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MAY 1992

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

Clifford Meek v. Essroc Corporation, Docket No. LAKE 90-132-DM. (Judge Fauver, March 31, 1992).

Secretary of Labor, MSHA v. Twentymile Coal Company, Docket No. WEST 91-449. (Judge Lasher, April 6, 1992)

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

Tom K. Sperry v. Ames Construction, Inc., Docket No. WEST 91-473-DM. (Judge Lasher, April 6, 1992).

Secretary of Labor, MSHA v. Ravenna Gravel, Docket No. LAKE 90-127-M. (Chief Judge Merlin, Default Decision, March 7, 1991).





## COMMISSION DECISIONS AND ORDERS



# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

May 5, 1992

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

v.

DRUMMOND COMPANY, INC.

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Docket No. SE 90-126

BEFORE: Backley, Doyle, Holen and Nelson, Commissioners<sup>1</sup>

## DECISION

BY THE COMMISSION:

This civil penalty proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988) ("Mine Act" or "Act"), involves the validity of the Secretary of Labor's interim "excessive history" program as applied to the proposal of civil penalties under the Mine Act against Drummond Company, Inc. ("Drummond"). This decision is the lead opinion in a group of seven decisions concerning the Secretary's excessive history program.<sup>2</sup>

In all seven proceedings, the mine operators filed motions with the presiding Commission administrative law judges requesting that the proposed penalties be remanded to the Secretary of Labor for recalculation. The operators contended that the proposed penalties were improper because they were not based on the Secretary's civil penalty regulations set forth at 30 C.F.R. Part 100 ("Part 100") but, instead, were computed in accordance with the interim excessive history program set forth in the Secretary's Program Policy Letter No. P90-III-4 (May 29, 1990) (the "PPL"), which, the operators asserted, had been unlawfully implemented outside the notice-and-comment process required by the Administrative Procedure Act, 5 U.S.C. § 551 et seq. (1988) ("APA"). Following hearings on the motions, the judges reached conflicting decisions as to the validity of the PPL and whether the proposed civil penalties ought to be remanded to the Secretary. In the present case, Commission Chief Administrative Law Judge Paul Merlin concluded, inter alia,

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<sup>1</sup> Chairman Ford did not participate in the consideration or disposition of this matter.

<sup>2</sup> The other excessive history decisions are: Drummond Co., Inc., Nos. SE 90-125, etc; Zeigler Coal Co., No. LAKE 91-2; Texas Utilities Mining Co., No. CENT 91-26; Utah Power & Light Co., Mining Div., Nos. WEST 90-320, etc.; Hobet Mining, Inc., No. WEVA 91-65; and Cyprus Plateau Mining Corp., Nos. WEST 91-44, etc.

that the PPL had been invalidly implemented. Judge Merlin remanded the proposed civil penalties to the Secretary with instructions to recalculate them without reference to the PPL. 13 FMSHRC 339 (March 1991)(ALJ).

The aggrieved parties filed petitions for interlocutory or discretionary review, seeking review of the same general issues: (A) whether the Commission has subject matter jurisdiction to consider the validity of the PPL; (B) whether the Secretary acted arbitrarily in proposing civil penalties on the basis of the PPL, an issue that involves an examination of whether the PPL exceeds the interim mandate of the United States Court of Appeals for the District of Columbia Circuit in Coal Employment Project v. Dole, 889 F.2d 1127 (1989) ("Coal Employment Project I"); and whether the PPL was adopted in contravention of the APA's notice-and-comment requirements; and (C) whether the excessive history provisions of the PPL are impermissibly retroactive. The Commission granted the petitions for review and heard consolidated oral argument in this and two other proceedings.

For the reasons that follow, we conclude that the Commission has jurisdiction under the Mine Act to review the validity of the PPL in the context of these civil penalty proceedings. We conclude that the PPL exceeded the Court's interim mandate in Coal Employment Project I and was issued in contravention of the APA. In light of these conclusions, we need not reach the retroactivity issue. Accordingly, we affirm Judge Merlin's decision herein and remand to the Secretary for recalculation of the civil penalty proposals.

## I.

### Background

#### A. General Legal and Regulatory Background

The Mine Act establishes a bifurcated civil penalty system. The Secretary proposes and this Commission assesses all civil penalties for violations of the Act and of the mandatory safety and health standards and other regulations thereunder. See 30 U.S.C. §§ 815(a) & (d) & 820(a) & (i). Section 105(a) of the Act provides in relevant part that, after the Secretary issues a citation or withdrawal order to a mine operator for an alleged violation, she "shall ... notify the operator ... of the civil penalty proposed to be assessed ... for the violation cited...." The operator has 30 days within which "to contest ... the proposed assessment of penalty." 30 U.S.C. § 815(a) (emphasis added). If the operator does not contest the Secretary's proposed penalty, the proposed assessment becomes a final "order of the Commission" not subject to review by any court or agency. Id.

If the operator contests the Secretary's proposed assessment of penalty, Commission jurisdiction over the matter attaches. 30 U.S.C. § 815(d). The Commission then affords an opportunity for a hearing, and "thereafter ... issue[s] an order, based on findings of fact, affirming, modifying, or vacating the Secretary's citation, order, or proposed penalty or directing other appropriate relief." Id. Section 110(i) of the Act provides: "The Commission shall have authority to assess all civil penalties

provided in this [Act]." 30 U.S.C. § 820(i).<sup>3</sup>

1. The Secretary's Part 100 Regulations

Section 508 of the Mine Act authorizes the Secretary to issue "such regulations as [she] deems appropriate" to carry out any provision of the Act. 30 U.S.C. § 957. To implement the Act's civil penalty scheme, the Secretary, acting through the Department of Labor's Mine Safety and Health Administration ("MSHA"), promulgated regulations at 30 C.F.R. Part 100. These regulations establish three methods for calculating proposed civil penalties: the regular assessment (30 C.F.R. § 100.3), the single penalty assessment (30 C.F.R. § 100.4), and the special assessment (30 C.F.R. § 100.5).<sup>4</sup>

MSHA calculates regular assessments on the basis of a formula derived from the six penalty criteria set forth in the Mine Act (n. 3, supra), including "[t]he operator's history of previous violations." 30 C.F.R. § 100.3(a)(2). MSHA promulgated these regulations in 1978 and 1982, establishing the single penalty assessment in 1982. See Coal Employment Project I, 889 F.2d at 1129-30.

Under the Part 100 scheme, MSHA could assess a single penalty -- in the amount of \$20 at the time these cases arose -- for a timely abated non-significant and substantial violation ("non-S&S"). 30 C.F.R. § 100.4.<sup>5</sup> If

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<sup>3</sup> Section 110(i) provides in part:

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

30 U.S.C. § 820(i). These same six penalty criteria are also referenced at 30 U.S.C. § 815(b)(1)(B) in connection with the Secretary's penalty proposal powers.

<sup>4</sup> As discussed below, the Secretary has recently amended the Part 100 regulations in certain respects not directly relevant to the issues presented in these cases. See 57 Fed. Reg. 2968 (January 29, 1992). Unless otherwise noted, references to the Part 100 regulations denote the rules applicable during the operative time frame in these proceedings.

<sup>5</sup> The S&S terminology is taken from section 104(d) of the Act, which distinguishes as more serious in nature any violation that "could significantly and substantially contribute to the cause and effect of a ... mine safety or health hazard...." 30 U.S.C. § 814(d)(1).

the violation was not timely abated, MSHA could propose either a regular or special penalty. Id. Proposed single penalty assessments that were timely paid by an operator were not included in the "history of previous violations" component of a regular assessment. 30 C.F.R. § 100.3(c).

Section 100.5 provides that "MSHA may elect to waive the regular assessment formula ([section] 100.3) or the single assessment provision ([section] 100.4) if [it] determines that conditions surrounding the violation warrant a special assessment." Section 100.5 also sets forth certain categories of violations that "may be of such a nature or seriousness that it is not possible to determine an appropriate penalty" in a routine manner under the regular or single penalty assessment provisions.

## 2. Coal Employment Project I

In the Coal Employment Project I litigation in 1988, a group of petitioners, including the Coal Employment Project and the United Mine Workers of America ("UMWA"), challenged the validity of the Part 100 single penalty assessment provisions. The petitioners asserted that the Secretary had acted unreasonably in construing the Mine Act so as not to require individualized consideration of the six statutory penalty criteria in connection with proposed assessment of a single penalty. See 889 F.2d at 1134. They contended that MSHA was required by the Mine Act to consider each of the six criteria individually when assessing a single penalty. The petition was filed originally in the District Court for the District of Columbia, which concluded that jurisdiction over the challenge lay with the D.C. Circuit and, accordingly, transferred the case to that Court. Coal Employment Project, et al. v. McLaughlin, et al., No. CA 88-402 (D.D.C. Sept. 27, 1988).

The D.C. Circuit, in a decision issued on November 21, 1989, first concluded that the Secretary's assessment of penalties according to "group classifications" based on the presence or absence of specific criteria was a "reasonable interpretation" of the Mine Act. 889 F.2d at 1134. The Court further held that, in calculating a penalty assessment, MSHA was not bound to engage in "individualized" or "full scale fact-finding on each criterion in every case...." Id. In that regard, the Court determined that, in general, the single penalty assessment program "reasonably account[ed]" for the criteria of operator size and negligence. 889 F.2d at 1134-35.

However, the Court expressed far different views over what it perceived as the failure of the single penalty program to take into account the criterion of violation history. Referring to the Mine Act's legislative history, the Court indicated that "the operator's violation history was an especially important criterion in Congress' eyes." 889 F.2d at 1136. The Court pointed out that violation history related to the validity of the single penalty assessment in two ways: (1) its presence or absence in the single penalty assessment itself; and (2) the omission of single penalty assessments from an operator's history when applying the regular and special assessment formulas. Id.

In resolving "whether the single penalty's non-individualized treatment

of violation history is a reasonable approach to deter repeat violators," the Court considered two scenarios: (1) operators who commit and timely abate a series of non-S&S violations, "incurring only a string of \$20 penalties;" and (2) operators who commit an S&S violation after committing and abating a series of non-S&S violations. Id. With respect to the first scenario, the Court determined that MSHA's regulations "do not appear to provide a reasonable and consistent method for imposing higher penalties against operators who commit numerous non-significant-and-substantial violations." 889 F.2d at 1137. The Court determined that this "regulatory failure runs so contrary to a principal purpose of the Mine Act as to render MSHA's regulation unreasonable." 889 F.2d at 1137-38. Concerning the second scenario, the Court noted that, if a later violation is not "repetitious of" the earlier non-S&S violations, MSHA's regulations and policies seem to imply that the later S&S violation would receive only a regular assessment not reflecting the earlier violations. 889 F.2d at 1138. The Court similarly concluded that such a result "would run contrary to the indications ... that Congress intended to impose higher penalties on operators with a record of past violations." Id.

Accordingly, the Court remanded the case to MSHA for reconsideration and revision of its Part 100 Regulations. The Court directed MSHA:

(1) to resolve the inconsistency between the MSHA regulations as written and MSHA's written and oral representations to the court, so as to ensure that MSHA does take account of past single penalty violations in deciding whether a special assessment is required in a case where the violation itself might qualify for another single penalty; and (2) to amend or establish regulations, as necessary, that clarify how administration of the single penalty standard will take account of the history of violations of mandatory health and safety standards that do and do not pose significant and substantial threats to miners' safety.

889 F.2d at 1138.

The Court also directed MSHA to take certain interim actions pending full compliance with the remand. These instructions provided:

In the interim, until MSHA formally complies with our remand, we direct MSHA to instruct its field personnel in assessing single penalties to consider an operator's history of non-significant-and-substantial violations, and to consider an operator's history of past single penalty assessments when imposing regular assessments against operators who commit a significant-and-substantial violation after

having committed a series of non-significant-and-substantial violations.

Id. (emphasis added).<sup>6</sup>

3. MSHA's interim response and Coal Employment Project II

MSHA, responding to the Court's decision, published an interim regulation in the Federal Register on December 29, 1989, implementing two actions: "(1) [t]emporarily revising its assessment policies to instruct its field personnel to review non-[S&S] violations involving high negligence and an excessive history of the same type of violation for possible special assessment under 30 C.F.R. [§] 100.5; and, (2) temporarily suspending the sentence in 30 C.F.R. [§] 100.3(c) which excludes timely paid single penalty assessments from an operator's history of violations for regular assessment purposes." Criteria and Procedures for Proposed Assessment of Civil Penalties, 54 Fed. Reg. 53609, 53610 (1989).

Petitioners Coal Employment Project and UMWA challenged the first of these actions in the D.C. Circuit on the grounds that it was nonresponsive to the Court's remand. In a decision dated April 12, 1990, the D.C. Circuit agreed, stating that the "high negligence" requirement seemed inconsistent with its concerns as articulated in Coal Employment Project I. Coal Employment Project v. Dole, 900 F.2d 367, 368 ("Coal Employment Project II"). The Court explained that "[i]n light of MSHA's substantial discretion in determining what constitutes 'high negligence,' we fear that even a series of identical non-[S&S] violations may not require MSHA to invoke the violation history criterion and may not generate more than a single penalty each time." Id. Accordingly, the Court ordered MSHA "to devise a suitable interim replacement responding to [these] concerns within 45 days." Id. The Court also "note[d] MSHA's present intention to publish a proposed final rule [in compliance with Coal Employment Project I] by August 1990," and "under-score[d] [its] hope and expectation that MSHA [would] act consistently with its own plan." Id.

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<sup>6</sup> The Court's formal conclusion stated:

[I]t is hereby [further ordered] that until MSHA complies formally with said remand, MSHA direct its field personnel in assessing single penalties for non-significant-and-substantial violations to take account of the past history on the part of the mine operators of non-significant-and-substantial violations, and to take into account past single penalty assessments in imposing regular assessments against operators who have previously committed a series of non-significant-and-substantial violations.



#### 4. The Program Policy Letter

The Secretary issued the PPL, the focus of the dispute in these cases, to all operators on May 29, 1990, within 45 days of the D.C. Circuit's decision in Coal Employment Project II. It became effective that same day, but was not published in the Federal Register. The PPL "implement[s] a program for higher civil penalty assessments at mines with an excessive history of violations." PPL at 1. The PPL notes that MSHA calculates violation history using the tables in section 100.3, which assign penalty points based on the average number of past violations per inspection day. Id. The PPL defines "excessive history" as "either (1) 16 or more penalty points for overall violation history (out of a possible 20), based on a 2-year period, or (2) 11 or more repeat violations of the same health or safety standard in a preceding 1-year period." Id.

The PPL provides that non-S&S violations, if associated with excessive history, are no longer eligible for single penalty assessment but will, instead, be assessed under the regular formula set forth in section 100.3. PPL at 2. The PPL also provides that operators with excessive history who previously would have received a regular assessment for S&S violations will receive a "special history" assessment. Id. The special history assessment is based upon the regular formula point system, plus a percentage increase of 20%, 30%, or 40%, depending on the degree of excessive history. The PPL also states that violations that previously would have received a special assessment will continue to do so, but an additional penalty will be added where there is an excessive history. Id.

The PPL's definition of excessive history does not distinguish between S&S and non-S&S violations. The PPL expressly states that "[i]ncreased assessments at mines with an excessive history of both S&S and non-S&S violations should serve as a more effective deterrent...." PPL at 2 (emphasis added). The PPL explains that, in addition to providing a more effective deterrent to violations, it meets the Coal Employment Project I remand order and responds to an internal report of the Department of Labor's Office of the Inspector General recommending increased assessments for repeat violations. Id.

#### 5. The Secretary's first proposed excessive history rules

The Secretary published proposed rules in the Federal Register entitled Criteria and Procedures for Proposed Assessment of Civil Penalties on December 28, 1990. 55 Fed. Reg. 53482. In the preamble, the Secretary summarized the legal background of the proposed rules, referring to the D.C. Circuit's mandates in Coal Employment Project I and II. Id. The preamble stated that the PPL implemented "a program of increased penalties for a mine with an 'excessive history' of both S&S and non-S&S violations." Id. The proposed rules generally reflected the excessive history definition and approach announced in the PPL. See 55 Fed. Reg. at 53483. However, the preamble indicated that, in applying the final version of the rules, only citations and orders issued on or after January 1, 1991, would be used in determining excessive history. 55 Fed. Reg. at 53483. Additionally, the proposed rules increased the penalty levels in the Part 100 regulations to

conform with the Omnibus Budget Reconciliation Act of 1990, Pub. L. 101-508, 104 Stat. 1388 ("Omnibus Budget Act"), which amended the Mine Act to increase the maximum civil penalties that may be assessed. See 55 Fed. Reg. at 53482-83 & 53484-85. (This latter action is not relevant to the issues in these cases.) The Secretary states in her brief that the rulemaking record was closed on April 2, 1991, and that she was targeting July 1991 for promulgation of a final rule. Sec. Br. at 9.<sup>7</sup>

6. The Secretary's second proposed excessive history rules and second Program Policy Letter

The Secretary published certain final rules in the Federal Register dealing with the Part 100 regulations on January 24, 1992. 57 Fed. Reg. 2968. These rules contain the final version of the Part 100 penalty increases mandated by the Omnibus Budget Act, as well as the final version of the interim action that included single penalties in an operator's history of violations for regular assessments. 57 Fed. Reg. at 2968-71. At the same time, the Secretary also published a revised version of proposed excessive history rules. 57 Fed. Reg. at 2972-77.

The new excessive history rules propose to continue the approach of "[i]ncreased assessments at mines with an excessive history of violations, including both S&S and non-S&S violations" but would significantly change the methods of excessive history calculations. 57 Fed. Reg. at 2973-77. In these 1992 proposals, the Secretary again set January 1, 1991, as the effective date for counting violations for excessive history purposes. 57 Fed. Reg. at 2975. The Secretary allowed 60 days for comments on the new proposed rules, and subsequently extended the comment period an additional 30 days (57 Fed. Reg. 9518 (March 19, 1992)). We note that the Secretary's most recent Semiannual Regulatory Agenda indicates that final action is expected in August 1992. 57 Fed. Reg. 16981 (April 27, 1992).

Concurrently with the publication of the final and the proposed rules in the Federal Register, MSHA also issued Program Policy Letter No. P92-III-1 (January 29, 1992) ("PPL-II"), which superseded the first PPL. PPL-II mirrors the new proposed excessive history rules. Like the first PPL, PPL-II was not published in the Federal Register. Neither PPL-II nor the new proposed rules changes the general approach to excessive history reflected in the first PPL and the original proposed rules -- inclusion of both S&S and non-S&S violations in determinations of excessive history and an increase in assessments for both S&S and non-S&S violations, based on excessive history.

B. Factual and Procedural Background

1. Factual Background

The relevant facts involved in this case were stipulated to by the parties. See 13 FMSHRC at 339-40. During the period from May 9 through 23,

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<sup>7</sup> Unless otherwise noted, references herein to the Secretary's brief are to her opening brief filed in this case.

1990, MSHA issued six citations to Drummond alleging two violations of 30 C.F.R. § 75.400 and four violations of 30 C.F.R. § 75.503. The Secretary then filed a penalty assessment petition for the six citations, calculating the proposed penalties according to the provisions of the PPL, and including, as part of Drummond's history, single penalty and other violations for the previous two years. The penalty proposals for four of the violations were derived from the regular penalty formula in section 100.3, with a 20% increase in that amount for excessive history. The penalty proposals for the remaining two violations were derived from the regular penalty formula with a 30% increase for excessive history.

Drummond objected to MSHA's augmentation of the proposed penalties pursuant to the PPL and filed a motion with the judge to remand the proposed penalties to the Secretary for recalculation. Judge Merlin granted the motion.

## 2. Judge's Decision

In his decision, Judge Merlin first examined whether the Commission possessed jurisdiction to consider the issues involved in this case. 13 FMSHRC at 344-46. The judge relied on the Commission's decision in Youghiogheny & Ohio Coal Company, 9 FMSHRC 673 (April 1987) ("Y&O"), in which the Commission held, in part, that in "certain limited circumstances" it could require the Secretary to repropose penalties in a manner consistent with the Part 100 regulations. 13 FMSHRC at 345, citing Y&O, 9 FMSHRC at 679. These "limited circumstances" refer to "appropriate" contexts where, prior to an evidentiary hearing, an operator would be permitted to establish that the Secretary had failed to comply with the Part 100 penalty regulations in proposing the penalty at issue. 9 FMSHRC at 679. The judge determined that the present case fell within the purview of Y&O because there had been no hearing on the merits and because Drummond was essentially arguing that the Secretary had followed the PPL instead of complying with the Part 100 regulations in proposing the penalties. 13 FMSHRC at 345-46. Thus, the judge concluded that he possessed jurisdiction under Y&O to entertain the operator's request for a remand to the Secretary.

In considering the validity of the method employed by MSHA to calculate the proposed penalties, the judge first concluded that the PPL exceeded the D.C. Circuit's interim mandate in Coal Employment Project I. 13 FMSHRC at 346-48. The judge observed that the D.C. Circuit, in its interim mandate, directed the Secretary to consider only an operator's history of non-S&S violations when calculating regular and single penalty assessments. The judge found that the PPL also takes into consideration an operator's history of S&S violations. 13 FMSHRC at 347. The judge found no warrant in the Court's decision for the inclusion of S&S history during the period of compliance with the Court's interim mandate. He found further that the PPL goes beyond the terms of the Court's interim mandate by establishing a new category of special history assessment for S&S violations. 13 FMSHRC at 347-48.

The judge then considered whether the PPL could "stand on its own without reliance upon the court's interim mandate." 13 FMSHRC at 348-49. The judge determined that resolution of that question would turn on whether

the Secretary was required by the APA to engage in notice-and-comment procedures when issuing the PPL. The judge explained that although interpretive rules, general statements of policy, and rules of agency organization, procedure or practice are excepted from notice-and-comment procedures by virtue of section 553(b)(3)(A) of the APA, the provisions of the PPL constituted substantive rules subject to the notice-and-comment process. 13 FMSHRC at 349-53. The judge concluded that notice-and-comment procedures were required and that, until they were followed by MSHA, the PPL could not be applied. 13 FMSHRC at 354.

The judge explained that "[a] particularly salient characteristic of agency action subject to notice and comment is the reduction or elimination of agency discretion." 13 FMSHRC at 350. The judge concluded that the PPL was so specific as to remove the element of agency discretion. 13 FMSHRC at 351-52. He further explained that agency action that "establishes a binding norm and is finally determinative of the issues or rights to which it is addressed" would also be subject to the notice-and-comment process. 13 FMSHRC at 351. Applying these principles to evaluation of the PPL, the judge concluded that "[b]y every measure, the precepts laid down by the [PPL] must be held to be substantive and not merely a general statement of policy as asserted by the [Secretary]." *Id.* Accordingly, the judge concluded that the PPL was a substantive rule subject to the notice-and-comment process, not merely interpretative material or a statement of general policy. *Id.*

Next, the judge rejected the Secretary's contention that notice-and-comment rulemaking was not required because the PPL did not change the overall penalty proposal and assessment scheme. The judge explained that the procedural framework for determination of penalty amounts was not at issue. 13 FMSHRC at 352. He also rejected the Secretary's argument that notice-and-comment rulemaking was not required because the Secretary's penalty proposals are not final in nature. 13 FMSHRC at 352. The judge reasoned that, although the Commission may assess penalties on a de novo basis, the vast majority of the Secretary's penalty proposals actually become final because they are not contested before the Commission. 13 FMSHRC at 352-53.

Finally, the judge rejected the contention that notice-and-comment rulemaking could be excused on the basis of the "good cause" exception in 5 U.S.C. § 553(b)(3)(B). He noted that the Secretary's initial response to the Court's mandate in Coal Employment Project I was to issue interim regulations, which expressly relied upon the Court's remand as constituting good cause for dispensing with notice-and-comment procedures. In contrast, the PPL made no reference to the good cause exception. 13 FMSHRC at 354. The judge also rejected the Secretary's argument that the PPL was justified because it accomplished the result ordered by the Court. He found that the PPL exceeds the Court's instructions. *Id.* Based on the foregoing determinations, the judge granted Drummond's motion to remand.

## II.

### Disposition of Issues

#### A. Commission Jurisdiction

These cases present the question of whether the Commission possesses subject matter jurisdiction, in the context of these contested civil penalty proceedings, to determine whether the PPL was validly promulgated. Invalidity of the PPL, under which the penalties in question were proposed, would serve as the basis for a remand of these proposed penalties to the Secretary.

##### 1. Parties' Arguments<sup>8</sup>

The Secretary's principal contention is that the Commission lacks subject matter jurisdiction to consider the operators' challenge to the PPL. The Secretary views the PPL as an extension of the Mine Act's regulatory civil penalty scheme. She submits that section 101(d) of the Mine Act confers exclusive jurisdiction over the operators' challenge to her regulatory methods upon the United States Courts of Appeals.<sup>9</sup>

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<sup>8</sup> The Commission permitted amicus curiae briefing by the American Mining Congress and United Safety Associates, mining industry trade associations. Reference in this decision to the arguments advanced by the operators includes the arguments of amici as well.

<sup>9</sup> Section 101(a) of the Mine Act authorizes the Secretary, in accordance with the APA's notice-and-comment procedures, to promulgate "improved mandatory health or safety standards...." 30 U.S.C. § 811(a). Section 101(d) of the Act provides for judicial review of any such "mandatory health or safety standard" as follows:

#### Judicial review

Any person who may be adversely affected by a mandatory health or safety standard promulgated under this section may, at any time prior to the sixtieth day after such standard is promulgated, file a petition challenging the validity of such mandatory standard with the United States Court of Appeals for the District of Columbia Circuit or the circuit wherein such person resides or has his principal place of business, for a judicial review of such standard. ... No objection that has not been urged before the Secretary shall be considered by the court, unless the failure or neglect to urge such objection shall be excused for good cause shown. ... The procedures of this subsection shall be the exclusive means of challenging the validity of a mandatory health or safety standard.

30 U.S.C. § 811(d)(emphasis added).

The Secretary further contends that Judge Merlin's reliance upon the Commission's decision in Y&O is misplaced because that decision dealt with a distinguishable procedural challenge, i.e., that the Secretary had failed to follow her civil penalty assessment scheme, rather than a claim that some segment of that scheme had been unlawfully adopted. The Secretary argues that the present cases arose because the manner in which she weighs violation history was changed, not because she incorrectly applied her method of proposing penalties to the facts in these cases. She also asserts that the Mine Act does not otherwise authorize the Commission to determine the validity of the Secretary's rules or procedures for proposing civil penalties.<sup>10</sup>

The operators respond that the method by which the Secretary now calculates proposed penalties conflicts with the method set forth in her published regulations. They assert that the Mine Act affords an operator aggrieved by a penalty proposed pursuant to the PPL a valid basis for contesting that penalty before the Commission and for seeking its remand to the Secretary for recalculation under the published rules.

The operators also maintain that the Courts of Appeals are not the exclusive forums for challenging regulatory pronouncements such as the PPL. They assert that section 101(d) of the Mine Act provides for judicial review only of mandatory safety and health standards promulgated under section 101 and does not apply to regulations, such as the Part 100 regulations, promulgated under section 508 of the Act to implement statutory provisions, such as sections 105 and 110. The operators contend that they are not challenging the validity of the Secretary's Part 100 regulatory scheme but, rather, the failure to operate within that framework.

According to the operators, jurisdiction to remand to the Secretary has been established by Y&O and is supported by section 105(d) of the Mine Act, which authorizes the Commission, in contested penalty cases, to "direc[t] other appropriate relief." The referral of this issue to the Courts of Appeals would, the operators argue, contravene the statute's policy of speedy administrative resolution of mine safety and health disputes. They contend that remand to the Secretary fosters expeditious resolution of many penalty disputes without resort to de novo Commission review.

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<sup>10</sup> The Secretary notes that the D.C. Circuit retained jurisdiction over the Coal Employment Project case until the remand is complete. 889 F.2d at 1138. Our decisions in these seven excessive history cases do not purport to, nor, in our opinion, do they intrude upon the Court's jurisdiction in the Coal Employment Project case. These cases have been instituted as civil penalty proceedings within the Commission's delineated statutory authority, as discussed below.

## 2. Analysis

### a. Statutory Considerations

In enforcing and construing the Mine Act, the Secretary, this Commission, and the Courts of Appeals must give effect to the "unambiguously expressed intent of Congress." See Chevron U.S.A., Inc. v. Natural Res. Def. Council Inc., 467 U.S. 837, 843 (1984). Section 101(d) clearly vests jurisdiction over challenges to the validity of mandatory safety and health standards exclusively with the United States Courts of Appeals.<sup>11</sup> As the Secretary acknowledges, Part 100 regulations are not mandatory standards but, rather, are regulations adopted pursuant to section 508 of the Act.<sup>12</sup> The distinction between mandatory standards and section 508 regulations is well recognized. See, e.g., UMWA v. Dole, 870 F.2d 662, 668 (D.C. Cir. 1989).

According to the Secretary, the PPL is not a section 508 regulation or a "binding" substantive or legislative rule but, rather, is a "non-binding" agency pronouncement issued as an extension of the Part 100 regulatory scheme. The Secretary variously identifies the PPL more specifically as an "interpretation," "policy statement," or an "internal procedure." See Sec. Br. at 18-32. The text of section 101(d) neither states nor implies that its provision for exclusive judicial review extends to section 508 regulations or to challenges to non-binding agency pronouncements.<sup>13</sup>

Congress lodged further exclusive jurisdiction in the appellate courts for judicial review of Commission decisions. Section 106, 30 U.S.C. § 816. Although Congress carved out these two areas of exclusive jurisdiction in the Mine Act for Court of Appeals review, there is no indication that Congress intended to confer exclusive jurisdiction with respect to the kind of challenges before us in these proceedings. Neither section 101(d), section 508, nor any other provision of the statute precludes such challenges in the context of enforcement proceedings.

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<sup>11</sup> The Act defines "mandatory health or safety standard[s]" as "the interim mandatory health or safety standards established by [Titles] II and III of this [Act], and the standards promulgated pursuant to [Title] I of this [Act]." 30 U.S.C. § 802(1). Title I of the Act, in section 101, grants the Secretary the authority to promulgate "improved" standards (n. 9, supra).

<sup>12</sup> Both proposed excessive history rules (December 1990 and January 1992) cited sections 508, 105, and 110 of the Act as their statutory authority. 55 Fed. Reg., supra, at 53484; 57 Fed. Reg. at 2977.

<sup>13</sup> The relatively brief legislative history pertaining to section 101(d) confirms Congress' intent that the provision applies only to challenges to mandatory standards. See S. Rep. No. 181, 95th Cong., 1st Sess. 20-21, 63 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2nd Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 608-09, 651 (1978) ("Legis. Hist."); Conf. Rep. No. 461, 95th Cong., 1st Sess. 43, reprinted in Legis. Hist. at 1321.

Indeed, the statute as a whole makes clear that Commission jurisdiction properly attaches over the challenges raised in these cases.<sup>14</sup> A number of the Act's provisions confer subject matter jurisdiction on the Commission "by establishing specific enforcement and contest proceedings and other forms of action or proceeding over which the Commission judicially presides...." Kaiser Coal Corp., 10 FMSHRC 1165, 1169 (September 1988). Among such proceedings are contests of the Secretary's proposed civil penalties pursuant to section 105(d) of the Act -- the actions involved in these cases. Further, where the statute creates Commission jurisdiction, it endows the Commission with a plenary range of adjudicatory powers to consider issues, to make findings of fact and conclusions of law, and to render relief -- in short, to dispose fully of cases committed to Commission jurisdiction. See, e.g., 30 U.S.C. §§ 815(c) (2) & (3) (Commission judicial powers with regard to discrimination complaints); 30 U.S.C. § 815(d) (Commission judicial powers with respect to citation and penalty contests); 30 U.S.C. § 817(e)(1) (Commission judicial powers over imminent danger contests); and 30 U.S.C. § 823 (general judicial powers of Commission judges and Commission). Significantly, section 105(d) broadly authorizes the Commission to direct "other appropriate relief." Thus, for example, the Commission, with Court of Appeals concurrence, has cited this language in section 105(d) as implicit authority for granting declaratory relief, as appropriate, in contest proceedings. Kaiser, 10 FMSHRC at 1171; Climax Molybdenum Co. v. Secretary, 703 F.2d 447, 452 (10th Cir. 1983).

In such contest proceedings, the Secretary's less formal, "non-binding" regulatory pronouncements fall within the Commission's jurisdictional purview. In fact, the Commission has often been asked by the Secretary to give weight or defer to such pronouncements. In appropriate cases, the Commission has examined such materials as evidence of the Secretary's policies and practices and of the consistency in her legal positions. See, e.g., Mettiki Coal Corp., 13 FMSHRC 760, 766-67 & nn. 6 & 7 (May 1991); cf. Coal Employment Project I, 889 F.2d at 1130 n. 5. The Commission also has refused to accord effect to such material when it represents an improper attempt to amend mandatory standards or implementing regulations outside the notice-and-comment process. King Knob Coal Co., 3 FMSHRC 1417, 1420-21 (June 1981).

The Mine Act expressly empowers the Commission to grant review of "question[s] of law, policy or discretion," and to direct review sua sponte of matters that are "contrary to ... Commission policy" or that present a

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<sup>14</sup> This Commission, in general, is obliged to accord "weight" to the Secretary's interpretations of the statute and her own regulations. S. Rep. No. 181 at 49, reprinted in Legis. Hist. at 637. However, we perceive no indication in the statute or its legislative history, or in sound policy, that deference to the Secretary's views of Commission jurisdiction is required. If deference applies in determining jurisdiction, it should be accorded to the Commission's interpretation of its own jurisdiction under the Mine Act. The question of whether Chevron applies in the context of an agency's determination of its own statutory jurisdiction is unsettled. See, e.g., The Business Roundtable v. S.E.C., 905 F.2d 406, 408 (D.C. Cir. 1990).



"novel question of policy...." Sections 113(d)(2)(A)(ii)(IV) & (B), 30 U.S.C. §§ 823(d)(2)(A)(ii)(IV) & (B). Since Congress authorized the Commission to direct such matters for review, we infer that Congress intended the Commission to possess the necessary adjudicative power to resolve them.<sup>15</sup> It would be anomalous if the Commission were deemed to lack the judicial power necessary to examine the effect of the PPL in these proceedings. The reason the Commission was created by Congress and equipped with broad remedial powers and policy jurisdiction was to assure due process protection under the statute and, hence, to enhance public confidence in the mine safety and health program. See S. Rep. at 47, reprinted in Legis. Hist. at 635. Addressing claims of arbitrary enforcement by the Secretary is at the heart of that adjudicative role.

The one extensive judicial discussion of this issue to date accords with the foregoing analysis. In Bituminous Coal Operators' Ass'n, Inc. v. Marshall, 82 F.R.D. 350 (D.D.C. 1979) ("BCOA"), the District Court determined that it lacked subject matter jurisdiction over a pre-enforcement challenge to a Secretarial "Interpretative Bulletin" dealing with the subject of miners' "walkaround" rights under section 103(f) of the Mine Act, 30 U.S.C. § 813(f). Among the challenges raised by the plaintiff was the claim that the Bulletin had been issued in violation of the APA's notice-and-comment requirements. The Court reviewed the administrative enforcement and adjudicative structure of the Act. BCOA, 82 F.R.D. at 352-53. Summarizing that scheme, the Court stated:

The Act contemplates that the Secretary issue citations and occasionally orders to mine operators when he has reason to believe that any mandatory safety and health regulation or any provision of the Act is being violated. Review of every such citation, once followed by a proposed penalty, and of every such order is vested first in the ... Commission ... and then in the Federal Courts of

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<sup>15</sup> No comparable policy jurisdiction was expressly granted to the Occupational Safety and Health Review Commission ("OSHRC") under the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 et seq. (1988) ("OSHAct"), which, like the Mine Act, is a "split-enforcement" statute dividing judicial and enforcement functions between two separate agencies. In Martin v. OSHRC, 499 U.S. \_\_\_, 113 L.Ed. 2d 117 (1991), which did not address the issue under consideration here, namely, the scope of an adjudicative agency's subject matter jurisdiction under a "split-enforcement" statute, the Supreme Court held that, with respect to ambiguous regulations promulgated under the OSHAct by the Secretary, reviewing courts are required to defer to the Secretary's reasonable interpretations of such regulations rather than to OSHRC's interpretations. Martin, 113 L.Ed. 2d at 127-33. Martin made clear that it applied only to the "division of powers between the Secretary and the Commission under the [OSHAct]." 113 L.Ed. at 132. The Mine Act's express conferral of policy jurisdiction upon this Commission is a crucial distinction between these two "split-enforcement" regulatory schemes and may be one reason the Court delimited the scope of its holding.

Appeals. This avenue for review provides plaintiff's members with two fully adequate forums for the consideration of the claims plaintiff raises here.

82 F.R.D. at 352 (footnote omitted).

The Court specifically indicated that, when the "Secretary acts in a manner which adversely affects an operator, the proper procedure for review of that act [is] to proceed first to the Commission and then to an appropriate Court of Appeals." 82 F.R.D. at 353. The Court found that the Interpretative Bulletin would adversely affect the interests of the plaintiff association's members only if it were actually relied upon by the Secretary in the issuance of citations and proposed penalties. Id. "Once that occurs," the Court observed, "the aforementioned exclusive avenue for review is triggered." Id.

The Court recognized the judicial authority of the Commission to resolve the kinds of issues before us in the present cases:

The Act, moreover, does not limit the nature of the issues -- be they factual or legal -- which the Commission or the Courts of Appeals may entertain. Consequently, all of the plaintiff's claims may be raised in those forums. This fact further supports the conclusion that the avenues of review provided by the Act are exclusive.

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Significantly, were the District Courts to entertain actions such as this one, they would lack the aid of the Commission's experience and expertise. A case brought to a Court of Appeals, pursuant to 30 U.S.C. § 816, would, by contrast, usually enjoy the benefit of such aid. Most of the issues raised in the instant action are typical of the questions which Congress wished the Commission to decide in the first instance. Moreover, as tendered here, they could be more effectively considered in the light of some concrete factual circumstances, are in many respects entirely conjectural, and therefore must be deemed not sufficiently ripe for determination by this Federal Court.

82 F.R.D. at 353, 354 (citation omitted).

In sum, we do not perceive any bar in section 101(d), or elsewhere in the Act, to our consideration of the operators' challenge to the PPL in these contest proceedings. To the contrary, we discern substantial statutory indicia that these claims are within our purview.

b. Applicability of Y&O

The Secretary further contends that, apart from whether section 101(d) precludes Commission review of these issues, our decision in Y&O does not reach the issue presented in these cases. We disagree.

Section 105(d)'s authorization to direct "other appropriate relief" underlies the Commission's Y&O holding. Y&O stands for the proposition that, in certain circumstances, the Commission may require the Secretary to repropose penalties in a manner consistent with the Part 100 penalty regulations. Viewing the Secretary's regulations in the context of the Act's bifurcated penalty scheme, the Commission recognized that it is generally neither necessary nor desirable to require the Secretary to repropose a penalty. Y&O, 9 FMSHRC at 679. The Commission rejected such a process where a hearing on the merits of the penalty had already been held before a Commission judge. Id. The Commission concluded, however, that "it would not be inappropriate for a mine operator prior to a hearing to raise and, if appropriate, be given an opportunity to establish that in proposing a penalty the Secretary failed to comply with [her] Part 100 penalty regulations." 9 FMSHRC at 679-80. The rationale for this conclusion was the Commission's role in guarding against arbitrary enforcement by the Secretary. "As has been stated, '[i]t is axiomatic that an agency must adhere to its own regulations.' Brock v. Cathedral Bluffs Shale Oil Co., 796 F.2d 533[, 536] (D.C. Cir. 1986) ..., citing Accardi v. Shaughnessy, 347 U.S. 260, 265-67 (1954)." 9 FMSHRC at 679. The Commission made clear that the scope of its inquiry into the Secretary's actions is limited because the Secretary "need only defend on the ground that [she] did not arbitrarily proceed under ... [her] regulations...." 9 FMSHRC at 680. If the Secretary's manner of proposing penalties is a legitimate concern to an operator and if he can prove the Secretary's departure from her regulations, then intercession by the Commission at an early stage of the litigation could assist in securing fidelity by the Secretary to her regulations. Such relief narrows the penalty issues in Commission proceedings and promotes settlement. Id.

The Secretary asserts that the operators' argument here is not that she has failed to follow her Part 100 civil penalty scheme, the issue in Y&O, but that she has changed that scheme through unlawful adoption of the PPL -- a subject the Secretary views as beyond Y&O and the Commission's authority. However, the Secretary also characterizes the PPL as a valid extension of the Part 100 scheme. The operators complain that the PPL cannot be so viewed and that the penalties proposed according to its provisions conflict with the existing Part 100 regulations. We are satisfied that the operators do not attack the validity of the Secretary's Part 100 regulations but, rather, the Secretary's failure to operate within, and to abide by, those regulations. We agree with the operators and the judge that a failure by the Secretary to comply with her regulations, by reliance upon an invalid PPL, would be within the scope of Y&O.

3. Conclusion on Commission jurisdiction

For the reasons stated above, we hold that the Commission possesses subject matter jurisdiction under the Mine Act and under Commission precedent

to consider the validity of the PPL in these civil penalty contests and we affirm the judge's determination of jurisdiction.

B. Validity of the Program Policy Letter

The validity of the PPL turns on two major issues: whether the PPL is justified by the Court's interim mandate in Coal Employment Project I; and whether the PPL qualifies as an exception to the APA's notice-and-comment requirements. If the PPL was not validly promulgated, it can be accorded no legal effect in these proceedings.<sup>16</sup>

1. Scope of interim mandate in Coal Employment Project I

a. Parties' Arguments

The Secretary maintains that the PPL was issued to comply with the Court's order in Coal Employment Project I as well as to address a concern of the Department's Inspector General that repeat violations receive a higher penalty assessment. S. Br. at 17. According to the Secretary, the Court emphasized that Congress was intent on "assuring that the civil penalties provide an effective deterrent against all offenders [...] with records of past violations" and was "particularly concerned about curbing repeat offenders among mine operators." S. Br. at 34, quoting Coal Employment Project I, 889 F.2d at 1132, 1133. She argues that, given the broad scope of the Court's concerns, it was proper for her to address an operator's history of S&S violations as well as non-S&S violations. The Secretary asserts that, since the Court authorized her to take "immediate interim steps" pending completion of its rulemaking proceeding, her actions did not exceed the Court's mandate.

The operators contend that the Secretary cannot dispute that the PPL is actually beyond the scope of the Court's interim order because the Assistant Secretary has admitted that "MSHA's new program goes far beyond what the court stipulated." Dr. Br. at 29. They maintain that the Court's orders were intended to remedy, in the interim, a specific perceived defect in the Part 100 regulations -- i.e., prior single penalty, non-S&S violations were not being taken into account in determining an operator's history of violations when assessing penalties for subsequent violations. They assert that MSHA has created a new category of "special-history assessments" that arbitrarily increases proposed penalties based on an operator's history of violations. Dr. Br. at 4. They further assert that they are being penalized

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<sup>16</sup> The operators' challenge here is not to the merits of the excessive history program. We note, however, that concerns have been raised about its targeting. At oral argument, reference was made to comments filed in the rulemaking proceeding to the effect that mines without excessive history, as that term is defined by the Secretary, had five times the fatality rate of mines with excessive history. Oral Arg. Tr. 48-49. Officials of the UMWA and the Bituminous Coal Operators' Association have raised the same concern, in a joint letter to the Assistant Secretary for Mine Safety and Health, dated January 15, 1992.

twice for their history of violations because they are being assessed penalty points based on that history in the calculation of their regular assessment, and then assessed a percentage increase under the special history assessment based on that same history of violations. They contend that the PPL overreaches the Court's interim mandate and MSHA's authority and that such changes in penalty calculation required notice-and-comment rulemaking.

b. Analysis

As discussed earlier, the issue in Coal Employment Project I was the validity of the single penalty assessment program. The Court found the exclusion of these violations from an operator's history to be in serious conflict with the purposes of the Mine Act and ordered the Secretary to amend or establish regulations to assure that the single penalty standard would take into account the operator's history of violations. The Court also issued an interim mandate requiring the Secretary to consider the operator's history of non-S&S violations, in assessing single penalties and in assessing regular penalties for S&S violations. 889 F.2d at 1138, 1139.

The PPL is not so limited in accordance with the interim judicial mandate. Rather, it takes account of S&S violations as well as non-S&S violations when determining whether the operator's history is "excessive." Under the PPL, an operator with "excessive history" is not eligible for single penalty assessments for non-S&S violations nor for regular assessments of S&S violations. Rather, both types of violations must be assessed higher penalties, non-S&S under the regular assessment formula and S&S under the "special history assessment" created by the PPL.

The Court's immediate concern was with the history of single penalty, non-S&S violations, as that history relates to assessments of subsequent S&S and non-S&S violations. It is clear that the PPL exceeds the Court's interim mandate because it requires consideration of an operator's history of S&S as well as non-S&S violations and because it establishes a new schedule of penalties based on that history.

The PPL's background section explains its motivation as multiple, based on deterrence of violations, meeting the requirements of a court order and responding to a recommendation from the Department of Labor's Office of the Inspector General. In fact, when the PPL was issued, the Department issued a press release stating that this new program to identify mines with an excessive history of violations "goes far beyond what the court stipulated" and would increase penalties for many violations. U.S. Department of Labor Press Release 90-287 (June 5, 1990). Counsel for the Secretary, in responding to a Commissioner's question at oral argument, did not dispute that the PPL took into account not only the Court's interim mandate but the Court's long-term concerns as well. Oral Arg. Tr. 16-17, 55-56. Thus, the record makes clear that the PPL addresses not only the Court's immediate, interim concerns but also broader concerns including those that the Court ordered the Secretary to address through notice-and-comment rulemaking. See 889 F.2d at 1138-39.

We conclude that the PPL goes beyond the Court's interim mandate. Accordingly, we affirm the judge's holding that, by requiring consideration of an operator's S&S history and by imposing special history assessments, the PPL exceeds the scope of the Court's interim mandate in Coal Employment Project I. We reject the Secretary's contention that the PPL finds justification within the Court's interim mandate.

2. Validity of the Program Policy Letter under the Administrative Procedure Act

a. Parties' Arguments

The Secretary argues that the PPL merely implements section 100.5, which states that "MSHA may elect to waive the regular assessment formula (§ 100.3) or the single assessment provision (§ 100.4) if the Agency determines that conditions surrounding the violation warrant a special assessment." The Secretary maintains that section 100.5 grants her wide discretion to utilize the special assessment process and that the method set forth in the PPL for proposing "excessive history" penalties is no more than a form of special assessment. The Secretary states that the Commission owes her deference on this issue because this interpretation of her own regulation is reasonable. She contends, more broadly, that since the PPL interprets section 100.5, it is not a substantive rule but is an "interpretative rule" that does not require notice-and-comment rulemaking under the APA. According to the Secretary, the PPL merely addresses the manner in which she weighs one of the six statutory criteria and does not place new binding obligations on operators.

The Secretary further argues that, given the bifurcated penalty scheme of the Act, under which the Commission assesses civil penalties de novo in contested cases, the PPL does not abridge operators' due process rights, and that she was not required under the APA to engage in notice-and-comment rulemaking, particularly because the PPL was issued as a direct result of the Court's order in Coal Employment Project I. The Secretary alternatively classifies the PPL as a policy statement and/or internal procedure, both of which, like interpretative rules, are exempt from the APA notice-and-comment process.

The operators contend that the PPL is not a special assessment procedure implementing section 100.5 but a hybrid creation and that the plain language of section 100.5 authorizes special assessments only when the conditions surrounding a particular violation warrant such an assessment. The operators emphasize that the PPL is inconsistent with Part 100's intent that special assessments not be automatic. They argue that the PPL's excessive history policy substantially exceeds and conflicts with the penalty scheme established by Part 100 and, thus, that the PPL is not merely an interpretation of section 100.5.

The operators further contend that the PPL contains new substantive rules that were established without notice-and-comment, in violation of the APA. They claim that rulemaking was required because the PPL establishes substantive, binding norms that determine an operator's obligations under the

Act and that strictly bind the Secretary's assessment personnel to a precise formula in assessing penalties, without discretion or exception. The operators argue that Judge Merlin was correct in concluding that the PPL does not qualify under any of the exceptions to notice-and-comment rulemaking in 5 U.S.C. § 553(b) -- i.e., the PPL does not qualify as a general statement of policy or a rule of procedure or practice, and does not fall within the "good cause" exception of the APA. They further argue that the fact that the Commission can review contested citations de novo is irrelevant for APA purposes.

b. Analysis

In examining the nature of the PPL, we first discuss MSHA's history of adopting its civil penalty rules through notice-and-comment rulemaking and then delineate the controlling APA framework. We examine the PPL in relation to the exceptions to notice-and-comment rulemaking to determine whether it qualifies under any of them. Finally, we address the Secretary's contention that the PPL establishes a process for special assessments under section 100.5.

(1) Adoption of penalty regulations through notice-and-comment rulemaking

The PPL contrasts with previous formal actions by the Secretary on penalty assessment procedures. Until issuance of the PPL, the Secretary adopted such regulations pursuant to APA notice-and-comment rulemaking under the aegis of section 508 of the Mine Act.

Upon the Mine Act's transfer of mine safety and health enforcement authority to the Department of Labor in 1978, the Secretary undertook notice-and-comment rulemaking to govern the proposed assessment of civil penalties. 43 Fed. Reg. 9120-21 (March 3, 1978). The Secretary announced an intent to carry forward the regulatory approach of the Secretary of Interior under the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 (1976) (amended 1977), in a program of regulations establishing a penalty point formula and a special assessment provision.

The Secretary adopted the regulatory penalty assessment scheme in Part 100. 43 Fed. Reg. 23514 (1978). Following these initial regulatory steps, the Secretary continued to pursue notice-and-comment rulemaking procedures and the policy of seeking wide participation in consideration of proposed changes. When issuing proposed revised regulations, which were later adopted, making significant changes in the civil penalty rules (including the single penalty assessment) in 1980 and 1982, MSHA provided for public comment and held public hearings. See 45 Fed. Reg. 74444 (1980); 47 Fed. Reg. 2335 (1982); 47 Fed. Reg. 22294 (1982). The Secretary has not asserted that she may adopt section 508 implementing regulations outside the APA.

(2) Requirements of the Administrative Procedure Act's notice-and-comment process

Section 553 of the APA requires agencies to provide notice of proposed rulemaking and an opportunity for public comment prior to a rule's promulgation, modification, amendment, or repeal. 5 U.S.C. § 553. See American Hosp. Ass'n v. Bowen, 834 F.2d 1037, 1044 (D.C. Cir. 1987). Under the APA, all "rules" must be promulgated through such notice-and-comment rulemaking. "Rule" is defined as:

the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing[.]

5 U.S.C. § 551(4).

In his opinion below, Judge Merlin summarized the value of the APA's notice-and-comment process:

Essential to a proper determination of [this] case is recognition and acknowledgement of the important purposes served by notice and comment. One purpose of the rulemaking process is to insure a thorough exploration of relevant issues culminating in application of agency expertise after interested parties have submitted their arguments. Pacific Gas and Electric Company v. Federal Power Commission, 506 F.2d 33, 39 (D.C. Cir. 1974). Another purpose is to provide that the legislative function of administrative agencies is so far as possible exercised only upon public participation and notice as a means of assuring that an agency's decisions are both informed and responsive. American Bus Association v. United States, 627 F.2d 525, 528 (D.C. Cir. 1980). Also, public participation and fairness must be reintroduced to affected parties after governmental authority has been delegated to unrepresentative agencies. Batterton v. Marshall, 648 F.2d 694, 703 (D.C. Cir. 1980). Finally, notice and comment are necessary to the scheme of administrative governance established by the APA because they assure the



legitimacy of administrative norms. Air Transport Association of America v. Department of Transportation, 900 F.2d 369, 375 (D.C. Cir. 1990).

13 FMSHRC at 349-50.

The APA, however, provides that the notice-and-comment process does not apply to "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice." 5 U.S.C. § 553(b)(3)(A). The APA also allows an agency to dispense with notice-and-comment procedures if it "for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. § 553(b)(3)(B).

The D.C. Circuit has articulated two guidelines for determining what may properly be classified as "interpretative rules, general statements of policy, or rules of agency organization, procedure or practice." First, in classifying agency action, the administrative agency's own label of the action is "indicative" but not necessarily "dispositive"; instead it is the "substance of what the [agency] has purported to do and has done which is decisive." Chamber of Commerce v. OSHA, 636 F.2d 464, 468 (D.C. Cir. 1968)(citations omitted). While the Secretary's views of the nature of her actions under the APA are entitled to "some" weight, the degree of deference to be accorded is "not overwhelming," and of "far greater importance" than the Secretary's characterizations are the actual language and effects of her pronouncements. Cathedral Bluffs, 796 F.2d at 537-38.

Second, the exceptions to notice-and-comment rulemaking are limited in extent and are to be narrowly construed. The D.C. Circuit has explained:

Congress intended the exceptions to § 553's notice and comment requirements to be narrow ones. The purposes of according notice and comment opportunities were twofold: "to reintroduce public participation and fairness to affected parties after governmental authority has been delegated to unrepresentative agencies," Batterton, [648 F.2d at 703], and to "assure[] that the agency will have before it the facts and information relevant to a particular administrative problem, as well as suggestions for alternative solutions." Guardian Federal Savings & Loan Insurance Corp., 589 F.2d 658, 662 (D.C. Cir. 1978). In light of the obvious importance of these policy goals of maximum participation and full information, we have consistently declined to allow the exceptions itemized in § 553 to swallow the APA's well-intentioned directive. See, e.g., Alcaraz v. Block,

746 F.2d 593, 612 (D.C. Cir. 1984)("The exceptions to section 553 will be 'narrowly construed and only reluctantly countenanced')(citation omitted)....

Bowen, 834 F.2d at 1044.

In general, the APA provisions cited above separate administrative pronouncements "that carry the force of law from those that do not." Batterton, 648 F.2d at 701. Advance notice and public comment are required for rules that are substantive or legislative, and thus bear the force of law. Id. In the words of the Batterton Court, legislative rules manifest the following qualities:

Legislative rules ... implement congressional intent; they effectuate statutory purposes. In so doing, they grant rights, impose obligations, or produce other significant effects on private interests. They also narrowly constrict the discretion of agency officials by largely determining the issue addressed. Finally, legislative rules have substantive legal effect.

648 F.2d at 701-02 (footnote omitted).

In contrast to substantive rules, "non-binding agency actions" (the Secretary's characterization of the PPL) do not carry the force of law. In Batterton, the Court described such agency pronouncements as follows:

Non-binding action, in contrast, merely expresses an agency's interpretation, policy, or internal practice or procedure. Such actions or statements are not determinative of issues or rights addressed. They express the agency's intended course of action, its tentative view of the meaning of a particular statutory term, or internal house-keeping measures organizing agency activities. They do not, however, foreclose alternate courses of action or conclusively affect rights of private parties.... Unlike legislative rules, non-binding agency statements carry no more weight on judicial review than their inherent persuasiveness commands.

648 F.2d at 702 (footnote omitted).

### (3) The PPL as an interpretative rule

An interpretative rule, the first exception set forth in section 553, is an agency statement "as to what [the agency] thinks the statute or regulation means." Bowen, 834 F.2d at 1045; see also Batterton, 648 F.2d at 705. The function of such a pronouncement is "to allow agencies to explain ambiguous terms in legislative enactments without having to undertake cumbersome proceedings." Bowen, 834 F.2d at 1045. Substantive rules grant

rights, impose obligations, or otherwise significantly affect private interests. In contrast, as a form of non-binding action, an interpretative rule seeks merely to clarify or explain existing law. Id. Interpretive pronouncements are "essentially hortatory and instructional." Alcaraz v. Block, 746 F.2d 593, 613 (D.C. Cir. 1984).

It is readily apparent that the PPL cannot qualify as an interpretative rule. From a formal standpoint, the text of the PPL does not contain any such self-identification. We also find no indication in the PPL that it is purporting to explain or interpret any part of the Secretary's existing Part 100 regulations. The PPL does not simply "remind" operators of existing penalty proposal formulas under the Part 100 scheme, but imposes new substantive formulas. Cf. Cabais v. Egger, 690 F.2d 234, 238-39 (D.C. Cir. 1982). Nor does the PPL merely construe a regulatory or statutory term. Cf. APWU v. USPS, 707 F.2d 548, 559 (D.C. Cir. 1983), cert. den., 465 U.S. 1100 (1984).

The PPL's mathematical formula for calculating excessive history constrains discretion in the proposal of penalties. Implementation of the PPL impinges significantly on private interests in the form of higher penalty proposals in the present cases as well as in many others. In response to a question raised by a Commissioner at oral argument, the Secretary submitted data to the Commission on September 17, 1991, indicating that for the period June 1, 1990, to May 31, 1991, actual assessments with excessive history increases would be \$2.9 million higher than the estimate of those assessments without excessive history increases. This is an increase of 18%. Accordingly, in terms of its nature, force, and potential impact, we find the PPL's excessive history provisions to be substantive in nature. See Batterton, 648 F.2d at 706 (for similar reasons, Department of Labor's statistical methodology for calculating unemployment statistics found to be substantive, not interpretive); Pickus v. United States Bd. of Parole, 507 F.2d 1107, 1112-13 (D.C. Cir. 1974) (Board of Parole's guidelines limiting discretion and affecting private interests deemed substantive, not interpretive).

#### (4) The PPL as a policy statement

A general statement of policy, the second exception set forth in section 553, is "merely an announcement to the public of the policy which the agency hopes to implement in future rulemaking, or adjudications." Pacific Gas & Electric Co. v. FPC, 506 F.2d 33, 38 (D.C. Cir. 1974). Its function is to "allow agencies to announce their 'tentative intentions for the future'...." Bowen, 834 F.2d at 1046, quoting Pacific Gas & Electric, 506 F.2d at 38. In the words of the Bowen Court:

We have previously contrasted "a properly adopted substantive rule" with a "general statement of policy," observing that while a substantive rule "establishes a standard of conduct which has the force of law" in subsequent proceedings,

[a] general statement of policy, on the other hand, does not establish a "binding norm." It is not finally determinative of the issues or rights to which it is addressed. The agency cannot apply or rely upon a general statement of policy as law because a general statement of policy only announces what the agency seeks to establish as policy.

Pacific Gas & Electric, 506 F.2d at 38 (footnote omitted); see also Batterton, 648 F.2d at 706-07.

834 F.2d at 1046.

In distinguishing between substantive rules and policy statements, the D.C. Circuit has utilized a "two criteria" test:

First, courts have said that, unless a pronouncement acts prospectively, it is a binding norm. Thus ... a statement of policy may not have a present effect: "a 'general statement of policy' is one that does not impose any rights and obligations...."

\* \* \*

The second criterion is whether a purported policy statement genuinely leaves the agency and its decisionmakers free to exercise discretion.

American Bus Ass'n v. United States, 627 F.2d at 529, (citations and footnote omitted), quoting Texaco v. FPC, 412 F.2d 740, 744 (3d Cir. 1969).

Applying this analytic framework, we find lacking in the PPL an orientation to future, prospective agency action. The challenged provisions have effect now, as these cases demonstrate. By increasing proposed penalties through application of a mathematical formula, the PPL clearly affects private interests in both a substantial and present manner. The PPL sets forth a binding norm that is determinative of the penalty proposal issues (and corresponding operator interests) to which it is addressed. See Pacific Gas & Electric, 506 F.2d at 38. Like the statistical methodology in Batterton, the pronouncement at issue here "does not merely represent [the Secretary's] future intention. It presents the course the agency has selected and followed, resulting in significant changes from the previous method." Batterton, 648 F.2d at 706.

The PPL also circumscribes the Secretary's penalty proposal discretion. Like the statistical methodology in Batterton and the parole guidelines in Pickus, the PPL's excessive history provisions are "formula-like," "effectively direc[t]" the Secretary's discretionary judgment in proposing penalties, and "define a fairly tight framework" to limit and channel the Secretary's broad penalty proposal authority. See Batterton, 648 F.2d at

707, citing Pickus, 507 F.2d at 1113. Judge Merlin delineated this aspect of the PPL:

By every measure, the precepts laid down by the letter must be held to be substantive and not merely a general statement of policy.... The letter sets forth the exact numerical levels at which an excessive history comes into being and the letter further details precisely what occurs when these levels are attained. Non S&S violations with excessive history are subject to the regular assessment formula and S&S violations with excessive history are subject to a special history assessment formula containing prescribed percentage increments in penalty amounts. The Secretary's broad authority under the Act to propose penalties in accordance with the six criteria is channelled, shaped, and indeed circumscribed in a tight framework. Absent is agency discretion with respect to a large number of cases involving prior history of violations and in place is a rigid mathematical formula which allows no room for maneuver either with respect to the existence or consequences of an excessive history.

Accordingly, if an operator has a certain number and type of violations within a given period it is charged with an excessive history and when it has such a history, its civil penalty liability is increased along prescribed lines. That is what happened in this case. The provisions of the letter were applied and the operator owed more money. Such circumstances demand that interested persons be given notice and opportunity to participate in rulemaking before the letter becomes final.

13 FMSHRC at 351-52 (citations omitted).

The Secretary, in identifying the PPL as a mere expression of policy, points out that the PPL generates only proposed penalties. The Secretary contends that the PPL cannot be regarded as determinative of penalty issues and operators' rights, inasmuch as the Commission possesses de novo penalty assessment authority. However, the vast majority of proposed penalties are not contested but, instead, are paid by the operators. Therefore, in most instances where the PPL would be applied, it would be finally determinative. As Judge Merlin stated:

I also find misplaced the Solicitor's proposition that notice and comment are not required because the Secretary's penalty proposals are not final. The appealability to the Commission of the Secretary's penalty proposals does not mean that notice and comment are unnecessary. The Secretary's

proposal function is an indispensable part of the Act's civil penalty scheme. In addition, section 105(a) of the Act ... provides that penalty proposals of the Secretary which are not appealed are final and not subject to any kind of review. In fact, almost all the Secretary's penalty proposals become final under this provision. The appeal rate to the Commission from MSHA proposed assessments were 3.2% in FY'88, 3.7% in FY'89, 4% in FY'90 and 6.7% for the first four months of FY'91. The realities of how the civil penalty system actually works cannot be ignored. Even in cases that come before the Commission, the Solicitor submits sufficient information for the Commission to approve settlements in the amount of the original assessment in a significant percentage of all settlement cases. Thus, in FY'90 the Commission approved settlements in the amount of the Secretary's original proposal in 29% of all settlement cases.

13 FMSHRC at 352-53 (citations and footnotes omitted). We note that for calendar year 1991, the appeal rate from proposed assessments not involving excessive history was 7.1%, and the rate from all proposed assessments, including those involving excessive history, was 13.2%.

We affirm Judge Merlin's determination that the PPL is properly classified as substantive, rather than a mere enunciation of future policy.

(5) The PPL as a rule of agency procedure

Section 553's third exception is for rules of agency organization, procedure, or practice. The purpose of this exception is "to ensure that agencies retain latitude in organizing their internal operations." Batterton, 648 F.2d at 707. As the Batterton Court explained:

A useful articulation of the exemption's critical feature is that it covers agency actions that do not themselves alter the rights or interests of parties, although it may alter the manner in which parties present themselves or their viewpoints to the agency.

Id. (footnote omitted). This exemption does not apply where the agency action "trenches on substantial private rights and interests." Batterton, 648 F.2d at 708.

Like the statistical methodology in Batterton, the PPL's excessive history formula "jeopardizes the rights and interests of parties" subjected to its coverage. 648 F.2d at 708. We find dispositive the PPL's actual effect on penalty issues and operators' correlative interests. Thus, we conclude that, viewed from the perspective of the third exception, the PPL is substantive rather than procedural in nature.

(6) Applicability of the "good cause" exception

We further conclude, in agreement with the judge, that the PPL cannot be justified on the basis of the "good cause" exception in 5 U.S.C. § 553(b)(3)(B). The grounds justifying an agency's use of the good cause exception must be incorporated within the agency pronouncement. 5 U.S.C. § 553(b)(3)(B); United States v. Garner, 767 F.2d 104, 120 (5th Cir. 1985). A judicial directive to take immediate action may constitute good cause for a section 553(b)(3)(B) exception. American Federation of Gov. Emp. v. Block, 655 F.2d 1153, 1158 (D.C. Cir. 1981). Where there is not a judicial directive to take immediate action, "'the mere existence of deadlines for agency action, whether set by statute or court order, does not itself constitute good cause for a § 553(b)(B) exception.'" Id., quoting United States Steel Corp. v. EPA, 595 F.2d 207, 213 (5th Cir. 1979). The good cause exception is to be read narrowly in order to avoid providing agencies with an escape clause from the rulemaking requirements Congress has prescribed. Garner, 767 F.2d at 120 (5th Cir. 1985).

Unlike the Secretary's interim regulation issued in December 1989 in response to Coal Employment Project I (*supra*), which formally relied upon the APA's good cause exception and cited a need for immediate action, the PPL is silent as to any claim of good cause under the APA. That defect alone is fatal. Moreover, as Judge Merlin found (13 FMSHRC at 353-54), and we have separately concluded, the PPL goes beyond the Court's interim mandate in Coal Employment Project I. Thus, the good cause exception does not apply.

(7) The Program Policy Letter as a type of special assessment

The Secretary also contends that the PPL is merely a form of, or further construction of, the special assessment procedure provided in section 100.5, *supra*. The special assessment provision sets forth eight categories of violations justifying individualized consideration, including "(h) Violations involving ... other unique aggravating circumstances." 30 C.F.R. § 100.5(h).<sup>17</sup> The provision requires that "[a]ll findings shall be

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<sup>17</sup> The categories are:

- (a) Violations involving fatalities and serious injuries;
- (b) Unwarrantable failure to comply with mandatory health and safety standards;
- (c) Operation of a mine in the face of a closure order;
- (d) Failure to permit an authorized representative of the Secretary to perform an inspection or investigation;
- (e) Violations for which individuals are personally liable under Section 110(c) of the Act;
- (f) Violations involving an imminent

in narrative form." 30 C.F.R. § 100.5.

We reject the Secretary's contention that penalty proposals under the PPL "fall squarely within the special assessment formula" of section 100.5(h). S. Br. at 18 (emphasis added). Section 100.5 provides that "some types of violations may be of such a nature or seriousness that it is not possible to determine an appropriate penalty under [Section 100.3 and Section 100.4]." Id. (emphasis in original). Special assessments are based on the conditions surrounding the violation and "neither the nature nor the seriousness of a particular violation will automatically result in a special assessment." 47 Fed. Reg. 22292 (1982).

Although Secretarial discretion is a cornerstone of the section 100.5 special assessment program, the PPL creates a rigid formula for the proposed assessment of all excessive history cases. MSHA, in attempting to shoehorn violations by operators who meet the "excessive history" criteria into section 100.5(h), seeks to increase each of these assessments based on criteria that are unrelated to the violation itself and to do so without examination of whether there are "unique aggravating circumstances" surrounding the particular violation. The "Narrative Findings for Special Assessment" sent to Drummond were summary and apparently standardized. Identical statements of narrative findings for special assessment accompanied the notices of proposed penalties in the other six excessive history cases. The PPL is not a valid form of special assessment under existing regulations, and the Secretary's interpretation of section 100.5 to that effect is unreasonable. Cf. Brock on behalf of Williams v. Peabody Coal Co., 822 F.2d 1134, 1145, 1151 (D.C. Cir. 1987), aff'g, Secretary on behalf of Acton and UMWA v. Jim Walter Resources, Inc., 7 FMSHRC 1348 (September 1985), et seq.

c. APA conclusions

For the reasons discussed above, we reject the Secretary's attempts to justify the PPL under any of the APA's exemptions to notice-and-comment rulemaking. In our opinion, the PPL is a binding norm of present effect. It constrains the Secretary's discretion and infringes upon substantial private interests. Accordingly, the Secretary was required to promulgate it through notice-and-comment rulemaking. As an invalidly issued substantive rule, the PPL can be accorded no legal weight or effect in these proceedings.

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danger;

(g) Discrimination violations under  
Section 105(c) of the Act; and

(h) Violations involving an extraordinarily high  
degree of negligence or gravity or other unique  
aggravating circumstances.

30 C.F.R. § 100.5(a)-(h).



3. The PPL's relationship to the Part 100 regulations and the merits of a remand

In applying the invalid PPL in the present case to calculate civil penalties, the Secretary acted outside the existing framework of the Part 100 regulations. It is a fundamental principle that an agency must comply with its own regulations, even where the promulgation of such regulations is discretionary. Y&O, 9 FMSHRC at 679. See also Reuters, Ltd. v. FCC, 781 F.2d 946, 950-51 (D.C. Cir. 1986); California Human Development Corp. v. Brock, 762 F.2d 1044, 1049 (D.C. Cir. 1985). In failing to so comply, the Secretary acted arbitrarily.

Drummond's proposed penalties were based in part on the criteria and penalty points for regular assessment in section 100.3, which assigns points based on history of violations. Excessive history penalty points drawn from the PPL were then applied and percentage increases calculated. No reference to such excessive history criteria or penalty points appears in any Part 100 regulations. Narrative findings accompanying Drummond's notice of proposed penalties stated that the penalty amount was increased by a certain percentage for excessive history. Thus, MSHA computed Drummond's penalties under the regular assessment formula but added to them an additional penalty purportedly under the authority of section 100.5 (special assessments).

We conclude that the civil penalties proposed in this matter are inconsistent with the existing Part 100 regulations, and constitute arbitrary enforcement action. The Commission announced in Y&O that it would guard against such arbitrary governmental action by remanding invalidly proposed penalties to the Secretary for recalculation in accordance with the Part 100 regulations. Under the circumstances presented, we conclude that such a remand qualifies as "other appropriate relief" in this civil penalty proceeding. 30 U.S.C. § 815(d).

C. Retroactivity

Drummond also argues that the excessive history provisions of the PPL were improperly applied retroactively because all but one of the citations in question were issued before the PPL's May 29, 1990, effective date, and because the history of violations includes violations that occurred before issuance of the PPL. Judge Merlin did not reach this issue.

In Bowen v. Georgetown University Hospital, et al., 488 U.S. 204, 208 (1988), the Supreme Court stated:

Retroactivity is not favored in the law. Thus, congressional enactments and legislative rules will not be construed to have retroactive effect unless their language requires this result. By the same principle, a statutory grant of legislative

rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms.

(Citations omitted). For purposes of determining whether an operator's history is "excessive," the PPL considers violations that occurred well before its issuance. Some of those violations may be ones that an operator chose not to challenge because the violations involved only a \$20 penalty and were not considered as part of its history. Given the Supreme Court's admonition in Bowen, the retroactive nature of the PPL's excessive history procedures raises additional issues. The Secretary has not set forth reasons supporting retroactivity and the justification for retroactivity is not readily apparent. We need not resolve now whether the PPL is impermissibly retroactive but we deem it appropriate to signal our concern.

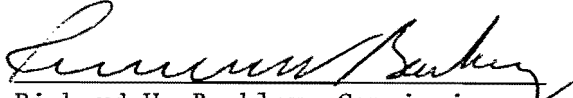
#### D. Summary

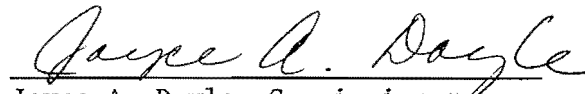
We hold that the Commission possesses subject matter jurisdiction, in these proceedings, to consider the nature and effect of the PPL. We conclude that the PPL exceeds the Court's interim mandate in Coal Employment Project I and contravenes the notice-and-comment provisions of the APA. We also conclude that the Secretary's interpretation of section 100.5(h) to encompass the provisions of the PPL is unreasonable. As an invalidly issued substantive rule, the PPL cannot be accorded legal effect. The penalties proposed against Drummond under the PPL conflict with the Part 100 regulatory scheme and constitute arbitrary agency action. Based on section 105(d) of the Mine Act and in consideration of the Commission's decision in Y&O, we conclude that these proposed penalties should be remanded to the Secretary for recomputation according to the Part 100 regulations and the Court's interim mandate as discussed herein.

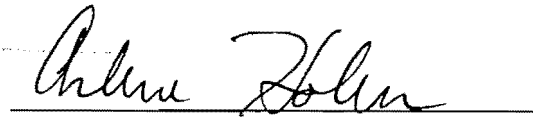
III.

Conclusion

For the foregoing reasons, we affirm the judge's decision. The proposed penalties in this matter are remanded to the Secretary for recalculation in accordance with the existing Part 100 regulations, without reference to or use of the PPL's "excessive history" provisions. The Secretary remains obligated to comply properly with the D.C. Circuit's mandates in Coal Employment Project I and II, as discussed above.

  
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# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

May 28, 1992

SECRETARY OF LABOR,	:	Docket Nos. SE 90-125
MINE SAFETY AND HEALTH	:	SE 90-127
ADMINISTRATION (MSHA)	:	SE 90-131
	:	SE 91-2
v.	:	SE 91-3
	:	SE 91-4
DRUMMOND COMPANY, INC.	:	SE 91-15
	:	SE 91-20
	:	SE 91-21
	:	SE 91-29

BEFORE: Backley, Doyle, Holen and Nelson, Commissioners<sup>1</sup>

## DECISION

BY THE COMMISSION:

This consolidated civil penalty proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988) ("Mine Act" or "Act"), involves the validity of the Secretary of Labor's interim "excessive history" program as applied to the proposal of civil penalties under the Mine Act against Drummond Company, Inc. ("Drummond"). This decision is one of seven decisions issued by the Commission with respect to the Secretary's excessive history program.<sup>2</sup>

In all seven proceedings, the mine operators filed motions with the presiding Commission administrative law judges requesting that the proposed penalties be remanded to the Secretary of Labor for recalculation. The operators contended that the proposed penalties were improper because they were not based on the Secretary's civil penalty regulations set forth at 30 C.F.R. Part 100 ("Part 100") but, instead, were computed in accordance with

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<sup>1</sup> Chairman Ford did not participate in the consideration or disposition of this matter.

<sup>2</sup> The other excessive history decisions are: Drummond Co., Inc., 14 FMSHRC \_\_\_\_, No. SE 90-126; Zeigler Coal Co., 14 FMSHRC \_\_\_\_, No. LAKE 91-2; Texas Utilities Mining Co., 14 FMSHRC \_\_\_\_, No. CENT 91-26; Utah Power & Light Co., Mining Div., 14 FMSHRC \_\_\_\_, Nos. WEST 90-320, etc.; Hobet Mining, Inc., 14 FMSHRC \_\_\_\_, No. WEVA 91-65; and Cyprus Plateau Mining Corp., 14 FMSHRC \_\_\_\_, Nos. WEST 91-44, etc.

the interim excessive history program set forth in the Secretary's Program Policy Letter No. P90-III-4 (May 29, 1990)(the "PPL"), which, the operators asserted, had been unlawfully implemented outside the notice-and-comment process required by the Administrative Procedure Act, 5 U.S.C. § 551 et seq. (1988)("APA"). Following hearings on the motions, the judges reached conflicting decisions as to Commission jurisdiction, the validity of the PPL and whether the proposed civil penalties should be remanded to the Secretary.

The aggrieved parties filed petitions for interlocutory or discretionary review seeking review of the same general issues: (A) whether the Commission has subject matter jurisdiction to consider the validity of the PPL; (B) whether the Secretary acted arbitrarily in proposing civil penalties on the basis of the PPL, an issue that involves an examination of whether the PPL exceeds the interim mandate of the United States Court of Appeals for the District of Columbia Circuit in Coal Employment Project v. Dole, 889 F.2d 1127 (1989)("Coal Employment Project I"); and whether the PPL was adopted in contravention of the APA's notice-and-comment requirements; and (C) whether the excessive history provisions of the PPL are impermissibly retroactive. The Commission granted the petitions for review and heard consolidated oral argument in three of the seven proceedings.

In the present case, Commission Chief Administrative Law Judge Paul Merlin granted the motion for remand filed by Drummond. 13 FMSHRC 356 (March 1991)(ALJ). The judge based his decision in this case on his decision in Drummond Co., 13 FMSHRC 339, No. SE 90-126 (March 1991)(ALJ). In that decision, the judge concluded, inter alia, that the PPL had been invalidly implemented and remanded the proposed civil penalties to the Secretary with instructions to recalculate them without reference to the PPL. Id.

For the reasons fully set forth in our lead decision in Drummond Co., Inc., 14 FMSHRC \_\_\_\_\_, No. SE 90-126 ("Drummond I"), we conclude that the Commission has jurisdiction under the Mine Act to review the validity of the PPL in the context of these civil penalty proceedings. We conclude that the PPL exceeded the Court's interim mandate in Coal Employment Project I and was issued in contravention of the APA. Accordingly, we affirm Judge Merlin's decision herein and remand to the Secretary for recalculation of the civil penalty proposals.

#### I.

Drummond I summarizes the general legal and regulatory background common to all seven cases. See 14 FMSHRC at \_\_\_\_\_, slip op. at 2-8. In the present case, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued 32 citations to Drummond alleging violations of mandatory safety or health standards. The Secretary then filed penalty assessment petitions for the citations, calculating the proposed penalties from the regular penalty formula in 30 C.F.R. § 100.3, and augmenting them according to the provisions of the PPL. The PPL provides for percentage increases in penalty amounts based on the presence and degree of an excessive history of violations. See Drummond I, 14 FMSHRC at \_\_\_\_\_, slip op. at 7. Included in Drummond's history were single penalty and other violations occurring during the previous two years. The penalty proposals for 23 of the violations were increased by 20% for alleged excessive history. The penalty proposals for the remaining nine violations were increased by 30% for alleged excessive history.

Drummond objected to MSHA's augmentation of the proposed penalties pursuant to the PPL and filed a motion with the judge to remand the proposed penalties to the Secretary for recalculation. Judge Merlin granted the motion, based on his determinations in Drummond I.

In his decision in Drummond I, Judge Merlin concluded that the Commission has jurisdiction to consider the issues involved. 13 FMSHRC at 344-46. The judge relied on the Commission's decision in Youghioghney & Ohio Coal Co., 9 FMSHRC 673 (April 1987) ("Y&O"), in which the Commission held, in part, that in "certain limited circumstances" it could require the Secretary to repropose penalties in a manner consistent with the Part 100 regulations. 13 FMSHRC at 344-46. In considering the validity of the method employed by MSHA to calculate the proposed penalties, the judge first concluded that the PPL exceeded the D.C. Circuit's interim mandate in Coal Employment Project I. 13 FMSHRC at 346-48. The judge then considered whether the PPL could "stand on its own without reliance upon the court's interim mandate." 13 FMSHRC at 348-49. The judge determined that the resolution of that question would turn on whether the Secretary was required by the APA to engage in notice-and-comment procedures when issuing the PPL. The judge concluded that notice-and-comment procedures were required and that, until they were followed by MSHA, the PPL could not be applied. 13 FMSHRC at 354. The judge explained that although "interpretive rules, general statements of policy, or rules of agency organization, procedure or practice" are excepted from notice-and-comment procedures by virtue of 5 U.S.C. § 553(b)(3)(A), the provisions of the PPL constituted substantive rules subject to the notice-and-comment process. 13 FMSHRC at 351. The judge additionally rejected the contention that notice-and-comment rulemaking could be excused on the basis of the "good cause" exception in 5 U.S.C. § 553(b)(3)(B). 13 FMSHRC at 353-54. The judge also rejected the Secretary's argument that the PPL was justified because it accomplished the result ordered by the Court in Coal Employment Project I. He found that the PPL exceeded the Court's instructions. 13 FMSHRC at 354. Based on the foregoing determinations, the judge granted Drummond's motion to remand.

## II.

The Secretary's principal contention is that the Commission lacks subject matter jurisdiction to consider the operators' challenge to the PPL. The Secretary argues that section 101(d) of the Mine Act confers exclusive jurisdiction over the operators' challenge to her regulatory methods upon United States Courts of Appeals. In Drummond I, we concluded that section 101(d) does not prohibit the Commission's consideration of the operators' challenge to the PPL in these contest proceedings. 14 FMSHRC at \_\_\_\_, slip op. at 13-16. We recognized that section 101(d) "clearly vests jurisdiction over challenges to the validity of mandatory safety and health standards exclusively with the United States Courts of Appeals." 14 FMSHRC at \_\_\_\_, slip op. at 13. We observed, however, that neither the PPL nor the Secretary's Part 100 penalty regulations are mandatory standards promulgated under section 101 of the Mine Act. Id. The Secretary characterizes the PPL as a "non-binding" agency pronouncement issued as an extension of her Part 100 regulatory scheme, which was promulgated pursuant to section 508 of the Act, 30 U.S.C. § 957. In Drummond I, we concluded that section 101(d) neither

states nor implies that its provision for exclusive judicial review extends to regulations adopted pursuant to section 508 of the Act or to challenges to non-binding agency pronouncements. Id.

In Drummond I, we explained that the present proceedings are contests of the Secretary's proposed civil penalties brought under section 105(d) of the Act, 30 U.S.C. § 815(d). 14 FMSHRC at \_\_\_\_, slip op. at 14. In such contest proceedings, the Secretary's less formal, "non-binding" regulatory pronouncements would fall within the Commission's jurisdictional purview. Id. We also noted that the Mine Act expressly empowers the Commission to grant review of "question[s] of law, policy or discretion," and to direct review sua sponte of matters that are "contrary to ... Commission policy" or that present a "novel question of policy...." 14 FMSHRC at \_\_\_\_, slip op. at 14-15, citing 30 U.S.C. §§ 823(d)(2)(A)(ii)(IV) & (B). We stated that the "reason the Commission was created by Congress and equipped with broad remedial powers and policy jurisdiction was to assure due process protection under the statute and, hence, to enhance public confidence in the mine safety and health program." 14 FMSHRC \_\_\_\_, slip op. at 15 (citation omitted). We pointed out that our analysis of the Commission's jurisdiction in such penalty proceedings accords with Bituminous Coal Operators' Ass'n. Inc. v. Marshall, 82 F.R.D. 350 (D.D.C. 1979), the one extensive judicial discussion of this issue to date. 14 FMSHRC at \_\_\_\_, slip op. at 15-16.

The Secretary additionally contends that our decision in Y&O does not reach the issue presented in these cases. In Y&O the Commission held that, in certain circumstances, the Commission may require the Secretary to repropose penalties in a manner consistent with the Part 100 penalty regulations. 9 FMSHRC at 679-80. In the present cases, the mine operators are asserting that the Secretary has failed to operate within, and to abide by, those regulations. In Drummond I, we agreed with the operators and the judge that a failure by the Secretary to comply with Part 100, by reliance upon an invalid PPL, would be within the scope of Y&O. 14 FMSHRC at \_\_\_\_, slip op. at 17.

On the basis of our decision in Drummond I, we hold that the Commission possesses subject matter jurisdiction under the Mine Act and consistent with Commission precedent to consider the validity of the PPL in this civil penalty proceeding. We affirm the judge's determination of jurisdiction.

The validity of the PPL turns on two major issues: whether the PPL is justified by the Court's interim mandate in Coal Employment Project I; and whether the PPL qualifies as an exception to the APA's notice-and-comment requirements.

The Secretary maintains that the PPL was issued to comply with the Court's order in Coal Employment Project I as well as to address a concern of the Department's Inspector General that repeat violations receive a higher penalty assessment. As discussed in Drummond I, the Court's interim mandate required the Secretary to consider an operator's history of non-significant and substantial ("S&S") violations in assessing single penalties and in



assessing regular penalties for S&S violations.<sup>3</sup> 14 FMSHRC at \_\_\_, slip op. at 19. The Secretary's PPL, however, takes account of S&S violations as well as non-S&S violations when determining whether the operator's history is "excessive." In Drummond I, we concluded that the PPL goes beyond the Court's interim mandate because it requires consideration of an operator's history of S&S as well as non-S&S violations and because it establishes a new schedule of penalties based on that history. 14 FMSHRC at \_\_\_, slip op. at 19-20. We determined that the PPL addresses not only the Court's immediate, interim concerns, but also broader concerns including those that the Court ordered the Secretary to address through notice-and-comment rulemaking. 14 FMSHRC at \_\_\_, slip op. at 19. Accordingly, we affirm the judge's holding here that, by requiring consideration of an operator's S&S history and by imposing special history assessments, the PPL exceeds the scope of the Court's interim mandate in Coal Employment Project I.

In Drummond I, we also rejected the Secretary's attempts to justify the PPL under any of the APA's exceptions to notice-and-comment rulemaking. 14 FMSHRC at \_\_\_, slip op. at 21-30. We held that the PPL is a binding norm of present effect and that it constrains the Secretary's discretion and infringes upon substantial private interests. Id. We concluded that the PPL is not an interpretative rule, general statement of policy, or a rule of agency organization, procedure or practice. 14 FMSHRC at \_\_\_, slip op. at 24-28. We also determined that the PPL cannot be justified on the basis of the good cause exception of the APA. 14 FMSHRC at \_\_\_, slip op. at 29. Accordingly, we affirmed the judge's holding that the Secretary was required to promulgate the PPL through notice-and-comment rulemaking and concluded that the PPL, as an invalidly issued substantive rule, can be accorded no legal weight or effect in these proceedings. 14 FMSHRC at \_\_\_, slip op. at 30. We also rejected the Secretary's contention that penalty proposals under the PPL fall within the special assessment provisions of section 100.5(h). 14 FMSHRC, slip op at 29-30.

In Drummond I, we further concluded that the civil penalties at issue were inconsistent with the existing Part 100 regulations and constituted arbitrary enforcement action. 14 FMSHRC at \_\_\_, slip op. at 31. We remanded the invalidly proposed penalties to the Secretary for recalculation pursuant to the Part 100 regulations, in accordance with the Commission's decision in Y&O. Id. We concluded that such a remand qualified as "other appropriate relief" under 30 U.S.C. § 815(d). Id.

Given our other dispositions in Drummond I, we did not resolve the retroactivity issues raised by the operators. However, we noted the retroactive nature of the PPL's excessive history procedures and signalled our concern. 14 FMSHRC at \_\_\_, slip op. at 32.

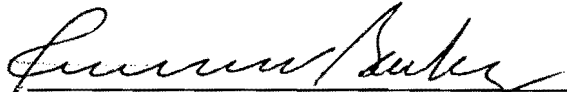
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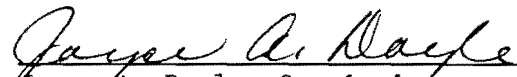
<sup>3</sup> The S&S terminology is taken from section 104(d) of the Act, which distinguishes as more serious in nature any violation that "could significantly and substantially contribute to the cause and effect of a ... mine safety or health hazard...." 30 U.S.C. § 814(d)(1).

For the reasons set forth in Drummond I, we conclude that the PPL, as an invalidly issued substantive rule, can be accorded no legal effect. The penalties proposed against Drummond pursuant to the PPL conflict with the Part 100 regulatory scheme and constitute arbitrary agency action. Based on section 105(d) of the Mine Act and in consideration of the Commission's decision in Y&O, we conclude that these proposed penalties should be remanded to the Secretary for recomputation according to the Part 100 regulations and the Court's interim mandate as explained in Drummond I.

III.

For the foregoing reasons, we affirm the judge's decision. The proposed penalties in this matter are remanded to the Secretary for recalculation in accordance with the existing Part 100 regulations without reference to or use of the PPL's "excessive history" provisions. The Secretary remains obligated to comply with the D.C. Circuit's Coal Employment Project mandates as discussed in Drummond I.

  
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# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

May 28, 1992

SECRETARY OF LABOR,	:	Docket Nos. WEST 91-44
MINE SAFETY AND HEALTH	:	WEST 91-45
ADMINISTRATION (MSHA)	:	WEST 91-46
	:	WEST 91-91
v.	:	WEST 91-118
	:	
CYPRUS-PLATEAU MINING CORPORATION	:	

BEFORE: Backley, Doyle, Holen and Nelson, Commissioners<sup>1</sup>

## DECISION

BY THE COMMISSION:

This consolidated civil penalty proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988) ("Mine Act" or "Act"), involves the validity of the Secretary of Labor's interim "excessive history" program as applied to the proposal of civil penalties under the Mine Act against Cyprus-Plateau Mining Corporation ("Cyprus"). This decision is one of seven decisions issued by the Commission with respect to the Secretary's excessive history program.<sup>2</sup>

In all seven proceedings, the mine operators filed motions with the presiding Commission administrative law judges requesting that the proposed penalties be remanded to the Secretary of Labor for recalculation. The operators contended that the proposed penalties were improper because they were not based on the Secretary's civil penalty regulations set forth at 30 C.F.R. Part 100 ("Part 100") but, instead, were computed in accordance with the interim excessive history program set forth in the Secretary's Program Policy Letter No. P90-III-4 (May 29, 1990) (the "PPL"), which, the operators asserted, had been unlawfully implemented outside the notice-and-comment process required by the Administrative Procedure Act, 5 U.S.C. § 551 et seq. (1988) ("APA"). Following hearings on the motions, the judges reached

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<sup>1</sup> Chairman Ford did not participate in the consideration or disposition of this matter.

<sup>2</sup> The other excessive history decisions are: Drummond Co., Inc., 14 FMSHRC \_\_\_\_, No. SE 90-126; Drummond Co., Inc., 14 FMSHRC \_\_\_\_, Nos. SE 90-125, etc.; Zeigler Coal Co., 14 FMSHRC \_\_\_\_, No. LAKE 91-2; Texas Utilities Mining Co., 14 FMSHRC \_\_\_\_, No. CENT 91-26; Utah Power & Light Co., Mining Div., 14 FMSHRC \_\_\_\_, Nos. WEST 90-320, etc.; and Hobet Mining, Inc., 14 FMSHRC \_\_\_\_, No. WEVA 91-65.

conflicting decisions as to Commission jurisdiction, the validity of the PPL and whether the proposed civil penalties should be remanded to the Secretary.

The aggrieved parties filed petitions for interlocutory or discretionary review seeking review of the same general issues: (A) whether the Commission has subject matter jurisdiction to consider the validity of the PPL; (B) whether the Secretary acted arbitrarily in proposing civil penalties on the basis of the PPL, an issue that involves an examination of whether the PPL exceeds the interim mandate of the United States Court of Appeals for the District of Columbia Circuit in Coal Employment Project v. Dole, 889 F.2d 1127 (1989) ("Coal Employment Project I"); and whether the PPL was adopted in contravention of the APA's notice-and-comment requirements; and (C) whether the excessive history provisions of the PPL are impermissibly retroactive. The Commission granted the petitions for review and heard consolidated oral argument in three of the seven proceedings.

In the present case, Commission Administrative Law Judge John J. Morris granted the motion for remand filed by Cyprus. 13 FMSHRC 719 (April 1991) (ALJ). Relying on this Commission's decision in Youghiogheny & Ohio Coal Company, 9 FMSHRC 673, 679 (April 1987) ("Y&O"), the judge concluded that the Commission has jurisdiction to consider whether the Secretary acted outside the Part 100 regulations when proposing penalties in this case. 13 FMSHRC at 726. The judge then determined that the PPL had been invalidly implemented and, further, that it had an impermissibly retroactive effect. 13 FMSHRC at 725-27. Accordingly, he remanded the proposed civil penalties to the Secretary for recalculation without reference to the PPL.

For the reasons fully set forth in our lead decision in Drummond Co., Inc., 14 FMSHRC \_\_\_\_, No. SE 90-126 ("Drummond I"), we conclude that the Commission has jurisdiction under the Mine Act to review the validity of the PPL in the context of these civil penalty proceedings. We conclude that the PPL exceeded the Court's interim mandate in Coal Employment Project I and was issued in contravention of the APA. Accordingly, we affirm Judge Morris' decision herein and remand to the Secretary for recalculation of the civil penalty proposals.

#### I.

Drummond I summarizes the general legal and regulatory background common to all seven cases. See 14 FMSHRC at \_\_\_\_, slip op. at 2-8. In the present case, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued 15 citations to Cyprus alleging significant and substantial ("S&S") violations of mandatory safety or health standards and three citations alleging non-S&S violations between April 23, 1990, and September 4, 1990.<sup>3</sup> 13 FMSHRC at 724-25. The Secretary then filed penalty assessment petitions for the citations calculating the proposed penalties according to the

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

provisions of the PPL and including, as part of Cyprus' history, single penalty and other violations for the previous two years. The penalty proposals for the citations alleging S&S violations were derived from the regular penalty formula in 30 C.F.R. § 100.3, with a 20% increase in that amount for excessive history. The penalty proposals for the citations alleging non-S&S violations were calculated in accordance with the formula in section 100.3, rather than in accordance with the single penalty formula in 30 C.F.R. § 100.4, based upon an alleged excessive history of violations.

Cyprus objected to MSHA's use of the PPL in calculating the proposed penalties and filed with the judge a "Motion to Strike or, in the Alternate to Remand" to the Secretary for recalculation of the proposed penalties. Judge Morris denied Cyprus' motion to strike because he determined that an order "striking allegations" would not reach the crux of the issues presented in the case and, instead, granted Cyprus' motion to remand. 13 FMSHRC at 728.

The judge reached this conclusion based on his interpretation of Y&O to afford the Commission subject matter jurisdiction over the case. 13 FMSHRC at 726. In considering the validity of MSHA's penalty assessments, the judge first concluded that the PPL exceeded the D.C. Circuit's interim mandate in Coal Employment Project I. 13 FMSHRC at 725. The judge also concluded that the PPL was fatally defective under the APA in that the Secretary was required to undertake notice-and-comment procedures for its proper issuance. 13 FMSHRC at 726-27. Finally, the judge found the excessive history provisions of the PPL to be impermissibly retroactive. 13 FMSHRC at 727. The judge explained that some of the citations for which disputed penalties were proposed had been issued prior to the PPL's effective date. Id. He stated that the "PPL adds considerably to the detriment an operator unknowingly incurred when it chose not to contest earlier single penalty assessments and other violations." 13 FMSHRC at 727. The judge noted that the Supreme Court had held in Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208 (1988), that statutes and administrative rules cannot be construed to have a retroactive effect unless their language requires such a result. Id. The judge concluded that nothing in the Mine Act or Coal Employment Project I permitted the retroactive imposition of the disputed penalties. Id.

## II.

The Secretary's principal contention is that the Commission lacks subject matter jurisdiction to consider the operators' challenge to the PPL. The Secretary argues that section 101(d) of the Mine Act confers exclusive jurisdiction over the operators' challenge to her regulatory methods upon United States Courts of Appeals. In Drummond I, we concluded that section 101(d) does not prohibit the Commission's consideration of the operators' challenge to the PPL in these contest proceedings. 14 FMSHRC at \_\_\_\_, slip op. at 13-16. We recognized that section 101(d) "clearly vests jurisdiction over challenges to the validity of mandatory safety and health standards exclusively with the United States Courts of Appeals." 14 FMSHRC at \_\_\_\_, slip op. at 13. We observed, however, that neither the PPL nor the Secretary's Part 100 penalty regulations are mandatory standards promulgated under section 101 of the Mine Act. Id. The Secretary characterizes the PPL as a "non-binding" agency pronouncement issued as an extension of her Part 100

regulatory scheme, which was promulgated pursuant to section 508 of the Act, 30 U.S.C. § 957. In Drummond I, we concluded that section 101(d) neither states nor implies that its provision for exclusive judicial review extends to regulations adopted pursuant to section 508 of the Act, or to challenges to non-binding agency pronouncements. Id.

In Drummond I, we explained that the present proceedings are contests of the Secretary's proposed civil penalties brought under section 105(d) of the Act, 30 U.S.C. § 815(d). 14 FMSHRC at \_\_\_\_, slip op. at 14. In such contest proceedings, the Secretary's less formal, "non-binding" regulatory pronouncements would fall within the Commission's jurisdictional purview. Id. We also noted that the Mine Act expressly empowers the Commission to grant review of "question[s] of law, policy or discretion," and to direct review sua sponte of matters that are "contrary to ... Commission policy" or that present a "novel question of policy...." 14 FMSHRC at \_\_\_\_, slip op. at 14-15, citing 30 U.S.C. §§ 823(d)(2)(A)(ii)(IV) & (B). We stated that the "reason the Commission was created by Congress and equipped with broad remedial powers and policy jurisdiction was to assure due process protection under the statute and, hence, to enhance public confidence in the mine safety and health program." 14 FMSHRC at \_\_\_\_, slip op. at 15 (citation omitted). We pointed out that our analysis of the Commission's jurisdiction in such penalty proceedings accords with Bituminous Coal Operators' Ass'n. Inc. v. Marshall, 82 F.R.D. 350 (D.D.C. 1979), the one extensive judicial discussion of this issue to date. 14 FMSHRC at \_\_\_\_, slip op. at 15-16.

The Secretary additionally contends that our decision in Y&O does not reach the issue presented in these cases. In Y&O the Commission held that, in certain circumstances, the Commission may require the Secretary to repropose penalties in a manner consistent with the Part 100 penalty regulations. 9 FMSHRC at 679-80. In the present cases, the mine operators are asserting that the Secretary has failed to operate within, and to abide by, those regulations. In Drummond I, we agreed with the operators and the judge that a failure by the Secretary to comply with Part 100, by reliance upon an invalid PPL, would be within the scope of Y&O. 14 FMSHRC at \_\_\_\_, slip op. at 17.

On the basis of our decision in Drummond I, we affirm Judge Morris' conclusion that the Commission has jurisdiction to review the validity of the PPL in the context of these consolidated civil penalty proceedings. We also affirm the judge's holding that our decision in Y&O is applicable to the present case.

The Secretary maintains that the PPL was issued to comply with the Court's order in Coal Employment Project I as well as to address a concern of the Department's Inspector General that repeat violations receive a higher penalty assessment. As discussed in Drummond I, the Court's interim mandate required the Secretary to consider an operator's history of non-S&S violations in assessing single penalties and in assessing regular penalties for S&S violations. 14 FMSHRC at \_\_\_\_, slip op. at 19. The Secretary's PPL, however, takes account of S&S violations as well as non-S&S violations when determining whether the operator's history is "excessive." In Drummond I, we concluded that the PPL goes beyond the Court's interim mandate because it requires consideration of an operator's history of S&S as well as non-S&S violations

and because it establishes a new schedule of penalties based on that history. 14 FMSHRC at \_\_\_\_, slip op. at 19-20. We determined that the PPL addresses not only the Court's immediate, interim concerns, but also broader concerns including those that the Court ordered the Secretary to address through notice-and-comment rulemaking. 14 FMSHRC at \_\_\_\_, slip op. at 19. Accordingly, we affirm the judge's holding here that, by requiring consideration of an operator's S&S history and by imposing special history assessments, the PPL exceeds the scope of the Court's interim mandate in Coal Employment Project I.

In Drummond I, we rejected the Secretary's attempt to justify the PPL under any of the APA's exceptions to notice-and-comment rulemaking. 14 FMSHRC at \_\_\_\_, slip op. at 21-30. We held that the PPL is a binding norm of present effect and that it constrains the Secretary's discretion and infringes upon substantial private interests. Id. We concluded that the PPL is not an interpretative rule, general statement of policy, or a rule of agency organization, procedure or practice. 14 FMSHRC at \_\_\_\_, slip op. at 24-28. We also determined that the PPL cannot be justified on the basis of the good cause exception of the APA. 14 FMSHRC at \_\_\_\_, slip op. at 29. Accordingly, we affirmed the judge's holding that the Secretary was required to promulgate the PPL through notice-and-comment rulemaking and concluded that the PPL, as an invalidly issued substantive rule, can be accorded no legal weight or effect in these proceedings. 14 FMSHRC at \_\_\_\_, slip op. at 30. We also rejected the Secretary's contention that penalty proposals under the PPL fall within the special assessment provisions of section 100.5(h). 14 FMSHRC at \_\_\_\_, slip op. at 29-30.

In Drummond I, we further concluded that the civil penalties at issue were inconsistent with the existing Part 100 regulations and constituted arbitrary enforcement action. 14 FMSHRC at \_\_\_\_, slip op. at 31. We remanded the invalidly proposed penalties to the Secretary for recalculation pursuant to the Part 100 regulations, in accordance with the Commission's decision in Y&O. Id. We concluded that such a remand qualified as "other appropriate relief" under 30 U.S.C. § 815(d). Id.

In the present case, Cyprus argued that the excessive history provisions of the PPL were improperly applied retroactively because nine of the eighteen citations in question were issued before the PPL's May 29, 1990, effective date, and because the history of violations includes violations that occurred before issuance of the PPL. As noted, Judge Morris found that the PPL had improper retroactive effect. 13 FMSHRC at 727.

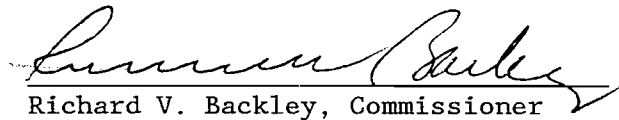
In Drummond I, we noted the Supreme Court's admonition in Bowen that retroactivity is not favored in the law. 14 FMSHRC at \_\_\_\_, slip op. at 31-32. We observed that the PPL considers violations that occurred before the issuance of the PPL and may include some that an operator chose not to challenge because the violations would not be considered as part of its history. 14 FMSHRC at \_\_\_\_, slip op. at 32. We did not resolve whether the PPL is impermissibly retroactive, but expressed concern that justification for the retroactive nature of the PPL's excessive history procedures is not readily apparent. Id. We express that concern here as well, although, as in Drummond I, we do not reach the issue.



For the reasons set forth in Drummond I, we conclude that the PPL, as an invalidly issued substantive rule, can be accorded no legal effect. The penalties proposed against Cyprus pursuant to the PPL conflict with the Part 100 regulatory scheme and constitute arbitrary agency action. Based on section 105(d) of the Mine Act and in consideration of the Commission's decision in Y&O, we conclude that these proposed penalties should be remanded to the Secretary for recomputation according to the Part 100 regulations and the Court's interim mandate as explained in Drummond I.

III.

For the foregoing reasons, we affirm the judge's decision. The proposed penalties in this matter are remanded to the Secretary for recalculation in accordance with the existing Part 100 regulations without reference to or use of the PPL's "excessive history" provisions. The Secretary remains obligated to comply with the D.C. Circuit's Coal Employment Project mandates as discussed in Drummond I.

  
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# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

May 28, 1992

SECRETARY OF LABOR,	:	Docket Nos. WEST 90-320
MINE SAFETY AND HEALTH	:	WEST 90-321
ADMINISTRATION (MSHA)	:	WEST 90-322
	:	WEST 90-323
v.	:	WEST 90-324
	:	
UTAH POWER AND LIGHT COMPANY,	:	
MINING DIVISION	:	

BEFORE: Backley, Doyle, Holen and Nelson, Commissioners<sup>1</sup>

## DECISION

BY THE COMMISSION:

This consolidated civil penalty proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988) ("Mine Act" or "Act"), involves the validity of the Secretary of Labor's interim "excessive history" program as applied to the proposal of civil penalties under the Mine Act against Utah Power and Light Company, Mining Division ("UP&L"). This decision is one of seven decisions issued by the Commission with respect to the Secretary's excessive history program.<sup>2</sup>

In all seven proceedings, the mine operators filed motions with the presiding Commission administrative law judges requesting that the proposed penalties be remanded to the Secretary of Labor for recalculation. The operators contended that the proposed penalties were improper because they were not based on the Secretary's civil penalty regulations set forth at 30 C.F.R. Part 100 ("Part 100") but, instead, were computed in accordance with the interim excessive history program set forth in the Secretary's Program Policy Letter No. P90-III-4 (May 29, 1990) (the "PPL"), which, the operators asserted, had been unlawfully implemented outside the notice-and-comment process required by the Administrative Procedure Act, 5 U.S.C. § 551 et seq. (1988) ("APA"). Following hearings on the motions, the judges reached

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<sup>1</sup> Chairman Ford did not participate in the consideration or disposition of this matter.

<sup>2</sup> The other excessive history decisions are: Drummond Co., Inc., 14 FMSHRC \_\_\_\_, No. SE 90-126; Drummond Co., Inc., 14 FMSHRC \_\_\_\_, No. SE 90-125, etc.; Zeigler Coal Co., 14 FMSHRC \_\_\_\_, No. LAKE 91-2; Texas Utilities Mining Co., 14 FMSHRC \_\_\_\_, No. CENT 91-26; Hobet Mining, Inc., 14 FMSHRC \_\_\_\_, No. WEVA 91-65; and Cyprus Plateau Mining Corp., 14 FMSHRC \_\_\_\_, Nos. WEST 91-44, etc.

conflicting decisions as to Commission jurisdiction, the validity of the PPL and whether the proposed civil penalties should be remanded to the Secretary.

The aggrieved parties filed petitions for interlocutory or discretionary review seeking review of the same general issues: (A) whether the Commission has subject matter jurisdiction to consider the validity of the PPL; (B) whether the Secretary acted arbitrarily in proposing civil penalties on the basis of the PPL, an issue that involves an examination of whether the PPL exceeds the interim mandate of the United States Court of Appeals for the District of Columbia Circuit in Coal Employment Project v. Dole, 889 F.2d 1127 (1989) ("Coal Employment Project I"); and whether the PPL was adopted in contravention of the APA's notice-and-comment requirements; and (C) whether the excessive history provisions of the PPL are impermissibly retroactive. The Commission granted the petitions for review and heard consolidated oral argument in this and two other proceedings.

In the present case, Commission Administrative Law Judge Michael Lasher denied the motion for remand filed by UP&L. 13 FMSHRC 511 (March 1991)(ALJ). The judge based his holding upon a determination that the PPL had been validly implemented, and that the Secretary had not acted arbitrarily in proposing penalties in accordance with the PPL. 13 FMSHRC at 517-19.

For the reasons fully set forth in our lead decision in Drummond Co., Inc., 14 FMSHRC \_\_\_\_\_, No. SE 90-126 ("Drummond I"), we conclude that the Commission has jurisdiction under the Mine Act to review the validity of the PPL in the context of these civil penalty proceedings. We conclude that the PPL exceeded the Court's interim mandate in Coal Employment Project I and was adopted in contravention of the APA. Accordingly, we affirm Judge Lasher's determination that the Commission possesses jurisdiction, but reverse the remainder of his order and remand to the Secretary for recalculation of the civil penalty proposals.

## I.

Drummond I summarizes the general legal and regulatory background common to all seven cases, focusing on the evolution of the Secretary's excessive history program. See 14 FMSHRC at \_\_\_\_\_, slip op. at 2-8. In the present case, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued 22 citations to UP&L alleging significant and substantial ("S&S") violations of various mandatory safety or health standards, and eight citations alleging non-S&S violations from January through May 1990.<sup>3</sup> The Secretary then filed penalty assessment petitions for the citations, calculating the proposed penalties according to the provisions of the PPL and including, as part of UP&L's history, single penalty and other violations occurring during the previous two years. The penalty proposals for the 22 citations alleging S&S violations were derived from the regular penalty

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

formula in 30 C.F.R. § 100.3, with a percentage increase in that amount for excessive history. The penalty proposals for the eight non-S&S violations were derived from the regular formula set forth in section 100.3, rather than under the single penalty assessment set forth in 30 C.F.R. § 100.4, based upon an alleged history of violations.

UP&L objected to MSHA's reliance on the provisions of the PPL in proposing the penalties, and filed a motion with the judge to remand the proposed penalties to the Secretary for recalculation. Judge Lasher denied the motion. The judge rejected the Secretary's argument that the Commission lacked jurisdiction to review UP&L's challenge. 13 FMSHRC at 513. The judge determined that such jurisdiction attached pursuant to Youghiogheny & Ohio Coal Company, 9 FMSHRC 673, 679-80 (April 1987) ("Y&O"), in which the Commission held that, in certain circumstances, it could require the Secretary to repropose penalties in a manner consistent with the Part 100 regulations. 13 FMSHRC at 514.

The judge concluded, however, that, in this case, the Secretary's proposal of penalties according to the PPL was not arbitrary within the meaning of Y&O. Id. The judge stated:

There is no reason to conclude that MSHA's promulgation and application of the PPL was instigated by any consideration other than the [D.C.] Circuit Court's mandate [in Coal Employment Project I]. The increases in UPL's 30 assessments here result from the Court's instructions to MSHA.

13 FMSHRC at 516. (emphasis in original). The judge accepted the Secretary's argument that anomalous results would obtain if only mines with excessive histories of non-S&S violations received higher civil penalties, while mines with excessive histories of S&S violations did not receive higher penalties. 13 FMSHRC at 517. The judge further found the Secretary's conduct consistent with the Court's general concern in Coal Employment Project I that proper weight must be given to an operator's history of violations, and that civil penalties serve a deterrent purpose. Id.

The judge rejected UP&L's argument that the special history assessments did not fall within the special penalty assessment provisions of 30 C.F.R. § 100.5. 13 FMSHRC at 518. He determined that, as provided by section 100.5, the Secretary had elected to waive the regular assessment formula of section 100.3 and the single penalty assessment formula of section 100.4, and that the violations for which the disputed penalties were proposed fell within the category described in section 100.5(h) as "other unique aggravating circumstances." 13 FMSHRC at 518-19.

Finally, the judge concluded that, even assuming that the notice-and-comment provisions of the APA applied to the PPL, the PPL fell within the "good cause exception" of section 553(b)(3)(B) of the APA. The judge found good cause for the Secretary not to follow notice-and-comment procedures because the Secretary was attempting to fulfill the D.C. Circuit's mandate when she issued the PPL. 13 FMSHRC at 519.

## II.

The Secretary's principal contention is that the Commission lacks subject matter jurisdiction to consider the operators' challenge to the PPL. The Secretary argues that section 101(d) of the Mine Act confers exclusive jurisdiction over the operators' challenge to her regulatory methods upon United States Courts of Appeals. In Drummond I, we concluded that section 101(d) does not prohibit the Commission's consideration of the operators' challenge to the PPL in these contest proceedings. 14 FMSHRC at \_\_\_\_, slip op. at 13-16. We recognized that section 101(d) "clearly vests jurisdiction over challenges to the validity of mandatory safety and health standards exclusively with the United States Courts of Appeals." 14 FMSHRC at \_\_\_\_, slip op. at 13. We observed that neither the PPL nor the Secretary's Part 100 penalty regulations are mandatory standards promulgated under section 101 of the Mine Act. Id. The Secretary characterizes the PPL as a "non-binding" agency pronouncement issued as an extension of her Part 100 regulatory scheme, which was promulgated pursuant to section 508 of the Act, 30 U.S.C. § 957. In Drummond I, we concluded that section 101(d) neither states nor implies that its provision for exclusive judicial review extends to regulations adopted pursuant to section 508 of the Act, or to challenges to non-binding agency pronouncements. Id.

In Drummond I, we explained that the present proceedings are contests of the Secretary's proposed civil penalties brought under section 105(d) of the Act, 30 U.S.C. § 815(d). 14 FMSHRC at \_\_\_\_, slip op. at 14. In such contest proceedings, the Secretary's less formal, "non-binding" regulatory pronouncements would fall within the Commission's jurisdictional purview. Id. We noted that the Mine Act expressly empowers the Commission to grant review of "question[s] of law, policy or discretion," and to direct review sua sponte of matters that are "contrary to ... Commission policy" or that present a "novel question of policy...." 14 FMSHRC at \_\_\_\_, slip op. at 14-15, citing 30 U.S.C. §§ 823(d)(2)(A)(ii)(IV) & (B). We stated that "the reason the Commission was created by Congress and equipped with broad remedial powers and policy jurisdiction was to assure due process protection under the statute and, hence, to enhance public confidence in the mine safety and health program." 14 FMSHRC at \_\_\_\_, slip op. at 15 (citation omitted). We pointed out that our analysis of the Commission's jurisdiction in such penalty proceedings accords with Bituminous Coal Operators' Ass'n. Inc. v. Marshall, 82 F.R.D. 350 (D.D.C. 1979), the one extensive judicial discussion of this issue to date. 14 FMSHRC at \_\_\_\_, slip op. at 15-16.

On the basis of our decision in Drummond I, we hold that the Commission has subject matter jurisdiction to review the validity of the PPL in the context of this consolidated civil penalty proceeding. In his order, Judge Lasher noted that the D.C. Circuit has retained jurisdiction over the Secretary's compliance with its remand directives in the Coal Employment Project case. 13 FMSHRC at 515. In Drummond I, we stated:

Our decisions in these seven excessive history cases do not purport to, nor, in our opinion, do they intrude upon the Court's jurisdiction in the Coal Employment Project case. These cases have been

instituted as civil penalty proceedings within the Commission's delineated statutory authority....

14 FMSHRC at \_\_\_\_, slip op. at 12 n. 10. We consider only whether the proposed penalties in these civil penalty proceedings were inconsistent with, or a departure from, the existing Part 100 regulations and, therefore, constituted arbitrary enforcement action within the meaning of Y&O.

The Secretary additionally contends that our decision in Y&O does not reach the issue presented in these cases. In Y&O the Commission held that, in certain circumstances, the Commission may require the Secretary to repropose her penalties in a manner consistent with the Part 100 penalty regulations. 9 FMSHRC at 679-80. In the present cases, the mine operators are asserting that the Secretary has failed to operate within, and to abide by, those regulations. In Drummond I, we agreed with the operators and the judge that a failure by the Secretary to comply with Part 100, by reliance upon an invalid PPL, would be within the scope of Y&O. 14 FMSHRC at \_\_\_\_, slip op. at 17. We accordingly affirm the judge's holding here that our decision in Y&O is applicable to the present case.

The Secretary maintains that the PPL was issued to comply with the Court's order in Coal Employment Project I as well as to address a concern of the Department's Inspector General that repeat violations receive a higher penalty assessment. As discussed in Drummond I, the Court's interim mandate required the Secretary to consider an operator's history of non-S&S violations in assessing single penalties and in assessing regular penalties for S&S violations. 14 FMSHRC at \_\_\_\_, slip op. at 19. The Secretary's PPL, however, takes account of S&S violations as well as non-S&S violations when determining whether the operator's history is "excessive." In Drummond I, we concluded that the PPL goes beyond the Court's interim mandate because it requires consideration of an operator's history of S&S as well as non-S&S violations and because it establishes a new schedule of penalties based on that history. 14 FMSHRC at \_\_\_\_, slip op. at 19-20. We determined that the PPL addresses not only the Court's immediate, interim concerns, but also broader concerns including those that the Court ordered the Secretary to address through notice-and-comment rulemaking. 14 FMSHRC at \_\_\_\_, slip op. at 19. Accordingly, we reverse the judge's conclusion in this case that the Court's directive to the Secretary in Coal Employment Project I validated the Secretary's proposal of penalties against UP&L in accordance with the PPL's excessive history provisions.

In Drummond I, we also rejected the Secretary's attempt to justify the PPL under any of the APA's exceptions to notice-and-comment rulemaking. 14 FMSHRC at \_\_\_\_, slip op. at 21-30. We held that the PPL is a binding norm of present effect and that it constrains the Secretary's discretion and infringes upon substantial private interests. Id. We concluded that the PPL is not an interpretative rule, general statement of policy, or a rule of agency organization, procedure or practice. 14 FMSHRC at \_\_\_\_, slip op. at 24-28. We also determined that the PPL cannot be justified on the basis of the good cause exception of the APA. 14 FMSHRC at \_\_\_\_, slip op. at 29. Accordingly, we affirmed the judge's holding that the Secretary was required to promulgate the PPL through notice-and-comment rulemaking and concluded that the PPL, as

an invalidly issued substantive rule, can be accorded no legal weight or effect in these proceedings. 14 FMSHRC at \_\_\_, slip op. at 30. We also rejected the Secretary's contention that penalty proposals under the PPL fall within the special assessment provisions of section 100.5(h). 14 FMSHRC at \_\_\_, slip op. at 29-30. Consequently, we reverse the judge's conclusions that the PPL may be justified by application of the APA's good cause exception and that the enforcement actions taken by the Secretary were a valid form of special assessment under section 100.5. In Drummond I, we concluded that the "PPL creates a rigid formula for the proposed assessment of all excessive history cases." 14 FMSHRC at \_\_\_, slip op. at 30. Accordingly, we held that the "PPL is not a valid form of special assessment under existing regulations, and the Secretary's interpretation of section 100.5 to that effect is unreasonable." Id. (citation omitted).

In Drummond I, we further concluded that the civil penalties at issue were inconsistent with the existing Part 100 regulations and constituted arbitrary enforcement action. 14 FMSHRC at \_\_\_, slip op. at 31. We remanded the invalidly proposed penalties to the Secretary for recalculation pursuant to the Part 100 regulations, in accordance with the Commission's decision in Y&O. Id. We concluded that such a remand qualified as "other appropriate relief" under 30 U.S.C. § 815(d). Id.

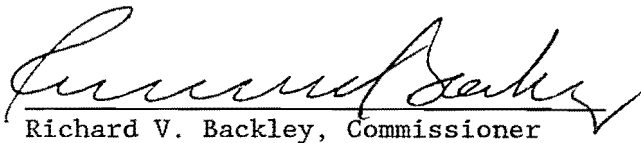
Finally, given our other dispositions in Drummond I, we did not resolve retroactivity issues raised by the operators. However, we noted the retroactive nature of the PPL's excessive history procedures and signalled our concern. 14 FMSHRC at \_\_\_, slip op. at 32.

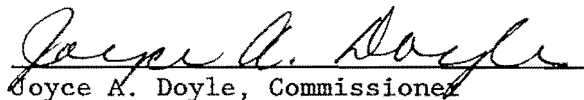
For the reasons set forth in Drummond I, we conclude that the PPL, as an invalidly issued substantive rule, can be accorded no legal effect. The penalties proposed against UP&L pursuant to the PPL conflict with the Part 100 regulatory scheme and constitute arbitrary agency action. Based on section 105(d) of the Mine Act and in consideration of the Commission's decision in Y&O, we conclude that these proposed penalties should be remanded to the Secretary for recomputation according to the Part 100 regulations and the Court's interim mandate as explained in Drummond I.

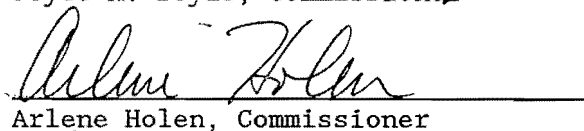


III.

For the foregoing reasons, we affirm the judge's determination that the Commission possesses jurisdiction in this matter, but reverse the remainder of his order. The proposed penalties are remanded to the Secretary for recalculation in accordance with the existing Part 100 regulations without reference to or use of the PPL's "excessive history" provisions. The Secretary remains obligated to comply with the D.C. Circuit's Coal Employment Project mandates as discussed in Drummond I.

  
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# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

May 28, 1992

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

v.

HOBET MINING, INCORPORATED

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Docket No. WEVA 91-65

BEFORE: Backley, Doyle, Holen and Nelson, Commissioners<sup>1</sup>

## DECISION

BY THE COMMISSION:

This civil penalty proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988) ("Mine Act" or "Act"), involves the validity of the Secretary of Labor's interim "excessive history" program as applied to the proposal of civil penalties under the Mine Act against Hobet Mining, Inc. ("Hobet"). This decision is one of seven decisions issued by the Commission with respect to the Secretary's excessive history program.<sup>2</sup>

In all seven proceedings, the mine operators filed motions with the presiding Commission administrative law judges requesting that the proposed penalties be remanded to the Secretary of Labor for recalculation. The operators contended that the proposed penalties were improper because they were not based on the Secretary's civil penalty regulations set forth at 30 C.F.R. Part 100 ("Part 100") but, instead, were computed in accordance with the interim excessive history program set forth in the Secretary's Program Policy Letter No. P90-III-4 (May 29, 1990) (the "PPL"), which, the operators asserted, had been unlawfully implemented outside the notice-and-comment process required by the Administrative Procedure Act, 5 U.S.C. § 551 et seq. (1988) ("APA"). Following hearings on the motions, the judges reached conflicting decisions as to Commission jurisdiction, the validity of the PPL and whether the proposed civil penalties should be remanded to the Secretary.

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<sup>1</sup> Chairman Ford did not participate in the consideration or disposition of this matter.

<sup>2</sup> The other excessive history decisions are: Drummond Co., Inc., 14 FMSHRC \_\_\_, No. SE 90-126; Drummond Co., Inc., 14 FMSHRC \_\_\_, No. SE 90-125, etc.; Drummond Co., Inc., 14 FMSHRC \_\_\_, Zeigler Coal Co., 14 FMSHRC \_\_\_, No. LAKE 91-2; Texas Utilities Mining Co., 14 FMSHRC \_\_\_, No. CENT 91-26; Utah Power & Light Co., Mining Div., 14 FMSHRC \_\_\_, Nos. WEST 90-320, etc.; and Cyprus-Plateau Mining Corp., 14 FMSHRC \_\_\_, Nos. WEST 91-44, etc.

The aggrieved parties filed petitions for interlocutory or discretionary review seeking review of the same general issues: (A) whether the Commission has subject matter jurisdiction to consider the validity of the PPL; (B) whether the Secretary acted arbitrarily in proposing civil penalties on the basis of the PPL, an issue that involves an examination of whether the PPL exceeds the interim mandate of the United States Court of Appeals for the District of Columbia Circuit in Coal Employment Project v. Dole, 889 F.2d 1127 (1989) ("Coal Employment Project I"); and whether the PPL was adopted in contravention of the APA's notice-and-comment requirements; and (C) whether the excessive history provisions of the PPL are impermissibly retroactive.<sup>3</sup> The Commission granted the petitions for review and heard consolidated oral argument in this and two other proceedings.

In the present case, Commission Administrative Law Judge William Fauver denied the motion to remand filed by Hobet. 13 FMSHRC 711 (April 1991)(ALJ). The judge based his decision upon his determination that the Commission lacked subject matter jurisdiction over Hobet's challenge to the Secretary's civil penalty proposal scheme. 13 FMSHRC at 715-17.

For the reasons fully set forth in our lead decision in Drummond Co., Inc., 14 FMSHRC \_\_\_\_\_, No. SE 90-126 ("Drummond I"), we conclude that the Commission has jurisdiction under the Mine Act to review the validity of the PPL in the context of these civil penalty proceedings, and we reverse Judge Fauver's holding to the contrary. We also conclude that the PPL exceeded the Court's interim mandate in Coal Employment Project I and was issued in contravention of the APA. Accordingly, we reverse the judge's decision and remand to the Secretary for recalculation of the civil penalty proposals.

#### I.

Drummond I summarizes the general legal and regulatory background common to all seven cases. See 14 FMSHRC at \_\_\_\_\_, slip op. at 2-8. In the present case, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued 11 citations to Hobet between July 19, 1990, and September 10, 1990, alleging violations of various mandatory safety or health standards. The Secretary then filed penalty assessment petitions for the citations, calculating penalties for seven of the citations according to the provisions of the PPL, and including, as part of Hobet's history, single penalty and other violations for the previous two years. Four other proposed penalties were based on the existing Part 100 regulations. H. Br. at 2; H. Motion to Remand at 1.

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<sup>3</sup> The operators' challenge in these seven proceedings is not to the merits of the excessive history program. Hobet, however, moved to supplement the record with a letter dated January 15, 1992, from officials of the United Mine Workers of America and the Bituminous Coal Operators' Association to the Assistant Secretary for Mine Safety and Health. The Secretary has not filed an opposition to this motion. In the letter, the officials express their concern that the excessive history program targets a group of mines that are safer than the mines not so targeted. We hereby grant Hobet's motion to supplement the record. See Fed. R. App. P. 28(j).

Hobert objected to MSHA's use of the PPL in proposing the penalties in issue and filed a motion with the judge to remand the penalties to the Secretary for recalculation. Judge Fauver denied the motion and certified his interlocutory ruling to the Commission pursuant to 29 C.F.R. § 2700.74(a)(1). 13 FMSHRC at 717.

In his decision, the judge concluded that the Commission lacked subject matter jurisdiction to consider the validity of the Secretary's procedures for proposing penalties. The judge interpreted the Commission's decision in Youghiogheny & Ohio Coal Co., 9 FMSHRC 673 (April 1987) ("Y&O"), to stand for the narrow proposition that the Commission has only limited authority to review prehearing challenges involving claims that the Secretary failed to comply with the Part 100 regulations when proposing penalties. 13 FMSHRC at 716. The judge explained that in Y&O, the Commission did not hold "that it has authority to determine the validity of the Secretary's regulations or rules for proposing civil penalties" but, rather, that "it has a limited scope of review of objections that the Secretary has failed to comply with Part 100 of her regulations in proposing a penalty." 13 FMSHRC at 716-17. The judge distinguished the present case from the circumstances presented in Y&O on the basis that this case does not involve the question of whether the Secretary complied with the Part 100 regulations. 13 FMSHRC at 717. Rather, the judge reasoned, the issue is "whether [the PPL] is valid as being in compliance with the Court's remand order and with the rulemaking requirements of the APA." Id. (emphasis in original). The judge then held that such issues lie outside the jurisdiction of the Commission and are vested instead with the Courts of Appeals. Id.

## II.

The Secretary's principal contention is that the Commission lacks subject matter jurisdiction to consider the operators' challenge to the PPL. The Secretary argues that section 101(d) of the Mine Act confers exclusive jurisdiction over the operators' challenge to her regulatory methods upon United States Courts of Appeals. In Drummond I, we concluded that section 101(d) does not prohibit the Commission's consideration of the operators' challenge to the PPL in these contest proceedings. 14 FMSHRC at \_\_\_, slip op. at 13-16. We recognized that section 101(d) "clearly vests jurisdiction over challenges to the validity of mandatory safety or health standards exclusively with the United States Courts of Appeals." 14 FMSHRC at \_\_\_, slip op. at 13. We observed, however, that neither the PPL nor the Secretary's Part 100 penalty regulations are mandatory standards promulgated under section 101 of the Mine Act. Id. The Secretary characterizes the PPL as a "non-binding" agency pronouncement issued as an extension of her Part 100 regulatory scheme, which was promulgated pursuant to section 508 of the Act, 30 U.S.C. § 957. In Drummond I, we concluded that section 101(d) neither states nor implies that its provision for exclusive judicial review extends to regulations adopted pursuant to section 508 of the Act, or to challenges to non-binding agency pronouncements. Id.

In Drummond I, we explained that the present proceedings are contests of the Secretary's proposed civil penalties brought under section 105(d) of the Act, 30 U.S.C. § 815(d). 14 FMSHRC at \_\_\_, slip op. at 14. In such contest

proceedings, the Secretary's less formal, "non-binding" regulatory pronouncements would fall within the Commission's jurisdictional purview. Id. We also noted that the Mine Act expressly empowers the Commission to grant review of "question[s] of law, policy or discretion," and to direct review sua sponte of matters that are "contrary to ... Commission policy" or that present a "novel question of policy...." 14 FMSHRC at \_\_\_\_, slip op. at 14-15, citing 30 U.S.C. §§ 823(d)(2)(A)(ii)(IV) & (B). We stated that "the reason the Commission was created by Congress and equipped with broad remedial powers and policy jurisdiction was to assure due process protection under the statute and, hence, to enhance public confidence in the mine safety and health program." 14 FMSHRC at \_\_\_\_, slip op. at 15 (citation omitted). We pointed out that our analysis of the Commission's jurisdiction in such penalty proceedings accords with Bituminous Coal Operators' Ass'n. Inc. v. Marshall, 82 F.R.D. 350 (D.D.C. 1979), the one extensive judicial discussion of this issue to date. 14 FMSHRC at \_\_\_\_, slip op. at 15-16.

The Secretary additionally contends that our decision in Y&O does not reach the issue presented in these cases. In Y&O the Commission held that, in certain circumstances, the Commission may require the Secretary to repropose penalties in a manner consistent with the Part 100 penalty regulations. 9 FMSHRC at 679-80. In the present cases, the mine operators are asserting that the Secretary has failed to operate within, and to abide by, those regulations. In Drummond I, we agreed with the operators and the judge that a failure by the Secretary to comply with Part 100, by reliance upon an invalid PPL, would be within the scope of Y&O. 14 FMSHRC at \_\_\_\_, slip op. at 17.

On the basis of our decision in Drummond I, we reverse the judge's conclusion that the Commission lacks jurisdiction to review the validity of the PPL in the context of this civil penalty proceeding. We also reverse the judge's holding here that our decision in Y&O is not applicable to the present case.

Although the judge did not reach any other issues in this case after finding that the Commission lacked jurisdiction to review Hobet's challenge, we summarize our conclusions as to the remaining relevant issues, given our holding that Commission jurisdiction attaches. In Drummond I, we concluded that the PPL goes beyond the Court's interim mandate in Coal Employment Project I because it requires consideration of an operator's significant and substantial ("S&S") as well as non-S&S violations and because it establishes a new schedule of penalties based on that history.<sup>4</sup> 14 FMSHRC at \_\_\_\_, slip op. at 19-20. In addition, we rejected the Secretary's attempts to justify the PPL under any of the APA's exceptions to notice-and-comment rulemaking. 14 FMSHRC at \_\_\_\_, slip op. at 21-30. We concluded that the PPL is not an interpretative rule, general statement of policy, or a rule of agency organization, procedure or practice. 14 FMSHRC at \_\_\_\_, slip op. at 24-28. We also determined that the PPL cannot be justified on the basis of the good

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<sup>4</sup> The S&S terminology is taken from section 104(d) of the Act, which distinguishes as more serious in nature any violation that "could significantly and substantially contribute to the cause and effect of a ... mine safety or health hazard...." 30 U.S.C. § 814(d)(1).

cause exception of the APA. 14 FMSHRC at \_\_\_\_, slip op. at 29. Accordingly, we affirmed the judge's holding that the Secretary was required to promulgate the PPL through notice-and-comment rulemaking and concluded that the PPL, as an invalidly issued substantive rule, can be accorded no legal weight or effect in these proceedings. 14 FMSHRC at \_\_\_\_, slip op. at 30. We also rejected the Secretary's contention that penalty proposals under the PPL fall squarely within the special assessment provisions of section 100.5(h). 14 FMSHRC \_\_\_\_, slip op. at 29-30.

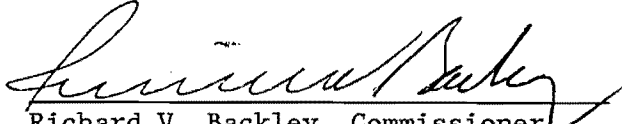
In Drummond I, we further concluded that the civil penalties were inconsistent with the existing Part 100 regulations and constituted arbitrary enforcement action. 14 FMSHRC at \_\_\_\_, slip op. at 31. We remanded the invalidly proposed penalties to the Secretary for recalculation pursuant to the Part 100 regulations, in accordance with the Commission's decision in Y&O, Id. We concluded that such a remand qualified as "other appropriate relief" under 30 U.S.C. § 815(d). Id.

Given our other dispositions in Drummond I, we did not resolve the retroactivity issues raised by the operators. However, we noted the retroactive nature of the PPL's excessive history procedures and signalled our concern. 14 FMSHRC at \_\_\_\_, slip op. at 32.

In the present case, the facts relevant and necessary to final disposition are undisputed. In the interest of judicial economy, we will resolve the PPL-related issues without remand to the judge. We conclude for the same reasons set forth in Drummond I, that the PPL, as an invalidity issued substantive rule, can be accorded no legal effect. The penalties proposed against Hobet pursuant to the PPL conflict with the Part 100 regulatory scheme and constitute arbitrary agency action. Based on section 105(d) of the Mine Act and in consideration of the Commission's decision in Y&O, we conclude that these proposed penalties should be remanded to the Secretary for recomputation according to the Part 100 regulations and the Court's interim mandate as explained in Drummond I.

III.

For the foregoing reasons, we reverse the judge's order. The seven penalties proposed pursuant to the PPL are remanded to the Secretary for recalculation in accordance with the existing Part 100 regulations without reference to or use of the PPL's "excessive history" provisions. The Secretary remains obligated to comply with the D.C. Circuit's Coal Employment Project mandates, as discussed in Drummond I. The judge may proceed with the remaining four non-PPL based civil penalties, as he deems appropriate.

  
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# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR  
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May 28, 1992

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

v.

TEXAS UTILITIES MINING COMPANY

Docket No. CENT 91-26

BEFORE: Backley, Doyle, Holen and Nelson, Commissioners<sup>1</sup>

## DECISION

BY THE COMMISSION:

This consolidated civil penalty proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988) ("Mine Act" or "Act"), involves the validity of the Secretary of Labor's interim "excessive history" program as applied to the proposal of civil penalties under the Mine Act against Texas Utilities Mining Company ("Texas Utilities"). This decision is one of seven decisions issued by the Commission with respect to the Secretary's excessive history program.<sup>2</sup>

In all seven proceedings, the mine operators filed motions with the presiding Commission administrative law judges requesting that the proposed penalties be remanded to the Secretary of Labor for recalculation. The operators contended that the proposed penalties were improper because they were not based on the Secretary's civil penalty regulations set forth at 30 C.F.R. Part 100 ("Part 100") but, instead, were computed in accordance with the interim excessive history program set forth in the Secretary's Program

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<sup>1</sup> Chairman Ford did not participate in the consideration or disposition of this matter.

<sup>2</sup> The other excessive history decisions are: Drummond Co., Inc., 14 FMSHRC \_\_\_\_, No. SE 90-126; Drummond Co. Inc., 14 FMSHRC \_\_\_\_, Nos. SE 91-125, etc.; Zeigler Coal Company, 14 FMSHRC \_\_\_\_, No. LAKE 91-2; Utah Power & Light Co., Mining Div., 14 FMSHRC \_\_\_\_, Nos. WEST 90-320, etc.; Hobet Mining, Inc., 14 FMSHRC \_\_\_\_, No. WEVA 91-65; and Cyprus Plateau Mining Corp., 14 FMSHRC \_\_\_\_, Nos. WEST 91-44, etc.

Policy Letter No. P90-III-4 (May 29, 1990)(the "PPL"), which, the operators asserted, had been unlawfully implemented outside the notice-and-comment process required by the Administrative Procedure Act, 5 U.S.C. § 551 et seq. (1988)("APA"). Following hearings on the motions, the judges reached conflicting decisions as to Commission jurisdiction, the validity of the PPL and whether the proposed civil penalties should be remanded to the Secretary.

The aggrieved parties filed petitions for interlocutory or discretionary review seeking review of the same general issues: (A) whether the Commission has subject matter jurisdiction to consider the validity of the PPL; (B) whether the Secretary acted arbitrarily in proposing civil penalties on the basis of the PPL, an issue that involves an examination of whether the PPL exceeds the interim mandate of the United States Court of Appeals for the District of Columbia Circuit in Coal Employment Project v. Dole, 889 F.2d 1127 (1989)("Coal Employment Project I"); and whether the PPL was adopted in contravention of the APA's notice-and-comment requirements; and (C) whether the excessive history provisions of the PPL are impermissibly retroactive. The Commission granted the petitions for review and heard consolidated oral argument in three of the seven proceedings.

In the present case, Commission Chief Administrative Law Judge Paul Merlin granted the motion for remand filed by Texas Utilities. 13 FMSHRC 387 (March 1991)(ALJ). The judge based his decision in this case on his decision in Drummond Co., 13 FMSHRC 339, No. SE 90-126 (March 1991)(ALJ). In that decision, the judge concluded, inter alia, that the PPL had been invalidly implemented and remanded the proposed civil penalties to the Secretary with instructions to recalculate them without reference to the PPL. Id.

For the reasons fully set forth in our lead decision in Drummond Co., Inc., 14 FMSHRC \_\_\_\_\_, No. SE 90-126 ("Drummond I"), we conclude that the Commission has jurisdiction under the Mine Act to review the validity of the PPL in the context of these civil penalty proceedings. We conclude that the PPL exceeded the Court's interim mandate in Coal Employment Project I and was issued in contravention of the APA. Accordingly, we affirm Judge Merlin's decision herein and remand to the Secretary for recalculation of the civil penalty proposal.

#### I.

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Texas Utilities objected to MSHA's augmentation of the proposed penalty pursuant to the PPL and filed a motion with the judge to remand the proposed

penalty to the Secretary for recalculation. Judge Merlin granted the motion, based on his determinations in Drummond I.

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non-binding agency pronouncements. Id.

In Drummond I, we explained that the present proceedings are contests of the Secretary's proposed civil penalties brought under section 105(d) of the Act, 30 U.S.C. § 815(d). 14 FMSHRC at \_\_\_\_, slip op. at 14. In such contest proceedings, the Secretary's less formal, "non-binding" regulatory pronouncements would fall within the Commission's jurisdictional purview. Id. We also noted that the Mine Act expressly empowers the Commission to grant review of "question[s] of law, policy or discretion," and to direct review sua sponte of matters that are "contrary to ... Commission policy" or that present a "novel question of policy...." 14 FMSHRC at \_\_\_\_, slip op. at 14-15, citing 30 U.S.C. §§ 823(d)(2)(A)(ii)(IV) & (B). We stated that the "reason the Commission was created by Congress and equipped with broad remedial powers and policy jurisdiction was to assure due process protection under the statute and, hence, to enhance public confidence in the mine safety and health program." 14 FMSHRC \_\_\_\_, slip op. at 15 (citation omitted). We pointed out that our analysis of the Commission's jurisdiction in such penalty proceedings accords with Bituminous Coal Operators' Ass'n. Inc. v. Marshall, 82 F.R.D. 350 (D.D.C. 1979), the one extensive judicial discussion of this issue to date. 14 FMSHRC at \_\_\_\_, slip op. at 15-16.

The Secretary additionally contends that our decision in Y&O does not reach the issue presented in these cases. In Y&O the Commission held that, in certain circumstances, the Commission may require the Secretary to repropose penalties in a manner consistent with the Part 100 penalty regulations. 9 FMSHRC at 679-80. In the present cases, the mine operators are asserting that the Secretary has failed to operate within, and to abide by, those regulations. In Drummond I, we agreed with the operators and the judge that a failure by the Secretary to comply with Part 100, by reliance upon an invalid PPL, would be within the scope of Y&O. 14 FMSHRC at \_\_\_\_, slip op. at 17.

On the basis of our decision in Drummond I, we hold that the Commission possesses subject matter jurisdiction under the Mine Act and consistent with Commission precedent to consider the validity of the PPL in this civil penalty proceeding. We affirm the judge's determination of jurisdiction.

The validity of the PPL turns on two major issues: whether the PPL is justified by the Court's interim mandate in Coal Employment Project I; and whether the PPL qualifies as an exception to the APA's notice-and-comment requirements.

The Secretary maintains that the PPL was issued to comply with the Court's order in Coal Employment Project I as well as to address a concern of the Department's Inspector General that repeat violations receive a higher penalty assessment. As discussed in Drummond I, the Court's interim mandate required the Secretary to consider an operator's history of non-significant and substantial ("S&S") violations in assessing single penalties and in

assessing regular penalties for S&S violations.<sup>3</sup> 14 FMSHRC at \_\_\_, slip op. at 19. The Secretary's PPL, however, takes account of S&S violations as well as non-S&S violations when determining whether the operator's history is "excessive." In Drummond I, we concluded that the PPL goes beyond the Court's interim mandate because it requires consideration of an operator's history of S&S as well as non-S&S violations and because it establishes a new schedule of penalties based on that history. 14 FMSHRC at \_\_\_, slip op. at 19-20. We determined that the PPL addresses not only the Court's immediate, interim concerns, but also broader concerns including those that the Court ordered the Secretary to address through notice-and-comment rulemaking. 14 FMSHRC at \_\_\_, slip op. at 19. Accordingly, we affirm the judge's holding here that, by requiring consideration of an operator's S&S history and by imposing special history assessments, the PPL exceeds the scope of the Court's interim mandate in Coal Employment Project I.

In Drummond I, we also rejected the Secretary's attempts to justify the PPL under any of the APA's exceptions to notice-and-comment rulemaking. 14 FMSHRC at \_\_\_, slip op. at 21-30. We held that the PPL is a binding norm of present effect and that it constrains the Secretary's discretion and infringes upon substantial private interests. Id. We concluded that the PPL is not an interpretative rule, general statement of policy, or a rule of agency organization, procedure or practice. 14 FMSHRC at \_\_\_, slip op. at 24-28. We also determined that the PPL cannot be justified on the basis of the good cause exception of the APA. 14 FMSHRC at \_\_\_, slip op. at 29. Accordingly, we affirmed the judge's holding that the Secretary was required to promulgate the PPL through notice-and-comment rulemaking and concluded that the PPL, as an invalidly issued substantive rule, can be accorded no legal weight or effect in these proceedings. 14 FMSHRC at \_\_\_, slip op. at 30. We also rejected the Secretary's contention that penalty proposals under the PPL fall within the special assessment provisions of section 100.5(h). 14 FMSHRC, slip op at 29-30.

In Drummond I, we further concluded that the civil penalties at issue were inconsistent with the existing Part 100 regulations and constituted arbitrary enforcement action. 14 FMSHRC at \_\_\_, slip op. at 31. We remanded the invalidly proposed penalties to the Secretary for recalculation pursuant to the Part 100 regulations, in accordance with the Commission's decision in Y&O. Id. We concluded that such a remand qualified as "other appropriate relief" under 30 U.S.C. § 815(d). Id.

Given our other dispositions in Drummond I, we did not resolve the retroactivity issues raised by the operators. However, we noted the retroactive nature of the PPL's excessive history procedures and signalled our concern. 14 FMSHRC at \_\_\_, slip op. at 32.

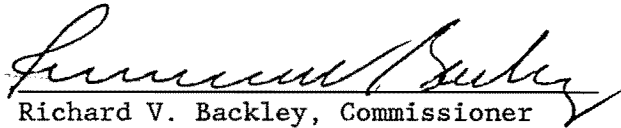
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<sup>3</sup> The S&S terminology is taken from section 104(d) of the Act, which distinguishes as more serious in nature any violation that "could significantly and substantially contribute to the cause and effect of a ... mine safety or health hazard...."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

For the reasons set forth in Drummond I, we conclude that the PPL, as an invalidly issued substantive rule, can be accorded no legal effect. The penalty proposed against Texas Utilities pursuant to the PPL conflicts with the Part 100 regulatory scheme and constitutes arbitrary agency action. Based on section 105(d) of the Mine Act and in consideration of the Commission's decision in Y&O, we conclude that the proposed penalty should be remanded to the Secretary for recomputation according to the Part 100 regulations and the Court's interim mandate as explained in Drummond I.

III.

For the foregoing reasons, we affirm the judge's decision. The proposed penalty in this matter is remanded to the Secretary for recalculation in accordance with the existing Part 100 regulations without reference to or use of the PPL's "excessive history" provisions. The Secretary remains obligated to comply with the D.C. Circuit's Coal Employment Project mandates as discussed in Drummond I.

  
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# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

May 28, 1992

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

v.

ZEIGLER COAL COMPANY

Docket No. LAKE 91-2

BEFORE: Backley, Doyle, Holen and Nelson, Commissioners<sup>1</sup>

## DECISION

BY THE COMMISSION:

This consolidated civil penalty proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988) ("Mine Act" or "Act"), involves the validity of the Secretary of Labor's interim "excessive history" program as applied to the proposal of civil penalties under the Mine Act against Zeigler Coal Company ("Zeigler"). This decision is one of seven decisions issued by the Commission with respect to the Secretary's excessive history program.<sup>2</sup>

In all seven proceedings, the mine operators filed motions with the presiding Commission administrative law judges requesting that the proposed penalties be remanded to the Secretary of Labor for recalculation. The operators contended that the proposed penalties were improper because they were not based on the Secretary's civil penalty regulations set forth at

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<sup>1</sup> Chairman Ford did not participate in the consideration or disposition of this matter.

<sup>2</sup> The other excessive history decisions are: Drummond Co., Inc., 14 FMSHRC \_\_\_, No. SE 90-126; Drummond Co. Inc., 14 FMSHRC \_\_\_, Nos. SE 91-125, etc.; Texas Utilities Mining Co., 14 FMSHRC \_\_\_, No. CENT 91-26; Utah Power & Light Co., Mining Div., 14 FMSHRC \_\_\_, Nos. WEST 90-320, etc.; Hobet Mining, Inc., 14 FMSHRC \_\_\_, No. WEVA 91-65; and Cyprus Plateau Mining Corp., 14 FMSHRC \_\_\_, Nos. WEST 91-44, etc.

30 C.F.R. Part 100 ("Part 100") but, instead, were computed in accordance with the interim excessive history program set forth in the Secretary's Program Policy Letter No. P90-III-4 (May 29, 1990)(the "PPL"), which, the operators asserted, had been unlawfully implemented outside the notice-and-comment process required by the Administrative Procedure Act, 5 U.S.C. § 551 et seq. (1988)("APA"). Following hearings on the motions, the judges reached conflicting decisions as to Commission jurisdiction, the validity of the PPL and whether the proposed civil penalties should be remanded to the Secretary.

The aggrieved parties filed petitions for interlocutory or discretionary review seeking review of the same general issues: (A) whether the Commission has subject matter jurisdiction to consider the validity of the PPL; (B) whether the Secretary acted arbitrarily in proposing civil penalties on the basis of the PPL, an issue that involves an examination of whether the PPL exceeds the interim mandate of the United States Court of Appeals for the District of Columbia Circuit in Coal Employment Project v. Dole, 889 F.2d 1127 (1989)("Coal Employment Project I"); and whether the PPL was adopted in contravention of the APA's notice-and-comment requirements; and (C) whether the excessive history provisions of the PPL are impermissibly retroactive. The Commission granted the petitions for review and heard consolidated oral argument in three of the seven proceedings.

In the present case, Commission Chief Administrative Law Judge Paul Merlin granted the motion for remand filed by Zeigler. 13 FMSHRC 367 (March 1991)(ALJ). The judge based his decision in this case on his decision in Drummond Co., 13 FMSHRC 339, No. SE 90-126 (March 1991)(ALJ). In that decision, the judge concluded, inter alia, that the PPL had been invalidly implemented and remanded the proposed civil penalties to the Secretary with instructions to recalculate them without reference to the PPL. Id.

For the reasons fully set forth in our lead decision in Drummond Co., Inc., 14 FMSHRC \_\_\_\_\_, No. SE 90-126 ("Drummond I"), we conclude that the Commission has jurisdiction under the Mine Act to review the validity of the PPL in the context of these civil penalty proceedings. We conclude that the PPL exceeded the Court's interim mandate in Coal Employment Project I and was issued in contravention of the APA. Accordingly, we affirm Judge Merlin's decision herein and remand to the Secretary for recalculation of the civil penalty proposal.

#### I.

Drummond I summarizes the general legal and regulatory background common to all seven cases. See 14 FMSHRC at \_\_\_\_\_, slip op. at 2-8. In the present case, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued one citation to Zeigler alleging a violation of 30 C.F.R. § 75.400. The Secretary then filed a penalty assessment petition for the citation, calculating the proposed penalty from the regular penalty formula in 30 C.F.R. § 100.3, according to the provisions of the PPL. The PPL provides for percentage increases in penalty amounts based on the presence and degree of an excessive history of violations. See Drummond I, 14 FMSHRC at \_\_\_\_\_, slip op. at 7. Included in Zeigler's history were single penalty and other violations occurring during the previous two years. The penalty proposal for the violation was increased by 20% for alleged excessive history.

Zeigler objected to MSHA's augmentation of the proposed penalty pursuant to the PPL and filed a motion with the judge to remand the proposed penalty to the Secretary for recalculation. Judge Merlin granted the motion, based on his determinations in Drummond I.

In his decision in Drummond I, Judge Merlin concluded that the Commission has jurisdiction to consider the issues involved. 13 FMSHRC at 344-46. The judge relied on the Commission's decision in Youghiogheny & Ohio Coal Co., 9 FMSHRC 673 (April 1987)("Y&O"), in which the Commission held, in part, that in "certain limited circumstances" it could require the Secretary to repropose penalties in a manner consistent with the Part 100 regulations. 13 FMSHRC at 344-46. In considering the validity of the method employed by MSHA to calculate the proposed penalties, the judge first concluded that the PPL exceeded the D.C. Circuit's interim mandate in Coal Employment Project I. 13 FMSHRC at 346-48. The judge then considered whether the PPL could "stand on its own without reliance upon the court's interim mandate." 13 FMSHRC at 348-49. The judge determined that the resolution of that question would turn on whether the Secretary was required by the APA to engage in notice-and-comment procedures when issuing the PPL. The judge concluded that notice-and-comment procedures were required and that, until they were followed by MSHA, the PPL could not be applied. 13 FMSHRC at 354. The judge explained that although "interpretive rules, general statements of policy, or rules of agency organization, procedure or practice" are excepted from notice-and-comment procedures by virtue of 5 U.S.C. § 553(b)(3)(A), the provisions of the PPL constituted substantive rules subject to the notice-and-comment process. 13 FMSHRC at 351. The judge additionally rejected the contention that notice-and-comment rulemaking could be excused on the basis of the "good cause" exception in 5 U.S.C. § 553(b)(3)(B). 13 FMSHRC at 353-54. The judge also rejected the Secretary's argument that the PPL was justified because it accomplished the result ordered by the Court in Coal Employment Project I. He found that the PPL exceeded the Court's instructions. 13 FMSHRC at 354. Based on the foregoing determinations, the judge granted Drummond's motion to remand.

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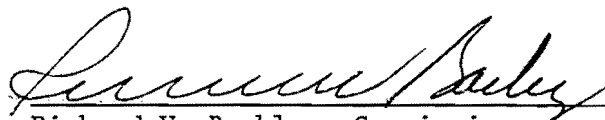
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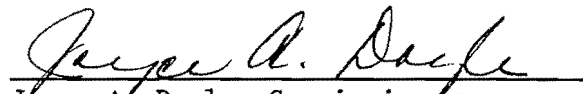
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For the reasons set forth in Drummond I, we conclude that the PPL, as an invalidly issued substantive rule, can be accorded no legal effect. The penalty proposed against Zeigler pursuant to the PPL conflicts with the Part 100 regulatory scheme and constitutes arbitrary agency action. Based on section 105(d) of the Mine Act and in consideration of the Commission's decision in Y&O, we conclude that the proposed penalty should be remanded to the Secretary for recomputation according to the Part 100 regulations and the Court's interim mandate as explained in Drummond I.

III.

For the foregoing reasons, we affirm the judge's decision. The proposed penalty in this matter is remanded to the Secretary for recalculation in accordance with the existing Part 100 regulations without reference to or use of the PPL's "excessive history" provisions. The Secretary remains obligated to comply with the D.C. Circuit's Coal Employment Project mandates as discussed in Drummond I.

  
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# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

May 14, 1992

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

v.

RAVENNA GRAVEL

Docket No. LAKE 90-127-M

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

## ORDER

BY THE COMMISSION:

Chief Administrative Law Judge Paul Merlin entered a decision on March 7, 1991, finding Ravenna Gravel ("Ravenna") in default for failing to timely file an answer in this civil penalty proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988)(the "Mine Act"). Ravenna failed to file a petition for discretionary review of Judge Merlin's decision within the 30-day period prescribed by the Mine Act, and the Commission did not direct review on its own motion. 30 U.S.C. § 823(d)(2) (A)(i), (B); 29 C.F.R. § 2700.70(a). Accordingly, by operation of the statute, the judge's decision became a final decision of the Commission 40 days after its issuance, i.e., April 16, 1991. 30 U.S.C. § 823(d)(1).

On April 27, 1992, more than one year after the judge's decision became a final order of the Commission, the Commission received a letter dated April 17, 1992, from Sue Ann Glovick, Ravenna's Secretary. In her letter, Ms. Glovick explains that Ravenna paid a civil penalty assessment of \$400 in February 1991. She says that Ravenna received an additional bill for \$400 and, upon inquiry, she learned that two civil penalties had been assessed as a result of the same violative condition. One penalty had been assessed against Ravenna as the mine operator, pursuant to section 110(a) of the Mine Act, 30 U.S.C. § 820(a), and the other had been assessed against Barry Glovick, Ravenna's owner, pursuant to section 110(c), 30 U.S.C. § 820(c). Ravenna paid the penalty assessed against Mr. Glovick, individually, in February 1991, but did not pay the penalty assessed against the company. Ms. Glovick further states that "[a]ccording to federal order 60B," Ravenna has the "right to disagree with [the] fine." She maintains that Ravenna's "neglect is excusable as we were unaware of the double charge."

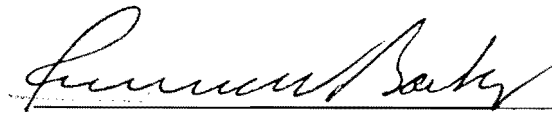
Under these circumstances, we construe Ravenna's motion to be a request for relief from a final Commission order. 29 C.F.R. § 2700.1(b) (Federal Rules of Civil Procedure apply in absence of applicable Commission rule); Fed.

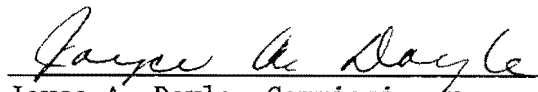


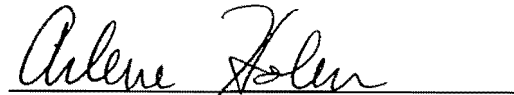
Rule Civ. P. 60 (Relief from Judgment or Order)("Rule 60"); Wadding v. Tunnelton Mining Co., 8 FMSHRC 1142 (August 1986). A Rule 60(b) motion based on allegations of "mistake, inadvertence, surprise, or excusable neglect ... shall be made within a reasonable time, and ... not more than one year after the judgment, order, or proceeding was entered or taken." Fed. R. Civ. P. 60(b). Ravenna's motion was filed on April 27, 1992 (see 29 C.F.R. § 2700.5(d)), more than one year after the judge's decision became a final order of the Commission. The motion is untimely under Rule 60(b). See generally Wadding, 8 FMSHRC at 1143.

In accordance with the requirements of Rule 60(b), and Commission precedent, we are constrained to deny Ravenna's motion.

  
Ford B. Ford, Chairman

  
Richard V. Backley, Commissioner

  
Joyce A. Doyle, Commissioner

  
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# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

May 15, 1992

PEABODY COAL COMPANY	:	
	:	
v.	:	Docket No. KENT 91-340-R
	:	KENT 91-341-R
SECRETARY OF LABOR,	:	KENT 91-342-R
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	

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

## DECISION

BY THE COMMISSION:

This contest proceeding is before the Commission by way of a petition for review filed by Peabody Coal Co., and involves alleged violations of section 103(f) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 813(f), (the Mine Act).<sup>1</sup> In a decision issued August 21, 1991, Commission

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<sup>1</sup> Section 103(f), 30 U.S.C. § 813(f), provides:

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

Administrative Law Judge Gary Melick dismissed Peabody's contest of three citations issued by the Secretary for the operator's refusal to compensate certain miners' representatives for time spent accompanying several MSHA inspectors during a regular quarterly inspection. 13 FMSHRC 1302. For the reasons that follow, we affirm the judge's decision.

I.

Factual and Procedural Background<sup>2</sup>

Peabody owns and operates the Martwick Mine, an underground coal mine in Muhlenburg County, Kentucky. During March 1991, MSHA conducted a quarterly inspection of the mine pursuant to section 103(a) of the Act, 30 U.S.C. § 813(a). Two segments of that regular inspection gave rise to the citations on review when MSHA conducted what are known as "blitz" inspections of the mine. On March 7, MSHA sent several inspectors to the No. 4 Unit and on March 19, MSHA sent several inspectors to the No. 1 Unit of the mine. 13 FMSHRC at 1303; S. Br. 11.

With respect to the March 7, 1991, inspection, A.J. Parks (MSHA supervisor), William Branson (electrical inspector), Terry Cullen (roof control specialist), Darold Gamblin (Martwick's regular inspector), and Sam Martin (inspector) arrived at the mine at 7:10 a.m. Supervisor Parks assigned each MSHA inspector his duties for the day, and they proceeded to examine the mine's records. 13 FMSHRC at 1303; Tr. 14-15.

The inspectors entered the mine at approximately 8:30 a.m., accompanied by: Kentucky state inspector James Hawkins; Peabody representatives Steve Little and Bob Epley; and miners' representatives Cecil Phillips, Sam Sookekey, Terry Bowman, William Johnson, and Artemaus Birchwell. Cecil Phillips was the usually designated "walkaround representative" during regular inspections while the other four miners' representatives -- Sookekey, Bowman, Johnson and Birchwell -- accompanied the MSHA inspectors at the request of the Local Union. 13 FMSHRC at 1303-1304; Tr. 15, 18.

At approximately 9:00 a.m., the inspection party reached the Four East Panel of the mine and split up into five groups, each of which included a walkaround representative. Once the groups were formed, they proceeded as follows: Group A travelled directly to the face areas of the No. 4 Unit by a mantrip through the track entry. Upon arriving, this group conducted an

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under the provisions of this subsection. Compliance with the subsection shall not be a jurisdictional prerequisite to the enforcement of any provision of this Act.

30 U.S.C. § 813(f).

<sup>2</sup> This case was submitted for decision below on the basis of two joint exhibits and a set of stipulations agreed to by the parties at the hearing and then read into the record. No testimony was taken, nor were the stipulations reduced to writing. See Hearing Transcript, June 13, 1991, hereafter, "Tr."

electrical inspection of the unit. Group B travelled to the face areas by a separate mantrip through the track entry. They inspected the roof and faces. Group C did a walk-through inspection of the 4,200 foot return entry and arrived at the face areas of the unit at approximately 11:30 a.m. Group D did a walk-through inspection of the 4,200 foot belt entry and arrived at the face areas at about 11:30 a.m. Group E did a walk-through inspection of the 4200 foot intake entry and also arrived at the face areas at approximately 11:30 a.m., where they took rock dust samples in seven different locations. 13 FMSHRC at 1303-1304; Tr. 15-16.

From 11:30 a.m. until 12:00 noon, "the various inspectors all identified above assisted in completing the inspection of the unit." Tr. 16. Thereafter, all the participants rendezvoused at the end of the track entry and left the mine together, arriving at the surface at about 12:45 p.m. From 12:45 p.m. until 1:45 p.m., the inspectors wrote those citations that had not been issued underground and delivered them to the Peabody representatives. Inspector Branson discussed his own findings with Peabody and left the mine at 1:45 p.m. At that point the remaining inspectors held a close-out conference with Peabody representatives and all five miners' representatives. The conference adjourned at 2:00 p.m., and Cullen and Martin left the mine. Parks and Gamblin left at 2:30 p.m. 13 FMSHRC at 1305; Tr. 16-17.

On March 19, 1991, a similar scenario took place when MSHA representatives Parks, Gamblin, and Branson were joined by Ted Smith and Mike Whitfield, also of MSHA. The group arrived at the mine at 7:15 a.m. to inspect the No. 1 Unit. Once again, in addition to the regular walkaround representative, Phillips, the Local Union requested that miners' representatives Sooke, Bowman and Birchwell be added to the inspection party. Peabody's representatives were again Little and Epley. 13 FMSHRC at 1304; Tr. 18-19. The inspection party entered the mine together at 8:30 a.m., arrived at the First Northwest Main at 8:45 a.m., and split up into four groups, each of which included a walkaround representative.

Group A travelled directly to the face areas of the No. 1 Unit through the track entry where they commenced an electrical inspection at about 9:00 a.m. Group B did a walk-through inspection of the 3,300 foot return entry arriving at the face areas of the unit at approximately 9:30 a.m. Group C walked the 3,300 foot belt entry also arriving at approximately 9:30 a.m. Group D walked the 3,300 foot intake entry and arrived at the face areas at approximately 9:35 a.m. 3 FMSHRC at 1304-1305. According to the stipulations, "various inspectors identified above conducted an inspection of the unit which lasted until approximately 12:45 p.m." Tr. 20. During that period a ventilation problem arose, and miners' representatives Phillips and Sooke were assigned to correct it. Sooke devoted 30 to 40 minutes to that task. 13 FMSHRC at 1305.

The entire group again rendezvoused at the end of the track entry, travelled out of the mine, and arrived on the surface at 1:10 p.m. As he had done on the previous occasion, Inspector Branson immediately discussed his findings with the Peabody representatives and left the mine at 1:15 p.m. After writing their citations, the remaining MSHA inspectors held a close-out conference from 1:30 p.m. until 1:45 p.m., with Peabody representatives and

the four miners' representatives in attendance. Smith and Whitfield left the mine at 1:45 p.m., and Parks and Gamblin, at 3:00 p.m. 13 FMSHRC at 1305, Tr. 21.

Following the March 7, 1991, inspection, Peabody paid miners' representative Phillips for the time spent accompanying the MSHA inspectors but did not pay miners' representatives Johnson, Birchwell, Bowman or Sookey. Following the March 19, 1991, inspection, Peabody again paid Phillips for the time spent accompanying the MSHA inspectors but did not pay Birchwell, Bowman or Sookey. 13 FMSHRC 1303, 1307; Tr. 21-22. On April 15, 1991, MSHA issued a citation alleging a violation of section 103(f) for Peabody's failure to compensate miners' representative Sookey "for time spent in the capacity of Miner Representative while traveling with an authorized representative of [the] Secretary" on March 7, 1991, and March 19, 1991. 13 FMSHRC at 1307. Similar citations were issued on April 16, 1991, with regard to Peabody's failure to compensate miners' representatives Johnson and Birchwell, and on April 17, 1991, for failure to compensate miners' representative Bowman. Id.

After summarizing the facts, the judge concluded: "It is not disputed that during the course of both the underground inspections, each team operated separate and apart, with no overlapping responsibilities or duplication of inspection efforts." 13 FMSHRC at 1305. The judge then cited Magma Copper Company v. Secretary and FMSHRC, 645 F.2d 694 (9th Cir. 1981), for the proposition that, whenever an inspection is conducted by more than one MSHA inspector and each acts separately and inspects a different part of the mine, a representative of the miners, who is also an employee of the operator, is entitled to accompany each inspector without loss of pay. Id.

Applying Magma to the instant case the judge found that although each inspection at the Martwick mine took place within a single mine unit, "each inspector was performing a separate and distinct inspection function." He further found that, "because of stoppings between the entries travelled by the inspection teams, most of the teams were also separated physically." 13 FMSHRC at 1306. Accordingly, the judge held that the circumstances in the Martwick mine fell "within the ambit of the Magma decision," and that Peabody had violated section 103(f) by not compensating all of the miners' representatives who accompanied the MSHA inspectors during the two inspections. 13 FMSHRC at 1305-1306.

## II.

### Disposition of Issues

Peabody argues on review that this case presents a matter of first impression: the scope and construction of the Magma decision, supra, in the context of "blitz" inspections conducted at underground coal mines. The operator asserts that the circumstances in the Martwick mine are distinguishable from those in Magma. In the Magma case, Peabody argues, two inspectors were indeed inspecting separate areas of a mine. Their inspections of a huge milling complex took them as many as six or seven miles apart and they did not see each other until they returned to the mine office to complete their paperwork. Under those circumstances, Peabody agrees the Secretary was justified in requiring a paid walkaround representative for each inspector.

Peabody asserts, in contrast, that Unit 1 and Unit 4 are each a single area or a single part of the mine. Therefore, under Magma, the MSHA contingents deployed on March 7, 1991, and March 19, 1991, were each a single inspection party entitled to only one paid walkaround representative during the course of the inspection. The operator argues that under the judge's interpretation of Magma, "a mine operator would be required to pay walkaround pay on virtually any occasion on which multiple inspectors inspect an underground coal mine." Pet. 5.

The Secretary rejoins that the judge correctly applied Magma here, given that the MSHA inspectors at the Martwick Mine on March 7, 1991, and March 19, 1991, were inspecting "different parts of the mine and perform[ing] separate and distinct inspection functions." Br. 9. She further contends that utilizing multiple inspectors and multiple miners' representatives reduces the amount of time needed to complete inspections at larger mines. Therefore, the Secretary contends, the total outlay of walkaround wages is approximately the same as it would be if only one inspector and one miners' representative were assigned to the same areas.

The Secretary argues that Peabody's attempt to distinguish the facts presented in Magma from the facts presented here, "exalts form over substance." Br. 11. The Secretary first points out that Peabody stipulated that the separate inspection groups performed separate functions (Tr. 27) and refers to joint exhibits showing the separate routes travelled by the respective groups through Units 1 and 4 of the mine. The Secretary contends that, given the "unique character of each entry, the individual areas of expertise of the different inspectors, and the division of the general inspection party along different paths to perform separate and distinct inspection functions in the mine," including a paid walkaround representative in each group was justified under the circumstances. Br. 14. The Secretary concedes that the areas covered in the Martwick Mine "may not have been as physically separate as those in Magma," but asserts nevertheless that "the same basic principles established in Magma are applicable here." Br. 14-15.

In Magma, the principal case dealing with compensation for multiple walkaround representatives, two MSHA inspectors arrived at the mine to inspect separate areas of the operator's extensive milling complex. Magma agreed to the inspector's requests that each be accompanied by a walkaround representative, but insisted that it would compensate only one of the representatives for time spent accompanying the inspector. Only one walkaround representative participated in the inspection, but Magma was cited for refusing to pay a miners' representative to accompany the second inspector. In deciding the matter on review, the Commission first reviewed the legislative purpose of section 103(f) in light of MSHA's customary inspection practices:

The language of section 103(f) conveys the impression that Congress expected that one inspection party will visit all parts of the mine and one paid miners' representative will therefore fully participate in the inspection. The walkaround pay limitation appears designed to minimize the operator's economic burden by

requiring him to pay only one miner who is in that one inspection party. However, several inspectors are often sent into large mines to expedite inspection of the entire mine. Providing walkaround pay only to one miners' representative when several inspection parties are inspecting the entire mine would make the right to walkaround pay dependent on the number of inspectors sent to the mine.

1 FMSHRC at 1951. Accordingly, the Commission held that "when the inspection is divided into two or more parties to simultaneously inspect different parts of a mine ... one miners' representative in each inspection party must be paid for time spent accompanying [the] inspector ..." 1 FMSHRC 1948.

The United States Court of Appeals for the Ninth Circuit affirmed the Commission's decision, holding that "where an inspection of a mine is conducted by more than one inspector, each of whom acts separately and inspects a different part of the mine, one representative of miners may accompany each inspector without loss of pay if he is an employee of the mine operator." 645 F.2d at 695. The Court also cited an Interpretive Bulletin for section 103(f), which states that when multiple inspectors inspect different areas of a mine, each is entitled to a walkaround representative and each representative is entitled to participate without loss of pay. 43 FR 17546, 17549 (April 25, 1978).

The citations in this case address the compensability of time spent by miners' representatives in the March 7 and March 19, 1991, inspections from the time the inspection teams were assembled up to the time when the teams completed their inspections of the face areas of the two units.<sup>3</sup>

The citation issued with respect to Peabody's failure to compensate miners' representative Sooke, which mirrors the citations issued with respect to the other uncompensated representatives, states:

A violation of 103(f) of the 1977 Act has occurred because Sam Sooke has evidence (pay record) that he suffered loss of pay on March 7 and 19 for time spent in the capacity of Miner Representative while traveling with an authorized representative of Secretary of Labor, (MSHA), during inspection.  
13 FMSHRC at 1307.

Peabody challenges the citations on the basis that Units 1 and 4 of the Martwick Mine are each an indivisible "area of the mine" analogous to each area of the milling complex for which a paid walkaround was required in the

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<sup>3</sup> On review, the parties also limit their discussion to the inspections themselves. We therefore leave to another case the extent to which a mine operator may be liable for compensation to miners' representatives who participate in post-inspection conferences following multiple-party inspections.

Magma decision. Accordingly, the operator argues, it was liable for compensation to only one walkaround representative for all of Unit 4 on March 7, and to only one such representative for all of Unit 1 on March 19, 1991. We disagree.

Insofar as the inspections of the respective entries in the two units were concerned, the inspectors and their miner escorts were as physically separated from each other as were the inspection teams at Magma's milling complex. Therefore, that portion of the inspections falls within the ambit of Magma.

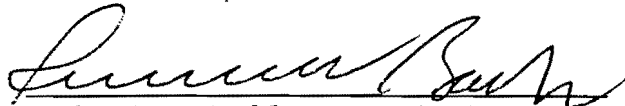
As to the inspection activity at the face areas of the two units following the walk-through inspections of the entries, the record evidence is sparse, essentially limited to the following stipulations: "the various inspectors ... assisted in completing the inspection of the [No. 4] unit" (Tr. 16), and "various inspectors ... conducted an inspection of the [No. 1] unit..." (Tr. 20). Furthermore, on the basis of an admission by Peabody that "each inspector performed a different and specific function during the course of these inspections," (Tr. 20), the judge concluded that "[i]t is not disputed that during the course of both of the underground inspections each team operated separate and apart with no overlapping responsibilities or duplication of inspection efforts." 13 FMSHRC at 1305. Moreover, Peabody did not challenge the judge's conclusion on this issue in its petition for review. We therefore conclude, on the basis of the record in this case, that the activity of the various inspectors at the face areas was separate and nonduplicative, and we deem the face inspection activity also to fall within the parameters of Magma.


In summary, we conclude from the record before us that the walkaround activity specified in the citations, i.e., "travelling with an authorized representative of [the] Secretary of Labor during inspection," 13 FMSHRC at 1307, was compensable time spent by each of the miners representatives who participated from the point at which the inspection teams were assembled until they completed their inspections of the face areas in Units No. 1 and No. 4.



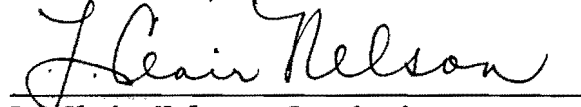
Accordingly, as explained above, we affirm the judge's decision that Peabody violated section 103(f) of the Mine Act.

  
Ford B. Ford, Chairman

  
Richard V. Backley, Commissioner

  
Joyce A. Doyle, Commissioner

  
Arlene Holen, Commissioner

  
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# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

May 21, 1992

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

v.

SOUTHERN OHIO COAL COMPANY

Docket No. LAKE 90-53

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

## DECISION

BY THE COMMISSION:

This civil penalty proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988) ("Mine Act" or "Act"), presents the issue of whether a notice to provide safeguards issued pursuant to 30 C.F.R. § 75.1403 is affected by the fact that it is patterned after 30 C.F.R. § 75.1403-10(h), a promulgated safeguard criterion.<sup>1</sup> Commission

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<sup>1</sup> 30 C.F.R. § 75.1403 repeats section 314(b) of the Mine Act, 30 U.S.C. § 874(b):

Other safeguards adequate, in the judgment of an authorized representative of the Secretary [of Labor], to minimize hazards with respect to transportation of men and materials shall be provided.

30 C.F.R. § 75.1403-1 sets forth general provisions regarding "criteria" by which authorized representatives are guided in requiring safeguards. Section 75.1403-1(a) provides:

Sections 75.1403-2 through 75.1403-11 set out the criteria by which an authorized representative of the Secretary will be guided in requiring other safeguards on a mine-by-mine basis under § 75.1403. Other safeguards may be required.

The procedures by which an authorized representative of the Secretary may issue a citation pursuant to section 75.1403 are described in 30 C.F.R. § 75.1403-1(b):

Administrative Law Judge James A. Broderick determined that the subject notice to provide safeguards was valid because it was based on a published safeguard criterion. 13 FMSHRC 40, 44 (January 1991)(ALJ). The judge also determined that SOCCO violated the safeguard but that the violation was not of a significant and substantial nature. 13 FMSHRC at 44-45.

We apply herein the principles recently announced in our decisions in Southern Ohio Coal Co., 14 FMSHRC 1 (January 1992)("SOCCO") and BethEnergy Mines, Inc., 14 FMSHRC 17 (January 1992)("BethEnergy") concerning the Secretary's authority to issue safeguards. For the reasons explained below, we vacate the judge's decision and remand this case for further proceedings.

I.

Factual Background and Procedural History

On March 31, 1989, Patrick McMahon, an inspector of the Department of Labor's Mine Safety and Health Administration ("MSHA"), issued a notice to provide safeguards to SOCCO at its Meigs No. 2 Mine, an underground coal mine in Meigs County, Ohio. The notice stated:

Only 6 inches of side clearance was provided for the company no. 5062 rubber-tired scoop car being operated along the 3L2SW (014-0 mmu) supply track where supplies were being loaded into the scoop bucket. This is a Notice to Provide Safeguards requiring that a total of at least 36 inches of unobstructed side clearance (both sides combined) be provided for all rubber-tired haulage equipment where such equipment is used.

Gov. Exh. 2.

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The authorized representative of the Secretary shall in writing advise the operator of a specific safeguard which is required pursuant to § 75.1403 and shall fix a time in which the operator shall provide and thereafter maintain such safeguard. If the safeguard is not provided within the time fixed and if it is not maintained thereafter, a [citation] shall be issued to the operator pursuant to section 104 of the Act.

30 C.F.R. § 75.1403-10 is entitled "Criteria-Haulage; general" and section 75.1403-10(h) provides:

A total of at least 36 inches of unobstructed side clearance (both sides combined) should be provided for all rubber-tired haulage equipment where such equipment is used.

MSHA Inspector McMahon conducted a regular inspection at the Meigs No. 2 Mine on January 5, 1990. As he walked up the track entry in the 001 section, he observed a rubber-tired scoop tractor parked between the coal rib and track-mounted supply cars. The inspector determined that the distance between the scoop tractor's operating compartment and the coal rib was 24 inches and that the distance between the scoop tractor and the supply car was four inches. Based on his observations, Inspector McMahon issued a citation, pursuant to section 104(a) of the Mine Act, 30 U.S.C. § 814(a), alleging a violation of the safeguard notice. The citation states, in pertinent part:

Only 28 inches of continuous clearance was provided for the company no. 5050 scoop being operated along the 15L1NW (mmu no. 014-0) supply track. The clearance on the operator's side was 24 inches and between the contactor compartment and the rock dust supply car was 4 inches. A Notice to Provide Safeguards has previously been issued requiring a minimum total clearance (both sides) along mobile equipment roadways of 36 inches.

Gov. Exh 1. Inspector McMahon designated the alleged violation to be of a significant and substantial nature.

SOCCO challenged the safeguard notice and the citation on the basis that the safeguard notice was directed at hazards that are of a general nature rather than hazards that specifically relate to the conditions at the Meigs No. 2 Mine. In his decision, the judge stated that he agreed with the reasoning of Judge Fauver in BethEnergy Mines, Inc., 12 FMSHRC 761 (April 1990)(ALJ). 13 FMSHRC at 43-44. In that decision, Judge Fauver concluded that "if an inspector's safeguard notice is based on a published criterion (in 30 C.F.R. §§ 75.1403-2 through 75.1403-11), using the same or substantially the same language as the criterion, then ... the safeguard is valid even if the hazard is of a general rather than a mine-specific nature..." 12 FMSHRC at 769. Judge Fauver relied upon United Mine Workers of America v. Dole, 870 F.2d 662, 672 (D.C. Cir. 1989). In the present case, Judge Broderick concluded that "incorporating published criteria in a safeguard notice, makes it in effect a mandatory safety standard." 13 FMSHRC at 44. He held that the notice to provide safeguards is valid because it "cited and tracked the criterion in 30 C.F.R. § 75.1403-10(h)." Id. He also determined that SOCCO violated the safeguard and affirmed the citation. Id.

The Commission granted SOCCO's Petition for Discretionary Review. Briefing was stayed until the Commission issued its decisions in SOCCO and BethEnergy.

## II.

### Disposition of Issues

The central issue in this case is the validity of the underlying safeguard. In its recent decision in SOCCO, the Commission addressed the extent of the Secretary's authority to issue safeguards under section 314(b) of the Mine Act. 30 U.S.C. § 874(b) (see n. 1 supra). We reviewed the text and legislative history of that section and reaffirmed the Commission's view, first expressed in Southern Ohio Coal Co., 7 FMSHRC 509, 512 (April 1985) ("SOCCO I"), that section 314(b) is an unusually broad grant to the Secretary of regulatory authority, permitting her to issue, on a mine-by-mine basis, what are in effect mandatory standards dealing with transportation hazards. 14 FMSHRC at 5-8.

The Commission rejected the proposition that a notice to provide safeguards is invalid if it addresses a hazard that exists in a significant number of mines. 14 FMSHRC at 8-10. We noted the considerable authority of the Secretary to determine what should properly be formulated as mandatory standards, and we held that the rulemaking provisions of the Mine Act, sections 101 and 301, do not circumscribe the Secretary's authority to issue safeguards under section 314(b). 14 FMSHRC at 10-12. Rather, we held that a safeguard may properly be issued to deal with commonly encountered transportation hazards, provided it is based on a determination by the inspector of a specific transportation hazard existing at a particular mine. Id. We made it clear that a safeguard may not properly be issued by rote application of general MSHA policies, irrespective of the specific conditions at a given mine. 14 FMSHRC at 12. Finally, we allocated to the Secretary the burden of proving that a safeguard was issued on the basis of the specific conditions at a particular mine. 14 FMSHRC at 13-14.

In BethEnergy, the Commission concluded that the validity of a safeguard is not affected by the fact that it is based on a promulgated criterion in section 75.1403, and that the principles with respect to roof control plan criteria set forth in the D.C. Circuit's decision in Dole are not relevant to cases involving safeguards. 14 FMSHRC at 22-24. For the reasons set forth in BethEnergy, we hold that a safeguard must be based on the specific conditions at a mine, regardless of whether the safeguard is patterned after a promulgated criterion, and that an otherwise invalid safeguard is not made valid simply because it is based on a promulgated criterion.

In this case, Judge Broderick adopted Judge Fauver's reasoning in BethEnergy and held that the safeguard was valid. In BethEnergy, the Commission rejected Judge Fauver's view that a safeguard is valid merely because it is based on a published safeguard criterion. Thus, Judge Broderick's decision in the present case is not consistent with the framework set forth in the Commission's SOCCO and BethEnergy decisions.

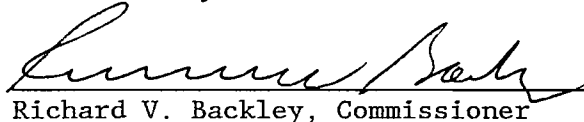
III.

Conclusion

For the reasons set forth above, we vacate the judge's decision that the safeguard is valid and remand this case for further consideration. The judge should set forth his findings and conclusions as to whether the Secretary proved that the safeguard was based on the judgment of the inspector as to the specific conditions at the Meigs No. 2 Mine and on the inspector's determination that a transportation hazard existed that was to be remedied by the action prescribed in the safeguard. Taking into consideration the principles announced in SOCCO I, the judge should determine whether the safeguard notice "identif[ied] with specificity the nature of the hazard at which it [was] directed and the conduct required of the operator to remedy such hazard." 7 FMSHRC at 512. If he finds the safeguard to have been validly issued, he should reevaluate whether SOCCO violated the safeguard.

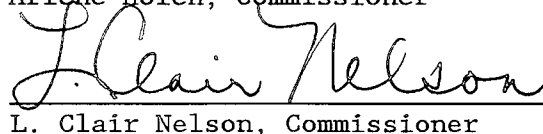
We reiterate here our conclusion in SOCCO: "Because the use of individual safeguards, issued on a mine-by-mine basis, may not adequately protect all affected miners from haulage related hazards, we strongly suggest that the safety of underground coal miners would be better advanced by the promulgation of mandatory safety standards aimed at eliminating transportation hazards." 14 FMSHRC at 16.

  
Ford B. Ford, Chairman

  
Richard V. Backley, Commissioner

  
Joyce A. Doyle, Commissioner

  
Arlene Holen, Commissioner

  
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# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

May 27, 1992

SECRETARY OF LABOR  
MINE SAFETY AND HEALTH  
ADMINISTRATION (MSHA)

v.

MAR-LAND INDUSTRIAL  
CONTRACTOR, INC.

Docket No. SE 90-117-M

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

## DECISION

BY THE COMMISSION:

This civil penalty proceeding, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988) ("Mine Act" or "Act"), presents the issues of whether Mar-Land Industrial Contractor, Inc. ("Mar-Land") violated 30 C.F.R. § 56.15005, a mandatory safety standard requiring the wearing of safety belts and lines when persons work where there is a danger of falling and of whether that violation was caused by Mar-Land's negligence. Following an evidentiary hearing, Commission Administrative Law Judge Avram Weisberger concluded that Mar-Land had violated 30 C.F.R. § 56.15005, that the violation was "significant and substantial" ("S&S") and, further, because a fatality resulted from the violation, that it was of high gravity. 13 FMSHRC 333 (March 1991)(ALJ). The judge also concluded that Mar-Land's conduct involved high negligence, based on his determination that there was insufficient training and supervision of employees as well as previous violations of the same standard. Based on these factors, he assessed a penalty of \$5,000. Id. at 337.

Mar-Land's petition for review challenges the judge's finding of a violation of the Mine Act and his determination of high negligence, asserting that the worker involved was under the influence of cocaine and that Mar-Land did, in fact, provide adequate training in the use of safety equipment. Mar-Land does not contest the S&S finding of the judge and, thus, that issue is not before the Commission. 30 U.S.C. § 823(d)(2)(A)(iii).

### I.

#### Factual Background and Procedural History

The facts of this case are essentially undisputed. Mar-Land is a general contractor, who, at the time of the accident, was performing structural steel work at the Ponce Cement Plant, owned by Puerto Rican Cement Company.



On February 19, 1990, Cecilio Caraballo was preparing to attach steel channeling to another steel cross member approximately 52 feet above the plant floor. Co-workers, who were between 8 and 10 feet away, observed Caraballo standing on the third level of the plant engaged in tying off his safety lines. Tr. 26. These co-workers each testified that Caraballo tied one safety rope that had carabiner hooks at both ends around a large vertical steel beam at the edge of the floor. According to these eye-witnesses, he then attached another rope to the rope tied around the beam.

Shortly after Caraballo finished attaching his safety lines, he leaned back on the rope to test it, the lines gave way and he fell 12 feet onto a rotating kiln and then down another forty feet to the concrete floor below. Emergency medical attention was given to him almost immediately but Caraballo was pronounced dead a short time later at a local hospital.

The Mine Safety and Health Administration ("MSHA") conducted an investigation into the cause of the fatal accident. The MSHA inspector found that the belt was properly worn by Caraballo and that the belt and the lines were not defective. Based on the findings of that investigation, Inspector Roberto Torres-Aponte issued a citation pursuant to section 104(a) of the Act, alleging a violation of 30 C.F.R. § 56.15005.<sup>1</sup> The citation stated:

A fatal accident occurred at this operation on 02-19-90, when an employee of a Contractor fell from 52 ft. to the ground, while [he] was working outside the pre-heater third level tower which was under construction. The victim was wearing a safety belt and line at the time the accident occurred, however the line was not secured to prevent him to fall [sic].

The inspector determined that the violation was S&S and the result of high negligence by the operator.

The judge found that Caraballo's belt was worn properly and that he had a rope properly attached to the belt. He found further that Caraballo had wrapped a second rope around a beam to which the first rope, attached to his belt, was also attached and that all items were in good and operable shape immediately after the accident. 13 FMSHRC at 334. However, the judge found that when Caraballo leaned back, he fell because the rope was not properly secured to the beam. Based on this fact, the judge concluded that "the belt was not being worn and used in a safe fashion in violation of Section 56.15005." Id.

The judge found high negligence on four grounds. The first was the degree of training received by the employees in the use of safety belts. The judge found that weekly safety meetings were held, including one on the day of the accident, in which the use of safety belts was discussed. Nonetheless, the judge discounted this training, finding that the record did not establish the "specific

---

<sup>1</sup> That section provides in relevant part: "Safety belts and lines shall be worn when persons work where there is danger of falling..." 30 C.F.R. § 56.15005.

content" of the meetings or what "specifically" was told to the employees in the form of "specific instructions or information" regarding the "specific manner" in which the belts should be used. In a footnote, the judge noted the testimony of an employee who stated he had been employed by Mar-Land for about a month prior to the accident and had received no training in the use of safety belts.<sup>2</sup> 13 FMSHRC at 334-35.

Second, the judge found that the employees had not received written instructions on the use of safety belts. Third, the judge found no evidence "that supervisors were present to observe or supervise the manner in which Caraballo wrapped the rope around the beam, and attached his belt to it." 13 FMSHRC at 335. He went on to find that, despite evidence of a training session the day of the accident, "when Caraballo attached or attempted to attach his belt to the beam there were no supervisors present." Id.

Finally, the judge found high negligence based on MSHA's determination of the existence of prior notice to the operator. The judge noted that MSHA had previously issued two imminent danger orders to the operator for violations of the same standard because employees were wearing their safety belts but not tying off. The judge found that Mar-Land had not taken corrective action as a result of the imminent danger orders to ensure that employees properly utilized their safety belts and lines to tie off. 13 FMSHRC at 336.

The judge rejected Mar-Land's defense that Caraballo was impaired on the day of his death as a result of his use of cocaine. The judge noted that a toxicological analysis indicated there was no cocaine present in the nasal passages or in the blood and there was no evidence of how much cocaine was ingested or how long prior to the accident it had been ingested. The judge found that, although the analysis indicated .30 mcg/ml benzoylecgonine (the metabolite of cocaine) in the kidneys, there was no evidence in the record that the level of benzoylecgonine was sufficient to significantly impair Caraballo's concentration and ability to properly secure his safety belt. 13 FMSHRC at 336-37.

## II.

### Disposition of Issues

#### A. Violation of the Mandatory Standard

Mar-Land does not contend that Caraballo's actions in tying off were in compliance with the regulation's requirements. Rather, Mar-Land's principle argument is that Caraballo was negligently and disobediently under the influence of illegal drugs, that his faculties were impaired, that Mar-Land has strict rules dealing with drug use and that, as a result, it cannot be liable for the consequences of Caraballo's failure to act properly under the circumstances, based on North American Coal Corporation, 3 IBMA 93 (April 1974) and Peabody Coal Corp., 1 MSHC 1676 (1976).

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<sup>2</sup> However, another witness testified, in answer to a question from the judge, that this witness was at the safety meeting on February 19, 1990 in which safety belts and lines were discussed. Tr. 99.

Mar-Land argues that those cases set forth a defense to a citation "when the failure to follow a safety regulation is entirely the result of the employee's disobedience or negligence and the operator establishes that it has a system of safety instruction." PDR at 7. Alleging that Caraballo was under the influence of cocaine, Mar-Land argues that the employee was entirely at fault and Mar-Land is not strictly liable for the violation.

In urging affirmance of the judge's finding of violation, the Secretary argues that Mar-Land's violation of the standard is established for two reasons. First, the Secretary asserts that Mar-Land admitted liability in its Petition for Discretionary Review. The second reason is that the standard at issue in North American is different from the standard applicable in this case in that the standard in North American required only that employees be "required to wear" specific equipment and the standard in this case requires that the equipment "be worn." According to the Secretary, the strict liability scheme of the Act imposes liability on the operator for the violation, notwithstanding Mar-Land's attempt to defend based on North American. The Secretary argues that North American has been severely limited by Southwestern Illinois Coal Corp., 5 FMSHRC 1672 (October 1983). We agree.

In Southwestern, the Commission drew a distinction between the wording of the standard in North American and the wording of the standard at issue here. The Commission explained that the health and safety standard at issue in North American provided only that an operator must require that its employees wear safety equipment. The Commission held that, under that standard, an operator could avoid liability if it could demonstrate that it required the wearing of the safety equipment and, indeed, enforced that policy with its workforce.

Here, as in Southwestern, the standard goes beyond an obligation that "employees shall be required to wear...." The standard in this case states that "belts and lines shall be worn..." and the Commission has held that when belts and lines must be worn, they must be worn properly. See Austin Power Inc., 9 FMSHRC 2015 (December 1987), affirmed 861 F.2d 99 (5th Cir. 1988).

Even if an employer could demonstrate that it had a policy requiring the wearing of belts but was unsuccessful, through no fault of its own, in securing employee compliance, the policies themselves are not relevant in determining the fact of violation. This is true even where the failure is the result of employee misconduct. The fact that belts are not worn properly is a violation under this standard for which the operator is liable irrespective of employee misconduct. See United States Steel Corporation, 1 FMSHRC 1306 (September 1979); Mid-Continent Coal and Coke Co., 3 FMSHRC 2502 (November 1981); Allied Products v. FMSHRC, 2 MSHC 1633 (5th Cir. 1982)(significant employee misconduct no defense to liability); and Great Western Electric Company, 5 FMSHRC 840 (May 1983)(subjective condition of miner ignored in determining fact of violation).

A defense such as the one proffered by Mar-Land does not eliminate an operator's liability for failing to insure that employees wear belts and lines, and do so properly, when there is a danger of falling. In Southwestern, supra., the Commission held that language found in North American is limited to the standard found in that case "and does not create an employee disobedience or

negligence exception to the liability without fault structure of the Mine Act." Southwestern at 1674-75. Thus, the employee's disobedience is not a relevant consideration for determining the fact of violation under this standard.

We must conclude based on the evidence of record that Caraballo failed to properly use his belt and lines. The inspector testified that the lines were in proper condition and that the belt had been properly worn. Although three other workers testified that Caraballo tied off, they offered no explanation as to how he could have fallen. While we do not suggest that a finding of violation is required, ipso facto, upon the occurrence of an accident, (see Kerr-McGee Corporation, 3 FMSHRC 2496 (November 1981)), in this case, no other reasonable explanation exists for Caraballo's fall other than his failure to properly tie the second rope to the support beam. Consequently, we affirm the judge's finding of Mar-Land's liability for Caraballo's failure to properly wear the belts and lines as required by section 56.15005.

Based on this determination, we need not reach the second issue raised by the Secretary, i.e., whether counsel for the operator admitted in the Petition for Discretionary Review that a violation had occurred by stating that the belt was not properly tied to the beam.

#### B. Negligence

The judge found that Mar-Land was highly negligent because: (1) the record did not establish the "specific content" of the safety meetings or what "specifically" was told to the employees regarding the "specific instructions or information" concerning the "specific manner" to use the belts; (2) the employees had not received written instructions; (3) supervisors were not present to observe or supervise the manner in which Caraballo wrapped the rope around the beam or attached his belt; and, (4) the operator had prior notice based on two imminent danger orders for violations of the same standard. 13 FMSHRC at 334-36.

Mar-Land broadly challenges the judge's high negligence finding by pointing to its training programs and the absence of a regulatory requirement to provide written instructions and immediate supervision of employees' use of safety belts and lines. Mar-Land argues that it did in fact have a training program that includes weekly safety instruction on the use of equipment, that witnesses called by the Secretary testified to the existence of the safety meetings and that safety belt use was discussed during those meetings, including one on the day of the accident. Mar-Land argues that neither the statute nor the regulations require the issuance of written instructions or the presence of supervisors for safety belt use.

The record does not contain substantial evidence supporting the judge's determination that Mar-Land was highly negligent. Although one of the riggers testified that he had not received any training during the month that he had been employed by Mar-Land prior to the accident, the record also contains evidence to the contrary, as well as evidence that, as a general rule, employees did receive instructions on how to use their safety equipment. Witnesses for both the Secretary and the operator testified that talks were given each Monday morning addressing the proper use of safety equipment including belts and lines. No authority has been found, and the judge cites none, suggesting that training in

addition to that indicated in the record is required to satisfy the obligations of the operator under the 30 C.F.R. Part 48 training rules.

There is no foundation in the law or the regulations for the judge's imposition of a requirement that safety instructions be provided to employees in writing or that supervisors be present each time an employee ties off. A finding of negligence based on the judge's ex post facto imposition of these requirements is erroneous as a matter of law.

The judge found that, based on two prior imminent danger orders issued for violations of the same standard within the previous two years, Mar-Land was on notice "that employees wearing belts had not tied them off." He further found that Mar-Land had not taken proper steps to rectify the problem, but the undisputed evidence in this case indicates that Caraballo was making every attempt to use his safety equipment correctly and to tie off properly.

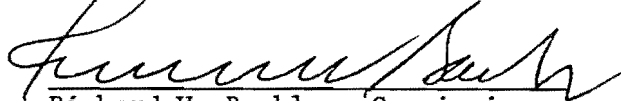
There is evidence also that training and enforcement of safety policies had improved in response to the second imminent danger order. For example, in January 1990, shortly after the second order, Mar-Land began to break down its company-wide weekly safety meetings into subgroups so that employees could be instructed more specifically according to the work they would be performing. There is also evidence in the record that at the same time, workers were disciplined for not tying off. Substantial evidence does not support the judge's conclusion that, having received notice, Mar-Land had taken no action to remedy the problem.

It must be noted that evidence exists in the record demonstrating some degree of negligence on the part of Mar-Land. As indicated above, the judge noted the testimony of one witness who had been working for the company as a rigger for one month prior to the accident and had received no instructions concerning the use of safety belts. Moreover, this witness was hired after the time Mar-Land contends that improvements were made to the safety training program. Under these circumstances we conclude that Mar-Land was, at least to some degree, negligent. We consider the degree of negligence with respect to the violation in issue to be ordinary.

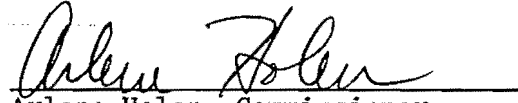
III.  
Conclusion

Accordingly, we affirm the judge's finding of violation herein but reverse his finding of high negligence and vacate his penalty assessment. We remand to him for reassessment of a civil penalty in light of the considerations set forth above.

  
Ford B. Ford, Chairman

  
Richard V. Backley, Commissioner

  
Joyce A. Doyle, Commissioner

  
Arlene Holen, Commissioner

  
L. Clair Nelson, Commissioner

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## ADMINISTRATIVE LAW JUDGE DECISIONS





# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

MAY 5 1992

THOMAS P. MUCHO,	:	DISCRIMINATION PROCEEDINGS
Complainant	:	
v.	:	Docket No. PENN 91-1382-D
	:	PITT CD 91-07
BETHENERGY MINES, INC.,	:	
Respondent	:	Docket No. PENN 91-1558-D
	:	PITT CD 91-10
	:	
	:	Mine No. 84

## DECISIONS

Appearances: Francis C. Rapp, Jr., Esq., Feldstein, Grinberg, Stein & McKee, Pittsburgh, Pennsylvania, for the Complainant;  
R. Henry Moore, Esq., Buchanan Ingersoll, P.C., Pittsburgh, Pennsylvania, for the Respondent.

Before: Judge Koutras

## Statement of the Proceedings

These consolidated proceedings concern discrimination complaints filed by the complainant Thomas P. Mucho pursuant to section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. Mr. Mucho filed his initial complaint with the Secretary of Labor, Mine Safety and Health Administration (MSHA), on March 28, 1991, alleging that the respondent discriminated against him by removing him from his position as head engineer at the No. 84 Mine, and transferring him to a staff engineer's position at the mine central office because of a safety complaint that he lodged with mine management (PENN 91-1382-D). Following an investigation of his complaint, MSHA advised Mr. Mucho of its determination that a violation of section 105(c) had not occurred, and Mr. Mucho then filed a timely complaint with the Commission on July 23, 1991.

Mr. Mucho filed a second complaint with MSHA on June 25, 1991, alleging that the respondent discriminated and retaliated against him by laying him off from his staff engineer's position at the central office because of the filing of his first complaint. MSHA conducted an investigation of this complaint and advised Mr. Mucho of its determination that a violation of

section 105(c) had not occurred. Mr. Mucho then filed another complaint with the Commission on September 20, 1991 (PENN 91-1558-D).

The respondent filed timely answers to both complaints and denied that it had taken any adverse discriminatory actions against Mr. Mucho in violation of section 105(c) of the Act. The respondent asserted that any personnel actions taken against Mr. Mucho were not motivated in any part by an intent to discriminate against him, but were premised upon reasonable business justifications. Following extensive discovery, the matters were heard in Pittsburgh, Pennsylvania, during the trial term February 11-13, 1992. The parties filed posthearing briefs, and I have considered their arguments in the course of my adjudication of these matters.

### Issues

The critical issue in these proceedings is whether or not Mr. Mucho's removal as head engineer and transfer to a staff engineer's position, at no loss of pay, and his subsequent layoff, were prompted or motivated in any way by his engaging in any protected safety activity, namely, the lodging of a safety complaint with management and the filing of a discrimination complaint with MSHA. Additional issues raised by the parties are identified and disposed of in the course of these proceedings.

### 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.

### Discussion

In his first complaint, Mr. Mucho asserted that on February 8, 1991, Mr. Patrick Metheny, the mine operations manager, at the request of mine superintendent Michael Jones, and with the approval of the respondent's president, Richard Fisher, removed him from his head engineer's position at the mine and transferred him to the mine central office as a staff engineer. Mr. Mucho's complaint filed with MSHA states as follows:

While employed as the Chief Engineer at Mine #84, an event took place on or about January 24, 1991, wherein I advised mine management that a plan they were developing was extremely dangerous and a violation of

Federal coal mining laws. As a result of my actions, BethEnergy took adverse employment action against me on February 8, 1991.

In his second complaint, Mr. Mucho identified Mr. Metheny, Mr. Jones, and Mr. Fisher as the individuals responsible for the alleged discriminatory layoff, and his complaint states as follows:

On June 7, 1991, I was laid off from my position at BethEnergy Mines, Inc. I believe the latest adverse job action (layoff) by BethEnergy was in response and retaliation for my earlier filing of a 105(c) complaint.

### Stipulations

The parties stipulated that the Commission and the presiding judge have jurisdiction in this matter. They also stipulated to the authenticity of their respective hearing exhibits (Tr. 9).

### Complainant's Testimony and Evidence

Thomas P. Mucho, testified that he holds a B.S. degree in education from the California University of Pennsylvania, a BS degree in mining engineering from the West Virginia University, and that he has been employed in mining since 1971. He began working for the respondent in 1973, and was appointed superintendent and manager of Mine No. 84 in 1986. In 1989 he was promoted to manager of the Ellsworth operations, which included Mine 84, Mine 58, and a central shop that serviced three mines, and he remained in that position until December, 1990 (Tr. 13). He confirmed that he is currently employed by the Federal Bureau of Mines in the ground and methane control group. He also confirmed that he is experienced in mine ventilation, was responsible for ventilation at the mines for approximately 12 years, and has testified as an expert in this field for the respondent. He has also served as the respondent's chief health and safety officer at the mining operations that he has managed (Tr. 17).

Mr. Mucho stated that he received a telephone call from Mr. Richard Fisher, President of Bethenergy Mines, on December 7, 1990, informing him that Mr. Fisher was placing Mr. Pat Metheny and Mr. Mike Jones in charge of the No. 84 Mine, and that they would be reporting directly to Mr. Fisher. Mr. Fisher said nothing about Mr. Mucho's status at the mine, and simply informed him that Mr. Metheny and Mr. Jones would be in charge of the mine. Mr. Mucho stated that Mr. Metheny was the manager of operations at Mine 31 (Eagle Nest) in West Virginia, and that Mr. Jones had previously worked at the No. 84 Mine in 1989, as part of a management evaluation of the operation (Tr. 20).

Mr. Mucho stated that Mr. Jones arrived at Mine 84 on December 10, 1990, and he greeted him briefly that day, and met with him on December 11, to discuss mine business. Mr. Jones told him that he was there "to discipline the mine, to whip it in shape" and that when he was through the mine would run itself and that he (Mucho) could choose to return as the operations manager or the chief engineer. Mr. Jones also told him that he had met on several occasions with Mr. Fisher, and with Bethlehem Steel vice-president Roger Penny to inform them as to what was needed to be done at the mine, and Mr. Mucho confirmed that Mr. Jones impressed him as being well informed in this regard (Tr. 24).

Mr. Mucho agreed that the mine needed more discipline and that it was a struggling operation for many reasons, including the need to instill more discipline "within the salary ranks in terms of adherence to management's goals and direction" (Tr. 25). He confirmed that two days prior to his initial call from Mr. Fisher, Mr. Fisher told him that he was sending Mr. Jones to the mine "to be my right hand to add some discipline into the place" (Tr. 25). During his December 11, conversation with Mr. Jones, Mr. Jones made numerous references to firing people and Mr. Mucho stated that "he was, as he had been described to me as a tree shaker" (Tr. 27). Mr. Mucho stated that while he was at the mine, Mr. Jones went about making a lot of changes, including the physical appearance of the mine and all of the buildings in order to accomplish his goals.

Mr. Mucho confirmed that in December, 1990, the No. 84 Mine was a "borderline operation in a very serious situation", and that it had basically been a "captive mine" to meet the steel making needs of Bethlehem Steel. However, Bethlehem no longer desired the coal and the mine entered the commercial market in 1988, but lacked the necessary tools to be competitive, and "we were attempting to make it at least a break even operation at that point in time" (Tr. 28). He further confirmed that Bethlehem was divesting itself of all deficit coal mines by closing or selling them (Tr. 29). Mr. Mucho confirmed that in 1980, Bethenergy operated 27 coal mines, and in 1990 it had only six operations, one of which was for sale, and one of which is in the process of closing. The current operations consist of four mines, including Mine 84 which employs 450 people, has one longwall, and produces two million tons a year. He stated that "if Mine 84 was not able to be profitable, then really Bethenergy as an entity with its support staff and central office group, really didn't make much sense" (Tr. 30). He confirmed that with the exception of Mine 33, the Cambria-Ebensburg operation, Bethlehem is in the process of divesting itself of all of the other mines and they are for sale (Tr. 31).

Mr. Mucho stated that in June, 1990, severe roof and face conditions were encountered on the 6B longwall panel, and on October 26, 1990, he made the decision to recover the longwall

and discontinue mining. Without the longwall operation, the mine was losing \$3 million a month, and the "losses were chalking up very rapidly for Mine 84 in the latter part of 1990" (Tr. 33). He confirmed that he developed the recovery plan for the longwall, and that 30 shields were recovered under very difficult and dangerous conditions (Tr. 33). He confirmed that during his December 11, 1990, meeting with Mr. Jones, Mr. Jones told him that his goal was to have the longwall operational again by February 1, 1991, and if it wasn't, the mine would have to shut down. Mr. Mucho stated that the February 1, 1991, date was the date he had presented to Bethenergy and Bethlehem Steel officials earlier in the fall of 1990, as the date he felt the 7A longwall panel would be ready (Tr. 34).

Mr. Mucho stated that in addition to the longwall panel as a goal, Mr. Jones also expressed his dissatisfaction with the productivity level of the continuous miners, and that Mr. Fisher told him that had the Bethlehem Steel officials known about the magnitude of the longwall problems from June, 1990, until it began operating in February, 1991, they would have closed the operation. Mr. Mucho stated that he communicated the longwall losses to Mr. Fisher, and that in the fall of 1990, he told Mr. Fisher that the fourth quarter loss would be \$9.6 million on top of the losses accrued for the first three quarters. Mr. Mucho commented that "the economics being that if you're looking at 22 million in losses and 40 to 60 million to close it, why not just go ahead and take the whole hit and close the operation and rid yourself of it" (Tr. 35-36).

Mr. Mucho stated that on December 14, 1990, he attended a meeting called by Mr. Metheny, and a second meeting held by Mr. Jones that same afternoon with key management members. Mr. Jones told the group "that I was the smartest man there and he said he'd be relying on me to make decisions" (Tr. 38). Mr. Jones met with Mr. Mucho and the engineering staff again on December 18, 1990, and announced that Mr. Mucho would be in charge of engineering. Mr. Mucho confirmed that during a prior private conversation with Mr. Jones, Mr. Jones indicated that he could continue on as chief engineer or mine manager after Mr. Jones left and to let him know. Mr. Mucho met with Mr. Jones again on January 8, 1991, and informed him that he desired to stay on as the chief engineer because he had performed that job for some time and was satisfied with it and would be relieved from the pressures of operating the mine as manager (Tr. 39). Mr. Mucho also told Mr. Jones that one of the major factors in his decision to stay on as chief engineer was the plan to sell the mine and the recognition "that top management usually goes in a deal like that". Since the engineers are usually retained, he would have more job security (Tr. 40).

Mr. Mucho stated that from December 10, 1990, to early January, 1991, he functioned in an advisory role to Mr. Jones,

but continued to run the mine on a day-to-day basis. He characterized Mr. Jones as a very hard worker who worked very long hours, and stated that when he met with him on January 2, 1991, it was obvious that Mr. Jones "was up to speed" and could operate the mine. During this management meeting, Mr. Jones stated that in order to make the mine profitable every department had to function together as a team and that "anyone who does not want to be a team player will not be working here". Mr. Jones also stated that the mine had "a country club reputation" at the home office and that he would change this image. He also made references to firing people for loafing, and the need to have "eight hours pay for eight hours work" (Tr. 45-46).

Mr. Mucho stated that he functioned in the role of chief engineer predominantly from January 2, 1991, until February 8, 1991, when Mr. Metheny called him and informed him that he was being assigned to the central office. Prior to this time he and Mr. Jones had a congenial and relaxed relationship, but it was obvious to him that Mr. Jones wanted to manage the mine, and that he (Mucho) took a subordinate role and took an office "at the far end of the building" and functioned as the head of engineering (Tr. 48-49).

Mr. Mucho stated that from January 2 to 24, 1991, two continuous mining sections (7A and 53P) were driving towards each other to speed up the development of the longwall panel. Once the cut-through was accomplished, he estimated that it would take another week in order to place the longwall into operation. Mr. Mucho developed plans for the cut-through, with input from mine foreman Duvall, and mine superintendent Black, and posted them on the mine map (Tr. 49-53).

Mr. Mucho stated that his ventilation plan for the cut-through was discussed at a meeting at 7:00 a.m., on January 24, 1991, in the foreman's room where the map was located (Tr. 57-62). Present were Mr. Black, Mr. Duvall, Mr. Dwayne Looman, and construction foreman Jim Nucetelli. Mr. Jones came through the office, paused briefly, and stated "hey boys, don't forget to switch the miners" and he explained that the 53P miner was old and was being replaced and that he did not want it on the back end of the panel. Mr. Mucho then left to go to his office to contemplate what needed to be done to change the plan. On his way back to the foreman's room he encountered Mr. Nucetelli in the hall and Mr. Nucetelli was cursing and swearing and stating that with the switching of the miners there was no way the longwall would be ready by February 1. Mr. Mucho stated that he explained to Mr. Nucetelli that the switching of the miners would not be a problem if the normal ventilation plan for building four stoppings and an air lock were followed, and Mr. Nucetelli calmed down (Tr. 65-73).

Mr. Mucho stated that when he next returned to the foreman's room, Mr. Duvall, Mr. Black, and Mr. Looman were at the map discussing a plan to use ventilation check curtains rather than stoppings to facilitate the cut-through and switching of miners. Mr. Mucho stated that he advised them that there was no need to devise a new plan, that the existing plan would work, and that all that was required was the construction of four stoppings. Mr. Looman and Mr. Black continued discussing the use of checks, and Mr. Duvall was noncommittal and "was more or less taking it all in" (Tr. 75).

Mr. Mucho confirmed that the construction of stoppings would entail more time beyond the estimated week to seven days to complete the cut-through (Tr. 76-77). He stated that he explained his plan in detail, and explained to the group that the use of checks would result in an air change. Mr. Mucho believed that the use of checks was an unsafe practice and illegal because it entailed an air change, and he tried to convince the group to go with his stopping plan. Mr. Black and Mr. Looman then began discussing the use of regulators to compensate for any air changes, and Mr. Mucho explained to them why this would not work. After further discussions, Mr. Nucettelli instructed his foreman (Myers) to prepare to build the stoppings (Tr. 79-84).

Mr. Mucho stated that since Mr. Looman and Mr. Black were still discussing the use of checks, he believed that the matter was unresolved and he returned to his office to complete his engineering recommendations and that "they could do what they want" (Tr. 86). However, realizing that he could not do this, he went to mine foreman Duvall's office to discuss the matter with him. Mr. Mucho explained the conversation as follows at (Tr. 86-88):

\* \* \* \* I told Mr. Duvall that, I says, under state law you are the mine foreman and therefore responsible for ventilation. I said, you heard what all went on in there. I says, what they are talking about is crazy and dangerous. I said, you know as chief engineer, I can't overrule anything if they decide that's what they're going to do, any one of those, and there was really a variation of plans that they put forth. And I said, all of them are crazy and dangerous and you know that and I can't stop it. I said, but if you go through with it, I'll tell you this, I will not be involved in it. I will not go into the mine and effect what is going on, and if anything happens I will take recourse.

\* \* \* \* I said, so things that are being put forth there just won't go. And he said, Tom, we're going to build the stoppings. He said, I'm going into the area. Mr. Black and I, and I'll make sure that the people know what to do. I said, fine. I'll go back to my office, I'll draw up the

plans, I'll give them to you before you go in so you can make sure that Myers and those people know where they go and know where we want them built.

Mr. Mucho stated that after his conversation with Mr. Duvall, he distributed his stopping plan to all of the key individuals who would be involved in the cut-through, including Mr. Black and Mr. Duvall (Tr. 89). Mr. Mucho confirmed that he did not discuss the incident with anyone else because he had put himself in a "tough position" and probably embarrassed Mr. Black in front of his subordinates. Mr. Mucho stated that there was no loud heated argument and that he simply discussed his views and tried to diplomatically handle the matter. He deliberately avoided discussing the matter further with anyone because he was concerned that Mr. Jones might find out about it and perceive it as interfering in his management of the mine or interfering with the longwall production schedule (Tr. 91). Mr. Mucho did not believe that Mr. Black or Mr. Duvall would tell Mr. Jones, but he was concerned that Mr. Looman might tell him because he was Mr. Jones' "eyes and ears". However, Mr. Looman had nothing against him, and Mr. Mucho hoped that he had no reason to inform Mr. Jones (Tr. 92).

Mr. Mucho stated that his insistence on the use of stoppings rather than checks was based on his safety concerns and belief that there was a high likelihood of an explosion if checks were installed in lieu of stoppings (Tr. 93). He confirmed that four steel stoppings were constructed during the work shifts on January 24, 1991. He also confirmed that the use of checks, no checks, or air locks where there is a major air change would constitute a violation of 30 C.F.R. § 75.322, and he explained his reasons for this conclusion (Tr. 96-97). He also explained that there was an air change when the cut through was made, and he explained the resulting ventilation problems that were encountered (Tr. 103-105).

Mr. Mucho stated that during the two weeks following the incident of January 24, 1991, he noticed a change in his relationship and interaction with Mr. Jones. He stated that Mr. Jones "became very noncommunicative, wouldn't look at me, would cast his eyes down when I'd meet him", and that the engineering department was left out of what was going on at the mine during this time (Tr. 106). Mr. Mucho stated that he called Mr. Black on February 7, 1991, and asked to speak with him because Mr. Jones wasn't talking to him, and Mr. Mucho suspected that Mr. Jones found out about the cut-through incident. Mr. Mucho stated that he and Mr. Black met with Mr. Jones and that he (Mucho) told Mr. Jones that his engineering group was being left out and Mr. Jones responded "fine, we'll involve you from now on" (Tr. 106). Mr. Mucho stated that his belief that Mr. Jones had found out about the mine map discussion of



January 24, was based on Mr. Jones' "actions" and "change in behavior" towards him which made him "suspicious" (Tr. 107).

Mr. Mucho confirmed that Mr. Metheny called him on February 8, 1991, and informed him that he was to report to Mr. Jay Hasbrouck at the central office and that there was a job there that he would like. Mr. Mucho stated that Mr. Metheny told him that he would be working with all of the mines and that the change "would be better" for him in the long run and that he would speak to him further about the matter. Mr. Mucho stated that he then cleaned out his desk at the 84 Mine, threw out some files, and took a half day vacation and left for the day. Mr. Mucho stated that he was surprised by his move to the central office because Mr. Jones had told him how much he respected his abilities and had told him that he would not be laid off or discharged. Mr. Jones had also previously told him that the mine problems were not his fault and that the stuck longwall caused the losses (Tr. 110).

Based on his management experience at the mine, Mr. Mucho was of the opinion that his transfer from the position of chief of engineering to a staff engineer position at the mine central office was something that normally would be discussed by higher management, such as operations manager Briskey, and Mr. Fisher, the company president (Tr. 111). Mr. Mucho believed that he was moved for the following reasons (Tr. 112):

A. I believe I was moved because of that incident on the 24th. I believe that it was viewed by Mr. Jones as interfering in management and not being a team player. And I think it was just interpreted that way. I don't think the safety implications were assessed and looked at in the correct light, if at all.

And I think it was the facility that enabled him to call Mr. Metheny and say, hey, I can't have two people here, I can't have Mucho interfering with what I'm trying to do if you want me to do the job here and, something that Mr. Metheny would buy and something he could sell to Fisher. So that's how I think it went down.

Mr. Mucho stated that the central office was located approximately one mile from the No. 84 Mine, and that he received no cut in pay or benefits when he was transferred (Tr. 114). Mr. Mucho assumed he would be supplying technical engineering services to the various mining operations in his new job at the central office, but instead he was assigned "odds and ends" and Mr. Hasbrouck expressed surprise at Mr. Mucho's understanding of what he would be doing and told him that he believed the job would only be temporary. Mr. Mucho stated that Ms. Frances Cooley replaced him as chief engineer at the 84 Mine and that his

new job at the central office did not entail any supervision over any one and he was strictly a staff engineer working on permitting for Mine 58. He was not permitted to do any work in connection with the 84 Mine (Tr. 116).

Mr. Mucho stated that he met with manager of human resources Tom Robertson on March 1, 1991, and informed him that "it's obvious they have no plans for me, as far as I'm concerned, I'm going out" (Tr. 117). Mr. Mucho also informed Mr. Robertson that "I'm amenable to talking about some type of severance arrangement" and that Mr. Robertson informed him that he would try to arrange a dialogue with Mr. Fisher (Tr. 118). Mr. Mucho stated that he received no further information from Mr. Robertson, and filed his discrimination complaint on March 28 1991, and an age discrimination complaint with the EEOC that same day. Subsequently, on April 22, 1991, he received a call from superintendent Stickler at the No. 33 Mine offering him a job as a project special engineer. Mr. Mucho turned the job down on April 24, because he did not believe it was comparable to the chief engineer's job at Mine 84. Mr. Mucho then met briefly with Mr. Fisher on May 15, 1991, and within a week Mr. Robertson called him and informed him that the 33 Mine job was the only one available and that he would be laid off on June 7, 1991, if he did to take it (Tr. 119-120).

Mr. Mucho confirmed that the No. 33 Mine is the only mine that the respondent intends to keep, but that it offered him no job security because it was well staffed with engineers and Mr. Fisher had previously indicated that it would probably operate for three years and would be downscaled (Tr. 120). Further, the mine was located in Ebensberg, a two-hour drive and long commute, and he would have taken a 9.4 percent pay cut (Tr. 126). Mr. Mucho believed that a job in technical services may have been available, but he was not sure. Mr. Fisher subsequently told him that there was no job (Tr. 124). Another potential job opening of personnel director was not offered to him by Mr. Fisher, even though Mr. Mucho believed that Mr. Robertson had recommended him for the position (Tr. 125).

On cross-examination, Mr. Mucho confirmed that he had no cut in pay until he was terminated on June 7, 1991. He also confirmed that he began consolidating his notes and keeping a daily log or journal on December 7, 1990, out of concern as to what might happen to him with respect to his continued employment. He knew of Mr. Jones' reputation as a "tree shaker", was aware that his management style was different than his, and he thought it would be in his best interest to keep good notes (Tr. 143).

Mr. Mucho confirmed that Mr. Fisher has an accounting background, and that this caused problems in communicating the nature of mining problems to him. Mr. Mucho confirmed that Mr. Fisher took a personal interest in the No. 84 Mine because it

was the "keystone to Bethenergy surviving as an entity", and "it was borderline and our intent was to infuse capital in it in some way to make it profitable" (Tr. 146). Mr. Mucho confirmed that September, 1991, was the estimated completion date for the rehabilitation of the 33 Mains area, and that Mr. Jones was assigned to that project, and he (Mucho) was assigned certain responsibilities by Mr. Jones to reevaluate the costs for the project, and to evaluate the ventilation (Tr. 149-156). Mr. Metheny asked Mr. Willison to come to the mine on February 4-6, 1991, to take an independent look at the project (Tr. 157).

Mr. Mucho stated that during the cut-through discussion on January 24, 1991, he mentioned the air change that he believed would result by the use of curtains to Mr. Black, Mr. Looman, and Mr. Duvall, but said nothing at that time about this being dangerous or in violation of any MSHA standards, because he assumed that they would understand and that this was implicit in the discussion. He also wanted to downplay the matter and did not want the foremen to know what they were talking about (Tr. 166).

Mr. Mucho described his conversation at the mine map as a "terse discussion", rather than an argument, and although he believed that Mr. Black seemed upset when he later went to his office, he was not upset during the discussion at the map. Mr. Mucho confirmed that he never discussed the matter with Mr. Jones, and that he had a congenial meeting with Mr. Jones on January 24, 1991, and Mr. Jones did not mention the matter (Tr. 168). Mr. Mucho confirmed that he added a reference about the January 24, 1991, mine map discussion to his personal notes at a later time after that date, and that he did not enter any notation about that incident when he was putting any his notes together on that day (Tr. 169).

Mr. Mucho confirmed that during a staff management meeting on January 15, 1991, Mr. Jones stated that he had turned down an offer from the Peabody Coal Company, that he had changed his mind about staying at the No. 84 Mine temporarily and would be there permanently, and he changed the "chain of command" with respect to the individuals who were to be in charge of the mine in his absence. Mr. Black and Mr. Hayden were to be in charge in Mr. Jones' absence, and Mr. Mucho was not included in the management "chain" (Tr. 171). Mr. Mucho stated that he was not surprised that he was not included because he had previously told Mr. Jones on January 8, 1991, that he was satisfied with his engineering position and did not wish to return as mine manager. Mr. Mucho stated that he believed that Mr. Jones "was asserting himself as the number one man and no longer had to keep me in a position to where I could step comfortably back into the role as a manager" (Tr. 172).

Mr. Mucho confirmed that in early January, 1991, while still manager of operations at the No. 84 Mine, he prepared a letter to the State Department of Environmental Resources, and during the interim when it was written and typed, Mr. Jones was placed in charge and Mr. Mucho felt it appropriate that Mr. Jones sign the letter. Mr. Mucho stated that he believed the state "was out of bounds" with respect to a mine scrubber issue, but he believed that he worded the letter diplomatically. Mr. Mucho assumed that Mr. Jones signed it and mailed it, but he has not seen a copy of the letter (Tr. 183-184).

Mr. Mucho stated that when he was transferred to the central office he considered himself as "effectively being terminated" and that it was "only a matter of time" before his overall employment with the respondent would be terminated (Tr. 184). After a job in technical services which had been mentioned by Mr. Metheny did not materialize, Mr. Mucho stated that "very quickly I started catching on to where I was at" (Tr. 185). He confirmed that Mr. Hasbrouck told him that he had heard that the reason he was transferred to the central office was because it was awkward having him at the No. 84 Mine with Mr. Jones (Tr. 185).

Mr. Mucho stated that after his assignment to the central office he spoke with Ms. Cooley on February 15, 1991, about certain statements that Mr. Bookshar had made to him. Mr. Bookshar had previously told him that Ms. Cooley had a meeting with Mr. Jones and Mr. Hayden after his reassignment to the central office and that they discussed why Mr. Mucho was sent to the central office, and included in the reasons given were "divided loyalties; and a ship can't have two masters" (Tr. 187). Mr. Mucho stated that Ms. Cooley could not recall Mr. Jones making such statements, and her recollection was that Mr. Hayden had made these statements on February 8, 1991, the day Mr. Mucho went to the central office. Mr. Mucho stated that Ms. Cooley did not mention the 53P-7A cut-through incident and he did not ask her about it (Tr. 188).

Mr. Mucho stated that on March 1, 1991, and thereafter, and prior to the filing of his MSHA discrimination complaint and his age discrimination complaint with the EEOC, he spoke with Mr. Robertson about resolving his employment situation and suggested that the respondent might pay him two or three years severance pay similar to IBM severance payments to their personnel under similar circumstances (Tr. 189-190). With regard to the job offer by Mr. Stickler at Mine No. 33, Mr. Mucho stated that he had previously worked for Mr. Stickler, and that Mr. Stickler expressed his disappointment with his situation when he informed him that he would not take the job. Mr. Mucho also stated that in April, 1991, Mr. Jim Baer told him that someone had asked him about plant foreman or first line supervisory openings at the No. 33 Mine for him (Mucho) but that Mr. Baer

advised the individual that he would not insult Mr. Mucho with such an offer (Tr. 189-192). Mr. Mucho confirmed that he met with Mr. Fisher on May 15, 1991, and that Mr. Fisher did not mention his MSHA or EEOC complaints. Mr. Mucho stated that he explained to Mr. Fisher why he believed he was effectively terminated illegally when he was transferred on February 8, 1991, to the central office (Tr. 193).

Mr. Mucho confirmed that that his EEOC complaint alleged that his demotion from mine manager and chief engineer and his reassignment to the central office were the result of age discrimination and the respondent's attempts to force him to resign (Tr. 201-202; Exhibit R-3). Mr. Mucho further identified a second complaint he filed with the EEOC claiming that his layoff of June 7, 1991, was in retaliation for the filing of his first complaint (Exhibit R-4; Tr. 202-203; 205). Mr. Mucho believed that he was discriminated against because of some statements by Mr. Jones that part of the respondent's goal was to rid themselves of some older and experienced workers. He further believed that the cut-through incident of January 24, 1991, "was merely the vehicle that elevated me into that group", and that he was placed there because of his interference with Mr. Jones' management (Tr. 215).

Mr. Mucho confirmed that immediately upon his speaking with Mr. Duvall about the use of curtains as opposed to stoppings for the cut-through ventilation he knew that his recommended stopping plan would be followed and that ended the issue (Tr. 236).

Mr. Mucho further confirmed that Mr. Bookshar called him at home on March 10, 1991, and told him that he had heard that his move to the central office "revolved around the incident involving the 58P/7A cut-through, and Jones found out about it the following Friday and was going to fire me on the spot but that Clarence Hayden intervened, convinced Mike to think about it over the weekend" (Tr. 239). Mr. Mucho confirmed that he never spoke to Mr. Hayden about the matter (Tr. 239).

Thomas F. Duvall, General Mine Foreman, No. 84 Mine, testified that he has been in that position since November 1, 1990, and is in charge of the underground mine workings. He confirmed that certain management changes were made in December, 1990, and the mine was placed under the direction of Mr. Metheny who was appointed mine manager replacing Mr. Mucho. Mr. Jones was also brought in and "it became apparent that he was going to run the mine". Mr. Mucho was assigned to head the engineering department after Mr. Metheny and Mr. Jones were assigned to the mine.

Mr. Duvall stated that the longwall panel was being prepared for production and that an important cut-through had to be made between the No. 7A and No. 53P areas to facilitate the switching

of two continuous miner machines. The target date for completing the cut-through was February 1, 1991, and Mr. Jones made it known that if this were not done and the longwall was not in production the mine would have to close. Mr. Jones made it known a few days or a week before the cut-through was made that the miners had to be switched.

Mr. Duvall stated that on January 24, 1991, there was a discussion around the mine map in the mine office with respect to the cut-through and the switching of the two mining machines. In addition to himself and Mr. Mucho, also present were Mr. Black, Don Myers, Jim Nuccetelli, and Dave Looman. The group discussed certain stoppings which were to be constructed to facilitate the switching of the miners, and Mr. Black indicated that canvas ventilation checks or no checks at all could be used in lieu of the stoppings, and that this would save time and involve less work. Mr. Mucho disagreed with Mr. Black's suggestion, and he wanted to proceed with his plan to use a double row of steel metal stoppings in order to insure the control of ventilation during the cut-through and switching of the miners. Mr. Duvall stated that Mr. Mucho was upset over the suggestion that his stopping plan would not be followed.

Mr. Duvall stated that during the discussion in question, Mr. Jones walked through the office and stated "don't forget to change the miners" and continued walking. Mr. Nuccetelli mentioned a prior training class concerning a prior cut-through which was done improperly and resulted in an explosion, and this was a reminder about what could happen if a cut-through is not done properly. Mr. Mucho commented about certain air changes and pressure differentials which could occur without the use of a double row of metal stoppings, and he indicated that the air pressure could not be controlled without stoppings.

Mr. Duvall was of the opinion that Mr. Black's suggestion for using check curtains or no curtains in lieu of stoppings was not a safe method. Mr. Duvall believed that doing it Mr. Black's way would have resulted in an air change and the air would have been out of control. This would pose a methane build-up and explosion hazard.

Mr. Duvall stated that after the group discussion, Mr. Mucho came to his office to discuss the matter further in private and informed him that in the event "they were going to do anything crazy" as was discussed at the mine map, he (Mucho) "did not want any part of it". Mr. Duvall further stated that Mr. Mucho reminded him (Duvall) that he was the responsible mine foreman, and Mr. Duvall told Mr. Mucho that the cut-through would not be done in the manner suggested by Mr. Black, and that Mr. Mucho's stopping plan would be followed.

Mr. Duvall stated that he first learned about Mr. Mucho's discrimination complaint in late March, 1991, while attending a management meeting in Washington, Pennsylvania. Mr. Metheney, Mr. Jones, Mr. Black, and other managers were at this meeting and Mr. Biszik received a telephone call advising him of Mr. Mucho's complaint, and he informed the others at the meeting about the complaint. Mr. Duvall stated that the management group at the meeting were trying to determine what the complaint was all about, and Mr. Duvall was of the opinion that the cut-through discussion precipitated the filing of the complaint (Tr. 243-261).

On cross-examination, Mr. Duvall stated that the discussion concerning the use of air regulators and curtains "was so ridiculous it could not be serious" and that there was no doubt in his mind that the metal stopping plan suggested by Mr. Mucho would be used during the cut-through and switching of the miners. Mr. Duvall confirmed that he did not see Mr. Mucho often after he was placed in charge of the engineering department. In response to further questions, he confirmed that Mr. Black could have been serious about the use of ventilation curtains. He confirmed that his opinion that Mr. Mucho's complaint was related to the January 24, 1991, cut-through discussion was based on the fact that he knew that the complaint had something to do with an occurrence on that day, and that Mr. Mucho was upset. Mr. Duvall further confirmed that he did not discuss Mr. Mucho's transfer to the central office with Mr. Jones (Tr. 261-268).

John M. Gallick, Director of Safety, testified that he works for Mr. Tom Robertson, the Human Resources Manager, and that he knows Mr. Mucho and considers him to be safety conscious. Mr. Gallick stated that he became aware of Mr. Mucho's discrimination complaint on about the end of March, 1991, and that he advised Mr. Robertson about the complaint. Mr. Gallick was assigned to investigate the complaint, and he telephoned Mr. Ron Biszick at the Ramada Inn in Washington, Pennsylvania, where he was attending a meeting and asked him to inform Mr. Metheney and Mr. Jones that the complaint had been filed. Mr. Gallick identified a memorandum that he prepared concerning the matter (Exhibit C-37). He confirmed that he spoke with Mr. Mucho and that the memorandum is a summary of what Mr. Mucho told him. He stated that Mr. Mucho told him that he had learned that Mr. Jones had found out about the cut-through incident and told Mr. Hayden that he was going to fire him, but Mr. Hayden told him to think about it over the weekend (Tr. 269-283).

On cross-examination, Mr. Gallick stated that he had no involvement in any decision to end Mr. Mucho's employment. He stated that the memorandum previously referred to was prepared from information which was furnished to him by Mr. Mucho. Mr. Gallick confirmed that there are cut-through situations where air pressures are not an issue, and that there are instances when

ventilation curtains can be safely used. Mr. Gallick made reference to a letter to the State department of environmental resources which resulted in that agency becoming upset with the respondent. The letter concerned the company position on belt ventilation and it was drafted by Mr. Mucho. It was Mr. Gallick's understanding that Mr. Jones claimed that he had not read the letter before signing it. Mr. Jones also made the statement that if he had read it, the letter would never have gone out over his signature because it was too harsh. Mr. Jones also "made some derogatory remarks about engineers in general and that some of his people aren't doing things that he wanted done" (Tr. 291).

Stanton O. Black, Superintendent of Underground Operations, stated that there were changes in upper-level management at the No. 84 Mine in December, 1990, when Mr. Jones and Mr. Metheny came to the mine, and he identified copies of notes that he took concerning meetings held by Mr. Jones and Mr. Metheny on December 14, 1990. Mr. Jones indicated that Mr. Mucho would be in charge of engineering and Mr. Metheny indicated that Mr. Jones would be acting manager in charge of operations. Mr. Black stated that during this period of time he did not see Mr. Metheny a great deal at the mine (Tr. 6-12).

Mr. Black confirmed that Mr. Jones placed a February 1, 1991, deadline on the 53P-7A cut-through, in order to put the longwall in production by that day, and that he made the statement that "we might shut down" if the deadline was not met. He confirmed that Mr. Mucho prepared the cut-through plan, including the required ventilation and use of steel stoppings to insure against interruption to the ventilation and accumulation of methane. Mr. Black confirmed that he participated in the cut-through discussion at the mine map on January 24, 1991, and that it concerned the location of the stoppings and the cut-through sequence which would be followed. He denied that he ever suggested the use of curtains as opposed to steel stoppings, and stated that he simply made a statement to that effect "to lighten up what I considered to be a very tense situation there, and I didn't think that anyone took it serious" (Tr. 15). However, he immediately stopped when he saw that Mr. Mucho was taking it seriously.

Mr. Black stated that prior to the cut-through discussion everyone was under a lot of pressure because of the changing management situation and "the people there not really knowing where we stood with Mike Jones and with Tom, because Tom was still the manager of operations" and his title had not changed (Tr. 16). Mr. Black stated that Mr. Mucho seemed upset during the discussion and indicated that his plan should be followed with no changes, and he confirmed that Mr. Mucho's plan was carried out as he originally outlined it (Tr. 17).



Mr. Black stated that he never observed Mr. Mucho attempting to cultivate factions and/or groups of employees as his supporters, and he confirmed that within a week or two after Mr. Jones' arrival he (Black) began to feel pressured. He also did not believe that Mr. Mucho ever cultivated any mistrust and believed Mr. Mucho was performing his job as an engineer (Tr. 18, 22). He further explained as follows at (Tr. 18-20):

A. When the salaried people were unsure of what Mr. Jones' role was and what Tom Mucho's role was, because Tom was still titled as manager of operations. We didn't know what Mike Jones' title was, and it just seemed like that Tom was in limbo for a period of time, and we didn't really know which way it was going to go.

And yet, Mike Jones was giving orders to people, and he was telling what had to be done, and there's just considerable tension when you're not quite sure who your leader is.

Q. Did you, during that period of time, observe any friction developing within the salaried personnel?

A. I don't know if I would describe it as friction, but I certainly noticed during that time that there was perhaps apprehension among salaried people and just a very tense period of time, where people then all of a sudden wasn't sure which way their loyalties were going to go. They didn't know how to act. It was not a comfortable time at all.

Q. Did you notice any distrust among those people?

A. Yes, I did.

Q. In what regard?

A. People weren't talking to one another like they had before, with openness. They seemed to be afraid to say things that they had said before as far as our operations, and the way we conducted business wasn't the same, and so people clammed up. They just weren't talking to one another, which is not good when you're trying to run a business. People have to be open.

Q. Mr. Black, is there any reason that you can think of why that occurred?

A. My opinion, the reason why it occurred --

Q. All right.

A. -- was because that a person comes in and then it's stated that he's going to be acting manager, but the manager is still there and he's still titled as the manager of operations. Does that mean that he is out the door but he is still there? Is the other guy going to be there a month and then he's leaving and the other guy's coming back in? No one really knew.

Mr. Black stated that Mr. Jones had "a threatening management style" in that he threatened to fire people for not doing what he wanted (Tr. 21). He confirmed that Mr. Jones threatened to fire him on many occasions, and when he asked Mr. Metheny why Mr. Jones treated him that way, Mr. Metheny told him that Mr. Jones felt intimidated by him (Black) and that he felt "inferior, knowledge wise to me" and may have been jealous (Tr. 23-24).

Mr. Black identified Exhibit C-93, as an excerpt from his personal notes of January 18, 1991, when he was underground with Mr. Jones and certain union officials. Mr. Black stated that Mr. Jones was talking to Donald Redman, the president of the union district, and his notes reflect that Mr. Jones made the statement that he would fire foremen if necessary. Mr. Black stated that he heard Mr. Jones mention that "he almost fired Tom Mucho last Friday", and this is reflected in his notes (Tr. 31). Mr. Black also referred to another note entry of January 21, 1991, which reflects that Mr. Jones stated that he did not like Mr. Mucho and Mr. Brookshar (Tr. 32). He also made reference to an entry of April 22, 1991, concerning a prior meeting with Mr. Jones about Mr. Jones' threats to fire him. Mr. Black stated that during that meeting Mr. Jones showed him Mr. Mucho's lawsuit and made the statement that he (Jones) probably would be gone before him (Black) (Tr. 35).

Mr. Black confirmed that his personal notes reflect that he and Mr. Jones and Mr. Metheny met with shift foreman Mike Error February 13, 1991, and informed him that due to an evaluation of the workforce his position was being eliminated effective February 28, 1991, and that he could continue to work until then or he could stay off and still be paid through that date (Exhibit C-45; Tr. 36). Mr. Black also made reference to an additional notation for February 13, 1991, concerning his possible transfer to Mine No. 33. Mr. Black stated that he did not want to go to that mine because he viewed it as a large dead end mine with many problems and continual losses, and he did not believe that a manager could go there and make a profit (Tr. 37).

On cross-examination, Mr. Black confirmed that he is currently the senior management person at the No. 84 Mine reporting to Mr. Metheny. He confirmed that the decision to switch the two mining machines on January 24, 1991, was made by himself and others prior to that date and then relayed to Mr. Jones. He

stated that when he sensed that Mr. Mucho appeared tense during the discussion that day, and in order "to sort of lighten the discussion", he commented that "Well, we could just hang a couple of canvasses up in each station and just use a regulator and just do it that way". He believed that Mr. Mucho would understand how ridiculous this was and would laugh and help lighten things up. However, this did not happen. Mr. Black stated that he had the greatest respect for Mr. Mucho and did not wish to upset him further (Tr. 40).

Mr. Black confirmed that Mr. Mucho mentioned that doing anything other than following his plan would create a dangerous situation and Mr. Black understood what he meant by this. Mr. Black stated that Mr. Mucho proceeded to explain the plan and everyone was listening but "wanted to get away from it because I don't think that everyone realized that Tom was upset" (Tr. 42). Mr. Black stated that he did not feel embarrassed by Mr. Mucho but "was worried that I may have created more turmoil for Tom" (Tr. 42). He confirmed that Mr. Mucho's situation at the mine was not good because he was still at the mine, and Mr. Jones, who did not have Mr. Mucho's title, was functionally in charge and had a management style totally different from Mr. Mucho. Mr. Black stated further that not knowing whether Mr. Mucho would later return as manager, or whether Mr. Jones would stay on, also created apprehension and tension (Tr. 43).

Mr. Black believed that Mr. Jones felt threatened by Mr. Mucho and he confirmed that Mr. Jones did not explain why he did not like Mr. Mucho or Mr. Brookshar during their discussion on January 21, 1991, nor did he explain why he almost fired Mr. Mucho when he made that statement on January 18, 1991 (Tr. 46). Mr. Black stated that he did not recall if Mr. Jones actually said that he did not like Mr. Mucho or whether he (Black) deduced this from his comments (Tr. 51).

Mr. Black confirmed that Mr. Mucho and Mr. Jones had a business-like relationship and were not overly friendly (Tr. 74). He confirmed that while Mr. Mucho never encouraged any factions, they did exist because the engineering, safety, production, and construction groups, who ordinarily communicated with each other, began separating themselves and "started to implode within their own groups" within a couple of weeks after Mr. Jones arrived (Tr. 54). This never occurred when Mr. Mucho was manager (Tr. 58).

Mr. Black agreed that management had the prerogative to transfer him to the No. 33 Mine, and if he chose not to go he could quit and would have no recourse or grievance (Tr. 62-63). He confirmed that he never said anything to Mr. Mucho about how Mr. Jones may have felt about him. Mr. Black confirmed that he had previously gone through management changes, but not like the

one in question where there was no prior announcement and "some-one just shows up on the scene. You're not sure what his role is going to be. The other person that was in charge was left there" (Tr. 71).

Francis Cooley, testified that she is in charge of the engineering department at Mine 84, and assumed that job when Mr. Mucho was transferred to the central office. She stated that Mr. Jones came to the mine in December, 1990, and she heard him state that "his mission was to get rid of everyone from the shift foremen on up". She stated that on or about February 8, 1991, or a couple of days later, she observed Mr. Mucho clearing out his desk and thought that he either quit his job or was fired. She asked Clarence Hayden, the Company controller, about it that same day or within a few days, and he told her that Mr. Mucho was being transferred to the division office to work there as an engineer. She stated that Mr. Hayden also told her that there had been an "incident" about the 7A and 53P cut-through and that Mr. Jones told Mr. Hayden that he wanted to fire Mr. Mucho over that incident. Mr. Hayden told her that he told Mr. Jones to think about it over the weekend and not to do anything rash, and that the following work day Mr. Jones told Mr. Hayden that he was right and that Mr. Mucho had a lot of knowledge and was valuable, and that "the company should be able to find something for him" (Tr. 81). Ms. Cooley also indicated that Mr. Hayden told her that Mr. Jones commented that "a ship could not have two masters. That as long as Tom was there, whether anything was intentional or not, people still tended to go to Tom for decisions and advice because he had been in charge for so long, and that was why he was being sent away from the mine" (Tr. 81).

On cross-examination, Ms. Cooley confirmed that when she gave her deposition she stated that Mr. Hayden told her that Mr. Jones told him that he felt that he could never really be in charge as long as Mr. Mucho was at the mine, but that he felt that Mr. Mucho had something to contribute to the operation and decided not to fire him (Tr. 83). Ms. Cooley further confirmed that she was not sure of the day when her conversation with Mr. Hayden took place, that she is simply relating "the gist" of what Mr. Hayden told her, and that she took no notes (Tr. 84).

Ms. Cooley stated that in late January, 1991, she was part of an effort requested by Mr. Jones to recalculate the costs of the 33 Mains renovations and that the original rehabilitation costs were estimated at \$3.6 million, while the estimated costs for the alternative solution of driving parallel entries was \$5.2 million (Tr. 85-86). She confirmed that the 33 Mains project was the responsibility of the engineering department as a group, and that Mr. Mucho, as the mine manager, and later chief of engineering, would pass the project information on to higher management, including Mr. Fisher. She confirmed that the planning is now completed, but that the project is not (Tr. 90). She

also confirmed that Mr. Hayden never indicated to her that Mr. Jones was displeased about Mr. Mucho's role in the 33 Mains project (Tr. 93).

William Bookshar, Mining Engineer, No. 84 Mine, confirmed that Mr. Jones arrived at the mine at the end of December, 1990, and that Mr. Mucho became the head of the engineering department at the end of January, 1991. He confirmed that he was present during a discussion at the mine map on January 24, 1991, and Mr. Mucho, Mr. Duvall, Mr. Nuccetelli, and Mr. Black were also present. Mr. Bookshar stated that the discussion "got rather heated" and each group was "rather adamant" as to how the ventilation would be established after the cut-through. One group advocated the use of no ventilation, and another group, including Mr. Mucho and Mr. Duvall, wanted to use steel stoppings to help keep the air separated and to preclude any explosion hazard.

Mr. Bookshar stated that the use of canvas curtains to ventilate the area where the cut-through would occur, or the use of no ventilation curtains, would "save a big equipment move down the road". He did not recall Mr. Mucho stating anything about any air change if stoppings were not used. Mr. Bookshar believed that the use of Mr. Mucho's stopping plan would avoid any idling of the mine, and would not result in any changes in the air ventilation. He confirmed that he later discussed the matter further with Mr. Mucho when he (Mucho) was writing up the ventilation plans in conjunction with the stoppings, and Mr. Mucho was upset because part of the group which had discussed the matter did not want to use any ventilation controls. Mr. Bookshar stated that it did not appear to him that any of the participants in the discussion concerning the ventilation procedures for the cut-through were joking about the matter, and Mr. Bookshar believed that it had serious implications and that everyone treated the matter seriously (Tr. 98-106).

Mr. Bookshar stated that after Mr. Mucho was transferred to the central office he (Bookshar) had a conversation with Ms. Cooley who told him that she had been informed by Mr. Hayden that Mr. Jones was mad about the cut-through ventilation incident and wanted to fire Mr. Mucho over that matter. Mr. Bookshar further stated that prior to the arrival of Mr. Jones at Mine 84, the engineering department was heavily involved in the operation of the mine, but its involvement "fell off" after Mr. Jones was assigned to the mine. Mr. Bookshar stated that after Mr. Mucho was transferred to the central office, he informed Mr. Mucho that he was not to work on any further engineering projects affecting Mine 84. Mr. Bookshar stated that Mr. Black instructed him to inform Mr. Mucho of this decision (Tr. 108-109).

On cross-examination, Mr. Bookshar stated that he had worked with Mr. Mucho for 8 years and considers him to be a "pretty good friend". Mr. Bookshar could not recall who suggested the use of

check curtains, and he stated that he was only present for 5 minutes and was standing to the rear of the group. He stated that it was not "a real loud" discussion, and that different people were expressing their opinions. Mr. Bookshar stated that during his discussion with Ms. Cooley, she told him that Mr. Hayden stated to her that Mr. Jones had made a statement that "you can't have a ship with two master", but he could not recall any further statements attributable to Mr. Hayden or Mr. Jones (Tr. 109-112).

Mr. Bookshar confirmed that he was in charge of the engineering department when Mr. Mucho was mine manager, and that after Mr. Jones was placed in charge of the mine, the role of the engineering department was diminished and he assumed this caused hard feelings (Tr. 118). He confirmed that the mine was not doing well because of the longwall failure and production was down when it was idle (Tr. 118). He further confirmed that after Mr. Mucho was transferred to the central office, he (Bookshar) did not assume his prior role as engineering head, and Ms. Cooley was given that job (Tr. 119).

Howard D. Looman, testified that he has been permanently employed at the No. 84 Mine for 8 or 9 months, and that he was initially assigned there in December, 1980, when Mr. Jones asked him to "come look around and help him develop the mine". He has known Mr. Jones all of his life, and previously worked with him intermittently for 4 or 5 years. He stated that Mr. Jones told him that he needed someone he could trust, and they stayed at the Days Inn together and occasionally commuted to the mine together. He confirmed that he and Mr. Jones are Lodge brothers (Tr. 120-125).

Mr. Looman recalled that the cut-through discussion of January 24, 1991, took place during a shift change and he only vaguely recalled the details. He stated that Mr. Mucho mentioned the use of ventilation steel stoppings and sealing off one side of the cut-through, and Mr. Looman confirmed that this was the way it was done. Mr. Looman could not recall whether he spoke with Mr. Jones about the cut-through discussion, and stated that he "could have discussed it" because it was an important project. (Tr. 125-131).

On cross-examination, Mr. Looman stated that his role at the mine was to make suggestions and recommendations to Mr. Jones. He confirmed that he had a conversation with Mr. Jones one evening while riding home from the mine, and Mr. Jones stated that he was going to fire Mr. Mucho. Mr. Looman did not recall when the conversation took place, but he believed that it was after Mr. Jones had a conversation with Mr. Hayden in his office and Mr. Looman saw them in the office when he came by to pick up Mr. Jones (Tr. 131-133). Mr. Looman stated that Mr. Jones told him that he was going to fire Mr. Mucho because of the cost and

time estimates for the 33 Mains project, and because Mr. Mucho had lied to him and made him look bad when he presented his business plan for that project (Tr. 133).

Mr. Looman could not recall the day of the week when he and Mr. Jones had their conversation, and he confirmed that Mr. Jones was upset because he believed that Mr. Mucho had lied to him about the completion costs for the project. He confirmed that Mr. Jones told him that Mr. Hayden had settled him down (Tr. 136). Mr. Looman confirmed that when he gave his deposition on November 1, 1991, and in response to a question as to whether or not Mr. Jones was upset because he had been given inaccurate information about the 33 Mains project, he responded "I think he might have mentioned that one time. I'm not sure", and when asked if he recalled when Mr. Jones may have mentioned that he was going to fire Mr. Mucho, he responded "No. These times all run together", and he stated that "they still do" (Tr. 137).

In response to further questions, Mr. Looman stated that "he may have seen" Mr. Jones on the evening of the cut-through incident of January 24, 1991, but that he was not sure (Tr. 142). When asked if he had ever mentioned the cut-through incident to Mr. Jones, Mr. Looman stated "I didn't say that I never. I said, if I did, it wasn't that big a deal", but that he could not remember mentioning it or discussing it with Mr. Jones (Tr. 142). Mr. Looman stated that he casually heard the conversation at the mine map during the shift change and "he just got in on the conversation" and "kind of stumbled on to it, and then stumbled back out of it" (Tr. 145).

Jay L. Hasbrouck, Superintendent of Engineering and Planning, confirmed that Mr. Mucho reported to the central office in early February, 1991. He explained that Mr. Fisher informed him approximately a week earlier that Mr. Mucho would be assigned to him for temporary engineering work until some other decision was made or until some other job could be found for him (Tr. 147-150).

On cross-examination, Mr. Hasbrouck stated that he could not recall whether he told Mr. Mucho that his assignment to the central office was temporary, but he assumed that he did. He stated that Mr. Fisher told him that Mr. Mucho was assigned to the central office because "things were getting awkward with Tom over there at Mine 84, or uncomfortable", and Mr. Hasbrouck took this to mean that Mr. Mucho, as the ex-manager, clashed with the current management. Mr. Hasbrouck stated that Mr. Mucho was an extra person assigned to him and that he had no vacancy to fill. He stated that Mr. Mucho did not fill the vacancy of engineer Mike Bedine who went to the No. 84 Mine, and that Mr. Bedine had completed his work at the central office (Tr. 150-153).

Mr. Hasbrouck stated that Mr. Mucho was assigned "bits and pieces" of work, particularly the permit renewal for Mine 58. Mr. Mucho's departure date was extended so that he could complete as much work as possible on that project. He confirmed that there were times when Mr. Mucho had little or nothing to do because of the lack of work. He confirmed that he was not involved in the offer of an engineering job to Mr. Mucho at the No. 33 Mine (Tr. 154-155).

Mr. Hasbrouck stated that after Mr. Mucho's meeting with Mr. Fisher on May 15, 1991, Mr. Fisher informed him (Hasbrouck) that Mr. Mucho "was adamant that he wanted to leave Bethenergy." Mr. Hasbrouck stated that Mr. Mucho had previously told him that he "wanted out of Bethenergy" (Tr. 156). He explained further as follows at (Tr. 156-157):

Q. Mr. Hasbrouck, when Mr. Mucho told you that he wanted out of Bethenergy, was that in the context of his being stationed at the central office and not having anything to do?

A. No, I don't believe so. I asked Tom what he wanted to do, you know, where he saw his future, or what he would like to do even for me, if I could assign him any more meaningful work, to let me know that. And he said he didn't have any plans, that he just wanted out of this company. He had enough of Bethenergy and wanted to leave.

Q. He --

A. So I didn't detect it as just being frustrated with a lack of things to do. I detected a deeper reason than that.

Q. You asked him if he wanted more meaningful work and he told you he just wanted out of Bethenergy?

A. Yeah.

Q. What were you going to do by way of more meaningful work? What if he would have said, yes, I would like more meaningful work?

A. I would have -- The only thing I could have done was just assign him more of the things that were under my power. You know, if he wanted to participate in anything else I was doing. I had no control over assigning him anything other than the jobs I was handling.

Mr. Hasbrouck stated that Mr. Fisher did not explain how he knew that Mr. Mucho's presence at the No. 84 Mine was "awkward



and uncomfortable" and that he (Hasbrouck) made that assumption because Mr. Mucho had previously served as mine manager (Tr. 158). He confirmed that subsequent to Mr. Mucho's departure, an engineer was hired on a temporary consulting non-full time basis for reclamation work at the No. 91 Mine, and he could not recall that he told Mr. Fisher that Mr. Mucho might be able to do that work (Tr. 159).

In response to further questions, Mr. Hasbrouck stated that Mr. Mucho was to be terminated on May 31, 1991, but that he asked Mr. Robertson for an extension for Mr. Mucho so that he could complete the Mine 58 permit work. Mr. Mucho indicated that he needed another week to finish the project, and his termination date was extended for one week. Mr. Hasbrouck stated that he was never told why Mr. Mucho was terminated, and he was of the opinion that when he turned down the job at the No. 33 Mine there was no other available job for him (Tr. 167). He confirmed that Mr. Mucho did a good job for him while at the central office, but he believed that "most of the work I assigned him was beneath his skills and background" (Tr. 171).

William N. Ross, Assistant Mine Inspector, confirmed that he was aware of the fact that Mr. Mucho was moved to the central office, and he stated that Mr. Jones told him that Mr. Mucho was moved because "he was not a team player" (Tr. 173).

On cross-examination, Mr. Ross stated that during a conversation with Mr. Hayden, Mr. Hayden was of the opinion that Mr. Mucho was moved to the central office because his presence at the No. 84 Mine was disruptive because he was the former mine manager and people still went to him for problems because he had been there so long and that this was hard on the new management. Mr. Ross confirmed that he had worked for Mr. Mucho for two years at the No. 84 Mine and people were used to going to him with problems. He got along well with Mr. Mucho, and occasionally went to him with problems after Mr. Jones was placed in charge. However, he did not deal directly with Mr. Jones, and only dealt with his supervisor Mr. Ronald Biszick (Tr. 177).

#### Respondent's Testimony and Evidence

Clarence S. Hayden, Senior Analyst, testified that he has worked at the No. 84 Mine since January, 1991, and that he previously worked at the central office. He confirmed that he had a conversation with Mr. Jones on Friday afternoon, January 25, 1991, concerning Mr. Mucho, and that Mr. Jones was upset and stated that he should fire Mr. Mucho because of certain incorrect projections that Mr. Mucho had made with respect to the 33 Mains project. Mr. Jones was concerned that this had created some credibility problems for him with the corporate office.

Mr. Hayden stated that he told Mr. Jones to "sleep on it" over the weekend before making any final decision and that he could do what he had to do at a later time (Tr. 182-189).

Mr. Hayden stated that when he next spoke with Mr. Jones the following Monday, Mr. Jones informed him that he had decided against firing Mr. Mucho, and several weeks later, he learned that Mr. Mucho had been transferred to the central office. Mr. Hayden stated that he spoke to Mr. Jones briefly after the transfer and that Mr. Jones told him that he had discussed their January 25, 1991 conversation with Mr. Metheny and that they thought it was best for Mr. Mucho to go to the central office. Mr. Hayden was of the opinion that Mr. Jones and Mr. Metheny were concerned about the credibility problem created by Mr. Mucho (Tr. 190).

Mr. Hayden could not recall any specific conversation with Ms. Cooley mentioning any reasons for Mr. Mucho's transfer to the central office. He denied that he discussed the 53P-7A cut-through ventilation incident with Ms. Cooley. He confirmed that during this period of time there were numerous conversations concerning the management change and that many of the discussions "concerned allegiances toward the new, allegiances toward the old". He stated that he would not extensively discuss any personnel moves such as Mr. Mucho's with Mr. Cooley because he worked closely with Mr. Jones and had to be careful in what he said to others. He further stated that he was not aware of the cut-through dispute at any time prior to February 8, 1991, and learned about it many months later (Tr. 192).

On cross-examination, Mr. Hayden stated that when he spoke to Mr. Jones about his prior statement that he should fire Mr. Mucho, he opened the door to Mr. Jones' office and saw that he had visitors. Mr. Jones raised his hand and stated "No action at this time". Mr. Hayden confirmed that Mr. Jones could have said "No, not now", and in fact testified that is what he said when he gave his deposition. Mr. Hayden explained that he asked Mr. Jones whether he was going to take any action, and that Mr. Jones replied "No, not now" (Tr. 194).

Mr. Hayden stated that during his January 25, 1991, conversation with Mr. Jones, Mr. Jones told him that Mr. Mucho had admitted that the information he had reported to the corporate office concerning the 33 Mains project was not correct, and that Mr. Mucho knew it was not correct and was not overly concerned (Tr. 196). Mr. Hayden confirmed that he stated in his deposition that he was surprised to hear from Mr. Jones that Mr. Mucho showed a lack of respect for the corporate office and would lie about such important matters because this was not consistent with what he knew about Mr. Mucho (Tr. 197).

Mr. Hayden stated that he never heard Mr. Mucho make any statement that he was "hanging on" at Bethenergy for 3 to 4 years so that he could retire. He considered Mr. Mucho to be a conscientious manager, and although he was concerned about profitability, the mine had been losing money (Tr. 203). He stated that Mr. Mucho had a quiet demeanor, was doing his job in the engineering department and was causing no problems that he was aware of (Tr. 203-204).

In response to further questions, Mr. Hayden stated he recalled no conversation with Ms. Cooley on the day that Mr. Mucho moved out of his office to go to the central office, and he believed that he probably had a conversation with her the following Monday, but felt that it would be inappropriate to comment about Mr. Mucho's departure until he learned all of the facts (Tr. 217-218). He believed that Mr. Mucho's transfer to the central office "was an inevitable decision that was going to be made since Tom had been relieved as being manager of the operation" and because "there were some people within the organization that still looked upon him as being in charge and reported directly to him, or in those instances where decisions had been made by the then management, they were checking with Tom before they would take steps to do what they had been assigned to do" (Tr. 218). He further stated that "we had the ex-chief still present, and that made for an uncomfortable situation".

Mr. Hayden confirmed that he found out about the January 24, 1991, cut-through incident many months after his January 25, 1991, conversation with Mr. Jones, and well after his conversation with Ms. Cooley (Tr. 219). He reiterated his denials that he and Mr. Jones ever discussed the January 24, 1991, cut-through incident, and he confirmed that Mr. Jones never mentioned it (Tr. 223-224). Since he did not know about that incident until much later, Mr. Hayden insisted that he never mentioned it to Ms. Cooley during their conversations (Tr. 225).

Richard Fisher, President and General Manager of Bethenergy Mines, testified that he holds a BS degree in economics, and that most of his work with Bethlehem Steel or its subsidiary Bethenergy Mines for approximately 36 and one-half years has been accounting work. He stated that in 1985, he supervised 13 mining operations, and as a result of Bethlehem's desire to exit the coal business, there are presently only four operations. He confirmed that he has no "hands on" mining experience and his knowledge of mining has been received from his managers. He confirmed that he made the decision to remove Mr. Mucho as mine manager on December 7, 1990, after a period of long deliberation because the mine was not doing well and it was not performing as effectively or efficiently as he was informed that it could. He explained that in 1986 the No. 84 mine was a primary supplier of high volatile metallurgical coal to a steel company. However, in 1988, the sulphur content was such that the coal was no longer

acceptable to steel plants, and it was decided that the mine would be classified "commercial" rather than "captive". Since the commercial market was very competitive, the mine needed to become more competitive, and in 1989 he instituted a "peer review" or audit of the mine to evaluate its performance (Tr. 227-233).

Mr. Fisher stated that the mine peer review noted several deficiencies, and recommendations were made to improve performance, and these were reviewed with Mr. Mucho and his supervisor Tom Brisky. Mr. Mucho was instructed to take action to try and correct the deficiencies, and that process started in early 1990. Outside groups of experts were also brought in to evaluate the performance of the mine, and Mr. Fisher explained what was done (Tr. 234-236). He stated that by July, 1990, it was obvious to him that the conditions noted by the peer reviews continued to exist relative to the way the mine was being managed. After further problems were encountered, including a longwall failure, and after considering all of the input he received from inside and outside of the company, he concluded and decided that the mine could be made more efficient by a change in management, which affected Mr. Mucho and Mr. Brisky. They were relieved of their management responsibilities, and he brought in Mr. Metheny and Mr. Jones to manage the mine. They both reported to him, and Mr. Jones also reported to Mr. Metheny (Tr. 237-242).

Mr. Fisher stated that when he selected Mr. Jones he was not given any specific title, and he informed Mr. Jones that if he proved himself, he might eventually have the title of operations manager (Tr. 244). Mr. Fisher stated that he decided not to remove Mr. Mucho from the mine when he made the management change because Mr. Metheny told him that Mr. Mucho expressed relief that the pressure had been taken off him and that he could focus his attention on the recovery of the longwall. Mr. Metheny believed that Mr. Mucho could play a useful role in an engineering capacity, and they reached that understanding. Mr. Fisher confirmed that he informed Mr. Mucho of his decision by telephone and sent him a fax announcing the new changes (Tr. 246).

Mr. Fisher confirmed that Mr. Mucho was transferred from his position as the mine chief engineer and to the central office on February 8, 1991. He explained that Mr. Metheny called him a week earlier and informed him that "the situation" at the mine was not working the way he had hoped, and that it was a mistake to have assumed that Mr. Mucho could be allowed to stay at the mine at the same time that changes were being made in the operation, and that Mr. Mucho needed to be removed. Mr. Fisher stated that Mr. Metheny gave him no further explanation, and Mr. Fisher did not question him further because "of the deep trust I have in terms of Pat's opinion and judgment" (Tr. 248).

Mr. Fisher stated that he suggested to Mr. Metheny that Mr. Mucho be moved to the central office as a convenience, and he then spoke with Mr. Hasbrouck and informed him that he wanted Mr. Mucho to work for him at the central office and that he was to give him "as much productive work as possible" (Tr. 249). Mr. Fisher stated that he viewed Mr. Mucho's move to the central office as temporary because Bethenergy was being restructured and downsized and had basically only one central group at the central office. Attempts were being made to make each mining operation self-sufficient entities and there was a relatively small group of technical support people at the central office and the operations people were pressuring him and questioning the need for such a support group. Mr. Fisher further explained that he was unsure as to whether the central group would be disassembled or whether a modest support group would remain. He confirmed that a determination was made before Mr. Mucho left the company that the technical support group could not be justified (Tr. 252).

Mr. Fisher confirmed that the 33 Mains project was essential to the future of the No. 84 mine, and as a result of a January 7, 1991, business plan meeting, the project was reevaluated. He confirmed that Mr. Jones called him about the project and was upset that he may have given him misleading information. Mr. Fisher stated that Mr. Jones told him that if he wasn't happy with his performance he could fire him, and Mr. Fisher told Mr. Jones "Don't worry. I understand. There's nothing to get excited about. We'll get on with it" (Tr. 255).

Mr. Fisher confirmed that he met with Mr. Mucho at Mr. Robertson's suggestion on May 15, 1991. He stated that Mr. Mucho "made it very, very clear to me that too much water had gone under the bridge, that he felt that he had to sever his relationship with Bethlehem Steel and Bethenergy" (Tr. 256). Mr. Fisher stated that he was aware of the fact that a job would be available in the human resources office after the retirement of Fred Ling, and that he was prepared to offer it to Mr. Mucho. However, in light of Mr. Mucho's statements that he did not wish to stay with the company, and his previous rejection of another job offer at Mine 33, Mr. Fisher did not offer Mr. Mucho the position. Mr. Fisher stated that he met with Mr. Mucho hoping there was a way to avoid his ultimate severance, but after speaking with him he concluded that this was not possible because "we had struck out when we made the offer at 33, and it became pretty obvious to me that if I would make another offer in human resources, that I would strike out there as well" (Tr. 258).

Mr. Fisher stated that Mr. Robertson tried to identify areas where Mr. Mucho could be effectively utilized and that no one wanted to see him injured by the decision to move him to the central office. Mr. Fisher stated that after his meeting with Mr. Mucho it became obvious that the next step would be his termination (Tr. 259). Mr. Fisher stated that at the time

Mr. Mucho was moved to the central office he was not aware of any dispute concerning the 53P-7A cut-through, and as far as he was concerned that incident had nothing to do with Mr. Mucho's move to the central office (Tr. 259-260). Mr. Fisher summarized Mr. Mucho's termination as follows at (Tr. 260):

Q. And when you decided, after having met with Mr. Mucho, that there wasn't any way to resolve the issues with him, what was the reason he was terminated?

A. That we had no place for him to go. He had turned down on opportunity, which basically we felt was a positive one, made for the right reason. And then he made it very, very clear to me on May 15th that he had selected his course of action that he wanted to take for the rest of his life, and that did not include Bethlehem Steel or Bethenergy.

Mr. Fisher stated that Bethlehem Steel has announced that it will be exiting the coal mining business and that the No. 84 Mine is for sale and bids have been made by potential buyers who have been invited to visit the mine (Tr. 260-261).

On cross-examination, Mr. Fisher identified a copy of his December 11, 1990, memorandum to R. P. Penny, senior vice-president of Bethlehem Steel, in which he indicated that "depending on what happen's with Mr. Mucho's performance, it is possible that Tom will be demoted to Underground Superintendent" (Exhibit C-89, Tr. 263). Mr. Fisher stated that he did not believe that he planned to bring Mr. Mucho back as operations manager and that he made that statement in the memorandum because he did not want Mr. Mucho to fail and did not want Mr. Penny to take any unilateral action with respect to Mr. Mucho "as we tried to work out this whole problem at Mine 84" (Tr. 264). Mr. Fisher conceded that when he gave his deposition he stated that Mr. Metheny and Mr. Jones perhaps were on a temporary basis and he would restore Mr. Mucho, and that the "worst case scenario" would be the demotion of Mr. Mucho to underground superintendent (Tr. 266).

Mr. Fisher confirmed that he did not hold Mr. Mucho totally responsible for the longwall failure, or for some of the problems at the mine, but he believed that Mr. Mucho was partially accountable for the basic blunder relative to mine planning and the direction in which the longwall was mined. He confirmed that Mr. Rich made a study and informed him that there were some foreseeable geological conditions that caused a problem in mining in the wrong direction. Mr. Fisher stated that there were some others who should have been involved in the accuracy of mine planning, but since Mr. Mucho was responsible for operating the mine, he should have foreseen the geological conditions (Tr. 280-281). Mr. Fisher confirmed that when he gave his

deposition, he stated that he did not hold Mr. Mucho responsible for the condition discussed by Mr. Rich, and that he felt that Mr. Mucho "was victimized" by the "environment of Bethenergy" (Tr. 281).

Mr. Fisher confirmed that when he spoke to Mr. Metheny about removing Mr. Mucho from Mine 84, he suggested to Mr. Metheny that Mr. Mucho might go to the central office, but he did not ask Mr. Metheny for any specific examples of any problems at the mine, and that he simply accepted Mr. Metheny's judgment that there was a problem without any further evaluation. He reiterated that he did not offer Mr. Mucho the job to be vacated by Mr. Ling upon his retirement because "it was absolutely clear in my mind at that time as to what his intentions were, and his intentions weren't to stay with Bethlehem Steel" (Tr. 286).

Mr. Fisher reviewed Mr. Mucho's performance ratings dating back to 1987, and confirmed that he signed some of them (Tr. 288). He agreed that some of the ratings he reviewed and signed reflected that Mr. Mucho "worked diligently on personal development to improve attitudes of work force", that he was doing "an outstanding job of communicating with his people", and that he had "exceptional managerial and communications skills and no major weaknesses" (Tr. 289). He further confirmed that one of the evaluations which he did not sign reflects that Mr. Mucho could be considered qualified for a human resources position (Tr. 290).

Mr. Fisher stated that when Mr. Jones called him about the 33 Mains project to inform him that he may have misled him, Mr. Jones did not mention Mr. Mucho (Tr. 296). Mr. Fisher stated that he did not recall Mr. Mucho stating that he would quit his job (Tr. 297). He confirmed that he performed a "performance management system analysis" of Mr. Mucho in February, 1991 (Exhibit R-22). He described it as a performance "contract" relative to certain key factors for purposes of a monetary bonus. He and Mr. Robertson prepared the analysis, and it reflects that Mr. Mucho received an overall rating of 2.8, which fell short of a 4.0 rating which reflects that all basic requirements of the business have been met. He stated that he gave Mr. Mucho "a less glowing or a worse evaluation" than previously given "because of what occurred during 1990 relative to the effectiveness of the mine, the operation of the mine" (Tr. 301-302).

Mr. Fisher stated that he "made a mistake" accepting and signing Mr. Mucho's management performance assessment prepared by Mr. Brisky for the period June 1, 1989 to May 31, 1990, and that he did not believe that Mr. Mucho was as an effective manager as he had thought. Mr. Fisher stated that he could not ignore the management assessments made with respect to the operation of the mine (Tr. 306-307). He further explained the management evaluations concerning Mr. Mucho and he confirmed that no ratings were

made for anyone in 1991, because "the whole system was thrown out in 1991 as being very, very ineffective" (Tr. 315-318). Mr. Fisher stated that he had no conversations with Mr. Jones or Mr. Metheny about the cut-through incident and that he had no knowledge of it (Tr. 319-320).

Michael E. Jones testified that he is currently employed by Back Diamond Resources, which is more or less his company, and that he retired from Bethenergy in July, 1991, after a brief stay at Mine No. 108. His final day of employment at Mine No. 84 was May 31, 1991, and he was employed by the respondent for a total of 22 years.

Mr. Jones stated that prior to his appointment at Mine 84, he was employed at the No. 108 Mine and was in charge of the tipple and purchasing outside coal for the company. Mr. Fisher asked him to take a position at the No. 84 Mine in order "to turn the mine around, give it credibility, and make it profitable." Mr. Jones stated that he knew nothing about the mine before he was assigned there and did not know Mr. Mucho prior to going there. He stated that Mr. Fisher emphasized to him the need to recover the longwall and put it into production in order for the mine to survive.

Mr. Jones stated that he held the title of acting manager when he was assigned to Mine 84, and that he reported to Mr. Metheny. Mr. Jones stated that he felt sorry for Mr. Mucho and told him that he would afford him an opportunity to reposition himself as the mine manager. He also informed Mr. Mucho in early January, 1991, that he would serve as chief engineer because of his ability and background. He also informed Mr. Mucho that he believed he could continue to contribute as a team player and that Mr. Mucho agreed to assume the job of chief engineer.

Mr. Jones characterized his management style as "very, aggressive and a lot of discipline". During his initial time at the mine he made certain observations "to get the feel" for the abilities and knowledge of the work force and made certain personnel changes, although not immediately. However, time was of the essence insofar as putting the longwall into production was concerned, and that without a producing longwall, it was his opinion that the mine would not survive (Tr. 7-13).

Mr. Jones stated that as time passed, his opinion of Mr. Mucho changed, and in January 1991, he announced that Mr. Mucho would no longer serve as mine manager in his absence and that Mr. Stan Black and Mr. Clarence Hayden would serve in that capacity (Tr. 13).



Mr. Jones made reference to a letter which was mailed to the Pennsylvania State Department of Resources regarding the mine belt ventilation, and he confirmed that the tone of the letter offended the state official to whom it was addressed and may have adversely affected the respondent's working relationship with the state. The letter was drafted by Mr. Mucho's engineering department. Mr. Jones stated that he may or may not have signed the letter and he confirmed that he often signed letters drafted by others without reading them or after simply glancing at them (Tr. 14-19).

Mr. Jones stated that the target date for the recovery of the longwall was February 1, 1991. He confirmed that a cut-through was in progress to connect the 53-P and 7-A panels, but that he did not participate in the discussion at the mine map on January 24, 1991, and only walked through the office quickly and reminded everyone not to forget the switching of the continuous miners. He stated that no one ever told him about the discussions which took place or any disagreements between Mr. Mucho and Mr. Black. Mr. Jones also denied any knowledge of any "confrontations" between Mr. Mucho and the others who were present during the discussions, and he denied that the fact that Mr. Mucho may have expressed his disagreement as to how to accomplish the cut-through was a factor in his re-assignment to the central office on February 8, 1991 (Tr. 20-21).

Mr. Jones stated that the dewatering and development of the 33-Mains section at Mine 84 was a high priority item and vital to any future mining and that Mr. Metheny made him and the entire operation responsible for this project. Mr. Jones stated that he presented a business plan at a management meeting on January 7, 1991, with respect to the 33-Mains project and read it from a statement prepared by the engineering department. Mr. Jones confirmed that he had only been at the mine for two or three weeks and spent much of his time underground when this report was made. Subsequently, on January 14, 1991, and based on his presentation of January 7, Mr. Metheny issued a follow-up business plan memorandum assigning him the responsibility for the 33-mains project (Tr. 21-24).

Mr. Jones stated that he subsequently informed Mr. Metheny that he did not believe that the information which had been compiled regarding the 33-Mains project was accurate and that during his discussions with the engineers in Mr. Mucho's engineering department he found that the information was based on 90 percent theory and 10 percent practicalities. Mr. Metheny expressed his concern about the project and stated that if it were not completed there would be no coal mine. Mr. Jones stated that he was frustrated about the engineering information he was receiving and that the original deadlines which had been established were simply being reasserted by the engineers (Tr. 24-25).

Mr. Jones stated that on January 25, 1991, he spoke to Mr. Hayden and expressed his dissatisfaction with the engineering department and the mine management team. He was very upset and remarked that he should fire Mr. Mucho. Mr. Jones denied that the cut-through matter of January 24, 1991, was discussed with Mr. Hayden, and he stated that he first learned about that matter after Mr. Mucho had filed his discrimination complaint with MSHA when he was advised of the complaint while at a management meeting at the Ramada Inn in Washington, Pennsylvania.

Mr. Jones explained that when he spoke with Mr. Hayden and commented that he should fire Mr. Mucho, he was upset that the credibility of mine 84 "was zero" and had a reputation of telling higher management "what they wanted to hear" and that "it was business as usual". However, Mr. Hayden calmed him down and Mr. Jones stated that he subsequently changed his mind and did not believe that "engineering was off on their own and was not playing as part of the management team". Mr. Jones confirmed that after speaking with Mr. Hayden he rode home with Mr. Looman that evening and mentioned his discussion and statement that he wanted to fire Mr. Much because of the lack of team work and the inaccurate information he had received with regard to the 33-mains project (Tr. 25-30).

Mr. Jones stated that he subsequently received a telephone call from Mr. Metheny who informed him that Mr. Mucho was being transferred to the central office. Mr. Metheny further informed him that as long as Mr. Mucho was in the same building at Mine 84, there would be a "choosing of sides" as far as management was concerned (Tr. 28).

On cross-examination, Mr. Jones reviewed his prior "statement" made to the MSHA investigator during the investigation of Mr. Mucho's complaint (Exhibit C-136), and he confirmed that he did not mention the 33-mains project to the investigator. Mr. Jones further stated that the mine was not working together and that this did not personally bother him. Referring to his deposition of December 12, 1991, Mr. Jones acknowledged that he stated that "he sensed the factions from day one" and that it was not a problem personally, but that it was a problem for the mine operation every day even though he did not mention it during his deposition (Tr. 32-44).

With regard to his January 25, 1991, conversation with Mr. Hayden, Mr. Jones stated that although no specific event resulted in his being upset, he felt pressured to get the 33-mains area de-watered and that he had discussed the matter

with Ms. Cooley and Mr. Bookshar that day and with the engineering department every other day. He explained his "outrage" when he spoke with Mr. Hayden as follows at (Tr. 45-46):

A. The various information I had accumulated from Engineering. I'd talk to one engineer, I'd get one story. Another engineer would say, well, I really don't want to say. I don't want to get in the middle to it. Could cost me my job or, you know, there was a lot of protecting each other.

And people wouldn't talk on the record. But off the record, they would and I would ask detailed questions, how we'd come up with these answers. And it all reverted back to, this is what Tom said. This is what the book says. This is the way Engineering has always done it. And I was supposed to take that as the Gospel.

I did have a lot of experience in rehabilitation, approximately 15 years. I felt that I had just as much knowledge, if not more, than the individuals giving me the information. That was somewhat of an expertise that I've acquired over the years.

\* \* \* \* \*

A. I had talked to Engineering about the dewatering of 33 Mains.

Q. That day?

A. That day and almost every day. We were waiting on a thrust block. We were waiting on this and that. We paid thousands of dollars for a design thrust block. It did not work. Then we went right back to the way they done it 20 years ago. You can't beat common sense. You can only do so much from a book. I was to the point I was fed up. I wasn't going to take anymore. Every time I asked a question, I was given a runaround. And I told Clarence that the pressure was on me to get that 33 Mains open, dewatered and back in coal. It was just one crisis after another at that time.

Mr. Jones stated that when he discussed the 33-mains project with Mr. Hayden he did not tell him he was misled about the costs of the project, and he could not recall whether he mentioned any cost problems when he discussed the project with Mr. Looman (Tr. 58-59). He stated that Mr. Looman would have no reason to tell him about the status of the cut-through because it was not his job and cut-throughs are every day occurrences for a longwall move. Further, the engineering department kept him advised daily on the progress of the cut-through (Tr. 63-64).

Mr. Jones stated that he called Mr. Fisher during the week of January 28, 1991, and informed him that he had given him misinformation about the 33-mains project and that it would not be ready by the original time estimate. He also told Mr. Fisher that the completion of the project would take longer than previously anticipated and that Mr. Fisher could do what he liked about him. He also told Mr. Fisher that Mr. Mucho had given him the information about the project (Tr. 70). Mr. Jones stated that he probably spoke with Mr. Metheny after he had spoken with Mr. Fisher that day, and after he had spoken with Mr. Hayden (Tr. 71-72).

Mr. Jones stated that he left the 84 mine after Mr. Fisher offered him another job but could not agree on his requested compensation, and that he subsequently retired and went into his own business. He acknowledged that Mr. Mucho informed him that if people were not assigned to the No. 33 project it would not be done. Mr. Jones stated that he did not hire additional people for the project because the 33-mains area was under water and he didn't want people just standing around with no work to do while the area was under water (Tr. 73-78).

In response to further questions, Mr. Jones stated that Mr. Mucho was not participating in the mine organization and that everytime he would ask for information from the engineering department, he could not get an unbiased opinion and the information was simply rearranged "because they didn't want to go against Tom" (Tr. 80). He stated that he informed everyone in management that he did not feel comfortable with the situation, that it was "a constant every-day battle", and that he was being misled (Tr. 81). Mr. Jones stated that "It was a relationship that engineering had run the mine for years. Anyone else's opinion did not count. And we didn't know what we were talking about, operations people, I'm saying. And I wasn't given the respect and the courtesy of what prior knowledge I'd acquired" (Tr. 82).

Mr. Jones stated that he harbors no animosity towards Mr. Mucho, and that Mr. Mucho never raised any safety issues with him while he was at Mine 84. He also stated that he never discussed the January 24, 1991, cut-through incident with Mr. Metheny or anyone else, did not participate in those discussions, and that he did not know about any such discussions until after Mr. Mucho filed his complaint (Tr. 84).

John P. Metheny, Manager of operations of the respondent's Eagle Nest and Mine 84 mining operations, stated that he was assigned to this position on December 7, 1990, when Mr. Fisher called him and asked him to take the job and to work with Mr. Jones. Mr. Metheny stated that the mine was losing money,

its productivity and credibility was down, and that cost projections and scheduling were not being met. It was his understanding that he and Mr. Jones would work as a team, that he (Metheny) would be manager of operations and that Mr. Jones would be there on a day-to-day basis (Tr. 90-95).

Mr. Metheny stated that he concluded in February, 1991, that Mr. Mucho had to be transferred because the mine personnel were not responding to Mr. Jones. He stated that he had gone through a similar situation at another mining operation where he removed the mine manager and made him his foreman. He stated that he "had a feeling that things weren't right" at the mine and that "the mine wasn't jelling as long as Mucho was there". Under the circumstances, he decided to transfer Mr. Mucho because he believed that his presence was disruptive and that everyone needed to report to Mr. Jones. After reporting this to Mr. Fisher, Mr. Fisher told him that "if that's your decision go ahead and make the move" (Tr. 99-101).

Mr. Metheny was not sure if it was Mr. Fisher's idea to reassign Mr. Mucho to the central office, but he was sure that this was discussed. On January 24, 1991, after he had spoken to Mr. Fisher, he called Mr. Jones and then called Mr. Mucho to advise him of his decision to reassign him. He told Mr. Mucho that he believed there were some problems and some friction and that "for the betterment of, myself, the operation and Tom himself, that he needed to be away from Mine 84". He instructed Mr. Mucho to report to Mr. Hasbrouck on the following Monday (Tr. 102).

Mr. Metheny stated that he was unaware of the cut-through incident of January 24, 1991, at the time he reassigned Mr. Mucho to the central office, and that he first learned about it on March 29, 1991, while at a management meeting at the Ramada Inn in Washington, Pennsylvania, when he was first informed of Mr. Mucho's complaint to MSHA (Tr. 102-103). Mr. Metheny stated that prior to February 8, 1991, Mr. Jones never called him to tell him that he wanted Mr. Mucho out of the mine. He also confirmed that he was not consulted when Mr. Mucho was laid off, and he did not believe that he had any role in that decision (Tr. 104). He confirmed that he did not consider reinstating Mr. Mucho as mine manager to the No. 84 Mine when Mr. Jones was leaving because "things were on the right track, production was on the increase profits were up", and he believed that morale was up and the mine was being cleaned up and "moving in the right direction". He was afraid that if Mr. Mucho returned, "it might go the other way" (Tr. 104).

Mr. Metheny confirmed that Mr. Jones made a presentation concerning the 33 Mains project which reflected that \$3.7 million in extra expenditures would be required for a ventilation shaft in connection with that project and that this came as a shock to

him because it had not previously been discussed. Mr. Metheny stated that the 33-mains project was not a part of his decision to transfer Mr. Mucho and that he simply wanted everyone to follow only one individual (Tr. 105-113).

On cross-examination, Mr. Metheny conceded that while the 33-mains project was not the definitive reason for his decision to transfer Mr. Mucho, it could have been part of his decision. He also stated that he had previously told Mr. Jones not to worry about the costs or time frame for the project.

Mr. Metheny confirmed that when he spoke with Mr. Jones at the end of January, 1991, about the problems with the 33 Mains project, Mr. Jones inferred that Mr. Mucho had given him the information about that project. Mr. Metheny further confirmed that he had given serious thought to moving Mr. Mucho in early February, 1991, but that during the previous second week in December while at the mine he "had this feeling that something wasn't quite right" and that he could sense that there was friction (Tr. 138). He stated that there were no specific instances of Mr. Mucho attempting to subvert Mr. Jones, but that based on his conversations with Mr. Jones he did not feel that Mr. Jones was being supported (Tr. 139).

Mr. Metheny stated that he considered Mr. Jones to be a good mining man, and a disciplinarian, and he confirmed that the thought entered his mind that Mr. Jones might be the cause of the friction and spoke to him about his management techniques (Tr. 139-142). He confirmed that he heard rumors "about people going to Mr. Mucho. Telling him things that Mike was doing" (Tr. 142). Mr. Metheny stated that he had worked with "that scenario for four years" and that he "saw the same kind of atmosphere" and found that it did not work. He further stated that Mr. Jones' activities "were going to cause problems with the people who were loyal to Tom Mucho" (Tr. 140, 143).

In response to further questions, Mr. Metheny reiterated that he was unaware of the cut-through discussion of January 24, 1991, until well after the events in this case, and that he did not discuss that matter with Mr. Jones, Mr. Black, or Mr. Duvall. He denied that Mr. Mucho was transferred to the central office because of that incident (Tr. 158). He confirmed that he had no role in Mr. Mucho's subsequent lay off, and "pretty much lost contact with him" after his transfer, but did stop by his office to speak with him two or three times (Tr. 159-161).

Thomas H. Robertson, Manager of Human Resources, testified that he is responsible for labor relations, personnel, and EEO matters. He stated that he was not involved in Mr. Mucho's removal from the mine manager's position at Mine 84 or his reassignment to the central office. He confirmed that after

Mr. Mucho was assigned to the central office he saw him on a daily basis, and in March, 1991, before Mr. Mucho filed his MSHA complaint, they discussed his employment situation. Mr. Robertson stated that Mr. Mucho informed him at that time that he "wanted to exit the organization" and they briefly discussed a possible severance settlement. Mr. Robertson stated that he and Mr. Mucho met again after he filed his MSHA complaint and they again discussed a possible severance settlement. Mr. Robertson stated that he had in mind the usual severance arrangement offered by the company, but that Mr. Mucho wanted a settlement similar to a severance formula used by I.B.M. which would have amounted to a payment of 2 to 3 years severance pay at a cost of \$200,000 to \$300,000. Mr. Robertson stated that he informed Mr. Mucho that this was beyond what he could offer and that he also told him that in light of his MSHA complaint and his EEOC complaint that he (Robertson) would have to defend the company's position (Tr. 163-170).

Mr. Robertson stated that a position of project engineer at the No. 33 mine was offered to Mr. Mucho by mine manager Richard Stickler, but that he (Robertson) was not involved in that offer. Mr. Robertson stated that he then suggested that Mr. Fisher and Mr. Mucho meet to discuss his situation. Mr. Robertson stated that while he was at the central office, Mr. Mucho was in a "make work" position, but that he always seemed to have something to do, even though it was not any substantive work. Mr. Robertson stated that he was concerned that Mr. Mucho's situation was adversely affecting morale at the central office because he had been a high level manager, was still being paid his previous manager's salary, and did not seem to be doing any meaningful work. For these reason, Mr. Robertson believed that Mr. Fisher and Mr. Mucho needed to meet in order to resolve Mr. Mucho's employment situation (Tr. 172-173).

Mr. Robertson stated that he made an effort to find a job for Mr. Mucho by submitting his name to Bethlehem Steel for possible placement but received no response. Mr. Robertson also spoke with Mr. Fisher and Mr. Fisher informed him that Mr. Mucho wanted to leave the organization. Mr. Robertson stated that he met with Mr. Mucho on May 21, 1991, and informed him that June 1, 1991, would be his effective date if he accepted the Mine 33 job, and if not, he would be laid off. He also advised Mr. Mucho that if he were laid off his health care and life insurance benefits would continue for two years, and that he would be eligible for a "deferred vested quit" pension. Since Mr. Robertson did not consider the lay-off to be permanent because Mr. Mucho's name had been submitted to Bethlehem Steel for possible placement, he wasn't sure that a job would not be available at a later time (Tr. 173-177).

Mr. Robertson stated that he explained to Mr. Mucho that if he accepted the Mine 33 job offer he would take a salary cut, but would be at the top of the pay scale in that new position. Mr. Robertson confirmed that he also discussed the company benefits guidelines concerning permanent position eliminations and shut-downs with Mr. Mucho. Mr. Mucho then informed him that he wanted to think about it and review the job offer with his attorney. Mr. Mucho subsequently informed him on May 28, 1991, that he did not feel the offer was a legitimate offer and did not explain his reasons for rejecting it (Tr. 177-181).

Mr. Robertson stated that Mr. Mucho asked him why he was not retained at the No. 84 Mine, and Mr. Robertson informed him of his belief that it was because the mine lost money and had a poor performance. Mr. Robertson also informed Mr. Mucho that he was informed that there was "a divided loyalty situation" at the mine which prevented the new manager from pulling everyone together. Mr. Robertson stated that he also informed Mr. Mucho that he did not believe it was appropriate to keep him in "a make work" situation at the central office, but that Mr. Mucho stayed on for awhile to finish up a mine permitting project. His lay-off was effective June 7, 1991 (Tr. 183).

Mr. Robertson confirmed that Mr. Mucho filed for unemployment compensation and that the respondent's legal department initially challenged the claim and took the position that Mr. Mucho had quit his job. Mr. Robertson stated that he disagreed with this decision and took the position that Mr. Mucho's departure was a lay off. He confirmed that the company did not appear at the initial hearing on Mr. Mucho's claim and that he ultimately prevailed and was awarded his compensation (Tr. 184-185).

Mr. Robertson believed that Mr. Mucho's situation was unusual, and since he considered his lay off to be "temporary", he made the decision that Mr. Mucho was not entitled to outplacement benefits pursuant to the Company's plan. Mr. Robertson believed that Mr. Mucho would have been laid off even if he had not filed a discrimination complaint because the central office was being re-structured, the staff was being cut, and everyone who was needed in the engineering department were already in place, and that 2 of the 3 mines operated by the respondent are for sale (Tr. 185). He confirmed that Mr. Ling worked for him, but that his position was never filled when he retired, and he does not anticipate that it will be filled because the central office "for all intents and purposes will not be there" (Tr. 187).

On cross-examination, Mr. Robertson confirmed that the company's law department was aware of the manner in which he handled Mr. Mucho's separation, and that they were not happy about it (Tr. 187). Mr. Robertson stated that when Mr. Mucho



left the company he still held the title of operations manager and that is why he did not consider his situation to be a position elimination (Tr. 188). He confirmed that when Mr. Mucho was no longer functioning as chief engineer, no paperwork was forthcoming changing his title, and although this would normally be done, it was Mr. Fisher's decision not to do it, Mr. Fisher took the position that there was no position elimination because the position of manager of operations still existed (Tr. 190).

Mr. Robertson explained the company's Income Protection Plan (IPP), which is a general benefit providing for a percentage of pay for a period of 12 months, and he confirmed that Mr. Mucho did not receive those benefits because there was no position elimination, and the position of manager of operations still exists at this time (Tr. 191). Mr. Robertson did not recall discussing this matter with Mr. Mucho (Tr. 192). He also confirmed that he mentioned filling Mr. Ling's vacancy with Mr. Mucho to Mr. Fisher, but that Mr. Fisher told him he was either not going to fill it or would defer it (Tr. 194).

Mr. Robertson confirmed that when he spoke with Mr. Mucho in March, 1991, the substance of what Mr. Mucho told him was that "I'm here at the Central Office. We all know what's going on. At this point, there's no future for me here" (Tr. 195). Mr. Robertson stated that he agreed with Mr. Mucho's assessment of his situation, and while he did not believe Mr. Mucho's career was over, he had some concerns and that is why he submitted his name to Bethlehem Steel for possible placement (Tr. 196). Mr. Robertson further explained the disposition of Mr. Mucho's unemployment compensation claim and the position taken by the law department, and he could not recall telling Mr. Mucho that the company would not oppose his claim (Tr. 199-201).

Mr. Robertson believed that Mr. Mucho was transferred because the mine did not succeed under his leadership. He confirmed that during all of the time Mr. Mucho was assigned as chief engineer at Mine 84, and project engineer at the central office, he still had the title of mine manager and retained his salary. Mr. Robertson confirmed that this was unusual, and it was his opinion that this occurred because of the uncertainty of filling the mine manager's position at the No. 84 Mine and "it was still in limbo" (Tr. 210-211). He also confirmed that if Mr. Mucho's title had been changed from mine manager to something else, this would have resulted in a pay cut (Tr. 213).

#### Complainant's Rebuttal Testimony and Evidence

By agreement of the parties, the following prehearing discovery depositions were filed for my consideration.

Larry R. Willison was deposed on November 1, 1991 and he confirmed that he is a professional mining engineer and has

served as the superintendent of surface mining for the High Power Mountain Corporation, a wholly owned subsidiary of the respondent, since June 1991. Prior to this position, he served as the chief engineer of the respondent's West Virginia Division during December, 1990, and January, 1991. He stated that in late January, or early February, 1991, Mr. Metheny asked him to come to the No. 84 Mine to review and assess the planning and timing of two development projects, namely, the acquisition of additional coal reserves for additional longwall panels in the northern area of the mine, and the possible renovation or parallel entries for the 33 Mains area. Also included in his review were matters concerning haulage, ventilation, and all of the support activities incident to any future mining.

Mr. Willison stated that he was at the mine intermitently from February 4, 1991, to February 21, 1991, and that he met with the engineering personnel (Bookshar and Cooley), and later met with Mr. Mucho and traveled with him underground as part of his evaluation of the projects. Mr. Willison could not recall whether Mr. Mucho informed him about any projected dates for access to the coal reserves through the 33 Mains area, but he confirmed that he was given a bar chart prepared by Mr. Mucho's engineering group concerning the timing for these projects. Based on the planned volume of work, Mr. Willison assumed that it would take two months to pump the water from the 33 Mains area, and he explained the projected manpower needs and work which needed to be accomplished (Tr. 1-22).

Mr. Willison stated that he presented his initial mine assessment report to a management group at the mine central office on February 5, 1991, and he believed that Mr. Fisher, Mr. Metheny, and Mr. Hasbrouck were present, but Mr. Jones was not (Tr. 26). Mr. Willison explained the briefing that he gave, and he advised management that he did not have much time to review the projected construction related costs of \$3.7 million, and that he believed that from a coal development and marketing standpoint, the projected costs of \$5.2 million would be higher because of the higher sulfur content in the parallel mains. He further advised management that the 33 Mains project work items which needed to be done would probably take until the end of 1991 to complete, and he based this conclusion on the information given to him by Mr. Mucho's engineering group and others (Tr. 38).

Mr. Willison stated that he assigned several specific work items to Mr. Mucho, Ms. Cooley, and Mr. Bookshar in connection with his plan evaluations, and Mr. Mucho was to prepare a projection for the E left section which provided for haulage and ventilation, including some redevelopment of the 53P area in connection with enhancing the returns and the ventilation (Tr. 43).

Mr. Willison stated that during his final evaluation week at the No. 84 Mine he had some verbal discussions with Mr. Metheny concerning the development of the mine, and he informed Mr. Metheny of his belief that the status of the pumping system had not progressed as he believed was necessary (Tr. 47). Mr. Willison stated that Mr. Metheny informed him that the water pumping operation was a high priority item, and that he would continue to emphasize this with Mr. Jones (Tr. 47). Mr. Willison was of the view that not enough attention was being applied to that project, and he confirmed that he advised Mr. Metheny of this (Tr. 48).

Mr. Willison stated that he knew Mr. Mucho before he began his evaluation of the No. 84 Mine in February, 1991, but that he had limited contact with him during their careers. In response to an opinion about Mr. Mucho's engineering work, Mr. Willison responded as follows at (Tr. 52-53):

Q. To a certain extent, when you came up to mine 84 in February, you got an opportunity to take a look at some of the work that he and his group had done, didn't you?

A. Yes.

Q. What did you think about that work? Was it good engineering work?

A. I would say generally, yes. I think the thing that concerned me was this planning and the timing that had been worked out. And, as I say I don't know what constraints may have been put on the timing process. But the plan that I was presented when I first started out I said during our conversation that I didn't feel to be realistic. That's maybe the only negative I would say to the situation.

Q. Do you think that Tom was a good engineer?

A. I really can't answer that. I've been around him in more of a management role than an engineering role.

Mr. Willison was subsequently deposed again by telephone on December 20, 1991, and he explained and discussed the materials that he used during his Mine 84 briefing to mine management and the J.T. Boyd Company (Tr. 1-20). He also identified and explained certain notes given to him by Mr. Metheny concerning the 33 Mains project, a work assignment that he had given to Mr. Mucho, and other documents incident to Mr. Metheny's request for an evaluation and assessment of the previously identified mine projects (Tr. 21-25). Mr. Willison also explained his completion time estimates for the projects (Tr. 26-29).

Theodore J. Brisky, was deposed on November 21, 1991, and he testified that he was previously employed by the respondent for 36 and a half years, and that he served as the senior manager of operations for all of its mines from November 1987, until he retired on February 1, 1991. He confirmed that he was senior manager of operations in August, 1990, and that Mr. Mucho worked for him at that time. He considered Mr. Mucho to be "a very strong communicator, a very knowledgeable engineer, and very professional in doing his responsibilities" (Tr. 10).

Mr. Brisky recalled that during the time frame of August 30, 1990, the 33 Mains project was discussed at a meeting with Mr. Fisher, Mr. Mucho, and Ms. Cooley, and that Mr. Fisher communicated his view that using the 33 mains area as a means of access to the northwest reserves might make the mine more attractive to investors. The consensus was to study the feasibility of going through the 33 mains area, and this phase was assigned to Mr. Mucho and his engineering staff. Mr. Brisky recalled that Mr. Mucho raised some questions at that time about adverse roof conditions, a large volume of water, and the need for a ventilation fan. Mr. Brisky confirmed that Mr. Mucho took the position that the project was "doable", but that the timing and water pumping needed to be addressed by his study (Tr. 15). Mr. Brisky identified a copy of a presentation made by Mr. Mucho at a meeting on October 5, 1990, and although he could not specifically recall whether Mr. Fisher and Mr. Metheny were present, he believed that all "key players", including Mr. Fisher and Mr. Metheny would have been present (Tr. 18).

Mr. Brisky stated that the 33 Mains project involved "a tremendous amount of work", and although he couldn't specifically recall what Mr. Mucho may have said at the October 5, meeting, he assumed that he covered the items reflected in the agenda which he had prepared (Tr. 18-20). Mr. Brisky could not recall whether Mr. Mucho covered the projected costs for the project, did not recall any numbers, and he assumed that costs would have been addressed in another report (Tr. 21-23). He confirmed that he had often heard Mr. Fisher remark that he (Fisher) was not a mining person and that he did not understand the technical aspects of mining (Tr. 21).

Mr. Brisky stated that during the fall of 1990, and prior to that time, several options were under study, and the alternatives ranged from a complete shut down of Mine 33 to the elimination of one or more longwalls. Manpower was reduced from 1,800 to 450, and "there was almost a year where we were changing our mind what we were going to do with 33; every two weeks or a month" (Tr. 25). He confirmed that keeping the mine open for a year or three years, or reducing it to one longwall were options available to Mr. Fisher (Tr. 26-27).

Mr. Brisky recalled a management meeting during November/December 1990, when Mr. Mucho discussed some roof condition problems in connection with the 6-B longwall area. The problems came to light during a geological study conducted by Mr. Doug Rich, who agreed that the problem was not foreseeable without the study he conducted, and who pointed out that mining had taken place for 40 to 60 years without the specific roof problem in question. Mr. Brisky further recalled a telephone conversation when Mr. Mucho told him that Mr. Fisher believed that Mr. Mucho was responsible for the longwall problems and felt that they were conditions that mine management should have known about, and that Mr. Mucho "should have known better" (Tr. 27-30).

Mr. Brisky did not believe that Mr. Mucho was responsible for the longwall problems, and he stated that "I do not put near the weight of a north-south direction that other people have in the failure of this face". Mr. Brisky also believed that the area could have been mined through in a north-south direction if certain requested equipment replacements sought two or three years earlier had been made (Tr. 31).

Mr. Brisky stated that he and Mr. Fisher had a strong difference of opinion about Mr. Mucho's capabilities. Mr. Fisher believed that Mr. Mucho "was part of the old regime of mining and parochial in his thinking, . . . and was not willing to change and adjust to new management styles as rapidly as Mr. Fisher wanted" (Tr. 32). Mr. Brisky stated that he did not share in this opinion of Mr. Mucho, and that in 1989 he submitted performance appraisals on all of his department heads, managers, and chief engineers, and Mr. Mucho was among three people who he ranked "very high potential performers for Bethenergy" (Tr. 33). He stated that he sent his appraisal reports to Mr. Fisher. He also indicated that he had been under extreme pressure from Mr. Fisher about Mine 84 from October, 1987 until his retirement, and that during his discussions with Mr. Fisher he always advised Mr. Fisher of his belief that the management of the mine "was the right choice" (Tr. 34).

Mr. Brisky stated that a peer evaluation of the 84 Mine was conducted during November/December, 1990, and that Mr. Mucho worked diligently to fulfill each of the recommendations. He further believed that Mr. Mucho did a good job as manager to maintain a safe mining operation and that he was concerned about safety (Tr. 34-35). Mr. Brisky could not recall reviewing any specific part of any evaluation report prepared by the J.T. Boyd Company in March, 1990, with respect to the 84 Mine (Tr. 35-37). Mr. Brisky confirmed that management changes were made at the mine during December 7, 1990, without his knowledge, and that a meeting was held in his absence by Mr. Fisher where the financial status of the mine may have been discussed (Tr. 37).

Ms. Cooley was deposed on November 18, 1991, and her testimony is essentially consistent with her hearing testimony. With regard to her conversation with Mr. Hayden when Mr. Mucho was transferred to the central office, Ms. Cooley stated that she could not recall the date of the conversation but was sure that it was the day that Mr. Mucho left the mine to go to the central office. She described the "general gist" of the conversation as follows at (Tr. 25-26):

A. That he said that Tom -- that there had been an incident, I'll call it an incident, earlier about an air change with the 7A, I guess, air change, about the two sections cutting into each other.

Q. To 53P?

A. Yes. And Tom had concerns about how some people wanted to do it. And there had been I guess a scene. I wasn't in the room, so I don't know. And my understanding was that Mike had been very mad about that, and had wanted to fire Tom because of that. And Clarence had said to him well, you know, why don't you think about it over the weekend before you do anything. So then when Mike came back Monday, he said to Clarence yeah, you're right, he's a valuable person, that we should -- the company should be able to utilize him somewhere, but he didn't really want him there at Mine 84. And there was something discussed about that there had been things that Tom hadn't passed on to Mike that he should have. He didn't go into specifics on that. And also he talked about that Mike felt that a ship couldn't have two masters. And whether Tom was trying to or not, as long as he was there, people still tended to go to Tom for decisions and things like that, because he'd been in charge for so long, it was just habit. And Mike felt that he would never be able to be in charge of the place as long as Tom was still there.

#### 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.

#### Mr. Mucho's Protected Activity

It is clear that Mr. Mucho had a right to make a safety complaint or to bring to the attention of management safety

matters which he believed presented a potential hazard to miners. Equally clear is the fact that any such safety complaint is a protected activity which may not be the motivation by mine management for any adverse personnel actions against Mr. Mucho, See: 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); Baker v. Interior Board of Mine Operations Appeals, 595 F.2d 746 (D.C. Cir. 1978); Chacon, supra. The complaint must be made with reasonable promptness and in good faith, and be communicated to mine management in order to afford management with a reasonable opportunity to address it. See: MSHA ex rel. Michael J. Dunmore 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); Secretary ex rel. Paul Sedgmer et al., v. Consolidation Coal Company, 8 FMSHRC 303 (March 1986); Miller v. FMSHRC, 687 F.2d 194 (7th Cir. 1982); Simpson v. Kenta Energy, Inc., 8 FMSHRC 1034, 1038-40 (July 1986); Dillard Smith v. Reco, Inc., 9 FMSHRC 992 (June 1987).

In addition to his protected right to make safety complaints, Mr. Mucho also had a protected right to file a discrimination complaint without fear of reprisal or adverse action. In the instant proceedings, Mr. Mucho contends that his transfer on or about February 8, 1991, from his position of chief engineer at the No. 84 mine to a staff engineer's position at the mine central office was an adverse personnel action prompted by a safety complaint which he made to mine management on or about January 24, 1991. He takes the position that this complaint was a protected activity pursuant to section 105(c) of the Act, and that management acted illegally when it transferred him because of the complaint. Mr. Mucho further contends that his subsequent layoff from his staff engineer's position at the central office on or about June 7, 1991, was likewise discriminatory and retaliatory because it was prompted by his filing of a discrimination complaint challenging his transfer.

In Secretary ex rel Jenkins v. Hecla-Day Minez Corp., 6 FMSHRC 1842, 1947-48 (August 1984), the Commission held that an adverse action is an act of commission or omission by the operator subjecting the affected miner to discipline or a detriment in his employment relationship, and that any determination as to whether an adverse action was taken must be made on a case-by-case basis. The Commission followed this approach in Ronny Boswell v. National Cement Company, 14 FMSHRC 253 (February 1992), when it concluded that a miner who was transferred to a lower paying hourly job suffered an adverse action even though he earned more annually in his new job than he would have in his previous one.



On the facts of this case, I conclude and find that Mr. Mucho's transfer from the position of head of the engineering department at Mine No. 84 to a staff engineer's position at the mine central office one mile away was an adverse personnel action. Although it is true that Mr. Mucho retained his salary and other benefits and still had the title of mine manager, it is clear to me that his transfer was in effect a demotion to a lower engineer's position, with no supervisory authority, and with no management responsibilities. I further conclude and find that Mr. Mucho's lay off was also an adverse personnel action, and was for all intents and purposes a termination from his job.

With the exception of the cut-through event of January 24, 1991, there is no evidence that Mr. Mucho ever made any prior safety complaints to mine management, or to any state or Federal inspector or mine enforcement agency. There is also no evidence that Mr. Mucho ever made any safety complaints, or raised any safety issues, with any of the three management officials who he claims were responsible for his transfer and subsequent lay off (Fisher, Metheny, and Jones).

The evidence establishes that in the course of a discussion at the beginning of the morning shift on January 24, 1991, at the mine map in the mine foreman's office, Mr. Mucho explained his ventilation plan to underground mine foreman Duvall, underground mine superintendent Black, and other mine management personnel. Mr. Mucho was at that time serving as the head of the engineering department, and the ventilation plan in question included the use of a double row of steel stoppings to maintain the ventilation at acceptable levels during the impending cut-through linking the No. 7A and No. 53P panels in anticipation of placing the longwall in production.

The evidence further establishes that during the discussion at the mine map, one or more of the participants other than Mr. Mucho either suggested or brought up the question of using alternative methods of maintaining the ventilation during the cut-through. These alternatives included the use of canvas ventilation checks, no curtains at all, and air regulators, and Mr. Mucho became upset and somewhat agitated by the suggestion that these alternate ventilation controls might be used in lieu of his suggested stoppings plan. I find credible Mr. Mucho's testimony that he informed the group who were present of his view that the use of curtains would result in an air change and that he tried to convince them to adopt and follow the stoppings plan that he had developed. I also find credible Mr. Mucho's belief that the use of any of the alternative ventilation devices other than stoppings would result in an air change and a potentially dangerous situation and I conclude and find that Mr. Mucho's safety concerns were reasonable and good faith conclusions based on his ventilation expertise and the facts then known to him.

Although Mr. Mucho conceded that he may not have clearly and directly made his safety concerns known during the initial discussion at the mine map, Mr. Duvall confirmed that Mr. Mucho commented about air changes and lack of control over the air pressure if stoppings were not used, and Mr. Duvall agreed that using check curtains would be unsafe. Further, Mr. Black confirmed that Mr. Mucho stated that doing anything other than using his stopping plan would create a dangerous situation, and he confirmed that he understood what Mr. Mucho meant by this statement.

Mr. Mucho's credible testimony, which is essentially corroborated and unrebutted by Mr. Duvall, further establishes that after the mine map discussion, Mr. Mucho went to Mr. Duvall's office and directly and unequivocally communicated to him his safety concerns about ignoring his stoppings ventilation plan and using any of the other alternative methods which were the topic of the group discussion. This communication by Mr. Mucho included a veiled warning to Mr. Duvall that he would be held accountable as the mine foreman for any ventilation breakdown and resulting hazardous conditions, including possible violations of the law.

I conclude and find that Mr. Mucho's discussions at the mine map concerning the safe cut-through procedures and the need to maintain proper ventilation, and his subsequent conversation with mine foreman Duvall in his office were safety related and in the nature of safety complaints and communications based on Mr. Mucho's reasonable and good faith belief that the failure to follow his ventilation stoppings plan would likely result in serious ventilation problems and potential safety hazards. Accordingly, I conclude and find that the articulation and communication of these safety concerns by Mr. Mucho was protected activity, and the respondent would be prohibited from discriminating against Mr. Mucho because of that activity. I further conclude and find that the filing of his discrimination complaint after his transfer to the central office was also protected activity, and the respondent would likewise be prohibited from discriminating against Mr. Mucho for filing the complaint.

The evidence establishes that the respondent promptly responded to Mr. Mucho's safety concerns by immediately constructing the ventilation stoppings in question, and Mr. Mucho himself conceded that he knew as soon as he spoke with Mr. Duvall in private that his recommended ventilation plan for the cut-through would be followed.

#### Mr. Mucho's Transfer of February 8, 1991

As the complainant in this case, Mr. Mucho has the burden of establishing by a preponderance of all of the credible evidence

that his protected safety concerns during the mine map discussions and his protected safety complaint to mine foreman Duvall on January 24, 1991, was known to those management officials who he claims made the decision to transfer him from the head engineer's position at Mine No. 84 to a staff engineer's position at the central office, and that the decision to transfer him was in part based on his complaint. In short, Mr. Mucho must establish a nexus between his safety complaint and the adverse personnel action (transfer). See: Sandra Cantrell v. Gilbert Industrial, 4 FMSHRC 1164 (June 1982); Alvin Ritchie v. Kodak Mining Company, Inc., 9 FMSHRC 744 (April 1987); Eddie D. Johnson v. Scotts Branch Mine, 9 FMSHRC 1851 (November 1987); Robert L. Tarvin v. Jim Walter Resources, Inc., 10 FMSHRC 305 (March 1988); Connie Mullins v. Clinchfield Coal Company 11 FMSHRC 1948 (October 1989).

As noted earlier, in the absence of any direct evidence that management's decision to transfer Mr. Mucho was motivated in part by his safety complaint, a discriminatory motive may be determined by circumstantial evidence showing that management knew he had made the complaint and were hostile towards him because of the complaint, the coincidence in time between the complaint and transfer, and any disparate treatment accorded Mr. Mucho. Reasonable inferences of motivation may be drawn from such circumstantial evidence, Secretary ex rel. Chacon v. Phelps Dodge Corp., *supra*. Sammons v. Mine Services Co., *supra*. However, it has been held that an employee's "mere conjecture that the employer's explanation is a pretext for intentional discrimination is an insufficient basis for denial of summary judgment". Branson v. Price River Coal Co., 853 F.2d 768, 46 FEP Cases (BNA) 1003 (10th Cir. 1988). There must be evidence of discriminatory intent or evidence from which a reasonable inference of discriminatory intent can be drawn.

The critical question in this case is not whether the respondent treated Mr. Mucho in a reasonably fair manner when he was transferred, but whether or not that transfer was made in part because of his engaging in a protected activity. As appropriately noted by Judge Broderick in Jimmy Sizemore and David Rife v. Dollar Branch Coal Company, 5 FMSHRC 1251, 1255 (July 1983), "...the Commission has no responsibility to assure fairness in employment relations or to determine whether an employee was discharged for cause, but only to protect miners exercising their rights under the Act". And, as stated by the Commission in Bradley v. Belva Coal Co., 4 FMSHRC 982 (June 1982), "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. Mucho does not allege that his removal as manager of the No. 84 Mine by Mr. Fisher on December 7, 1990, was discriminatory.

Mr. Fisher's credible testimony establishes that his decision to make a management change and to place Mr. Metheny and Mr. Jones in charge of the mine was based on his belief that the mine could be operated more efficiently by a change in management. In the absence of any evidence to the contrary, I conclude and find that as president of the company, it was well within Mr. Fisher's managerial discretion to remove Mr. Mucho as mine manager. As a matter of fact, Mr. Mucho agreed that the mine was a struggling and borderline operation that was in need of more discipline, and he confirmed that it was his desire to stay on as head of the engineering department because that job had less pressure and offered him better job security in the event the mine were sold (Tr. 28-30; 39-40).

The thrust of Mr. Mucho's complaint in his belief that Mr. Jones found out about the cut-through discussion of January 24, 1991, and threatened to fire him the next day over that incident. Although Mr. Jones did not follow through with his alleged threat to fire Mr. Mucho, Mr. Mucho nonetheless suggests that Mr. Jones perceived his safety concern as an interference with Mr. Jones' authority to manage the mine or an interference with the longwall production schedule, and decided to have him transferred. Mr. Mucho further asserts that Mr. Metheny, at the request of Mr. Jones, and with the approval of Mr. Fisher, made the decision to transfer him, and that all three of these management officials conspired to transfer him because of the cut-through incident of January 24, 1991.

The evidence establishes that the decision to transfer Mr. Mucho to the central office was made by Mr. Metheny and not by Mr. Jones. Mr. Fisher accepted Mr. Metheny's judgement that Mr. Mucho should be transferred and he concurred in the decision. Mr. Metheny and Mr. Fisher denied any knowledge of the cut-through incident prior to the transfer, and they denied ever discussing the matter with Mr. Jones prior to the transfer. They testified that they first learned about the cut-through discussion after Mr. Mucho filed his complaint. Having viewed Mr. Metheny and Mr. Fisher in the course of the hearing, I find them to be straightforward and credible witnesses, and I believe that they were unaware of Mr. Mucho's cut-through safety concerns or his conversation with Mr. Duvall prior to Mr. Mucho's transfer. Accordingly, I find no credible evidentiary support for Mr. Mucho's suggestion that Mr. Metheny's decision to transfer him, and Mr. Fisher's concurrence in that decision, were prompted or motivated in any part by the safety concerns raised by Mr. Mucho during the cut-through discussion at the mine map or during his subsequent conversation with foreman Duvall.

Mr. Mucho's conclusion that Mr. Fisher and Mr. Metheny were aware of the cut-through discussions prior to his transfer is based in part on Mr. Mucho's speculative belief that such a

transfer could not have been accomplished without a discussion among higher management officials such as Mr. Fisher and operations manager Brisky (Tr. 111). However, Mr. Brisky, who was retired at the time he was deposed and had nothing to lose by testimony favorable to Mr. Mucho, made no mention of any such discussion that he may have participated in, and it would appear from his testimony that he was not even consulted about Mr. Metheny's decision to transfer Mr. Mucho. Mr. Fisher and Mr. Metheny confirmed that they discussed Mr. Mucho's transfer prior to Mr. Metheny's decision of February 8, 1991, but there is no evidence or any supportable inferences that the discussion included the cut-through incident of January 24, 1991.

I find no credible evidence of any animus on the part of Mr. Metheny or Mr. Fisher towards Mr. Mucho. Indeed, at the time that Mr. Fisher decided to relieve Mr. Mucho of his mine manager's responsibilities, rather than firing him or transferring him at that time, Mr. Fisher decided to keep Mr. Mucho at the mine at the urging of Mr. Metheny who believed that Mr. Mucho could make a meaningful contribution in an engineering capacity. Mr. Metheny and Mr. Mucho confirmed that after Mr. Mucho was transferred, Mr. Metheny visited and spoke with Mr. Mucho at his new job in the central office on two or three occasions, and I find no evidence of any ill-will on the part of Mr. Metheny towards Mr. Mucho, and Mr. Mucho has not asserted, nor has he established, that Mr. Metheny was angry with him or exhibited any hostility towards him. As for Mr. Fisher, although he expressed some personal reservations about Mr. Mucho's management skills, I find no evidence of any hostility or ill-will on his part towards Mr. Mucho. Indeed, even after Mr. Mucho filed his discrimination and EEOC age discrimination complaints, Mr. Fisher met with him to discuss his job situation and there is no evidence or suggestion that this meeting was other than cordial, nor is there any evidence that Mr. Fisher ever exhibited any hostility or anger towards Mr. Mucho during their employment relationship.

Mr. Mucho confirmed that when he served as mine manager, and in order to address certain management and supervisory problems, he too made decisions affecting mine personnel, including removals and reassignments (Tr. 175-181). He also confirmed that he participated in management discussions and decisions which included the monitoring of the performance of foreman Durko, which subsequently resulted in his cut in pay and subsequent retirement, and the lay off of foreman Error (Tr. 221-232). Further, Mr. Mucho candidly admitted that the appointment of Mr. Jones by Mr. Fisher to the No. 84 Mine was in response to management problems that Mr. Mucho himself had been reporting for a couple of years (Tr. 175).

The record in this case reflects that Mr. Mucho was not the only managerial employee affected by Mr. Fisher's decision to install a new management team at the No. 84 Mine. Mr. Metheny

confirmed that during the period from December, 1990, through the first part of February, 1991, he brought in a superintendent, a shift foreman, and a longwall foreman from another mine (Tr. 96). Mr. Bookshar, who previously headed the engineering department when Mr. Mucho was mine manager, did not return to that position after Mr. Mucho was transferred, and Ms. Cooley was placed in charge of engineering (Tr. 119).

Mr. Fisher relieved Mr. Brisky from his position of senior manager of mine operations at the same time that Mr. Mucho was relieved of his mine manager's duties, and Mr. Brisky subsequently retired on February 1, 1991 (Tr. 10; 240). Mr. Black, who testified that he felt pressured by Mr. Jones, and that Mr. Jones threatened to fire him on many occasions, is still employed at the mine as the senior management person and superintendent of underground operations. Mr. Jones has since left his employment and retired after a disagreement with Mr. Fisher about another position and pay. Mr. Mucho's personal log contains entries for February 13 and 22, 1991, March 12, and July 29, 1991, confirming several additional managerial lay offs, a job elimination, and additional reassignments and changes among foremen and other managers.

Mr. Mucho characterized Mr. Jones as a very hard worker who worked long hours and who was well informed as to what needed to be accomplished at the mine when he and Mr. Metheny assumed their managerial roles (Tr. 24, 45-46). Mr. Jones conceded that his management style was "very aggressive and a lot of discipline", and the respondent's counsel conceded that Mr. Jones' management style included threatening people with discharge (Tr. 26, 28-29). The fact is, however, that Mr. Jones never followed through with his January 25, 1991, statement to Mr. Hayden that he should fire Mr. Mucho, and he decided to keep Mr. Mucho on because he believed he could make a contribution. Two weeks passed before Mr. Metheny made the decision to transfer Mr. Mucho and he advised Mr. Jones of his decision by telephone.

Mr. Mucho conceded that his conclusion that Mr. Jones found out about the cut-through discussion was based on his perception of a change in Mr. Jones' "actions and behavior" towards him which made him "suspicious" (Tr. 107). However, I take note of Mr. Mucho's testimony that prior to his transfer on February 8, 1991, he and Mr. Jones had a relaxed congenial relationship, and that on the very day of the cut-through discussion of January 24, 1991, he and Mr. Jones had a congenial meeting and Mr. Jones never mentioned that incident (Tr. 48-49; 168). I also take note of Mr. Jones's testimony that prior to the cut-through matter, his opinion of Mr. Mucho changed, and he removed Mr. Mucho from the management "chain of command" of people who would fill for him in his absence (Tr. 17).

Mr. Jones testified that he harbored no animosity towards Mr. Mucho. Mr. Black, who also experienced a feeling of aloofness on the part of Mr. Jones, testified that Mr. Metheny told him that Mr. Jones felt inferior and intimidated by Mr. Black's knowledge. Mr. Black characterized the relationship between Mr. Mucho and Mr. Jones as "businesslike and not overly friendly" (Tr. 74), and although Mr. Black stated that Mr. Jones once told him that he did not like Mr. Mucho, on further questioning, Mr. Black conceded that he could not recall whether Mr. Jones actually made such a statement of whether he deduced it from their conversation. Mr. Black also testified that during the time that Mr. Jones was in charge of the mine and Mr. Mucho was still there, the salaried personnel in general were not speaking to each other and it was a tense period of apprehension and mixed loyalties.

Mr. Black testified to a conversation he overheard on January 18, 1991, while underground with Mr. Jones and several union and mine officials. He stated that Mr. Jones made a statement that he would fire foremen if it was necessary and that "he almost fired Tom Mucho last Friday" (Tr. 31). Mr. Black recorded this incident in his personal log (Exhibit C-93), but he could not further explain the statement attributed to Mr. Jones and he did not know whether it was true and simply recorded what he heard. In the absence of any further clarification and explanation, I cannot conclude that this purported isolated statement by Mr. Black sufficiently establishes animus on the part of Mr. Jones towards Mr. Mucho. The fact is that Mr. Jones did not fire Mr. Mucho, and three weeks passed before Mr. Mucho was transferred by Mr. Metheny.

I find no credible evidence that Mr. Jones ever expressed any animosity towards Mr. Mucho directly, or that he openly expressed his anger or showed any dislike of Mr. Mucho in his presence. Mr. Jones does not deny that he was upset with Mr. Mucho when he spoke with Mr. Hayden on January 25, 1991, nor does he deny that he made the statement that he should fire Mr. Mucho. However, as previously noted, Mr. Jones did not follow through with his threat to fire Mr. Mucho, and he asserted that his displeasure with Mr. Mucho stemmed from his frustration with the engineering department, his belief that he was not being accorded any respect and was being given the runaround, and his feeling of pressures from Mr. Metheny and Mr. Fisher to complete the 33 Mains project.

Mr. Jones, Mr. Metheny, and Mr. Fisher all denied any connection between Mr. Mucho's cut-through safety complaint and his transfer of February 8, 1991. Three additional credible witnesses testified to other reasons for the transfer. Superintendent Hasbrouck testified that Mr. Fisher told him that Mr. Mucho was transferred because his continued presence at the No. 84 Mine was "awkward and uncomfortable", and Mr. Hasbrouck

interpreted this to mean that Mr. Mucho, as the former mine manager, clashed with the newly appointed management. Mr. Mucho's personal journal has an entry for February 11, 1991, 3 days after his transfer, which reflects a statement by Mr. Hasbrouck that Mr. Mucho was transferred because his presence at the mine was awkward for both management and Mr. Mucho. Assistant Mine Inspector Ross testified that Mr. Hayden told him that Mr. Mucho was transferred because his presence at the mine as the former manager was disruptive because people continued to go to him with their problems rather than going to the new management.

Human Resources Manager Robertson testified that he believed Mr. Mucho was transferred because the mine lost money and had a poor performance record under Mr. Mucho's management, and that after new management came in, there was a "divided loyalty situation" at the mine. Mr. Robertson's testimony is consistent with an entry in Mr. Mucho's journal on March 1, 1991, noting a statement by Mr. Robertson that he told Mr. Fisher that Mr. Mucho was "caught up in situation and that what happened with the longwall would have happened anyway". The notation also reflects a statement by Mr. Robertson that the performance of the No. 84 Mine "was the worst in its history" and that Mr. Mucho just happened to be manager.

The focal point of Mr. Mucho's suspicion that Mr. Jones learned about the cut-through matter prior to his transfer is the testimony of Ms. Cooley. In her pretrial deposition, Ms. Cooley testified to a conversation that she had with Mr. Hayden on or about the day that Mr. Mucho was cleaning out his office at the mine to move to the central office. Ms. Cooley could not recall Mr. Hayden's exact words. She testified that the "general gist" of the conversation was Mr. Hayden's reference to an earlier "incident" about an air change when sections 7A and 53P were cutting into each other, and Mr. Mucho's "concerns about how some people wanted to do it". Ms. Cooley "guessed" that there had been "a scene" and that Mr. Jones was "very mad about that, and had wanted to fire Tom because of that". Ms. Cooley further stated that Mr. Hayden mentioned that Mr. Mucho had not passed on certain unspecified information to Mr. Jones, Mr. Jones' feeling that "a ship couldn't have two masters", his belief that people continued to seek out Mr. Mucho for decisions, and Mr. Jones' feeling that he would never be able to be in charge of the mine while Mr. Mucho was still there.

At trial, Ms. Cooley confirmed that she made no notes of her conversation with Mr. Hayden. She reiterated her previous deposition testimony and confirmed that Mr. Hayden told her that Mr. Jones had informed him that Mr. Mucho was transferred from the mine because "a ship could not have two masters" and that people still went to Mr. Mucho for decisions and advice because he had previously been in charge for so long.



Mr. Bookshar testified that after Mr. Mucho's transfer, Ms. Cooley told him about her conversation with Mr. Hayden and informed him that Mr. Hayden told her that Mr. Jones was mad about the cut-through incident and wanted to fire Mr. Mucho at that time over that matter. Mr. Bookshar confirmed that Ms. Cooley also told him about the comment that "a ship cannot have two masters", but he could not recall that Ms. Cooley said anything about people continuing to rely on Mr. Mucho, or Mr. Jones' feeling that he would never be in charge of the mine as long as Mr. Mucho was still there. There is no evidence that Mr. Bookshar ever spoke with Mr. Hayden about the cut-through matter, and whatever he knew about the matter he learned second-hand from Ms. Cooley. Having viewed Mr. Bookshar during his testimony, I detected that he was not too enchanted with Mr. Jones, and given the fact that he was not retained as head of the engineering department, and characterized himself as a very good friend of Mr. Mucho, I am not convinced that his testimony was totally unbiased.

Mr. Mucho confirmed that he began keeping a detailed log or journal on December 7, 1990, the day he was removed as mine manager, and that he did so out of concern for his employment situation. He believed that it was in his best interest to keep a log because he knew about Mr. Jones' management style and reputation as "a tree shaker". However, I take note of Mr. Mucho's admission that he made no contemporaneous journal entry about the cut-through incident and his disagreement and objections about proceeding with the cut-through without following his stopping plan, and that he added a journal entry covering that event at a much later time (Tr. 169; Tr. R-20). Given Mr. Mucho's obvious concern for his continued employment situation after his removal as mine manager, and his decision to keep a log for his own protection, I find it strange that Mr. Mucho did not deem it particularly important to make the cut-through journal entry on January 24, 1991, when the event occurred.

Mr. Mucho's journal contains the following notation for February 11, 1991:

Per BB.Fran in mtg. w/MJ on 2/8/91. M.J. indicated that there was too much allegiance to T.P.M. Can't have 2 bosses (Masters) and that's why TPM was moved to C.O. According to MJ. there were a couple of incidents (of disloyalty) that made him mad.

Mr. Mucho's journal contains the following entry for February 15, 1991:

Talked to Fran C. . . .Said Bill B. is "spastic" over events. Said he had meeting w/MJ this AM about this. Asked her about what BB said MJ told her about why I

was transferred. She said that CH was one that told her about me being moved due to loyalties, people coming to me for things, etc. Said she didn't remember MJ saying that but CH (who must have gotten from MJ) talked to RB & WR.

An additional journal entry by Mr. Mucho on February 15, 1991, is a comment concerning his belief that management's putting his brother "on notice" appeared to be in retaliation against Mr. Mucho and his "loyalists".

My interpretation of Mr. Mucho's journal entries for February 11, and 15, 1991, is that within a week after his transfer of February 8, 1991, during conversations with Ms. Cooley, Mr. Mucho was told that the reasons he was transferred were Mr. Jones' belief that there was too much loyalty to Mr. Mucho and that the mine cannot have two bosses. There is absolutely no mention of the cut-through event of January 24, 1991, in these journal entries, nor is there any statement or hint that the cut-through incident had anything to do with Mr. Mucho's transfer. However, subsequent journal entries on March 10, and 11, 1991, more than one month after the transfer, contains a notation that Mr. Bookshar spoke with Mr. Mucho on those days and advised him that he "had heard" that the transfer "revolved around" the cut-through incident, and that Mr. Jones found out about it and was going to fire Mr. Mucho on the spot over that incident, but was convinced by Mr. Hayden to think about it over the weekend. A second notation reflects a statement by Mr. Bookshar expressing his concern that he and Ms. Cooley were the "only ones who knew info about MJ going to fire me over air incident".

Ms. Cooley testified that she spoke with Mr. Hayden on or shortly after February 8, 1991, the day Mr. Mucho was transferred, and that the general gist of the conversation was that Mr. Jones was upset and mad at Mr. Mucho because of the cut-through incident and wanted to fire him over that matter. Mr. Bookshar's testimony reflects that he learned about Ms. Cooley's conversation with Mr. Hayden from Ms. Cooley during a conversation with her after Mr. Mucho's transfer. Yet, nowhere in Mr. Mucho's journal entries of February 11, and 15, 1991, is there any mention of Mr. Hayden's purported statements to Ms. Cooley that Mr. Jones had threatened to fire Mr. Mucho over the cut-through incident. It seems reasonable to me that if Mr. Hayden had in fact made the statements attributed to him by Ms. Cooley, she would have communicated this to Mr. Mucho during their conversation of February 15, 1991, when he asked her about her knowledge of any reasons for his transfer. Her apparent failure to do so at that time raises a question in my mind about Ms. Cooley's credibility and the reliability and probative value of her testimony concerning her purported cut-through conversation with Mr. Hayden.

Mr. Mucho confirmed that he spoke with Ms. Cooley on February 15, 1991, and that she did not mention the cut-through incident. Mr. Mucho explained that he considered the statements "divided loyalties", "a ship not being able to have two masters", etc., which were communicated to him by Ms. Cooley as reasons for his transfer, to be "code words", and he probed no further and asked Ms. Cooley no further questions because he did not want to put her "on the spot" (Tr. 187-188). Mr. Mucho also confirmed that he never spoke to Mr. Hayden about his conversation with Ms. Cooley, and he explained that he did not feel "close enough" to Mr. Hayden to speak with him about his knowledge of the reasons for his transfer and the statement attributed to him by Ms. Cooley (Tr. 239).

Mr. Mucho further confirmed that when he spoke with human resources manager Robertson on March 1, 1991, less than a month after his transfer, he acknowledged to Mr. Robertson that it was obvious that the respondent had no plans for him and that he (Mucho) would be leaving and would be amenable to talking about a severance arrangement (Tr. 117-118). Under these circumstances, and considering the fact that Mr. Mucho had kept a rather detailed journal to protect his employment interests, had received information from Ms. Cooley and Mr. Bookshar which suggested some ulterior motive for his transfer, and Mr. Mucho's recognition that his continuous employment was on tenuous grounds, I find it difficult to understand why he abandoned any further efforts to pursue the cut-through matter with Ms. Cooley and Mr. Hayden. His failure to do so, coupled with his admission that he included a reference to the cut-through incident in his journal well after the event as an after-thought, raises a serious credibility doubt in my mind concerning Mr. Mucho's after-the-fact suspicion and speculation that Mr. Jones found out about the cut-through incident and somehow convinced Mr. Metheny and Mr. Fisher to transfer Mr. Mucho because of that incident.

On the basis of the foregoing findings and conclusions, and after careful scrutiny of all of the testimony and evidence in this case, I find no credible evidence to support a conclusion that Mr. Jones was aware of Mr. Mucho's safety concern or complaint concerning the cut-through, and that as a result of that knowledge, he somehow convinced Mr. Metheny or Mr. Fisher to transfer Mr. Mucho to the central office because of that incident. Even if Mr. Jones had knowledge of the cut-through incident, for the reasons which follow, I cannot conclude that this had anything to do with the decision to transfer Mr. Mucho to the central office. I conclude that Mr. Mucho would have been transferred in any event.

As noted earlier, the decision to transfer Mr. Mucho was made by Mr. Metheny, with Mr. Fisher's blessing. I find no credible evidence to establish that Mr. Jones was consulted before the decision was made by Mr. Metheny to transfer

Mr. Mucho. After careful review of Mr. Jones' testimony, it seems obvious to me that after the initial "honeymoon period" of two or three weeks after Mr. Jones' initial arrival at the mine was over, Mr. Jones began losing confidence in Mr. Mucho and had reservations and misgivings about his continued presence at the mine.

Mr. Jones testified that as time passed, his opinion of Mr. Mucho changed, and Mr. Jones removed Mr. Mucho from the "chain of command" of individuals who would fill in for him in his absence. Mr. Jones also expressed some misgivings about the offensive tone of a letter drafted by the engineering department and mailed to a State mining official over his signature. Mr. Jones expressed his frustrations and dissatisfaction with the engineering department, and he questioned the accuracy and credibility of the engineering information which he was receiving and passing on to higher management officials. Mr. Jones also felt that he was being misled by the engineering department, that he sensed "factions" who relied on Mr. Mucho, that he could not receive any unbiased opinions from the engineering department, and that the information he was receiving was being rearranged because the department did not want to go against Mr. Mucho. Some of the information received by Mr. Jones resulted in his communicating with Mr. Fisher and confessing error, and inviting Mr. Fisher to fire him if he deemed it appropriate.

Mr. Jones testified that he informed "everyone in management" of his discomfort with the situation which existed at the mine and he characterized it as "a constant every-day battle". I believe that it is reasonable to conclude that Mr. Jones discussed his management problems with Mr. Metheny and that Mr. Metheny was aware of his frustrations. I also believe and find credible Mr. Metheny's belief that Mr. Jones did not have the total support of all management personnel at the No. 84 Mine, and that there were divided loyalties toward Mr. Mucho and Mr. Jones. I also find credible support for a conclusion that there was friction over Mr. Jones' threatening management style, which was in contrast to Mr. Mucho's previous management style prior to his removal as manager.

I conclude and find that Mr. Metheny's explanation that he transferred Mr. Mucho after concluding that mine personnel were not responding to Mr. Jones, and that Mr. Mucho's continued presence at the mine was disruptive, were reasonable and plausible reasons for the transfer. I further conclude and find that Mr. Metheny and Mr. Fisher acted well within their managerial and discretionary authority in effecting Mr. Mucho's transfer, and that they were free to make managerial judgments which they reasonably believed would result in a productive and harmonious mine operation. I reject Mr. Mucho's suggestions that mine management, namely, Mr. Jones, Mr. Metheny, and Mr. Fisher, conspired to transfer him from the No. 84 Mine to the central

office because of the safety concerns that he expressed in connection with the cut-through matter of January 24, 1991.

Mr. Mucho's June 7, 1991, Lay Off

Mr. Mucho alleges that the respondent terminated his employment on June 7, 1991, and laid him off out of retaliation for the filing of his MSHA discrimination complaint on March 28, 1991.

I take note of the fact that from the day he was removed as mine manager by Mr. Fisher on December 7, 1990, until he was laid off, Mr. Mucho continued to receive his full salary at the pay level of a mine manager. I assume that the respondent could have revised Mr. Mucho's job description and made an adjustment in his salary to reflect his new position as a project engineer when he was transferred to the central office on February 8, 1991, but it did not do so. Even after he filed his complaint with MSHA and a simultaneous age discrimination complaint with the State EEOC, Mr. Mucho's salary remained unchanged until he was laid off. It seems to me that if the respondent wanted to retaliate against Mr. Mucho it would have cut his pay to reflect his new job responsibilities rather than allowing him to retain his mine manager's pay for more than two months after his discrimination complaint was filed.

I believe that Mr. Mucho's tenuous employment situation with the respondent began on December 7, 1990, when company president Fisher removed him as mine manager and replaced him with the Metheny-Jones management team. I conclude that Mr. Mucho realistically appraised his prospects for continued employment with the respondent at that time, and for that reason he began consolidating his notes and keeping a detailed log or journal for his own protection. Mr. Mucho candidly admitted that upon his removal as head of the engineering department and transfer to the central office he knew that he had been "effectively terminated" and that it was "only a matter of time" before he would be terminated (Tr. 184). He also confirmed that he also made that statement to Mr. Fisher during a subsequent meeting with him after he had filed his complaint (Tr. 193).

Mr. Mucho testified that he met with human resources director Robertson on March 1, 1991, approximately a month before he filed his complaint, and that he suggested a severance arrangement to Mr. Robertson and informed him that "it's obvious they have no plans for me, as far as I'm concerned, I'm going out" (Tr. 117-118). Mr. Robertson confirmed that he met with Mr. Mucho before he filed his complaint and that Mr. Mucho informed him that he wanted to leave the company and briefly mentioned a severance settlement, but he did not mention the cut-through incident. Mr. Robertson's credible and unrebutted testimony further reflects that he had a second meeting with

Mr. Mucho after he filed his complaint, and Mr. Mucho at that time informed Mr. Robertson that he wanted a severance settlement amounting to 2 to 3 years of his salary. Mr. Robertson informed Mr. Mucho that this was beyond what the company could offer.

The record reflects that approximately a month after filing his complaint, Mr. Mucho received a job offer as a project engineer from the superintendent of the No. 33 Mine. Mr. Mucho testified that he rejected the offer because the job offered no security, it was not a comparable job, and he would have a two-hour commute and would have to take a 9.4 percent pay cut. Mr. Robertson confirmed that he informed Mr. Mucho that he would take a pay cut if he accepted the job, but he pointed out that Mr. Mucho would have been at the top of the pay scale for that position. Mr. Mucho subsequently rejected the job after consulting his attorney, and Mr. Robertson testified that when Mr. Mucho rejected the job he gave him no reasons other than his belief that it was not a legitimate offer. The record also reflects that in addition to the engineer's job offer at the No. 33 Mine, Mr. Mucho was informed that someone had inquired at that mine about possible plant foreman or first line supervisory positions for Mr. Mucho, but that the individual to whom the inquiry was addressed did not want to "insult" Mr. Mucho with such offers. Mr. Robertson confirmed that he made an effort to find a job for Mr. Mucho by submitting his name to Bethlehem Steel for possible placement, but no response was forthcoming.

Mr. Fisher confirmed that he met with Mr. Mucho on May 15, 1991, after the complaint had been filed, and that Mr. Mucho "made it very, very clear to me that too much water had gone under the bridge, that he felt that he had to sever his relationship with Bethlehem Steel and Bethenergy" (Tr. 256). Mr. Hasbrouck testified that Mr. Fisher informed him about his meeting with Mr. Mucho and told him that Mr. Mucho was adamant and that he wanted to leave the company. Mr. Hasbrouck further testified that he had previously discussed with Mr. Mucho's his assignment to his office and his job situation and that Mr. Mucho told him that "he just wanted out of this company. He had enough of Bethenergy and wanted to leave" (Tr. 156). Mr. Hasbrouck also confirmed that Mr. Fisher informed him that Mr. Mucho's assignment to his office was temporary (Tr. 148).

Mr. Fisher further testified that in view of Mr. Mucho's statement that he did not wish to remain with the company, and in light of his prior rejection of a job offer at the No. 33 Mine, he (Fisher) did not offer to retain Mr. Mucho in a human resources position that may have been available after the retirement of the individual in that position. Mr. Fisher concluded that it would have been fruitless to offer Mr. Mucho that position, and he believed that it became obvious that the next step would be Mr. Mucho's termination.

A week following Mr. Mucho's meeting with Mr. Fisher, Mr. Robertson informed Mr. Mucho that the No. 33 Mine job offer was the only offer available for him and that if he did not accept it, he would be laid off effective June 7, 1991. Mr. Fisher confirmed that Mr. Mucho was terminated because he had made it absolutely clear to him during their meeting that his future plans did not include Bethlehem Steel or Bethenergy, and that after Mr. Mucho rejected the NO. 33 Mine job offer there was no place for him to go. Mr. Fisher further confirmed that before Mr. Mucho left the company, a decision was made that the small technical support group at the central office could no longer be justified, and that the No. 84 Mine is for sale.

I find no credible evidence to support a conclusion that the respondent was motivated to lay off Mr. Mucho because of the filing of his discrimination complaint challenging his transfer to the central office. Nor do I find any credible evidence that the proffered justification for Mr. Mucho's transfer and subsequent lay off some four months later was pretextual. To the contrary, I conclude and find that a combination of factors unconnected with Mr. Mucho's cut-through safety concerns and his complaint over that incident, culminated in his inevitable lay off on June 7, 1991. These factors include the fact that Mr. Fisher considered Mr. Mucho's transfer to be a temporary measure while attempts were being made to find a place for him in the organization, Mr. Mucho's own candid recognition that his days with the company were numbered when he was initially transferred to the central office with virtually little or no work to do, the respondent's rejection of Mr. Mucho's suggested severance pay settlement of the matter, and Mr. Mucho's consistent and un rebutted statements to Mr. Hasbrouck, Mr. Robertson, and Mr. Fisher that he wished to end his relationship with the respondent and its parent company. Under all of these circumstances, I cannot conclude that Mr. Fisher's decision that Mr. Mucho should be laid off was unreasonable, or that his stated reasons for this personnel action were less than plausible.

#### Additional Acts of Alleged Retaliation.

Mr. Mucho's MSHA discrimination complaints are confined to his transfer and subsequent lay off. However, in the course of the hearing Mr. Mucho raised additional claims of alleged retaliation by the respondent because of the filing of his discrimination complaint. Mr. Mucho asserted that the respondent retaliated against him by initially contesting his unemployment claim, denying him severance pay benefits under a company Income Protection Plan (IPP), posting a notice about him on April 21, 1991, at the No. 84 Mine stating that he was not authorized to be there, and paying him only up to the last day he worked rather than through the end of the month, or at least for half a month, as was the usual company practice (Tr. 127-134). Mr. Mucho also suggested that his brother's lay off on March 5, 1991, and

Mr. Nucettelli's brief transfer to the portal to fill in for an outside foreman "were generally retaliatory in nature" (Tr. 130-132). Mr. Mucho further asserted that he was discriminated against by certain statements purportedly made by Mr. Jones reflecting that part of the respondent's goal was to rid themselves of some of its older and experienced employees (Tr. 214-215).

#### Unemployment Compensation Claim.

Although the paperwork initiated in connection with Mr. Mucho's unemployment compensation claim suggests that Mr. Mucho may have quit his job, respondent's counsel conceded that the respondent does not take the position that Mr. Mucho quit (Exhibits C-87, C-32, C-33; Tr. 203). The respondent's benefits coordinator, A.S. Berchin, whose name appears on some of the correspondence relating to Mr. Mucho's claim, was not called to testify or to explain the matter further. Mr. Robertson, respondent's manager of human resources, confirmed that the corporate legal department initially challenged the claim and took the position that Mr. Mucho had quit his job. Mr. Robertson further confirmed that he disagreed with the legal department's view that Mr. Mucho quit his job, and he believed that Mr. Mucho was in a lay off situation. In any event, the respondent did not appear at the initial hearing to contest Mr. Mucho's claim, and Mr. Mucho received his unemployment compensation benefits.

Mr. Robertson confirmed that the was not involved in Mr. Mucho's initial removal as mine manager or his reassignment to the central office, and I find no evidence to the contrary. Mr. Mucho's speculative suggestion that the respondent retaliated against him by opposing his compensation claim is not supported by any credible evidence of record, nor is there any evidence to support any reasonable inferences that Mr. Fisher, Mr. Metheny, Mr. Jones, and the respondent's legal department entered into some sort of conspiracy to deprive Mr. Mucho of his rightful unemployment compensation. Under the circumstances, Mr. Mucho's retaliation allegation IS REJECTED.

#### Severance Pay and Other Pay Benefits.

The respondent's policies and procedures concerning the reduction in force and compensation benefits for non-represented management employees are discussed in several Bethlehem Steel Corporation personnel office memorandums (Exhibit R-11). The memorandums were apparently circulated by L.C. Kesselring, Jr., who is identified as the Director of Personnel and Equal Employment. However, Mr. Kesselring was not called to testify or to explain these policies.



The record reflects that Mr. Mucho was paid \$4,157.81, for his vacation benefits, and in the absence of any evidence to the contrary, and according to the un rebutted testimony of Mr. Robertson, Mr. Mucho was eligible for some kind of a pension and a two-year continuation of his health care and life insurance benefits (Tr. 173-177). The record also reflects that Mr. Mucho received no cut in salary when he was relieved as mine manager, and he continued to be paid at that salary level after his transfer and up to the day of his lay off. I assume that the respondent could have changed Mr. Mucho's job title and paid him less money, but this was not done, and Mr. Robertson confirmed that a change in title would have resulted in a pay cut (Tr. 213).

The credible and un rebutted testimony of Mr. Robertson reflects that he and Mr. Mucho discussed a severance arrangement. Mr. Robertson was willing to consider the respondent's "usual several arrangement", but he rejected Mr. Mucho's request for an "I.B.M. type settlement" amounting to 2 to 3 years severance pay. Mr. Robertson confirmed that he discussed the company benefits guidelines with Mr. Mucho, submitted Mr. Mucho's name to Bethlehem Steel for possible placement, and discussed another job offer with Mr. Mucho. Mr. Robertson further explained the reasons why Mr. Mucho was ineligible for the company's Income Protection Plan (IPP) and outplacement program.

Although Mr. Mucho contended that the usual company practice was to pay an employee through the end of the month, and that a former foreman who was laid off (Error) may have been paid through the end of the month even though he did not work the full month, I cannot conclude that Mr. Mucho has established that paying an employee through the end of the month, or at least for half a month, regardless of when he may have been terminated, was in fact a regular company practice. Even if this were established, I cannot conclude that there is any credible or probative evidence to support any reasonable conclusion that the respondent's failure to pay Mr. Mucho through the end of the month was in retaliation for his filing his discrimination complaints. After careful examination of Mr. Robertson's testimony, and having viewed him during his testimony, I find him to be a credible and candid witness and I cannot conclude that his treatment of Mr. Mucho was unfair. Indeed, Mr. Robertson was of the opinion that the cut-through safety issue raised by Mr. Mucho had nothing to do with the personnel actions taken against him, but were rather based on the fact that the No. 84 Mine had a poor performance record and did not succeed under Mr. Mucho's leadership. Mr. Robertson was of the further opinion that Mr. Mucho should have been let go in December, 1990, when Mr. Fisher appointed the new management to run that operation.

As noted earlier, Mr. Mucho's employment rights, including his severance rights, are covered by the respondent's personnel

policies and directives, and in the absence of any evidence of any illegal discriminatory motives prohibited by the Mine Act, Mr. Mucho must look to some other forum for relief if he believes that his salary and severance entitlements have been violated by the respondent. See: Jimmy Sizemore and David Rife v. Dollar Branch Coal Company, 5 FMSHRC 1251, 1255 (July 1983); Bradley v. Belva Coal Co., 4 FMSHRC 982 (June 1982). Under all of these circumstances, I conclude and find that Mr. Mucho has failed to establish that the respondent retaliated against him by withholding certain salary and severance benefits, and his allegations in this regard ARE REJECTED.

The Posted Notice of April 21, 1991.

The mine notice which Mr. Mucho complained about is addressed to "Dispatchers", and it signed by T. McGinty. The notice states as follows (Exhibit C-134):

You are to keep the gate closed at all times except shift change on weekends. Everyone who wants to enter the property must identify himself. Record their name and check number. Tom Mucko (sic) is not authorized to be at the mine. He is not permitted to enter the gate. If he comes into the building you are to call Tom Duvall and Tom McGinty immediately. You are to inform him that he is to leave the property.

Mr. Mucho confirmed that he went to the No. 84 Mine on Sunday, April 21, 1991, rather than during the regular work in order to avoid Mr. Jones. Mr. Mucho stated that he went to the mine to pick up some keys and that he called in advance to speak to Mr. Duvall who was normally there on Sunday. However, Mr. Duvall was not at the mine and Mr. McGinty was in charge. When Mr. Mucho arrived, Mr. McGinty informed him that he was instructed by Mr. Jones to follow him around the mine. Mr. Mucho, accompanied by Mr. McGinty, proceeded to the building housing the engineering offices, the foremen's offices, and Mr. Jones' office. Mr. Mucho was perturbed that Mr. McGinty had called Mr. Jones and Mr. Black and informed them that he was at the mine, and Mr. Mucho decided "to have some fun" with Mr. McGinty by pretending that he was looking through some file drawers. Mr. Mucho then left the mine after tiring of "playing the game" with Mr. McGinty, and Mr. Mucho's visit apparently prompted the posting of the sign (Tr. 197-199).

Mr. Mucho conceded that at the time of his Sunday mine visit he was not officially assigned to work there and Mr. Bookshar had informed Mr. Mucho about Mr. Black's instructions that he was not to do any further work on any engineering projects affecting the No. 84 Mine. There is no evidence that Mr. Mucho had advance permission to be on the mine premises. At the time of his visit Mr. Mucho's safety discrimination and EEOC age discrimination

complaints were pending and Mr. Mucho had retained a lawyer. Under the circumstances, and in view of the fact that Mr. Mucho apparently had free access to Mr. Jones' office and the company's files, and deliberately gave Mr. McGinty the impression that he was searching through the company records, I find nothing unusual in management's posting a notice barring any future unauthorized mine visits by Mr. Mucho. I conclude and find that mine management had a right to insure the integrity of its offices and files, particularly in situations that are in litigation. Further, it would appear that Mr. Mucho enjoyed his visit, and I find no evidence that the posting of the sign was in any way intended to retaliate against him for the filing of his discrimination complaints. Under the circumstances, Mr. Mucho's allegations concerning the posting of the notice ARE REJECTED.

Mr. Mucho's suggestions that his brother's layoff and Mr. Nucetelli's transfer to an outside foreman's position were somehow accomplished to retaliate against him or to punish his brother and Mr. Nucetelli because of his complaints ARE REJECTED. I find absolutely no evidence to support any such conclusion. Mr. Mucho's brother and Mr. Nucetelli had a right to file their own complaints if they believed they were discriminated against. Finally, Mr. Mucho's contention that he was discriminated against because of some purported statements by Mr. Jones that the respondent wanted to get rid of some older and experienced employees is a matter for consideration and adjudication in connection with Mr. Mucho's pending EEOC age discrimination case.

#### ORDER

In view of the foregoing findings and conclusions, and on the basis of a preponderance of all of the credible testimony and evidence adduced in these proceedings, I conclude and find that the complainant Thomas P. Mucho has failed to establish that his transfer of February 8, 1991, and his subsequent lay off of June 7, 1991, were discriminatory personnel actions in violation of section 105(c) of the Act, or were motivated by the respondent's intent to retaliate against him for exercising his protected safety rights under the Act. Even if Mr. Mucho had established a prima facie case, I would still find and conclude that it was rebutted by the respondent's credible evidence establishing reasonable and plausible management related non-discriminatory reasons for the actions in question. Under the circumstances, Mr. Mucho's complaints ARE DISMISSED, and his claims for relief ARE DENIED.

  
George A. Koutras  
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION  
OFFICE OF ADMINISTRATIVE LAW JUDGES  
THE FEDERAL BUILDING  
ROOM 280, 1244 SPEER BOULEVARD  
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MAY 7 1992

ASARCO, INCORPORATED,	:	CONTEST PROCEEDINGS
Contestant	:	
	:	Docket No. WEST 92-227-RM
	:	Citation No. 3602316; 1/14/92
v.	:	
	:	Concentrator
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Mine I.D. 02-00826
ADMINISTRATION (MSHA),	:	
Respondent	:	Docket No. WEST 92-228-RM
	:	Citation No. 3602354; 1/28/92
	:	
	:	Ray Unit
	:	
	:	Mine I.D. 02-00150
	:	
	:	Docket No. WEST 92-244-RM
	:	Order No. 3908090; 1/29/92
	:	
	:	Troy Unit
	:	
	:	Mine I.D. 02-01467

DECISION

Appearances: G. Lindsay Simmons, Esq., James Zissler, Esq.,  
Jackson & Kelly, Washington, DC,  
for Contestants;  
Ann M. Noble, Esq., Office of the Solicitor, U.S.  
Department of Labor, Denver, Colorado  
for Respondent.

Before: Judge Cetti

These expedited Contest Proceedings were filed by Asarco, Incorporated (Asarco), pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act", to challenge three citations issued by the Secretary of Labor alleging two violations of the mandatory safety "stop cord" standard 30 C.F.R. § 56.14109 (Citation No. 3602316 and 3602354) and one violation of 30 C.F.R. § 57.14112(b) (Order 3908090). The two stop cord citations were fully and vigorously litigated by the parties. Both parties filed helpful post-hearing briefs which have been considered along with the evidence and arguments offered at trial.

### STIPULATIONS

At the hearing, the parties stipulated as follows:

(1) Asarco, Incorporated is engaged in mining and selling of copper in the United States and its mining operations affect interstate commerce.

(2) Asarco, Incorporated is the owner and operator of a Ray Mine and concentrator, MSHA I.D. No. 02-00826 and 02-00150, and is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977.

(3) The presiding administrative law judge has jurisdiction in this matter.

(4) The subject citation was properly served by a duly authorized representative upon agents of Asarco, Incorporated on the date and place stated on the citations.

(5) The citations may be admitted into evidence for the purposes of establishing their issuance and not for the truthfulness or the relevancy of any statements asserted in the citations.

(6) The exhibits to be offered by both parties are stipulated to be authentic, but no stipulation is made as to their relevance or the truth of the matters asserted therein.

(7) Subsection (b) of the cited safety standard 30 C.F.R. 56.14109, concerning alternate guarding by railings, is not relevant to this proceeding.

### I

DOCKET NO. WEST 92-244-RM  
ORDER NO. 3908090 VACATED

At the hearing, the parties stated on the record that Order No. 3908090 in Docket No. WEST 92-244-RM involving an alleged violation of 30 C.F.R. § 57.14112(b) was vacated. The representation of the parties are accepted. Order No. 3908090 is vacated and Docket No. WEST 92-244-RM is dismissed.

## II

DOCKET NOS. WEST 92-227-RM AND WEST 92-228-RM  
CITATION NOS. 3602316 AND 3602354

On January 14 and 28, 1992, during routine inspections of Asarco's Ray Complex (the Hayden Concentrator and the Mine, respectively), MSHA issued two 104(a) citations for improper location of emergency stop cords along two conveyor belts (the 1-B belt at the Concentrator and the 117 belt at the Mine). These citations (Nos. 3602316 and 3602354), allege violations of a mandatory safety standard (the "stop cord" standard) -- 30 C.F.R. § 56.14109(a) -- which provides as follows:

Unguarded conveyors next to the travelways  
shall be equipped with -

(a) Emergency stop devices which are  
located so that a person falling on or  
against the conveyor can readily deactivate the conveyor drive motor.

The primary issue is whether or not Asarco's emergency stop cords for the 1-B and 117 conveyors positioned between the conveyor's lower return belt and upper belt at a height of 27 to 38 inches above the adjacent walkway floor were located so that a person falling on or against the conveyor can readily deactivate the conveyor drive motor.

On conveyor 1-B the lower (return) belt was 18 inches above the floor and the top portion (outer edge) of the upper belt was 64 inches above the floor. The B-1 conveyor stop cord running parallel to the conveyor between the top and bottom belts was approximately 27 to 32 inches above the adjacent walkway floor.

On conveyor 117 the lower (return) belt was 24 inches above the floor and the top belt was 60 inches above the floor. The stop cord running parallel to the conveyor between the top and bottom belts was approximately 29 to 38 inches above the adjacent walkway floor.

It is Asarco's position that the stop cord for each conveyor was properly located and readily accessible in event of a fall so that a person falling on or against the conveyor could "readily

deactivate the conveyor drive motor and that, therefore, Asarco was in full compliance with the cited stop cord standard".<sup>1</sup>

Asarco also points out and presented credible evidence that (1) the stop cord along the 1-B conveyor at Hayden Concentrator has been in place for over 30 years; (2) the stop cord along the 117 conveyor at the Ray Mine has been in place for over 20 years; (3) no citations have been issued to Asarco for stop cords at the Ray Complex since Asarco acquired the Ray Complex in 1986, despite 39 MSHA inspections; (4) there have been no injuries or accidents involving conveyors at the Ray Complex since Asarco acquired the property in 1986 and (5) the conflicting abatement methods suggested by the two inspectors presented more hazards than Asarco's original placement of the stop cords.

It is the Secretary's contention, as outlined in her post-hearing brief, that (1) the stop cords for conveyors 1-B and 117 were not located so an employee who fell on or against the conveyor could easily and quickly stop the conveyor and (2) abatement problems and the absence of prior citations for stop cords even where the stop cords had been in place for many years are not relevant to a determination of whether the violations occurred.

#### DISCUSSION

The Secretary's latter (second) contention is accepted. On review and evaluation of the record, however, I find the Secretary's first contention must be rejected. The preponderance of the evidence presented did not establish that the stop cord for either the 1-B or the 117 belt conveyor was so located that a person falling on or against the conveyor could not readily deactivate the conveyor drive motor.

Asarco may well be subject to citations for having too much slack in one or two spots in its B-1 or 117 stop cords but that's

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<sup>1</sup> Without conceding the validity of either citation, Asarco abated the particular conditions cited by raising the stop cords along the 1-B and 117 conveyors. Asarco was informed that if it did not raise the stop cords along thousands of additional feet of numerous different conveyor belts throughout the Ray Complex, it would receive Section 104(d) citations or orders. (Tr. 246).



not what these two citations are about. The record clearly shows the citations were for having the entire length of each stop cord installed at a level which the inspectors believed, (because of their misinterpretation of the stop cord safety standard) to be too low. The pleadings and the evidence presented at the hearing show that the citations were issued by inspectors Hunt and Swanson (the only witness as presented by the Secretary) as a result of their misinterpretation and impermissible expansion of the requirements of the safety standard.

It is fundamental and undisputed that the "plain meaning" of the standards should be examined to determine what action is required to comply with its requirements. The regulation, 30 C.F.R. § 56.14109 as relevant here, provides that "unguarded conveyors next to the travelways shall be equipped with -- emergency stop devices (e.g. stop cords) which are "located so that a person falling on or against the conveyor can readily deactivate the conveyor drive motor."

It is clear from the record, including the testimony of the two inspectors who issued the citations that the citations in question were issued because both inspectors misinterpreted the cited standard. Both inspectors testified that the cited standard requires that the safety cord be so placed that a person falling on or against a conveyor "automatically trip" the stop cord by "falling through" the cord. Both inspectors testified that placing the cord where a person can reach and grab the cord to deactivate the drive motor does not, in their opinion, satisfy the standard.

Dr. James Glaze, Asarco expert witness, is a certified safety professional and has been a safety engineering consultant for over 20 years. (Tr. 130-131; Asarco Exhibit 17). He is familiar with conveyor systems. His prior experiences with conveyors includes studying conveyor systems and recommending how to guard them. (Tr. 141-147). He has investigated conveyor accidents and "near misses." (Tr. 202-203).

Dr. Glaze conducted ergonomic studies, analyzed relativity positions and performed safety analyses of the original location of the stop cords including simulation of falls to determine whether the stop cords along the 1-B and 117 conveyors at the Ray Complex were located so that a person falling on or against the conveyor could readily deactivate the motor. (Tr. 155, 159, 165-166).

Dr. Glaze's expert opinion is that the stop cords along the 1-B and 117 conveyors were ideally located and fully complied with the requirements of the standard. (Tr. 164-165, 173-174).

The "stop cord" standard (30 C.F.R. § 56.14109(a)) is a performance-oriented machinery and equipment standard. The intent of the standard is to reduce the likelihood of accidents and injuries related to unguarded conveyors adjacent to travelways. (Tr. 24-25, 138). This standard does not require that an operator locate its stop cords so that it guarantees that a person who falls on or against a conveyor will first fall on or through the stop cord. Nevertheless, in this case, the MSHA inspectors who issued the stop cord citations to Asarco erroneously believe that the stop cord standard does require that a falling person "automatically trip" the cord. It appears from the record, this misunderstanding was the basis for their citations. (Tr. 226, 228, 241-244, 247). In addition, both inspectors incorrectly believe that placing a stop cord in a location where a person can reach and grab the cord in the event of a fall does not satisfy the standard. (Tr. 227, 243).

To achieve the purpose of the standard, where an unguarded conveyor exists next to a travelway, "emergency stop devices" (e.g., stop cords) are required. These stop cords must be "located" so that a person who falls "on or against the conveyor" can "readily" stop the conveyor drive motor. Stop cords can be installed in a number of ways to achieve this objective. The standard does not define, mandate nor restrict the "location" of the stop cord, other than to state that it must be "readily" accessible to the person who is falling. It does not prohibit stop cords below, at, or above any particular component of a conveyor. With respect to a belt conveyor, the standard does not dictate placement vis-a-vis the floor, the upper or lower belts, the upper or lower idlers, the pulleys, or the drive motor. The stop cords along the 1-B and 117 conveyors at the Ray Complex were located at or above the height of an average man's hand as he walked the adjacent travelway floor. (Tr. 156-157). In that location, they could be "readily" reached by a person falling on or against the conveyor. Their location met the intent, as well as the letter, of the stop cord standard.

The Secretary's interpretation of 30 C.F.R. § 56.14109(a) in this case ignores the plain meaning of this standard. Both inspectors erroneously believe that the standard requires a person falling on or against a conveyor to "automatically trip" the cord by "falling through" the cord. The record clearly shows that this misunderstanding was the basis for the issuance of the

citations. (Tr. 226, 228, 239, 241 and 244). In addition, both inspectors erroneously believe that placing the cord in such a manner that a falling person can reach and grab the cord to deactivate the drive motor does not satisfy the standard. (Tr. 227, 243). These interpretations not only ignore the plain meaning of the standard, they constitute an impermissible expansion of the plain meaning of the standard and thus constitutes an impermissible avoidance of the rulemaking requirements of Section 101 of the Mine Act.

In relation to the deference to be accorded an agency's interpretation of a mandatory safety standard, the court is required to give effect to the actual words and the plain objective meaning of the regulations and is not bound by the agency's "hidden intentions and idiosyncratic interpretations." In Western Fuels-Utah, Inc., 11 FMSHRC 278, 284 (March 1989), the Commission stated:

While the Secretary's interpretation of her regulations are entitled to weight, that deference is not limitless and the Secretary's interpretations are not without bounds. Deference is not required when the Secretary's interpretations are plainly erroneous or inconsistent with the regulations. See Udall v. Tallman, 380 U.S. 1, 16-17 (1965) (quoting Bowles v. Seminole Rock Co., 325 U.S. 410, 413-414 (1945)). . . . The Mine Act does not contemplate that the Commission merely "rubber-stamp" the Secretary's interpretations without evaluating the reasonableness of those interpretations and their fidelity to the words of the regulations.

It is a basic tenant of administrative law that "a regulation cannot be applied in a manner that fails to inform a reasonably prudent person of the conduct required." Secretary v. Garden Creek Pocahontas Company, 11 FMSHRC 2148, 2152, (1989) (citing Mathies Coal Company, 5 FMSHRC 300, 303 (1983)). An agency's failure to provide adequate and fair notice constitutes a denial of due process and renders any attempted enforcement action invalid. Gates and Fox Company, Inc. v. Occupational Safety and Health Review Commission, 790 F. 2d 154, 156 (D.C. Cir. 1986). The rulemaking provisions of the Mine Act were intended to ensure sound standards and regulations and fair and adequate notice to regulated parties. Regulatory interpretations that extend beyond the clear language of the regulation and change the rights or

duties of the parties constitute unenforceable amendments that are in avoidance of required rulemaking procedures. 5 U.S.C. § 551 et seq. (1988). Garden Creek Pocahontas Company, supra.

If the Secretary truly desires to direct the specific location of stop cords and further wishes to require that a person falling on or against a conveyor first fall "through" the stop cord, then the Secretary must pursue this goal through notice-and-comment rulemaking. The Secretary should promulgate a standard to clearly and directly address not only the perceived hazard but also clearly inform the mine operator what he must do for compliance. In short, the Secretary's interpretation (1) contradicts the "plain meaning" of this performance standard; and (2) violates the rulemaking requirements of the Mine Act.

### III

#### DECLARATORY RELIEF DENIED

In its post-hearing brief, Asarco asks for declaratory relief citing Mid Continent Resources, Inc., Docket No. WEST 87-88, 12 FMSHRC 949 (May 23, 1990), aff'g 10 FMSHRC 881 (July 1, 1988) (ALJ Morris). I have reviewed the facts of this case in the light of the cited commission decision. The Commission in that decision points out that the discretionary nature of administrative declaratory relief is its paramount feature. The Commission also ruled that to grant declaratory relief, the Complainant must show that there is an actual, not moot, controversy under the Mine Act between the parties, that the issue as to which relief is sought is ripe for adjudication, and that the threat of injury to the Complainant is real, not speculative.

In my opinion, an insufficient showing of these factors has been made in this case so as to make this case an appropriate one for declaratory relief. I, therefore, decline to exercise my discretionary authority to grant declaratory relief in this case. I trust my ruling on the issues in this case will bring about the reasonable proper interpretation and enforcement of the safety standard in question without need for further litigation or declaratory relief.

#### ORDER

On the basis of the foregoing findings and conclusions, **IT IS ORDERED AS FOLLOWS:**

1. Citation No. 3602316, January 14, 1992, citing alleged violation of 30 C.F.R. § 56.14109(a) is **VACATED** and Docket No. WEST 92-227-RM is **DISMISSED**.

2. Citation No. 3602354, January 28, 1992, citing an alleged violation of 30 C.F.R. § 56.14109(a) is **VACATED** and Docket No. WEST 92-228-RM is **DISMISSED**.

3. Order No. 39028090, January 29, 1992, citing an alleged violation of 30 C.F.R. § 57.14112(b) is **VACATED** and Docket No. WEST 92-244-RM is **DISMISSED**.

  
August F. Cetti  
Administrative Law Judge

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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**MAY 11 1992**

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 91-310
Petitioner	:	A. C. No. 46-06489-03518
v.	:	
	:	Black Rose No. 1 Mine
DONNER COAL COMPANY, INC.,	:	
Respondent	:	

**DECISION**

Appearances: Patrick L. DePace, Esq., Office of the Solicitor,  
U. S. Department of Labor, Arlington, Virginia,  
for the Secretary;  
James V. Brown, Esq., Charleston, West Virginia,  
for Respondent.

Before: Judge Maurer

This case is before me based on a petition for assessment of civil penalty filed by the Secretary alleging violations of various mandatory standards set forth in Volume 30 of the Code of Federal Regulations.

Pursuant to a notice of hearing, the case was heard on December 3, 1991, in Charleston, West Virginia. At that hearing, the parties proposed to settle one of the citations at issue in the case (Citation No. 3482742) with a reduction in the civil penalty from \$178 to \$89. The parties also moved to request approval of the Secretary's proposed vacation of Citation No. 3482745. Based on the Secretary's representations, I conclude that the proffered settlement is appropriate under the criteria contained in section 110(i) of the Mine Act. The terms of this settlement agreement will be incorporated into my order at the end of this decision.

There remained for trial seven section 104(a) citations. The operator does not dispute the violations, but only the special "significant and substantial" (S&S) findings and of course, the amount of the civil penalty.

Both parties have filed post-hearing submissions, which I have considered along with the entire record in making the following decision.

## DISCUSSION AND FINDINGS

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

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

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

In United States Steel Mining Company, Inc., 7 FMSHRC 1125, 1129 (August 1985), the Commission stated further as follows:

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

### Citation No. 3482437

On January 14, 1991, while conducting a regular AAA inspection of Donner Coal Company's Black Rose No. 1 Mine, MSHA Inspector Melvin England observed that the transformer enclosure located on the surface was not locked against

unauthorized entry and the gate was open. Inspector England issued section 104(a) Citation No. 3482437 for a violation of 30 C.F.R. § 77.509(c).

Inspector England testified that he had been informed by the Mine Superintendent, Mr. Lyons, that the gate had been left open because an electrician had been working in the enclosure and forgot to close and lock the gate.

The inspector's testimony is quite credible and I find the violation of the cited standard to be proven. The real issue is whether it amounts to an S&S violation in these circumstances.

I find that it does not because even though the failure to close and lock the gate to the transformer enclosure created the distinct potential hazard of an unauthorized person possibly entering the enclosure and being electrocuted, it was unlikely that anyone would actually do so. Plus the fact that the operator kept a watchman on the premises 24 hours a day, even when they were not running coal and the relative remoteness of the site render any unauthorized entry into the enclosure unlikely in my opinion.

Therefore, based on the criteria contained in section 110(i) of the Act, I conclude that an appropriate penalty for the non-S&S violation is \$50.

Citation No. 3482721

On January 16, 1991, while conducting a regular AAA inspection of respondent's Black Rose No. 1 Mine, Inspector England observed that the off-standard Joy 21 shuttle car operating in the 001-0 Section was not provided with a device that would permit the equipment to be deenergized quickly in the event of an emergency. More specifically, the "panic bar" was not installed in its place on the shuttle car. Inspector England issued Citation No. 3482721 for a violation of 30 C.F.R. § 75.523.

This shuttle car makes 40 to 50 trips each shift from the dumping point to the continuous mining machine at the face. When operative, the panic bar is designed to deenergize the shuttle car immediately in the event of an emergency. The operator of the shuttle car may need to quickly deenergize the shuttle car if the tram becomes stuck, thereby making it impossible for the shuttle car to be stopped without being deenergized. This is the function of the "panic bar" which is part of the standard equipment of the shuttle car when it is purchased from the manufacturer.



The hazard presented by this violation was the danger that the shuttle car, unable to be stopped by being deenergized by the operator, would run into or over another individual working in the area. If this occurred, it would be reasonably likely to result in a fatality because the shuttle car is so large, approximately 18 to 20 feet in length, and 8 feet wide. Furthermore, the shuttle car was being operated in an area with lots of activity, with miners and equipment moving around on a frequent basis.

Inspector England testified that he has personally observed shuttle cars with the tram stuck on them, and unable to be stopped without being deenergized. Although Mr. Lyons testified that there were other methods of stopping the shuttle car besides activating the "panic bar", he also acknowledged that "there's no excuse for the panic bar being off the machine" and admitted that when he operates the shuttle car, he does so with the "panic bar" in place. (Tr. 102). Furthermore, as Inspector England opined, the "panic bar" is necessary to allow the shuttle car to be instantly deenergized in the event that the other methods of stopping the shuttle car fail, or could not be activated in a timely fashion.

I therefore find that the failure to have a "panic bar" on this shuttle car created the distinct possibility of a miner being run into or over by the shuttle car which could not be immediately stopped because it could not be deenergized rapidly enough. Accordingly, I find that it was reasonably likely that a fatal injury could have occurred as a result of the "panic bar" not being installed in place on this shuttle car. The violation was therefore "significant and substantial" and serious.

Based on the criteria contained in section 110(i) of the Act, I conclude that an appropriate penalty for the violation is \$112, as originally proposed by the Secretary.

Citation No. 3482726

On January 22, 1991, while conducting a regular AAA inspection of respondent's Black Rose No. 1 Mine, Inspector England observed that a canopy was not provided for the Joy Miner operating in the 001-0 Section. Inspector England determined that the canopy had been removed to be repaired and had not been reinstalled on the Joy Miner. He also testified that the miner was in operation at the time he observed it. He then issued the subject citation for a violation of 30 C.F.R. § 75.1710-1(a).

The hazard presented by this violation was of a roof fall on the miner operator. Should a roof fall have occurred on the miner operator when the canopy was not there to protect him, the operator could very likely have been fatally injured. In addition, as Inspector England testified, the roof conditions in

this mine were such that a roof fall was likely. There have been previous instances of roof falls in this mine, and numerous citations had been issued for violative roof conditions prior to the date of the instant violation. The previous violations were for additional roof support needed, roof fallen out from around roof bolts, and loose and unconsolidated roof.

The failure to have a canopy in place on the miner created the distinct safety hazard of an individual being injured or killed by a roof fall occurring while he was operating the miner. In light of the previous citations issued to Donner for unsafe roof conditions, and considering the normal course of continued mining operations, it was reasonably likely that an individual would be fatally or at least seriously injured as a result of a roof fall occurring while operating this miner unprotected by a canopy. Accordingly, I find the violation was "significant and substantial."

Based on the criteria contained in section 110(i) of the Act, I conclude that an appropriate penalty for this violation is \$112, as proposed by the Secretary.

Citation No. 3482740

On January 25, 1991, while conducting a regular AAA inspection of this mine, Inspector England observed that the fire sensor system provided for the main line belt and the section belt inside the mine was not being maintained in an operative condition. Inspector England also observed that when tested, the automatic fire sensor system would not give an automatic warning if a fire occurred on or near the belt. The system can be tested to determine if it is operational, and Inspector England tested the system from the dumping point at the belt and again in the mine office, and the system was not operational. Replacement equipment was necessary to make the system operational. The system was not operational on either belt, for a distance of approximately 1000 feet on the main line belt and a distance of 300 feet on the section belt.

The hazard presented by this violation was that in the event of a fire, the miners in the area would receive no alarm from the fire sensor system. Furthermore, I find that it was reasonably likely that a fire could occur because of combustible materials accumulated in the area. Inspector England testified that he had recently written a citation to the respondent for loose coal and float coal dust on the belt and connecting crosscuts. He also testified that these combustible materials could ignite from several different ignition sources, including hot belt rollers or an explosion. Superintendent Lyons conceded that there was float coal dust in the area and that float coal dust is very combustible. The failure to maintain the fire sensor system in an operative condition created the discrete safety hazard of the

miners being overcome by smoke or fire because they would not receive sufficient advance warning of a fire in the area. I therefore find that the hazard created by this violation was reasonably likely to result in a serious injury or fatality if the violation had remained unabated during the continued normal course of mining operations. Accordingly, I find the violation to be "significant and substantial."

Based on the criteria contained in section 110(i) of the Act, I conclude and find that an appropriate penalty for this violation is \$136, as proposed.

Citation No. 3482741

On January 25, 1991, while conducting a regular AAA inspection of the captioned mine, Inspector England observed that a mechanical equipment guard was not provided for the right side of the No. 2 belt conveyor head. The belt head was approximately 3 feet off the mine floor and the absence of a guard made it possible for an individual to become caught between the roller and the belt. The belt was moving at the time Inspector England observed these conditions.

The hazard presented by this violation was that an individual could become caught between the roller and the belt. Inspector England explained that this could happen by someone attempting to clean spillage up around the belt or reaching in to dislodge a piece of coal which had become stuck on the belt. At least one individual on each shift has the responsibility of insuring that the belt remains clean. Because an individual would be working in close proximity to this belt on each shift, it was reasonably likely that someone would get caught in the exposed area as a result of the absence of the guard and that such an occurrence would result in at least a permanently disabling injury.

I accept as credible the inspector's opinion that in the continued course of normal mining operations with the guard missing, it was reasonably likely that a miner would be seriously injured by being caught between the unguarded pulley and the belt. Accordingly, I find the violation at bar to be "significant and substantial."

Based on the criteria contained in section 110(i) of the Act, I conclude and find that an appropriate penalty for this violation is \$91.

Citation No. 3482743

On January 25, 1991, while conducting a regular AAA inspection of Donner Coal Company's Black Rose No. 1 Mine, MSHA Inspector England observed that the canopy provided for the

off-standard shuttle car operating in the 00-10 Section was not substantially constructed in that one of the legs of the canopy was broken.

The hazard presented by this violation was that the canopy would not adequately protect the person operating the shuttle car in the event of a roof fall. Although the canopy with three good legs would provide some protection, it would not be sufficient because the roof in the section in which this shuttle car was operating was massive sandstone. Furthermore, in the opinion of Inspector England, because of the roof condition in this mine, this violation was reasonably likely to result in a permanently disabling injury to the operator and I concur. I find the violation to be "significant and substantial," and serious.

Based on the criteria contained in section 110(i) of the Act, I conclude and find that an appropriate penalty for this violation is \$91, as originally proposed.

Citation No. 3482744

On January 25, 1991, while conducting a regular AAA inspection of respondent's mine, Inspector England observed two parallel roof cracks extending for approximately 25 feet at the dumping point of the section belt conveyor. These cracks were approximately 3 feet apart, and were not supplemented with any supporting devices such as posts, cribs, or crossbars as required by the roof control plan. As a result of the conditions he observed, Inspector England issued Citation No. 3482744 for a violation of 30 C.F.R. § 75.220(a)(1).

The hazard presented by this violation was the danger that a large piece of roof would fall in at once. Inspector England opined that it would be likely for a piece as large as 25 feet long and 3 feet wide to fall. He further concluded that it would be reasonably likely for such a roof fall to occur because the roof is massive sandstone in this area. And such a roof fall was reasonably likely to result in a fatality because of the size of the piece that could fall and because the cracks were in an area in which there was a great deal of activity. People are travelling in this area. The mine telephone is positioned nearby, and the shuttle cars make frequent trips through this immediate area.

Therefore, I find that because these roof cracks were in a very active area of the mine, in the continued normal course of mining operations, it was reasonably likely that an individual would be fatally injured as a result of a roof fall occurring at the point of the roof cracks. Accordingly, the violation was "significant and substantial," and serious.

Based on the criteria contained in section 110(i) of the Act, I conclude that an appropriate civil penalty for this violation is \$112.

Respondent's principal defense to all these charges is to the effect that it would be highly unlikely that any accident would occur as the result of these types of violations. Their "proof" of that position is the fact that no fatal accidents have actually happened and neither has any type of injury occurred as a result of these particular violations or any other violations written up at the Black Rose No. 1 Mine. That may all very well be true, but is not the test for an S&S violation. The law is otherwise.

ORDER

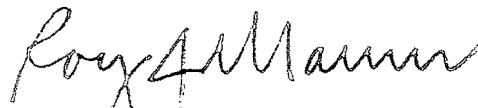
1. Citation Nos. 3482742 and 3482437 are modified to delete the characterization "significant and substantial" and, as so modified, ARE AFFIRMED.

2. Citation No. 3482745 IS VACATED.

3. Citation Nos. 3482721, 3482726, 3482744, 3482741, 3482743, and 3482740 ARE AFFIRMED.

4. The Donner Coal Company, Inc., shall within 30 days of the date of this decision, pay the sum of \$793 as a civil penalty for the violations found herein.

5. Upon payment of the civil penalty, these proceedings ARE DISMISSED.

  
Roy J. Maurer  
Administrative Law Judge

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF ADMINISTRATIVE LAW JUDGES

2 SKYLINE, 10th FLOOR

5203 LEESBURG PIKE

FALLS CHURCH, VIRGINIA 22041

**MAY 13 1992**

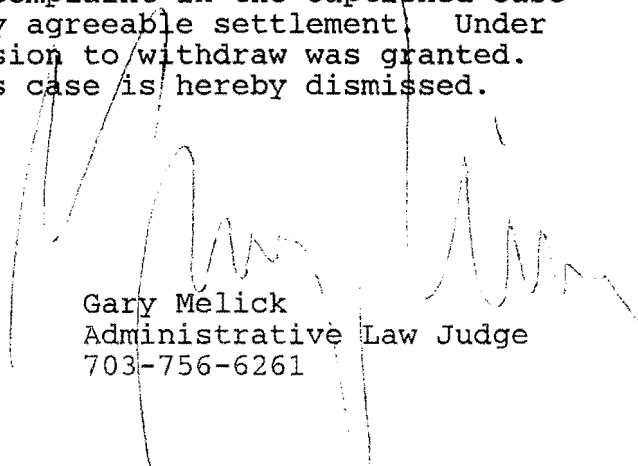
HOMER D. BENNETT, : DISCRIMINATION PROCEEDING  
Complainant :  
v. : Docket No. LAKE 92-141-DM  
: MSHA Case No. NC MD 92-02  
AYERS LIMESTONE QUARRY, :  
Respondent : Ayers Limestone Quarry

ORDER OF DISMISSAL

Appearances: Neeta A. Bass, Esq., Suite 510, St. Clair  
Building, Steubenville, Ohio 43952  
Keith A. Sommer, Esq, P.O. Box 279,  
Martins Ferry, Ohio 43935

Before: Judge Melick

At the hearing, Complainant, in essence, requested approval to withdraw his Complaint in the captioned case on the basis of a mutually agreeable settlement. Under the circumstances, permission to withdraw was granted. 29 C.F.R. § 2700.11. This case is hereby dismissed.

  
Gary Melick  
Administrative Law Judge  
703-756-6261

Distribution:

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/lh

# 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 13 1992

JIM WALTER RESOURCES	:	CONTEST PROCEEDINGS
INCORPORATED,	:	
Contestant	:	Docket No. SE 91-750-R
v.	:	Safeguard No. 2805189; 8/8/91
SECRETARY OF LABOR,	:	Docket No. SE 91-751-R
MINE SAFETY AND HEALTH	:	Citation No. 2805196; 8/12/91
ADMINISTRATION (MSHA),	:	
Respondent	:	No. 4 Mine
	:	Mine ID 01-01247

## DECISIONS

Appearances: R. Stanley Morrow, Esq., Harold D. Rice, Esq., Jim Walter Resources, Inc., Brookwood, Alabama, for the Contestant;  
George D. Palmer, Associate Regional Solicitor, U.S. Department of Labor, Office of the Solicitor, Birmingham, Alabama, for the Respondent

Before: Judge Koutras

## Statement of the Proceedings

These proceedings concern Notices of Contests filed by the contestant (JWR) against the respondent (MSHA) pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, challenging safeguard notice No. 2805189, issued on August 8, 1991, pursuant to 30 C.F.R. § 75.1403-1(b). JWR also challenges a section 104(a) "S&S" citation No. 2805196, issued on August 12, 1991, charging JWR with an alleged violation of 30 C.F.R. § 75.1403-1(b), for allegedly failing to comply with the requirements of the August 8, 1991, safeguard notice. A hearing was held in Birmingham, Alabama, and the parties waived the filing of posthearing briefs. However, I have considered their arguments made on the record during the course of the hearing in my adjudication of these matters.

## Issues

The issues presented in these proceedings are as follows:

- (1) Whether the initial safeguard notice was properly issued based on a specific mine hazard involving

the transportation of men and materials at JWR's No. 4 Mine.

- (2) Whether the contested citation which followed the issuance of the safeguard notice was properly issued for a violation of the safeguard notice and 30 C.F.R. § 75.1403-3(b).
- (3) Whether the alleged violation was "significant and substantial". Additional issues raised by the parties are identified and disposed of in the course of these decisions.

#### Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, Pub. L. 95-164, 30 U.S.C. § 801, et seq.
2. 30 C.F.R. § 75.1403; 75.1403-1, 75.1403-3(b).
3. Commission Rules, 29 C.F.R. § 2700.1 et seq.

#### Stipulations

The parties stipulated to jurisdiction, and that the contestant (JWR) is a large mine operator. They also agreed that the payment of the proposed civil penalty assessment, which has not formally been processed, will not adversely affect the respondent's ability to continue in business (Tr. 5).

#### Docket No. SE 91-750-R

Safeguard Notice No. 2805189, was issued on August 8, 1991, by MSHA Inspector Claude A. Lutz, pursuant to 30 C.F.R. § 75.1403(b). The notice states as follows:

The man-cage being operated with 65 personnel into the 2,000 foot shaft, and out, with no means of prevent (sic) the employees from be (sic) pushed off the east and west side man cage; except a single chain extended across the east and west side of man cage. The man cage is approximately 10 x 14 feet used to transport 65 employees each man trip three shifts a day. This safeguard is to prevent employees from being pushed or thrown against the shaft walls. The east and west side of the 14 x 10 man cage shall be (sic) provide a gate or some other means that will provided (sic) the same safety for the employees.

1. The other means shall provided (sic) protection for the employees so that they cannot be throw (sic) against the shaft walls, if man cage should come to a sudden stop in the shaft.



2. Gate, safety chains that will provided (sic) employees from being throw (sic) out or against the shaft walls.

3. Bars may also be used if they provide the same protection. Any of the above means can be used, the height of the above means should be approximately 5 feet high, and so designed so employees cannot be throw (sic) through or under the protection (sic) through or under the protection (sic) chains, bars, or gate.

Docket No. SE 91-751-R

On August 12, 1991, Inspector Lutz issued section 104(a) "S&S" Citation No. 2805196, citing JWR with a violation of 30 C.F.R. § 75.1403-3(b), and he made reference to the previously issued safeguard notice of August 8, 1991, to support the citation. The cited condition or practice is described as follows:

Added safety chains was not provided on the west and east side of the man cage to protect employees from being thrown out of the cage when the hoist cause (sic) man cage to come to a sudden stop in the shaft. The man cage has only one safety chain across the east and west side of cage when transporting 65 employees in and out of the 2000 foot shaft. The safety chain across the east and west end of the man cage only extended, west side 32 1/2 inches above the cage floor, and 33 1/2 inches on the east side of man cage. The one (1) chain is not adequate protection.

Inspector Lutz made a finding that the alleged violation was "significant and substantial" and he fixed the abatement time as 8:00 a.m., August 16, 1991. Subsequently, on August 16, 1991, he extended the abatement time to 8:00 a.m., August 19, 1991, and the justification for this extension states as follows:

The operator added a safety chain approximately 5 feet on the east and west side of the man cage. However, there was not a safety chain between the safety (sic) 33 1/2 inches above man cage floor. The safety chain should be added to make sure that employees legs cannot place legs in a danger area outside of the man cage when the 65 employees are being transported into and out of the 2000 feet shaft. The operator requested more time to consider other means, or to complie (sic) with the criteria of the safeguard.

Inspector Lutz terminated the citation on August 19, 1991, and the termination notice states as follows:

Added safety chains were provided for the East and West side of the service hoist man cage that transports approximately 300 employees into and out of the 2,000 ft. service shaft (5) days a week when the mine is operating.

#### MSHA's Testimony and Evidence

James Blankenship, testified that he has worked at the No. 4 Mine since 1980 and that he is an alternate member of the safety committee and serves as vice-president of his union. He has ridden the cited man cage hundreds of times, and he stated that it operates with four large ropes and guide rails similar to a "track" and can accommodate 65 people. The cage has a mesh floor, and mats are placed down during the winter to keep out the cold air. He confirmed that he has ridden the cage when it has stopped suddenly both up and down, and he stated that "It'll put you on your knees if your not careful. .you're dropping at 900 feet a minute, and . . . as far as the safety device that takes it out, it stops instantly. And I've seen people on the ground on the floor." (Tr. 10). He confirmed that "grab chains" are provided, but that "people will grab you by the shoulder to keep from falling" (Tr. 10).

On cross-examination, Mr. Blankenship confirmed that there are two or three "grab chains" hanging against the cage wall, but not enough for everyone to use when there are 65 people on the cage. He has never been injured while riding the cage (Tr. 11). However, he believed that someone was injured getting off the cage, but he knew of no one else being injured while riding the cage (Tr. 11-12). JWR's counsel introduced an accident report which reflects that someone was injured on January 27, 1992, while exiting the man cage and becoming entangled in some excess chain guards (Exhibits CX-1, Tr. 13).

In response to further questions, Mr. Blankenship confirmed that 65 people typically ride the man cage. He stated that he was present when Inspector Lutz returned to abate the citation. At that time, there were two chains installed on the cage, but Mr. Lutz did not believe they were sufficient "to keep people from going over, through, or under the chains", and he extended the citation. Maintenance Superintendent Frankie Lee was concerned that with the addition of a third chain, if it came loose and fell down the shaft it could damage the cage. Mr. Lutz informed him that it was management's responsibility to keep the chains secured (Tr. 16).

Billy Joe Martin, confirmed that he was the individual who was injured on January 27, 1992, while exiting the man cage at

the end of his shift. He explained that the chains were unhooked and thrown down on the floor, and while everyone was exiting at the same time, his foot became entangled in the chains and he started to fall. He caught himself with one foot, but the chain caught his other foot and he was injured. He confirmed that he missed two weeks of work as a result of this injury (Tr. 17-19).

MSHA Inspector Claude Lutz testified that he issued the contested safeguard notice and citation and he identified exhibit R-1 as two photographs of the chain and man cage. He confirmed that one chain was installed at the front and rear of the cage at the time he issued his initial safeguard notice, and that after abatement of the citation three chains were installed at each end (Tr. 20). He stated that the cage travels at 13.3 feet per second, or 900 feet per minute, and that the shaft is 2,000 feet deep. The cage was installed in 1977 or early 1978, and a single chain was installed on each man cage at all of JWR's mines at that time (Tr. 22-23).

Mr. Lutz stated that a complaint was received from the No. 4 Mine on July 31, 1991, because the cage was "kicking off", and he investigated the matter. He stated that in the event the cage tripped off while travelling at 900 feet per second one may not be able to react and hit the stop button and it was impossible to say that serious injuries would not occur. He described the resulting hazards as follows at (Tr. 23-25):

The hazards would be if a man got tripped or thrown or if several men did in the shaft wall, traveling at those speeds and even if it stopped, whenever it stopped it threw him into -- such a sudden stop and if it threw him in there, and his arms or leg or head became entangled when the cage does this, it bounces upward, it could tear off an arm or a leg, even kill him.

\* \* \* \* \*

We're talking, if this occurred, if those men came out, we're talking torn-off arms and legs, skin -- torn up bodies or perhaps even a head because there is some distance between there. Now I taken measurements. There was seven to thirteen inches difference between the wall and the flange on that cage floor.

Mr. Lutz confirmed that he based his "significant and substantial" finding on "the amount of injury if the accident occurred, the amount of injury that it could do to him. And of course, I expected it to occur by this hoist continuously tripping off. We didn't know whether it was completely fixed or not" (Tr. 26).

Mr. Lutz stated that at the time he issued the safeguard on August 8, 1991, requiring a chain, he spoke with the mine manager and discussed the alternative use of nylon gates or other means of protecting the men in the event the cage tripped out. Management refused to do anything unless he put it in writing, and the safeguard notice followed (Tr. 28). He explained that he spoke with his supervisor and that "I didn't have any other choice but to issue a safeguard to get it done before we did have an accident occur" (Tr. 30).

Mr. Lutz stated that it was possible for an accident to happen even if the emergency stop did not trip. A rail could loosen and anything can occur at the speed the cage travels, and even though the cage is inspected daily, anything can occur because of its daily use (Tr. 30). He also confirmed that in the event of a shift in the weight of the people on the cage, one chain would only provide a workload support of 1,250 pounds, while three chains would provide additional support and would equalize the weight and spread out the impact (Tr. 30-31). He confirmed that he is not aware of any man cage injuries at the No. 4 Mine caused by the hoist "kicking out" while it was in operation (Tr. 33).

Mr. Lutz confirmed that the specific condition at the No. 4 Mine which prompted the issuance of the safeguard was the reported "tripping out" of the man cage and the men riding the cage while this was occurring (Tr. 39). He believed that someone could stick their foot out of the cage or be pushed out into the shaft wall without any problem with just a single protective chain (Tr. 40-21). He confirmed that the cage was repaired and that it was put back into service, and by the next day, it started "kicking out" again, but he was not sure whether this was before or after he issued the safeguard. He insisted that the safeguard was issued "because there was a hazard there" (Tr. 43). He confirmed that the safety committee had requested a section 103(g) inspection because of the tripping problem on the same cage and that he issued an imminent danger order and a "(d) Order", which was subsequently modified to a section 104(a) citation (Tr. 44-45).

#### JWR's Testimony and Evidence

Frankie Lee, maintenance superintendent, testified that he is responsible for the hoist in question and he confirmed that it was installed with a single chain and that it was inspected and approved by MSHA. He stated that the hoist began tripping in June, 1991, and that the safety devices are redundant safety features that are intended to trip when there is a problem. The hoist could trip for different reasons, and the one in question did have a problem that was causing it to trip out, and it would have to be shut down for repairs. Engineers were called in an

attempt to find the problem, and the union filed a safety grievance. The grievance could not be resolved, and a section 103(g) complaint was filed in June, 1991, because of the continued tripping. Repairs were made in mid-July, and the safeguard was issued after that time (Tr. 62).

Mr. Lee was of the opinion that the use of a single safety chain does not present a safety hazard, but that the use of more than one chain presents a problem with people walking over them and keeping them out of the way, and the combined weight of the chains may present a problem to a small person attempting to lift and hook them up. The single chain has been used since the operation began without any problem (Tr. 62).

On cross-examination, Mr. Lee stated that he could not recall any specific MSHA approval of the hoist with one chain, but he confirmed that it had previously been inspected and travelled by MSHA inspectors, including Mr. Lutz, for years and it was never cited (Tr. 63-64). He agreed that the cage will bounce if it stops immediately, and he indicated that the distance from the edge of the cage to the cement shaft wall is three to four inches once the cage is out of the collar level. He confirmed that the problem which caused the tripping in June, 1991, has not re-occurred, but that "nuisance tripping" has occurred since that time when a gate is not properly closed or is accidentally opened or there is a derail or loss of air pressure (Tr. 64-65). He stated that if the cage does not trip there is a problem, and that it could trip "a couple of times in a twenty-four hour period" (Tr. 65).

In response to further questions, Mr. Lee stated that the cage does not presently trip out any more than it did in the past and that it has been upgraded frequently over the past nine years and it will be upgraded further (Tr. 67). He confirmed that since the injury occurred, a mesh gate has replaced the three chains and it is attached permanently to one side of the cage and unclipped on the other side to allow the men to exit and to unload material (Tr. 69).

Mr. Lee disagreed with Inspector Lutz's belief that the cage posed a hazard, and he stated that there was never a problem with people being thrown against the wall when the cage had one chain and there were no injuries. He confirmed that the cage bounces up and down for a distance of six inches to one-foot when it stops, but that there is no slowdown when it trips and the brake is activated by air pressure when the safety circuit causes it to trip and stop immediately (Tr. 70). He confirmed that he has ridden the cage when it has tripped, and he agreed that "it will make you buckle your knees" and that "any sudden stop is going to cause you a little bit of an alarm. It would alarm anybody before it would stop" (Tr. 71).

Mr. Lee stated that JWR objected to adding two more chains and tying them together because it believed that it was abiding by the law, which requires "chains, bars or gates". He confirmed that costs were not a problem, but that three chains tied together presented an additional maintenance problem and a tripping hazard which could result in back injuries to someone picking up the chains. He stated that "it had been satisfactory for so long with no injuries due to picking it up, no tripping hazard which could result in ever been written and I didn't see anything wrong with it and that was my feeling" (Tr. 72-73). He confirmed that the three chains are "quarter inch chains", and he believed that the total weight of the chains exceeds 15 pounds (Tr. 73-74).

Mr. Lee confirmed that he has received no safety complaints from the safety committee since the three chains were installed other than the one tripping injury. As a result of that incident, a mesh gate was installed to replace the three chains. However, Mr. Lutz issued a citation for a tripping hazard when he observed men walking over the mesh while leaving the cage, and the citation reflects that "the men were not proceeding in an orderly manner" while exiting the cage (Tr. 77, Exhibit CX-2). Another inspector issued a citation for failure to provide a clear travelway when he observed that the mesh gate was dropped on the cage floor (Tr. 79, Exhibit CX-3).

Mr. Blankenship was recalled by MSHA, and he stated that it was his opinion that the combined weight of the three chains tied together was approximately 20 pounds, and that there was no one on the man cage who could not have picked them up (Tr. 93).

#### DISCUSSION

The evidence in these proceedings establishes that the cited man cage was installed and placed in operation sometime in 1977 or early 1978, and that a single chain was installed across both ends of the cage at that time. The chain was intended to provide protection for persons riding the cage when it was hoisted or lowered into and out of the mine shaft. The cage was subsequently operated with no reported incidents or injuries as a result of the use of the single chain, and there is no evidence that MSHA had ever considered the single chain to be inadequate until Mr. Lutz issued the safeguard notice on August 8, 1991. No citations had previously been issued because of the use of the single chain until Mr. Lutz issued the contested citation on August 12, 1991, because of JWR's noncompliance with the safeguard.

In June 1991, problems developed with the cage and it "tripped out" periodically, causing it to be shut down for repairs. Engineers were called in to find the problem and the union filed a safety grievance which could not be resolved. A

section 103(g) complaint was filed because of the continued tripping, and Inspector Lutz investigated the matter and issued an imminent danger order. Repairs were made, but the cage began "tripping out" again and the men continued to ride it while it was in this condition. As a result, Inspector Lutz issued a section 104(d)(2) order, which was modified to a section 104(a) citation, and the safeguard notice followed.

The August 8, 1991, safeguard notice states that the only means of preventing employees from being pushed off the man cage was a single chain extending across each end of the cage. The citation of August 12, 1991, states that the cage still had single chains across each end, that the single chains provided inadequate protection, and that additional chains had not been provided. The inspector fixed the abatement time of August 16, 1991, and when he returned that day he found that a second chain had been installed. However, he determined that two chains still provided inadequate protection, and that a third chain was necessary. He extended the abatement time to February 19, 1991. The citation was terminated on that day after a third chain was installed and tied together with the other two chains as shown in photographic exhibit R-1.

The 3-chain system was subsequently replaced by JWR by the installation of a mesh gate which is permanently attached to one side of the cage and unclipped on the other side to allow the gate to drop down so the men can exit the cage. MSHA has apparently found this to be an acceptable protective device in compliance with the safeguard notice (Tr. 76). However, JWR was served with additional citations for hazards which subsequently developed after the mesh gate was installed. In one instance, Inspector Lutz issued a citation when he observed that the mesh gate had been dropped on the floor as the men were exiting the cage at the end of a shift and they were walking over the gate. He found that the men were not proceeding "in an orderly manner" and he concluded that a tripping hazard existed as they exited the cage and walked over the gate. In a second instance, another inspector issued a citation after observing that the mesh gate had dropped to the floor and six miners had walked over it while exiting the cage. He issued the citation because of his belief that "a clear travelway for exiting the service cage was not provided." (Tr. 77-80).

#### JWR's Arguments.

JWR asserted that the safeguard notice issued by Inspector Lutz was not based on any specific hazardous condition at the No. 4 Mine, and that the inspector believed that the requirement for chains, bars, or chains should have equally applied to all of JWR's mines (Tr. 96-97). JWR further asserted that the safeguard notice on its face, does not specify the exact conduct required for compliance, and merely refers to "chains." JWR suggested

that since there was one chain installed at one end of the cage, and another chain installed at the other end, "chains" were in fact in place and that this amounted to compliance with the safeguard. JWR also expressed concern that "the next inspector might come back and say, no, three chains tied together is not good enough, we want four chains with two tied together" (Tr. 99).

JWR further asserted that its principal and basic complaint in this case is that a single chain was installed at both ends of the cage in question for 15 years with no resulting problems or injuries, even with the single chain being dropped to the floor with men walking over it. However, since the safeguard was issued requiring the installation of additional chains, and with the installation of the mesh gate, one miner has been injured, and JWR has received two additional citations, all because of the safeguard and the inspector's insistence that additional protective chains be installed (Tr. 85-88; 99). JWR also suggested that the combined weight of more than one chain exposed an individual who had to lift them to possible back injuries.

#### MSHA's Arguments.

MSHA argued that the phrase "chains" means chains "that are safe to accomplish the safety of the people on the man cage" and that a chain hung 6 feet high would not be adequate to meet the safeguard or the criteria (Tr. 37). MSHA asserted that there was a hazard requiring a safeguard, and that JWR's management understood what Inspector Lutz was requiring, but simply disagreed with his conclusion that the use of only one chain presented a hazard (Tr. 49, 51).

MSHA's position is that the inspector established that there was a specific condition at the No. 4 Mine that required a safeguard, that he correctly issued the safeguard, and that it was based solely on the hazard that he perceived would have occurred had the safeguard not been enforced (Tr. 94). With regard to JWR's contention that compliance with the safeguard has resulted in an injury and additional citations for tripping and stumbling hazards, MSHA's counsel stated that "management can abate any hazard in a sloppy way" and that the hanging up of the chain or insuring that the mesh gate is against the wall of the cage before people leave it is not onerous (Tr. 85-86).

#### FINDINGS AND CONCLUSIONS

Section 314(b) of the Act provides as follows:

Other safeguards, adequate, in the judgment of an authorized representative of the Secretary, to minimize hazards with respect to transportation of men and materials shall be provided.



30 C.F.R. § 75.1403 repeats section 314(b) of the Act and provides as follows: "Other safeguards adequate, in the judgment of an authorized representative of the Secretary, to minimize hazards with respect to transportation of men and materials shall be provided."

Section 75.1403-1 provides:

(a) Sections 75.1403-2 through 75.1403-11 set out the criteria by which an authorized representative of the Secretary will be guided in requiring other safeguards on a mine-by-mine basis under section 75.1403. Other safeguards may be required.

(b) The authorized representative of the Secretary shall in writing advise the operator of a specific safeguard which is required pursuant to section 75.1403 and shall fix a time in which the operator shall provide and thereafter maintain such safeguard. If the safeguard is not provided within the time fixed and if it is not maintained thereafter, a notice shall be issued to the operator pursuant to section 104 of the Act.

(c) Nothing in the sections in the section 75.1403 series in this Subpart O precludes the issuance of a withdrawal order because of imminent danger.

Section 75.1403-3 provides the criteria for cage construction, and subsection (b) of that section states as follow:

(b) Cages used for hoisting persons should be constructed with the sides enclosed to a height of at least six feet and should have gates, safety chains, or bars across the ends of the cage when persons are being hoisted or lowered.

In Southern Ohio Coal Company, (SOCCO), 7 FMSHRC 509 (April 1985), the Commission noted that the safeguard provisions of the Act confer upon the Secretary "unique authority" to promulgate the equivalent of a mandatory safety standard without resort to the otherwise formal rulemaking requirements of the Act. The Commission held that safeguards, unlike ordinary standards, must be strictly construed, and a safeguard notice "must identify with specificity the nature of the hazard at which it is directed and the conduct required of the operator to remedy such hazard." In short, the operator must have clear notice of the conduct required of him.

In Jim Walter Resources, Inc., 7 FMSHRC 493,496 (April 1985), the Commission took particular note of the broad language found in section 314(b) of the Act, and it concluded that this section "manifests a legislative purpose to guard against all hazards attendant upon haulage and transportation in coal mining."

In Southern Ohio Coal Company, 14 FMSHRC 1 (January 1992), the Commission reaffirmed its SOCCO and Jim Walter Resources, Inc., holdings and stressed that a safeguard must identify with specificity the hazard at which it is directed and the remedial conduct required of the operator. The Commission rejected the operator's contention that a safeguard is invalid if it addresses conditions that exist in a significant number of mines, and it stated in relevant part in this regard as follows at 14 FMSHRC 12:

. . .a safeguard may properly be issued for a commonly encountered hazard, so long as such safeguard addresses a specific transportation hazard actually determined by an inspector to be present and in need of correction at the mine in question . . the fact that the safeguard was based on a common hazard encountered in a number of other mines does not, by itself, invalidate the safeguard.

In Beth Energy Mines, Inc., 14 FMSHRC 17 (January 1992), the Commission reaffirmed its SOCCO holding that a safeguard must be interpreted narrowly in order to balance the Secretary's unique authority to require a safeguard and the operator's right to fair notice of the conduct required of it by the safeguard. The Commission also held that the validity of a safeguard is not affected by the fact that it is based on the published safeguard criteria, 14 FMSHRC at 22-25, and it stated as follows at 14 FMSHRC 25:

. . . A criterion does not provide clear notice until it is embodied in a safeguard issued to the operator. The focus of judicial inquiry is on whether the safeguard is based on specific conditions, whether it affords the operator fair notice of what is required or prohibited by the safeguard.

. . . the fact that a notice to provide safeguard is based upon a promulgated safeguard criterion is not, of itself, determinative of the validity of the safeguard. As explained in SOCCO, the validity of a safeguard depends on whether it was based on the inspector's evaluation of specific conditions at the mine in question and a determination that those conditions created a specific transportation hazard in need of the remedy prescribed.

Insofar as the validity of the safeguard itself is concerned, the critical issue is whether or not the evidence establishes that the safeguard was based on the judgment of the inspector that a specific condition existed at the mine in question, that the condition concerned an existing transportation hazard, and that the hazardous condition was to be remedied by the action prescribed in the safeguard. Assuming that I find that the safeguard was validly issued, the next question presented is whether or not the evidence establishes that the respondent violated the safeguard, and if so, whether the violation was of a significant and substantial nature as claimed by the inspector.

Docket No. SE 91-750-R. Safeguard Notice No. 2805189

It seems clear to me that an adequately written safeguard notice is a mandatory safety requirement that is enforceable at the mine where it is issued. In this case, although the notice issued by Inspector Lutz is not a model of clarity, I conclude and find that it adequately informed JWR of the hazard, and put it on notice as to what was required to achieve compliance. The notice itself states in relevant part that it was issued "to prevent employees from being pushed or thrown against the shaft walls" and to provide protection for the miners riding the cage if it "should come to a sudden stop in the shaft". Further, the credible testimony of the inspector reflects that the notice was issued to address the hazard presented in the event the man cage came to an abrupt and unannounced stop when it "tripped out", and the inspector confirmed that he discussed the safeguard with mine management, including alternative methods of achieving compliance

It is undisputed that the cited man cage in question was tripping out and causing problems, and the record reflects that the union filed a safety grievance over the matter. JWR's maintenance superintendent Lee confirmed that even after the problem which caused the tripping was taken care of, "nuisance tripping" has continued when the cage gate is improperly closed or accidentally opened, or there is a derail or loss of air pressure. Mr. Lee further confirmed that due to the fact the cage is designed to "trip" when a problem develops, it could do so "a couple of times" over a 24-hour period.

Alternate safety committeeman Blankenship, who has ridden the cage hundreds of times, testified credibly that when the safety device trips out, the cage stops instantly and suddenly, and that "it'll put you on your knees if your not careful". Although he confirmed that "grab chains" are provided, he stated there are not enough for use when the cage is full. He also stated that he has observed people on the cage floor when it stopped and that "people will grab you by the shoulders to keep from falling".

Superintendent Lee confirmed that when the cage safety circuit trips, the cage stops automatically and immediately and that it will bounce up and down for a distance of six-inches to one-foot after it stops. He further confirmed that he has been on the cage when it has tripped and that "it will make you buckle your knees" and causes some alarm when it comes to a sudden stop.

Inspector Lutz believed that given the speed of the cage up and down the shaft, any sudden stop could possibly propel someone against the shaft wall exposing them to serious arm or leg injuries, or injuries to other bodily parts. Although Mr. Lutz agreed that there have been no reported injuries of this kind caused by the cage in question tripping out, he nonetheless believed that the single protective chain which was installed at each end of the cage was insufficient to restrain people when the cage was filled to capacity, and that it would not prevent anyone from sticking their arm or foot out beyond the cage or being pushed into the shaft wall and contacting it while the cage was moving.

JWR's suggestion that the safeguard notice was improperly issued because Inspector Lutz believed that protective chains, bars, or gates should equally apply to all of JWR's mines is rejected. There is no evidence that the contested safeguard notice in question applied to mines other than the No. 4 Mine, and even if it did, the Commission recently held that a safeguard covering a specific mine is valid notwithstanding the fact that similar safeguards may have been issued at other mines. Southern Ohio Coal Company, 14 FMSHRC 1, 14 (January 1992).

I agree with the inspector's findings with respect to the existence of a hazard to miners riding the man cage in question when it "tripped out" and came to a sudden and unexpected stop. Based on all of the evidence and testimony adduced in this case, I conclude and find that the safeguard notice issued by Inspector Lutz addressed a specific mine transportation hazard with respect to the cited man cage in question, and that the safeguard was a reasonable and proper way of achieving compliance and correcting the condition which created the hazard. Under the circumstances, the safeguard notice IS AFFIRMED.

Docket No. SE 91-751-R. Citation No. 2805196

The inspector issued the citation after finding that JWR had failed to add any additional chains or other alternative protective devices to protect the miners riding the man cage. He cited a violation of safeguard standard section 75.1403(b), which requires safety chains or bars across the ends of the cage when persons are being hoisted or lowered, and he also included a reference to the prior safeguard notice on the face of the citation which he issued.

JWR's assertion that it complied with the requirements of section 75.1403(b), in that the two single chains which were installed at each end of the cage, when considered together, constituted "chains" within the meaning of that section, and constituted compliance with the safeguard is rejected. The record reflects that when the inspector issued the initial safeguard notice he believed that a single chain at each end of the cage constituted inadequate protection for the miners riding the cage. For this reason, he issued the safeguard notice enumerating the use of protective chains, bars, or a gate to protect the miners from being thrown out of the cage or against the shaft walls in the event the cage came to a sudden stop. It seems clear to me that the inspector required JWR to install more than one chain at either end of the cage, and Mr. Lutz' credible testimony, which is corroborated by Mr. Blankenship, as well as the citation extension which he issued, establishes that Mr. Lutz informed mine management as to what was required to achieve compliance and abate the citation.

JWR's assertion that the cage with single chains had not previously been cited by MSHA is rejected as a defense to the citation. See: King Knob Coal Company, Inc., 3 FMSHRC 1417, 1422 (June 1980); Midwest Minerals Coal Company, Inc., 3 FMSHRC 1417 (January 1981); Missouri Gravel Co., 3 FMSHRC 1465 (June 1981); Servtex Materials Company v. 5 FMSHRC 1359 (July 1983); Emery Mining Corporation v. Secretary of Labor, 3 MSHC 1585, the Tenth Circuit's Affirmance of the Commission's decision at 5 FMSHRC 1400 (August 1983).

JWR's contention that compliance with the safeguard requirements imposed by the inspector through the use of more than one safety chain at each end of the cage has resulted in safety risks which were non-existent during the approximate 15 years that single chains were used, and that compliance with the safeguard has not only resulted in an injury, but has also exposed JWR to additional citations for tripping or stumbling hazards resulting from the use of multiple chains and a mesh guard, raises the issue of the so-called "greater hazard" or "diminution of safety" defense. This defense had been narrowly construed by the Commission, and it has held that when this defense is raised in an enforcement proceeding it must be closely scrutinized to insure that each of the elements of the three-prong test enunciated in Penn Allegh Coal Co. Inc., 3 FMSHRC 1392 (June 1981), and Sewell Coal Co., 5 FMSHRC 2026 (December 1983), are supported with clear proof. See: Westmoreland Coal Company, 7 FMSHRC 1338 (September 1985). The three-prong test consists of the following elements: (1) the hazards of compliance are greater than non-compliance; (2) alternative means of protecting miners are unavailable; and (3) a modification proceeding under section 101(c) of the Act would not have been appropriate.

I cannot conclude that JWR has established any reasonable "diminution of safety" defense in this case. The tripping and stumbling hazards which resulted in the issuance of additional citations are conditions which may be present when the cage comes to a stop and the men are exiting. These are not conditions which prompted the issuance of the safeguard notice. Although I can understand JWR's frustration at being cited for stumbling and tripping hazards after it had corrected the conditions which prompted the issuance of the safeguard and abatement of the citation, the fact remains that the burden of continued compliance with the safeguard rests with JWR. Any tripping or stumbling hazards subsequently caused by the installation of the mesh gate or chains are within the control of JWR and it must find a way to insure that these protective devices that are required by the safeguard notice in question are hung and stored in a such a manner as to preclude additional safety hazards. I cannot conclude that MSHA's expectation that this is done is unreasonable. JWR's defense is rejected. In view of the foregoing, and after careful review and consideration of all of the testimony and evidence adduced in this proceeding, I conclude and find that MSHA has established a violation by a preponderance of the credible evidence and the citation IS AFFIRMED.

#### Significant and Substantial Violation

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

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

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

In United States Steel Mining Company, Inc., 7 FMSHRC 1125, 1129, (August 1985), the Commission stated further as follows:

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

In Halfway, Incorporated, 8 FMSHRC 8 (January 1986), the Commission upheld a significant and substantial finding concerning a roof area which had not been supported with supplemental support, and ruled that a reasonable likelihood of injury existed despite the fact that miners were not directly exposed to the hazard at the precise moment of the inspection. In that case, the Commission stated as follows at 8 FMSHRC 12:

[T]he fact that a miner may not be directly exposed to a safety hazard at the precise moment that an inspector issues a citation is not determinative of whether a reasonable likelihood for injury existed. The operative time frame for making that determination must take into account not only the pendency of the violative condition prior to the citation, but also continued normal mining operations. National Gypsum, supra, 3 FMSHRC at 825; U.S. Steel Mining Co., Inc., 6 FMSHRC 1573, 1574 (July 1984).

Inspector Lutz confirmed that he based his significant and substantial (S&S) finding on his expectation that an accident would occur with the cage continuously tripping off. He also considered the lack of knowledge as to whether or not the condition which caused the tripping problem had been repaired, the daily use of the cage, and the extent of injury that one would sustain if an accident occurred. Mr. Lutz believed that in the event someone were thrown against the shaft wall after the cage came to a sudden stop while travelling at 900 feet per minute, he would sustain serious injuries. JWR's maintenance superintendent Lee confirmed that any sudden stop of the cage will cause it to bounce and that such a bouncing action will cause one's knees to buckle. Mr. Lee confirmed that the distance from the edge of the cage to the cement shaft wall once the cage is out of the collar level is three to four inches. Mr. Blankenship confirmed that a sudden stop of the cage traveling 900 feet per minute would likely drop someone to their knees, and

he confirmed that he used the cage numerous times and has observed people on the floor of the cage after it came to a sudden and unexpected stop.

Based on the testimony of the inspector with respect to the hazards presented, and the injuries which would likely result in the event of an accident caused by the sudden stopping of the cage travelling at a relatively high rate of speed, and the corroborating testimony of Mr. Lee and Mr. Blankenship concerning the bouncing action of the cage if it were to come to a sudden stop, I cannot conclude that the inspector's "S&S" finding was unreasonable. I conclude and find that in the normal course of operating the man cage in question, with a full load of miners, and with only one protective chain, the miners were exposed to a hazard in that the bouncing action of the cage could cause them to fall or be pushed against the side of the shaft or outside of the chain. If this occurred, I find that it was reasonably likely that they would sustain injuries of a reasonably serious nature. Under the circumstances, the inspector's "S&S" finding IS AFFIRMED.

ORDER

In view of the foregoing findings and conclusions, IT IS ORDERED AS FOLLOWS:

1. Safeguard Notice No. 2805189, August 8 1991, IS AFFIRMED, and JWR's contest IS DENIED.
2. Section 104(a) "S&S" Citation NO. 2805196, August 12, 1991, IS AFFIRMED, and JWR's contest IS DENIED.

  
George A. Koutras  
Administrative Law Judge

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

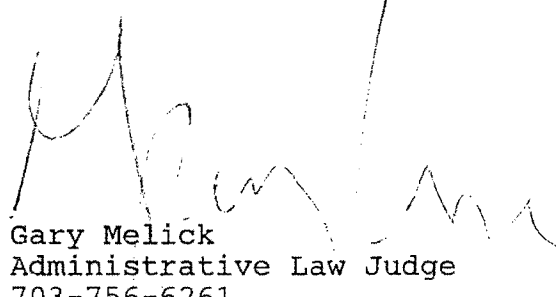
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5203 LEESBURG PIKE  
FALLS CHURCH, VIRGINIA 22041

**MAY 18 1992**

ELMER SPEELMAN,	:	DISCRIMINATION PROCEEDING
Complainant	:	
	:	
v.	:	Docket No. PENN 92-262-D
	:	MSHA Case No. PITT CD 92-01
TUNNELTON MINING COMPANY,	:	
Respondent	:	

**ORDER OF DISMISSAL**

Complainant requests approval to withdraw his complaint in the captioned case. 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  
703-756-6261

**Distribution:**

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# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FALLS CHURCH, VIRGINIA 22041

MAY 18 1992

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. YORK 91-35-M
Petitioner	:	A. C. No. 30-01185-05538
v.	:	
	:	Docket No. YORK 91-43-M
ZCA Mines, Inc. (formerly	:	A. C. No. 30-01185-05540
NJZ MINES, INC.),	:	
Respondent	:	Balmat No. 4 Mine & Mill

## DECISION

Appearances: James A. Magenheimer, Esq., Office of the Solicitor, U. S. Department of Labor, New York, New York, for Petitioner;  
Sanders D. Heller, Esq., Gouverneur, New York, for Respondent.

Before: Judge Maurer

These cases are before me based upon petitions for assessment of civil penalty filed by the Secretary alleging violations of various mandatory standards set forth in Volume 30 of the Code of Federal Regulations.

Pursuant to a notice of hearing, these cases were heard on December 19, 1991, in Watertown, New York. At that hearing, the parties proposed to settle one of the citations at issue in these cases (Citation No. 3592372) with a reduction in the civil penalty from \$68 to \$20. Based on the Secretary's representations, I conclude that the proffered settlement is appropriate under the criteria contained in section 110(i) of the Mine Act. The terms of this settlement agreement will be incorporated into my order at the end of this decision.

There remained for trial three section 104(a) citations. The operator does not dispute the violations, but only the special "significant and substantial" (S&S) findings and of course, the amount of the civil penalty.

Neither party wished to file post-hearing submissions, but both made closing arguments on the hearing record, which I have considered along with the entire record in making the following decision.

## DISCUSSION AND FINDINGS

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

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

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

In United States Steel Mining Company, Inc., 7 FMSHRC 1125, 1129 (August 1985), the Commission stated further as follows:

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

### Citation No. 3592371

On February 6, 1991, while conducting an inspection of respondent's facility, MSHA Inspector Stephen Field issued section 104(a) Citation No. 3592371, charging a violation of 30 C.F.R. § 57.14107(a), which alleges the following condition or practice:

The head pulley, tail pulley and impact rollers of the mine ore apron feeder were not guarded to prevent persons from inadvertently contacting the pinch points. The pulleys were 31 inches above the walkway. The impact rollers were 45 inches above the walkway. Persons travel the walkway adjacent to the feeder daily.

The violation of the cited standard is essentially admitted. The real issue is whether or not it amounts to an S&S violation in these particular circumstances.

I find that it does not because the feeder only moves "inches per minute" and then only intermittently throughout the day depending on ore demand. The inspector had no idea how often it would move or when for that matter during a shift. The record is also rather fuzzy on when and how many employees ever walk by this feeder in any event. The Secretary simply has not met her burden of proving up the S&S special finding in this instance. My impression from reading the record as it concerns this citation as a whole is that any kind of an accident involving an employee becoming entangled in this tortoise-like feeder is extremely unlikely.

Therefore, based on the criteria contained in section 110(i) of the Act, I conclude that an appropriate penalty for this non-S&S violation is \$20.

Citation No. 3592378

On February 6, 1991, while conducting an inspection of respondent's facility, Inspector Field issued the instant citation which alleges the following condition or practice:

The headlights of the Waldon 5000 front end loader, observed being operated in the mill basement, were not functional. One headlight was missing. Darkened areas of the mill basement would require the use of headlights to assure appropriate visibility and to alert persons in the area of the loaders presence. Several persons were observed in the area.

The testimony from the inspector was to the effect that the mill basement had some dimly-lit areas where this front end loader was operated. I concur with him that it is a hazardous situation to have this vehicle, without functioning headlights, moving around an area where other employees are working in darkened conditions. There was also testimony from the inspector that the company's safety director had told him that the equipment was also used outside at night without benefit of headlights.

The hazard presented by this violation, of course, was the danger that the front end loader operator, unable to properly see or be seen would hit a person traveling by foot. If that happened, which I find to be reasonably likely in these circumstances, it would also be reasonably likely to cause serious injury. Accordingly, I conclude that this violation was therefore "significant and substantial" and serious.

Based on the criteria contained in section 110(i) of the Act, I conclude that an appropriate penalty for this violation is \$91, as originally proposed by the Secretary.

Citation No. 3592742

On February 12, 1991, while conducting an inspection of respondent's facility, Inspector Field issued the instant citation, which was subsequently modified to charge a violation of 30 C.F.R. § 57.15005 and alleges the following condition or practice:

Safety belts and lines were not worn to prevent persons from falling from the top of the two 30,000 gallon diesel fuel storage tanks located behind the oil storage building, in that a means was not provided to secure the lines. The tanks were 10 feet in height and were provided with caged ladders. An employee is required, every 2 to 3 months to access the top of the tank to make checks.

These tank tops are 10 feet off the ground, 20 feet in diameter and surrounded by a soft sand surface. The man who goes up there every so often to "stick the tank" for a manual fuel quantity check testified that he climbs up the caged ladder, walks approximately to the center of the tank and performs his check. The whole process takes him about 5 minutes. He also testified that he has been doing this since 1971 and has never fallen or slipped on top of these tanks. Nor to his knowledge has anyone else ever fallen or slipped on the top of these tanks. He believes the likelihood of falling off those tanks is absolutely nil. "If you're sticking them like that you can't get anywhere near the edge, so the possibility of falling is nil. There is no possibility." (Tr. 24). I concur with Mr. Zeller. This citation will be modified to reflect that it is non-S&S.

Therefore, based on the criteria contained in section 110(i) of the Act, I conclude that an appropriate penalty for this non-S&S violation is \$20.


ORDER

1. Citation Nos. 3592372, 3592371, and 3592742 are modified to delete the characterization "significant and substantial" and, as so modified, ARE AFFIRMED.

2. Citation No. 3592378 IS AFFIRMED.

3. Respondent shall, within 30 days of the date of this decision, pay the sum of \$151 as a civil penalty for the violations found herein.

4. Upon payment of the civil penalty, these proceedings ARE DISMISSED.

  
Roy J. Maurer  
Administrative Law Judge

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dcp

# 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 19 1992

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 91-2077
Petitioner	:	A. C. No. 46-00506-03519
v.	:	
	:	Docket No. WEVA 91-2123
STEELE BRANCH MINING,	:	A.C. No. 46-00506-03520
Respondent	:	
	:	Surface Mine No. 927

## DECISION

Appearances: Patrick L. DePace, Esq., U.S. Department of Labor, Office of the Solicitor, Arlington, Virginia for Petitioner;  
Roger L. Sabo, Esq., Schottenstein, Zox, and Dunn, Columbus, Ohio for Petitioner.

Before: Judge Weisberger

## Statement of the Case

These two civil penalties proceedings, which were consolidated for hearing, are before me based upon petitions filed by the Secretary (Petitioner), alleging violations by the Operator (Respondent) of 30 C.F.R. § 77.404(a) and 30 C.F.R. § 50.11(b), and seeking the imposition of civil penalties. Pursuant to notice, the cases were heard in Charleston, West Virginia on March 18, 1992. James E. Davis and Donald R. Mills, testified for the Secretary. Wiley Queen, Bobby Edward Casto, Frederick R. Miller, Steven L. Kittle, Mark Potnick, and William Roberts testified for Respondent. The parties filed post hearing briefs on May 11, 1992.

## Findings of Facts and Discussion

### I. Violation of 30 C.F.R. § 77.404(a)

On April 23, 1991, Donald R. Mills an MSHA investigator of heavy machines and coal mine inspector, inspected the primary fuel filter of a No. 16 Caterpillar road grader (No. 009), which had been involved in a fatal accident earlier that day involving

the Operator of the grader, Rayburn Browning.<sup>1</sup> Mills removed the filter case assembly and observed that the retainer, spring, and ring, were all missing and that the element assembly (filter) was no longer properly connected, and was lying on the bottom of the case assembly. He indicated that the filter was not performing its function, and that accordingly the engine of the grader could stall, or shut down, as a result of being injected with fuel containing contaminants. According to Mills, should this occur while the grader is going around a curve, an accident could occur causing injuries or death.

Mills also indicated that the steering wheel had between 270 to 300 degrees of slack, in that the wheel had to be turned to that extent in order for it to respond. He indicated that a delay in steering could cause an accident should this occur while the vehicle is being driven around a blind curve. Mills issued a Citation alleging a violation of 30 C.F.R. § 77.404(a) which, as pertinent, provides that mobile equipment "...shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately."

a. The primary filter

The filter at issue is a primary filter designed to remove scabbing, rust, dirt, and particulate from the fuel<sup>2</sup>. Before the fuel in the grader is pumped into the engine, it is first pumped through the primary filter in question. Then the fuel goes through two secondary filters whose function is to remove fine particles. James Davis, an MSHA inspector, indicated that all three filters are needed to insure that clean fuel will enter the injection pump where it is then pumped to the engine. He was unable to state whether the secondary pumps will adequately remove contaminants in the event that the primary filter does not operate. However, he indicated on cross examination that material not trapped by the primary filter would then enter the secondary filters where the materials would then be trapped.

Wiley Queen, head mechanic at the mine in question, indicated that the purpose of the primary filter is to screen

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<sup>1</sup>The Citations that were issued as a consequence of an MSHA investigation of this fatality are not the subject of the instant proceeding.

<sup>2</sup>James Davis, an MSHA inspector, indicated that the filter is also designed to remove water. William Roberts, the equipment manager of Geupel Construction Company, the parent company of Respondent, testified that the filter is not designed to remove water, but rather that water settles to the bottom of the case assembly. I accord more weight to the testimony of Roberts due to his expertise.



large debris. William Roberts, equipment manager for Geupel Construction Company, Respondent's parent, indicated that secondary filters are meant to remove fine particles. Hence, it would appear that the contaminants which would not have been screened by the primary filter which was not in its proper place, would, a fortiori, have been screened and trapped by the two secondary filters that are designed to screen smaller particles.

b. Excessive play in the steering wheel

Mills did not drive the grader, and did not start the engine. However, when he turned the wheel he observed between 270 to 300 degrees of slack through which the steering wheel had to be turned before the wheels responded. He indicated that the slack in the steering wheel should be "10 degrees, 20 degrees". (Tr. 88) According to Queen, if the engine on the grader is in operation all the slack in the steering wheel would be taken up except for about a third. In the same connection, Roberts indicated that due to the gear system the grader is equipped with, if the engine off, there is more play in the steering wheel. He indicated that with the engine off the play in the steering wheel is about 120 degrees, whereas if it is on there is only 45 degrees of play. Bobby Edward Casto, a field serviceman employed by Walker Machinery, which services the grader in question, testified that if the engine in the grader is not on, there is about 100 to 180 degrees of play in the steering wheel before movement of the wheels is felt. Casto indicated that on April 23, he drove the grader up a hill, and there was only about one degree of play. I do not assign much probative weight to this testimony with regard to the play of the steering wheel with the engine on, as Casto did not specifically test the steering wheel for play. Also, there is no indication that when Casto drove the vehicle uphill any curves were encountered which necessitated the turning of the steering wheel.

Queen also indicated that he had driven the grader sometime prior to the time the citation was issued, and did not notice any slack in the steering. However he could not indicate with any degree of specificity when this occurred. Accordingly, not much weight was accorded his testimony in this regard.

Queen indicated that he had worked with Browning for a year, and that if Browning experienced any problems he brought them to his (Queen's) attention. Queen stated that on the morning of the fatality, Browning returned grader No. 007 as there was a problem with the brakes, and instead was given the grader in question to operate. Queen indicated that Browning did not state that there were any problems with the steering of the vehicle. Queen said that, in his opinion, Browning would not have operated the vehicle in question if it was unsafe. In the same fashion Frederick R. Miller, who was the mine superintendent from October 1989 through September of 1991, indicated that Browning

was "real good" at making preshift examinations, and that he would normally bring any problems to attention of the mechanic (Tr.274).

According to Miller, the vehicle in question was inspected by MSHA and State inspectors three weeks prior to April 23, 1991, and no violation was cited. Respondent's records indicate that the vehicle was operated only 17.5 hours subsequent to the date of this inspection up until April 23 (Exhibit F).

In analyzing whether the evidence establishes that the grader was "unsafe" within the purview of Section 77.404 § 77.404(a) supra, the common meaning of the term "safe" is to be considered. Webster's Third New International Dictionary, (1986 edition) ("Webster's") defines "safe" as "2. Secure from threat of, danger, harm or loss:", Webster's defines "Secure" as "2 a: free from danger." "Danger" is defined in Webster's as "3. a: liability to injury, pain, or loss: PERIL, RISK... ."

I find the testimony of Respondent's witnesses insufficient to contradict or impeach the specific testimony of Mill that, on April 23, 1990, when he tested the steering there was between 270 to 300 degrees of play. Although the steering wheel might exhibit more slack when the engine is off, I conclude that play in the steering wheel of approximately 270 degrees when the engine is off, is clearly evidence of play in the steering wheel to a more than non-significant degree when the engine is on. Inasmuch as the grader was being operated on an access road that, according to the uncontradicted testimony of Mills, contained curves, and a 8 to 9 percent grade in some areas, an accident could have resulted from a delay in the steering caused by the play in the steering wheel. Hence, applying the common usage of the term "safe" as defined in Webster's infra, I conclude, that due to the play in the steering wheel, the grader in question was not in safe operating condition. Since it was in operation, I find that Respondent herein did violate section 77.404(a).

c. Significant and substantial

The grader was being used to grade and maintain a 6 mile road which provided the only access to the mining operation. As such, the road was used by trucks carrying coal from Respondent's operation, as well as by other vehicular traffic. According to the uncontradicted testimony of Mills, the road had a 8 to 9 percent grade in some areas, and portions of the roadway that curved were only 20 to 25 feet wide. Given the degree of the excessive play in the steering wheel, and the road and traffic conditions, I conclude that the violation herein was significant and substantial. (See Turner Brother, Inc., 7 FMSHRC 424 (1985) (Judge Melick)).

Taking into account the statutory factors set forth in Section 110(i) of the Federal Mine Safety and Health Act of 1977 (the Act), I conclude that a penalty of \$85 is appropriate for this violation.

## II. Violation of 30 C.F.R. § 50.11(b)

James E. Davis, an MSHA inspector and accident investigator, indicated that on April 23, 1991 an investigation commenced with regard to the fatality that had occurred at Respondent's site on that date. He indicated that at the start of the investigation, he requested of Frederick R. Miller, and Mark Potnick, the Director of Human Resources of Geupel Construction Company to provide an investigation report including a description of steps taken to prevent a similar occurrence in the future. Davis indicated that he made follow-up requests on April 23, April 24, and April 26. He indicated that on April 29, he spoke with Potnick, who oversees the mine safety programs at the Steel Branch operation, concerning preventive measures Respondent would take to avoid a recurrence of a fatal accident. Davis said that he and Potnick discussed "the subject of seat belts", reinstructing miners in the safe operating and emergency procedures and the examinations of equipment and "relevant" training (Tr.41). He indicated that he made follow-up requests of Respondent on May 8 and May 9, and that the only reasons offered to him by Respondent to excuse its not having filed a report were that the father-in-law of Potnick had died, and that the report was being worked on "or passed through the appropriate channels" (Tr.48). He further stated that Potnick never told him when the report was going to be submitted. Davis indicated that normally reports are submitted 3 to 4 days after the conclusion of the investigation.

On May 13, 1991, Davis cited the operator for violating Section 50.11(b) supra. The report was submitted 3 days later on May 16.

Section 50.11(b) supra, as pertinent, provides as follows: "An operator shall submit a copy of any investigation report to MSHA at its request." Section 50.11(b) supra does not expressly require the operator's report to be submitted within any time frame subsequent to the occurrence of the accident or investigation. It requires only that the report "shall" be submitted at the "request" of MSHA. Respondent has not contradicted or impeached the testimony of Davis that he initially requested of Respondent to submit a report at the commencement of the investigation on April 23, and made follow-up requests on April 24, 26, May 8, and May 9. Nor has Respondent impeached or contradicted the testimony of Davis that Potnick had never told him when the operator's report was to be submitted. Further, the record is clear that no report had been submitted by the Operator by May 13, the date the Citation was issued by Davis.

Respondent appears to rely on the testimony of Potnick that a delay in the submission of a copy of its report was not unreasonable, taking into account Potnick's numerous other responsibilities, the desire to prepare the report after a review by him of transcripts of interviews with various witnesses during the investigation, the need to submit the report to his superiors for review, and the delay occasioned by the death of his father-in-law. These factors are germane to the issue of the amount of the penalty to be imposed and will be discussed in that connection. However, these factors are insufficient to rebut Petitioner's case that by May 13, 1991, Respondent had failed to submit a copy of its investigation report inspite of numerous requests by MSHA. Accordingly, I find that Respondent herein did violate Section 50.11(b) supra.

Davis testified that he considered the violation to be significant and substantial. In essence, he explained that failure to submit the report was highly likely to result in a fatality, because there could be a reoccurrence if MSHA is not advised of the steps taken to prevent a recurrence. (Tr. 36,42).

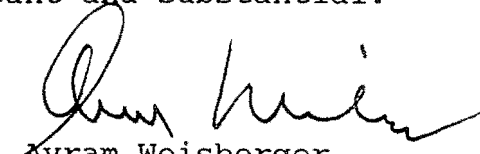
Having observed the demeanor of Potnick, I find his testimony credible that, on April 29, at the closeout conference of the investigation, he informed Davis orally that the operator intended to have its employees instructed by Walker Machinery on the functions of the particular heavy equipment in question, the use of the seat belts, and the dangers of jumping out of moving heavy equipment. In the written report submitted on May 16, the operator reiterated these steps and did not set forth any others. Hence, since the operator did orally report to MSHA, as early as the closeout of the investigation six days after the accident, on the steps that it intended to take to prevent a similar reoccurrence, I find that the violation herein to be not significant and substantial.

In evaluating the amount to a civil penalty to be imposed herein, I place emphasis on the fact that six days subsequent to the accident the operator orally reported to MSHA with regard a description of the steps to be taken to prevent a similar occurrence in the future. Also, I note the good faith of the operator as manifested by Potnick's uncontradicted testimony that a delay in submitting the written report was caused by the desire of the operator to have a complete set of facts prior to the submission of the report. In this connection, Potnick indicated that he wanted to study the typed transcript of questions and answers of various persons interviewed during the investigation. Also, due to company policy, Potnick had to submit the entire completed written report to his supervisors for their review. In addition, delay was contributed to by Potnick's numerous responsibilities, as well as the fact that his father-in-law had died unexpectedly sometime after the investigation. I thus find that Respondent was not negligent to any degree in connection

with the violation herein, and that the violation itself was not very serious considering the fact that the critical aspects of the report i.e. a description of steps taken to prevent a similar occurrence, were orally reported to MSHA six days after accident. Taking into account the other factors set forth in Section 110(i) of the Act I conclude that a penalty herein of \$10 is appropriate.

ORDER

It is ORDERED that Respondent shall pay a civil penalty of \$95, within 30 days of this decision. It is further ORDERED that Citation No. 2956463 be amended to reflect the fact that the cited violation is not significant and substantial.

  
Avram Weisberger  
Administrative Law Judge

Distribution:

Patrick L. DePace, Esq., Office of the Solicitor, U. S.  
Department of Labor, 4015 Wilson Boulevard, Room 516, Arlington,  
VA 22203 (Certified Mail)

Roger L. Sabo, Esq., Schottenstein, Zox and Dunn, 41 South High  
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

THE FEDERAL BUILDING

1244 SPEER BOULEVARD #280

DENVER, CO 80204-3582

(303) 844-5266 / FTS 564-5266

May 21, 1992

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 91-404
Petitioner	:	A.C. No. 05-00301-03768
	:	
v.	:	Dutch Creek Mine
	:	
MID-CONTINENT RESOURCES	:	
INCORPORATED,	:	
Respondent	:	

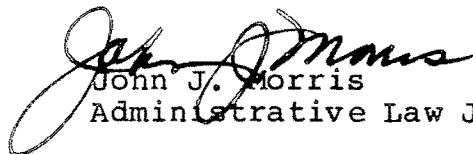
AMENDMENT OF DECISION

Appearances: Margaret A. Miller, Esq., Tandra Leonard, Esq.,  
Office of the Solicitor, U.S. Department of Labor,  
Denver, Colorado,  
for Petitioner;  
Edward Mulhall, Jr., DELANEY & BALCOMB, P.C.,  
Glenwood Springs, Colorado,  
For Respondent.

Before: Judge Morris

Pursuant to Commission Rule 65(c), 29 C.F.R. § 2700.65(c),  
the Judge strikes paragraph 3 of the Order entered in the Caption  
Decision and inserts a new paragraph 3.

A two-page "Amended Decision" is attached hereto.

  
John J. Morris  
Administrative Law Judge

Distribution:

Margaret A. Miller, Esq., Tandra Leonard, Esq., Office of the  
Solicitor, U.S. Department of Labor, 1585 Federal Office  
Building, 1961 Stout Street, Denver, CO 80294

Edward Mulhall, Jr., Esq., DELANEY & BALCOMB, Drawer 790,  
Glenwood Springs, CO 81602

ek

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

THE FEDERAL BUILDING

1244 SPEER BOULEVARD #280

DENVER, CO 80204-3582

(303) 844-5266 / FTS 564-5266

May 21, 1992

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 91-404
Petitioner	:	A.C. No. 05-00301-03768
	:	
v.	:	Dutch Creek Mine
	:	
MID-CONTINENT RESOURCES	:	
INCORPORATED,	:	
Respondent	:	

AMENDED DECISION

Appearances: Margaret A. Miller, Esq., Tamara Leonard, Esq.,  
Office of the Solicitor, U.S. Department of Labor,  
Denver, Colorado,  
for Petitioner;  
Edward Mulhall, Jr., DELANEY & BALCOMB, P.C.,  
Glenwood Springs, Colorado,  
For Respondent.

Before: Judge Morris

This is civil penalty proceeding initiated by Petitioner against Respondent pursuant to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, et seq. (the "Act"). The civil penalties sought here are for the violation of mandatory regulations promulgated pursuant to the Act.

A hearing in this case and related cases was held in Glenwood Springs, Colorado, on February 26, 1992. The parties reached an amicable settlement on the record and subsequently filed a written Joint Motion to Approve Settlement.

Respondent further filed a suggestion of bankruptcy.

The Citations, the original assessments, and the proposed dispositions are as follows:

<u>Citation No.</u>	<u>Proposed Penalty</u>	<u>Amended Proposed Penalty</u>
3410472	\$276.00	\$166.00
2931613	\$240.00	\$144.00

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

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

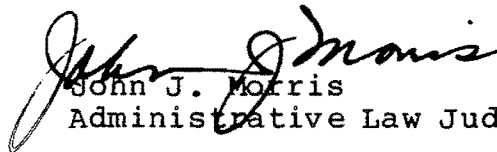
Accordingly, I enter the following:

ORDER

1. The order of consolidation entered on March 2, 1992, is **DISSOLVED**.

2. The above Citations and amended penalties are **AFFIRMED**.

3. Respondent filed a case under Chapter 11 of the Bankruptcy Code and is operating its bankruptcy estate as a debtor-in-possession. Accordingly, upon approval of the United States Bankruptcy Court in Case No. 91-11658 PAC, it is **ORDERED** that civil penalties will be assessed against the Respondent in the amount of \$310 and Petitioner is authorized to assert such assessment as a claim in Respondent's Bankruptcy Case.

  
John J. Morris  
Administrative Law Judge

Distribution:

Margaret A. Miller, Esq., Tamara Leonard, Esq., Office of the Solicitor, U.S. Department of Labor, 1585 Federal Office Building, 1961 Stout Street, Denver, CO 80294

Edward Mulhall, Jr., Esq., DELANEY & BALCOMB, Drawer 790, Glenwood Springs, CO 81602

ek



FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

THE FEDERAL BUILDING

1244 SPEER BOULEVARD #280

DENVER, CO 80204-3582

(303) 844-5266 / FTS 564-5266

May 21, 1992

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 91-470
Petitioner	:	A.C. No. 05-00301-03770
	:	
v.	:	Dutch Creek Mine
	:	
MID-CONTINENT RESOURCES	:	
INCORPORATED,	:	
Respondent	:	


AMENDMENT OF DECISION

Appearances: Margaret A. Miller, Esq., Tandra Leonard, Esq.,  
Office of the Solicitor, U.S. Department of Labor,  
Denver, Colorado,  
for Petitioner;  
Edward Mulhall, Jr., DELANEY & BALCOMB, P.C.,  
Glenwood Springs, Colorado,  
For Respondent.

Before: Judge Morris

Pursuant to Commission Rule 65(c), 29 C.F.R. § 2700.65(c),  
the Judge strikes paragraph 3 of the Order entered in the Caption  
Decision and inserts a new paragraph 3.

A two-page "Amended Decision" is attached hereto.

  
John J. Morris  
Administrative Law Judge

Distribution:

Margaret A. Miller, Esq., Tandra Leonard, Esq., Office of the  
Solicitor, U.S. Department of Labor, 1585 Federal Office  
Building, 1961 Stout Street, Denver, CO 80294

Edward Mulhall, Jr., Esq., DELANEY & BALCOMB, Drawer 790,  
Glenwood Springs, CO 81602

ek

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

THE FEDERAL BUILDING

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DENVER, CO 80204-3582

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May 21, 1992

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 91-470
Petitioner	:	A.C. No. 05-00301-03770
	:	
v.	:	Dutch Creek Mine
	:	
MID-CONTINENT RESOURCES	:	
INCORPORATED,	:	
Respondent	:	

AMENDED DECISION

Appearances: Margaret A. Miller, Esq., Tandra Leonard, Esq.,  
Office of the Solicitor, U.S. Department of Labor,  
Denver, Colorado,  
for Petitioner;  
Edward Mulhall, Jr., DELANEY & BALCOMB, P.C.,  
Glenwood Springs, Colorado,  
For Respondent.

Before: Judge Morris

This is civil penalty proceeding initiated by Petitioner against Respondent pursuant to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, et seq. (the "Act"). The civil penalties sought here are for the violation of mandatory regulations promulgated pursuant to the Act.

A hearing in this case and related cases was held in Glenwood Springs, Colorado, on February 26, 1992. The parties reached an amicable settlement on the record and subsequently filed a written Joint Motion to Approve Settlement.

Respondent further filed a suggestion of bankruptcy.

The Citations, the original assessments, and the proposed dispositions are as follows:

<u>Citation No.</u>	<u>Proposed Penalty</u>	<u>Amended Proposed Penalty</u>
3410412	\$ 20.00	\$ 20.00
3410415	\$ 20.00	\$ 20.00
3410392	\$ 20.00	\$ 20.00
9996551	\$147.00	\$ 88.00
3241264	\$ 20.00	\$ 20.00
3586355	\$119.00	\$ 71.00
3586278	\$198.00	\$119.00

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

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

Accordingly, I enter the following:

ORDER

1. The order of consolidation entered on March 2, 1992, is **DISSOLVED**.

2. The above Citations and amended penalties are **AFFIRMED**.

3. Respondent filed a case under Chapter 11 of the Bankruptcy Code and is operating its bankruptcy estate as a debtor-in-possession. Accordingly, upon approval of the United States Bankruptcy Court in Case No. 91-11658 PAC, it is **ORDERED** that civil penalties will be assessed against the Respondent in the amount of \$358 and Petitioner is authorized to assert such assessment as a claim in Respondent's Bankruptcy Case.

  
John J. Morris  
Administrative Law Judge

Distribution:

Margaret A. Miller, Esq., Tandra Leonard, Esq., Office of the Solicitor, U.S. Department of Labor, 1585 Federal Office Building, 1961 Stout Street, Denver, CO 80294

Edward Mulhall, Jr., Esq., DELANEY & BALCOMB, Drawer 790, Glenwood Springs, CO 81602

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

THE FEDERAL BUILDING

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DENVER, CO 80204-3582

(303) 844-5266 / FTS 564-5266

May 21, 1992

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 91-471
Petitioner	:	A.C. No. 05-00301-03771
	:	
v.	:	Dutch Creek Mine
	:	
MID-CONTINENT RESOURCES	:	
INCORPORATED,	:	
Respondent	:	

AMENDMENT OF DECISION

Appearances: Margaret A. Miller, Esq., Tandra Leonard, Esq.,  
Office of the Solicitor, U.S. Department of Labor,  
Denver, Colorado,  
for Petitioner;  
Edward Mulhall, Jr., DELANEY & BALCOMB, P.C.,  
Glenwood Springs, Colorado,  
For Respondent.

Before: Judge Morris

Pursuant to Commission Rule 65(c), 29 C.F.R. § 2700.65(c),  
the Judge strikes paragraph 4 of the Order entered in the Caption  
Decision and inserts a new paragraph 4.

A two-page "Amended Decision" is attached hereto.

  
John J. Morris  
Administrative Law Judge

Distribution:

Margaret A. Miller, Esq., Tandra Leonard, Esq., Office of the  
Solicitor, U.S. Department of Labor, 1585 Federal Office  
Building, 1961 Stout Street, Denver, CO 80294

Edward Mulhall, Jr., Esq., DELANEY & BALCOMB, Drawer 790,  
Glenwood Springs, CO 81602

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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DENVER, CO 80204-3582

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May 21, 1992

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 91-471
Petitioner	:	A.C. No. 05-00301-03771
	:	
v.	:	Dutch Creek Mine
	:	
MID-CONTINENT RESOURCES	:	
INCORPORATED,	:	
Respondent	:	

AMENDED DECISION

Appearances: Margaret A. Miller, Esq., Tandra Leonard, Esq.,  
Office of the Solicitor, U.S. Department of Labor,  
Denver, Colorado,  
for Petitioner;  
Edward Mulhall, Jr., DELANEY & BALCOMB, P.C.,  
Glenwood Springs, Colorado,  
For Respondent.

Before: Judge Morris

This is civil penalty proceeding initiated by Petitioner against Respondent pursuant to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, et seq. (the "Act"). The civil penalties sought here are for the violation of mandatory regulations promulgated pursuant to the Act.

A hearing in this case and related cases was held in Glenwood Springs, Colorado, on February 26, 1992. The parties reached an amicable settlement on the record and subsequently filed a written Joint Motion to Approve Settlement.

Respondent further filed a suggestion of bankruptcy.

The Citations, the original assessments, and the proposed dispositions are as follows:

<u>Citation No.</u>	<u>Proposed Penalty</u>	<u>Amended Proposed Penalty</u>
3586432	\$20.00	Vacate
9996593	\$20.00	\$20.00
9996594	\$20.00	\$20.00
9996595	\$20.00	\$20.00

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

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

Accordingly, I enter the following:

ORDER

1. The order of consolidation entered on March 2, 1992, is **DISSOLVED**.

2. Citation No. 3586432 is **VACATED**.

3. Citation Nos. 9996593, 9996594, 9996595, and the proposed penalties therefor are **AFFIRMED**.

4. Respondent filed a case under Chapter 11 of the Bankruptcy Code and is operating its bankruptcy estate as a debtor-in-possession. Accordingly, upon approval of the United States Bankruptcy Court in Case No. 91-11658 PAC, it is **ORDERED** that civil penalties will be assessed against the Respondent in the amount of \$60 and Petitioner is authorized to assert such assessment as a claim in Respondent's Bankruptcy Case.

  
John J. Morris  
Administrative Law Judge

Distribution:

Margaret A. Miller, Esq., Tamara Leonard, Esq., Office of the Solicitor, U.S. Department of Labor, 1585 Federal Office Building, 1961 Stout Street, Denver, CO 80294

Edward Mulhall, Jr., Esq., DELANEY & BALCOMB, Drawer 790, Glenwood Springs, CO 81602

ek

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

**MAY 26 1992**

SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. SE 91-32
Petitioner	:	A. C. No. 40-03011-03510
	:	
v.	:	S&H Mine No. 1
	:	
S AND H MINING, INCORPORATED,	:	
Respondent	:	

**DECISION**

Appearances: Mary Sue Taylor, Esq., Nashville,  
TN, for Petitioner;  
Mr. Paul G. Smith, Lake City, TN,  
for Respondent.

Before: Judge Fauver

This case involves a petition for civil penalties, under § 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq.

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

**FINDINGS OF FACT**

1. S&H Mining Incorporated owns and operates an underground coal mine, known as Mine No. 7, in Campbell County, Tennessee, where it produces coal for sale or use in or substantially affecting interstate commerce.

2. Federal Mine Inspector Don McDaniel, who specializes in electrical inspections, issued Citation 3174041 on May 11, 1990, under § 104(d)(1) of the Act. This citation was not contested by the operator and stands as issued.

3. During an inspection of Mine No. 7 on May 14, 1990, Inspector McDaniel was accompanied by Tommy McCoo, a mine foreman. Dwight Lindsey had conducted the preshift exam at the mine on May 14, 1990. At the section power center, Inspector McDaniel stepped on a cable and saw the cable coupler for the

feeder drop down, tripping the circuit breaker. The coupler fell because there was no upper locking device. He found wedges that were placed under the cable coupler in an attempt to hold it in place. The locking device for the coupler was broken on top, the bolts to hold it in place were stripped, and the locking device had been removed. Mr. Lindsey told Inspector McDaniel that he had noticed the condition during his preshift examination and that he had placed the wedges under the cable coupler to hold it in place. Based on this condition, Inspector McDaniel issued Order 3174055 for an unwarrantable failure to comply with 30 C.F.R. § 75.902, which provides that cable couplers shall be constructed so that the ground check continuity conductor shall be broken first and the ground conductors broken last when the coupler is uncoupled. Without a properly functioning lock, the ground conductor would break before the ground check continuity conductor, creating a safety hazard.

4. The cable coupler has a male section, connected to the cable, and a female section, on the power center. There are three phase wires and a ground wire on the four corners of the male connector. In the center of the male connector two pilot wires serve as a ground monitor system, to break the circuit if the ground wire is not functioning. The ground wire is on the top right corner of the male connector. The pilot wires are much smaller than the ground or the phase wires and are susceptible to breaking. A defect in the ground monitor system, e.g., a defective relay, could go undetected for a substantial period. The regulations require that the power center be examined monthly.

5. The male section of the coupler is designed to be locked to keep it from falling down, to ensure that the ground wire will not drop out first. If the system is functioning properly, the pilot wires will disengage the circuit breaker if the ground wire has dropped out. In a small but significant number of cases, including some instances at S&H mines, the circuit will not break because of an undiscovered defect in the ground check system.

6. The lack of a lock on the cable coupler, if combined with a fault in the pilot wire system, could allow the belt feeder to operate for an extended period without a ground wire. Such a condition, in the event of a ground fault on the feeder, could lead to electrical shock or death.

7. The lack of a lock could also allow the cat head to slip and hang attached with only two phase wires connected to the power center. In this condition, the power could arc to the detached third phase wire, and potentially start a mine fire or burn out the circuit breaker, jeopardizing miners working around the feeder or its circuit.



Order 3174056

8. On May 15, 1990, Inspector McDaniel traveled with mine Foreman Tommy McCoo to examine the splices in the high voltage cables. He examined one splice in a 4160-volt cable, using a tick tracer meter, designed to pick up stray current. He had used this meter for a number of years without errors in the readings as confirmed by physical inspections of the interior of splices. The meter indicated stray current was emitting from the splice. There were no signs of exterior damage to the splice or the cable.

9. Phase wires in a high-voltage cable are covered with copper shielding when they come from the manufacturer. The shielding is required to prevent stray current from penetrating the outer cable insulation. The shielding must be overlapped by at least one-half inch to prevent escaping current. Splices are made with a splice kit, which includes the necessary shielding material.

10. Inspector McDaniel asked who had made the splice and was told that it was made by Charles White, who is the mine superintendent and mine electrician. The inspector stated that his inspection indicated there was little or no shielding on the phase wires inside the splice. He found this to be a violation of 30 C.F.R. § 75.804, which requires that underground high-voltage cables be equipped with metallic shields around each ground conductor and that splices provide continuity of all components. Because the splice was made by Mr. White, Inspector McDaniel issued Order 3174056, charging an unwarrantable failure of mine management to comply with the safety standard, under § 104(d)(1) of the Act. Mr. White accompanied Inspector McDaniel to the splice, and opened the splice in his presence. There were repeating one-half inch gaps in the shielding on two of the phase wires for the entire distance of the splice. After examining the splice, Inspector McDaniel found that the person making the splice should have known that the phase wires were not adequately shielded, because of the size and number of the gaps in the phase wire shielding. Inspector McDaniel based this opinion on experience in having made a number of these splices, as well as his years of experience as an MSHA electrical inspector. It was Inspector McDaniel's opinion that Mr. White's position as superintendent and electrician for the company made the company responsible for a high degree of negligence displayed in the making of this splice.

11. The lack of phase wire shielding created a safety hazard because the current would eventually work through the insulation and could cause in an explosion, fire, or electrocution of a miner. The danger presented did not require that a person actually touch the wire to be electrocuted. It was reasonably likely that an accident would occur because the cable

was in an entry which was regularly traveled and the mine floor was wet. Charles White testified that he made the splice, but did not intentionally inadequately wrap the phase wires. He stated that he occasionally would use the old shielding that was on the phase wires instead of using the shielding provided in the splice kit. He also said that he made the splice under time constraints with only cap lighting. He acknowledged that the phase wire shielding had gaps in it, but he disputed the size of the gaps. I credit Inspector McDaniel's testimony as to the size of the gaps and the other conditions he observed.

#### DISCUSSION WITH FURTHER FINDINGS

##### Order 3174055

The top locking device on the feeder cable coupler was broken and had been removed. On May 14, 1990, Inspector McDaniel saw the coupler fall from its top locking position because wedges had been placed there instead of a locking device. This condition was a violation of 30 C.F.R. § 75.902.

Mr. Lindsey, who performed the preshift exam that morning, knew that the locking device was broken and had been removed. He was the operator's agent and certified examiner charged with finding and reporting hazardous conditions. He found this hazardous condition and not only failed to report it in his preshift report, but attempted to bypass the safety lock by using wedges. Mr. Lindsey's actions demonstrate aggravated conduct beyond ordinary negligence, imputable to the operator. Eastern Associated Coal Corp., 13 FMSHRC 178, 187 (1991). The violation was therefore "unwarrantable" under § 104(d)(1) of the Act.

Without the inspection of Inspector McDaniel, the cable coupler would have remained in an unsafe condition for a substantial period. It is reasonably likely that this condition would result in the operation of the feeder without ground fault protection. Given the wet mining conditions, it is reasonably likely that, in the event of a ground fault, someone working in the area would suffer an electrical shock. Additionally, continued mining could well result in arcing between the two connectors and could cause a mine fire or burn out the circuit breaker. The violation was "significant and substantial" within the meaning of § 104(d)(1) of the Act.

##### Order 3174056

This order involved an improper high voltage splice that created a hidden, serious danger. Mine conditions were wet, and the cable was located in a traveled area. The splice was made by Charles White, who was mine superintendent and mine electrician. It was one of many splices of this type that Mr. White had made. He is an experienced electrician who is well aware of the reason

for adequate shielding in a splice and the required method for providing that shielding.

Once sealed, an unsafe splice is not detectable to the naked eye. Given the danger involved in the failure to adequately shield a high-voltage splice, Mr. White had a high duty to ensure that the splice was made properly before sealing it. In addition, Mr. White is a member of management charged with the duty to ensure that the mine is safe for those who work there. He is also an electrician, and is charged with greater knowledge of the dangers involved concerning high voltage splices. I find that his conduct in making an unsafe splice was aggravated, beyond ordinary negligence. I therefore find that this was an unwarrantable violation.

Under continued mining operations the unsafe splice was reasonably likely to result in an electrical shock, of high voltage, causing death or serious injury. The violation was "significant and substantial" within the meaning of § 104(d)(1) of the Act.

#### Civil Penalties

Considering all of the criteria for civil penalties in § 110(i) of the Act, I find that the following civil penalties are appropriate for the violations found herein:

<u>Order</u>	<u>Civil Penalty</u>
3174055	\$400
3174056	\$400
	<hr/>
	\$800

#### CONCLUSIONS OF LAW

- 1, The judge has jurisdiction in this proceeding.
2. Respondent violated 30 C.F.R. § 75.902 as alleged in Order 3174055.
3. Respondent violated 30 C.F.R. § 75.804 as alleged in Order 3174056.

#### ORDER

WHEREFORE IT IS ORDERED that:

1. Orders 3174055 and 3174056 are AFFIRMED.

2. Respondent shall pay the above civil penalties of \$800 within 30 days from the date of this Decision.

  
William Fauver  
Administrative Law Judge

Distribution:

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

Mr. Paul G. Smith, S&H Mining Incorporated, P. O. Box 480, Lake City, TN 37769 (Certified Mail)

/fas

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

**MAY 27 1992**

JEFFERY A. PATE, : DISCRIMINATION PROCEEDING  
Complainant :  
v. : Docket No. SE 91-104-D  
WHITE OAK MINING COMPANY, :  
Respondent : BARB CD 90-36  
: White Oak Mining

**DECISION AND ORDER AWARDING COSTS AND DAMAGES**

Appearances: Mitch Damsky, Esq., Birmingham, Alabama, for  
Complainant;  
David M. Smith, Esq., Maynard, Cooper, Frierson &  
Gale, P.C., Birmingham, Alabama, for Respondent.

Before: Judge Maurer


On April 15, 1992, a decision on the merits was entered finding that respondent had discriminated against complainant in violation of section 105(c) of the Mine Act.

Subsequently, the parties have settled the costs (including attorney's fees) and damages aspect of the case. A total payment of \$4500 in exchange for a full and final resolution of this matter is proposed, and I conclude appropriate.

**FINAL ORDER**

Respondent shall pay \$4500 to complainant within 30 days of this decision and order for reimbursement of his costs (including attorney's fees) and in full satisfaction of his damages.

This decision and order represents the final disposition of these proceedings before this judge.

  
Roy J. Maurer  
Administrative Law Judge

Distribution:

Mitch Damsky, Esq., 3600 Clairmont Avenue, Birmingham, AL 35222  
(Certified Mail)

David M. Smith, Esq., Maynard, Cooper, Frierson & Gale, P.C.,  
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dcp

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

MAY 27 1992

BETHENERGY MINES, INC.,	:	CONTEST PROCEEDINGS
Contestant	:	
	:	Docket No. PENN 89-277-R
	:	Citation No. 3088080; 9/7/89
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	Docket No. PENN 89-278-R
Respondent	:	Citation No. 3088162; 9/7/89
	:	
	:	Livingston Portal
	:	Eighty Four Complex

## DECISION ON REMAND

The Commission remanded these cases (Bethenergy Mines, Inc., 14 FMSHRC 17 (1992)) with the following directives:

With respect to the issue of whether the underlying safeguard is valid, the judge should set forth findings and conclusions as to whether the Secretary proved that the disputed safeguard was based on the judgment of the inspector as to the specific conditions at BethEnergy's Mine No. 60 and on a determination by the inspector that a transportation hazard existed that was to be remedied by the action prescribed in the safeguard. Taking into consideration the principles announced in SOCCO, the judge should determine whether the safeguard notice "identif[ied] with specificity the nature of the hazard at which it [was] directed and the conduct required of the operator to remedy such hazard." 7 FMSHRC at 512. If the judge finds the safeguard to have been validly issued, he should resolve the question of whether BethEnergy violated the safeguard. The remaining issues are to be reconsidered as appropriate to the judge's other determinations. [14 FMSHRC at 27-28.]

The parties have submitted proposed findings and conclusions, with supporting briefs.

Having considered the hearing evidence and the record as whole, I find that a preponderance of the substantial, reliable,

and probative evidence establishes the following Findings of Fact and further findings in the Discussion that follows:

### FINDINGS OF FACT

1. On June 13, 1984, MSHA Inspector Francis E. Weir issued Notice to Provide Safeguard 2395866 at the subject mine which provided:

A clear travelway of at least 24 inches wide was not provided on both sides of the belt conveyor in the longwall section MMU 031. Starting at the tipple and extending inby for approximately 400 ft. For the first 200 ft. the clearance changed from the left side back to right and management had the area fenced off and a crossunder had been provided. The second area was approximately 300 ft. inby the tipple was on the left side and the clearance was between 23 inches and 15 inches for approximately 10-15 feet in two different locations.

This is a notice to provide safeguard that requires at least 24 inches of clear travelway be provided on both sides of all belt conveyors installed after March 30, 1970 at this mine.

2. On September 7, 1989, MSHA Inspector John Mull issued § 104(a) Citations 3088080 and 3088162, alleging violations of the safeguard notice issued by Inspector Weir. Citation 3088080 alleges:

At least 24 inches of clear travelway was not provided on both sides of the Number 4 belt, as the side not normally walked was obstructed with rib material, crib block and other material at numerous locations.

Citation 3088162 alleges:

At least 24 inches of a clear travelway was not provided on both sides of the entire Number 3 belt, as the side not normally walked was obstructed with rib material, crib block and other material at numerous locations.

3. Belts 3 and 4 are main belts that travel uphill about 3000 feet each. The belts are suspended from the mine roof. From the top of the belt to the mine roof there is a three to

four foot clearance. The bottom belt is about 18 to 24 inches from the mine floor. The belts are 60 inches wide.

4. The obstructions alleged in Citation 3088162 were 3 inches high in one location and 1 1/2 to 2 feet high in others. The obstructions alleged in Citation 3088080 were as high as 3 feet.

5. The obstructions created hazards of tripping, slipping and falling, including falling against a moving belt.

6. Miners worked on the "tight" side of the belts to clean up spillage, to maintain the roof support system, to change belt rollers, and, in the event of an interruption of the ventilation system, to make repairs on the stopping line. Inspector Mull found evidence that someone had traveled the tight side of the belt in that there were legs for I-beams used for a roof support system in some of the material left along one of the cited belts.

7. BethEnergy has a policy that prohibits employees from working on the tight side of the belt when the belt is running unless another employee is stationed at the pull cord, on the wide side. When activated, the pull cord stops the movement of the belt conveyor, but not immediately. Depending on the weight of the load on the belt, the belt would travel another 5 to 15 feet. An employee would most likely work on the tight side of a moving belt to clean up spillage. In the event that an employee tripped or fell while the belt was running and became entangled in the belt, serious injuries, including death, could occur, notwithstanding the belt would be stopped after moving 5 to 15 feet.

8. Citations 3088080 and 3088162 were abated over the course of 10 shifts, with two to four employees performing clean-up activities on each shift. The belts were running when this work was done; one employee stood on the wide side at the pull cord and another cleared loose coal, rib sloughage and other materials from the tight side.

9. Safeguard Notice 2395866 was one of many similar safeguard notices issued to mines in the Monroeville subdistrict pursuant to a published criterion, 30 C.F.R. § 75.1403-5(g).

#### DISCUSSION WITH FURTHER FINDINGS

##### Is the Underlying Safeguard Valid?

The Commission stated that the judge should "set forth findings and conclusions as to whether the Secretary proved that the disputed safeguard was based on the judgment of the inspector as to the specific conditions at BethEnergy's Mine No. 60 and on a determination by the inspector that a transportation hazard



existed that was to be remedied by the action prescribed in the safeguard." 14 FMSHRC at 27.

The conditions causing Inspector Weir to issue Notice of Safeguard 2395866 were obstruction of the travelway (putting a fence across the travelway) and failing to keep a width of at least 24 inches (he found distances of 15 to 23 inches). He referred to the obstructing fence and the narrow travelway in the safeguard notice and then applied the safety guideline in 30 C.F.R. § 75.1403-5(g), requiring a safeguard that "at least 24 inches of clear travelway be provided on both sides of all belt conveyors installed after March 30, 1970 at this mine." I conclude that the safeguard notice was based on the judgment of the inspector as to specific conditions at this mine, which he observed and stated in the notice.

Inspector Mull, who issued the two citations based on the safeguard, interpreted the language of the safeguard notice as requiring a clear travelway free of obstructions and extending at least 24 inches. The day before the hearing, he spoke to Inspector Weir about the conditions Inspector Weir had intended the safeguard notice to apply to, and Inspector Weir told him the safeguard notice was intended to require a clear travelway of at least 24 inches, free of "Anything that could be obstructing the clearance." Tr. 143.

I conclude that the safeguard was based on a determination by the inspector that transportation hazards existed that were to be remedied by the action prescribed in the safeguard. The transportation hazards implicit in Inspector Weir's safeguard are those that one would conclude from an ordinary and reasonable understanding of its language. A requirement to have "at least 24 inches of clear travelway" means, in ordinary language, that the travelway be clear -- that is, open and unobstructed -- for a width of at least 24 inches. Protection against certain hazards is implicit in this requirement: (1) With inadequate clearance (fewer than 24 inches) a miner may walk too close to the belt or the rib, and fall against either; (2) if the travelway is obstructed by objects or material, the obstructions may cause a miner to trip and fall against the belt, rib or floor; (3) becoming entangled with a moving belt could result in death or serious injury; (4) falling against a rib, the mine floor, or a belt conveyor could result in serious injury. The Commission's rule of narrow interpretation of safeguard notices (see Discussion at pp. 6-7, below) requires eliminating the hazards in item (2), above, from the reach of the safeguard.

#### Citations 3088080 and 3088162

Inspector Mull found that 24 inches of clear travelway was not provided because of material from the ribs and other material obstructing the travelway along the Number 4 belt, as alleged in

Citation 3088080, and because of rib material, crib block and other material obstructing the travelway along the Number 3 belt, as alleged in Citation 3088162. He found the conditions to be violative of the safeguard notice, based on his interpretation that it required a clear travelway, free of obstructions, for at least 24 inches.

The obstructing material reduced the safe, usable width of each travelway but the Secretary did not prove that it was reduced to below 24 inches. Inadequate clearance could present a danger of accidental contact with the moving belt, with likely serious injuries or death. There are many trips and falls in mines, so that walking too close to a moving belt, without adequate clearance, is itself a dangerous practice. Also, inadequate clearance could present a danger of walking too close to the rib, with the risk of falling against it. However, since the inspector did not measure the safe, usable widths of the obstructed travelways, I find the evidence is not sufficient to prove dangers from inadequate clearance.

The obstructions in each travelway created hazards of tripping, slipping or falling against the belt, rib, or mine floor. If someone attempted to break a trip or fall by reaching out, he or she could come into contact with the moving belt and become entangled in a roller, with a high risk of serious injury or death. The likelihood of injury was created by the fact that employees travel and work on the "tight" or "narrow" side of the belt when the belt is running to maintain the roof support system, to change belt rollers, clean spillage, and, in the event of an interruption of the ventilation system, to make repairs on the stopping line. Inspector Mull also found evidence that someone had traveled the tight side of the belt in connection with the installation or placement of legs for I-beams used for roof support.

BethEnergy has a policy that prohibits employees from working on the tight side of the belt when the belt is running unless another employee is stationed at the pull cord, which can stop the belt conveyor in about 5 to 15 feet. If a miner tripped or fell and became entangled in the belt, the pull cord would be activated by the other employee. However, serious injury or death could occur despite BethEnergy's policy. First, the miner on the wide side of the belt would have to observe the accident and then pull the emergency cord. The time spent in these reflexes could easily be too late to prevent serious injury or a fatality. Secondly, after the cord was pulled, the belt would still travel another 5 to 15 feet and this added motion could cause serious injury or death if the victim were entangled in a roller.

Citations 3088080 and 3088162 were abated over the course of 10 shifts, with two to four employees performing clean-up

activities on each shift. The belt was running when the work was done; one employee stood on the wide side of the belt at the pull cord and another cleared loose coal, sloughage and other materials from the tight side.

**Is the Safeguard Enforceable as to the  
Hazards Alleged in the Citations?**

In Southern Ohio Coal Company ("SOCCO I"), 7 FMSHRC 509 (1985), the Commission held that "a safeguard notice must identify with specificity the nature of the hazard at which it is directed and the conduct required of the operator to remedy such hazard. We further hold that in interpreting a safeguard a narrow construction of the terms of the safeguard and its intended reach is required." It then held that a citation for slipping and falling hazards caused by a 10 inch accumulation of water in a travelway did not fall within a safeguard requiring 24 inches of clear travelway. The Commission reasoned that the hazards causing the notice of safeguard were tripping and falling because of fallen rocks and cement blocks, not slipping and falling because of an accumulation of water, and that this distinction was sufficient to invalidate the citation. The Commission did not address the issue whether reducing the safe, usable width to below 24 inches would violate the safeguard.

In applying a rule of strict construction,<sup>1</sup> the Commission expressed its concern for possible abuses of the safeguard authority, which does not give the operator an opportunity to participate in the formulation of the safety standard, as in rulemaking procedures. At the same time, the Commission recognized the inspector's authority and responsibility to require a safeguard to prevent a specific transportation hazard not covered by a published safety standard.

The line between the appropriate use or misuse of the inspector's safeguard authority may be a fine one. The Commission appears to have made the line bolder by narrowing the scope of safeguards under a rule of strict construction.

Applying the Commission's strict construction rule, I conclude that the safeguard at issue, requiring "at least 24 inches of clear travelway," while validly issued, is not enforceable except as to the specific conditions that gave rise to the safeguard and were noted in the notice of safeguard. That is, a violation of this safeguard exists only if (1) a travelway

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<sup>1</sup> The Commission has applied the rule of strict construction to safeguards in a number of cases, e.g., Green River Coal Co., Inc., 14 FMSHRC 43 (1992) and the remand decisions in Rochester & Pittsburgh Coal, 14 FMSHRC 37(1992) and in the instant cases.

between the rib and the conveyor belt has a width below 24 inches <sup>2</sup> or (2) a fence <sup>3</sup> obstructs the travelway.

The first of these conditions may be met by proof that obstructions reduced the safe, usable width of a travelway to below 24 inches. Such a holding is consistent with a strict construction rule, for as a practical matter of safety, a travelway cannot be said to "clear for at least 24 inches" if a miner must move around obstructions that reduce his corridor of safe, usable space to below 24 inches. The hazards of inadequate clearance (fewer than 24 inches) include the risk of walking too close to a moving belt and falling against it, or falling against the rib. Thus, quite apart from tripping hazards left in a travelway, there are many trips and falls in coal mines, which commonly have uneven walking surfaces. With inadequate clearance, if someone attempted to break a trip or fall by reaching out, he or she could come into contact with a moving belt and become entangled in a roller, with a high risk of serious injury or death.

However, Inspector Mull testified that by observation (not measurements) he believed the travelways were over 24 inches wide, and he did not measure the width in any place where he found obstructing material. The Secretary thus failed to prove that obstructions reduced the safe, usable width of the travelways to below 24 inches. In the area where rib sloughage was about three feet high, and Inspector Mull believed it was necessary to cross over the belt to get around the obstruction, the evidence might have sustained a finding that the safe, usable width of the travelway was reduced to below 24 inches. However, since the inspector did not measure the width of the area, I find that the Secretary failed to prove a violation of the safeguard.

To summarize, the Secretary contends that a safeguard issued for a narrow travelway and an obstructing fence also addresses obstructing materials in the travelway, such as crib blocks and rib sloughage. I hold that the Commission's rule of strict construction precludes this position, except where obstructing materials reduce the safe, usable width of a travelway to below 24 inches. The inspector's failure to measure the width of the travelways at the places where obstructions were found precludes a finding that the obstructing material reduced the safe, usable width of the travelway to below 24 inches. Accordingly, I conclude that the Secretary failed to prove a violation of the safeguard.

---

<sup>2</sup> The safeguard notice notes a finding of clearances of 15 to 23 inches.

<sup>3</sup> The safeguard notice notes a finding of a fence blocking a travelway.

As a final point, it appears to this judge that the Commission's narrow construction of safeguards should suggest to the Secretary that her guidelines for safeguards (30 C.F.R. §§ 75.1403-1 through 75.1403-11) may have little practical effect unless they are promulgated as mandatory safety standards by public rulemaking. In that case, they would be interpreted by a "reasonable notice" rule, not strict construction.

The Commission stated its view on this matter at the end of SOCCO II:

. . .[W]e strongly suggest that the safety of underground coal miners would be better advanced by the promulgation of mandatory safety standards aimed at eliminating transportation hazards. [14 FMSHRC 15.]

#### CONCLUSIONS OF LAW

1. The judge has jurisdiction in this proceeding.
2. Notice of Safeguard 2395866 is AFFIRMED.
3. The Secretary failed to prove a violation of Notice of Safeguard 2395866 as alleged in Citations 3088080 and 3088162.
4. Citations 3088080 and 3088162 are VACATED.

  
William Fauver  
Administrative Law Judge

#### Distribution:

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

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

/fas



These penalty and contest cases arise under the Federal Mine Safety and Health Act of 1977, U.S.C § 801, et seq. (the "Act").

On November 13, 1991, Petitioner filed a MOTION TO APPROVE PARTIAL SETTLEMENT, and on December 3, 1991, the Presiding Judge issued a DECISION APPROVING PARTIAL SETTLEMENT. The settlement disposed of seven Citations. Order No. 3583459 remained at issue and the Judge retained jurisdiction to resolve such issues.

A copy of the Judge's DECISION APPROVING PARTIAL SETTLEMENT is attached to this Decision.

A hearing on the merits commenced as to the remaining Order on March 5, 1992, in Salt Lake City, Utah. The hearing could not be concluded and continued to the following day.

On March 6, 1992, the parties reached an amicable settlement agreement, which encompassed all three pending cases.

In connection with Docket No. WEST 92-173 and WEST 91-174, the parties moved that Order No. 3583459 be modified to a 104(a) Citation.

Further, the parties moved that wherever a violation of 30 C.F.R. § 75.512 is alleged, it should be amended to allege a violation of 30 C.F.R. § 75.517. The violation of Section 75.517 is designated as an S&S Citation.

The parties further stipulated that an appropriate civil penalty is \$345.00. The violation was originally assessed at \$1000.00.

In view of the disposition herein, Cyprus Plateau further withdraws its notice of contest in WEST 92-173-R.

For the foregoing reason, I enter the following:

#### ORDER

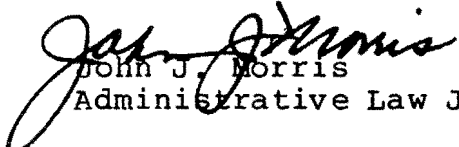
1. The motions to amend Order No. 3583459 and its modifications are **GRANTED**.

2. Citation No. 3583459 and the amended civil penalty are **AFFIRMED**.

3. Cyprus Plateau is ORDERED TO PAY to the Secretary of Labor the sum of \$345 within 40 days of the date of this decision.

4. The motion of Cyprus Plateau to withdraw its contest in WEST 92-173-R is GRANTED and the said case is DISMISSED.

5. The Secretary's motion to dismiss WEST 91-635 (Robert Q. Powell) is GRANTED and said case is DISMISSED.

  
John J. Morris  
Administrative Law Judge

Distribution:

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

R. Henry Moore, Esq., BUCHANAN INGERSOLL P.C., CYPRUS PLATEAU MINING CORP., USX Tower, 57th Floor, 600 Grant Street, Pittsburgh, PA 15219 (Certified Mail)

ek



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

MAY 27 1992

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No. WEST 91-509  
Petitioner : A.C. No. 05-00301-03779  
v. :  
MID-CONTINENT RESOURCES, INC., : Dutch Creek Mine  
Respondent :

DECISION

Appearances: Margaret A. Miller, Esq., Tandra Leonard, Esq.  
Office of the Solicitor, U.S. Department of Labor,  
Denver, Colorado,  
for Petitioner;  
Edward Mulhall, Jr., Esq., DELANEY & BALCOMB, P.C.,  
Glenwood Springs, Colorado.

Before: Judge Morris

This is a civil penalty proceeding initiated by Petitioner against Respondent pursuant to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (the "Act"). The civil penalties sought here are for the violation of mandatory regulations promulgated pursuant to the Act.

A hearing in this case and related cases was held in Glenwood Springs, Colorado, on February 26, 1992. The parties reached an amicable settlement and subsequently filed a written Joint Motion to Approve Settlement.

Respondent further filed a suggestion of bankruptcy.

The Citations, the original assessments, and the proposed dispositions are as follows:

<u>Citation No.</u>	<u>Proposed Penalty</u>	<u>Amended Proposed Penalty</u>
3586644	\$91	\$55
3586645	\$91	\$55
3586646	\$91	\$55

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

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

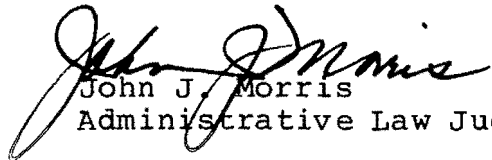
Accordingly, I enter the following:

ORDER

1. The order of reconsolidation entered on March 2, 1992, is **DISSOLVED**.

2. The above Citations and amended penalties are **AFFIRMED**.

3. Respondent filed a case under Chapter 11 of the Bankruptcy Code and is operating its bankruptcy estate as a debtor-in-possession. Accordingly, upon approval of the United States Bankruptcy Court in Case No. 91-11658 PAC, it is **ORDERED** that civil penalties will be assessed against the Respondent in the amount of \$165 and Petitioner is authorized to assert such assessment as a claim in Respondent's Bankruptcy Case.

  
John J. Morris  
Administrative Law Judge

Distribution:

Margaret A. Miller, Esq., Tamara Leonard, Esq., Office of the Solicitor, U.S. Department of Labor, 1585 Federal Office Building, 1961 Stout Street, Denver, CO 80294 (Certified Mail)

Edward Mulhall, Jr., Esq., DELANEY & BALCOMB, P.C., Drawer 790, Glenwood Springs, CO 81602 (Certified Mail)

ek

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

**MAY 28 1992**

CHARLES T. SMITH,	:	DISCRIMINATION PROCEEDING
Complainant	:	
	:	Docket No. KENT 90-30-D
v.	:	BARB CD 89-27
	:	
KEM COAL COMPANY,	:	
Respondent	:	

**DECISION ON DAMAGES**

Before: Judge Fauver

The Decision on Remand, April 28, 1992, found Respondent liable for a discriminatory discharge of Complainant in violation of § 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq.

The parties have stipulated that Complainant's back pay and interest through April 30, 1992, are \$46,157.12 and a reasonable attorney fee and costs are \$6,247.50 through April 30, 1992. In addition, the parties have stipulated a method of determining any damages for medical expenses due Complainant.

**ORDER**

WHEREFORE IT IS ORDERED that:

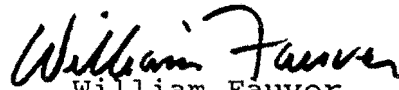
1. Respondent shall, within 10 days of the date of this Decision, pay Complainant \$46,157.12 in back pay and interest through April 30, 1992, plus additional back pay and interest accruing from April 30, 1992, until the date of payment.

2. Respondent shall, within 10 days of the date of this Decision, pay to counsel for Complainant \$6,247.50 representing a reasonable attorney fee and costs through April 30, 1992, plus any additional reasonable attorney fee and costs accruing from April 30, 1992, until the date of payment. Upon such payment, Counsel for Complainant shall promptly reimburse Complainant for any prior payments made by Complainant toward an attorney fee or litigation costs in this matter.

3. Within 10 days of this Decision, or a later date if stipulated by the parties, the parties shall fully comply with paragraph 5 of their Stipulation of Monetary Award Update, and if they agree upon damages for medical expenses such amount shall be

promptly paid to Complainant. If they fail to agree on medical damages and Complainant contends such are due, Complainant may file a claim for such damages in a supplemental proceeding before the Commission within 30 days after such disagreement is communicated by Respondent to Complainant.

4. This Decision on Damages together with the prior Decision on Remand constitutes the judge's final disposition of this proceeding.



William Fauver  
Administrative Law Judge

Distribution:

Michael S. Endicott, Esq., L.E., "Ed" Spencer and Associates, 83 Main Street, P.O. Box 1176, Paintsville, KY 42140 (Certified Mail)

Timothy Joe Walker, Esq., Reece, Lang & Breeding, P.S.C., London Bank & Trust Building, 400 South Main Street, P. O. Drawer 5087, London, KY 40745-5087 (Certified Mail)

/fas

**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 1992

SOUTHERN OHIO COAL COMPANY, : CONTEST PROCEEDINGS  
Contestant :  
v. : Docket No. WEVA 91-1615-R  
: Order No. 3105369; 5/22/91  
: SECRETARY OF LABOR, : Docket No. WEVA 91-1616-R  
MINE SAFETY AND HEALTH : Citation No. 3105370; 5/22/91  
ADMINISTRATION (MSHA), :  
Respondent : Docket No. WEVA 91-1617-R  
: Citation No. 3105350; 5/22/91  
: Mine ID 46-03805  
: SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No. WEVA 92-740  
Petitioner : A. C. No. 46-03805-04098  
v. : Martinka No. 1 Mine  
: SOUTHERN OHIO COAL COMPANY, :  
Respondent :  
:

**DECISION**

Appearances: Rebecca J. Zuleski, Esq.,  
Morgantown, WV, for SOCCO;  
Glenn M. Loos, Esq., Arlington, VA,  
for the Secretary of Labor.

Before: Judge Fauver

These proceedings involve contests by Southern Ohio Coal Company (SOCCO) seeking to vacate an order and two citations issued by MSHA inspectors and a petition by the Secretary for a civil penalty, under § 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S. § 801 et seq.

The parties stipulated that SOCCO's Martinka No. 1 Mine is subject to the Act. A motion to vacate Citation 3105350 and to delete any reference to it in Order 3105369 was granted at the hearing.

The order and citation requiring adjudication are as follows:

Order 3105369 alleges in part:

Beginning at the B-12 Longwall Section No. 2 face conveyor motor and extending to No. 1 shield a distance of approximately 20 feet, the roof was inadequately supported along the walkway side of the stageloader where a roof cutter existed with loose broken and hanging material. A no walkway tight clearance sign was posted and the Section crew stated they were crossing the stageloader to the solid side to get to and from the longwall face. Additional roof supports such as post[s] or dukes were not installed on the solid side of the stageloader from the crossover extending 27 feet inby to the face.

The distance from the tips of No. 2, 3 and 4 shields to the face averaged 6 to 10 feet during normal mining, in order for miners to travel to and from the longwall face the pan line had to be pushed in and No. 2, 3 and 4 shields had to be advanced within 5 feet of the face. 3 miners were observed on the longwall face at the time the Order was issued.

75-1403 A clear unobstructed 24 inch walkway is not provided on the track side of the B-12 longwall stageloader beginning at the tip at No. 1 shield and extending approximately 20 feet outby. The walkway is obstructed with loose roof rock, 2 pieces of pipe and 4 post[s] also the crossover at the stage loader from the solid side to the track side is obstructed with a hydraulic shield leg, hoses, and a piece of chain reducing the 24 inch travelway to 7 inches.

Citation 3105370 alleges in part:

Beginning at the crossover on the solid side of the B-12 Longwall Stageloader and extending for a distance of approximately 27 feet inby, additional roof supports such as post[s] or dukes were not installed to support the roof. The solid side of the stageloader is being used as a travelway to and from the longwall face because of adverse

roof conditions on the track side of the stageloader.

A termination due date is not set due to this Citation being written in conjunction with 107a Order Number 3105369 issued May 22, 1991.

The parties stipulated that the judge has jurisdiction to assess a civil penalty under § 110(i) of the Act if he finds a violation as charged in Citation 3105370. After the hearing, the Secretary filed a petition for such a penalty, in Docket No. 92-740.

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

#### FINDINGS OF FACT

1. On May 22, 1991, Federal Mine Inspectors Ronald Tulanowski and Richard Jones went to the Martinka No. 1 Mine for a regular quarterly (or "AAA") inspection. Inspector Tulanowski was accompanied by company representative Gary Freeman and union representative James Tutalo. Inspector Jones was accompanied by company representative James Ice and union representative James Talerico. At the beginning of the afternoon shift, the inspection parties traveled together to the B-12 longwall section of the mine.

2. At the mouth of the B-12 longwall section, the inspection parties separated, walking different entries to the face. Inspector Jones and his party walked the return entry to the tailgate of the longwall. Inspector Tulanowski took his party up the belt entry to the headgate of the longwall.

3. At the headgate, Inspector Tulanowski observed adverse roof conditions in the belt entry. A crack in the roof, called a "ripper" or "cutter," on the track side of the stage loader, extended from the No. 1 shield of the longwall outby about 27 feet. It had been reported in the on-shift examination book on May 21, 1991. The crack in the roof was about two feet wide, and pieces of rock were actively falling out of the roof when the inspection party arrived. Water was dripping through the crack. The roof was sagging or leaning toward the track side of the entry. The floor on the track side was obstructed by various materials and debris, including four roof posts which had been knocked down by motors as the stage loader advanced. The advancing motors struck the posts because the entry had been cut too narrow.

4. Inspector Tulanowski saw three miners at the longwall face. He was informed that the track side of the stage loader was the crew's normal means of access to the face, but because of tight clearance and walkway obstructions on the track side, SOCCO had instructed its crews to use an alternative means of access to the face, requiring the miners to use the stage loader crossover and then travel up the solid side or coal side of the stage loader to get to the face. A sign was hung on the track side, stating, "Tight clearance, no walkway." It did not refer to the adverse roof conditions.

5. The belt entry was roofbolted according to the operator's roof support plan, and the required number of dukes (7 on each side of the stage loader)<sup>1</sup> were installed in the entry. The majority of the dukes were set outby the stage loader crossover. On the solid side of the entry, one duke was set directly at the crossover and the other six were set outby. The entry was a highly traveled walkway. Miners traveled through the entry several times a shift, e.g., at the beginning and end of the shift, on dinner runs, fireboss runs, maintenance runs and supply runs.

6. Based on the conditions observed by Inspector Tulanowski and reported to him by crew members, the inspector found that an imminent danger existed in the belt entry from the shields of the longwall outby to the stage loader crossover. He orally issued § 107(a) order and requested that Inspector Jones come from the tail of the longwall to observe the conditions and assist in the investigation. Inspector Jones arrived at the headgate in 20 or 25 minutes.

7. When he arrived at the headgate, Inspector Jones observed the same conditions seen by Inspector Tulanowski and agreed that an imminent danger existed. He observed the conditions from the face, on the side of the entry opposite Inspector Tulanowski's side. Two miners and their foreman were at the face of the longwall. An accumulation of water and mud was under the footing of the No. 1 shield, causing its roof support to tilt 8 to 10 inches down from the roof toward the track side. On the track side, the crack in the roof ran from the No. 1 shield to the first crosscut. The roof was jagged, hanging and broken. The plates on the row of roof bolts closest to the rib on the track side were buckling, showing pressure on the bolts. Four posts, two pieces of pipe, and loose rock (which appeared to have fallen from the roof) were lying on the track side of the stage loader, obstructing this former walkway.

8. After observing the area and making some measurements, Inspector Jones moved across the entry and met Inspector

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<sup>1</sup> A "duke" is a roof support jack post.



Tulanowski. They continued their investigation and discussed ways of correcting the hazardous conditions. The inspectors agreed with the operator that the roof on the track side could not be supported because of the tight area, the obstructions in the walkway, and the extent of the hazardous roof conditions. They also agreed that the solid side was the only possible access to the face at that time. The inspectors determined that the solid side needed additional roof support to make it safe as a walkway. To accomplish this, the operator moved dukes that were outby the stage loader on the solid side to positions inby the stage loader on that side. They were set at five foot intervals. The inspectors found that this provided adequate additional roof support for miners traveling in the new walkway, and terminated the § 107(a) order.

#### DISCUSSION WITH FURTHER FINDINGS

##### Order 3105369

Section 107(a) of the Mine Act provides:

If, upon any inspection or investigation of a coal or other mine which is subject to this Act, an authorized representative of the Secretary finds that an imminent danger exists, such representative shall determine the extent of the area of such mine throughout which the danger exists, and issue an order requiring the operator of such mine to cause all persons, except those referred to in Section 104(c), to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such an imminent danger and the conditions or practices which caused such imminent danger no longer exists. The issuance of an order under this subsection shall not preclude the issuance of a citation under Section 104 or the proposing of a penalty under Section 110.

Section 3(j) of the Act defines an imminent danger as "the existence of any condition or practice in a coal or other mine which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated." 30 U.S.C. § 802(j). This definition is unchanged from that contained in the Coal Mine Health and Safety Act of 1969.

The Fourth Circuit has held that "an imminent danger exists when the condition or practice observed could reasonably be expected to cause death or serious physical harm to a miner if normal mining operations were permitted to proceed in the area

before the dangerous condition is eliminated." Eastern Associated Coal Corporation v. IBMA, 491 F.d 277, 278 (4th Cir. 1974; emphasis in original). The Seventh Circuit adopted this interpretation in Old Ben Coal Corp. v. IBMA, 523 F.2d 25, 33 (7th Cir. 1975), and the Commission applied these holdings in Rochester & Pittsburgh Coal Company v. Secretary of Labor, 11 FMSHRC 2159, 2163 (1989), where it stated (quoting Senate Report 187, 95th Cong., 1st Sess. 38(1977)):

[A]n imminent danger is not to be defined "in terms of a percentage of probability that an accident will happen." \* \* \* Instead, the focus is on the potential of the risk to cause serious physical harm at any time."

\* \* \* The Committee stated its intention to give inspectors "the necessary authority for the taking of action to remove miners from risk." [Id. at 2164.]

The Commission recognized (in Rochester & Pittsburgh Coal Company, at 2164) that inspectors must be given wide latitude in making on-the-spot determinations of whether an imminent danger exists, quoting the following from the Seventh Circuit's decision in Old Ben (523 F.2d. at 31):

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

Applying this controlling test, the Commission stated that "the question is whether [the inspector] abused his discretion when he determined [that an imminent danger existed]" (Rochester & Pittsburgh Coal Company, at 2164).

In Utah Power & Light Co., 13 FMSHRC 1617 (1991), the Commission clarified its decision in Rochester & Pittsburgh, by stating that the latter decision, which stated that the imminent danger focus is on the potential of a risk to cause harm "at any time" (11 FMSHRC at 2164), was intended to denote a potential to cause harm "at any moment," that is, "within a short period of time." 13 FMSHRC at 1622. The Commission did not depart from its previous conclusion that wide discretion must be given to inspectors to issue § 107(a) orders. Thus it stated, in Utah Power & Light:

We reaffirm our holding in Rochester & Pittsburgh that an inspector must have considerable discretion in determining whether an imminent danger exists. This is because an inspector must act immediately to eliminate conditions that create an imminent danger. We also reiterate here that the hazardous condition or practice creating an imminent danger need not be restricted to a threat that is in the nature of an emergency, and that section 107(a) withdrawal orders are "not limited to just disastrous type accidents." Coal Act Legis. Hist. at 1599. [13 FMSHRC at 1627-1628.]

It must be emphasized that the inspector has to exercise his or her best judgment "on the spot" to protect the safety of miners. Accordingly, the issue in reviewing a § 107(a) order is not the objective accuracy of the facts found by the inspector, but whether the inspector acted reasonably in investigating the facts available to him and in evaluating the situation as an imminent danger. This boils down to an "abuse of discretion" test.

In Utah Power & Light, the Commission held that an inspector "abuses his discretion in the sense of making a decision that is not in accordance with law when he orders the immediate withdrawal of miners under section 107(a) in circumstances where there is not an imminent threat to miners" (Id., at 1622-1623). An error of law, of course, is one of the bases for finding an abuse of discretion. However, an abuse of discretion in the sense of evaluating facts "may be found only if there is no evidence to support the decision" (Bothyo v. Moyer, 772 F.2d 353, 355 (7th Cir. 1985); and see: Bosma v. United States Dept. of Agriculture, 754 F.2d 804, 810 (9th Cir. 1984)).

On balance, the issue is whether the inspector reasonably evaluated the information available to him at the time he issued the § 107(a) order. That is, the controlling issue is not whether there was an imminent danger, but whether "there is evidence that he has abused his discretion or authority" in evaluating the conditions as constituting an imminent danger. Old Ben, supra, 523 F.2d at 31; Rochester & Pittsburgh Coal Company, 11 FMSHRC at 2164.

When Inspector Tulanowski arrived at the stage loader he saw the cutter (crack) in the roof and observed rocks actively falling from the roof. Water was dripping through the crack. The cracked area was unsupported. An accumulation of water and mud was under the footing of the No. 1 shield, causing its roof support to tilt 8 to 10 inches down from the roof toward the track side. On the track side, the crack in the roof ran from

the No. 1 shield to the first crosscut. The roof was jagged, hanging and broken. The slates on the row of roof belts closest to the rib were buckling, showing pressure on the bolts. Inspector Tulanowski believed that the roof was unstable, dangerous, and could fall at any time. He then learned that miners were crossing the stage loader crossover and using the solid side as a new walkway. He believed that additional roof support was necessary for the new walkway because a roof fall on the cutter side could extend to the solid side, and a roof fall causing death or serious injury could occur at any time. Also, he believed that if normal mining operations continued, as planned by the operator, the roof conditions would be worsened by the vibrations and stress of mining. He evaluated the available facts as showing an imminent danger.

Inspector Richard Jones agreed with Inspector Tulanowski's assessment of the situation and co-signed the written § 107(a) order. Inspector Jones, who has extensive experience on longwalls and working in the lower Kittaning coal seam, where the Martinka Mine is located, stated that he saw all the signs of deterioration and a failing roof and a danger that the roof could come down without warning. He stated that when a roof starts failing in that coal seam, it starts cutting and sagging, and the result could be a roof fall at any time. He stated that a fall could have occurred from rib to rib and that the tilting of the roof toward the track side was not due to the natural undulation of the roof but to deterioration, which increased the danger of a rib to rib fall. He also stated that this is an area of changing conditions, with the stage loader moving, the vibrations of the shearer, and the changing longwall supports as the face advances, so that if mining had continued as planned by the operator - - to "mine through" the adverse roof area - - the additional stress and vibrations created by the mining process would have worsened the roof conditions, increasing the danger to the miners in the new walkway. He believed a roof fall could occur at any time without warning.

The testimony of UMWA representative James Tutalo supports the findings of Inspectors Tulanowski and Jones. Mr. Tutalo, who was a roofbolter for about three years at the Martinka Mine, stated that the roof was showing signs of stress, the roof conditions were hazardous, and would have become more dangerous if mining were continued as normal.

I find that Inspectors Tulanowski and Jones made a reasonable investigation and evaluation of the facts under the circumstances and that the facts known to them and reasonably available to them supported the issuance of the § 107(a) order. The opinions of the operator's witnesses differed from the inspectors' evaluation of the facts, but the difference in opinions does not warrant a finding that the inspectors' finding of an imminent danger was an abuse of discretion. Indeed, the

reliable facts amply support the finding of an imminent danger. I therefore find that Order 3105369 was properly issued.

Citation 3105370

The citation charges a violation of 30 C.F.R. § 75.220, under which section 75.220(a)(1) provides:

(a)(1) Each mine operator shall develop and follow a roof control plan, approved by the District Manager, that is suitable to the prevailing geological conditions, and the mining system to be used at the mine. Additional measures shall be taken to protect persons if unusual hazards are encountered.

The Secretary does not contend that the operator violated its roof control plan, but that additional roof support was necessary to protect miners using the new walkway. Inspector Tulanowski's assessment that an imminent danger existed was corroborated by Inspector Richard Jones and UMWA representative James Tutalo.

The evidence preponderates in showing that additional roof support measures were required in the new walkway because of adverse roof conditions. Although the operator was complying with its roof control plan, the plan sets only minimal standards. Additional roof support in the new walkway was required because of unusual hazards, but the operator took no action to protect the miners traveling in the entry. The normal procedure at the Martinka Mine was merely to shift the walkway to the opposite side of the stage loader when adverse roof conditions were encountered on the track side. On the afternoon shift of May 22, the roof conditions had reached the point that the entry was threatened by a roof fall rib to rib, including the new walkway. The operator's failure to provide additional roof support in the new travelway constituted a violation of 30 C.F.R. § 75.220(a)(1).

The Commission has held that a violation is "significant and substantial" if, "based upon the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (1981). In Mathies Coal Company, 6 FMSHRC 1, 3-4 (1984), the Commission delineated a four-prong test to prove a violation is significant and substantial: (1) an underlying violation of a mandatory safety standard; (2) a discrete safety hazard, i.e., a measure of danger to safety

contributed to by the violation; (3) a reasonable likelihood<sup>2</sup> that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

Under the third prong of the Mathies test, the Secretary must establish that the hazard contributed to could result in an event in which there is an injury. U.S. Steel Mining, Co., 7 FMSHRC 1125, 1129 (1985). The time frame includes both the time that a violative condition existed prior to the citation being issued and the time that it would have existed if normal mining operations had continued. Halfway, Inc., 8 FMSHRC 8, 12 (1986).

The operator failed to take necessary additional roof support measures to protect miners from the adverse roof conditions at the headgate of the longwall. This constituted a violation of 30 C.F.R. § 75.220(a)(1).

The hazard presented was a roof fall, which could cause death or serious injury.

Without additional roof support, it was reasonably likely<sup>3</sup>

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<sup>2</sup> Analysis of the statutory language and the Commission's decisions indicates that the test of a "significant and substantial" violation is a practical and realistic question whether, assuming continued mining operations, the violation presents a substantial possibility of resulting in injury or disease, not a requirement that the Secretary of Labor prove that it is more probable than not that injury or disease will result. See my decision in Consolidation Coal Company, 4 FMSHRC 748-752 (1991). The statute does not use the phrase "reasonably likely" or "reasonable likelihood" in defining an S&S violation, but states that an S&S violation exists if "the violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard" (§ 104(d)(1); emphasis added). Also, the statute defines an "imminent danger" as "any condition or practice ... which could reasonably be expected to cause death or serious physical harm before [it] can be abated" (§ 3(j) of the 1969 Mine Act, unchanged by the Federal Mine Safety and Health Act of 1977), and expressly places S&S violations below an imminent danger (see § 104(d)(1)). It follows that the Commission's use of the phrase "reasonable likelihood" or "reasonably likely" in discussing an S&S violation does not preclude an S&S finding where a substantial possibility of injury or disease is shown by the evidence, even though the proof may not show that injury or disease was more probable than not.

<sup>3</sup> See Fn. 2 for a discussion of the practical application of the term "reasonably likely" concerning S&S violations.

that a roof fall would occur, causing in death or serious injuries. If mining had continued, as planned by the operator, the roof conditions would have worsened with greater danger to the miners.

The Secretary proposes a finding that the operator was moderately negligent concerning the violation cited in Citation 3105370. The operator was aware of the cutter on the track side of the entry. The adverse roof conditions were highly visible. The cutter had existed for some time and was reported in the examination books the day before the inspection. However, no additional roof support was provided by the operator. As the operator's warning sign and other facts indicate, the operator appears to have been more concerned with the "tight clearance" in the walkway rather than the adverse roof conditions. Following its normal procedure, when adverse roof conditions were encountered SOCCO merely moved the walkway to the opposite side of the stage loader without addressing the adverse roof conditions. Nothing was done on the track side of the entry. This inaction allowed the roof conditions to become worse, threatening a roof fall on the solid side. No additional roof support measures were taken on the solid side, yet miners were ordered to use it as a walkway.

I find that SOCCO was negligent in failing to provide additional roof support to protect miners using the new walkway.

SOCCO's motion for summary decision was taken under advisement. A summary decision is appropriate only when there is no genuine issue as to a material fact and the moving party is entitled to judgment as a matter of law. The testimony at the hearing reveals numerous disputes concerning facts and opinions material to a final resolution of the issues. Therefore, the motion for summary decision made by SOCCO at the end of the hearing will be denied.

Considering all the criteria for a civil penalty in § 110(i) of the Act, I find that a penalty of \$800 is appropriate for the violation alleged in Citation 3105370.

#### CONCLUSIONS OF LAW

1. The judge has jurisdiction in these proceedings.
2. Order 3105369 was validly issued.
3. SOCCO violated 30 C.F.R. § 75.220(a)(1) as alleged in Citation 3105370.

#### ORDER

WHEREFORE IT IS ORDERED that:

1. SOCCO's motion for summary decision is DENIED.
2. Citation 3105350 is VACATED.
3. Order 3105369 is MODIFIED TO DELETE any reference to Citation 3105350.
4. Order 3105369 is AFFIRMED.
5. Citation 3105370 is AFFIRMED.
6. SOCCO shall pay a civil penalty of \$800 within 30 days of the date of this Decision.

  
William Fauver  
Administrative Law Judge

Distribution:

Docket No. WEVA 91-1615-R; WEVA 91-1616-R; WEVA 91-1617-R

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## ADMINISTRATIVE LAW JUDGE ORDERS



FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

May 5, 1992

KEYSTONE COAL MINING CORP.,	:	CONTEST PROCEEDINGS
Contestant	:	
v.	:	Docket No. PENN 91-1480-R
	:	Citation No. 3687890;
	:	8/21/91
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Emilie No. 1 Mine
ADMINISTRATION (MSHA),	:	
Respondent	:	Mine ID 36-00821
	:	
	:	Docket No. PENN 91-1454-R
	:	Citation No. 3687888;
	:	8/14/91
	:	
	:	Margaret No. 11 Mine
	:	Portal # 2
	:	
	:	Mine ID 36-08139
	:	
	:	Docket No. PENN 92-54-R
	:	Citation No. 3687895;
	:	9/20/91
	:	
	:	Emily No. 1 Mine
	:	
	:	Mine ID 36-00821
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. PENN 92-114
Petitioner	:	A.C. No. 36-00821-03761
	:	
v.	:	Emilie No. 1 Mine
	:	
KEYSTONE COAL MINING CORP.,	:	Docket No. PENN 92-119
Respondent	:	A. C. No. 36-08139-03512
	:	
	:	Margaret No. 11 Mine No. 2
	:	Portal

## Order Denying Motion for Summary Decision

### I.

At issue in these consolidated contests and civil penalty proceedings are three citations issued by MSHA Inspector Brady Cousins alleging violations of 30 C.F.R. § 70.100(a). These citations were issued pursuant to a "spot inspector" program whereby five different occupations were tested for dust samples during one production shift. On February 7, 1992 the Operator filed a Motion for Summary Decision which was replied to by the Secretary on March 27, 1992. In a telephone conference call between the undersigned and counsel for both parties on April 9, 1992, counsel were requested to provide proper citations in the record to certain assertions set forth in their respective memorandum submitted in connection with the Operator's Motion. In response thereto, the Secretary, on April 10, 1992, submitted certain exhibits which are referred to in the depositions taken by the Operator of Thomas T. Tomb and Brady Cousins, and referenced by the Operator in connection with its Motion.

### II.

The citations at issue allege violations of 30 C.F.R. § 70.100(a) which provides, as pertinent, that an operator "...shall continuously maintain the average concentration of respirable dust in the mine atmosphere during each shift to which each miner in the active working of each mine is exposed at or below 2.0 milligrams of respirable dust per cubic meter of air... ." The regulations do not define the term "average concentration", but that term is defined in Section 202(f) of the Federal Mine Safety and Health Act of 1977 as follows:

For the purpose of this title, the term "average concentration" means a determination which accurately represents the atmospheric conditions with regard to respirable dust to which each miner in the active workings of a mine is exposed (1) as measured, during the 18 month period following the date of enactment of this Act, over a number of continuous production shifts to be determined by the Secretary and the Secretary of Health, Education, and Welfare, and (2) as measured thereafter, over a single shift only, unless the Secretary and the Secretary of Health, Education, and Welfare find, in accordance with the provisions of section 101 of this Act, that such single shift measurement will not, after applying valid statistical techniques to such measurement, accurately represent such atmospheric conditions during such shift. (Emphasis supplied.)

The Mine Safety and Health Administration (MSHA) in promulgating respirable dust standards, (which include section 70.100(a) supra), set forth the following language under

the heading Discussion of Major Issues:

The Secretary of the Interior and Secretary of Health, Education, and Welfare conducted continuous multi-shift sampling and single-shift sampling and, after applying valid statistical techniques, determined that a single-shift respirable dust sample should not be relied upon for compliance determinations when the respirable dust concentration being measured was near 2.0 mg/m<sup>3</sup>. Accordingly, the Secretary of Interior and Secretary of Health, Education, and Welfare prescribed consecutive multi-shift samples to enforce the respirable dust standard. (45 Fed. Reg. 23997 (April 8, 1980))

In July 1991, the Secretary commenced a "spot inspection" program sampling the mine atmosphere for respirable dust for only one eight hour production shift.

### III.

In essence, it is the Operator's argument that, pursuant to Section 202(f), supra, once the Secretary makes a finding that a single shift would not accurately represent atmospheric condition during a shift, it cannot cite an Operator for a violation of a dust standard based on a single shift sample. The Operator argues that such a finding was made by the Secretary in connection with the promulgation of the dust standards (45 Fed. Reg., supra,) and that, having found that a single shift sample is unreliable, the Secretary cannot depart from such a finding without similar resort to the normal rule making procedures referred to in section 101 of the Act.

According to the clear language of Section 202(f) supra, the "average concentration" of respirable dust is measured only over a single shift, unless the Secretary makes a finding, pursuant to the rule making procedures of the Administrative Procedures Act, that single shift measurement will not "accurately represent such atmosphere conditions during such shift." The finding of the Secretary relied on by the Operator, 45 Fed. Reg. supra, does not explicitly conclude that a single shift measurement per se, will not accurately reflect conditions during the shift. To the contrary, the finding of the Secretary is based on a determination that a single shift sample should not be relied upon only "...when the respirable dust concentration being measured was near 2.0 mg/m<sup>3</sup>." (emphasis added.) The Secretary did not make any explicit finding subject to the rule making procedures of the Administrative Procedure Act as to what dust

concentrations are to be considered "near" 2.0 mg/m<sup>3</sup>.<sup>1</sup> I thus find that it has not been established that the Secretary has made a finding, in accordance with section 101(f) of the Act concerning the unreliability of single shift samples in general.

#### IV.

In addition, the Operator argues that dust samples taken during only one shift are violative of the Secretary's policy and hence are invalid. In this connection the Operator apparently refers to the following statement by the Secretary as indicative of her policy not to take samples based only on one shift:

Compliance determinations will generally be based on the average concentration of respirable dust measured by five valid respirable dust samples taken by the operator during five consecutive shifts, or five shifts worked on consecutive days. Therefore, the sampling results upon which compliance determinations are made will more accurately represent the dust in the mine atmosphere than would the results of only a single sample taken on a single shift. (45 Fed. Reg. supra at 23997)

The Operator also refers to a handbook issued on February 15, 1989, setting forth procedures for MSHA personnel to follow in conducting inspections pertaining to respirable dust, which contains the following language: "A Decision of Non-compliance Cannot be Made on One Sample." (Exhibit 18, table 1 page 1.12).

The Secretary in her Response to Motion for Summary Decision, does not contest the Operator's assertions that, prior to the implementation of the present policy, the policy was to take samples over five shifts. Instead, the Secretary argues, in essence, that the shift to single shift sampling does not change the Operator's obligation "...to continuously maintain an average concentration of respirable dust in active working at no greater than 2.0 mg/m<sup>3</sup>", and that the only change has been "the manner in which the Secretary will prove a violation of Section 70.100(a)."

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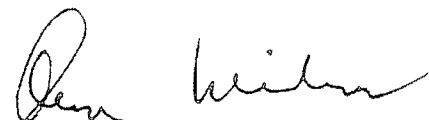
<sup>1</sup>A document entitled, Respirable Dust Spot Inspection and Monitoring Program for Underground Mines, provided to inspector Cousins when he was trained in connection with the spot inspection program in July 1991, appears to provide that citations for accumulations of dust measured during a single shift shall not be issued where the concentrations are below 2.5 mg. This would appear to indicate the Secretary's intention to limit the finding that single shift dust samples are not reliable, to those situations where the concentrations are at or less than 2.5 mg. In the citations at issue the dust concentrations found were at least 2.8 mg.

The record before me does not contain a sufficiently clear presentation of evidentiary facts to allow me to reach a conclusion as to whether the shift to a single shift sampling procedure affects the Operator's substantive rights, or whether it is merely a change in a scientific method for determining whether the standard has been exceeded. An evidentiary hearing is thus necessary to resolve this issue.

V.

The Operator also refers to 30 C.F.R. § 70.2(p) which defines a valid respirable dust sample as one that is "collected and submitted as required by this part, and not voided by MSHA". In this connection, references are made to the Self-Study Technician Manual ("the Manual") which requires samples having a net weight gain of 1.8 mg or greater to be checked for oversized materials (Exhibit 20). Although Cousins did not check for oversized particles, there is no clear indication that the manual sets forth procedures that unequivocally pertain to the responsibilities of an inspector. Hence, I cannot find the presence of a definite MSHA policy mandating an inspector to check for oversized particles. However, there remains a factual issue as to whether Cousins should have voided the samples taken. This issue can be resolved only by a full examination of all the facts in existence at the time the samples were taken. As pointed out by the Secretary in her response, there are differences between the version of Cousins set forth in his deposition, and factual assertions contained in the affidavits of James Manuel (Exhibit 4) and Dennis R. Malcolm (Exhibit 10). As such a hearing is necessary to resolve these conflicts (See, 29 C.F.R. § 2700.64(b))

Therefore, for all the above reasons, the Motion for Summary Decision is DENIED and a hearing in this matter will be held, as previously scheduled, on June 2, 3 and 4.



Avram Weisberger  
Administrative Law Judge

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nb

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

May 15, 1992

IN RE: CONTESTS OF RESPIRABLE ) MASTER DOCKET NO. 91-1  
DUST SAMPLE ALTERATION )  
CITATIONS )

## ORDER GRANTING CONTESTANTS' MOTION TO PRODUCE DUST FILTERS FOR DEPOSITION

On May 13, 1992, R. Timothy McCrum, Laura Beverage and William Althen, representing certain mine operators, and Patrick Zohn representing the Secretary of Labor initiated a telephone conference call to resolve a dispute as to whether the Secretary need produce certain requested dust sample filters to used by counsel for the operators during the deposition of the Secretary's expert witness, Dr. Marple, scheduled to commence May 18, 1992. Mr. McCrum seeks to have the Government produce 60 cited filters, 2 filters included in the PHTC October 1989 report, 33 "no - call" filters, and 16 MSHA inspector filters. Ms. Beverage seeks to have the Government produce 60 filters which the Government previously produced in May 1991 as representative of the cited filters, and 17 filters used in the deposition of Robert Thaxton.

Counsel for the operators argued that a comparison of the cited filters and Dr. Marple's experimental filters and an examination of Dr. Marple's expert opinions as related to representative cited filters is critical to an effective deposition.

Counsel for the Secretary argued that under II. D. 10.b. of the Discovery Plan, questions of an expert witness relating to specific citations fall outside the scope of the Joint Discovery Phase of the Plan. He stated that Dr. Marple's conclusions are solely based on the 740 test filters which will be available. He also asserted that transporting the filters could result in damage or deterioration, and that preservation of the filters was still necessary because of potential criminal proceedings.

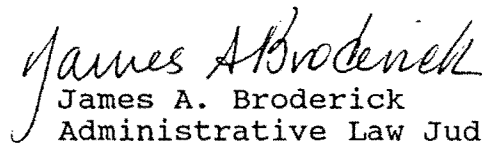
As I stated in my orders of March 19, 1992 and March 26, 1992, which granted the Secretary's motion to have access to certain documents and experimental filters of the mine operators' experts, expert opinion evidence will likely be critical to the proper resolution of these cases. Therefore, expert witness depositions are extremely important. To the extent that



documents and exhibits assist in and enhance expert witness depositions they are also extremely important. I am persuaded that the filters requested by counsel for the operators may assist in the effective and productive deposition of Dr. Marple. I further conclude that questioning Dr. Marple concerning his expert opinion by seeking to compare representative cited filters with his experimental filters is properly a part of Joint Discovery under the Discovery Plan.

Therefore, the Secretary is ORDERED to produce and make available the requested filters to be used in the deposition of Dr. Marple, under the following conditions.

1. The petri dish covers and backing pads may only be removed by MSHA personnel.
2. If the MSHA representative determines in the case of a particular filter, that removing the petri dish cover or backing pad will affect the integrity of the filter, it shall not be removed.
3. In the event that any damage or dust dislodgement results to any filter, the photographs of that filter will be admissible in evidence.

  
James A. Broderick  
Administrative Law Judge

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF ADMINISTRATIVE LAW JUDGES  
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**MAY 22 1992**

IN RE: CONTESTS OF RESPIRABLE DUST SAMPLE ALTERATION CITATIONS	)	MASTER DOCKET NO. 91-1
	)	
SOUTHERN OHIO COAL COMPANY, Contestant	)	CONTEST PROCEEDINGS
v.	)	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	)	Docket Nos. LAKE 91-454-R through LAKE 91-472-R
	)	
WINDSOR COAL COMPANY, Contestant	)	Docket Nos. WEVA 91-1244-R through WEVA 91-1258-R
v.	)	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	)	
	)	
GREAT WESTERN COAL (KENTUCKY), INC., Contestant	)	Docket Nos. WEVA 91-1259-R through WEVA 91-1260-R
v.	)	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	)	
	)	
GREAT WESTERN COAL (KENTUCKY), INC., Contestant	)	Docket Nos. KENT 91-867-R through KENT 91-871-R
v.	)	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	)	
	)	
GREAT WESTERN COAL, INC., Contestant	)	Docket Nos. KENT 91-859-R through KENT 91-863-R
v.	)	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	)	

HARLAN FUEL COMPANY,	)	Docket Nos. KENT 91-864-R
Contestant	)	through KENT 91-866-R
v.	)	
SECRETARY OF LABOR,	)	
MINE SAFETY AND HEALTH	)	
ADMINISTRATION (MSHA),	)	
Respondent	)	
DRUMMOND COMPANY, INC.,	)	Docket No. SE 91-225-R
Contestant	)	
v.	)	Docket Nos. SE 91-239-R
	)	through SE 91-241-R
SECRETARY OF LABOR,	)	Docket No. SE 91-242-R
MINE SAFETY AND HEALTH	)	
ADMINISTRATION (MSHA),	)	Docket Nos. SE 91-243-R
Respondent	)	through SE 91-248-R
JIM WALTER RESOURCES, INC.,	)	Docket Nos. SE 91-362-R
Contestant	)	through SE 91-382-R
v.	)	
SECRETARY OF LABOR,	)	Docket Nos. SE 91-383-R
MINE SAFETY AND HEALTH	)	through SE 91-384-R
ADMINISTRATION (MSHA),	)	
Respondent	)	Docket Nos. SE 91-385-R
	)	through SE 91-389-R
	)	
	)	Docket Nos. SE 91-391-R
	)	through SE 91-451-R
SECRETARY OF LABOR,	)	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	)	
ADMINISTRATION (MSHA),	)	Docket Nos. WEST 91-475
Petitioner	)	and WEST 91-476
v.	)	
ENERGY FUELS COAL, INC.,	)	
Respondent	)	

#### ORDER DENYING MOTIONS TO VACATE CITATIONS

On March 3, 1992, Contestants Southern Ohio Coal Company (SOCCO) and Windsor Coal Company (Windsor) filed a motion for an order vacating the 36 citations issued by the Secretary of Labor (Secretary) to Contestants on April 4, 1991. Each citation alleged a violation of 30 C.F.R. § 70.209(b) because the respirable dust sample submitted by Contestants had been altered by removing a portion of the dust from the sample. As grounds for the motion Contestants state that the Secretary failed to

issue the citations with the "reasonable promptness" required by section 104(a) of the Mine Act. The motion was accompanied by a memorandum in support of the motion and 30 attached exhibits.

On March 18, 1992, the Secretary filed a motion to strike Contestants' motion to vacate together with its supporting memorandum and the associated exhibits, on the ground that the motion to vacate "relies in significant part" on inappropriate documents and materials. On March 30, 1992, Contestants filed an opposition to the Secretary's motion to strike. On March 30, 1992, the Secretary filed a motion for leave to file out of time her previously filed motion to strike Contestants' motion to vacate citations.

On March 25, 1992, Energy Fuels Coal, Inc. (Energy Fuels) filed a motion to vacate the nine citations issued to it on April 4, 1991. Energy Fuels incorporates by reference the memorandum in support of the motion to vacate citations filed by Contestants. On March 31, 1992, the Secretary filed a motion to strike Energy Fuels' motion to vacate.

On April 1, 1992, Great Western Coal (Kentucky), Inc. (Great Western Kentucky), Great Western Coal, Inc. (Great Western), and Harlan Fuel Co. (Harlan) filed a motion to join the Contestants' motion to vacate citations and memorandum in support of the motion.

On April 7, 1992, I issued an order granting the Secretary leave to file out of time but denying her motion to strike and directing her to respond to Contestants' motion to vacate. On April 27, 1992, the Secretary filed a statement in opposition to the motion to vacate. She attached to the motion an appendix containing a graphic representation of the alleged tampered dust samples by month from August 1989 to January 1991, and excerpts from depositions. On May 7, 1992, Contestants filed a reply to the opposition.

On May 15, 1992, Drummond Company, Inc. (Drummond) and Jim Walter Resources, Inc. (JWR) filed motions to vacate 100 citations issued to them on April 4, 1991. Drummond and JWR incorporate by reference the memorandum in support of the motion to vacate citations filed by Contestants.

#### I.

#### Motion for Summary Decision

As I noted in my order denying the Secretary's motion to strike, Contestants' motions to vacate citations are being treated as motions for summary decision under Commission Rule 64(b). Contestants, of course, do not seek a summary decision on the merits of the contested citations, i.e., whether

they tampered with the dust samples, but on an extrinsic, time-limitations issue, i.e., whether the citations were issued in compliance with the requirement in section 104(a) of the Mine Act, 30 U.S.C. § 814(a), that if the Secretary believes a mine operator has violated any mandatory standard, "[s]he shall, with reasonable promptness, issue a citation to the operator." The courts have held that the issue of laches may be determined on a motion for summary judgment. EEOC v. Dresser Industries, Inc., 668 F.2d 1199 (11th Cir. 1982); Holmes v. Virgin Islands, 370 F. Supp. 715 (D.C.V.I. 1974). Although laches, as such, is not the issue in these proceedings, the question whether the citations were issued with reasonable promptness is analogous to it.

Under Rule 64(b), Contestants' motions may be granted only if the entire record shows (1) that there is no genuine issue as to any material fact, related to the question raised in the motions; and (2) the movant is entitled to summary decision as a matter of law. The entire record includes the pleadings, depositions, answers to interrogatories, admissions, and affidavits. The Lee Report, referred to in the memoranda of both parties, and a copy of which was sent to me by counsel for other Contestants, is not part of the record, and I will therefore not consider it in ruling on these motions, except to the extent that it is referred to in depositions which are part of the record.

The Federal Courts, in considering Rule 56, F.R. Civ. P., upon which Commission Rule 64(b) is based, have said that summary judgment is a "drastic remedy." United States v. Bosurgi, 530 F.2d 1105 (2d Cir. 1976). The burden of proof is on the moving party to show that there is no genuine issue of material fact and that he is entitled to judgment as a matter of law. All ambiguities must be resolved and all reasonable inferences drawn in favor of the opponent to the motion. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986); Celotex Corp. v. Catrett, 477 U.S. 317 (1986); Garza v. Marine Transport Lines, Inc., 861 F.2d 23 (2d Cir. 1988). Cf. Mullenix, Summary Judgment: Taming the Beast of Burdens, 10 Am. J. Trial Advoc. 433 (1987) (the author questions the practice of relating the burden of proof to the standards required for a directed verdict). The Commission has stated that summary decision "is an extraordinary procedure [which] [i]f used improperly . . . denies litigants their right to be heard." Missouri Gravel, 3 FMSHRC 2470, 2471 (1981).

What are the "material facts" with respect to the pending motions? In broad outline, they may be grouped into four categories: (1) the time lapse between the dates the samples were taken and the date the corresponding citations were issued; (2) the date when the Secretary believed that Contestants violated the mandatory standard; (3) the reason for the delay

in issuing the citations; and (4) whether the delay resulted in prejudice to Contestants. I must look at the entire record to ascertain whether there are genuine issues with respect to these factual categories.

1. All 36 citations involved in this proceeding (SOCCO and Windsor) were issued April 4, 1991. The dust samples upon which the citations are based were taken at the mines between August 4, 1989, and February 15, 1990. The actual dates on which the samples were taken are shown in Exhibit 1 attached to Contestants' motion. I find that there is no genuine issue as to these material facts.

2. Contestants state that Robert Thaxton, MSHA Supervisory Industrial Hygienist and an authorized representative of the Secretary, made the determination of a violation in each case upon his examination of the dust filter. They refer to Thaxton's deposition testimony. This is not contested by the Secretary, and there is no genuine issue as to this fact. Thaxton received the cassettes containing the cited filters between August 31, 1989, and March 2, 1990. These facts appear on Contestants' Exhibit 1 and are based on the Department of Labor Custody Sheets. Thaxton made his determination that a filter was in violation of the standard within an average of 3 to 5 working days after the filter was referred to him. (Secretary's answer to Interrogatories). Therefore, Contestants assert that the time lag between the date the Secretary (in the person of Thaxton) believed that violations were shown and the date the citations were issued varied from approximately 11 months to 19 months in the case of SOCCO Meigs No. 31 Mine; from approximately 8 months to 19 months in the case of SOCCO Martinka No. 1 Mine; from approximately 13 months to 14 months in the case of SOCCO Meigs No. 2 Mine; and approximately 13 months in the case of Windsor Mine.

The Secretary states that MSHA's national policy-level decisionmakers, as a collective group, did not reach the determination that the investigation warranted the issuance of citations until November 1990. She refers to the deposition testimony of Edward Hugler, then Deputy Administrator for Coal Mine Safety and Health, and Ronald Schell, newly-appointed Chief of the Division of Health. The Secretary asserts that she is not bound by the opinions of individual MSHA employees, e.g., Thaxton, who may personally have been persuaded at an earlier date that tampering was the cause of AWCs, because she and her agents had a responsibility to satisfy themselves that the AWC phenomena established violations. Therefore, the Secretary asserts that the time lag between the date the Secretary (in the persons of her decisionmakers) believed that violations were shown and the date the citations were issued was approximately 4 months.

Here, there is a genuine dispute as to a material fact, namely, the length of the delay between the time the Secretary believed there was a violation and the time she issued the citations. In an ordinary situation, an inspector, as an authorized representative of the Secretary, observes a condition in a mine, determines that a violation has occurred, and issues a citation immediately or within a short period of time. When dust samples are submitted by a mine operator showing an average concentration of respirable dust in excess of the amount permitted by the regulations, a citation is issued after the samples are analyzed and weighed in the MSHA Pittsburgh dust processing laboratory. The cases under consideration here are unusual and far more complex than the run-of-mine violations. They involve allegations that a large number of mine operators, indeed, almost the entire coal mining industry, deliberately tampered with the dust samples to falsify the dust levels present in the mine atmosphere. Clearly, such charges required an extensive investigation and reference to high-level Labor Department officials before the issuance of citations. Under the circumstances, the fact that Thaxton "believed" in August 1989 that the operators violated the standard did not ipso facto justify the issuance of citations. The determination by the Secretary that citations were justified was not made (resolving factual doubts in the Secretary's favor) until November 1990. Nevertheless, there is still approximately a 4-month delay between that date and the date the citations were issued. The Secretary does not dispute that fact. Therefore, for the purpose of ruling on the motions, I conclude that there is no genuine dispute as to the fact that a delay of approximately 4 months took place from the time the Secretary believed that violations occurred until the citations were issued.

3. The Secretary has advanced as the reason for her failure to issue citations promptly after concluding that violations occurred that she was requested by the U.S. Attorney's office, with whom she had been cooperating throughout the course of her investigation, not to issue the citations until after April 1, 1991, when the criminal investigation of Peabody Coal Company was completed, so as not to jeopardize the criminal proceedings. The citations were issued shortly after the Peabody indictments. Although the parties obviously do not agree as to the gravity of the reason for delay, nor whether the delay was justified, there does not seem to be any genuine issue of fact as to the Secretary's reason for delay. The question of justification must be considered in determining whether the movants are entitled to summary decision as a matter of law.

4. Contestants assert that the delay in issuing the citations prejudiced them in four different respects: (1) Had the Contestants been notified of the alleged violations in August 1989 (when the earliest cited samples were taken), they might have taken steps to prevent the issuance of subsequent citations;

(2) non-cited samples taken at the same time as the cited samples have been disposed of or destroyed, thus preventing Contestants from comparing cited samples with non-cited samples; (3) parts of the cassettes containing the cited filters have been discarded, including the plastic covers, plugs, sealing tape, and aluminum foil backing, which might explain the AWCs; and (4) potential witnesses have ceased working for Contestants and may be unavailable to testify, and memories of those still available have faded. I conclude that there is no genuine issue as to these facts. I should note, however, that these assertions of prejudice relate in large part to the time period prior to the Secretary's conclusion that violations occurred. Nevertheless, the questions as to the significance of the facts and whether they establish prejudice must be considered in determining whether the movants are entitled to summary decision as a matter of law.

## II.

### Reasonable Promptness

Whether Contestants are entitled to a summary decision as a matter of law depends upon whether the facts, concerning which I have found there is no genuine issue, establish (1) that the Secretary did not issue the contested citations with reasonable promptness; and (2) her failure to do so is as a matter of law fatal to their validity.

Section 104(a) of the Mine Act provides in part: "If, upon inspection or investigation, the Secretary . . . believes that an operator . . . has violated this Act, or any mandatory health or safety standard, . . . [s]he shall, with reasonable promptness, issue a citation to the operator . . . . The requirement for the issuance of a citation with reasonable promptness shall not be a jurisdictional prerequisite to the enforcement of any provision of this Act." The Mine Act's predecessor, the Coal Act of 1969, provided in section 104(b): "If, upon any inspection of a coal mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard . . . , [s]he shall issue a notice to the operator . . . ." Section 104(f) of the Coal Act provided: "Each notice . . . issued under this section shall be given promptly to the operator . . . ."

After the Coal Act and before the Mine Act, Congress passed the Occupational Safety and Health Act (OSH Act) in 1970. Section 9(a) of the OSH Act provides in part: "If, upon inspection or investigation, the Secretary . . . believes that an employer has violated . . . any standard . . . or . . . regulations . . . , [s]he shall with reasonable promptness issue a citation to the employer." Unlike the Mine Act, the OSH Act, in section 9(c) provides a statute of limitations: "No citation may



be issued under this section after the expiration of six months following the occurrence of any violation." Therefore, cases under the OSH Act are of limited utility in resolving the issue before me.

The legislative history of the Mine Act describes the situations which may justify the Secretary's delay in issuing a citation after she believes a violation has occurred:

Section 105(a) provides that if, upon inspection or investigation, the Secretary . . . believes an operator has violated . . . any standard, . . . [s]he shall with reasonable promptness issue a citation to the operator. There may be occasions where a citation will be delayed because of the complexity of issues raised by the violations, because of a protracted accident investigation, or for other legitimate reasons. For this reason, section 105(a) provides that the issuance of a citation with reasonable promptness is not a jurisdictional prerequisite to any enforcement action.

S. Rep. No. 181, 95th Cong., 1st Sess. 30 (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 618 (1978).

The first Commission case where the question of reasonable promptness in issuing citations was raised was Secretary v. Peabody Coal Co., 1 FMSHRC 473 (ALJ) (1979). The judge considered the reason for the delay and whether the delay resulted in prejudice to the operator. The inspector who issued the citations was uncertain that the conditions observed were violations and, if they were, what corrective action should be recommended. Therefore he consulted with his superiors, which did "not appear [to the judge] to be inappropriate," and the delay of 2 business days was found not to be unreasonable. "This is particularly so where there is no showing that such delay was in any way prejudicial . . . ." Id. at 480-481.

In a case under the Coal Act, a Commission judge determined that the issuance of a citation 35 days after the completion of an accident investigation (40 days after the alleged violation) was "an unreasonable delay in informing [the mine operator] of the allegations lodged against it." Secretary v. Bethlehem Mines Corp., 1 FMSHRC 1280, 1289 (ALJ) (1979). The judge's opinion did not discuss whether the operator was prejudiced by the delay.

The case of Old Dominion Power Co. v. Secretary, 3 FMSHRC 2721 (ALJ) (1981), aff'd, Secretary v. Old Dominion Power Co., 6 FMSHRC 1886 (1984), rev'd on other grounds sub nom., Old Dominion Power Co. v. Donovan, 772 F.2d 92 (4th Cir. 1985),

involved a delay of 1 year in issuing a citation after the inspector determined that a violation occurred. The delay resulted from "the complexity of the law with respect to whether MSHA should cite only a production operator for the violations of independent contractors working on mine property." 3 FMSHRC at 2737. The judge concluded that "[t]he evidence . . . shows that no prejudice to OD resulted because of the fact that OD was not specifically cited for a period of 1 year [since] OD had participated in the thorough investigation which MSHA made into the cause of the accident and MSHA personnel . . . discussed the fact that MSHA was considering the question of finding OD to be an operator under the . . . Act . . . ." Id. at 2739.

The Commission referred to the last sentence in section 104(a) that the requirement for the issuance of a citation with reasonable promptness shall not be a jurisdictional prerequisite to the enforcement of any provision of the Act. It then discussed prejudice: "Most important, . . . Old Dominion has not shown that it was prejudiced by the delay. Indeed, Old Dominion was aware from the time of its employee's fatal accident that an investigation involving its actions was being conducted by MSHA, and it has been given a full and fair opportunity to participate in all stages of this proceeding." 6 FMSHRC at 1894.

In Emerald Mines Co. v. FMSHRC, 863 F.2d 51 (D.C. Cir. 1988), the Court of Appeals affirmed the Commission's decision upholding orders and citations issued for past violations not directly observed by the inspector. In its opinion the court said at page 58, "Section 104(a) requires that citations issue 'with reasonable promptness,' and this requirement could be construed to cover not only the inspection to citation time lag but the violation to citation span as well. In any event, the Secretary is under a general obligation to act reasonably and would not do so were she to resurrect distant violations to place an operator on a section 104(d) chain. A 'reasonable promptness' requirement here would comport with, and be no less administrable than, other timely action specifications contained in the Mine Act."

The Wilberg Mine fire which began in December 1984, spawned a number of Commission cases. In March 1987, the Secretary issued citations and orders charging Emery Mining Company as an operator with certain violations and charging Utah Power & Light with derivative liability as a successor-in-interest. Commission Judge Morris held that Utah Power & Light was not cited as an operator and could not be held liable as a successor-in-interest. Thereafter in April 1988, the Secretary sought to modify the citations and orders so as to charge Utah Power & Light with direct liability as an operator. The judge denied her motion. Energy Mining Corp. and/or Utah Power and Light Co. v. Secretary, 10 FMSHRC 1337 (ALJ) (1988): "I conclude that the purported modifications cannot stand. In particular, the modifications are

untimely, were not issued 'forthwith' nor with 'reasonable promptness,' and the modification conflicts with the procedural requirements of the Act; further they are prejudicial to [Utah Power & Light]." Id. at 1346.

Judge Morris specifically addressed the delay in issuing the 104(a) citations holding that they were not issued with reasonable promptness: "While reasonable promptness is not a per se jurisdictional bar to their issuance, the legislative history indicates there must be a reasonable basis for the delay, such as a 'protracted accident investigation.' . . . Here, the protracted accident investigation could justify the initial delays. But by August 13, 1987 the last of the citations and orders had been issued and there appears to be no legitimate basis for the further delay until April 1988 to cite [Utah Power and Light]." Id. at 1351 (citation omitted). The judge discussed and rejected the Secretary's contention that Utah Power & Light was not prejudiced by the delay.

The Commission has thus grappled with the issue of the reasonable promptness requirement despite the provision in 104(a) of the Act that the requirement is not a "jurisdictional prerequisite" to enforcement of the Act. And the Court of Appeals stated in Emerald Mines, at 58, that "the Secretary is under a general obligation to act reasonably," and she may not issue citations for "distant violations" without a reasonable basis for the delay. Therefore, I conclude that the Commission and the courts must still consider whether a delay in issuing a citation has a reasonable basis, and whether the delay resulted in prejudice to the mine operator. There are, then, three factors which must be considered here: (1) the length of the delay; (2) the reason for the delay; and (3) whether the delay resulted in prejudice to the mine operators. The Commission has indicated that the most important of these factors is (3), the question of prejudice.

For the purposes of ruling on the motions, I have found that the citations involved here were issued approximately 4 months after the Secretary believed that violations were shown. The Secretary states that the delay in issuing the citations was justified by the continuing criminal investigation: she was requested by the U.S. Attorney's Office not to issue citations or otherwise indicate her awareness of the suspected tampering violations, because this would have jeopardized the grand jury investigation by revealing the nature of the potential criminal charges and the targets of the investigation. Although the continuing criminal investigation involves companies other than Peabody, the Peabody case seems to have been the primary concern of the U.S. Attorney. After the Peabody indictments were handed down, and pleas were entered, the citations were issued. There is no indication that SOCCO or Windsor was or is the target of any criminal investigation. Thus, the question is whether a

pending criminal investigation of other coal companies justifies a substantial delay in issuing citations to SOCCO and Windsor. There is an important public purpose served in not prematurely revealing matters involved in a criminal investigation. There is also an important public purpose in requiring the Secretary to issue a citation with reasonable promptness after she has determined that a violation has occurred. The public policy against premature disclosure of criminal investigations is, on balance, of greater importance than the requirement that the Secretary issue citations promptly, especially since the requirement is by the terms of the statute not a jurisdictional prerequisite. Therefore, I conclude that the Secretary has established an adequate justification for the delay. This brings me to the question of prejudice to the mine operators.

Socco and Windsor urge that the delay in issuing the citations has prejudiced them in preparing and conducting their defense to the violations charged by limiting the evidence they could seek to introduce.

First, they argue that "[i]f the allegations had been brought to [their] attention at the time the samples were taken, [they] could have investigated them and, if necessary, taken corrective measures . . . [to avoid] the alleged defects in the subsequently cited samples . . . ." Contestants have asserted that AWCs can result from naturally occurring conditions, e.g., physical attributes of the cited filters, rather than tampering. However, the record does not indicate what corrective measures might have been taken by the Contestants to avoid additional AWC citations. Whatever harm has resulted to the operators' cases has not been shown to be prejudicial.

Second and third, Contestants argue that "[h]ad MSHA issued the citations promptly, Contestants would have demanded that it preserve not only the cited samples, but also any [non-cited] samples submitted at the time, establishing a 'norm' for measuring the alleged 'abnormality' of the cited samples." I agree with Contestants that the disposal of the non-cited filters taken at the same time as the cited filters and the discarding of cassette parts of the cited filters limits in some degree their ability to demonstrate that AWCs result from physical attributes of the cited filters. However, as I noted above, the delay in issuing these citations was (for the purpose of ruling on these motions) from November 1990 until April 1991. The disposal of the non-cited filters and cassette parts occurred before that time. For this reason, I conclude that the delay did not prejudice the mine operators' cases.

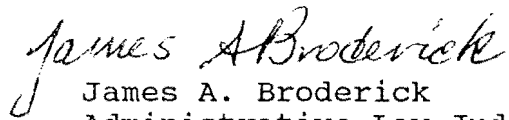
Finally, Contestants argue that "the delay has diminished the availability of testimonial evidence" because potential witnesses have ceased working for them and the memories of witnesses who are still available have faded with the passage of

time. I agree with Contestants that personnel changes and the faded memories of remaining employees reduces in some degree their ability to demonstrate that they properly handled the filter cassettes. However, the fact that witnesses have ceased working for Contestants does not establish their unavailability. Contestants have not shown that the potential witnesses are indeed unavailable, nor what their testimony would be. Thus, they have failed to show prejudice. I conclude that a delay of 4 months in issuing the citations is not prejudicial to Contestants' ability to defend themselves in these proceedings.

Because the statutory mandate that section 104(a) citations be issued with "reasonable promptness" is not a jurisdictional prerequisite to enforcement, because the Secretary has established an adequate justification for the delay, and because Contestants have not shown that they were prejudiced, I conclude that they are not entitled to summary decision as a matter of law.

ORDER

Accordingly, the motions to vacate the citations filed on behalf of SOCCO, Windsor, Energy Fuels, Great Western Kentucky, Great Western, Harlan, Drummond, and JWR are DENIED.

  
James A. Broderick  
Administrative Law Judge

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