banovic testified that on May 18, 1990, before entering the underground portion of the No. 10 Mine, he inspected the mine examiner's book and noted that coal dust was reported to exist at the cited transfer point in about 7 of the preceding shift reports. Once underground, Banovic found that excessive loose coal and coal dust existed at 5 locations. There were two piles under the 7th west belt line 15 feet long and about 30 inches high and the coal was being rubbed by the belt rollers and the belt. There was another pile around the second north drive roller. He concluded that this coal had been packed for up to a week. Dust had been compressed around the 30 inch diameter roller. There were also two piles between the second north drive roller and the transfer point. According to Banovic these piles were "fresh" and looked as though they had been deposited within 24 hours.

Inspector Banovic concluded that coal dust in contact with the belt and rollers provided an ignition source from friction. He also noted that ventilating air proceeds inby to two working units and that any smoke from a fire would proceed over working miners possibly resulting in suffocation. The inspector noted that an electric motor runs the belt drive and could also provide an ignition source. He observed that some of the coal piles along the seventh west belt line were also not in an area covered by fire suppression devices. Under the circumstances Banovic's expert opinion that the violation was "significant and substantial" is clearly supported by a preponderance of the evidence. Mathies Coal Co., supra.

Banovic concluded that the violation was the result of high negligence since the cited area had been reported several times in the preshift book as having had loose coal. He noted that no one was then present to clean up these conditions and that it took five persons working four hours to clean up the cited coal. The inspector also concluded that the belt had recently been running because, in his presence, several foremen were asking on

the telephone why the belt was down. He felt that the violation was the result of "unwarrantable failure" not only because the condition had been recorded in the preshift examination book that morning and no one was then working to correct the condition but that violations of the same standard had been repeatedly occurring at this mine.

According to Supervisory Inspector Conner, he and other MSHA officials met with Peabody officials in March, June and November 1989, to bring to management's attention, among other things, the frequent and repeated violations of the standard at issue herein. Conner observed that there had been no decrease in these violations even after these meetings.

According to Mine Superintendent Raetz, in May 1990, at the time of the order herein, they employed 42 "belt shovellers" to clean up the belt lines. He acknowledged that the intersection at issue in this case was a dumping location and was frequently a problem area. While Raetz had no personnel knowledge concerning the violation herein he thought that the coal pile-ups could have resulted from the failure of the belts to coordinate after one belt went down from a roof fall. If that had occurred and the other belts continued to operate the coal spillage could, he speculated, have resulted.

Finally, Raetz testified that it was his understanding that when safety hazards are reported in the preshift book the oncoming shift foreman has until the completion of his 8 hour shift to abate any reported hazards. Raetz noted that an individual had been assigned to correct the instant violation but that she was working in another area of the mine at the time the violation was cited. It was Raetz' opinion that she would have arrived to clean up the cited violations by the end of her shift. It is noted however that in order to abate the instant violation it required 5 miners working 4 hours. Accordingly Raetz' opinion that one person working part-time to clean up the cited violation in less than one shift is not credible. This evidence clearly supports a finding that under all the circumstances the operator knew or should have known of these loose coal and coal dust deposits and failed to abate the violative conditions because of lack of due diligence, indifference or lack of reasonable care. Under the facts of this case the negligence was particularly aggravated.

Raetz also testified that following the meeting with MSHA officials he gave oral instructions to his supervisors to correct coal dust problems. Although Raetz indicated that Peabody maintains a computer record of disciplinary action, including in some cases reference to the specific regulatory standard which the disciplined employee failed to correct, he could not state whether any disciplinary action had in fact been taken for employees failing to correct any of the previous violations of

the standard at issue. Indeed the record shows that Peabody had been previously cited for violations of the standard at issue herein 17 times between October 30, 1989 and May 10, 1990. This evidence is relevant in showing a pattern of lack of due diligence, indifference or lack of reasonable care and supports the finding that the violation herein was the result of gross negligence and aggravated acts and/or ommissions constituting "unwarrantable failure". Youghiogheny and Ohio Coal Co., supra, Emery Mining, supra, and Quinland Coals, Inc. supra.

Considering all of the criteria under section 110(i) of the Act it is clear that the penalties proposed by the Secretary in this case are appropriate.

ORDER

Citation No. 3035886 is affirmed as a citation under section 104(d)(1) of the Act. Order No. 3035889 is affirmed as an order under section 104(d)(1) of the Act. Peabody Coal Company is directed to pay civil penalties of $1,300 and $1,400 respectively for the violations alleged in the above citation and order within 30 days of the date of this decision.

Gary Melick
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

MAY 20 1991

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 91-126-D
On behalf of	:	MSHA Case No. MORG CD 91-01
THOMAS PROUDFOOT,	:	
Complainant	:	Flaggy Meadow Mine
v.	:	
	:	
MOHIGAN MINING COMPANY,	:	
Respondent	:	

ORDER OF DISMISSAL

Before: Judge Melick

The Complainant, Secretary of Labor, requests approval to withdraw its complaint in the captioned case with the consent of the represented individual, Thomas Proudfoot. Under the circumstances herein, permission to withdraw is granted. 29 C.F.R. § 2700.11. This case is therefore dismissed.

Gary Melick
Administrative Law Judge
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Mr. Thomas Proudfoot, 204 Serpell Avenue, Belington, WV 26250 (Certified Mail)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FALLS CHURCH, VIRGINIA 22041

MAY 20 1991

EAGLE NEST, INCORPORATED, Contestant	:	CONTEST PROCEEDING
v.	:	Docket N. WEVA 91-293-R
	:	Citation No. 3751114; 3/20/91
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Eagle Nest Mine
	:	Mine ID 46-04789

DECISION

Appearances: David J. Hardy, Esq., Jackson & Kelly, Charleston, West Virginia, for Contestant;
Pamela S. Silverman, Esq., Office of the Solicitor, U. S. Department of Labor, Arlington, Virginia, for the Respondent.

Before: Judge Weisberger

Statement of the Case

On April 9, 1991, the Operator, Eagle Nest, Incorporated (Contestant), filed a Notice of Contest alleging that Citation No. 3751114 issued to it on March 20, 1991, is invalid and should be vacated. Contestant also filed on April 8, 1991, a Motion for Expedited Proceedings. In a telephone conference call initiated by the undersigned, with Counsel for both Parties on April 11, 1991, the matter was set for hearing in Charleston, West Virginia, for April 16, 1991. At the hearing, Ronnie Joe Dooley, Franklin Miller, and James P. Addison testified for the Secretary (Respondent). Donnie G. Roberts and Steve Alexander, Jr., testified for Contestant. At the conclusion of the hearing, pursuant to the request of the Parties, they were granted until May 1, 1991, to file Proposed Findings of Fact and a Brief, and were granted until May 8, 1991, to file a reply. Pursuant to a request by Respondent, not opposed by Contestant, these dates were extended to May 6 and May 13, respectively. the parties each filed a post-hearing brief on May 6, 1991. Reply briefs were filed on May 15, 1991.

Findings of Fact and Discussion

I. Introduction

On March 20, 1991, while making a spot inspection of the longwall, A panel, at Contestant's Eagle Nest Mine, Ronnie Joe Dooley, an MSHA Inspector, issued Citation No. 3751114 alleging as follows: "At least one entry of the longwall tailgate return entry could not be made safely in its entirety. Water had accumulated in depth exceeding 16 inches at survey spad No. 3777 and various locations outby. This condition creates a hazard to those persons required to make weekly examinations" (sic). The Citation alleges a violation of 30 C.F.R. § 75.305. Section 75.305, supra, provides, as pertinent, that, "At least once a week," an examination of the return entry "in its entirety," shall be made. Section 75.305, supra, requires that the examinations shall be made for "hazardous conditions," including tests for methane, and for compliance with mandatory health or safety standards, and that the examiner shall place his initials and the date and time at the places examined, and, "if any hazardous condition is found, such condition shall be reported to the operator promptly." Section 75.305, supra, further provides that "Any hazardous condition shall be corrected immediately."

In essence, it is Contestant's position that the Citation is invalid, in that it does not allege that a weekly examination was not made, or that hazardous conditions noted in the previous examination were not corrected. Contestant further argues, in essence, that an accumulation of water up to 34 inches does not, constitute a hazardous condition. For the reasons that follow, I do not find merit in Contestant's arguments.

Respondent is correct in its assertion, that, on its face, the Citation in issue does not allege that a weekly examination was not performed or that hazardous conditions previously noted were not corrected. Neither did the testimony of Dooley set forth such allegations. Further, a record of weekly examinations at the subject mine contains the following note: "A-Panel Return-Ch4 Neg-Water 4 feet deep at #23 Pump 3/14/91..."[1]/ (Government Exhibit 4). Hence, at the time the Citation was issued, March 20, 1991, there is evidence, which has not been impeached or contradicted by Respondent, that an examination had been made within the immediate preceding 7 day period, and this examination did report the existence of water 4 feet deep in the entry in question. However Section 75.305, supra, requires, in essence, that any "hazardous condition" that is found during a

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[1]/ A signature appears after the date of 3/14/91, but the signature is not legible.

weekly examination, be reported to the Operator and "shall be corrected immediately." Hence, it must be resolved whether, on March 20, 1991, the date of Dooley's inspection, there had been a report of hazardous conditions which had not been corrected immediately.

II. Hazardous Condition

On March 14, 1991, an examiner reported water 4 feet deep at #23 pump. On March 19, 1991, Ronnie G. Roberts, Contestant's longwall coordinator, examined the entire return entry in question. At the #23 pump he observed that there was an accumulation of water approximately 48 inches deep.[2]/

On March 20, 1991, when Dooley examined the entry in question, he walked down the entry outby from the face and indicated that he encountered water, and at spad 377 (cross-cut 40). He said that when the water had reached the top of the 16 inch boots he was wearing, he stopped and did not proceed further. He indicated that the water extended across the width of the entry, which he approximated as being 20 feet, and extended outby as far as he could see.

Essentially, it is Contestant's position that the accumulations of water did not constitute such a hazard as to bar an examiner from performing an examination of the entire entry. In essence, Roberts opined that water at a level of 16 inches is not a hazard, as one could walk around it while staying within the walkway, wearing hip boots provided by Contestant. He indicated that the water could be traversed safely by walking slowly and carefully by keeping one foot placed in a firm position and using the other to feel for underwater hazards. Roberts indicated that those miners required to perform examinations in the area could be trained in this fashion.

In essence, Roberts' testimony in this regard was corroborated by Steve Alexander, Jr., the superintendent of the mine in question. Also, Roberts and Alexander indicated, in essence, that hazards encountered on the floor of the entry underwater, such as rocks, mud, and slippery surfaces would similarly exist in the absence of water. In this connection, Alexander stated that there have been more accidents due to falls in dry areas than in areas with water.

According to Dooley, the accumulations of water that he observed on March 20, 1991, were murky, and the bottom could not been seen. Accordingly, he opined that one walking in the area would be exposed to slipping hazards occasioned by mud on the

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[2]/ Roberts testified that he is authorized to make examinations pursuant to Section 75.305, supra.

bottom of the mine floor, as well as submerged rocks, and abandoned pieces of wood from cribs and pallets. In essence, he opined that if a person wearing 16 inch boots would enter water at a lever higher than that, the water would enter his boots making them heavier and, in essence, decreasing his agility if he were to slip and lose his balance. He indicated that this problem would be exacerbated by wearing hip boots and encountering water at a lever higher than the boots, allowing water to enter and fill the boots.

Dooley opined that one slipping and falling could suffer injuries such as a broken limb. He further indicated that a fatality could occur by drowning, if a person in falling would hit his head and lose consciousness. Also, according to Dooley, a fatality by drowning could also result if an examiner loses his balance while walking in the water and is unable to arise from the water due to the weight of the water in his boots.

I thus find, based on the testimony of Dooley, that the accumulation of water herein did present a hazard to those miners who would have to traverse it to make an examination. I find that at best the testimony, of Roberts and Alexander, indicates that steps may be taken to minimize the degree of exposure to the hazards. However, their testimony does not negate the fact that the accumulation of water herein did constitute a hazardous condition.

III. Immediate Correction

According to Roberts, Contestant had, prior to the opening of the longwall panel in question, anticipated problems with water accumulation and attempted to alleviate these problems by a number of methods. Test were taken which indicated that the water in the areas in question came from the surface, and attempts were made to divert surface streams from leaking into these areas. Also, surveys were made to establish the low points along the floor of the entry in question. Electrical pumps were then installed in these locations to pump water out of the entry through a 10 inch pipe, which had replaced a 6 inch pipe, to make the removal of water more efficient. However, in spite of these efforts, the conclusion is inescapable that the accumulations of water reported by the examiner on March 14, 1991, had not been corrected immediately, as accumulations were observed again on March 19, 1991, by Roberts, and again noted, on March 20, 1991, by Dooley and Franklin Miller, who accompanied him.

Accordingly, inasmuch as the hazardous condition of water accumulation had not been immediately corrected by March 20, 1991, the Contestant herein did violate Section 75.305 as alleged.

In light of this finding, I deny Contestant's request for a declaratory rulling that it is not a hazardous condition for its examiners to travel through water accumulations of 24 inches or less when they are wearing hip boots and proceeding at a careful leisurely pace.

IV. SIGNIFICANT AND SUBSTANTIAL

In order to establish that the violation herein is significant and substantial, the Secretary must establish a violation of a mandatory standard, a discrete safety hazard contributed to by the violation, a reasonable likelihood that the hazard contributed to will result in an injury, and that a reasonable likelihood exists that the resulting injury will be of a reasonably serious nature. Mathies Coal Co., 6 FMSHRC 1, 3-4 (1984).

As set forth infra, the evidence establishes a violation of a mandatory standard, as well as a safety hazard of slipping or falling contributed to by, the violation. The key issue is whether they was a reasonable likelihood that the hazard of slipping or falling will result in an injury. As explained by the Commission in Consolidation Coal Co., 6 FMSHRC 189, at 193 (1984), proof as this issue "embraces a showing of a reasonable likelihood that the hazard will occur because of course, there can be no injury of it does not".

Although a stumbling or falling hazard certainly is present, due to the depth and musky nature of the water accumulation, the hazard can be mitigated by walking cautiously to feel for submerged objects so they may be avoided.

I conclude that accordingly, it has not been established that there was a reasonable likelihood that the hazard of falling or slipping would occur. Hence the violation is nor "significant and substantial".

ORDER

It is **ORDERED** that the Notice of Contest be **DISMISSED.** It is further **ORDERED** that Citation No. 3751114 be amended to reflect the fact that the violtion cited therein is not significant and substantial.

Avram Weisberger
Administrative Law Judge

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

May 24, 1991

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEVA 90-305 A. C. No. 46-01867-03859
v.	:	Blacksville No. 1 Mine
CONSOLIDATION COAL COMPANY, Respondent	:	

DECISION

Appearances: Wanda M. Johnson, Esq., Office of the Solicitor, U. S. Department of Labor, Arlington Virginia, for Petitioner;
Walter J. Scheller, Esq., Consolidation Coal Company, Pittsburgh, Pennsylvania, for Respondent.

Before: **Judge Merlin**

This case is a petition for the assessment of civil penalties filed by the Secretary of Labor against Consolidation Coal Company under section 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820.

Citation No. 3314686

This citation was settled by the parties prior to the hearing. A settlement motion was submitted by the Solicitor requesting that the citation be modified to delete the significant and substantial designation and asking that the operator be ordered to pay a civil penalty of $200. The settlement motion was approved on the record at the hearing (Tr. 4).

Citation No. 3314689

This citation alleges a violation of 30 C.F.R. § 75.303(a). A hearing was held on March 27, 1991. Post hearing proceedings were delayed because of many errors made by the court reporter in preparation of the administrative transcript, necessitating retranscription. This has now been done and the parties have filed post-hearing briefs.

30 C.F.R. § 75.303(a), which restates section 303(d)(1) of the Act, 30 U.S.C. § 863(d)(1), provides in pertinent part:

> (a) Within 3 hours immediately preceding the beginning of any shift, and before

> any miner in such shift enters the active workings of a coal mine, certified persons designated by the operator of the mine shall examine such workings and any other underground area of the mine designated by the Secretary or his authorized representative. Each such examiner shall
>
> * * *
>
> examine for such other hazards and violations of the mandatory health or safety standards, as an authorized representative of the Secretary may from time to time require.
>
> * * * *

Citation No. 3314689, dated July 13, 1990 and challenged herein, charges a violation for the following alleged condition or practice:

> An adequate preshift examination was not performed for the 8am - 4 p.m. shift of 07/13/90 from the 4 South loaded track to the 4 South Clear haul on the 4 South supply track. Condition of trolley wire installation and adequate roof support were easily observed by this inspector. No mention had been reported by the examiner. Citations of 75.516, No. 3314687, and 75.202(a) No. 3314688 were cited. A reexamination is required of the area.

The inspector marked the citation as significant and substantial (hereafter referred to as "S&S") and found negligence was moderate.

As appears hereinafter, Citation Nos. 3314687 and 3314688 also are relevant. Citation No. 3314687 charged an S&S violation of 30 C.F.R. § 75.516 for the following condition:

> The trolley wire 250 v, D.C. 1½ Blocks outby 50+00 on the 4 South supply track was not installed on suitable insulators to prevent such from contacting combustible materials. As track mounted equipment would pass, the trolley poles would push the wire against a wooden heading. Groving (sic) of the board indicated repeated contact. Such conditions may create fires and smoke inhalation to miners.

And Citation No. 3314688 charged an S&S violation of 30 C.F.R. § 75.202(a) for the following condition:

> The roof along the 4 South supply track, 50 feet outby 50+00, was not adequately supported in a loose shale roof area. An area nearest the wire side of the entry contained a roof bolt which had become loosen (sic) due to shale deterioration. Such left an area loose shale roof 7'8" wide by 6'3" in length. Nearly 6" of loose shale had fallen from around the bolt. Such conditions may cause fall of roof striking person in open jitneys presenting broken bones and cuts to head faces and arms.

At the prehearing conference the parties agreed to the following stipulations (Tr. 3-4):

(1) The operator is the owner and operator of the subject mine;

(2) the operator and the mine are subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977;

(3) I have jurisdiction of this case;

(4) the inspector who issued the subject citation was a duly authorized representative of the Secretary;

(5) a true and correct copy of the subject citation was properly served upon the operator;

(6) payment of any penalty will not affect the operator's ability to continue in business;

(7) the operator demonstrated good faith abatement;

(8) the operator has an average history of prior violations;

(9) the operator is large in size;

(10) Citation Nos. 3314688 and 3314687 were not contested by the operator, have been paid, and are final with respect to all matters therein;

(11) the Blacksville No. 1 mine had no fatal injuries in 1989 or in 1990.

The inspector testified that when he travelled to the P-9 area of the mine he observed black markings and indentations on a

board in the roof which showed that a trolley pole had been repeatedly striking the board (Tr. 14). As a result the inspector issued Citation No. 3314687, quoted above, which, as already set forth, was not contested and is final. (Stipulation No. 10). Accordingly, the condition described therein and the finding that it was S&S are accepted for present purposes. The inspector stated the condition was obvious because the indentations with black graphite marks from the trolley wire were easy to see (Tr. 14, 46). In his opinion the condition had not happened overnight, but had come about over a matter of days (Tr. 15-16, 38). Upon questioning, the operator's preshift examiner expressed the opinion that the condition occurred between the preshift and the inspection, but his explanation was confusing because it appeared to mix up the two underlying citations (Tr. 90-91). The operator's mine safety supervisor said anything was possible but admitted that he did not know when the violation occurred (Tr. 104-105). In light of the foregoing, I accept the inspector's testimony that the trolley wire condition had existed for a matter of days.

The preshift examiner further testified that he would have had to have been directly underneath the board in order to have seen the indentations made by the trolley wire. He relied upon the fact that on the preshift examination he travelled in an outby direction, whereas the inspector travelled inby (Tr. 78, 88-89). The mine safety supervisor testified to the same effect (Tr. 98-101). However, I find more persuasive the inspector's testimony that he could see the black marks made by the trolley wire when he looked backwards (outby) from an inby position (Tr. 60-61). Accordingly, I find the trolley wire condition was readily observable and should have been seen.

With respect to the roof condition cited in Citation No. 3314688, the inspector testified that roof deterioration had occurred gradually over a number of days (Tr. 24). Here too, the operator's preshift examiner averred that the condition could have happened between the time of the examination and the inspection. The mine safety supervisor also said it was possible (Tr. 91, 103-104). I find the inspector's judgement more convincing with respect to the length of time the roof condition existed. I also accept the inspector's testimony that the roof condition was easily observable because six inches of roof material had fallen to the floor (Tr. 22).

It is not disputed that the trolley wire and roof condition were not reported by the preshift examiner (Operator's Exhibit No. 5; Tr. 68-69). In Quinland Coals Inc., 9 FMSHRC 1614, 1619 (1987), the Commission held that 30 C.F.R. § 75.303 required a preshift examiner to report hazardous conditions and violations of the mandatory safety standards such as an inadequately supported roof and that in failing to report such conditions, the preshift examiner violated the standard. In accordance with the

decision in Quinland, I find a violation of 30 C.F.R. § 75.303 existed in this case.

The next issue is whether the violation was S&S as that term has been defined by Commission in Mathies Coal Co., 6 FMSHRC 1 (January 1984). As already noted, the findings that the trolley wire violation presented a significant and substantial risk of fire and that the roof violation presented a significant and substantial risk of a fall are final for purposes of this case. I conclude that the failure to report these violations also presented a reasonable likelihood of serious injury. In this connection, I find particularly relevant the inspector's testimony that the conditions which were not reported, occurred on the main artery where people and 90% of all vehicles normally travel (Tr.34). The purpose of the preshift examination is to detect hazardous conditions so that corrective measures can be taken and thereby eliminate the exposure of miners to dangerous conditions. Indeed, the administrative law judge in Quinland whose findings were upheld by the Commission, specifically found that the failure of the pre-shift examiner to report hazardous conditions could have significantly and substantially contributed to a serious mine accident. 8 FMSHRC 1175, 1180 (August 1986). In light of the foregoing, I conclude the violation was significant and substantial.

I further find the operator was negligent. As set forth above, the unreported conditions were readily observable and had existed for some period of time. As the inspector stated, the preshift examiner should have been on the lookout for bad roof conditions because this mine had thirty-three unintentional roof falls in only the last 4 or 5 years (Tr. 24-25). The remaining criteria with respect to the amount of civil penalty to be assessed have been stipulated to by the parties.

The parties are reminded that I am not bound by an MSHA assessed penalty but rather have de novo authority to assess a civil penalty herein. Sellersburg Stone Co., 5 FMSHRC 287 (March 1983), aff'd. 736 F.2d 1147 (7th Cir. 1984); Consolidation Coal Co., 10 FMSHRC 1935 (October 1989). I do not believe the MSHA assessed penalty is sufficient to serve as an effective deterrent. A penalty of $500 is assessed.

The post-hearing briefs filed by the parties have been reviewed. To the extent that the briefs are inconsistent with this decision, they are rejected.

ORDERS

Citation No. 3314689

It is **ORDERED** that the finding of a violation be **AFFIRMED.**

It is further **ORDERED** that the finding of significant and substantial be **AFFIRMED.**

It is further **ORDERED** that a penalty of $500 be **ASSESSED.**

Citation No. 3314682

It is **ORDERED** that the citation be **MODIFIED** to delete the significant and substantial designation.

It is further **ORDERED** that the proposed settlement of $200 be **APPROVED.**

ORDER TO PAY

It is **ORDERED** that the operator **PAY** $700 within 30 days of the date of this decision.

Paul Merlin
Chief Administrative Law Judge

Distribution:

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Walter J. Scheller, Esq., Consolidation Coal Company, 1800 Washington Road, Pittsburgh, PA 15241 (Certified Mail)

Mr. Steven Solomon, UMWA, Box 370, Cassville, WV 26527 (Certified Mail)

Mr. Donzel Ammons, Consolidation Coal Company, P. O. Box 24, Wana, WV 26590 (Certified Mail)

/gl

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

May 24, 1991

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS Docket No. WEVA 91-18 A. C. No. 46-01453-03930
v.	:	Humphrey No. 7 Mine
CONSOLIDATION COAL COMPANY, Respondent	:	

DECISION

Appearances: Wanda M. Johnson, Esq., Office of the Solicitor, U. S. Department of Labor, Arlington Virginia, for Petitioner;
Walter J. Scheller, Esq., Consolidation Coal Company, Pittsburgh, Pennsylvania, for Respondent.

Before: **Judge Merlin**

This case is a petition for the assessment of four civil penalties filed by the Secretary of Labor against Consolidation Coal Company under section 110 of the Federal Mine Safety and Health Act of 1977. 30 U.S.C. § 820.

Prior to the hearing the Solicitor submitted a motion to approve settlements and other dispositions for three of the four citations. I have reviewed the motion and determine that it is in accord with the provisions of the Act. Accordingly, as requested in the motion Citation No. 3314152 is modified to delete the significant and substantial designation and a penalty in the amount of $250 is assessed; Citation No. 3314153 is vacated for the reasons explained by the Solicitor; and a penalty of $370 is assessed in the original amount for Citation No. 3314148.

There remains for consideration Citation No. 3314143. A hearing was held on March 27, 1991. Post hearing proceedings were delayed because of many errors made by the court reporter in preparation of the administrative transcript, necessitating retranscription. This has now been done and the parties have filed post hearing briefs.

Citation No. 3314143 charges a violation of 30 C.F.R. § 75.517 for the following alleged condition:

> The power cable serving power to the loading machine operating on the 12 East 0490

section is not being adequately insulated. The outer jacket of the cable had been damaged and taped. However, the tape was worn exposing the insulated power leads.

30 C.F.R. § 75.517 which is a restatement of section 305(l) of the Act, 30 U.S.C. § 865(l), provides as follows:

> Power wires and cables, except trolley wires, trolley feeder wires, and bare signal wires, shall be insulated adequately and fully protected.

At the hearing the parties agreed to the following stipulations (Tr. 3-4):

(1) The operator is the owner and operator of the subject mine;

(2) the operator and the mine are subject to the Federal Mine Safety and Health Act of 1977;

(3) the Administrative Law Judge has jurisdiction in this matter;

(4) the inspector was a duly authorized representative of the Secretary; a true and correct copy of the subject citation was properly served upon the operator;

(5) payment of any penalty will not affect the operator's ability to continue in business;

(6) the operator demonstrated good faith abatement;

(7) the operator has an average history of prior violations;

(8) the operator is large in size;

(9) the Humphrey No. 7 Mine had no fatalities in 1989, 1990, or to date.

The MSHA inspector testified that he noticed a damaged place 6 to 7 inches long in the middle of the cable to a loading machine (Tr. 8, 12, 13, 29). That area of the cable had been previously damaged and retaped (Tr. 13). He said that when he picked up the cable he noticed some slight color but not much from an inner power lead of the cable (Tr. 8). He first stated he "believed" the color was green and when called on rebuttal said he "assumed" it was green (Tr. 10, 110). Seeing the color meant to him that the outer insulation was inadequate (Tr. 9).

The inspector testified that after he saw the color he bent the cable five or six times (Tr. 14). Originally, he asserted that he used minimal pressure because not much pressure was necessary on a taped area, but on rebuttal he could not remember how far he bent the cable (Tr. 15-16, 111).

The operator's inspector escort testified in contradiction to the MSHA inspector. According to the escort, the inspector picked up the cable and bent it further then normal bending until the cable was almost in a figure eight (Tr. 52, 53). The inspector bent the cable until his hands met and the cable was in a loop (Tr. 54). The escort stated that the inspector bent it in that manner five or six times while twisting it (Tr. 53). Only after he bent the cable did the inspector tell the escort, who was standing next to him, that there were exposed wires (Tr. 55, 63). Both the operator's escort and the operator's foreman testified that the inspector bent the cable far more than it would have been bent under normal mining operations (Tr. 53, 62, 67, 96). The escort testified that the taping was adequate before the inspector bent the cable and it was his view that the inspector himself exposed the inner leads by his excessive bending and twisting (Tr. 59, 61).

After listening to and observing the witnesses and reviewing the transcript, I find the evidence of the operator's witnesses more credible and I accept their version of what transpired. As noted above, the operator's escort stated that the inspector did not say anything about an exposed power wire until after the bending. The inspector could not remember if he told the escort the lead was exposed before bending the cable (Tr. 110, 111). It is clear to me that if the inspector had seen an exposed wire when he first picked the cable up, he would have told the escort who was by his side (Tr. 52, 63). I accept the evidence that the conductor in question was yellow not green as the inspector said and I particularly note that the inspector's testimony on this point during rebuttal was tentative in manner and tone. The inspector admitted that he bent the cable while the machine was energized and admitted that this was dangerous as well as stupid (Tr. 20-21). I find it hard to believe that an experienced MSHA inspector would engage in life-threatening actions such as bending and twisting a live cable which had an exposed wire. Accordingly, the fact that the power was on casts further doubt upon the inspector's testimony that he saw an exposed wire before he bent the cable. Based upon the foregoing, I find that the inspector did not see an exposed power wire before he bent the cable.

I conclude, therefore, that when the inspector undertook to bend the cable the place was taped and that, as the escort testified, the tape was adequate. In this connection, I again note that the inspector first testified he used minimal force but on rebuttal said he did not remember how far he bent the cable.

The consistent testimony of the operator's escort and section foreman shows that the inspector bent the cable into a loop while twisting it thereby subjecting the cable to more stress than it would have undergone in normal mining operations. Also, the section foreman's testimony that bending the cable excessively causes the adhesive of a taped place to come loose is accepted (Tr. 90). Accordingly, I conclude that the inspector himself created the violative condition and that therefore the citation must be vacated.

The post-hearing briefs filed by the parties have been reviewed. To the extent that the briefs are inconsistent with this decision, they are rejected.

ORDERS

It is **ORDERED** that Citations Nos. 3314143 and 3314153 be **VACATED.**

It is further **ORDERED** that Citation No. 3314152 be **MODIFIED** to delete the significant and substantial designation.

It is further **ORDERED** that the proposed settlement of $620 for Citation Nos. 3314152 and 3314148 be **APPROVED.**

It is further **ORDERED** that the operator pay $620 within 30 days of the date of this decision.

Paul Merlin
Chief Administrative Law Judge

Distribution:

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Mr. Barry Dangerfield, Consolidation Coal Company, P. O. Box 100, Osage, WV 26543 (Certified Mail)

/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 28 1991

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. PENN 90-248
	:	A.C. No. 36-08036-03507
v.	:	
	:	Signal Frackville Energy
MOREA SERVICES, INCORPORATED, Respondent	:	

DECISION APPROVING SETTLEMENT

Appearances: Susan M. Jordan, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for the Petitioner; Carl J. Steinbrenner, Esq., Rosenn, Jenkins & Greenwald, Wilkes-Barre, Pennsylvania, for the Respondent.

Before: Judge Melick

This case is before me upon a petition for assessment of civil penalty under Section 105(d) of the Federal Mine Safety and Health Act of 1977 (the Act). Petitioner has filed a motion to approve a settlement agreement and to dismiss the case. A reduction in penalty from $15,000 to $12,000 is proposed. I have considered the representations and documentation submitted in this case, as well as testimony at hearings, and I conclude that the proffered settlement is appropriate under the criteria set forth in Section 110(i) of the Act.

WHEREFORE, the motion for approval of settlement is **GRANTED**, and it is **ORDERED** that Respondent pay a penalty of $12,000 within 30 days of this order.

Gary Melick
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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MAY 28 1991

LOCAL UNION 2874, DISTRICT 5, UNITED MINE WORKERS OF AMERICA, Complainant	:	COMPENSATION PROCEEDING
	:	Docket No. PENN 88-232-C
v.	:	Marianna Mine No. 58
BETHENERGY MINES, INC., Respondent	:	

ORDER OF DISMISSAL

Before: Judge Fauver

Complainant's Motion to Dismiss is GRANTED, and this proceeding is DISMISSED.

William Fauver
William Fauver
Administrative Law Judge

Distribution:

Mary Lu Jordan, Esq., Ms. Joyce A. Hanula, Legal Assistant, UMWA, 900 15th Street, N.W., Washington, DC 20005 (Certified)

R. Henry Moore, Esquire, Buchanan Ingersoll Professional Corporation, 600 Grant Street, 57th Floor, Pittsburgh, PA 15219 (Certified)

fas

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

MAY 28 1991

BRADLEY S. CRAIG, Complainant	:	DISCRIMINATION PROCEEDING
v.	:	Docket No. LAKE 91-38-D
ARCH OF ILLINOIS, INC., Respondent	:	Captain Mine

DECISION

Appearances: Bradley S. Craig, pro se, DuQuoin, Illinois, for Complainant;
David S. Hemenway, Esq., Thompson & Mitchell, St. Louis, Missouri, for Respondent.

Before: Judge Broderick

STATEMENT OF THE CASE

Complainant Craig contends that he was constructively discharged from his job as a utility machine fill-in (UMFI) worker by Respondent Arch, because of activity protected under the Mine Act. Respondent contends that Craig voluntarily terminated his employment and that his termination was unrelated to any protected activity. Both parties engaged in pretrial discovery. Pursuant to notice, the case was called for hearing in St. Louis, Missouri, on March 26, 1991. Bradley Craig testified on his own behalf and Brenda Craig and Bobby Gene Craig testified on his behalf. At the conclusion of Complainant's case, Respondent made a motion to dismiss which I denied on the record. Respondent called Gregory Bigham, Benny R. McElvain, Allan Schulz, and Hubert Place as witnesses. Both parties have filed Post Hearing Briefs. I have considered the entire record and the contentions of the parties, and make the following decision.

FINDINGS OF FACT

I

At all times pertinent to this proceeding, Respondent Arch of Illinois (Arch) was the owner and operator of the Captain Mine, a surface mine located in the State of Illinois. Complainant was employed by Arch from July 1976 to October 18, 1990 as a miner. The Captain Mine produces approximately 6 million tons of coal a year from two pits. The pit in which

Craig worked was about 5600 feet long, with a highwall of between 20 and 40 feet. The coal bench is about 90 feet wide and the dragline bench from about 110 feet to 140 feet wide below the first coal seam.

Craig was hired in July 1976 as a drill helper. He received orientation and on the job training. He continued as a drill helper until November 12, 1976, when he became a driller. He continued as a driller until June 2, 1979, when he bid for a job on railroad maintenance. He remained on that job until April 1980. From April 3, 1980 to November 17, 1982, he worked as a belt wagon operator. From November 17, 1982 to August 22, 1987, he went back on railroad maintenance. Thereafter he was a belt repairman until January 12, 1988. He then returned to railroad maintenance work until April 18, 1988, when the job was eliminated. He then became an UMFI worker until October 18, 1990.

II

An UMFI employee may be assigned to different jobs on different days - wherever they are needed. One of the jobs an UMFI may be required to perform is that of a pumper. A pumper is required to set and take out pumps and to monitor the pumps which are set. He hooks the hoses and the electric cable to the pump which is set in the area where the water is to be pumped out. The job requires physical exertion, but very little skill. On January 12, 1989, Arch sent a memorandum to all classified employees setting forth the criteria for job testing. The job of pumper lists the experience required as "experience in pumping." (R. Ex. 4). On March 20, 1989, it sent out another memorandum entitled "Changes in Experience Requirement." It listed the different jobs at the Captain Mine including the job of pumper which it states requires 1 month pumping experience. (Comp. Ex. 3).

Craig had been assigned to the pumper job between 6 and 12 times beginning in August 1989. On August 21, 1989, he was assigned to a pumper's job and received new task training as a pumper from Pit Foreman Allan F. Schulz. Craig signed MSHA Certificate of Training form that he had completed the new task training. (R. Ex. 3). Thereafter he was assigned to pumper duties on September 13, 1989, February 27, 1990, May 17, 1990, August 24 and 25, 1990, October 16, 17, and 18, 1990. (R. Ex. 5). Before October 1990, he never set up a pump completely by himself, nor did he ever take one out. He did however work with others in setting up and taking out pumps. He was never classified as a pumper.

On October 16, 1990, he was assigned as a pumper and was task-trained for the job by Pit Foreman Benny McElvain. McElvain testified that it was his practice to task-train any employee

assigned to a new job if he is unsure of the employee's experience. He showed him how to hook the hose to the pump truck, and to attach the hoses and cable to the pump. He completed a certificate of training on an MSHA Form, which Craig signed attesting that he had completed the training. (R. Ex. 2).

III

On October 17, 1990, Craig and another UMFI employee, Olan Thompson, were assigned to pumping duties in the 2750 pit of the Captain Mine. Allan Schulz was the foreman. It was raining heavily, and Craig and Thompson were directed to set a pump. Craig testified the Thompson actually set the pump, hooked it up and started it. Craig helped drag the hoses and lines. He also testified that he had to go under the swing of the dragline to get to the pump, but he "didn't squawk safety that night, I just wanted to get the job done, get the hell out of there, and get up to the top and get on some clean clothes because I was drenched to the bone." (R. 20). Setting the pump took from 30 minutes to an hour.

When Craig arrived at the mine on October 18, he was told by Pit Foreman Benny McElvain that he was to be the pumper on his shift. Craig testified that two pumps were set in the sump and McElvain told his to hook the hoses and electric cables to them. He also testified that the pumps were down a "real steep bank . . . and one of them was setting at a real awkward angle." (R. 33). Before Craig and McElvain left for the worksite, Craig told McElvain that he "could be hurt down here," (R. 145), referring to the pumper's job.

McElvain testified and I find as a fact that the hoses were already attached to the pump, but had been taken apart at the "parting" in order to load out the coal. Craig's assigned task was to splice the ends of the hoses together and plug the cable into the pumps. Craig told McElvain that he was not qualified to be the pumper and asked for another job. McElvain told him that he didn't have anyone else to do the job and that Craig would have to do it. Craig asked for help and McElvain sent Joe Summers, a heavy equipment operator who helped him drag the cable and hoses to where they were to be hooked up, but Summers did not offer to help Craig hook up the cable and hoses. Craig again asked McElvain for a different job and McElvain again refused. There is no evidence that Craig made specific safety complaints to McElvain at that time. He merely reiterated that he disliked and did not have the skill to perform the pumper's job.

After further discussion, McElvain took Craig in his truck to the Shift Superintendent Steve Bigham. Craig told Bigham that he didn't like to pump and asked for another job. Bigham told him that he was the only person available and capable of pumping at the time and that he would have to perform the duties of a

pumper. Craig also told Bigham that the pumping job was not safe. After further discussion, Bigham asked Craig if he wanted a union representative or safety committeeman to come to the area. Craig, who testified that he was under great mental stress at the time, rejected the offer because he "just wanted out of there." (R. 44). Bigham then gave Craig a direct order to perform the job of pumper or be suspended with intent to discharge. When Craig again raised a safety issue, Bigham again asked if he wanted a safety committeeman or pit committeeman. Craig again said no. Craig than said he wanted to sign a quit slip. McElvain took him to the office where he signed a separation form in which he checked the type of separation as elective layoff. (R. Ex. 1). The fact that Craig signed a voluntary separation from does not establish that he was not the recipient of adverse action: in fact he was terminated for refusing to perform certain work, and whether the termination took the form of a quit slip or suspension with intent to discharge is irrelevant under the Mine Act. Before signing the separation form, Craig asked for an union representation. Bigham refused because he "saw no need after twice before refusing a safety committeeman and a pit committeeman to have any other representation there." (R. 124). Craig testified that he assumed when he signed the separation form as an elective layoff, he would be entitled to unemployment benefits and continuation of medical insurance for 1 year.

The weight of the evidence establishes and I find as a fact that Craig's work refusal was based on his dislike for the pumper's duties, and his belief that he was unable to perform them. His reference to alleged unsafe aspects of the job was not a significant factor in his refusal to perform the duties assigned him.

Following his separation, Craig was very distraught and depressed. He was seen at the Perry County Counseling Center because of "his emotional reaction to losing his job." He exhibited symptoms of depression. (Comp. Ex. 1). He consulted the Union President after his separation, but was told that since he signed the quit slip, there was nothing the union could do.

IV

Beginning in January 1988, Complainant Craig was enrolled in a program at the Logan College/Wabash Valley College in Carterville, Illinois, for an associate degree in coal mine technology. Arch paid his tuition. By October 1990, Craig had completed 61 hours of a required 70 hours. He was given credit by the college for his annual retraining at the mine.

Complainant has not worked since his separation from Arch. He attempted to find employment and filed applications with a large number of prospective employers between October 23, 1990 and January 16, 1991.

ISSUES

1. Whether Complainant was constructively discharged or otherwise discriminated against because of activity protected under the Mine Act?

2. If so, to what remedies is he entitled?

CONCLUSIONS OF LAW

I

Respondent Arch is subject to the provisions of the Mine Act in the operation of the Captain Mine. Complainant Craig was employed by Arch as a miner, and is protected under Section 105(c) of the Act. I have jurisdiction over the parties and subject matter of this proceeding.

II

In order to establish a prima facie case of discrimination under Section 105(c) of the Mine Act a complaining miner bears the burden of production and proof to establish (1) that he engaged in protected activity and (2) that the adverse action complained of was motivated in any part by that activity. Secretary on behalf of Pasula v. Consolidation Coal Company, 2 FMSHRC 2768 (1980), rev'd on other grounds sub nom. Consolidation Coal Company v. Marshall, 663 F.2d 1211 (3d Cir. 1981); Secretary on behalf of Robinette v. United Castle Coal Company, 3 FMSHRC 803 (1981); Secretary on behalf of Jenkins v. Hecla-Day Mines Corporation, 6 FMSHRC 1842 (1984); Secretary on behalf of Chacon v. Phelps Dodge Corp., 3 FMSHRC 2508 (1981), rev'd on other grounds sub nom. Donovan v. Phelps Dodge Corp., 709 F.2d 86 (D.C. Cir. 1983). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no way motivated by protected activity. If an operator cannot rebut the prima facie case in this manner it may nevertheless affirmatively defend by proving that it was also motivated by the miner's unprotected activities alone. The operator bears the burden of proof with regard to the affirmative defense. Haro v. Magma Copper Company, 4 FMSHRC 1935 (1982). The ultimate burden of persuasion does not shift from the complainant. Robinette, supra. See also NLRB V. Transportation Management Corporation, 462 U.S. 393, 76 L.Ed.2d 667 (1983), where the Supreme Court approved the NLRB's virtually

identical analysis for discrimination cases arising under the National Labor Relations Act. Refusal to perform hazardous work can be protected activity under the Mine Act.

Generally, refusal to work cases turn on the miner's belief that a hazard exists, so long as that belief is held in good faith and is a reasonable one. Secretary ex rel. Bush v. Union Carbide Corp., 5 FMSHRC 993 (1983); Miller v. FMSHRC, 687 F.2d 1984 (7th Cir. 1982).

In analyzing whether a miner's belief is reasonable, the hazardous condition must be viewed from the miner's perspective at the time of the work refusal, and the miner need not objectively prove that an actual hazard existed. Secretary ex rel. Bush v. Union Carbide Corp., 5 FMSHRC 993 (1983); Secretary ex rel. Pratt v. River Hurricane Coal Co. 5 FMSHRC 1529, (1983); Haro v. Magma Copper Co., 4 FMSHRC 1935 (1982); Robinette, supra. The Commission has also explained that "[g]ood faith belief simply means honest belief that a hazard exists." Robinette, supra, at 810.

III

Although the Commission has declined to articulate a standard as to how severe a hazard must be to trigger a miner's right to refuse to work, see Secretary/Pratt v. River Hurricane Coal Co., 5 FMSHRC 1529 (1983)), it is clear that the refusal to work must involve a hazard beyond the hazards inherent in the mining industry or the job itself. Simmons v. SOCCO, 4 FMSHRC 1584 (1982); Runyon v. Big Hill Coal Co., 8 FMSHRC 1441 (1986).

IV

The evidence in the present case establishes that complainant refused to perform the work of a pumper. He was told that if he continued to refuse to perform the work, he would be discharged. Rather than accept a discharge which he believed would "mess up" his "good record over the past fourteen years," he signed the "quit slip." (R. 46-47). A miner who resigns because of intolerable conditions may be found to have been constructively discharged. Simpson v. FMSHRC, 842 F.2d 453 (D.C. Cir. 1988). If the operator maintains conditions so intolerable that a reasonable miner would feel compelled to resign, he is constructively discharged.

What were the conditions at the Captain Mine which precipitated Craig's resignation? First and foremost, Craig disliked the job of pumper and felt that he was not capable of performing its duties. Secondly and more by way of a post-discharge rationale, he complained of a steep slope going down to the pumps, rocky, wet ground, and the dangers of a fall of ground from the highwall. These conditions are not hazards beyond those

inherent in the job itself. Complainant's distaste for the duties of the pumper, and his lack of skill and ability to perform the job are not intolerable safety hazards, or in fact hazards at all. I find, based on the testimony of McElvain and Bigham that the highwall did not pose a hazard to the pumper, nor did the slope to the pumps. From Craig's point of view, these conditions were not such as to cause a reasonable belief that they were safety hazards. I conclude that Craig's work refusal was not based on a reasonable good faith belief that the work he as asked to perform was hazardous, but rather on his long-held dislike for the pumper job, and his belief that he was unable to perform the duties of the job. His safety rationale was not made in good faith. Therefore, I conclude that Craig has failed to establish that his termination was the result of activity protected under the Mine Act.

ORDER

Based on the above findings of fact and conclusions of law, **IT IS ORDERED** that the complaint of discrimination is **DISMISSED.**

James A. Broderick
James A. Broderick
Administrative Law Judge

Distribution:

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David S. Hemenway, Esq., Patricia L. Cohen, Esq., Thompson & Mitchell, One Mercantile Center, Suite 3400, St. Louis, MO 63101 (Certified Mail)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

MAY 29 1991

THOMAS J. MCINTOSH, Complainant	:	DISCRIMINATION PROCEEDING
v.	:	Docket No. KENT 90-113-D
	:	MSHA Case No. BARB CD 90-06
FLAGET FUELS, INC., Respondent	:	No. 1 Surface Mine

DECISION

Appearances: Tony Oppegard, Esq., Appalachian Research & Defense Fund of Kentucky, Inc., Lexington, Kentucky, for the Complainant.

Before: Judge Koutras

Statement of the Case

This proceeding is before me to determine the relief due the complainant based upon my decision of May 3, 1991, finding that the respondent Flaget Fuels, Inc., discriminated against the complainant in violation of section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, et seq. In response to my Order of May 3, 1991, the complainant has filed his petition for backpay and expenses, and a statement of attorney fees and litigation expenses incurred as a result of his discriminatory discharge by the respondent. The respondent, who failed to appear at the hearing to defend this action, filed no response to the complainant's pleadings for relief.

Backpay

The complainant is claiming backpay for the period of December 1, 1989, through January 15, 1990, a period of 6 work weeks. Based on a wage rate of $8 per hour for regular time and $12 per hour for overtime, the complainant's weekly pay rate was $440 ($320 regular time and $120 overtime). Complainant asserts that for the six weeks backpay period, he would have earned $2,640, had he not been unlawfully discharged.

In addition to backpay, the complainant claims mileage expenses of $87.97, in conjunction with his search for work during the backpay period, as well as for his meetings with his attorney and his attendance at the hearing in this matter. The complainant has filed a detailed log in support of this claim.

Citing Secretary of Labor on behalf of Bailey v. Arkansas-Carbona Co. and Walker, 5 FMSHRC 2042, 2049 (1983), and Local Union 2274, UMWA v. Clinchfield Coal Co., 10 FMSHRC 1493 (1988), aff'd sub nom, Clinchfield Coal Co., v. FMSHRC, 895 F.2d 773 (D.C. Cir. 1990), the complaintant also seeks the payment of interest on the damages owed him by the respondent, and he requests an order requiring the respondent to pay interest pursuant to the computation formula established by the Commission in Arkansas-Carbona and Clinchfield Coal Co., supra.

After due consideration of the complainant's petition for backpay and expenses, I conclude and find that it is reasonable and proper and the petition IS GRANTED. The complainant is due $2,727.97 ($2,640 + $87.97) (less interest) for backpay and expenses.

Attorney Fees and Litigation Expenses

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

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

The complainant has requested $7,740 in attorney fees, based on 51.6 hours of work claimed by counsel Oppegard at the rate of $150 per hour. The complainant also requests $317.34, for certain enumerated litigation expenses incurred by the Appalachian Research & Defense Fund of Kentucky in pursuit of his case. The total amount of claimed attorney fees and litigation expenses is $8,057.34.

Included in the 51.6 hours of claimed work by counsel Oppegard is a claim of 20.1 hours for work performed during the period December 11, 1989, to February 16, 1990, prior to the complainant's filing of his complaint with the Commission on March 9, 1990. I conclude and find that the time spent by Mr. Oppegard during the time that the complaint was being pursued and investigated by MSHA, including interviews, phone calls, and contacts with MSHA's special investigator, was non-legal work unconnected with the trial of the case, or preparation for the trial of the case, and that an hourly rate less than $150 is appropriate in the circumstances. See: Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 717 (5th Cir. 1974), and my

decision of April 19, 1991, in Ricky Hays v. Leeco, Inc., Docket No. KENT 90-59-D. I Further conclude and find that $50 per hour is a reasonable billing rate for this work. Accordingly, I will allow $1,005 for this work (20.1 hours x $50).

I have reviewed the remaining claims for work performed by Mr. Oppegard from March 5, 1990, through May 9, 1991, and with the exception of 4.4 hours ($660) claimed for round trip travel from Lexington to Pikeville, Kentucky, I conclude that the charges are reasonable and they are allowed. In view of the allowable mileage, lodging, and meal expenses in connection with the relatively brief hearing held in this case, I conclude that counsel has been adequately compensated for these expenses and that an additional charge of $660 for counsel's travel time is unreasonable. Accordingly, it is disallowed. I will allow payment for the remaining 27.1 hours of work at an hourly rate of $150 ($4,065).

I have further reviewed the claims for other litigation expenses incurred by counsel in the amount of $317.34, and I conclude and find that they are reasonable and proper, and they are allowed.

ORDER

IT IS ORDERED THAT:

1. My decision in this case, issued on May 3, 1991, is now final.

2. The respondent shall reinstate the complainant to his former position with full backpay and benefits, with interest, at the same rate of pay, on the same shift, and with the same status and classification that he would now hold had he not been unlawfully discharged.

The backpay due the complainant for the period of December 1, 1989, through January 15, 1990, is $2,640. Backpay interest will continue to accrue until this matter becomes final and the complainant is reinstated and paid. The interest accrued with respect to the backpay will be computed according to the Commission's decision in Local Union 2274, UMWA v. Clinchfield Coal Co., 10 FMSHRC 1483 (1988), aff'd sub nom. Clinchfield Coal Co. v. FMSHRC 895 f.2D 773 (D.C. Cir., 1990), and calculated in accordance with the formula in Secretary/Bailey v. Arkansas Carbona, 5 FMSHRC 2042 (1984).

3. The respondent shall expunge from the complainant's personnel records and/or any other company records any reference to his discharge of December 8, 1989.

4. The respondent shall pay the complainant's expenses of $87.97, incurred during the backpay period. The respondent shall also pay the complainant's attorney fees and other litigation costs and expenses in the amount of $5,387.34.

5. The respondent shall post a copy of my decision of May 3, 1991, and the instant decision, at its No. 1 Surface Mine in a conspicuous, unobstructed place where notices to employees are customarily posted for a period of 60 consecutive days from the date of this decision and order.

6. The respondent shall comply with the aforesaid enumerated Orders within thirty (30) days of the date of this decision.

George A. Koutras
Administrative Law Judge

Distribution:

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/ml

ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

May 3, 1991

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. KENT 90-356
	:	A. C. No. 15-16477-03526
v.	:	
	:	Docket No. KENT 90-399
	:	A. C. No. 15-16637-03528
LJ'S COAL CORPORATION, Respondent	:	No. 3 Mine
	:	
	:	Docket No. KENT 90-358
	:	A. C. No. 15-16637-03504
	:	
	:	No. 4 Mine

ORDER

On April 8, 1991, Respondent filed a Motion asking "the Court" to "disqualify" me from hearing the above captioned cases on the ground that in not approving a Joint Motion to Approve Settlement, I had "determined" my "opinion" in "these matters."

29 C.F.R. § 2700.81(b) provides that a Party may request a Judge to withdraw ". . . on grounds of personal bias disqualification by filing promptly upon discovery of the alleged facts an affidavit setting forth in detail the matters alleged to constitute grounds for disqualification."

Respondent has not filed any affidavit setting forth matters alleged to constitute grounds of disqualification.

In an Order entered February 25, 1991, I set forth the pertinent history of these cases as follows: "On January 14, 1991, Counsel for the Petitioner filed a Joint Motion to Approve Settlement (the Motion). In essence, neither the Motion nor the exhibits attached to it allege the existence of any facts or circumstances which contravene or dilute assertions set forth in the various Citations at issue, and in the accompanying Narrative Findings for Special Assessment. Specifically the Motion does not allege any facts or circumstances with regard to the gravity of the alleged violations, and the Operator's negligence which contravene or dilute the assertions set forth in the Citations at issue. Indeed, the Joint Motion does not allege any facts or circumstances other than those set forth in the various Citations."

On January 18, 1991, in a conference call I initiated between Counsel for both Parties, it was explained that, inasmuch as the Motion did not contain sufficient facts to support the proposed settlements it could not be approved.

In my analysis of the Joint Motion to Approve Settlement, and in my Decision denying the Motion, and in my conversation with the Parties on January 18, 1991, concerning my inability to approve the Motion, I in no way reached any opinion as to the merits of the issues raised by the pleading as the record did not contain any evidence. I continue to have a totally open mind with regard to the issues raised by the pleadings, as there is no evidence before me. My mind shall remain open until a evidentiary hearing scheduled for June 18-20, 1991, is concluded and post hearing briefs are received. Only at this time shall I weigh the evidence and reach a decision on all matters at issue. The fact that I have denied a Motion to Approve Settlement on the grounds that it does not provided facts in support of the appropriateness of the proposed penalties, does not in any way preclude me from subsequently reaching an objective, impartial decision based solely on the evidence to be presented at the evidentiary hearing.

Accordingly, for all these reasons, Respondent's Motion is **DENIED.**

Avram Weisberger
Administrative Law Judge
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