

MAY 1993

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MAY 1993

The following cases were granted for review during the month of May:

Secretary of Labor, MSHA v. Spurlock Mining Company and Sarah Ashley Mining Company, Docket Nos. KENT 92-380, etc. (Judge Melick, April 2, 1993.)

Secretary of Labor, MSHA v. W-P Coal Company, Docket No. WEVA 92-746. (Judge Melick, April 9, 1993.)

Secretary of Labor, MSHA v. Glen Burwick, employed by Burwick Construction, Docket No. CENT 92-341-M. (Chief Judge Merlin, Default Decision of April 22, 1993 - unpublished.)

Secretary of Labor, MSHA v. Higman Sand & Gravel, Docket No. CENT 93-18-M, CENT 93-19-M. (Chief Judge Merlin, Default Decision of April 22, 1993 - unpublished.)

Secretary of Labor, MSHA v. A-1 Grit Company, Docket No. WEST 92-527-M. (Chief Judge Merlin, Default Decision of April 22, 1993 - unpublished.)

Secretary of Labor, MSHA v. Davis Trucking Company, Docket No. LAKE 92-421-M. (Chief Judge Merlin, Default Decision on April 23, 1993 - unpublished.)

The following case was denied for review during the month of May:

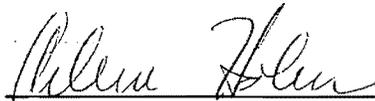
Secretary of Labor, MSHA v. Cyprus Tonopah Mining Corporation, Docket No. WEST 90-202-M, etc. (Judge Lasher, April 9, 1993.)

COMMISSION DECISIONS AND ORDERS

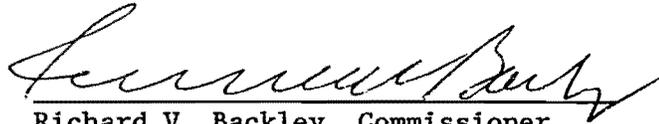
the basis that C.W.'s appeal is moot.

The Commission has "responsibility under the Mine Act ... to ensure that a contested case is terminated ... in accordance with the Act." Youghiogeny & Ohio Coal Co., 7 FMSHRC 200, 203 (February 1985). A motion by the Secretary to dismiss a review proceeding in which he has vacated the underlying citation or order will ordinarily be granted if "adequate reasons" to do so are present. See Southern Ohio Coal Co., 10 FMSHRC 1669, 1670 (December 1988) and authorities cited. We conclude that adequate reasons exist in this case. The Secretary, as the prosecutor charged with enforcing the Mine Act, determined that he should vacate the citation and seek to dismiss this appeal. The operator does not object to the Secretary's motion and nothing in the record indicates that C.W. will be prejudiced by dismissal of this proceeding.

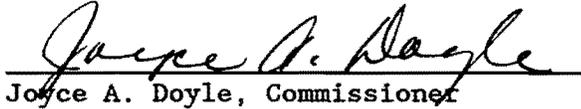
For the foregoing reasons, the Secretary's dismissal motion is granted, the Commission's direction for review is vacated, as is that part of the judge's decision wherein he affirmed the citation, and this civil penalty proceeding is dismissed.



Arlene Holen, Chairman



Richard V. Backley, Commissioner



Joyce A. Doyle, Commissioner



L. Clair Nelson, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

May 21, 1993

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
v.	:	Docket No. CENT 92-341-M
	:	
GLEN BURWICK,	:	
Employed by Burwick	:	
Construction Co.	:	
	:	

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

ORDER

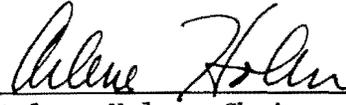
BY THE COMMISSION:

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988)("Mine Act"). On April 22, 1993, Chief Administrative Law Judge Paul Merlin issued an Order of Default, finding respondent Glen Burwick, an employee of Burwick Construction Co., in default for failing to answer the notice of proposed civil penalty filed by the Secretary of Labor or the judge's February 9, 1993, Order to Show Cause. The judge assessed the civil penalty of \$400 proposed by the Secretary. For the reasons that follow, we vacate the default order and remand this case for further proceedings.

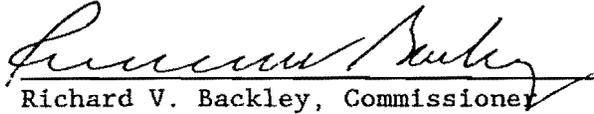
The Commission has received a letter from Ms. Tanya Burwick dated April 27, 1993, stating that on February 22, 1993, Glen and Therell Burwick responded to the Proposal, showing their opposition to the charges brought against them. The February 22 letter contained no docket numbers and was filed only in the official record in Therell Burwick, emp. by Burwick Construction Co., Docket No. CENT 92-340-M, a related case.

The judge's jurisdiction over this case terminated when his decision was issued on April 22, 1993. 29 C.F.R. § 2700.69(b). Under the Mine Act and the Commission's procedural rules, relief from a judge's decision may be sought by filing a petition for discretionary review with the Commission within 30 days of its issuance. 30 U.S.C. § 823(d)(2); 29 C.F.R. § 2700.70(a). We deem the April 27 letter to be a timely filed Petition for Discretionary Review, which we grant. See, e.g., Middle States Resources, Inc., 10 FMSHRC 1130 (September 1988). On the basis of the present record, we are unable to evaluate the merits of the respondent's position. In the interest of justice, we remand this matter to the judge, who shall determine whether a default order is warranted.

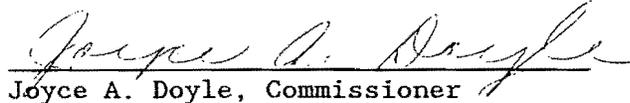
For the reasons set forth above, we vacate the judge's default order and remand this matter for further proceedings.



Arlene Holen, Chairman



Richard V. Backley, Commissioner



Joyce A. Doyle, Commissioner



L. Clair Nelson, Commissioner

Distribution

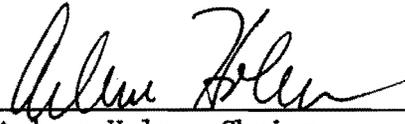
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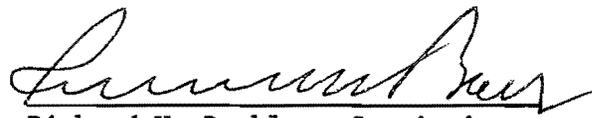
Chief Administrative Law Judge Paul Merlin
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30 C.F.R. § 56.14132(a), a mandatory audible warning device standard for surface metal and nonmetal mines. On October 6, 1992, MSHA's Office of Assessments, under the regular assessment procedures of 30 C.F.R. § 100.3, notified Higman that it proposed a civil penalty of \$362 for the alleged violation. On October 21, 1992, Higman filed its "Blue Card" request for a hearing before this independent Commission. On December 18, 1992, the Secretary filed a complaint proposing the assessment of a civil penalty for the violation. Under the Commission's rules of procedure, the party against whom a penalty is sought was obligated to file its answer with the Commission within 30 days after service of the penalty proposal. 29 C.F.R. § 2700.5(b) & .29. The record indicates that Higman did not file an answer to the complaint with the Commission. When no answer to the penalty proposal was filed, the judge, on February 24, 1993, issued an order directing Higman to file an answer within 30 days or to show good cause for its failure to do so.

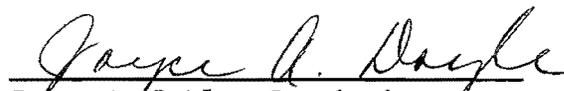
It appears that Higman, proceeding without benefit of counsel, may have confused the roles of the Commission and MSHA in this adjudicatory proceeding and may have attempted to respond to the judge's show cause order by sending its response to MSHA. We are unable, on the basis of the present record, to evaluate the merits of Higman's position. Because Higman has asserted an attempt to respond, we will, in the interest of justice, permit Higman the opportunity to present its position to the judge, who shall determine whether relief from default is warranted. Therefore, we vacate the default order. Higman is reminded that it must file all documents and correspondence with the Commission, and serve the Secretary with copies of all of such filings. 29 C.F.R. §§ 2700.5(b) & .7.



Arlene Holen, 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 25, 1993

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

v.

HIGMAN SAND & GRAVEL, INC.

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:
:
:
:
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:
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:
:

Docket No. CENT 93-19-M

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

ORDER

BY: Holen, Chairman; Backley, and Doyle, Commissioners

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988) ("Mine Act"). Commission Chief Administrative Law Judge Paul Merlin issued an Order of Default on April 22, 1993, finding respondent Higman Sand & Gravel, Inc. ("Higman") in default for failure to answer the civil penalty proposal of the Secretary of Labor ("Secretary") and the judge's February 24, 1993, Order to Show Cause. The judge assessed the civil penalty of \$292 proposed by the Secretary. For the reasons that follow, we vacate the default order and remand this case for further proceedings.

On April 30, 1993, Higman filed a letter with the Commission, which stated, in essence, that Higman believed it had done everything necessary to obtain a hearing. A letter dated March 19, 1993 was attached, which Higman alleges it mailed to the Department of Labor's Mine Safety and Health Administration ("MSHA") Civil Penalty Compliance Office in Arlington, Virginia.

The judge's jurisdiction in this proceeding terminated when his decision was issued on April 22, 1993. 29 C.F.R. § 2700.69(b). Under the Mine Act and the Commission's procedural rules, relief from a judge's decision may be sought by filing a petition for discretionary review with the Commission within 30 days of its issuance. 30 U.S.C. § 823(d)(2); 29 C.F.R. § 2700.70(a). We will treat Higman's letter as a timely filed petition for discretionary review of the decision. See, e.g., Middle States Resources, Inc., 10 FMSHRG 1130 (September 1988).

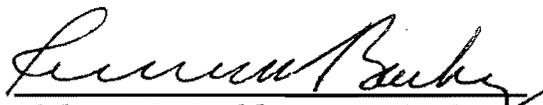
On July 16, 1992, an MSHA inspector issued to Higman a citation pursuant to section 104(a) of the Mine Act, 30 U.S.C. § 814(a), alleging a violation of

30 C.F.R. § 56.20008, a mandatory toilet facility standard for surface metal and nonmetal mines. On September 15, 1992, another MSHA inspector issued to Higman an order pursuant to section 104(b) of the Mine Act, 30 U.S.C. § 814(b), for failure to abate the violation. On October 6, 1992, MSHA's Office of Assessments, under the regular assessment procedures of 30 C.F.R. § 100.3, notified Higman that it proposed a civil penalty of \$292 for the alleged violation. On October 21, 1992, Higman filed its "Blue Card" request for a hearing before this independent Commission. On December 18, 1992, the Secretary filed a complaint proposing the assessment of a civil penalty for the violation. Under the Commission's rules of procedure, the party against whom a penalty is sought was obligated to file its answer with the Commission within 30 days after service of the penalty proposal. 29 C.F.R. § 2700.5(b) & .29. The record indicates that Higman did not file an answer to the complaint with the Commission. When no answer to the penalty proposal was filed, the judge, on February 24, 1993, issued an order directing Higman to file an answer within 30 days or to show good cause for its failure to do so.

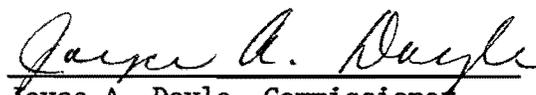
It appears that Higman, proceeding without benefit of counsel, may have confused the roles of the Commission and MSHA in this adjudicatory proceeding and may have attempted to respond to the judge's show cause order by sending its response to MSHA. We are unable, on the basis of the present record, to evaluate the merits of Higman's position. Because Higman has asserted an attempt to respond, we will, in the interest of justice, permit Higman the opportunity to present its position to the judge, who shall determine whether relief from default is warranted. Therefore, we vacate the default order. Higman is reminded that it must file all documents and correspondence with the Commission, and serve the Secretary with copies of all of such filings. 29 C.F.R. §§ 2700.5(b) & .7.



Arlene Holen, Chairman



Richard V. Backley, Commissioner



Joyce A. Doyle, Commissioner

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

May 25, 1993

JIM WALTER RESOURCES, INC. :
 :
 v. : Docket No. SPECIAL 92-01
 :
 SECRETARY OF LABOR, :
 MINE SAFETY AND HEALTH :
 ADMINISTRATION (MSHA) :

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

DECISION

BY THE COMMISSION:

In this proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988) ("Mine Act" or "Act"), Jim Walter Resources, Inc. ("JWR") filed with the Commission a Notice of Contest and Motion for Partial Relief from Final Order seeking to reopen certain uncontested civil penalty assessments in which JWR had paid in full the penalties proposed by the Secretary of Labor. As the basis for its motion, JWR cites Rule 60(b), Federal Rules of Civil Procedure ("Fed. R. Civ. P."), and principles of equity.

This is the lead case in a group of 19 special proceedings in which similar notices of contest and motions for relief from final orders were filed by mine operators (Docket Nos. SPECIAL 92-02 through -16; and 93-01 through -03). The operators contend that the penalties in dispute were invalidly augmented on the basis of 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 Commission concluded in Drummond Co., 14 FMSHRC 661, 692 (May 1992), and related cases, could be accorded no legal weight or effect. The operators seek refunds of those portions of paid penalties attributable to augmentations under the PPL.

The Commission granted the motions of the American Mining Congress ("AMC") and National Coal Association ("NCA") to participate as amici curiae and heard oral argument. For the reasons that follow, we hold that the Commission possesses jurisdiction to reopen final orders, including orders in which uncontested penalties were paid, but conclude that JWR's request does not meet the requisite criteria under Fed. R. Civ. P. 60(b) or principles of equity for the grant of such relief. Accordingly, we deny JWR's motion to reopen and we dismiss this proceeding.

I.

Background

A. General Legal and Regulatory Background

The Mine Act establishes a bifurcated civil penalty system in which the Secretary proposes and the Commission assesses, based on specified criteria,¹ all civil penalties for violations of the Act, of mandatory safety and health standards, and of other regulations issued under the Act. 30 U.S.C. §§ 815(a) & (d), 820(a) & (i); see, e.g., Sellersburg Stone Co., 5 FMSHRC 287, 290-92 (March 1983), aff'd, 736 F.2d 1147 (7th Cir. 1984). Section 105(a) of the Act states in pertinent part that, after the Secretary has issued a citation or withdrawal order to a mine operator for an alleged violation, he "shall ... notify the operator ... of the civil penalty proposed to be assessed ... for the violation...." 30 U.S.C. § 815(a). Section 105(a) allows the operator 30 days within which to contest a proposed penalty and further provides that, if the operator does not contest it, the assessment "shall be deemed a final order of the Commission and not subject to review by any court or agency." Id.

The Secretary, acting through the Department of Labor's Mine Safety and Health Administration ("MSHA"), promulgated regulations at 30 C.F.R. Part 100 to implement the proposal of penalties.² Two methods were provided for calculating proposed penalties, regular and special assessment. In 1982, MSHA added a "single penalty" assessment of \$20 for a timely abated non-significant and substantial ("non-S&S") violation.³ See Drummond, 14 FMSHRC at 663-64.

¹ Section 110(i) of the Act provides in relevant 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).

² The civil penalty regulations were adopted pursuant to section 508 of the Mine Act. 30 U.S.C. § 957. See Drummond, 14 FMSHRC at 663.

³ 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).

In Coal Employment Project v. Dole, 889 F.2d 1127, 1136-38 (D.C. Cir. 1989), the D.C. Circuit found that the Secretary's procedure for assessing single penalties failed to take into account violation history, one of the Mine Act's penalty criteria. The Court remanded the case to MSHA "for appropriate amendment of the regulations." 889 F.2d at 1128. The Court ordered MSHA, in the interim, to consider an operator's history of non-S&S violations in proposing single penalties and to include an operator's history of single penalties in proposing regular assessments. 889 F.2d at 1138, 1139.

Issuance of the PPL was one of the actions taken by MSHA in response to the Court's interim remand. See Drummond, 14 FMSHRC at 678. The Secretary did not publish the PPL in the Federal Register but sent it to all operators on May 29, 1990. In addition to incorporating single penalties in the violation history scheme, the PPL augmented penalty assessments by specified percentage amounts, depending on the degree of "excessive history."⁴ On December 28, 1990, the Secretary published proposed rules, "Criteria and Procedures for Proposed Assessment of Civil Penalties," which generally incorporated the provisions of the PPL. 55 Fed. Reg. 53482, 53483. See Drummond, 14 FMSHRC at 667-68.

B. The Drummond Litigation and Related Developments

The Secretary began proposing civil penalties based on the PPL in May 1990. The Commission docketed 2,803 contests from mine operators contending that the proposed penalties were improper because they were not based on the Part 100 penalty regulations alone but, instead, were increased in accordance with the PPL's interim excessive history program, which, the operators argued, had been unlawfully issued outside the notice-and-comment rulemaking process required by the Administrative Procedure Act, 5 U.S.C. § 551 et seq. (1988) ("APA"). The operators also moved to have the proposed penalties remanded to the Secretary for recalculation without reference to the PPL. The Commission granted seven petitions for review of decisions by its administrative law judges and, while these cases were pending on review, proceedings in the other excessive history contests were stayed. The petitions for review resulted in Drummond and related decisions.⁵ See Drummond, 14 FMSHRC at 661-62, 669-70.

⁴ The PPL provided that non-S&S violations, if associated with excessive history, would no longer be eligible for a single penalty but would be assessed under the regular assessment formula. PPL at 2. S&S violations associated with excessive history would receive a regular assessment augmented by a percentage increase of 20%, 30% or 40%. Violations specially assessed would receive a similar percentage increase for excessive history. Id.

⁵ Also issued the same date were a second Drummond decision, 14 FMSHRC 695 (May 1992), as well as: Cyprus-Plateau Mining Corp., 14 FMSHRC 702 (May 1992); Utah Power and Light Co., Mining Div., 14 FMSHRC 709 (May 1992); Hobet Mining, Inc., 14 FMSHRC 717 (May 1992); Texas Utilities Mining Co., 14 FMSHRC 724 (May 1992); and Zeigler Coal Co., 14 FMSHRC 731 (May 1992).

In Drummond, the Commission determined that it possessed subject matter jurisdiction to review the validity of the PPL and to require the Secretary to propose penalties in a manner consistent with the Part 100 penalty regulations. 14 FMSHRC at 673-78. It further determined that the PPL exceeded the Coal Employment Project interim mandate. 14 FMSHRC at 678-80. The Commission determined that, under established APA precedent, the PPL could not be regarded as an interpretative rule, policy statement, or agency procedure excepted from notice-and-comment rulemaking (see 5 U.S.C. § 553(b)(3)(A)) (14 FMSHRC at 684-88), and that it did not otherwise qualify for exception from that process (14 FMSHRC at 689-90). The Commission held that the PPL was an "invalidly issued substantive rule" that could not be "accorded legal effect." 14 FMSHRC at 692. Accordingly, the Commission remanded the proposed penalties in Drummond and the related matters to the Secretary for recalculation in accordance with the existing Part 100 regulations, without use of the PPL. The 2,779 other pending penalty matters were also remanded to the Secretary for reproposal in accordance with Drummond.

By letter dated June 3, 1992, the Department of Labor's Associate Solicitor advised the Commission's Chief Administrative Law Judge that the Secretary had decided that he would not appeal Drummond. The Associate Solicitor also stated, in effect, that new penalties would be proposed for S&S violations with excessive history, i.e., to rescind penalty augmentations, but not for non-S&S violations with excessive history.

While Drummond was pending on review, certain final Part 100 rules were published, containing, as relevant here, the final version of MSHA's interim action in response to the Coal Employment Project order to include single penalties in an operator's history of violations. 57 Fed. Reg. 2968-71 (January 24, 1992). That same day, the Secretary published a revised proposed penalty rule. 57 Fed. Reg. 2972-77. On January 29, 1992, MSHA also issued Program Policy Letter No. P92-III-1 ("PPL-II"), which superseded the PPL and mirrored the new proposed penalty rule. PPL-II, like the earlier PPL, was not published in the Federal Register. Drummond, 14 FMSHRC at 668.

A final penalty rule, taking into account an operator's history of violations in determining eligibility for a single penalty assessment, was issued by the Secretary on December 21, 1992, completing MSHA's response to the Coal Employment Project order.⁶ 57 Fed. Reg. at 60690-97. The penalty system underlying the final rule continues to incorporate the Mine Act's penalty criteria, including violation history. The final rule, however, is significantly different from MSHA's two PPL's and the two proposed rules in that it does not provide for percentage augmentations of penalties based on excessive history.

⁶ The Coal Employment Project Court had retained jurisdiction over its remand to MSHA. 889 F.2d at 1138, 1139. Upon receiving the Secretary's Notification of Completion of Rulemaking, the Court issued an order removing the case from its docket on January 19, 1993, thus terminating its jurisdiction in the case.

C. JWR's Motion

Relying on Drummond's invalidation of the PPL, JWR filed its Notice of Contest and Motion for Partial Relief from Final Order on June 29, 1992. Eighteen similar pleadings from other operators followed. In all these matters, the operators had failed to contest, within the time provided by section 105(a) of the Act, the proposed penalties and, instead, had paid the penalties in full. The Commission heard oral argument on January 28, 1993.

II.

Disposition of Issues

Two major issues are presented: (1) whether, in view of the language in section 105(a) of the Mine Act, the Commission possesses jurisdiction to reopen these final orders; and (2), if the Commission does have such jurisdiction, whether JWR has satisfied appropriate criteria for such reopening. We answer the first question in the affirmative and the second in the negative.

A. Commission Jurisdiction

1. Parties' arguments

JWR and the amici (hereafter, the "operators") do not seek refund of the basic penalty amounts nor do they contest the underlying citations. Rather, they request reduction of the penalties by the amount attributable to augmentation under the PPLs. They assert that Fed. R. Civ. P. 60(b) ("Rule 60(b)"), which the Commission has invoked frequently to reopen final orders such as default judgments, may serve as the basis for reopening these matters, which have become "final orders of the Commission" by operation of section 105(a). The operators point to case law under the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 et seq. (1988)(the "OSHAct"), permitting Rule 60(b) relief, notwithstanding analogous "final order" language in section 10(a) of that statute, 29 U.S.C. § 659(a). See, e.g., J.L. Hass Co. v. OSHRC, 648 F.2d 190, 192-95 (3rd Cir. 1981). The operators also note that section 105(a) specifically precludes "agency" but not "Commission" review and, thus, does not bar this Commission's review of these matters.

The Secretary contends that the Commission is without jurisdiction to consider JWR's challenge because JWR failed to timely contest the penalty proposals as provided in section 105(a) of the Mine Act. He relies on the language in section 105(a), which provides that a final order of the Commission is not subject to review "by any court or agency." 30 U.S.C. § 815(a). Thus, by operation of the statute, these matters are final and may not be reopened for review by the Commission.

2. Disposition

In construing the Act, the Secretary, this Commission, and the Courts of Appeals must give effect to the "unambiguously expressed intent of Congress." Chevron U.S.A. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 (1984).

In general, the Commission also is required to accord "weight" to the Secretary's interpretations of the statute and his implementing regulations. S. Rep. No. 181, 95th Cong., 1st Sess. 49 (1977)("S. Rep."), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 637 (1978)("Legis. Hist."). However, as the Commission stated in Drummond, "we perceive no indication in the statute or its legislative history, or in sound policy, that [Commission] deference to the Secretary's views of Commission jurisdiction is required." 14 FMSHRC at 674 n.14.

The Secretary argues that the language of section 105(a), "not subject to review by any court or agency," is unambiguous and precludes the Commission itself from reopening its final orders. We disagree. In our view, section 105(a) merely sets forth a general principle of finality covering the procedure for the contest of citations and proposed penalties. The Commission has recognized that, in appropriate circumstances, it may grant various forms of relief from final Commission orders. See generally, e.g., Danny Johnson v. Lamar Mining Co., 10 FMSHRC 506, 508 (April 1988); M.M. Sundt Const. Co., 8 FMSHRC 1269, 1270-71 (September 1986). In reopening final orders, the Commission has found guidance in, and has applied, "so far as practicable," Rule 60(b), dealing with relief from judgments or orders.⁷ See Commission Procedural Rule 1(b), 29 C.F.R. § 2700.1(b).

The legislative history indicates that Congress enacted section 105 to end the lengthy and repetitive procedure of penalty assessment and collection under the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 et seq. (1976)(amended 1977)("1969 Coal Act"). UMWA v. Ranger Fuel Co., 12 FMSHRC 363, 372-73 (March 1990). Under the 1969 Coal Act, operators had the right to seek de novo review of those penalties in United States District Courts. See S. Rep. at 16, 44, 45, reprinted in Legis. Hist. at 604, 632, 633. The legislative history makes clear that the "not subject to review" language was intended to abolish this cumbersome process by preventing collateral attacks on penalty determinations. See, e.g., S. Rep. at 34, 45-46, reprinted in Legis. Hist. at 622, 633-34; see also Legis. Hist. at 89

⁷ In relevant part, Rule 60(b) provides:

Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; ... (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; ... or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1) ... and (3) not more than one year after the judgment, order, or proceeding was entered or taken....

(remarks of Sen. Williams introducing S. 717, the bill upon which the Mine Act was based). There is nothing in the legislative history to suggest that Congress intended to bar the Commission itself from granting Rule 60(b) type post-judgment relief in appropriate circumstances.⁸

The Commission's view of section 105(a) is supported by analogous case law. Section 10(a) of the OSHAct, 29 U.S.C. § 659(a), also provides that an uncontested citation or proposed penalty "shall be deemed a final order of the [Occupational Safety and Health Review] Commission and not subject to review by any court or agency." In J.I. Hass, the Third Circuit held that section 10(a) of the OSHAct cannot be reasonably construed to prohibit all late-filed notices of contest:

The Secretary contends that the final clause of section 10(a) is jurisdictional and must be read literally to prohibit review of citations if an employer files no timely notice of contest. Under this interpretation of section 10(a), once any employee of the employer signs the certified receipt for the citations, no circumstances would permit a late notice of contest. Thus, if an employee signed for citations and then was killed while returning from the post office, and the letter destroyed, an employer with a meritorious defense could still get no relief if 15 working days elapsed before he learned of the citations. We do not believe that Congress intended such a harsh result.

648 F.2d at 194. See also Capital City Excavating Co. v. Donovan, 679 F.2d 105, 109-10 (6th Cir. 1982).

⁸ Amicus AMC argues that section 105(a) precludes review only by other agencies and courts but does not explicitly preclude Commission review. AMC Reply at 7. The Secretary argues that Commission Procedural Rule 25, 29 C.F.R. § 2700.25, which stated that section 105(a) orders were not subject to review by the Commission or a court, precludes relief. Procedural Rule 25 first appeared in Rule 23 of the Interim Procedural Rules published on March 10, 1978, prior to the assumption of office by Commission members. 43 Fed. Reg. 10320, 10324 (1978). No explanation of the Interim Rule was provided. Id. When the Commission adopted its Procedural Rules in 1979, Interim Rule 23, which departed from section 105(a) of the Mine Act, was substantially retained in Rule 25, without comment. 44 Fed. Reg. 38227, 38229 (1979). The Commission has published new final Procedural Rules, which took effect on May 3, 1993, and, in a number of instances, has revised the text of rules to conform to the statute. 58 Fed. Reg. 12158-74 (March 3, 1993). Revised Rule 27, which replaces prior Rule 25, conforms the earlier rule to the language of section 105(a) of the Mine Act, "not subject to review by any court or agency." (Emphasis added.) 58 Fed. Reg. 12167. In any event, we construe the prior rule in a manner consistent with the language of the Mine Act and the analysis set forth in this decision.

For the foregoing reasons, we hold that a final order of the Commission may be reopened by the Commission in appropriate circumstances pursuant to Rule 60(b).

B. Whether JWR Meets Criteria for Post-Judgment Relief

1. Parties' arguments

JWR invokes Rule 60(b)(3), alleging misrepresentation by the Secretary in the proposal of the penalties, and Rule 60(b)(6), asserting that the requested relief would ensure that justice is served. JWR alleges that, in proposing the penalties, the Secretary misrepresented his actions by stating that the proposals had been calculated pursuant to 30 C.F.R. Part 100, when, in fact, that was not the case. Only when the Commission in Drummond found the PPL to be invalid, did JWR realize that it had paid invalidly determined penalties. The operators argue that it is unfair to require the payment of illegally proposed penalties and contend on separate equitable grounds that they should be relieved from these final orders.

The Secretary responds that the criteria of Rule 60(b) have not been satisfied. The Secretary points out that the penalty proposals stated on their face that the penalties had been increased under the excessive history program. (See Attachment A to JWR's Notice of Contest.) He also notes that the PPL was disseminated to all regulated operators and, in light of such notification, the operators cannot claim misrepresentation as to the penalty calculations. He further argues that these motions are essentially attempts to change litigating positions in light of subsequent legal developments, and that neither Rule 60(b) nor other equitable relief is appropriate under such circumstances.

2. Disposition

Motions to reopen under Rule 60(b) are committed to the sound discretion of the judicial tribunal in which relief is sought. See, e.g., Randall v. Merrill Lynch, 820 F.2d 1317, 1320-21 (D.C. Cir. 1987).⁹ However, discretion in this regard is not open-ended. As the Court stated in Randall: "Rule 60(b) is the mechanism by which courts temper the finality of judgments with the necessity to distribute justice. It is a tool which ... courts are to use sparingly...." 820 F.2d at 1322. See also Ronald Tolbert v. Chaney Creek Corp., 12 FMSHRC 615, 619 n.1 (April 1990).

We reject JWR's Rule 60(b)(3) claim alleging misrepresentation by the Secretary. In a Rule 60(b)(3) motion, misrepresentation must be shown by clear and convincing evidence. 11 Wright & Miller, Federal Practice and Procedure: Civil § 2860 (1973), and authorities cited. The Secretary's notifications to JWR and other operators of the proposed penalties stated expressly that the penalties were augmented by the excessive history program. As to the invalidity of the PPL, a conclusion subsequently reached in

⁹ Because we dispose of JWR's motion on substantive grounds, we do not reach issues of time limitation.

Drummond, we do not regard this as a "fact" that the Secretary would be obligated to disclose in proposing penalties. Rather, it is a legal conclusion that was reached following timely challenges to penalty proposals. Accordingly, we discern no misrepresentation for Rule 60(b)(3) purposes.

We are similarly unpersuaded by the operators' Rule 60(b)(6) arguments. Rule 60(b)(6) provides for relief for "any other reason justifying relief," but cannot be used to relieve a party from the duty to take legal action to protect its interests by challenging dubious enforcement actions. See, e.g., Ackermann v. U.S., 340 U.S. 193, 199-202 (1950); McNight v. U.S. Steel Corp., 726 F.2d 333, 336 (7th Cir. 1984); Wright & Miller, supra § 2864. Nor does Rule 60(b)(6) obviate the general principles of finality of judgments. Here, JWR chose to pay certain penalties rather than to contest them. JWR now attempts to rely on the litigation efforts of other operators who questioned and successfully contested penalties augmented under the PPL. Many operators questioned the validity of the excessive history program and pursued their rights under Mine Act review procedures.

As noted in Parks v. U.S. Life and Credit Corp., 677 F.2d 838 (11th Cir. 1982):

An unsuccessful litigant may not rely on appeals by others and share in the fruits of victory by way of a Rule 60(b) motion. ...

The strong interest in the finality of litigation demands rejection of appellant's suggestion. During the pendency of an appeal, the parties recognize the possibility of reversal; thus, modification of a judgment being appealed impacts not at all on finality concerns. "There must be an end to litigation some day, and free, calculated, deliberate choices are not to be relieved from." [Ackermann v. United States,] 340 U.S. 193, 198, 71 S.Ct. 209, 211, 95 L.Ed. 207 [(1950)].

677 F.2d at 840-41.

The operators argued that a large operator such as JWR must regularly process hundreds of notifications of proposed penalties. Its decisions to contest are largely administrative and cannot realistically be characterized as deliberate litigation choices. Tr. Oral Arg. 20, 23-26, 32-34. Under the Mine Act, however, JWR is required to make such deliberate choices and its failure to contest proposed penalties as provided in section 105 is at its peril.

As to the equity principles invoked, the Commission is not a court of general equity. Cf. Kaiser Coal Corp., 10 FMSHRC 1165, 1169-71 (September 1988). In any event, it is a fundamental premise that equity aids those who have vigilantly pursued their rights. E.g., 27 Am. Jur. 2d Equity § 130 (1966). JWR was less than vigilant.

We conclude that the operators have failed to make a clear and convincing demonstration of justification for Rule 60(b)(3) or (b)(6) relief or for general equitable relief.¹⁰

C. Res Judicata and Sovereign Immunity

The Secretary argues that the paid penalties have a res judicata effect, precluding JWR's attempt at relitigation. He further contends that sovereign immunity has not been waived by the United States as to recoupment of these penalties and, accordingly, any refund is barred, and that the proper forum for monetary claims is the Court of Claims or a United States District Court. The operators argue that res judicata is inapplicable under the circumstances and contend that, notwithstanding sovereign immunity, the Commission possesses ample power under the Act to direct relief. Given our preceding disposition, we need not rule on the Secretary's res judicata and sovereign immunity arguments.

D. Merits of the Requested Refunds

Although we are constrained to deny JWR's motion, we express our disapproval of the Secretary's actions regarding attempted compliance with the Coal Employment Project mandate. The Secretary has pursued a confusing course of action, issuing proposed rules for comment at the same time as he issued and implemented PPLs outside the aegis of the APA. See Drummond, 14 FMSHRC at 678-90. A joint industry and labor comment received during the rulemaking process "contended that the proposed excessive history criteria and program were inherently flawed because they did not target the appropriate [i.e., higher fatality rate] mines." 57 Fed. Reg. at 60693 (preamble to final rule). Based on further substantive analysis, the Secretary deleted from the final rule percentage augmentations of penalties based on excessive history.

¹⁰ Amicus AMC also argues that Rule 60(b)(4) relief is justified in that the underlying section 105(a) final orders are "void" pursuant to the principles announced in Drummond. We decline to reach this issue. JWR premised its motion only on Rule 60(b)(3) and (b)(6) and on equitable principles. Absent exceptional circumstances, not shown here, an amicus cannot expand the scope of an appeal beyond the issues raised by the parties. E.g., Richardson v. Alabama State Bd. of Educ., 935 F.2d 1240, 1247 (11th Cir. 1991); Christopher M. v. Corpus Christi Ind. Sch. Dist., 933 F.2d 1285, 1292 (5th Cir. 1991).

The Secretary has argued that making the requested refunds would be administratively chaotic, because thousands of cases would have to be reopened and approximately \$1,500,000 refunded. Sec. Opp. at 19. However, following the Commission's remand of penalty cases in accordance with Drummond, the Secretary recalculated thousands of penalties that had been proposed pursuant to the PPL and reduced the assessments involved by \$859,038. Letter from Secretary's Counsel to Commission (in response to Commission's written inquiries) at 2 (February 4, 1993)("Sec. Letter").¹¹ The Secretary further argues that he is barred from granting refunds, relying, in part, on a Comptroller General opinion issued more than fifty years ago in matters that are not analogous. Sec. Surreply Br. at 8-10 & n.7. The Secretary, however, has not requested the Comptroller General's opinion as to the legality of refunds in these matters nor did the Secretary seek such opinion on the refunds he made voluntarily. See Oral Arg. Tr. at 38-39; see also Sec. Letter at 2. The Secretary has informed the Commission that, as of February 4, 1993, he had refunded to operators \$249,513 in excessive history penalty overpayments based on "retroactivity considerations." Sec. Letter at 1-2. These refunds were made by MSHA to remove any "doubt as to the fairness and consistency of [MSHA's] Assessment policies and procedures." Notification to Mine Operator[s], Attachment C to JWR's Notice of Contest.

In not appealing Drummond, in reproposing many penalties in accordance with Drummond, and in modifying the final penalty rule, the Secretary has implicitly recognized that percentage augmentations based on excessive history were misplaced. In other cases involving the excessive history program, the Secretary has undertaken penalty recalculations and has made refunds on a broad scale. We urge the Secretary to evaluate further the legality and feasibility of providing refunds in these matters and to reconsider his position.

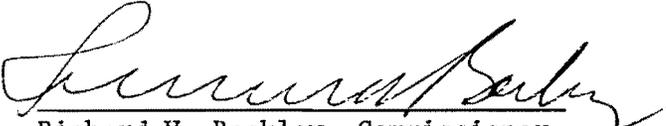
¹¹ We note that, in addition to those reproposals for S&S violations, the Secretary has agreed, based on Drummond, to reduce penalty proposals for non-S&S violations with excessive history. See JWR Citation of Supplemental Authority (Letter of May 21, 1993).

III.

Conclusion

For the foregoing reasons, JWR's motion for relief is denied and this proceeding is dismissed.


Arlene Holen, Chairman


Richard V. Backley, Commissioner


Joyce A. Doyle, Commissioner


L. Clair Nelson, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

May 27, 1993

SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA) :
v. : Docket No. LAKE 92-421-M
DAVIS TRUCKING COMPANY, INC. :

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

ORDER

BY: Holen, Chairman; Backley, and Doyle, Commissioners

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988)("Mine Act"). On April 23, 1993, Chief Administrative Law Judge Paul Merlin issued an Order of Default to Davis Trucking Co. ("Davis") for failing to answer the notice of proposed civil penalty filed by the Secretary of Labor or the judge's February 24, 1993, Order to Show Cause. The judge assessed the civil penalty of \$2,000 proposed by the Secretary. For the reasons that follow, we vacate the default order and remand this case for further proceedings.

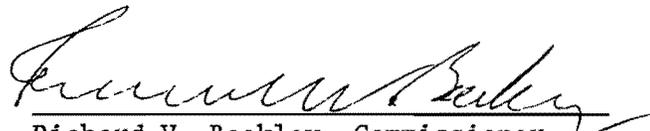
On April 30, 1993, the Commission received from Davis' counsel a motion to vacate and set aside the default order. Davis' counsel explained that Davis had been negotiating a settlement in this matter, and did not understand that a default judgment would be entered against it during ongoing settlement negotiations.

The judge's jurisdiction over this case terminated when his decision was issued on April 23, 1993. 29 C.F.R. § 2700.69(b). Under the Mine Act and the Commission's procedural rules, relief from a judge's decision may be sought by filing a petition for discretionary review with the Commission within 30 days after its issuance. 30 U.S.C. § 823(d)(2); 29 C.F.R. § 2700.70(a). We deem Davis' motion to be a timely filed Petition for Discretionary Review, which we grant. See, e.g., Middle States Resources, Inc., 10 FMSHRC 1130 (September 1988). On the basis of the present record, we are unable to evaluate the merits of Davis' position. In the interest of justice, we remand this matter to the judge, who shall determine whether default is warranted. See Hickory Coal Co., 12 FMSHRC 1201, 1202 (June 1990).

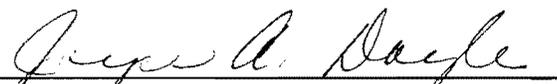
For the reasons set forth above, we vacate the judge's default order and remand this matter for further proceedings.



Arlene Holen, Chairman



Richard V. Backley, Commissioner



Joyce A. Doyle, Commissioner

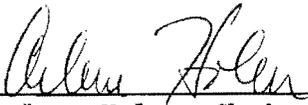
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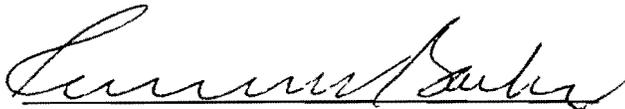
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For the reasons set forth above, we vacate the judge's default order and remand this matter for further proceedings.


Arlene Holen, Chairman


Richard V. Backley, Commissioner


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ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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MAY 4 1993

WALTER L. McMICKENS, : DISCRIMINATION PROCEEDING
Complainant :
 :
v. : Docket No. SE 92-452-D
 :
 : BARB CD 92-29
JIM WALTER RESOURCES, INC., :
Respondent : No. 7 Mine

DECISION

Appearances: Ralph E. Coleman, Esq., Coleman & Friday,
Birmingham, Alabama, for the Complainant;
David M. Smith, Esq., Mark Strength, Esq.,
MAYNARD, COOPER, FRIERSON & GALE, R. Stanley
Morrow, Esq., Jim Walter Resources, Inc.,
Birmingham, Alabama, for the Respondent.

Before: Judge Koutras

Statement of the Case

This proceeding concerns a discrimination complaint filed by the complainant Walter L. McMickens against the respondent Jim Walter Resources, Inc. (JWR), pursuant to section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c). Mr. McMickens filed his initial complaint with the Secretary of Labor, Mine Safety and Health Administration (MSHA), on April 15, 1992, and by letter dated July 17, 1992, he was advised by MSHA that after review of the information gathered during its investigation of his complaint, MSHA determined that a violation of section 105(c) of the Act had not occurred. Subsequently, on August 17, 1992, Mr. McMickens filed his complaint with the Commission.

The complainant alleges that the respondent discriminated against him when it laid him off from his employment as a foreman after he was examined by x-ray pursuant to section 203 of the Act and found to have evidence of category I simple pneumoconiosis. He further alleges that his layoff was the result of his having exercised his right to request a dust free environment, and that the respondent responded to his request by placing him on a job that subjected him to dust, and that during subsequent mine inspections, kept him away from his work area before the inspections in order to meet the requirements of MSHA's respirable dust regulations.

The respondent filed an answer to the complaint denying any discrimination and contending that the complainant was laid off during an approximate 25% reduction in its work force. A hearing was held in Birmingham, Alabama, and the parties filed post-hearing arguments which I have considered in the course of my adjudication of this matter.

Issue

The critical issues in this case are whether or not the complainant's termination was prompted or motivated in any way by his Part 90 miner status, and whether or not the respondent discriminated against the complainant by placing him on a job subjecting him to dust after he had requested a dust free working environment.

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.
4. Part 90, Title 30, Code of Federal Regulations.

Stipulations

The parties stipulated to the following (Tr. 17-21):

1. The respondent is a large operator covered by the Mine Act, and operates underground coal mines in Tuscaloosa County, Alabama.
2. The complainant was a salaried employee at the respondent's No. 7 Mine from January 3, 1980, to April 10, 1992.
3. When the complainant was laid off, the respondent laid off approximately 25 other salaried personnel and approximately 125 union personnel from the No. 7 Mine.
4. The complainant claimed Part 90 status on September 10, 1991, and after exercising his Part 90 rights, he continued to receive the same salary as he had before he exercised such rights.

5. At the time of his layoff, the complainant received severance pay equivalent to three and one-half months salary and all accrued vacation pay of fifteen days' salary.

Complainant's Testimony and Evidence

Walter L. McMickens testified that he previously worked for another mining company for 22 years as a union and salaried miner working in different jobs, and that he was hired by the respondent in 1980 as a salaried section foreman supervising a coal production crew. Within 13 months he was advanced to assistant mine foreman supervising other coal production supervisors. In approximately 1983, there was "a big layoff" and all union employees and 20 supervisors were laid off. Approximately 14 employees were called back and he supervised them in "setting timbers" to protect the beltline and "doing dead work". When the mine started up again, he was assigned as a construction foreman. No one complained about his work, and while serving as a construction foreman he became familiar with the other jobs in the mine, including production, blasting and shooting, and did "just anything they said to do". He remained a construction foreman for approximately seven years from 1984 to either 1990 or 1991, and shortly before he became a Part 90 miner he was assigned to a "setup crew". After he filed for a Part 90 Miner designation, general mine foreman Gerald McKinney spoke with him about the matter and "asked me what did I expect" (Tr. 22-33). Mr. McMickens stated that he responded to Mr. McKinney as follows (Tr. 33):

THE WITNESS: I told him I didn't expect any difference whatsoever because I felt like that I was in about as good a -- as a setup foreman, out of the dust about as good as any place I could be in the mine because there's no really dust free atmosphere in the mine.

And I told him the only thing I wanted was to get it on record that if I lived to retire, I might get black lung, or if I died maybe my wife would get black lung.

I didn't expect to be changed from the job, even though I asked for dust free atmosphere. That was to comply with the Federal.

Mr. McMickens confirmed that a second mine layoff occurred in 1984 or 1985, and although he was retained on the job, several union employees and several foremen were laid off, and others were transferred to other mines (Tr. 51).

Mr. McMickens identified a copy of a September 6, 1991, statement he executed on that date exercising his option to transfer as a Part 90 Miner (Tr. 34; Exhibit C-4). He also

identified a copy of a September 10, 1991, letter from MSHA to the respondent informing it of the fact that his medical examination reflected that he was eligible for Part 90 miner's rights pursuant to the Coal and Mine Acts (Tr. 36; Exhibit C-1). Mr. McMickens confirmed that he had x-rays taken periodically, beginning in 1965, each time the mobile x-ray unit came to the mine (Tr. 36).

Mr. McMickens confirmed that in February, 1991, he was still working as a construction foreman, or on "general projects", or he would "fill in" and perform any job that he was assigned. He stated that he did not request the special projects job, and that other people also worked on special projects or on specific jobs, but that he was "kind of this special projects foreman night after night after I came off construction" (Tr. 38). He confirmed that after he requested Part 90 Miner status, the respondent was required to test him for dust exposure and obtain five samples. He identified Exhibit C-3, as the results of sampling during the period October 22, 1991, through April 6, 1992 (Tr. 40).

Mr. McMickens stated that during his dust sampling the MSHA inspector put the respirable dust testing pump on him at 11:00 p.m. before he went underground and instructed him to meet him "at the end of the track" at 2:30 a.m. Mr. McMickens explained that the track area in question was a "fresh air" area, and he stated that he was there with the inspector, a company representative, and a union safety man from 2:30 until 5:30. Mr. McMickens stated that "we sat there and talked till 5:30 in the morning", and he indicated that this was the last time he was tested by an MSHA inspector before his layoff on April 10, 1992, (Tr. 54-56). He confirmed that the inspector and company representatives do not accompany him during the entire shift. The inspector hangs the pump on him and starts it up before he goes underground, and the inspector removes the pump at the end of the shift (Tr. 74).

Mr. McMickens believed that he was the only salaried employee to ever file for that status at the mine. He stated that he did so because he was told he had black lung and should see his doctor. He identified two salaried employees with less seniority who were not laid off when he was (Tr. 57, 65-66).

Mr. McMickens confirmed that company safety inspector Bobby Taylor notified MSHA by letter dated October 1, 1991, that after his designation as a Part 90 miner, he would primarily be working as an outby labor foreman, and would also be subject to work as a face supervisor if so designated by management (Tr. 77; Exhibit C-2). Mr. McMickens confirmed that he did in fact work as an outby labor foreman after his Part 90 designation, and that he was qualified to do the work of a face supervisor, a job that is still open and being performed (Tr. 78).

On cross-examination, Mr. McMickens stated that he was a foreman or supervisor from 1980 until 1992, and at times had Part 90 miners under his supervision. He confirmed that he never harassed or intimidated any miners because of their Part 90 status, that mine management never instructed or encouraged him to intimidate or discriminate against any Part 90 miners, and that during his 12 years of employment with the respondent he knows of no instances when a Part 90 miner was ever discriminated against because of his status (Tr. 81).

Mr. McMickens confirmed that he was already working outby when he was designated a Part 90 miner, and that before 1991 he worked at different jobs involving construction and special projects rather than coal production. He stated that he supervised a continuous miner section during his first 13 months of employment with the respondent, but after that he only supervised such a section "for part of a shift from one time to another" and not on a full time basis (Tr. 82). He confirmed that the volume coal production comes from the longwall and that he never worked on a longwall section or supervised such a section, and that as of the date of his layoff he was not qualified or trained to perform the duties of a longwall foreman (Tr. 83).

Mr. McMickens confirmed that he spoke with Mr. McKinney after MSHA informed him of his Part 90 status, and that he informed Mr. McKinney that he did not expect any work changes to be made and that he simply wanted to document the fact that he had black lung and to protect any future benefits that his wife might receive. Mr. McMickens acknowledged that there was no dust free atmosphere in the mine and that he expected no change. He stated that "I was . . . a setup foreman, which I think was in a less dusty atmosphere there on that than where I was put" (Tr. 85). In response to a question as to whether or not the respondent kept him in an environment that was generally less dusty than MSHA's regulations required after he was designated a Part 90 miner, Mr. McMickens responded as follows (Tr. 85-87):

A. You never know what you're going to kick up. When you -- go from one section to another, you never know how much dust is going to be on the ground or how much the air volume is going to be after you get in there.

There would be a brattice out. You might not have no ventilation. You never know until you go into an area how much dust you're gonna be kicking up in the air.

Q. I understand that. My question is: Did Jim Walter seem to try and keep you in a less dusty environment generally?

A. Yeah.

Q. After you were Part 90, did Jim Walter or any management person above you at Jim Walter ever try to intimidate you about your Part 90 rights?

A. No, sir.

Q. Did they ever try to harass you about your Part 90 rights?

A. No, sir.

Q. Did they ever threaten you?

A. No, sir.

Q. Did they ever say, McMickens, you've declared this Part 90 status, and I guarantee it's going to come back to haunt you?

A. No, ain't nobody said nothing like that.

Q. Did anybody ever say to you or say anything to someone else that you heard about that was negative about your Part 90 status.

A. No, sir.

Q. Before you filed this complaint could you tell the Court any example any time in history when Jim Walter has taken negative action against a Part 90 Miner because of their Part 90 status?

A. They never did.

Mr. McMickens confirmed that he has stated under oath to the EEOC that his layoff was a result of his age and that his age was the determinative factor (Tr. 87). He believed that 137 union miners were laid off when he was laid off, and pursuant to the labor agreement, they were laid off by seniority. However, seniority did not apply to the layoff of salaried personnel (Tr. 88). Mr. McMickens stated that he was not aware of any economic condition that required a reduction in force in 1992, and he did not know that this was the case. He simply believed that someone else should have been laid off instead of him (Tr. 89).

Mr. McMickens stated that he was assigned normal and routine jobs to do during his respirable dust sampling period, and that there was no "hanky panky" in connection with the dust sampling (Tr. 90). He further stated that there was no avoidance of any

dusty conditions in an attempt to hide them from the inspector, and he confirmed that the respondent was never cited for assigning him work under conditions that were too dusty for Part 90 miners. He knew of no Part 90 miners ever being cited for working in a dusty atmosphere, and as far as he knew, the respondent was never cited for samples that exceeded MSHA's dust exposure regulations (Tr. 92).

Tommy R. Boyd, testified that he has worked at the mine since 1980, and that he is a longwall helper and serves as the union safety representative. On numerous occasions he has assisted MSHA inspectors and management in the taking of dust samples for Part 90 miners (Tr. 108). He explained the procedures followed at the time Mr. McMickens was sampled and tested, and he confirmed that a sampling pump can malfunction at any time. When this occurs, the miner is resampled in order to obtain a full eight-hour sample (Tr. 113-114). He confirmed that there were occasions when he was with an inspector during midshift to look at Mr. McMickens's sampling pump, and he explained the incident when the inspector met with Mr. McMickens at the end of the track as follows at (Tr. 115-116):

A. We went down -- I know -- I remember the occasion you're talking of. We went down and met Mr. McMickens at the end of the track, Mr. Phillips, the inspector and myself. And we sat there for some three hours on the end of the track talking.

Q. Do you generally make it a habit of sitting down at the end of the track talking three hours?

THE WITNESS: No, sir. We usually don't do that because it ties the mine foreman up, and the mine foreman he oversees the whole mines.

And for that reason -- I don't know why the inspector decided to sit and talk for three hours and joke and laugh and cut up, which it did interfere with mine operations.

Mr. Phillips was just as astonished as I was because he asked me several times, reckon when he's going to leave. He said, we can't leave until the inspector gets ready to leave as part of our aid and assist.

Q. (By Mr. Coleman) Would that, in fact, affect -- as far as the reading and the overall dust sample, would that affect the --

A. Well, that's three hours.

Q. -- liability?

A. That's three hours that he's in fresh air that he would have normally been in a possible more dusty area.

Mr. Boyd stated that the work performed by Mr. McMickens as a setup foreman on special projects was "outby work" away from the areas that were producing coal, and these areas were less dusty (Tr. 118-119).

On cross-examination, Mr. Boyd acknowledged that Mr. Wiggins was working as a rock foreman before Mr. McMickens was ever declared a Part 90 miner. He also acknowledged that during the three-hour conversation with the inspector at the end of the track while Mr. McMickens was being sampled, shift foreman Phillips wanted the inspector to leave so that Mr. McMickens could return to work. Mr. Boyd confirmed that the inspector was dictating the course of this event and "as long as the inspector sits there, we have to sit there with him" (Tr. 124).

Respondent's Testimony and Evidence

Richard A. Donnelly, mine manager, No. 7 Mine, testified that the workforce was reduced in April, 1992, because the world coal market had declined and the respondent had problems in selling its coal at a profit. It therefore became necessary to reduce costs and the amount of tonnage produced at all of its mines. He participated in the development of an operating plan to accomplish the reductions, and he explained the plan as follows at (Tr. 131-132):

A. The plan we came up with entailed running fewer miner sections, fewer long walls sections, just basically doing a lot less of everything that we normally do, thereby creating less tonnage.

At the same time, it reduced dramatically the number of people that were required to do these jobs. A lot of the expenses that we incurred were reduced.

So, in effect, we ended up eliminating -- I believe the number was 134 union jobs and it was 24 supervisors. We laid off 23 because one supervisor quit and went with another company right in the midst of that. So, it was actually a reduction of 24 jobs.

Q. And the reduction in force of the labor force is done by the collective bargaining agreement, right?

A. Yes, it is.

Q. How was the evaluation done of which salaried persons to lay off?

A. What we did was look at what jobs had to be performed at the reduced levels, how many miner sections, how many long wall sections. Just, basically, how many jobs there were. And then we went through and looked at the people that were available, the people that we had on the payroll at the time and picked the best people to do those jobs until we filled every job. And once we filled each of the jobs, the people that were remaining were the people that got laid off.

Mr. Donnelly stated that he arrived at the No. 7 Mine in August, 1991, and that Mr. McMickens received his Part 90 status in September, 1991. Mr. McMickens was not involved in coal production work and he basically performed "outby dead work" as a special projects foreman (Tr. 134).

Mr. Donnelly confirmed that he participated in the final decision to lay off Mr. McMickens and he did not consider his Part 90 status to be a negative factor. He was not aware of anyone making any negative reference to Mr. McMickens' status. Mr. Donnelly confirmed that consideration was given to the fact that Mr. McMickens did not like to do production work at the face, and this was considered as part of his overall job abilities. Mr. Donnelly explained that Mr. McMickens had made statements that he did not want to work at the face, that he did not want the responsibility of dealing with MSHA and the regulations and the pressures involved and that he preferred to continue doing work outby. Mr. Donnelly confirmed that this was a factor in the decision to lay off Mr. McMickens (Tr. 135).

On cross-examination, Mr. Donnelly stated that he never observed Mr. McMickens at his job, but he was told by other mine foremen that Mr. McMickens was an "average" supervisor (Tr. 136). Mr. Donnelly stated that fewer longwall and miner unit shifts were going to be operated and the ability to operate each of these sections was a very important consideration in the layoff. Mr. Donnelly believed that the longwall faces were the dustier areas in the mine, and that he would probably not assign a Part 90 miner to those areas (Tr. 137).

Mr. Donnelly stated that at the time of the layoff he was the deputy mine manager and that Willis Coaxe was the mine manager. He confirmed that layoff meetings were held to identify and determine the jobs that were to be retained, and to begin to select the best people to fill those jobs. Mr. Donnelly confirmed that he relied on a large degree on Mr. Phillips or Mr. McKinney to tell him who was going to be retained, but he was not aware that anyone's personnel records were reviewed as part of the selection process. He further confirmed that he and the management officials making the selections were aware that Mr. McMickens was a Part 90 miner (Tr. 139).

Mr. Donnelly stated that during his 16 years in a supervisory capacity, Mr. McMickens was the only supervisor that he was aware of that had Part 90 status. Mr. Donnelly believed that such a status would not enhance Mr. McMickens' record with the Company (Tr. 139). He confirmed that mine manager Coaxe would be the final authority as to who would be laid off and who would stay (Tr. 140). Although seniority was considered, it was not the only consideration. He confirmed that Mr. McMickens had more seniority than Mr. Bo Wiggins, the person who replaced him, and he may have had more seniority than another supervisor (Parsons) (Tr. 140-141).

In response to further questions. Mr. Donnelly reviewed a list of names of supervisors who were laid off in April, 1992 (Exhibit R-1), and he stated that Mr. McMickens may have been retained if three more salaried people had been retained, but it was his opinion that if only one more person had been retained it would not have been Mr. McMickens. He believed that Mr. McMickens probably was among the top 10 or 11 people at the mine. Mr. Donnelly did not believe that Mr. McMickens was qualified for a communication supervisor's job which involved a TV computer network to monitor different mine work areas (Tr. 143).

Mr. Donnelly stated that during the layoff there was no particular list prepared of persons to be laid off in any particular order. He explained that management knew that a number of jobs would be retained and that a certain number of people would be laid off. He confirmed that prior to the layoff there were numerous jobs in the category of special projects outby foreman on all three shifts, but that after the layoff, there were very few of those jobs, and they were the majority of jobs that were eliminated from the operating plan (Tr. 144-145).

Mr. Donnelly stated that Mr. Wiggins and Mr. Parsons are presently working on construction foreman jobs, and that Mr. McMickens would only fill in temporarily on that job. He confirmed that Mr. McMickens performed outby special projects work, and that Mr. Wiggins and Mr. Parsons previously performed that kind of work on a very limited basis (Tr. 145).

Mr. Donnelly stated that for the last several years no written evaluations of supervisors were made, and he confirmed that he and Mr. Coaxe and Mr. McKinney were the main participants in the discussions as to who would be retained in the layoff (Tr. 147).

Mr. Donnelly stated that he would not hesitate to put a Part 90 miner to work at the face if the mine were in compliance with the 1.0 milligram respirable dust requirement. He confirmed that he was told that Mr. McMickens did not want to work at the face (Tr. 148).

Gerald E. McKinney, General Mine Foreman, No. 7 mine, testified that he has worked with Mr. McMickens and has given him work assignments. He stated that Mr. McMickens was a construction foreman for several years and changed to a special projects foreman in February, 1990, approximately 18 months before his Part 90 status, and he was one of many outby "dead work" foremen (Tr. 151).

Mr. McKinney stated that he was involved in the evaluation of salaried personnel in 1992, in connection with a reduction of the work force. He believed that he knew of the work that Mr. McMickens could do and not do. He stated that sometime after February, 1990, Mr. Phillips informed him that Mr. McMickens told him (Phillips) that he did not want to be on a coal production face because of the additional pressures and responsibility of that job. This occurred prior to Mr. McMickens' Part 90 status, and Mr. McMickens himself told him (McKinney) of his desire not to work at the face during a conversation in his office (Tr. 153).

Mr. McKinney reviewed a list of supervisory personnel, (Exhibit R-1), and he explained the consideration given to those listed during the layoff as follows at (Tr. 154-155):

Q. All right. And in the context of deciding what miners to keep, what salaried personnel to keep, were there persons who would have been kept before Mr. McMickens on that list; that is, Exhibit 1?

A. Just glancing over it, there's a couple of people that I know were ex-coal runners on the face that did produce coal at one time and a couple of long wall experienced people.

I would probably myself -- and maybe even some of the maintenance people. There would be probably be four or five that I would probably -- would fall in line before Mr. McMickens would.

Q. And you're referring to Exhibit 1?

A. Right.

Q. Did you at any time consider Mr. McMickens' Part 90 status?

A. No, sir, I did not.

Q. Did you in any way retaliate against Mr. McMickens for exercising his rights as a Part 90 Miner?

A. No, sir.

On cross-examination, Mr. McKinney stated that Mr. McMickens was his supervisor at one time in the past when he (McKinney) was first hired at the mine in 1982. Mr. McKinney recalled an incident in which Mr. McMickens was called on to assist in a rock fall situation and that he probably commended Mr. McMickens for doing a good job. He believed that Mr. McMickens was "a good company man" (Tr. 157).

Mr. McKinney confirmed that one of the criteria for retaining an employee during the reduction in force "was that everyone we kept we tried to have them where they could either fill in on the longwall face or be able to run a miner section " (Tr. 158). He denied that Part 90 miners cannot work at the face, but did not know where they are assigned on a regular basis. He was only familiar with Part 90 miners that operate dust pumps, and stated that there are many such miners that never invoke their rights. He confirmed that Mr. Mickens was the only supervisor in his mining experience that had Part 90 status and that he "was very surprised" at this because he believed that such a status was for union employees (Tr. 159).

Mr. McKinney confirmed that Mr. McMickens was retained during two prior layoffs in 1982 and 1985 prior to his Part 90 status (Tr. 162). He explained the work experience of Mr. Parsons and Mr. Wiggins and stated that "we had an opportunity to hire two ex-rock people and we did so. We felt that our mines may need them in the future" (Tr. 164). Mr. McKinney confirmed that safety director Taylor's letter of October 1, 1991, to MSHA, reflects that Mr. McMickens "will be on the owl shift working primarily as an outby laborer", and he stated that Mr. McMickens was already doing that work at that time and that he was also subject to working at the face (Tr. 165). However, due to low coal production, the salaried people doing the outby work were all former section foreman who were moved to outby jobs to fill in for people who were off (Tr. 166).

Paul A. Phillips, shift foreman, No. 7 mine, stated that Mr. McMickens worked under his supervision as a supervisory work foreman on the owl shift, and that in April, 1992, at the time of the reorganization Mr. McMickens was working as an outby foreman. He described his duties as "changing from night to night" depending on the work to be done, and that "it could go anywhere from setting timbers to building seals" (Tr. 168). He considered the position of special projects foreman to be the same as an outby section foreman. He explained that "outby" involved the maintaining of the rest of the mine away from where coal is being extracted from the face (Tr. 168).

Mr. Phillips stated that Mr. McMickens informed him on several occasions that "he did not want anything to do with the face work, the production of coal" and wanted to stay outby because there were less responsibilities, and that these statements were made prior to September, 1991 (Tr. 169). He confirmed that Mr. McMickens was a construction supervisor before he became a special projects foreman, and he considered him to be "an average construction foreman" (Tr. 170). He confirmed that he was aware that Mr. McMickens elected to exercise his Part 90 rights. He could not recall exactly when this was done, but confirmed that Mr. McMickens was already working in the outby area when he learned of his status (Tr. 171).

Mr. Philips stated that he was not directly involved in the decision-making process in connection with the reduction-in-force that resulted in Mr. McMickens' layoff (Tr. 171). He evaluated supervisors on a daily basis, and denied that anyone's Part 90 status had any part in his evaluations. He speculated that efforts were made to keep supervisors who were able to work in more than one mine area (Tr. 172).

Mr. Phillips described the supervisory duties performed by Mr. Parsons and Mr. Wiggins, and he believed that Mr. McMickens was able to "walk belts", but he would not use Mr. McMickens to work at the face on a regular basis and he did not believe he was qualified to install belts (Tr. 174-177).

Mr. Phillips explained what occurred at the time the MSHA inspector tested Mr. McMickens for exposure to respirable dust. He stated that after Mr. McMickens put the pump on he was sent to his job assignment and when he and the inspector went to check the pump "we did sit there longer than usual" and that "the inspector calls the shots when he's there" (Tr. 180).

On cross-examination, Mr. Phillips stated that he did not directly or indirectly have anything to do with the decisions to layoff or retain employees during the reduction in force which affected Mr. McMickens, and he had no knowledge of the management discussions which may have taken place concerning the reorganization (Tr. 182). In his opinion, individuals who could work at the face and "who could do everything" were retained (Tr. 183). He confirmed that Part 90 non-salaried miners have been assigned to work at the face as a matter of choice by bidding on certain jobs, and that the face, area is "a more dusty place" (Tr. 184).

Mr. McMickens was recalled by the presiding judge, and he stated that he could not recall ever stating that he did not want to work at the face. He stated that his job was mainly behind the longwall rockdusting the crosscuts and that he liked the work "because I could stay in the fresh air" and "kind of stay out of

it yourself and see that the work's done" (Tr. 198). He further stated he "might have made that statement for that effect" (Tr. 198). He confirmed that he does not deny making the statement about not wishing to work at the face, but that he could not recall doing so, (Tr. 200).

Complainant's Arguments

In his posthearing brief, complainant asserts that the respondent discriminated against him when it terminated his employment, after twelve years of service, in part because he exercised his Part 90 miner rights. Complainant maintains that the respondent's defense that he was laid off for economic reasons is merely a pretext for one of the primary reasons he was terminated during the layoff in question. Assuming that I accept the respondent's argument that it was going through a period of economic adjustment that required some layoffs, the complainant points out that he was a good and experienced employee who had survived two previous layoffs, and had seniority over some of the employees who were retained, and that in spite of these qualifications, he was laid off while others with less seniority, experience, and age, were retained.

In support of his conclusion that his Part 90 status was at least one of the underlying reasons why he was not retained during the layoff, the complainant asserts that deputy mine manager Richard Donnelly and mine foreman Gerald McKinney both testified that he was the only salaried employee or supervisor that they had ever known who had elected to exercise his Part 90 rights. The complainant points to the statement by Mr. Donnelly that a supervisor who elected part 90 status "would not enhance his status with the company" by doing so, and that mine foreman Gerald McKinney revealed his real opinion of his decision to elect Part 90 status when he stated "I was very surprised when I learned of it . . . I guess I just never . . . you just kind of get in your head. I just kind of thought it was for the union, the UMWA people really. And I just never . . . and it just kind of shocked me when I learned of it". The complainant concludes that these statements reveal bias against his decision to exercise his Part 90 rights and shows that the very people who made the decision about who was to be laid off took into account his Part 90 status in making that decision.

Citing Pasula v. Consolidation Coal Company, 2 FMSHRC 2786 (October 1980), rev'd on other grounds sub nom. Consolidation Coal Company v. Marshall, 663 F.2d 1211 (3d Cir. 1981), and several other leading cases, the complainant argues that liability pursuant to section 105(c) of the Act is not dependent on whether or not an employe has been discriminated against solely because he has engaged in a protected activity, but rather, whether his engagement in a protected activity is at least part of the reason for the adverse discriminatory action

taken against him. The complainant concludes that because the evidence shows that the respondent's decision to lay him off was based in part on his Part 90 status, in direct violation of section 105(c) of the Act, he is entitled to reinstatement and back pay.

The complainant takes the position that the evidence presented in this proceeding supports a reasonable inference that the respondent's decision to terminate him during the 1992 layoff was motivated, at least in part, by the fact that he was a part 90 employee. Under the circumstances, and given the fact that the presiding judge refused to dismiss the matter at the close of his case, the complainant concludes that it has established a prima facie case. In support of this conclusion, the complainant states that it is undisputed that his election to exercise his Part 90 rights is considered a protected activity. The complainant asserts that the evidence establishes that he was a good, experienced and dedicated employee who had survived two previous layoffs involving a large number of people, and that he was experienced and qualified to work in a number of different areas in the mine. He cites the testimony of the miner's representative and safety committeeman, Tommy Boyd, attesting to his experience as a rock and pillar worker who was able to do "whatever it took", and Mr. Boyd's confirmation of the fact that the two employees (Wiggins and parsons) who took over his duties after the layoff were not Part 90 miners and were not laid off.

The complainant points out that he had seniority over some of the employees who were retained in the layoff, that seniority was a consideration during the layoff, and that prior to the layoff, he had never been told or informed in any way that his work needed improvement, and there was never any indication of any problem with his job performance at any time.

The complainant argues that even assuming that the respondent's contention that he was terminated as a part of a general layoff resulting from economic consideration is supportable, the respondent must still establish by a preponderance of the evidence that he would have been terminated during this general layoff even if he had not engaged in protected activity.

In response to the testimony of the witnesses who participated in the decision to terminate him (Donnelly and McKinney), the complainant points out that they produced no personnel records or any other business records substantiating that he would have been laid off under any circumstance, and that no records were kept regarding the discussions to determine who was to be laid off, and none have been introduced by the respondent. The complainant finds it "even more puzzling", that mine manager Willis Coaxe, one of the supervisors making the decision about who to retain and who to layoff, did not testify

in this case, and that his motive for the termination cannot be ascertained.

The complainant further points out that although deputy mine manager Donnelly, who participated in the layoff decision, admitted that he had only been on the job site a short time and knew nothing about his work or abilities, Mr. Donnelly did know that he was a Part 90 employee. The complainant finds it difficult to imagine that Mr. Donnelly could make any meaningful evaluation of his work without his personnel records or other information, except for the verbal input of foreman McKinney. The complainant concludes that the only thing Mr. Donnelly was sure of was that he was the only supervisor he ever knew of to exercise his Part 90 rights, and that the exercise of those rights would not "enhance his position with the company". (I take note of the fact that the actual statement made by Mr. Donnelly was that the complainant's status "would not enhance his record with the company" (Tr. 139).

The complainant asserts that mine foreman McKinney was the only witness who could testify about his true work skills and qualities, and that Mr. McKinney had good things to say about him, including selecting him to assist in the excavation of a trapped miner on one occasion, and commenting that he had done a "Good job" on another occasion. Complainant also makes reference to Mr. McKinney's testimony that he was "a good company man" and worked every day, and that these were his "strong points".

In response to the respondent's affirmative defense, the complainant asserts that in Simpson v. Kent Energy, Inc., 11 FMSHRC 770 (May 1989), the company alleged that economic considerations justified the layoff of an employee who had engaged in protected activity, but that "The Court" (Commission), rejected the argument after concluding that the company's failure to produce any records or written evidence explaining the layoffs was insufficient to prove the affirmative defense by a preponderance of the evidence. The complainant cites the following from the decision, at 11 FMSHRC 779:

The judge weighed respondent's evidence and found it lacking. Jackson's testimony lacks specificity as to how seniority was calculated. It also lacks certainty as to the seniority of the two laid-off miners or the retained miners in relation to Simpson, and as to how "job qualification" and family considerations figured into Jackson's decisions regarding layoffs. Further, the respondents did not introduce seniority lists or business records explaining the layoff decisions or the effects of the alleged recession on the mine's operation.

The complainant concludes that the facts in his case and those presented in the Simpson case "are remarkably similar and command the same result". In support of this conclusion, the complainant asserts that in both cases the company was claiming that general economic conditions were the reason for the layoff, and in both cases the company produced no documentary evidence to substantiate their affirmative defense. In the instant case, the complainant points out that in the absence of any written documentation to support the respondent's claim, and the positive testimony of the only company witness (McKinney) who did have personal knowledge about Mr. McMickens' skills and experience, it is clear that the respondent has not proved by a preponderance of the evidence that Mr. McMickens was laid off as part of a general layoff. The complainant concludes further that the respondent's defense is a mere pretext for the primary reason he was chosen over other employees to be laid off -- his Part 90 status.

The complainant takes note of the fact that it appears from "Exhibit E", a copy of which was attached to its brief, that a number of Part 90 employees were affected by the April, 1992 layoff, although their names do not appear on the Exhibit produced at the hearing in this matter. The complainant concludes that if, in fact, a number of Part 90 employees were terminated during the layoff, the case for discrimination against him would be that much stronger. The complainant further notes that while there is a discrepancy in the testimony as to why he expressed a preference not to work at the face, (he said it was because he wanted to avoid the dusty conditions which might further exacerbate his pneumoconiosis and Mr. Donnelly and Mr. McKinney were under the impression it was because he did not want the responsibility), the testimony of all of the witnesses is consistent to the extent that he was merely stating a "preference" -- "if at all possible" not to work at the face, and he did not give any indication that he would not perform the work. In fact, the complainant points out that even after he elected Part 90 status, the respondent notified the Department of Labor that he would be subject to work at the face at the discretion of his supervisors and that foreman Phillips testified that he assigned him work on the face when necessary, although not regularly.

The complainant asserts that the impact of the testimony concerning his preference not to work at the face is significant only to the extent that both Mr. Donnelly and Mr. Phillips testified that "the face" probably would not be a suitable place for a Part 90 worker because of the dusty conditions, even though it may not be "forbidden" by the regulations. The complainant concludes that if Mr. Donnelly and Mr. McKinney decided to terminate him because they did not think that the face was an appropriate place for a Part 90 worker, even though it might technically qualify under Part 90, then they are, in effect, discriminating against him because of his Part 90 status, which

is still a violation of Section 105(c). The complainant further concludes that the fact that he also stated a "preference" not to work on the face "if at all possible" was not a statement that he would not do so, and he should not be penalized or discriminated against because he stated that preference, particularly in light of the fact that the supervisors also stated that they "preferred" that a Part 90 employee not work on the face. The fact that he had worked on the face at the direction of Mr. Phillips since he had elected Part 90 status is sufficient evidence of the fact that he was willing to do whatever was necessary, although it was not his preference.

Respondent's Arguments

Citing several appropriate decisions, including cases involving Part 90 miners, the respondent agrees that to support a prima facie discrimination case under section 105(c) of the Act, the complainant bears the burden of production and proof to establish that (1) he engaged in protected activity, and (2) that the adverse action complained of was motivated in any part by that activity. Hatter v. Franklin Coal Co., 8 FMSHRC 1374, 1383 (September 1986); Mullins v. Beth-Elkhorn Coal Corp., 9 FMSHRC 891, 895 (May 1987); Goff v. Youghiogheny & Ohio Coal Co., 8 FMSHRC 1860, 1863 (December 1986); Hall v. Clinchfield Coal Co., 8 FMSHRC 1624, 1628 (November 1986); McCracken v. Valley Camp Coal Co., 2 FMSHRC 928, 932 (April 1980). The respondent further agrees that it 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 the protected activity, and that once it establishes a legitimate cause for the discharge, the complaining miner must then show by affirmative and persuasive evidence that the invocation of such cause was merely a pretext for unlawful motive, and that the ultimate burden of persuasion does not shift from him.

The respondent asserts that in order to establish a prima facie case of discrimination, the complainant in this case has the burden to show that he engaged in protected activity by exercising his rights as a part 90 miner and that his termination during the April 1992 reduction in force was motivated by the exercise of those rights. The respondent takes the position that the complainant has not established a prima facie case, and in support of this conclusion cites the testimony of the complainant that he became a "setup foreman" shortly before he became a Part 90 miner, and that after achieving that status he told foreman McKinney that he did not expect any different treatment because he felt that the setup foreman position that he occupied was "out of the dust about as good as any place he could be in the mine because there's no really dust free atmosphere in the mine". The respondent points out that the complainant did not request that Mr. McKinney transfer him to the setup foreman position after he obtained Part 90 status, and in fact told

Mr. McKinney that he did not "expect any change whatsoever", and "did not want a change made", and that the only reason that he filed for Part 90 classification was "to get it on record that if I lived to retire, I might get black lung (benefits), or if I died maybe my wife would get black lung (benefits)".

The respondent further argues that the complainant confirmed that he was already doing outby work prior to becoming a Part 90 miner, that he had been doing such outby work since before 1991, and that this work involved construction and special projects, and not coal production. The respondent points out that the complainant admitted that the respondent seemed generally to keep him in a less dusty environment after he became a Part 90 miner, and that according to his own testimony, he did not assert any Part 90 transfer rights. Citing Mullins v. Beth-Elkorn Coal Corp., 7 FMSHRC 1819, 1837 (November 1985), the respondent argues that a miner is not entitled to exercise his Part 90 rights unless he is working in an atmosphere which has a concentration of more than 1.0 milligrams of respirable dust, and that in this case there is no notable evidence that the dust concentration in the area in which the complainant was working prior to the reduction in force exceeded the limits imposed by Part 90. Under all of these circumstances, the respondent concludes that the complainant could not have exercised any Part 90 rights even if he had desired to do so, and that the testimony supports a conclusion that he either did not assert any Part 90 transfer rights or that he explicitly waived such rights.

The respondent concludes that the complainant has failed to show that his layoff was motivated by an alleged exercise of his Part 90 rights, and it takes the position that his case is factually similar to McCracken v. Valley Camp Coal Co., 2 FMSHRC 928 (April 1980). In McCracken, the complainant was laid off during a reduction in force in which 137 union employees and 14 supervisors were laid off, and as in the instant case, the complainant asserted a claim that he was qualified for underground mining positions and that he should have been considered for such positions. The respondent took the position that the complainant did not have the ability to perform available work, and Judge Melick ruled that the complainant's discharge resulted from a legitimate reduction in force. McCracken, 2 FMSHRC at 929.

In response to the complainant's assertion that he had more seniority and/or was more qualified than other supervisors who were not terminated during he reduction in force, and that these supervisors (Parsons and Wiggins) began performing all or part of his job duties after the reduction in force, the respondent cites the Commission's decision in Mullins v. Beth-Elkhorn Coal Corp., 9 FMSHRC 891, 899 (May 1987), holding that the Mine Act "is not an employment statute", and it concludes that the complainant's claims as to who should or should not have been terminated during

the reduction in force are not appropriate subject matter for these proceedings.

In further support of its argument, the respondent points out that when asked how it was that Part 90 affected his layoff, the complainant stated that he only has a 60% hearing loss in one ear, that he was a good employee for 12 years, and that the respondent does not want MSHA inspectors coming to the mine to take dust samples because they may discover other violations while they are present at the mine. The respondent concludes that there is absolutely no evidence in this case to indicate anything other than the complainant was laid off during a legitimate reduction in force, and that he has failed to establish a prima facie case under section 105(c) of the Act.

Even assuming that the complainant has established a prima facie case, the respondent argues that his layoff was in no way motivated by any alleged protected activity. In support of this conclusion, the respondent cites the uncontradicted testimony of Mr. Donnelly that the work force at the No. 7 Mine was reduced in April 1992, because the world coal market was in decline and the respondent was experiencing difficulty selling its coal at a profit. Under these circumstances, the respondent asserts that it was necessary to reduce coal production at all of its mines, and that the evaluation of which salaried employees were to be laid off was accomplished by examining the number of jobs available at the reduced level of operations and then filling these jobs with the most qualified persons. Respondent states that there is uncontradicted testimony that the complainant had no desire to work in a coal production position and that his preference for avoiding work at the face was pivotal in the respondent's decision not to retain him.

The respondent cites Mr. McKinney's undisputed testimony that prior to his classification as a Part 90 miner, the complainant told Mr. McKinney that he did not want to be assigned to the coal production face due to additional job pressures and responsibilities associated with face work, and that in implementing the reduction in force, an effort was made to keep employees who were able to fill in on a longwall face or who could supervise a miner section. The respondent also states that the uncontradicted testimony of Mr. Phillips reflects that on several occasions prior to September 1991, the complainant told Mr. Phillips that he did not want anything to do with coal production at the face and that he wanted to continue to do outby work so that he would not have to comply with the laws applicable to face work.

The respondent concludes that it effectuated a legitimate reduction in force in April 1992, properly followed its procedures during the reduction in force, and that the complainant was laid off during the reduction in force without

regard to his Part 90 status. Respondent further concludes that it has rebutted the prima facie case that the complainant has attempted to establish, and that the complainant has elicited no affirmative and persuasive evidence that the legitimate cause for his termination was merely a pretext for unlawful motive on the part of the respondent.

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 (2d 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 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.2 194 (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.

Protected Activity

Section 105(c)(1) of the Mine Act provides in pertinent part as follows:

No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this Act * * * because such miner, representative of miners or applicant for employment is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101 * * *. (Emphasis added.)

The mandatory health standards authorized by section 101(a)(7) of the Mine Act, are found at 30 C.F.R. Part 90. Pursuant to those regulations, a miner employed at an underground coal mine or at a surface area of an underground coal mine may be eligible to work in a low dust area of the mine where there has been a determination that he has evidence of pneumoconiosis. If there is evidence of pneumoconiosis, a miner may exercise his option to work in a mine area where the dust levels are below 1.0 milligrams per cubic meter of air.

In Goff v. Youghiogeny & Ohio Coal Co., 7 FMSHRC 1776, 1780-81 (November 1985), the Commission held that section 105(c) of the Act bars discrimination against or interference with

miners who are "the subject of medical evaluations and potential transfer" under the Part 90 standards. However, the Commission has recognized that a miner's Part 90 rights, and the protection afforded him in that status, are not unlimited and that he is not entitled to work in a mine environment totally free of respirable dust. Goff v. Youghiogeny & Ohio Coal Co., 8 FMSHRC 1860, 1865 (December 1986).

In Martha Perando v. Mettiki Coal Corporation, 10 FMSHRC 491 (April 1988), the Commission held that even if the complaining miner suffering from industrial bronchitis were included within the scheme of MSHA's Part 90 regulations, she would not have had a right under those provisions to transfer with pay retention to a less dusty position since her underground work areas were consistently below the required Part 90 respirable dust level of 1.0 mg/m³. The Commission also observed that "Exposure to some amount of respirable dust is inherent in virtually all underground coal mining", FMSHRC at 496.

In Jimmy R. Mullins v. Beth-Elkhorn Coal Corporation, et al., 9 FMSHRC 891 988 (May 1987), the Commission observed that the Mine Act "is not an employment statute", and it held that while a Part 90 miner has the right to be transferred to a position satisfying the requisite Part 90 criteria, he is not entitled to dictate to the operator or otherwise specify the particular position to which the transfer must be made. The Commission further held that "placement in a position meeting the relevant dust concentration criteria is all that is required", and that "the fundamental purpose of these transfer provisions is the protection of miners' health--not the distribution of specific jobs", 9 FMSHRC 895, 897.

The record in this case establishes that the complainant engaged in a protected activity when he filed for, and received, Part 90 miner status, and that he suffered an adverse personnel action when he was laid off. However, the critical question is not whether the respondent treated the complainant in a reasonably fair manner when it laid him off, but whether or not the layoff was made in any part because of the complainant's Part 90 status. As appropriately noted by Commission 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".

The Alleged Discrimination

In his initial complaint filed with MSHA, the complainant asserted that he elected to transfer to a less dusty atmosphere upon notification of his option to transfer as a Part 90 Miner. However, the evidence reflects otherwise, and the complainant confirmed that he did not request or exercise any transfer rights as a result of his Part 90 status. He admitted that he did not expect or want any changes made in his work status, and that he only filed for Part 90 status in order to preserve any future claims for black lung benefits. Further, the complainant admitted that he was already doing work outby the face prior to his Part 90 designation, and that the respondent generally kept him in a less dusty environment after that designation.

Although the complainant alluded to his Part 90 status at the time he filed his MSHA complaint, and expressed his belief that his status contributed to his layoff, the thrust of his complaint was his assertion that he was laid off because the respondent wished to retain younger foremen. Indeed, in the course of the hearing, the complainant confirmed that in his sworn complaint filed with the EEOC in connection with his age discrimination complaint, he took the position that his age was the determinative factor for his layoff.

In the absence of any direct evidence that management's decision to lay off the complainant was motivated in part by his Part 90 status, a discriminatory motive may be determined by circumstantial evidence showing that management was hostile towards him because of his status, the coincidence in time between his filing for and receiving that status, and any disparate treatment accorded him because of his status. Although a reasonable inference of motivation may be drawn from such circumstantial evidence, Secretary ex rel. Chacon v. Phelps Dodge Corp., supra; Sammons v. Mine Services Co., supra, there must be credible evidence of discriminatory intent or credible evidence from which a reasonable inference of discrimination or discriminatory intent can be drawn. Branson v. Price River Coal Co., 853 F.2d 786, (10th Cir. 1988).

I find no evidence of any disparate treatment of the complainant by the respondent, and the record establishes that he was not the only salaried foreman affected by the layoff. The complainant confirmed that the respondent never intimidated, harassed, or threatened him because of his Part 90 status, and never said anything negative about his status. The complainant further confirmed that the respondent had never taken any negative action against any employee because of their Part 90 status.

I find no evidence to support the complainant's claim that the respondent placed him on a job which subjected him to dust in response to his request for a dust free environment, and that the respondent deliberately kept him away from his work area in order to meet MSHA's respirable dust standards prior to any inspections. The only incident alluded to by the complainant concerned a three-hour discussion in "fresh air" in the company of an MSHA inspector, a union safety representative, and a company representative, at a time when the complainant was wearing a respirable dust sampling device. The credible testimony regarding that incident reflects that the inspector was in control and responsible for any delay in the complainant's returning to work. Further, the complainant himself confirmed that during his respirable dust sampling period, he was assigned to his normal work duties, that there was no "hanky panky" connected with the sampling, and there was no avoidance of any dusty working conditions in an attempt to hide them from an inspector. The complainant also confirmed that the respondent was never cited for assigning him work under dusty conditions, that he knew of no Part 90 miners ever being cited for working under dusty conditions, and that the respondent had never been cited for exceeding MSHA's dust exposure regulations.

Mr. Donnelly confirmed that the reduction in force which affected the 134 union jobs was accomplished under the collective bargaining agreement, and in the absence of any evidence to the contrary, I assume that miners affected by the reduction were afforded their appropriate union protection. However, as a salaried supervisory management employee, and in the absence of any evidence to the contrary, I assume that the complainant had no formal layoff retention rights, and that his continued employment was at the discretion of mine management. The complainant confirmed that he had no seniority rights, and the record reflects that he received severance and accrued vacation pay when he was laid off.

Citing Simpson v. Kent Energy, Inc., 11 FMSHRC 770 (May 1989), the complainant suggests that in order to establish the legitimacy of the layoff, and to support its contention that the reduction in force was necessary because of adverse economic conditions affecting the world coal market, it was incumbent on the respondent to provide written documentation and business records to support this claim. In the absence of such documentation, the complainant would totally discount the testimony presented by the respondent in support of the propriety of the layoff.

In the Simpson case, the Commission observed that the trial judge weighed the respondent's evidence and found it lacking in specificity and certainty, and the Commission cited several transcript references reflecting the respondent's rather equivocal testimony, highlighted by a number of "guesses",

concerning certain critical facts connected with the layoff in question. It was in this context that the Commission observed in part at 11 FMSHRC 779, that the company "did not introduce seniority lists or business records explaining the layoff decisions or the effects of the alleged recession on the mine's operation". In short, the Commission affirmed the trial judge's credibility findings, and I find nothing in the decision to support any conclusion or general rule that the only evidence worthy of belief is written documentary business records.

The record in this case reflects that the respondent took the pretrial deposition of the complainant. However, the complainant did not depose any of the respondent's witnesses, including the mine manager, (Willis Coaxe), who made the final decision to lay him off. Although Mr. Coaxe was not called to testify in this case, there is no evidence that he was not available and the complainant did not subpoena him. Further, the complainant apparently made no attempt to seek out any documentary evidence from the respondent through pretrial discovery.

The evidence reflects that prior to 1991, the complainant worked at different jobs tasks involving construction and special projects, rather than coal production, and that his supervision of a continuous miner section on a full time basis took place during his initial 13 months of employment, and on a part-time basis thereafter (Tr. 82). The complainant acknowledged that most of the coal production took place at the longwall sections, and he conceded that he had never worked on, or supervised, such a section and that he was not qualified or trained to perform the duties of a longwall foreman (Tr. 83). The evidence also reflects that most of the complainant's work experience was in the outby areas of the mine.

Shift foreman Phillips, who supervised the complainant's work, confirmed that he evaluated his supervisors on a daily basis and that he considered the complainant to be "an average construction foreman". General mine foreman McKinney, who also was familiar with the complainant's work, confirmed that during the layoff consideration he reviewed a list of salaried supervisory personnel that included individuals with longwall and coal face production experience, and that four or five of these individuals would be retained ahead of the complainant. Both Mr. Phillips and Mr. McKinney confirmed that salaried personnel with longwall or face coal production experience, or those experienced in supervising a miner section, were given preference during the reduction in force and layoff.

Mine Manager Donnelly acknowledged that he had never personally observed the complainant's work, and he indicated that no written evaluations of supervisors were made for several years prior to the layoff in question. However, he confirmed that in

his discussions with other supervisory foreman who were aware of the complainant's work, the complainant was characterized as an "average" supervisor. Mr. Donnelly further confirmed that the reduction in force brought about by the adverse coal market would result in fewer longwall and continuous miner work shifts, and that it was critical to retain personnel skilled in those jobs.

Mr. Donnelly acknowledged that he was aware of the complainant's statements that he did not like to do face production work because he did not wish to accept the responsibilities and pressures of that kind of work and preferred to continue working outby, and that this was a factor that he considered in the decision not to retain him. Mr. McKinney confirmed that the complainant told him that he did not want to work on a production face because he did not want the additional responsibilities and pressures of such a job, and that Mr. Phillips also informed him about similar statements made to him by the complainant. Mr. Phillips confirmed that the complainant had indeed made such statements to him.

The complainant's testimony concerning the statements attributed to him is both equivocal and unconvincing. He testified that "he might have made" the statements, did not deny making them, but indicated that he simply could not recall (Tr. 200). Having viewed Mr. Donnelly, Mr. McKinney, and Mr. Phillips in the course of the hearing, I find them to be credible witnesses, and I believe that the complainant made the statements in question. Under the circumstances, I do not find Mr. Donnelly's consideration of these statements during his layoff deliberations to be unusual or unreasonable.

The record reflects that two prior layoffs occurred at the mine in 1982 and 1986 prior to the layoff which resulted in the complainant's termination, and there is no suggestion that those layoffs were other than legitimate. With regard to the layoff which resulted in the complainant's termination, Mr. Donnelly and Mr. McKinney presented credible and unrebutted testimony concerning the facts and circumstances which prompted the reduction of the work force which affected a substantial number of salaried personnel in addition to the complainant, and they explained how the reductions were accomplished and the pertinent factors and considerations which were made in deciding who would be retained and who would be laid off. The fact that little or nothing was reduced to writing is irrelevant, particularly when salaried management personnel are involved. As the responsible management officials, Mr. Donnelly and Mr. McKinney were free to make certain managerial judgments and decisions regarding salaried personnel, including who would be retained and who would be laid off, and I conclude and find that these were matters within their managerial authority and discretion. Further, after careful consideration of all of the evidence and testimony regarding the reduction in force and layoff in question, I

conclude and find that their explanations of the events in question are reasonable and plausible.

I find nothing unusual about Mr. McKinney's expressions of surprise and shock at learning of the complainant's Part 90 status. Mr. McKinney's explanation that he had always been under the impression that this was a status accorded only union employees is believable. With regard to Mr. Donnelly's statement that the complainant's Part 90 status "would not enhance his record with the company", while it could possibly support an inference that Mr. Donnelly was influenced by the complainant's status during the layoff discussions, when considered in the context of the drastic layoffs affecting a relatively large number of people, including approximately 25 salaried supervisory personnel, and the elimination of the majority of the remaining special projects foreman jobs, I cannot conclude that the statement, standing alone, establishes that Mr. Donnelly was influenced by the complainant's Part 90 status, or that he was predisposed not to retain him because of that status. I find nothing in the statements made by Mr. Donnelly and Mr. McKinney to suggest any retaliatory or ulterior motive on their part simply because the complainant sought and received Part 90 status. Nor do I find any persuasive evidence to show that the legitimate cause for the complainant's layoff was a pretext for an unlawful motive on the part of the respondent.

Conclusion

I find no persuasive evidence, direct or circumstantial, from which to draw a reasonably supportable inference of discriminatory intent or motivation on the part of mine management with respect to the layoff because of the complainant's Part 90 miner status. I find no credible evidentiary foundation for inferring or concluding that management's decision not to select or include the complainant among those salaried supervisory personnel who were retained during the reduction in force was in any way related to his Part 90 Miner status.

ORDER

On the basis of the foregoing findings and conclusions, I conclude and find that the complainant has failed to establish a prima facie case of discrimination. Even if the complainant had established such a case, I would still conclude and find that it was rebutted by the respondent's credible evidence establishing reasonably plausible economic and management non-discriminatory reasons for the reduction in force and layoffs in question.

Under the circumstances, the complainant's discrimination complaint and claims for relief ARE DENIED AND DISMISSED.


George A. Koutras
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

MAY 6 1993

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 92-358-M
Petitioner	:	A. C. No. 39-00226-05506
	:	
v.	:	
	:	
CONCRETE MATERIALS,	:	Summit Pit
Respondent	:	

ORDER ACCEPTING RESPONSE
DECISION APPROVING SETTLEMENT
ORDER TO PAY

Before: Judge Merlin

This case is before me upon a petition for assessment of a civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977. On December 17, 1992, the Solicitor filed a motion to approve settlement of the one violation involved in this case. The Solicitor sought approval of a reduction in the penalty amount from the original proposal of \$690 to \$50. On February 18, 1993, an order was issued disapproving the settlement and directing the Solicitor to file additional information to support her motion. On March 1, 1993, the Solicitor filed a second motion to approve settlement.

Citation No. 3909835 was issued for a violation of 30 C.F.R. § 56.12067 because the fence surrounding an electrical substation was not six feet in height. According to the citation, the substation contained six mounted transformers with exposed energized components. The inspector concluded that contact with the energized high voltage components might result in a fatality. In her original motion the Solicitor alleged that negligence was less than originally assessed and that because the violation was unlikely rather than likely to contribute to an accident the significant and substantial designation should be deleted.

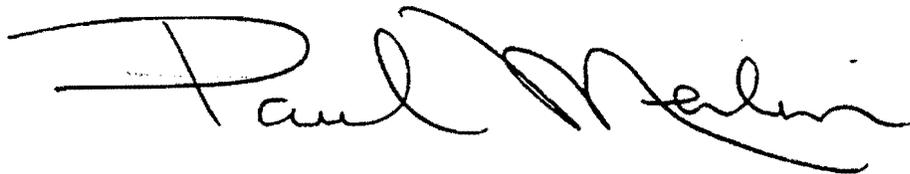
The Solicitor advises in her second settlement motion that the fence is only two to three inches short of the required six feet but does have some rips and tears. The Solicitor also avers that photographs submitted by the operator show that it was unlikely that a person would be able to reach any of the energized components over the fence. Therefore, although the fence

components unless a deliberate attempt was made to climb the fence.

I accept the Solicitor's representations and I conclude that the settlement is appropriate under the six criteria set forth in section 110(i) of the Act.

In light of the foregoing, it is ORDERED that the settlement motion filed March 1 is ACCEPTED as a response to the February 18 order.

It is further ORDERED that the recommended settlement be APPROVED and the operator PAY \$50 within 30 days of the date of this decision.

A handwritten signature in black ink, reading "Paul Merlin". The signature is fluid and cursive, with a large initial "P" and "M".

Paul Merlin
Chief Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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MAY 6 1993

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. KENT 92-549
Petitioner : A.C. No. 15-02706-03753-A
v. :
: Hamilton No. 2 Mine
PRABHU DESHETTY, employed by :
ISLAND CREEK COAL COMPANY, :
Respondent :

DECISION

Appearances: Gretchen M. Lucken, Esq., Office of the
Solicitor, U.S. Department of Labor,
Arlington, Virginia, for Petitioner;
Timothy M. Biddle, Esq. and J. Michael Klise,
Esq., Crowell and Moring, for Respondent.

Before: Judge Melick

This case is before me upon the petition for civil penalties filed by the Secretary of Labor pursuant to Section 110(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, et seq., the "Act," charging Prabhu Deshetty as an agent of a corporate mine operator, i.e. Island Creek Coal Company (Island Creek), with knowingly authorizing, ordering, or carrying out a violation by that mine operator of the mandatory standard at 30 C.F.R. § 75.400 as alleged in Order No. 3549013.¹

¹ Section 110(c) provides as follows:
"Whenever a corporate operator violates a mandatory health or safety standard or knowingly violates or fails or refuses to comply with any order issued under this Act or any order incorporated in a final decision issued under this Act, except an order incorporated in a decision issued under subsection 105(c), any director, officer, or agent of such corporation, who knowingly authorized, ordered, or carried out such violation, failure, or refusal shall be subject to the same civil penalties, fines, and imprisonment that may be imposed upon a person under subsections (a) and (b)."

Order No. 3549013, issued at 9:30 a.m. on January 15, 1991, alleges as follows:

Loose fine coal, coal dust and float coal dust was permitted to accumulate in dangrous [sic] amounts under and along the #1 Unit MMU 003 panel belt conveyor for a distance of approximately eight hundred feet. The fine coal and coal dust ranged in depth from four inches to thirty six inches very black in color and dry, three damaged or frozen belt rollers was [sic] flaged [sic] along the belt conveyor. The belt examiners record book has the conditions recorded from 1-7-91 to 1-14-91 no corrective actions where [sic] shown in record book. Rock-dust layers in the 36" coal dust where examined showed it had been rockdusted over top of coal dust at least two times.

The cited standard, 30 C.F.R. § 75.400, provides that "[c]oal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials shall be cleaned up and not be permitted to accumulate in active workings, or on electric equipment therein."

Prabhu Deshetty, as mine manager of the Island Creek Hamilton No. 2 Mine, does not dispute that he was an agent of the cited corporate mine operator, but denies that there was a violation as charged and maintains that even assuming there was a violation, he did not knowingly authorize, order, or carry out such a violation.

I find, however, from the credible testimony of experienced Mine Safety and Health Administration (MSHA) Inspector Harold Gamblin alone, that the violation has been proven as charged. I further find that Inspector Gamblin's testimony is corroborated in significant respects by the testimony of Respondent's witnesses. Indeed, Deshetty himself acknowledged that when he proceeded underground on January 15, 1991, shortly after the order at bar was issued and presumably during the abatement cleanup, he observed a pile of coal dust some eight inches to twelve inches in height as it was being cleaned behind the head drive. Deshetty also acknowledged that he thereafter walked the length of the beltline and observed other areas with coal spillage up to ten inches deep. He further acknowledged that it took 16 miners nearly two hours to clean the cited area.

While admitting the existence of these loose coal and coal dust deposits in the cited areas, including those depicted in the photograph in evidence as Exhibit R-3,

Deshetty maintained only that these did not constitute a hazard. While not denying the existence of the cited 36-inch pile of coal dust Deshetty denied at hearing that even this was an illegal accumulation based on his stated belief that only coal dust which is touching a frictional area would be illegal.

Stan Bealmear, a shift foreman who was training for the Island Creek safety department at the time the order was issued, accompanied Inspector Gamblin on the No. 1 Unit and acknowledged that this pile of coal dust at the takeup of the drive of the No. 1 belt was measured by Gamblin at about twelve inches by thirty-six inches. He further acknowledged that this thirty-six inch deposit would probably have taken a couple of shifts to have developed. This corroborates Gamblin's discovery of several layers of rock dust in this coal deposit and his conclusion that this deposit had therefore developed over an extended period of time. While Bealmear also stated that he did not see any rollers operating in coal dust, he acknowledged that as a result of the withdrawal order issued in this case they replaced three defective rollers.

Shuttle car driver James Hill, testifying on behalf of the Respondent, also acknowledged the existence of a pile of coal behind the header which he estimated to have been about three feet high by three feet long. Island Creek Belt Inspectors Henry Grisham and Garry Hatfield both testified that even the coal dust piles along the cited belt line and appearing in Respondent's photographs (Exhibit R-1 through R-9) constituted accumulations that should have been cleaned up. These photographs were taken by Island Creek after the order had been issued and the cleanup had commenced. The photographs admittedly did not even depict the worst deposits present along the belt line.

Within this framework of evidence it is clear that significant loose coal and coal dust accumulations existed along the No. 1 beltline in violation of the standard at 30 C.F.R. § 75.400. In reaching this conclusion I have not disregarded the testimony of Respondent's witnesses that much of the accumulated material was wet and, in particular, the thirty-six inch accumulation was wet from water sprays at that location. Even assuming, arguendo, that this was true, the Commission has observed in Black Diamond Coal Co., 7 FMSHRC 1117 (1985) that such coal dust accumulations nevertheless present a serious hazard and are in violation of the cited standard in light of the fact that accumulations may be quickly dried.

The remaining issue to be decided is whether Mr. Deshetty "knowingly authorized, ordered or carried out" any of the violative conditions. The Commission defined the term "knowingly," as used in the statutory predecessor to Section 110(c), in Kenny Richardson v. Secretary of Labor, 3 FMSHRC 8 (1981), aff'd 669 F.2d 632 (6th Cir. 1982), cert denied, 461 U.S. 928 (1983) as follows:

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

In this case there is no dispute that Deshetty, as mine manager of the Hamilton No. 2 Mine during the latter part of 1990 through the date of the violation here at issue, was in a position of responsibility for the safety of the mine, including the maintenance of the No. 1 beltline free of illegal accumulations of coal dust, float coal dust and other combustible materials. Furthermore, Deshetty was placed on specific notice of problems regarding combustible accumulations at this mine by a particularly large number of recent violations of the mandatory standard at issue herein (See Government Exhibit No. 1).

Indeed, the evidence shows that in the year preceding the instant order, there were 45 violations of this standard at the mine. It is therefore clear, and should have been clear to Deshetty as mine manager, that long before, and at the time the order herein was issued, the Hamilton No. 2 Mine had a serious problem with repeated violations for the accumulation of combustible materials. Deshetty admitted that he knew of these prior violations and had personally reviewed all of the corresponding citations with the MSHA inspectors. Inspector Gamblin confirmed that he had previously discussed such citations with, and had recently warned Deshetty that his mine had been issued too many violations for the accumulation of combustible materials.

More particularly, Deshetty had reason to know of the existence of coal dust accumulations along the cited beltline before the instant order was issued at 9:30 a.m. on January 15, 1991, by the recent preceding reports of his belt examiners citing the need to clean the No. 1 Unit beltline (See Government Exhibit No. 3). Significantly, there were insufficient corresponding entries in the reports from which it could be determined that these conditions had been corrected. Deshetty admittedly countersigned these reports while conceding that he did not know whether the conditions had been corrected and acknowledged there was no way to ascertain from the belt examiner's reports whether any cleaning or other corrective action had been taken.²

More particularly, however, in determining whether Deshetty knowingly committed the cited violation, I need focus on only one of the specific accumulations charged, i.e. a 36-inch accumulation of fine coal and coal dust outby the takeup at the belt drive. Inspector Gamblin observed that this accumulation contained at least two layers of rock dust. Based on this undisputed evidence Gamblin concluded that this accumulation had existed for two or three weeks. Foreman Stanley Bealmear also concluded from this evidence that this accumulation had existed for an extended period of time -- at least two or three shifts.

In concluding that Deshetty, at 9:30 a.m., on May 15, 1991, had reason to know of this long standing accumulation one need only to refer to the repeated entries in preceding belt examination reports expressing the need for cleaning along the No. 1 Unit belt and stating that the belt was "dirty." It is inconsequential for purposes of establishing notice that these entries may not have specifically identified this same 36-inch deposit. It is reasonable to infer from these repeated entries, without corresponding notations of corrective action, that Deshetty, who countersigned the reports, had reason to know of this accumulation which had, according to the credible evidence, existed for up to three weeks before it was cited by Inspector Gamblin.

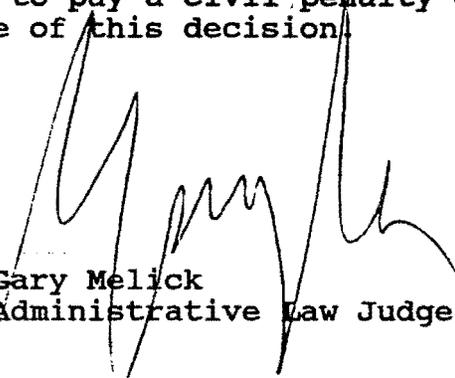
Under the circumstances I find that the Secretary has sustained her burden of proving that Deshetty had reason to know of the violation charged in Order No. 3540913. Inspector Gamblin's ability to observe and his motivation are unchallenged. I therefore accord great weight to his testimony that several belt rollers were actually in contact with some of the coal

² The belt examiner's reports do reflect some corrective action taken in response to some reported hazardous conditions, but these entries are not relevant to the accumulation at issue.

dust accumulations. Under the circumstances the violation was of high gravity. Based on my findings herein that Deshetty had reason to know of the violative condition I also find that he was highly negligent. There is no evidence that Deshetty has any prior violations under the Act. Under the circumstances I find that the Secretary's proposed penalty of \$1,500 is appropriate.

ORDER

Prabhu Deshetty is directed to pay a civil penalty of \$1,500 within 30 days of the date of this decision.



Gary Melick
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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MAY 6 1993

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 92-1052-D
On Behalf of	:	
DONALD BOWLING,	:	Mine ID 15-13937 and
Complainant	:	15-13937 AFW
	:	
and	:	MSHA No. BARB CD 92-28
	:	
DONALD BOWLING,	:	
Intervenor	:	
	:	
v.	:	
	:	
PERRY TRANSPORT, INC.,	:	
A Corporation; STEVIE CALDWELL,	:	
TRUCKING, INC., a Corporation;	:	
and STEVIE CALDWELL,	:	
an Individual,	:	
Respondents	:	
	:	
	:	
SECRETARY OF LABOR,	:	Docket No. KENT 93-287-D
MINE SAFETY AND HEALTH	:	BARB CD-92-28
ADMINISTRATION (MSHA),	:	
On Behalf of	:	Surface Mine
DONALD R. BOWLING,	:	
Complainant	:	
	:	
v.	:	
	:	
PERRY TRANSPORT, INC.,	:	
DEWEY CRIGSBY, an Individual;	:	
STEVIE CALDWELL TRUCKING, INC.,	:	
a Corporation; STEVIE CALDWELL,	:	
an Individual; and LOST MOUNTAIN	:	
MINING COMPANY, a division of	:	
MCI MINING CORPORATION,	:	
Respondents	:	

DECISION APPROVING SETTLEMENT

Before: Judge Fauver

On September 10, 1992, the Secretary filed an action (Docket No. KENT 92-1052-D) on behalf of Donald R. Bowling alleging that

Respondents violated § 105(c) of the Federal Mine Safety and Health Act of 1977 and requesting that Mr. Bowling be temporarily reinstated to his former position pending a proceeding on his claim of discrimination.

On January 27, 1993, the Secretary filed an action (Docket No. KENT 93-287-D) on behalf of Donald R. Bowling alleging that Respondents violated § 105(c) of the Federal Mine Safety and Health Act of 1977 and requesting, an inter alia, that Mr. Bowling be permanently reinstated to his former position.

The parties have moved for approval of a settlement designed to resolve all matters related to Mr. Bowling's claims in both of the above actions.

I have reviewed the documentation and representations submitted and find that the settlement is consistent with the purposes of § 105(c) of the Act.

Accordingly, the motion for approval of settlement is GRANTED, and these proceedings are DISMISSED.


William Fauver
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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MAY 7 1993

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 92-266-M
Petitioner	:	A.C. No. 29-00708-05546
	:	
v.	:	
	:	Chino Mine
PHELPS DODGE CHINO INC.,	:	
Respondent	:	

DECISION

Before: Judge Lasher

After prehearing preparation and discovery, on March 5, 1993, Petitioner moved to vacate the Citation in this matter, No. 3556068, on the basis of insufficient evidence. ¹

On April 2, 1993, Respondent filed its "Motion of Phelps Dodge Chino Inc. To Dismiss With Prejudice Or In The Alternative For Declaratory Relief."

On April 14, 1993, Petitioner filed a letter stating:

We have received Respondent's Motion ... to Dismiss With Prejudice, etc. We have no objection to your dismissing the citation with prejudice as you did in Homestake Mining Co., 13 FMSHRC 988. Such action would moot Respondent's request for any declaratory relief, which is requested "in the alternative" if you do not vacate the citation with prejudice.

Respondent responded by letter, saying:

We wish to note an important consideration in response to the government's current statement that it has no objection to dismissal with prejudice: such dismissal must be in accordance with Rule 41, Federal Rules of Civil Procedure. That is, dismissal will operate as

¹ It is noted at the outset that at the time the motion to vacate was filed, while Respondent had submitted a motion for summary judgment, such had not been ruled on or determined, the factual prerequisites of this case had not been established, no trial had been conducted and a record developed, nor had findings of fact been scrutinized and determined.

an adjudication on the merits. Such a result is consistent with the ultimate resolution in Homestake Mining Company v. Secretary of Labor, et al., United States Court of Appeals for the District of Columbia Circuit, Docket No. 91-1423. In Homestake, the case was dismissed with prejudice and the Secretary was "not to issue a new citation for violation of the same regulation" under analogous facts.

As counsel for Petitioner urges, in Homestake Mining Co., 13 FMSHRC 988 (June 21, 1991), I set forth my understanding what dismissal with prejudice meant. In sum,

1. abandonment of the instant prosecution by the Petitioner;
2. prohibition against seeking future action on the citation being vacated.

Dismissal with prejudice does not mean enjoining the enforcement agency, MSHA, from future use of the safety standard involved, or applying the standard to "the same mine area described in the subject Citation." As I noted therein, expanding the concept of dismissal with prejudice to these latter concepts would in effect be (a) granting the Contestant's declaratory relief request without benefit of due process, hearing, and normal adjudication processes.

Respondent urges that the dismissal with prejudice of the citation involved in this proceeding "operate as an adjudication on the merits" and alleges that such is "consistent with the ultimate resolution in Homestake Mining Company v. Secretary of Labor, et al., U.S. Court of Appeals for the D.C. Circuit, Docket No. 91-1423. If adjudication on the merits is intended to mean that Respondent's view of the law, arguments, and positions as to factual happenings, are adopted, such is rejected. The ultimate resolution in the cited Homestake decision of the D.C. Circuit grew out of this question: What should be the Secretary's ability to issue a new citation for violation of the same regulation on the identical facts? When the Secretary indicated that she would not issue a new citation for violation of the same regulation on the identical facts on which she issued the citation which she was vacating, the court held that such response rendered the case "moot and not suitable for declaratory relief." The court considered that "any future enforcement action must be based on a different set of facts."

I do not find the decision of the Court of Appeals inconsistent with the holdings of my decision in Homestake, which was not reviewed by the Commission. The Order set forth below is intended to effectuate the principles set forth herein.

ORDER

1. Petitioner's action to vacate Citation No. 3556068 is **GRANTED**.
2. Citation No. 3556068 is **VACATED WITH PREJUDICE**.
3. Respondent's Motion in the alternative for Declaratory Relief is **DENIED**.
4. Petitioner shall not initiate any future enforcement action under the same regulation against Respondent on the identical facts; any future enforcement action must be based on a different set of facts.

Michael A. Lasher Jr.
Michael A. Lasher, Jr.
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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MAY 7 1993

SECRETARY OF LABOR : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. SE 92-27-M
Petitioner : A.C. No. 09-00113-05503 EYU
v. :
Burns Brick Mine
YARBROUGH CONSTRUCTION :
COMPANY, :
Respondent :

DECISION

Appearances: Michael K. Hagan, Esq., Office of the Solicitor,
U.S. Department of Labor, Atlanta, Georgia,
for Petitioner;
Charles N. Yarbrough, Yarbrough Construction,
Incorporated, Lizella, Georgia,
for Respondent.

Before: Judge Barbour

THE PROCEEDING

This case is before me upon the petition of the Secretary of Labor ("Secretary") for the assessment of civil penalties pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977 ("Act" or "Mine Act"). The petition alleges that Yarbrough Construction Company ("the Company") was responsible for three violations of various mandatory safety standards for surface metal and non-metal mines found in Part 56, Volume 30, Code of Federal Regulations. The Company answered, in some instances denying its responsibility for the violations and pointing to factors it believed warranted mitigation of the penalties proposed by the Secretary.

A hearing on the merits was held in Macon, Georgia at which Michael K. Hagan represented the Secretary and Charles N. Yarbrough represented the Company. The sole witness for the Secretary was Federal Mine Safety and Health Administration ("MSHA") Inspector Donald Collier. The Company relied upon cross examination of Collier and upon statements by Yarbrough.

At the commencement of the hearing Yarbrough raised an additional objection to the imposition of civil penalties by challenging MSHA's authority to cite the Company for violations of the Mine Act. Yarbrough asserted that the activities of the Company were not conducted at a "coal or other mine" in that the Company simply moved material that had already been mined by another company. Tr. 3-4.

At the hearing's close, the parties elected not to brief the issues, standing upon the closing statements of counsel and Yarbrough.

JURISDICTION

THE FACTS

Yarbrough described the Company as "a home-owned business," taking in an average of approximately \$5,000 to \$6,000 per month. Tr. 81-82. The Company engages in two kinds of work: moving clay and site preparation for things such as commercial sites, parking lots and roads. Tr. 82. During the past two years the biggest part of the business has been that involving clay. Tr. 82.

According to Yarbrough, the clay is extracted from a riverside site. Tr. 39. Once clay has been extracted from the earth, it is transported by truck to a stockpile. The stockpile is approximately seven tenths of a mile from the place where the clay is extracted. Tr. 39. The area containing the stockpile is surrounded by a levy. Yarbrough explained that the clay is enclosed by the levy so that "when [the nearby river] floods . . . the water doesn't come into the levy and saturate the material." Tr. 27. The levy is large -- approximately 26 feet high and 15 feet across at the top. Yarbrough guessed that the levy encompasses approximately 25 - 50 acres. Tr. 39.

Once the clay has been stockpiled, a company employee operating a scraper transports the clay from the stockpile to a hopper. Tr. 28. The employee drives the scraper to the top of the hopper, opens the bottom of the scraper and the clay falls into the hopper. The distance the clay is transported by the scraper varies with the position of the stockpile. At a minimum it is 600 feet and at a maximum 3,000 feet. Id.

Occasionally, in order to dry out the clay, the scraper operator is also required to use a farm harrow and to pull the harrow with a tractor over the stockpiled clay to loosen the clay. Tr. 62, 68. Unless this is done the clay will stick in the hopper. Tr. 68.

The clay is used for the manufacture of bricks by Burns Brick, a brick making company. Yarbrough described what happens after the clay reaches the hopper:

Burns Brick people are working underneath the hopper, and when the material falls in the hopper they have a tram system that's similar to a ski lift with buckets instead of seats, and the tram system brings the buckets underneath the hopper and the material goes into the hopper [and into the buckets] and is carried three and a half miles up the cable to the plant.

Tr. 28. At the end of the tram the clay is dumped into another stockpile from whence it is removed by Burns Brick for manufacture. Tr. 69.

Once the scraper operator has dumped the clay into the hopper the operator drives the empty scraper back to the stockpile via a circular route. Tr. 28, 31. (Yarbrough described the Company's transportation of the clay "a continuous circle, not a back-and-forth operation." Tr. 31.) The Company usually keeps one scraper only at the job site because the work done there is "a one-man operation." Tr. 30. The Company has transported clay for Burns Brick for "probably 10 maybe 15 years." Tr. 33. During 1991 it moved approximately 80,000 to 90,000 tons of clay to the hopper. Tr. 83-84.

Yarbrough stated that Burns Brick owns the clay. In August 1991 (the date of the subject violations), the clay was extracted by Tom Sealy, a person not connected with the Company. Once the clay was taken from the ground, Sealy had it trucked to the stockpile. Tr. 31. However, commencing in September 1991 and continuing until November of that same year, the Company, under an agreement with Burns Brick, extracted the clay and moved it by truck to the stockpile. Tr. 32, 41. Yarbrough did not dispute that during September and November 1991 the Company had engaged in mining.¹ Yarbrough testified that when the Company is excavating clay it employs more than one person. Tr. 32, 35. However, Yarbrough adamantly contended that when the Company was cited for the subject violations it was "only moving clay that someone else had mined and put in a stockpile, and [the Company] was moving it from the stockpile to the hopper." Tr. 33. According to Yarbrough, this was not mining. In addition, Yarbrough explained that when the Company was cited for the subject violations it was only billing Burns Brick for moving clay from the stockpile to the hopper. However, when the Company was conducting mining operations, it had billed Burns Brick for mining the clay and for moving it from the mine (i.e., the

¹ Yarbrough testified that he hoped the company again would reach an understanding with Burns Brick to extract clay in the future. Tr. 37.

extraction site) to the stockpile. Tr. 47. At the time when the Company changed its activity from extracting the clay and trucking it to the stockpile, to moving the clay from the stockpile to the hopper only, it did not notify MSHA. Nonetheless, Yarbrough maintained that an MSHA inspector could tell whether or not the Company was mining (i.e., extracting the clay and trucking it to the stockpile) or whether it was not mining (i.e., taking clay from the stockpile to the hopper) simply by observing. Tr. 48. Or, the inspector could ask. Tr. 49. Yarbrough also stated that inspectors from the Secretary's Occupational Health and Safety Administration ("OSHA") did not inspect the stockpile area. Tr. 95-96.

Yarbrough was uncertain regarding ownership of the property on which the Company was working. He did not know whether Burns Brick owned it or leased it. Tr. 30. He also indicated that another brick company, Cherokee, obtained its clay from a adjacent property and that it was difficult to tell where Burns Brick's clay ended and Cherokee's began. Tr.44. Yarbrough also questioned whether "brick clay" was a mineral within the meaning of the act. Tr. 34.

PARTIES' ARGUMENTS

Counsel for the Secretary asked that judicial notice be taken of the fact that clay is a mineral extracted from the land. Tr. 85-86. Counsel then asserted that the "mine" in this instance includes the area where the clay was extracted and the area where it was stockpiled and trucked to the hopper. These areas are basically contiguous. Tr. 87. Further, counsel pointed to the MSHA-OSHA Interagency Agreement, 44 FR 22827 (April 17, 1979), 48 FR 7521 (February 22, 1983) ("Agreement"), and noted that it specifically provides that at brick plants OSHA authority "commences after arrival of the raw materials at the plant stockpile." Exh. P-5 at 4, Tr. 88. Counsel argued that the "plant stockpile" was the stockpile at the brick plant, three and one half miles away from the hopper, i.e, the stockpile at the other end of the tramway. Tr. 88-89.

Counsel cited the "most troubling aspect" of the case as being the fact that if the Company's argument were accepted, when the Company was in a "non-mining" phase of operation, that is when it was only removing clay from the stockpile and taking it to the hopper, company workers would be in a regulatory Never-Never Land, protected by neither MSHA nor OSHA. Tr. 89.

In sum, Counsel argued that under the circumstances of this case the Company was an independent contractor performing services at a mine and thus was properly subject to the jurisdiction of the Act and to resulting inspection by MSHA.

Yarbrough, argued that while the area from which the clay was extracted was clearly a mine, the mine was divided by the levy from the area where the stockpile was located and the stockpile side of the levy was not a mine. Tr. 91-92. Thus, MSHA was without jurisdiction to inspect the Company's operations inside the levy. Nonetheless, the Company's workers are fully protected. The Company was insured and the insurance company sent inspectors to inspect company equipment. Indeed, according to Yarbrough, the insurance inspectors came twice as often as the MSHA inspectors. Tr. 92.

JURISDICTIONAL FINDINGS AND CONCLUSIONS

While, as the U.S. Court of Appeals for the Fourth Circuit has noted, the Mine Act does not apply to every company whose business brings it into contact with minerals, I have no doubt that in this instance the Company comes within the parameters of the Act. See Donovan v. Carolina Stalite Co., 734 F.2d 1547 (4th Cir. 1984).

Section 4 of the Mine Act states that "[e]ach coal or other mine, the products of which enter commerce . . . and each operator or such mine . . . shall be subject to the provisions of this Act." 30 U.S.C. 803. Section 3(h)(1), 30 U.S.C. § 802(h)(1), defines "coal or other mine" in part as:

(A) an area of land from which minerals are extracted in nonliquid form . . . (B) private ways and roads appurtenant to such area, and (C) lands, excavations, underground passageways, shafts, slopes, tunnels and workings, structures, facilities, equipment, machines, tools and other property . . . used in or to be used in, or resulting from the work of extracting such minerals . . . or used in or to be used in the milling of such minerals, or the work of preparing coal or other minerals.

Section 3(d) 30 U.S.C. § 802(d) defines "operator" as "any owner, lessee, or other person who operates, controls, or supervises a coal or other mine or any independent contractor performing services or construction at such mine."

In order to determine whether the Company is working at a "mine" and if so whether it is an "operator" of that mine the first question is whether the material involved is a "mineral?"

The pertinent material is clay that has been extracted in non-liquid form. I note the definition of "clay" and I find that the material is a mineral within the meaning of the Act.²

The next question is whether the mineral is being "extracted," "milled" or "prepared?" If so then the land from which it is extracted or the lands, structures, etc., used in or to be used in its milling or preparation constitute a mine.

Here, the Company was moving the clay from the place it was stockpiled to the conveyor that transported it to the place it was to be used as a raw material for the manufacture of bricks. This transportation was not associated with a milling or preparation process -- processes which, generally speaking, are associated with the treating of mined minerals for market. See Carolina Stalite, 734 F2d at 1551. However, the record is not totally silent regarding whether or not the clay was subject to any such treatment once it had been extracted. Yarbrough stated that the Company occasionally had to harrow the stockpiled clay in order to dry it so it could be trammed to the brick plant. Since this aeration of the clay was a treating process incident to the shipment of the clay to its ultimate market, it was mineral preparation within the meaning of the Act, and I so find.

In addition, I reject Yarbrough's, proposed distinction between the extraction and (apparently) the initial stockpiling of the clay and transportation of the clay to the point where the mineral was conveyed to the user/manufacturer.³ I note, as I must, that the legislative history of the Act makes clear that Mine Act coverage is to be favored and that "what is considered to be a mine and to be regulated . . . be given the broadest possibl[e] interpretation." S. Rep. No. 181, 95th Cong., 1st Sess. 14 (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 602

² "Clay" is defined as:

A fine-grained, natural, earthy material composed primarily of hydrous aluminum silicates. It may be a mixture of clay minerals and small amounts of nonclay materials or it may be predominantly one clay mineral. The type of clay is determined by the predominant clay mineral present.

U.S. Department of the Interior, (1968) A Dictionary of Mining, Mineral and Related Terms 214.

³ I state "apparently" because during his testimony Yarbrough seemed to imply that both extraction of the clay and its initial stockpiling inside the levy constituted mining activity subject to the Act, whereas in his closing statement he seemed to take a more restrictive view and to argue that only extraction was covered. See Tr. 33, 91-92.

(1978). While it is true that when cited for the violations here at issue, the Company was primarily engaged in transporting the clay that others extracted and stockpiled to the hopper from whence it would be conveyed to the brick plant, I conclude that the transportation to the hopper was so closely related to the extraction process that it indeed was an essential ingredient of that process. Without transportation to the hopper extraction would have been a meaningless exercise in that the clay would never have entered the stream of commerce. I therefore conclude that the area of the stockpile and the route to the hopper is indeed a "mine" within the meaning of the Act. See Bulk Transportation Services, Inc., 12 FMSHRC 772, 792-793 (April 1990) (ALJ Koutras), aff'd 13 FMSHRC 1354 (September 1991).

I am further persuaded that the subject area was a "mine" by the very fact that the Secretary chose to exercise his jurisdiction over the area pursuant to the Act. The Secretary enforces both the Mine Act and the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 et seq., and has discretion in determining which of his two enforcement agencies, MSHA or OSHA, should exercise jurisdiction over a given facility or activity. The Secretary's choice is entitled to deference provided it is exercised reasonably. Here, where the alleged violations were cited in an area virtually continuous to the extraction site and in an area well within that which the Secretary regards as falling under the Mine Act -- as counsel for the Secretary noted, under the Agreement the Secretary claims Mine Act jurisdiction up until the arrival of the clay at the plant stockpile -- I conclude that the Secretary's choice of MSHA as the appropriate inspection authority was reasonable.

The question remains whether the Company was an "operator" within the meaning of the Act? Yarbrough was uncertain who owned the land upon which the Company was working, nor did the Secretary introduce evidence regarding ownership of the mine site. Also, the record is not entirely clear regarding the extent of the Company's control or supervision at the site, although there is certainly no suggestion that at the time the subject violations were cited any entity other than the Company was exercising control or supervision at the site. What is apparent is that the Company occasionally aerates the clay and transports the clay for Burns Brick and charges Burns Brick on a per unit basis of approximately \$9 per load. Tr. 29. Thus, regardless of whether the Company was an "operator" by virtue of its control and supervision of the area involved, certainly it was an independent contractor performing a service at the mine.

For these reasons, I conclude that the Company was properly subject to Mine Act jurisdiction.

THE VIOLATIONS

Section 104(a) Citation No. 3605398, 8/8/91, 30 C.F.R. § 56.14132

The citation states:

The warning horn on the Dresser
412 B pan scraper was not
operative.

Exh. P-2.⁴

Inspector Collier stated on August 8, 1991, he observed the pan scraper in operation at the mine. He inspected the equipment and during the course of the inspection he asked the scraper operator, Riley Sanders, to sound the scraper's horn. The operator tried to do so, but the horn would not sound. Tr. 10-11. Because the scraper was a self propelled piece of equipment, Collier believed that the lack of an operable horn violated section 56.14132.

With regard to gravity, Collier stated that although at the time of the inspection no one aside from the scraper operator was in the vicinity of the scraper there were "other employees who might work in the area during the course of the shift everyday." Tr. 14, see also Tr. 15. However, because the scraper normally would not be operated in the vicinity of other employees Collier considered it "unlikely" that persons would be injured due to the violation.

With regard to negligence, Collier noted that the scraper was required to be inspected at the start of the shift, prior to it being placed in operation. Tr. 13-14, 16.

Yarbrough did not dispute the fact that the horn did not sound. He explained that for some reason -- he did not know why -- someone -- he did not know who -- had cut the horn wire. Yarbrough acknowledged this had happened before and that the Company had been cited for it. Tr. 20.

⁴ 30 C.F.R. §56.14132(a) states:

Manually-operated horns or other audible
warning devices provided on self-propelled
mobile equipment as a safety feature shall
be maintained in functional condition.

I conclude the violation existed as charged. The scraper is "self-propelled mobile equipment," and as Yarbrough acknowledged, its horn did not work. Further, I accept the inspector's testimony that an injury resulting from the violation was unlikely and I find the violation was not serious. Finally, the Company was negligent in allowing the violation to exist. The fact that the horn did not work should have been detected and corrected prior to the start of the shift and the fact that the Company previously had experienced a similar problem, further emphasizes its lack of due care.

Section 104(a) Citation No.3605399, 8/8/91, 30 C.F.R.
§ 56.14130(i)

Citation No. 3605399 states:

The seat belts on the Int. 1566 Tractor are not maintained in functional condition. The buckle is defective and will not stay latched. The tractor is not being used at this time but is subject to be used anytime.

Exh. P-3.⁵

Collier testified that when he inspected the International 1566 tractor on August 8, 1991, the tractor was in the stockpile area. Tr. 55.⁶ During the course of the inspection Collier attempted to buckle the seatbelt but could not get the buckle to latch. Collier speculated that mud may have gotten into the latching mechanism. Tr. 50-51. At the time of the inspection the tractor was not tagged-out or put in an area of restricted use so it could not be operated. Tr. 52. Collier stated that Riley Sanders told him that the tractor had "broken down" but Collier denied Sanders told him the tractor lacked the batteries necessary to make it operable. Tr. 54. Collier stated that

⁵ 30 C.F.R. § 14130(i) states:

Seat belts shall be maintained in functional condition, and replaced when necessary to ensure proper performance.

⁶ 30 C.F.R. § 14130(a) requires that seat belts shall be installed on tractors.

Sanders said "they'd used [the tractor] the day before," and Yarbrough observed, "He had not used it the day before, I had." Tr. 55.

Collier stated that he believed the condition of the seatbelt constituted a violation of section 56.14130. He further stated the violation was a significant and substantial contribution to a mine safety hazard in that it was reasonably likely if the seatbelt were not fixed a person could be thrown from the tractor and be crushed. Tr. 52-53. When asked why he thought it reasonably likely this could happen, Collier responded:

Based on a recent policy memorandum. In a study of mining accidents with haulage equipment [,] of the fatalities that occurred over a ten-year period . . . 1979 to 1989, . . . the use of seat belts might have prevented half of those fatalities and . . . we're to consider non-use, not providing seat belts, or seat belts not in a functional condition . . . to be as serious.

Tr. 57. When asked whether there was anything with respect to the particular site that he considered when determining the violation was S&S, Collier replied, "[N]ot at that time." Tr. 57.

With regard to the Company's negligence, Collier was of the opinion that the condition of the seatbelt should have been detected and corrected because the tractor is required to be inspected prior to being placed in use each shift. Tr. 53.

Yarbrough stated the tractor wasn't in use the day the citation was issued, but he agreed with the inspector that it had not been tagged-out. Tr. 58. According to Yarbrough, one of the tractor's batteries had fallen off the tractor and had broken, and had been that way for two weeks. Further, Yarbrough stated he had jump started the tractor the day before the citation was issued and had moved it to the spot where the inspector found it. Tr. 59.

I find the violation existed as charged. Section 56.14130(i) requires that seat belts shall be maintained in functional condition. There is no question about the condition of seatbelt -- it did not latch. Moreover, the presence of a non-functioning seatbelt was a hazard to the tractor operator. As both Collier and Yarbrough agreed, the tractor was not removed from service or marked to prohibit its use. Further, even though it lacked a battery, the tractor could be jump started and moved, as Yarbrough demonstrated.

I cannot find this was a serious violation. I accept Yarbrough's testimony that the battery was missing and had been missing for two weeks prior to the inspection. The apparent effect was to render the tractor inoperative for commercial use. Thus, it was unlikely anyone would be exposed to the danger of the tractor while in operation unless a person had, like Yarbrough, jump started it and moved it to an area for repair. This being the case, I also cannot find there was a reasonable likelihood that the hazard contributed to -- the hazard of the tractor operator being thrown from the tractor and crushed -- would result in an event culminating in an injury.⁷ The tractor simply could not be used enough to make an accident reasonably likely. This being the case, I find the violation was not S&S.

I also am constrained to observe that the wisdom of the inspector basing a S&S finding solely upon a policy or informational memorandum and giving no consideration to the factual situation at hand is highly questionable, to say the least. The Commission has made clear that the question of whether a violation is S&S must be based upon the particular facts surrounding the violation. Texas Gulf, Inc., 10 FMSHRC 498, 501 (April 1988). While I suppose it is conceivable that the Secretary could prove facts existed warranting an S&S finding despite the inspector's failure to take them into account, I cannot imagine such proof would be easily established or come by.

Finally, I find that the condition of the seatbelt exhibits a lack of due care on the Company's part. Because the tractor had not been taken out of service, the Company was required to make certain that it complied with all applicable standards. A reasonably prudent operator would have made sure the seatbelt worked.

104(a) Citation No. 56 3605400, 8/8/91, Section 56.12025

The citation states:

The metal frame of the fuel pump
motor at the fuel storage area was
not grounded to the system ground.

⁷ In Mathies Coal Co., 6 FMSHRC 1, (January 1984), the Commission set forth the four elements of a "significant and substantial" violation, including the one critical here, a reasonable likelihood that the hazard contributed to will result in an injury." In U.S. Steel Mining Co., 6 FMSHRC 1834, 1836 (August 1984), the Commission amplified the meaning of the third element of the Mathies test, explaining it "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury."

Exh. P-4.⁸

Collier stated that during his inspection on August 8, he observed a metal framed fuel pump located "pretty close to the hopper" but to one side of it. Tr. 75. The pump was electric. It was used to pump fuel from a fuel storage tank. Collier was told the pump and storage tank belonged to Burns Brick, but that the Company used the tank to store its fuel and used the fuel for its equipment. Tr. 73, 75.

Collier noticed that the frame of the pump was not grounded. However, Collier did not believe that it was likely any person would be shocked because of the failure to ground the frame. He observed that because the pump structure was located on the ground, its electrical components were subjected to very little vibration. (Vibration could cause an electrical short-circuit by bringing conductors into contact with the frame.) Moreover, Collier observed that the pump was not used very often so that even if an ungrounded shock hazard occurred, which was unlikely, it also was unlikely persons would actually be subjected to the hazard before it could be corrected. Tr. 73.

With regard to the Company's negligence, Collier stated that grounds have to be tested once each year and that the missing ground wire should have been known to the Company. Tr. 74.

Yarbrough testified that the Company had begun using the pump and tank in its day-to-day operation after the Company paid Burns Brick for the fuel already in the tank. Tr. 78-79. Before the Company started to use the pump Yarbrough had not inspected it, and he did not know whether or not it was grounded. He stated, "I never checked." Tr. 79.

I find that the violation existed as charged. The metal pump frame enclosed electrical circuits, and the pump was not grounded. While the pump itself appears to be have been owned by Burns Brick, the Company had the full use of it and was using it, as Yarbrough stated, "in the day-to-day operations of moving the material from the stockpile to the hopper." Tr. 79. Thus, the pump was part of the equipment necessary for the Company to

⁸ 30 C.F.R. § 56.12025 states:

All metal enclosing or encasing electrical circuits shall be grounded or provided with equivalent protection. This requirement does not apply to battery operated equipment.

perform its duties as an independent contractor, and I imply from this that the Company was responsible for the pump and properly cited for the violation.

Collier, an electrical engineer with a degree from Virginia Polytechnical University, testified the chance of an injury resulting from the violation was unlikely. I accept his testimony and find that this was a non-serious violation.

Moreover, because the Company was using the pump and was responsible for it, due care required the Company to make sure the pump met all applicable safety standards. The Company did not and in failing to do so I find that the Company was negligent.

OTHER CIVIL PENALTY CRITERIA

Yarbrough testified and I find that the Company is small in size. See Tr. 81-82, 84. The Company's history of previous violations also is small. In the two years proceeding August 8, 1991, the Company was assessed for a total of four violation. G. Exh. P-1, Tr. 84-85.

Finally, Yarbrough stated that the size of the penalties proposed by the Secretary for the violations here alleged would not affect the Company's ability to continue in business and I will consider this when I assessed civil penalties for the violations that I have found herein. Tr. 81.

CIVIL PENALTIES

Taking in to account all of the statutory civil penalty criteria, I conclude that assessment of the following civil penalties is appropriate:

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. Section</u>	<u>Civil Penalty Amount</u>
3605398	8/8/91	56.14132	\$20
3605399	8/8/91	56.14130	\$20
3605400	8/8/91	56.12025	\$20

ORDER

The Company is ORDERED to pay the civil penalties assessed within thirty (30) days of the date of this decision. Payment is to be made to MSHA and upon receipt or payment this matter is dismissed.

The Secretary is ORDERED to MODIFY Section 104(a) Citation No. 3605399 by deleting the "S&S" finding, which is hereby VACATED.



David F. Barbour
Administrative Law Judge

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/epy

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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MAY 7 1993

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. WEVA 92-917
Petitioner : A.C. No. 46-01455-03887
 :
v. : Docket No. WEVA 92-918
 : A.C. No. 46-01455-03888
 :
CONSOLIDATION COAL COMPANY, : Docket No. WEVA 92-933
Respondent : A.C. No. 46-01455-03889
 :
 : Docket No. WEVA 92-988
 : A.C. No. 46-01455-03891
 :
 : Osage No. 3 Mine
 :
 : Docket No. WEVA 92-921
 : A.C. No. 46-01453-04007
 :
 : Docket No. WEVA 92-932
 : A.C. No. 46-01453-04011
 :
 : Docket No. WEVA 92-994
 : A.C. No. 46-01453-04016
 :
 : Humphrey No. 7 Mine

DECISION

Appearances: Caryl L. Casden, Esq., Office of the Solicitor,
U.S. Department of Labor, Arlington, Virginia,
for Petitioner;
Daniel E. Rogers, Esq., Consol, Incorporated,
Pittsburgh, Pennsylvania for Respondent.

Before: Judge Barbour

STATEMENT OF THE CASE

In these proceedings the Secretary of Labor ("Secretary") on behalf of the Mine Safety and Health Administration ("MSHA") charges the Respondent, Consolidation Coal Company ("Consol"), with violating safety regulations promulgated pursuant to the Federal Mine Safety and Health of 1977, 30 U.S.C. § 801 et seq., (The "Mine Act" of "Act"). In addition, the Secretary alleges that certain of the violations constituted significant and substantial contributions to mine safety hazards ("S&S" violations) and that certain were the result of Consol's unwarrantable failure to comply with the cited standards.

A hearing on the merits was conducted in Morgantown, West Virginia, and counsels have submitted helpful post-hearing briefs. At the commencement of the hearing counsel for the Secretary announced that several of the violations had been settled. (In some instances the settlements disposed of the entire case at hand.) At my request, counsel stated on the record the facts pertaining to the settlement agreements and I explained that I would consider the settlements and if I found them warranted under the Act, I would approve them in my decision.

THE SETTLEMENT AGREEMENTS

DOCKET NO. WEVA 92-917

There are two violations alleged in this case, both of which the parties have agreed to settle.

<u>Citation/Order No.</u>	<u>Date</u>	<u>30 C.F.R. Section</u>	<u>Assessment</u>	<u>Settlement</u>
3307656	11/28/90	75.305	\$ 276	\$ 166
3716059	10/16/91	75.503	\$1100	\$ 660

Counsel for the Secretary explained that Citation No. 3707656 was issued for the failure of Consol to properly conduct a required weekly examination for hazardous conditions in the cited area of the mine. Counsel further explained that although the manner in which the company was conducting the examination was not correct technically, it was an effective and safe way to examine. Therefore, counsel proposed the citation be modified to delete the S&S designation and that the penalty be assessed as shown above. Tr. 7.

Counsel further explained that Section 104(d)(2) Order No. 3716059 was issued for the company's failure to properly secure an electrical junction box on a loading machine. Upon inquiring into the facts surrounding the violation, counsel discovered that although two of four bolts were missing and the other two were damaged, the box cables were taut so that the box could not readily move. Therefore, in MSHA's opinion, it was unlikely that the box would be damaged due to the missing and defective bolts. Counsel proposed the order be modified by deleting the S&S designation and that a civil penalty assessed be as shown. Tr. 8.

DOCKET NO. WEVA 92-118

There is one violation alleged in this case which the parties have agreed to settle.

<u>Citation No.</u>	<u>Date</u>	30 C.F.R. <u>Section</u>	<u>Assessment</u>	<u>Settlement</u>
3716332	03/25/92	75.1105	\$431	\$ 50

Counsel stated that subsequent to being issued, the citation was modified by MSHA to delete the S&S finding, but that the assessment erroneously did not take into account the modification. Had the citation been assessed as modified, the civil penalty proposed would have been \$50 and counsel suggested a civil penalty be assessed in that amount. Tr. 9.

DOCKET NO. WEVA 92-933

There are four violations alleged in this case, two of which the parties have agreed to settle.

<u>Citation No.</u>	<u>Date</u>	30 C.F.R. <u>Section</u>	<u>Assessment</u>	<u>Settlement</u>
3718138	12/18/91	75.1725(a)	\$1000	\$1000
3715916	01/08/92	75.400	\$ 800	
3715920	01/13/92	75.400	\$1200	
3718210	04/20/92	75.601-1	\$ 362	\$ 362

Counsel stated that Consol had agreed to pay in full the penalties proposed for Order No. 3718138 and Citation No. 3718210. Tr. 9-10.

DOCKET NO. WEVA 92-988

There are five violations alleged in this case, four of which the parties have agreed to settle.

<u>Citation/Order No.</u>	<u>Date</u>	30 C.F.R. <u>Section</u>	<u>Assessment</u>	<u>Settlement</u>
3715905	12/30/91	75.807	\$241	\$145
3715909	01/06/92	75.1105	\$178	\$178
3718483	01/22/92	75.503	\$241	\$145
3718486	01/22/92	75.202(a)	\$227	
3718488	12/03/92	75.202(a)	\$178	\$178

Citation No. 3715905 was issued for Consol's failure to properly place and guard a high voltage transmission cable. In addition to the alleged violation, the inspector found the violation to be S&S. Counsel stated the cable had numerous protective features to interrupt the power in the event the cable was damaged and that should such damage occur there would be

little likelihood of injury to miners. Accordingly, counsel proposed the S&S finding be deleted and a civil penalty be assessed as shown. Tr. 11-12.

Citation No. 3718483 was cited for Consol's failure to maintain a roof bolting machine in permissible condition. In addition, the inspector found the violation to be S&S. The impermissible openings constituting the violations were of minimal dimensions (one in excess of .006 of an inch and one in excess of .007 of an inch). Counsel maintained that any hazard resulting from the violation was unlikely to occur, and counsel proposed the S&S finding be deleted and a civil penalty be assessed as shown. Tr. 12.

Counsel also stated that Consol had agreed to pay in full the civil penalties proposed for Citation No. 3715909 and for Citation No. 3718488. Tr. 12-3.

DOCKET NO. WEVA 92-932

There are two violations alleged in this docket, both of which the parties have agreed to settle.

<u>Order No.</u>	<u>Date</u>	30 C.F.R. <u>Section</u>	<u>Assessment</u>	<u>Settlement</u>
3108769	01/30/92	75.1003(a)	\$800	\$400
3108741	02/04/92	75.1101-8(c)	\$800	\$400

Section 104(d)(2) Order No. 3108769 was issued for Consol's failure to adequately guard a trolley wire that ran above the supply track. The inspector further found that the violation was S&S and resulted from Consol's unwarrantable failure to comply with the cited standard. Counsel stated that upon investigating the facts surrounding the violation MSHA had concluded the evidence would not support the inspector's unwarrantable failure determination. Counsel proposed the unwarrantable finding be deleted, the order of withdrawal be modified to a Section 104(a) citation and a civil penalty be assessed as shown.

Section 104(d)(2) Order No. 3108741 was issued for Consol's failure to maintain an adequate discharge rate on a belt drive sprinkler system. However, counsel stated that further investigation into the facts surrounding the violation revealed the system had been inspected 3 hours previously by Consol and had been found to be fully functional at that time. Therefore, MSHA did not believe the inspector's unwarrantable determination could be supported at trial. Counsel therefore proposed the order be modified to a section 104(a) citation by deleting the finding of unwarrantable failure and that a civil penalty be assessed as shown. Tr. 13-14.

DOCKET NO. WEVA 92-994

<u>Order No.</u>	<u>Date</u>	30 C.F.R. <u>Section</u>	<u>Assessment</u>	<u>Settlement</u>
3116513	06/17/91	75.220	\$1200	\$1200

Counsel stated that Consol had agreed to pay in full the proposed penalty. Tr. 14-15.

In addition to the statements of counsel, the record contains information relating to the six statutory penalty criteria found in Section 110(i) of the Act, 30 U.S.C. § 820(i).

APPROVAL OF THE SETTLEMENTS

I have considered all of this information and I find that approval of the penalties upon which the parties have agreed is warranted and reasonable and in the public interest. I further find that counsel for the Secretary has stated adequate grounds for the modifications of the citations and orders that the parties have made a part of the settlements.

Accordingly, the settlements are approved. I will order the appropriate payments and modifications at the end of this decision.

CONTESTED CASES

STIPULATIONS

At the commencement of the hearing regarding the contested cases that parties stipulated as follows:

1. Consol is the owner and operator of mines in which the subject citations and orders of withdrawal were issued;
2. The operations of Consol are subject to the jurisdiction of the Mine Act;
3. The Federal Mine Safety and Health Review Commission and the Administrative Law Judge have jurisdiction over these proceeding pursuant to Section 105 and 113 of the Mine Act, 30 U.S.C. §§ 815 and 823;
4. The individuals who issued the contested citations and orders were acting in their official capacity as authorized representatives of the Secretary when the citations and orders were issued;
5. True copies of each of the citations and orders at issue were served on Consol as required by the Act;

6. The total proposed penalty for the violations alleged in the citations and orders contested by Consol will not effect Consol's ability to continue in business;

7. The citations and orders that will be submitted as exhibits are authentic copies of the citations and orders that are at issue;

8. The proposed assessment forms that will be submitted as exhibits set forth accurately Consol's size, production, hours worked per year and the total number of assessed violations in the 24 months preceding the date of the alleged violations.

See Tr. 17-18.

DOCKET NO. WEVA 92-933

ORDER NO. 3715916, 01/08/92, 30 C.F.R. § 75.400

MODIFICATION OF THE ORDER

MSHA Inspector Lynn Workley when issuing this order of withdraw found the alleged violation of section 75.400 to be S&S. Subsequently, the order was the subject of a conference between MSHA and Consol. As a result of the conference the order was modified to delete the S&S finding. In a letter dated December 2, 1992, counsel for the Secretary stated to counsel for Consol that this modification was an error. Further, she stated that she had advised Consol's counsel of this error during a December 1, 1992 telephone conversation. Finally, she stated that she intended to present evidence regarding the alleged S&S nature of the violation at the December 8, 1992 hearing.

Prior to presenting her case, counsel for the Secretary moved to amend the order to include an S&S finding. Tr. 18-19. Consol's counsel objected, expressing his belief that Consol should be able to rely on what was done at the conference. Tr. 20. Counsel for the Secretary responded that such an amendment is permissible, provided the operator is not prejudiced. Tr. 21.

I note that in order to grant the motion I must find not only a lack of prejudice, but also that the moving party is not guilty of bad faith, See Wyoming Fuels Corp., 14 FMSHRC 1282, 1289-90 (August 1992). Counsel for Consol candidly stated Consol was not prejudiced. Tr. 21. Further, far from exhibiting bad faith, counsel for the Secretary seasonably advised Consol's counsel of how she intended to proceed. Accordingly, the motion is granted and the inspector's S&S finding is restored to Order No. 3715916.

THE VIOLATION

THE EVIDENCE

The order states:

Combustible material had been permitted to accumulate on the 2 left belt, in that a pile of fine dry coal dust up to 6 inches deep was under the belt at the first low bottom roller and there was a layer of dry float coal dust on the transfer structure, water line, and belt structure, from the transfer inby for 30 feet on the 2 left belt. The float coal dust was dry, black and powdery and varied from 1/16 to 1/4 inch deep.

Exh. P-2.¹

Inspector Workley stated that when he inspected the Osage No. 3 Mine on January 13, 1992, he was accompanied by the representative of miners and by Consol's safety escort, Norm Hill. Tr. I 28. Workley was familiar with the mine in that he had inspected it in its entirety on several prior occasions. Tr. I 27. The inspection party approached the 2 Left section belt transfer, the point at which the 2 Left belt dumps onto the main belt, and Workley observed accumulations of coal dust on the top of the transfer structure, on the bearing box for the transfer roller, and on the water line above the 2 Left section belt and the belt structure. The dust was black in color and extended a total distance of approximately 30 feet. To gage the depth of the dust Workley ran his finger through it and found that it ranged for 1/16 to 1/4 inch deep. Tr. I 29.

Under the bottom belt of the 2 Left section belt Workley also observed fine coal and coal dust. The material was in a pile and Workley placed his hand in the pile and determined that the coal and coal dust was dry. Also, he measured the pile with a ruler and found it to be approximately six inches deep and three feet square. Tr. I 29-30.

¹ 30 C.F.R. § 75.400 provides:

Coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on electric equipment therein.

Workley explained that due to the amount of coal dust present he was of the opinion the accumulation had existed for several days. Further, he explained that the area of the 2 Left section belt transfer must be examined once each shift and that miners are at times required to shovel the belt. Thus, it was his opinion that the area of the 2 Left section belt transfer constituted active workings. ("Active workings" is defined as "any place in a coal mine where miners are normally required to work or travel. 30 C.F.R. § 75.2(g)(4).) Because section 75.400 prohibits the accumulation of float coal dust and coal dust in active workings, Workley believed that the condition constituted a violation of the regulation.

Consol's chief safety inspector, Earl Kennedy, stated that he was at the mine on January 8, and that approximately one hour before Workley cited the violation, he, Kennedy, had walked past the 2 Left section belt transfer area looking for hazards on the belt line. When asked what he had observed, Kennedy responded:

I seen an area that was well rock dusted. I seen an area that was properly ventilated. I seen an area where there was no ignition sources. I seen an area that had fire suppression, heat sensors, belt scrapers, no rubbing, nothing hot, proper walkways, [and] dates where the fire bosses had been . . . recently. I seen an area that I would have been proud of.

Tr. I 81. When asked whether he had noticed accumulations of coal dust Kennedy replied, "I saw what I just described." Id. Kennedy stated that when he heard that an order had been written on conditions in the area he "almost fell down." Id. However, Kennedy added that the 2 Left section belt transfer had two levels -- an upper and a lower level -- and that he could not have seen the area cited by Workley for accumulations of float coal dust, an area visible from the upper level, because he, Kennedy, was on the lower level. Tr. I 82-84.

After passing the 2 Left section belt transfer, Kennedy traveled to other areas of the mine, but he returned to the area of the 2 Left section belt transfer after hearing that the subject order had been issued. He arrived while the alleged accumulations were being cleaned up. Kennedy maintained that if there was an accumulation of anything in the area it was a pile of rust and dirt, reddish brown in color, under the belt. This material had been scraped from the belt by the belt scrapers and had fallen under the belt. Tr. I 85. Kennedy believed that the heavier particles of rust and dirt fell to the floor, particularly under the bottom roller scraper, and the finer

particles were put into airborne suspension and as dust ended up on the belt structure. Although he admitted that "there was some coal dust" on the belt structure, most of what was on the belt structure, was of the fine, reddish brown rust and dirt particles. Tr. I 86-87.

William Kun also testified for Consol. Kun has been the safety superintendent at the mine since May 1985. Kun stated that 3 days before the order was issued he traveled to the area of the 2 Left section belt transfer and noticed brownish/black material -- "muck, water, whatever" -- under the belt. Kun was certain that whatever the material was, it was not float coal dust or spilled coal. Tr. I 113.

EXISTENCE OF THE VIOLATION

Workley, an experienced mine inspector, was a cogent and credible witness. He described in detail the float coal dust, coal dust and loose coal that he had observed. He determined its depth. He estimated and measured its extent. He further determined through a hands-on approach that the accumulation under the belt was dry. Kennedy did none of this and I fully credit Workley's testimony regarding what he observed under the belt.

With regard to the float coal dust on the transfer structure, the belt structure and the water line, I note Kennedy's admission that he could not see the structure on the upper level during his first visit to the area. Kennedy only viewed the area after abatement had begun, and I credit Workley's testimony that when Kennedy arrived some float coal dust had not yet been removed and still was present. Workley had remained in the 2 Left section belt transfer area after issuing the order and he was monitoring the abatement procedure. Therefore, I find the weight of the evidence established that the accumulations existed as described by Workley.

Loose coal and coal dust is combustible, and Consol does not contend that the area of the 2 Left section belt transfer was an inactive working. Accordingly, I conclude the violation of section 75.400 has been proven as charged.

S&S AND GRAVITY

Workley stated that he considered the violation to be of a S&S nature because coal dust once ignited can go into suspension and propagate a mine fire or an explosion. In his opinion, such a result is reasonably likely to occur when accumulations are

adjacent to potential ignition sources. Tr. I 40-41. As Workley put it:

When you permit combustible material to accumulate in the coal mine, all that is necessary . . . is an ignition source. Rollers on belt lines go bad frequently. We have difficulties with electrical cables, rocks fall on them can split them open. There is sparking potential. If an ignition source occur[s] and the float dust or dry coal dust is present you have a fire. In a coal mine a fire can be a disaster in no time.

Tr. I 41.

Turning from the general to the specific, Workley described several potential ignition sources that he believed made the cited accumulations a fire or an explosion waiting to happen. He noted that there were bearings on both sides of the transfer roller and that all of the belt rollers had bearings. Workley maintained that there were approximately 20 roller bearings for every 10 feet of belt. Tr. I 41-42. He stated that when a bearing "freezes" metal rubs on metal as the roller turns and the roller shaft can become red hot from the friction in "just a short period of time." Tr. I 42. Workley stated that he had been told by mine management that as many as a dozen rollers previously had gone bad on one belt in one shift. Tr. I 44.

In addition, Workley explained the way a bearing could freeze -- dust and dirt could enter the bearing and create excessive friction and heat. "Once the bearing starts deteriorating it just melts." Id.

A further potential ignition source was the bottom belt which could shift while it was running and could cut into the belt structure. The resulting heat from the friction could start a fire or an explosion. Tr. I 44-46.

Finally, Workley stated that a layer of float coal dust thinner than a ordinary sheet of paper would propagate an explosion. When asked if, in his opinion, there was enough float coal dust present in the left belt transfer area to propagate an explosion, Workley replied, "Dozens of times. More than enough." Tr. I 46.

If a fire were to occur Workley believed that one or more miners would probably suffer burns or smoke inhalation attempting to extinguish the fire. If an explosion were to occur, not only would miners in the vicinity of the 2 Left section belt transfer

area be subject to concussive injuries but miners in other entries could be injured by flying concrete blocks blown out of stoppings. Tr. I 49-50.

Workley admitted that the walkways, the roof and the ribs surrounding the accumulations were well rock dusted and he agreed that if there were an ignition and rock dust were blown into the air by the ignition, the rock dust could prevent propagation of the explosion. Tr. I 59-60. He also agreed that fire prevention devices such as a carbon dioxide monitoring system and a fire suppression system were installed along the belt line, Tr. I 66-67, and he acknowledged that at the time he issued the subject order, no defective bearings were present in the 2 Left section belt transfer area. Tr. I 68.

Kennedy, testifying on Consol's behalf, he stated that the bearings on the transfer rollers were self-greased and thus were not as subject to failure from dust or dirt getting into their mechanisms. Tr. I 95. On the other hand, the bearings for the belt rollers were not self-greased and he agreed that they periodically "go bad." Tr. I 97. According to Kennedy, when this happened the top rollers rarely got hot enough to cause a fire.

Although Kennedy admitted, "I do know of situations where belts cutting have caused belt fires," he maintained that the subject belt structure was of a new design that prevented the belt from ever cutting into the structure. Tr. I 97-98. Kennedy also maintained that if the area of coal dust cited by Workley had been present, it would have presented a "serious problem" only if it had been "completely around the area . . . [and had been] dry float dust, just like gunpowder," which it was not. Tr. I 101.

The Commission has held that a violation is "significant and substantial" if, based on the particular facts surrounding the violation, there exists a "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 further explained:

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

in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

I have concluded that the accumulations existed as described by Workley and that they constituted a violation of section 75.400. Further, there certainly was a measure of danger contributed to by the violation. Obviously, loose coal can burn. In addition, float coal dust and coal dust can burn and, if put into suspension, can propagate an explosion. Moreover, multiple ignition sources were present. Even if I were to find that Kennedy was right about the belt not being able to cut into the belt structure and that the self-greasing roller bearings were less likely to fail (and I have no reason to disbelieve his statements in this regard) there remain the many non-self-greasing roller bearings, which as both Workley and Kennedy agreed, were subject to failure and overheating. The fact that the bottom non-self greasing rollers were more likely to fail does not mean that those for the top belt did not occasionally fail as well and, in any event, the pile of coal dust and loose coal under the bottom belt was adjacent to the bottom rollers. Exh. P-1.

I believe the evidence establishes that if normal mining operations had continued stuck roller bearings would have resulted and an actual ignition source would have been present. Thus, the hazard contributed to by the violation, a fire or explosion in the active workings in question, was reasonably likely to occur and posed a reasonable likelihood of injury to miners working in the area of the 2 Left section belt transfer. Obviously, any injuries resulting from such a fire or explosion would be of a reasonably serious nature.

In sum, I agree with Workley that the violation was S&S. I also conclude that it was a serious violation. In assessing the gravity of the violation, both the potential hazard to the safety of miners and the probability of the hazard occurring must be analyzed. Here the potential hazard was grave. Underground fires and/or explosions present a very real threat of death or serious injury. Moreover, as I have found, had normal mining operations continued, a frozen roller bearing reasonably could have been expected and an actual ignition source would have been present.

UNWARRANTABLE FAILURE AND NEGLIGENCE

Workley testified that a certified person must examine the area of the 2 Left section belt transfer at least one time each shift. Tr. I 50. Given the quantity of the accumulations, he estimated that it had taken up to three days for them to reach the state he had observed. Further, given the location of the

accumulations and the fact that they were "easily observable," Workley believed that Consol's failure to detect and correct the condition was the result of unwarrantable failure.² Tr. I 50-51.

In Emery Mining Corp., 9 FMSHRC 1997, 2000-04 (December 1987), and Youghiogheny & Ohio Coal Co., 9 FMSHRC 2007, 2010 (December 1087), the Commission held that "unwarrantable failure means aggravated conduct, constituting more than ordinary negligence, by an operator in relation to a violation of the Act." The Commission stated that while negligence is conduct that is "inadvertent," or "inattentive," conduct constituting an unwarrantable failure is conduct that is "not justifiable" or "inexcusable". Emery, supra

As previously stated, Workley was a cogent and credible witness. His estimates of the length of time the accumulations had existed and his opinion that the accumulations should have been easily detected by the preshift examiners are worthy of belief. For example, as noted below, Workley stated that he could see the float coal dust from 50 feet away, and I accept this to be a statement of fact. Moreover, the pile of coal dust and loose coal under the belt was visually obvious.

Thus, in view of the size and extent of the accumulations and the fact that it took several shifts for the accumulations to reach the point at which Workley found them, I hold that the repeated failure of Consol to detect the accumulations and to remove or to neutralize them was the result of Consol's unwarrantable failure to comply with section 75.400.

I further conclude that Consol exhibited high negligence in overlooking the prohibited accumulations for the several shifts that they existed.

SECTION 104(d)(2) ORDER NO. 3715920, 1/13/92, 30 C.F.R. § 75.400

Order No. 3715920 states:

Combustible material in the form of dry loose coal and coal dust had accumulated between and beside the rails of the old 11 North Spur from roof and rib sloughage and from spillage off of loads parked there. The loose coal has been ground into fine dry black powder where the wheels of loaded coal cars travel, and is laying against the rails

² Workley testified that he could see the black float coal dust from 50 feet away. Tr. I 50-51.

which are the return conductors of the 300 volt D.C. trolley system. The combustible [material has] accumulated mostly in the last 400 feet of the spur. The most recent date board was 11/25/91 on a crib near the end of the spur.

Exh P-7. The order alleges a S&S violation of section 75.400.

Workley testified that he inspected the 11 north spur, a side track running off of the main track where empty and/or unneeded mine cars regularly were parked. The mine cars were backed into and pulled out of the spur by a locomotive that derived its power from the track trolley wire. Tr. I 131-132. Workley described the spur as extending approximately 1,000 feet off of the main track. Tr. I 124-127.³ The trolley wire ran along the main track and extended about 30 feet into the spur. Tr. I 146. At the end of the spur there was a crib on which there was a date board. The most recent date on the board was November 25, 1991. Tr. I 147.

Workley testified that on January 13, he commenced his inspection of the spur at its mouth -- i.e., the point where the spur joined the main track. Mine cars were parked in the spur and Workley had to walk between the rib and the cars to inspect the area. Tr. I 149. In the back 400 feet of the spur he observed accumulations of dry, loose coal and coal dust along the track and between the rails. Workley stated that the coal and coal dust came from small chunks of coal that had fallen from the mine roof and ribs. He also indicated that he believed there was some spillage from the mine cars. Tr. I 125, 128. Adjacent to the rail the coal had been finely ground. It was black in color and Workley picked some up and described it as having the consistency of "facial powder." Tr. I 128.

The coal and coal dust became more extensive as Workley neared the end of the spur. The entry was approximately 13 feet wide. Toward the back of the entry the accumulations extended from rib to rib. Tr. I 128. The coal and coal dust varied in thickness from one inch to six or seven inches, and, according to Workley, all of it was extremely dry. Tr. 128-129.

³ According to Workley, a full trip of mine cars contains about 35 cars. If such were parked in the spur, the cars would extend from the mouth of the spur nearly to its end. Tr. I 147.

EXISTENCE OF THE VIOLATION

Consol did not offer testimony to counter Workley's description of the condition of the spur. Kun, the only witness to testify for Consol regarding the alleged violation, had nothing to say concerning the existence of the coal and coal dust. Accordingly, I find that the conditions described by Workley in fact existed.

In defining a prohibited "accumulation" for section 75.400 purposes, the Commission has noted that while "some spillage of combustible materials may be inevitable in mining operations. . . it is clear that those masses of combustible materials that could cause or propagate a fire or explosion are what Congress intended to proscribe." Old Ben Coal Co. 2 FMSHRC 2808 (October 1980). As I will describe when discussing the issue of S&S, Workley credibly testified that given the extent and nature of the coal and coal dust and its location next to potential ignition sources, the accumulations not only could cause a mine fire, it was reasonably likely that they would. Tr. I 131-132. I therefore conclude that the Secretary has proven that the cited conditions constituted a violation of section 75.400.

S&S AND GRAVITY

Workley believed the accumulations constituted a S&S contribution to a mine safety hazard. He noted the extremely dry, finely ground coal dust and loose coal lay approximate to the rails and adjacent to the wheels of the mine cars. Workley explained that the locomotive pulling the cars drew up to 2,000 amps of direct current and that the current passed through the cars to the wheels and then to the rails and then to a rectifier to complete a circuit. Tr. I 131-132. If there was a gap between the wheels and the rail or a gap between the track joints, arcing could occur. Tr. I 134. Workley stated that such arcing was not unusual and that he had observed it almost every time he has seen mine cars being moved by a locomotive. ("I've seen sparks and small arcs come off the wheels of mine cars almost every time that I'm alongside the haulage and the trip goes past with the motor applying power." Tr. I 135.) Workley noted that if a locomotive were moving a full trip of cars into or out of the spur, the arcing and sparking could occur almost to the end of the spur. He believed that the coal and fine dry coal dust near the track could be "very easily ignited" and that given the extent of the accumulated material a fire could "get out of hand very quickly." Tr. I 137.

Workley also remarked upon the absence of heat sensors and fire suppression devices in the spur and stated that while the locomotive operator would be immediately subject to the dangers of smoke inhalation and burn injuries, if smoke got into the main line haulage entry, all miners working along the haulage or

traveling it would be endangered. Tr. I 138-139, 140. However, Workley also observed that the spur is ventilated by air that passes from the main line haulage into the spur and travels to the end of the spur before exiting into the return. Tr. 150. Thus, should a fire occur in the spur, in the course of normal mining operations the only person who would be in by the smoke would be the examiner who must walk and examine the spur and the returns. Tr. I 151.

Consol offered no testimony refuting Workley's contentions regarding the ignition source presented by the mine cars. Although Kun testified that he never had observed sparks caused by moving cars in the spur, he also stated that he had never been in the spur when cars were being moved. Tr I 174. Moreover, he agreed that he had seen sparks when he had seen cars being moved in other areas of the mine. Tr. I 186.

I conclude that the Secretary has established the S&S nature of the violation. The violation existed as charged. The accumulated coal and coal dust was located in an area that was required to be preshift examined, as Workley and Kun agreed. Tr. I 141, 171. Thus, miners were exposed to the hazard. The mass of coal and coal dust that could have burned was large. Therefore, a "measure of danger to safety" was presented by the cited accumulation.

Kun stated that 95 to 98 percent of the time he had been in the spur he found it to be full of coal cars. Tr. I 185. I accept this and conclude that there was a great deal of coal car movement into and out of the spur. Given the fact that arcing and sparking would most likely occur in the immediate vicinity of the loose coal and coal dust whenever cars were moved, I find that had normal mining operations continued there was a reasonable likelihood of fire.

Moreover, such a fire was reasonably likely to cause injury to the locomotive operator or to any certified person from Consol who was examining the spur or the return air courses that ventilated by air that had passed through the spur. Finally, and as Workley noted, such persons would be subject to burns and smoke inhalation, injuries that would be of a reasonably serious nature.

In assessing the gravity of the violation, I note that the potential hazard was grave. Smoke inhalation and burns can severely injure miners. Given the extent of the accumulations, their close proximity to the tracks, the probably frequency of arcing or sparking along the tracks and the regular presence of miners proximate to the hazards, I conclude that this was a very serious violation.

UNWARRANTABLE FAILURE AND NEGLIGENCE

Workley believed that the coal and coal dust "took days or weeks or maybe even a month" to accumulate. Tr. I 141. He further stated, as already noted, that a certified person is required to examine the spur, and he added that any person who walked to the end of the spur could have seen the accumulations. Tr. I 141-142. To Workley, the presence of the accumulations signaled the failure of the preshift examination process. Tr. I 142.

Kun emphasized the difficulty of making the required examination. He testified that the entry had been cut with a borer. As a result, the ribs sloped from the roof. Since mine cars usually were in the entry the examiner had to walk between the sides of the cars and the ribs and there was very little clearance. Tr. I 166-167. In addition, although the spur was six feet high for its first 150 feet, it decreased to 4 feet after that point. Tr. I 165. Thus, the preshift examiner not only had to bend as he traveled the entry, he also had to drop one shoulder as he walked. Tr. I 165-166, 168. Further, because the coal and coal dust was compacted, it was difficult for the preshift examiner to see under the mine cars, there being about one to one and a half inches of clearance between the top of the compacted material and the bottom of the mine cars. Tr. 169-170, 182. However, Kun subsequently admitted that there was approximately 24 inches of space between each mine car and that it was possible to see the mine floor between the cars. Tr. I 185.

I accept Kun's testimony concerning the inconveniences and complications involved in examining the spur, nevertheless whatever the difficulties the area is required to be examined so that hazardous conditions are reported and corrected. There was no testimony offered to refute Workley's belief that the accumulations had existed for some days at least, and I agree with Workley that the extent of the accumulations and the length of time they existed makes it clear that the preshift examination was wholly inadequate. Moreover, while it may well have been virtually impossible to look beneath the cars, the accumulations should have been readily apparent between the cars. Therefore, I also agree with Workley that in allowing the violation to exist, Consol's preshift examiner or examiners exhibited conduct that was not justifiable or inexcusable, and I conclude that the violation was indeed due to Consol's unwarrantable failure to comply with section 75.400.

I further conclude that Consol exhibited high negligence in overlooking the prohibited accumulations for the several shifts that they existed.

WEVA 92-988

SECTION 104(a) CITATION NO. 3718466, 12/3/92

30 C.F.R. § 75.202(a)

Citation No. 3718466 states:

There is an area of inadequately supported roof in the 2 left return aircourse. At 60 feet outby spad 818 there is a slip outby a roof bolt and a 1/2 inch crack extends into the rock at a 45 [degree] angle. The top is sagging and drummy outby the slip and the bolt is 48 inches away.

Exh P-1A. The citation alleges a S&S violation of section 75.202(a).⁴

Workley testified that on December 3, 1992, he was inspecting the 2 Left return aircourse near the mouth of the section when he observed a crack in the mine roof 1/2 inch to 3/4 inch wide. The crack was approximately 5 feet long and ran across the entry. The roof was approximately 6 1/2 to 7 feet high. One side of the crack was "hanging" about an inch below the other side. Tr. 190-191. Workley stated that he measured the depth of the crack with a ruler and found it to be 18 inches. The crack extended into the roof on an angle of approximately 45 degrees. Tr. I 191.

Workley believed that the crack indicated a vertical fault in the roof strata. He explained that such faults are especially dangerous because the roof can slip and fall without warning along the fault line. Tr. 192-193. Because of this and because

⁴ 30 C.F.R. § 75.202(a) states:

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

the crack was in the middle of an entry that was daily traveled by miners, Workley believed that the condition violated section 75.202(a).⁵

EXISTENCE OF THE VIOLATION

Consol did not challenge the fact that miners at the Osage No. 3 Mine worked and traveled the entry directly beneath the cited slip. Thus, the question is whether the roof was supported or otherwise controlled on December 3 to protect those persons from a roof fall?

Kun testified that approximately two weeks after the violation was abated he traveled the entry. While he observed posts that had been set to abate the condition, he was unaware that a citation had been written for the condition and he was curious as to why the posts had been set. Tr. I 206.⁶ After he found out that a citation had been issued, he went back to look more closely at the condition. He also had looked at the condition a week before the hearing. According to Kun, when he observed the roof the week before the hearing its condition was unchanged from when he had seen it after learning about the citation. Tr I 207-207. Kun stated that the posts did not appear to be taking any weight and wedges at the top of the posts were not squeezed-out, as they would have been if the roof were sagging on the posts. Tr. I 210-211. In addition, the crack had not widened. Tr. I 211.

Kun measured the spacing to the roof bolts and found them to be approximately 48 inches apart in the area of the crack. Tr. 212. (Workley did not measure the roof bolt spacing, but had testified that the roof control plan required bolts to be installed on five foot centers and that the crack developed in an area between the bolts. Tr. I 192. Since Kun actually measured the spacing -- and since the bolts were not repositioned between the time Workley cited the violation and Kun measured -- I accept

⁵ Workley testified that miners would "drag" the entry and would do so at least daily. Tr. I 195. (He described dragging as follows: "a piece of brattice cloth is usually attaches to a board or a stick. The miners drag that along behind them down the aircourse. As it drags on the mine floor it turns [the] coal dust down into the rock dust." *Id.*) In his opinion other miners who would be subject to the roof fall hazard were persons examining the return air course, persons rock fall hazard were persons examining the return air course, persons rock dusting it and any mine who might use the aircourse for "sanitary purposes." Tr. I 199.

⁶ Workley had testified that given the height of the entry and the fact that one side of the crack overhung the other by about one inch, it would not have been unusual for someone examining the entry to have missed seeing the crack. "If he didn't look up at just the right location as he was passing under it, he would miss the crack." Tr. I 203.

Kun's testimony that the roof bolts in the area of the crack were approximately one foot closer together than required by the plan.) In addition, Kun testified that a plank had been installed at one end of the crack and that the back portion of the crack was supported by the plank. Tr. I 210. (Workley could not recall if the plank had been in place on December 3, and I accept Kun's testimony in this regard. Tr. I 210.)

Kun believed that when roof bolts had been installed in the entry, the weakness in the roof had been detected by Consol, the spacing of the roof bolts had been accordingly reduced and the plank had been installed. Given the reduced spacing of the roof bolts and the presence of the plank, he did not believe that roof would have fallen. Tr. I 209-210, 212-213. However, he also stated that "it's possible additional posts should have been set . . . [i]t's a judgement thing that everybody has to make." Tr. I 219.

I am persuaded that the Secretary has established the existence of the violation. Workley's testimony regarding the inherent danger of a verticle fracture in the plane of the roof strata is compelling. As Workley explained, a verticle fracture in the Pittsburgh coal seam is particularly likely to produce unpredicted falls between the roof bolts. Tr. I 197-198. Moreover, while Kun testified that the posts set to abate the violation did not appear to be taking any undue weight and while I fully credit his testimony, I do not find it relevant to whether or not on December 3 the roof was supported to protect persons from roof falls. The posts had been set to abate the violation and all that I can conclude from Kun's testimony is that they were doing their job.

Moreover, Consol does not dispute Workley's testimony that the 2 Left return aircourse is required to be traveled weekly by a person examining the aircourse and that it at least occasionally has to be rock dusted.

I therefore hold that on December 3, the area cited was an area where persons were required to work and travel and the roof was not supported to protect those persons from falls.

S&S AND GRAVITY

The evidence establishes a violation of the cited standard. There was a measure of danger contributed to by the failure to support the roof to protect those working and traveling under it from the danger of a roof fall, in that the lack of adequate support, a roof fall could occur at any moment and without warning. Further, during the course of continued normal mining operations, miners were required to travel and work under the cited area, and given the propensity of the roof to fall along the fault line, I conclude it was reasonably likely that had normal mining operations continued the roof would have fallen and struck a miner. Finally, as Workley stated, the fall of a rock

weighing at least one half of a ton and falling from six and one half feet on an unsuspecting miner would seriously disable, if not kill outright, the person struck. Tr. I 199. Thus, the S&S designation was appropriate and is affirmed.

Also, I conclude that this was a serious violation. As I have found, the potential hazard to miners was at least one of disabling injury. Because the entry was not traveled or worked in during every shift, there was a somewhat reduced likelihood of a miner being injured. Thus, what might otherwise have been found to constitute an extremely serious violation is found to be serious instead.

NEGLIGENCE

At the time he cited the violation, Workley believed that it was due to Consol's "low" negligence. See Exh. P-1A. This assessment of negligence, made contemporaneously with the citation of the violation, was confirmed by Workley's testimony. Workley persuasively explained how the crack would have been easy for the someone examining the return aircourse to miss. The examiner would have had to "look up at just the right location as he passed under it." Tr. I 203. Even an experienced mine examiner easily could have walked by the area and not have detected the crack. Tr. I 201. Therefore, I agree with Workley and find that the violation existed due to a low degree of negligence on Consol's part.

WEVA 92-921

SECTION 104(d)(2) ORDER NO. 3315335, 7/29/91, 30 C.F.R. § 75.515

Order No. 3315335 states:

On the 6 South West Longwall at the power center a properly assembled entrance was not provided for the shearer circuit trailing cable plug. Bolts were missing from the back of the cable plug assembly thereby not providing proper strain relief. Mine management was told on July 25, 1991 that this needed to be repaired before starting load coal with the longwall. Two passes were mined. Bill Rice was the responsible official.

Exh. P-3(B). The order alleges an S&S violation of section 75.515 and that the violation was the result of Consol's unwarrantable failure to comply with the cited standard.⁷

Michael Kalich, an electrical inspector for MSHA, testified on behalf of the Secretary. Kalich explained that on July 25, 1991, he conducted a compliance assistance inspection of the 6 southwest longwall of Consol's Humphrey No. 7 Mine. The longwall was in the process of being set up and consequently was not yet in operation. The inspection began at the longwall power center. Tr. II 13. (The power center was located on intake air at the track heading. At the power center incoming 7200 high voltage power was transformed to the 995 voltage power that was utilized on the longwall. Tr II 13-14.)

Kalich stated that the power center had four cables that went from the center to the longwall master control boxes. The cables were attached to the center by a cable coupler. The case of the coupler was metal. He explained that the coupler consisted of two parts: one part was bolted to the power center itself, the other part was in essence a plug that terminated the cable and that plugged onto the part of the coupler attached to the power center. Kalich drew an analogy, "[I]t's a large version of a plug that you would use in your house. It just has more connection points." Tr. II 16.

Upon inspecting the cables, Kalich found that one had a coupler (also known as a strain clamp) that was missing a bolt. Tr. II 14.

Kalich identified a picture of a coupler similar to the one that he had observed. Exh. P-1(B). Kalich testified that the cable that terminated in the coupler was about two and one half inches in diameter. The coupler was approximately 18 inches long and 10 to 12 inches wide. At the point where the cable entered the coupler, a bolted cable clamp helped to hold the cable in place. Tr. II 16-17, see also Exh P-1(B)(part "I" of bottom diagram). The purpose of the clamp was to prevent strain on the cable as it entered the coupler. Tr. II 17.

Kalich stated that during his inspection on July 25, he found missing one of the bolts that secured the clamp to the cable. When he returned on July 29 and conducted a regular inspection of the longwall, the bolt was still missing and he issued the subject order of withdrawal. Tr. II 17. Kalich

⁷ Section 75.515 states in pertinent part:

Cables shall enter metal frames of motors, splice boxes, and electric compartments only through proper fittings.

maintained that because the clamp was loose, the cable was loose where it entered the coupler and that the cable could be moved. Kalich stated that had the bolt been present the cable could not have been moved. Tr. II 35-36.

Kalich further stated that by not having the clamp tightened around the cable, when the cable was pulled it would place a strain on the internal connections inside the coupler. If the internal connections, which are not insulated, were pulled loose the wires could move around inside the coupler housing, they could contact other wires and create an electrical fault inside the coupler. Tr. II 25. In turn, this could burn a hole in the metal case of the coupler and cause a fire. In addition, any person then in contact with the coupler would be subject to a shock and burn hazard. Tr. II 26-27.

Stanley Brozik, the safety supervisor at the mine, testified on behalf of Consol. Brozik traveled with Kalich on July 29 and the subject withdrawal order was issued to him. Brozik stated that the cited clamp was secured around the cable with two bolts. He agreed that on July 29, one of the bolts was present and one was missing. He further agreed that Kalich was able to wiggle the cable because the clamp was not tightened on one side. Tr. II 71-72, 75.

EXISTENCE OF THE VIOLATION

The evidence establishes that the cable entered the metal frame of the cable coupler through a fitting that was loose due to the missing bolt on the strain clamp. A loose fitting is not a proper fitting and I conclude that the violation of section 75.515 existed as charged.

S&S AND GRAVITY

There was a violation of the underlying safety standard. The discrete safety hazard contributed to by the violation was described by Kalich:

There would have to be some way that sufficient strain or movement would be applied to the cable to cause the connections to become loose or to be pulled out inside the coupler. . . [T]hen you would have a bare wire flopping about inside the coupler . . . [and if phase to phase contact occurred] you would have arcing, burning, and the possibility of a fire.

Tr. II 53. As noted, Kalich also believed that in the event of phase to phase contact, a shock hazard would exist for anyone handling the coupler. Tr. II 27. Further, Kalich testified that during the course of normal mining operations the cable would be pulled when miners picked up and moved the cable and that over time, the movement of the cable would loosen the connections. Tr. II 48-50. This testimony was not disputed by Brozik. I conclude therefore that the evidence established the loose clamp contributed to the possibility of a fire endangering those in the immediate area of the power center or working inby and of a shock endangering anyone handling the coupler at the moment phase to phase contact occurred and thus that the second element of the Mathies test has been satisfied. Further, because any resulting injury from burns, smoke inhalation or shock would be of a reasonably serious nature, the fourth element likewise has been satisfied.

As is frequently the case when the Secretary alleges that a violation is S&S, the question is whether the Secretary has established a reasonable likelihood that the hazard will result in an injury. In other words, had normal mining operations continued on the longwall, would there have been a reasonable likelihood of "an event in which there [would have been] an injury?" U.S. Steel Mining Co., 6 FMSHRC 1834,1836 (August 1984).

Here, I conclude the answer is "no." Kalich stated that in order for there to be a fire or shock hazard, the connectors inside the coupler would have had to contact one another. In order to do this the cable and the coupler would have had to be subject to repeated movement. The only way the cable and coupler would be moved, according to Kalich, was manually or by using a winch. Kalich believed that a person pulling once on the cable would not be able to loosen the connections, that the movements would have to take place over time, but he did not know how much movement would be required. Tr. II 48. Nor was he able to testify that he had ever seen internal coupler connectors that made contact under circumstances similar to those that he cited. Tr. II 58. Further, he admitted that in order for the winch to move the cable in such a way as to put any strain on the coupler, the winch would have to have been used incorrectly. Given these factors, I cannot conclude that the Secretary has established that had normal mining operations continued on the longwall it

was reasonably likely that the connectors inside the coupler would have become detached and touched one another leading to a fire or to a shock injury.⁸

Even though I do not find that the violation of section 75.515 was S&S, I still conclude that it was of a serious nature. A potential hazard to miners from burns, smoke inhalation and/or shock injuries existed as did the possibility that the violation could cause such hazards to occur. In my view the fact that the hazards were not reasonably likely to occur reduces what would have been a very serious violation to one that was serious.

UNWARRANTABLE FAILURE AND NEGLIGENCE

I also conclude that the Secretary has failed to establish that the violation was due to Consol's unwarrantable failure to comply with section 75.515. Kalich's unwarrantable failure finding was based upon his compliance assistance inspection of July 25. As Kalich put it: "I had pointed the [missing bolts] out on July 25 . . . [and had] told mine management that they needed [to be] fixed before the 29th and found that they hadn't been corrected. [I]n my mind it left me no choice but to issue a [section 104](d)(2) order with high negligence." Tr. II 36-37. When asked whether he believed Consol had consciously disregarded the requirements of the standard Kalich stated: "Seeing as how I pointed it out, that's the conclusion that I c[a]me to." Tr II 43, See also Tr. II 45.

Brozik testified that the bolt had not been purposefully left off of the coupler clamp. Although, Brozik was not present on the section on July 25, he explained that he got his information about conditions on July 25 from talking with the company safety escort and "everybody on the site." Tr. II 73, 74-75. Brozik believed that on July 25 the bolt was available but that the nut to secure it was missing, and that on July 29, the nut was on the section but the mechanic had not yet attached the bolt and nut to the clamp. Tr. II 68, 70-71, 73. If the bolt was there, Brozik did not know why it had not been secured to the clamp. Tr. II 83.

The fact that the missing bolt was pointed out to Consol during the compliance assistance inspection does not, in and of

⁸ In concluding that the violation was not S&S, I have not considered the fact that should the connectors contact one another, the circuit breaker would have tripped because I accept Kalich's testimony that even if the circuit breaker worked as it was supposed to there would still have been an electrical arc before power was cut off. Tr. II 53. Rather, I am relying on what seems to me to be a dearth of evidence that the cable and coupler would be subjected to the repetitive movements necessary to cause an electrical malfunction.

itself, establish unwarrantable failure. It proves knowledge of the violative condition, but such knowledge is not a sole prerequisite for unwarrantable failure. There must be other factors that allow a conclusion of inexcusable conduct on Consol's part. Here, those factors are lacking.

It is helpful to recall that the compliance assistance inspection came at a time when production had not yet begun on the longwall and when Consol was attempting to make certain that prior to production all was "kosher" on the section. Other potential violations of regulations were pointed out to Consol. In the scope of the impending startup of the longwall, the fact that one bolt was missing from a clamp for the cable coupler on one of the cables at the power center might reasonably have been viewed by Consol as a relatively minor problem, especially since, as I have found, the condition did not pose a reasonable likelihood of producing a fire or shock accident once mining began. In this context, I conclude that it was not the kind of condition whose failure to correct would automatically rise to the level of inexcusable conduct, and this is so regardless of whether or not Brozik was right in believing that Consol had secured the missing nut but had inadvertently failed to install it.⁹

Rather than an unwarrantable failure, I conclude that the fact that the missing bolt was not installed on July 29 was likely due to inattention or inadvertence and thus that in allowing the violation Consol was negligent.

OTHER CIVIL PENALTY CRITERIA

As revealed by the proposed assessment forms contained in each docket and which the parties have stipulated accurately set forth Consol's size, the company is large. In addition, and as also stipulated by the parties, the size of any penalties assessed for the subject violations will not affect Consol's ability to continue in business. Further, I find that in each instance where a violation has been found or where the parties have sought my approval of a settlement, Consol demonstrated good faith in abating the violations. Finally, I find that Consol's history of previous violations at the mines involved is not such as should otherwise increase the penalties assessed or agreed to by the parties.

⁹ The mischief of automatically finding unwarrantable failure based solely upon conditions that have been pointed out during a compliance assistance inspection was remarked upon by counsel for Consol. Tr. II 90. I agree with him that such automatic unwarrantable findings can go far to lessen the effectiveness of the compliance assistance program, a program that has proven of great value in furthering the goals of the Act.

CIVIL PENALTY ASSESSMENTS FOR CONTESTED VIOLATIONS

DOCKET NO. WEVA 92-933

ORDER NO. 3715916, 1/8/92, 30 C.F.R. § 75.400

The Secretary has proposed a civil penalty of \$800. Noting especially that Consol is a large operator and that the violation is serious and the result of a high degree of negligence on Consol's part, I conclude that a civil penalty of \$1,000 is appropriate.

ORDER NO. 3715920, 1/13/92, 30 C.F.R. § 75.400

The Secretary has proposed a civil penalty of \$1200. For the same reasons as those set forth above, I conclude that a civil penalty of \$1,000 is appropriate.

DOCKET NO. WEVA 92-988

CITATION NO. 3718486, 12/3/92 30 C.F.R. § 75.202(a)

The Secretary has proposed a civil penalty of \$227. The violation is without question serious, the low degree of negligence on Consol's part is a significant factor mitigating what would otherwise have been a much more substantial civil penalty. I conclude that a civil penalty of \$300 is appropriate.

DOCKET NO. WEVA 92-921

ORDER NO. 3315335, 7/29/91, 30 C.F.R. § 75.515

The Secretary has proposed a civil penalty of \$1,000. Although this was a serious violation and although Consol is a large operator, I believe that given the fact that the violation was due to Consol's inadvertence or inattention rather than to its purposeful disregard of the requirements of the standard or to its inexcusable failure to comply, the proposal is excessive. I conclude that a civil penalty of \$400 is appropriate.

ORDER

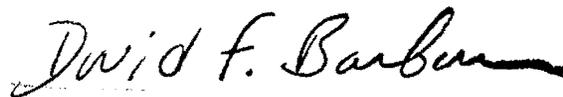
Consol is ORDERED to pay civil penalties in the settlement amounts shown above in satisfaction of the violations in question. Further, Consol is ORDERED to pay civil penalties in the assessed amounts shown above in satisfaction of the contested violations in question.

With respect to the settled cases, the Secretary is ORDERED to modify Citation No. 3307656 and Order No. 3716059 by deleting the S&S designations. The Secretary is ORDERED to modify Citation No. 3715905 and Citation No. 3718483 by deleting the

S&S designations. The Secretary is ORDERED to modify Order No. 3108769 and Order No. 3108741 to citations issued pursuant to section 104(a) after having deleted the unwarrantable failure designations.

With respect to the contested case, the Secretary is ORDERED to modify Order No. 3315335 by deleting the S&S designation and the unwarrantable designation. Further, the Secretary is ORDERED to modify Order No. 3315335 to a citation issued pursuant to section 104(a) of the Act. 30 U.S.C. 814(a).

Payment by Consol is to be made to the Secretary within thirty (30) days of the date of this decision, and upon receipt of payment, these matters are dismissed.



David F. Barbour
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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MAY 10 1993

DOUGLAS E. DEROSSETT, : DISCRIMINATION PROCEEDING
Complainant :
v. : Docket No. KENT 93-203-D
: MSHA Case No. PIKE-CD-92-14
MARTIN COUNTY COAL CORPORATION, :
Respondent : MTR Surface Mine No. 1

DECISION

Appearances: Johann F. Kerlotz, Esq., Piper, Wellman and
Bowers, Lexington, Kentucky, for Complainant;
Diana M. Carlton, Esq., Stoll, Keenan and
Park, Lexington, Kentucky, for Respondent

Before: Judge Melick

This case is before me upon the complaint by Douglas E. DeRossett under Section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801, et seq., the "Act," alleging violations of Section 105(c)(1) of the Act, by Martin County Coal Corporation (Martin County).¹ In a

¹ Section 105(c)(1) of the Act provides as follows:
"No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this Act because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine, or because such miner, representative of miners or applicant for employment is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101 or because such miner, representative of miners or applicant for employment has instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding, or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this Act."

motion to dismiss Martin County argues (1) that the "amended" complaint filed with this Commission on December 22, 1992, included issues not presented in the original complaint filed by Mr. DeRossett on August 10, 1992, with the Secretary of Labor's Mine Safety and Health Administration (MSHA) and, (2) that the complaint was filed untimely.

The initial complaint filed August 10, 1992, with MSHA states as follows:

I was discharged by Martin County Coal Corp., MTR Surface Mine No. 1, in November 1989, for complaining about safety hazards. I am requesting reinstatement to my original job, receive backpay plus interest, have all benefits reinstated and to have all records pertaining to the discharge removed from my personnel file.

The amended complaint filed with this Commission on December 22, 1992, claims, as additional violations of Section 105(c)(1), the following:

* * *

8. Complainant on numerous occasions made complaints to supervisory personnel about unsafe working conditions, which complaints were a substantial factor in motivating Defendant to move complainant to second shift in April, 1988 during a reduction in force, despite the retention on the first shift of a position for which Complainant was qualified and entitled to fill.

* * *

10. Complainant sought reinstatement to his former position on numerous occasions following his discharge, but Defendant refused to rehire him despite the recall of less senior individuals following the December 4, 1989, reduction in force. Complainant's safety complaints were a substantial factor in Defendant's decision not to rehire him.

* * *

Even assuming, arguendo, however, that DeRossett's complaint to MSHA filed August 10, 1992, did indeed incorporate the allegations of discrimination contained in the amended complaint filed with this Commission on December 22, 1992, and even assuming that such allegations were investigated by MSHA, I nevertheless find that the

complaint was filed untimely and that the untimely filing cannot be excused.²

In relevant part, Section 105(c)(1) of the Act prohibits discrimination against, or the discharge of, a miner because of his exercise of any statutory right afforded by the Act. n. 1, supra. If a miner believes that he has been discharged in violation of the Act and wishes to invoke his remedies under the Act, he must file his initial discrimination complaint with the Secretary of Labor within 60 days after the alleged violation in accordance with Section 105(c)(2) of the Act.³ The Commission has held that the purpose of the 60-day time limit is to avoid stale claims, but that a miner's late filing may be excused on the basis of "justifiable circumstances." Hollis v. Consolidation Coal Company, 6 FMSHRC 21 (1984); Herman v. IMCO Services, 4 FMSHRC 2135 (1982). In those decisions the Commission cited the Act's legislative history relevant to the 60-day time limit:

While this time-limit is necessary to avoid stale claims being brought, it should not be construed strictly where the filing of a complaint is delayed under justifiable circumstances. Circumstances which could warrant the extension of the time-limit would include a case where the miner within the 60-day period brings the complaint to the attention of another agency or to his employer, or the miner fails to meet the time-limit because he is misled as to or misunderstands his rights under the Act. (citation omitted).

² It appears that Mr. DeRossett did in fact include in a statement on August 14, 1992, detailing his complaint to MSHA, his allegations of being transferred in April 1988 to the evening shift and of several undated efforts subsequent to his December 4, 1989, layoff seeking reinstatement with Martin County. Accordingly, it would appear that he has complied with the administrative prerequisites. See Hatfield v. Colquest Energy Inc., 13 FMSHRC 544 (1991).

³ After investigation of the miner's complaint, the Secretary is required to file a discrimination complaint with this Commission on the miner's behalf if the Secretary determines that the Act was violated. If the Secretary determines that the Act was not violated, he shall so inform the miner, and the miner then may file his own complaint with the Commission under Section 105(c)(3) of the Act.

The Commission noted accordingly that timeliness questions must be resolved on a case-by-case basis, taking into account the unique circumstances of each situation.

At hearings Mr. DeRossett testified that he was uncertain when he had requested reemployment with Martin County and the only documented effort in that regard appears in a letter dated April 24, 1990, written on Mr. DeRossett's behalf by Attorney Wolodymyr Cybriwsky (Respondent's Motion Exhibit No. 1). The only other date that can be established without substantial speculation was related by Mr. DeRossett to the June 1990 departure of an employee named Stapleton. Thus more than 4 years, more than 2-1/2 years, and more than 2 years elapsed, respectively, from the April 1988 shift transfer, the December 4, 1989 reduction-in-force, and the June 1990 request for reinstatement until the instant complaint was filed with MSHA on August 10, 1992.

In the present case Mr. DeRossett claims ignorance of the filing requirements. He maintains that he was first hired by Martin County in 1978 and that at no time during his 10 years employment with them was he informed of any of his rights under the Act. He maintains that it was not until he discovered a pamphlet in December 1992 entitled "Guide to Miners Rights" in the office of another company did he discover that his purported safety complaints were protected under the Act and that he had a right to file a complaint with MSHA.

Mr. DeRossett also maintains that he always knew that his safety complaints were a causative factor in its discharge but never mentioned that fact to anyone before December 1992. He claims that even when he first contacted the National Labor Relations Board (NLRB) on December 7, 1989, claiming that he was unlawfully discharged because of his participation in a strike (see Respondent's Motion Exhibit No. 2) he believed that he had been discharged because of his safety complaints. He maintains that in spite of this he did not tell the NLRB attorney of this belief nor the attorney who wrote the letter on his behalf in April 1990 (Respondent's Motion Exhibit No. 1) nor the attorney who later represented him in a workman's compensation case against the Respondent.

At the motion hearings former Martin County Director of Training, Troy Chafin, testified on behalf of the Respondent that he had been principal officer in charge of health and safety and had developed and conducted the mandatory and other training programs for Martin County. More particularly, he was in charge of training Martin County employees, including DeRossett, from April 1973 through April 1990. He subsequently worked for the Kentucky Department of Mines and Minerals as Assistant Director of Training and Education and is currently president of his own company.

Chafin testified that he was well acquainted with Mr. DeRossett while he worked for Martin County. At hearing, Chafin identified certificates of training for DeRossett, including those Chafin signed personally certifying that training had been completed for DeRossett on the dates noted (Respondent's Motion Exhibit No. 5). It is clear from the certificates that DeRossett attended at least 13 training sessions while at Martin County at which the subject of "statutory rights of miners" was covered.

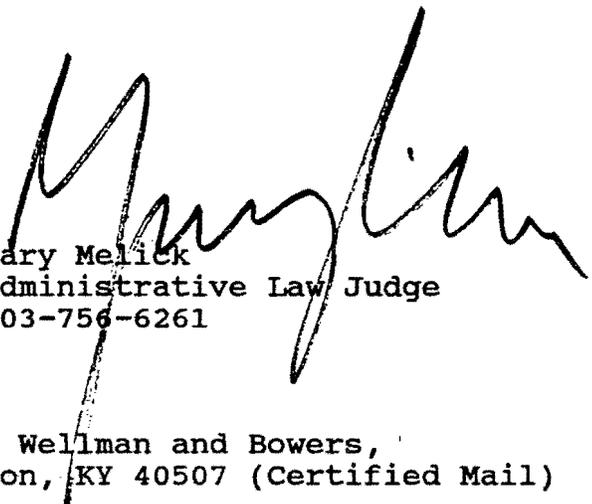
Chafin also testified that he personally taught training classes for those sessions for which his signature appears on the certificate but that in all of the training sessions he presented opening comments to the miners, including a review of their rights to make complaints to management and to MSHA free of retaliation. More specifically, he testified that miners' rights under Section 105(c) were discussed at some of the sessions. I find Chafin's testimony credible.

Mr. DeRossett is a high school graduate and, from his appearance and testimony at hearing, it is readily apparent that he is a man of ample intelligence. He has demonstrated the ability to pursue sophisticated complaints regarding his employment with other governmental agencies and has conferred with at least three attorneys regarding employment matters. Under all of the circumstances it may reasonably be inferred that Mr. DeRossett received sufficient information during his period of employment with Martin County from which he knew, or should have known, of his right to file complaints with MSHA under Section 105(c) of the Act for retaliation against him for making safety complaints.

Under the circumstances I conclude that DeRossett knew or certainly should have known of his rights to file a complaint with MSHA under Section 105(c) at the time of his April 1988 shift transfer and also at the time of his December 1989 layoff and his last established request for reinstatement in June 1990, and that therefore his late filed complaint herein cannot be excused for "justifiable circumstances." Accordingly, the complaint herein must be dismissed.

ORDER

Discrimination proceeding Docket No. KENT 92-203-D is hereby dismissed.



Gary Melick
Administrative Law Judge
703-756-6261

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/lh

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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MAY 12 1993

ELMER DARRELL BURGAN, : DISCRIMINATION PROCEEDINGS
Complainant :
 :
v. : Docket No. KENT 92-915-D
 : BARB-CD-92-31
 :
HARLAN CUMBERLAND COAL CO., : Harlan Mine
Respondent :
 :
 :
ELMER DARRELL BURGAN, : Docket No. KENT 93-101-D
Complainant :
v. : No. 1 Mine
 :
DIXIE FUEL COMPANY, :
Respondent :

DECISION

Appearances: Phyllis Robinson, Esq., Hyden, Kentucky,
for the Complainant
H. Kent Hendrickson, Esq., Harlan,
Kentucky, for the Respondents.

Before: Judge Feldman

These cases are before me based upon discrimination complaints filed pursuant to Section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §815(c)(3) (the Act) by complainant Elmer Darrell Burgan (Burgan) against corporate respondents Harlan Cumberland Coal Company (Harlan) and Dixie Fuel Company (Dixie).¹ Clyde Bennett is the general manager of the respondents which are closed family corporations. Bennett's children are the corporate officers of these

¹ Burgan's complaints which serve as the jurisdictional basis for this matter were filed with the Secretary in accordance with Section 105(c)(2) of the Act, 30 U.S.C. §815(c)(2). Burgan's complaints were investigated by the Mine Safety and Health Administration (MSHA) which concluded that there were no Section 105(c) violations with respect to Burgan's employment at Harlan Cumberland Coal Company or Dixie Fuel Company. Burgan subsequently filed complaints with this Commission which are the subject of this proceeding.

corporations. These cases were consolidated for hearing at the complainant's request by order dated January 6, 1993. The cases were heard in Richmond, Kentucky on March 9 and March 10, 1993. For the reasons discussed herein, Burgan's discrimination complaints against the corporate respondents are dismissed.

At trial, the parties stipulated that Harlan and Dixie are coal companies engaged in interstate commerce. Therefore, the parties agree that I have jurisdiction to hear these matters. The parties also stipulated to Burgan's employment history. The complainant's direct case consisted of his testimony as well as the testimony of six other individuals, including the complainant's brother, Robert Burgan, who was the Superintendent at Harlan. In defense of the charges filed by Burgan, the respondents provided the testimony of Clyde Bennett and two employees of Harlan and one individual employed by Dixie. The parties filed simultaneous proposed findings and conclusions which were received in my office on April 26 and April 27, 1993.

Burgan's Section 105(c) Complaints

The gravamen of Burgan's complaint against Harlan is that his three day suspension and subsequent transfer from Harlan's H2 Mine to its D3 and C3 Mines following a January 14, 1992, altercation with his brother Allen was, in fact, discriminatorily motivated because of Burgan's safety related complaints. Specifically, Burgan asserts that he complained about H2 Mine Foreman Matthew Coats' intentional blocking of shuttle car breakers which interfered with Burgan's short circuit protection during his shuttle car operation. Burgan contends that Coats' blocking of these breakers exposed him to electric shock and potential electrocution. Burgan alleges that his discriminatory suspension and transfer ultimately resulted in his unemployment when the C3 Mine was closed until Burgan was called back to work to open Dixie's No. 1 Mine. With respect to Dixie, Burgan argues that Clyde Bennett's June 11, 1992, denial of his request to transfer from the Dixie No. 1 Mine back to the H2 Mine, because the H2 mine was closer to Burgan's home, was also motivated by discrimination because of his past safety complaints.²

² The complainant's theory of the case regarding Dixie is not well focused. For example, Burgan initially argued that he was afraid to return to the Dixie No. 1 Mine on June 10, 1992, because he believed the mine was unsafe after a smoke incident caused by a conveyor belt stoppage on June 4, 1992. (See Verified Complaint, Kent 93-101-D, Para. 9; Tr. 27, 81, 86, 89, 91, 96, 102-103). However, late in the first day of the trial counsel conceded that the evidence reflected that this belt condition was abated the next day and that Burgan did not experience any reoccurrence of smoke related problems when he returned to work at the Dixie No. 1 Mine on June 8, 1992. (See Tr. 288-292).

Respondents' Defense

The respondent counters by denying that blocking of breakers occurred and by denying that Burgan ever communicated any safety related complaints. In addition, the respondent maintains that Burgan's three day suspension and transfer were motivated solely by its desire to separate Burgan from his brother Allen Burgan after a serious altercation. The respondent states that Burgan's subsequent temporary layoff from March 14 through June 3, 1992, occurred because the D3 and C3 Mines were closed because they were not profitable. In this regard, the respondent contends that Burgan was laid off along with the rest of the crew that was assigned to these mines. Finally, the respondent asserts that Burgan quit his job at the Dixie No. 1 Mine in Cawood, located approximately 30 miles from Burgan's home, on June 11, 1992, after Clyde Bennett told him that he did not have any work for him at the H2 mine in Louellen, Kentucky.

PRELIMINARY FINDINGS OF FACT

The fundamental facts are not in dispute. Burgan resides in Closplint which is located within a few miles of Louellan, Kentucky. He has been employed by coal mines operated by Clyde Bennett since 1979. From 1979 until March of 1982, he was employed at the Dixie mine at Cawood, in Harlan County, Kentucky which is, as noted above, located approximately 30 miles from his home in Closplint. From March 1983 until January 14, 1992, he was employed at several Harlan mines located in Louellan, in close proximity to his home in Closplint. During this period, the complainant and his brother Allen Burgan worked together at Harlan's H2 Mine for approximately four years. Burgan's other brother, Robert Burgan, was the Superintendent of the H2 Mine since the latter part of 1987 until he terminated his employment on January 7, 1992, because of a reported back condition. During the period that the three Burgan brothers were employed by Harlan, Matthew Coats was the Foreman at the H2 Mine. Coats reported directly to Robert Burgan who in turn reported to Clyde Bennett.

fn. 2 (continued)

Counsel thereupon modified the alleged discriminatory action associated with Burgan's Dixie employment to Clyde Bennett's refusal to transfer Burgan to the H2 Mine closer to Burgan's home. (Tr. 275). In support of this new approach, Counsel now argues that Burgan needed to work close to home because of car problems and because Burgan's driver's license had been revoked for driving under the influence (DUI). (See Tr. 272-276). I am not unmindful of the contradiction associated with Burgan's car problems at a time when he had no driver's license. Nevertheless, it is the theory advanced on behalf of the complainant.

On January 14, 1992, the complainant had an altercation with his brother Allen Burgan after Allen backed a continuous miner into a bolting machine located behind a curtain where the complainant and James Skidmore were eating. An argument ensued during which there was cursing. During the argument the complainant grabbed a piece of roof bolting steel and drew it back and threatened to hit Allen. Allen walked away and no blows were exchanged. (Tr.375-376). As a result of this incident, the complainant was suspended without pay from Wednesday, January 15, through Friday, January 17, 1992. On Monday, January 20, 1992, the complainant was transferred to Harlan's D3 Mine in Louellan until it was closed on January 24, 1992. Burgan was then transferred to Harlan's C3 Mine at Louellan on January 25, 1992. His employment continued until March 13, 1992, when the C3 Mine was closed. Burgan was laid off and collecting unemployment insurance from March 14, 1992 through June 2, 1992.

On June 3, 1992, Burgan was called back to work at the Dixie Fuel Company No. 1 Mine in Cawood, Kentucky. Burgan worked at the Dixie No. 1 Mine on Wednesday, June 3rd, and Thursday, June 4th. At the end of the June 4th shift, at approximately 4:00 p.m., there was an incident wherein the belt slipped off the head drive. The roller continued to turn against the stationary belt scorching the belt causing smoke. Employee Elvis Saylor shut the belt down immediately. Burgan and three other mine personnel in the belt entry traveled through a door from the belt entry into a fresh air course to escape the smoke. Shortly thereafter, Foreman Ron Osborne received a call from the surface informing him that Burgan's wife was enroute to the hospital to deliver a baby. Osborne informed Burgan that he could take Friday, June 5th off in view of his wife's childbirth.

Burgan returned to work at the Dixie No. 1 Mine on the morning of Monday, June 8th. He also worked the following day on June 9th. On Wednesday, June 10th, he telephoned Clyde Bennett and stated that he could not come to work because his car broke down. On Thursday, June 11th, he called Bennett and stated that his car was still inoperable. Bennett inquired why it was taking so long to fix his car.³ Burgan asked Bennett for a transfer back to the H2 Mine in Louellan which was nearer to his home.

³ Bennett testified that Burgan told him that his car needed its tie rod ends replaced. Bennett called several local auto supply stores and determined that the parts were readily available. Bennett estimated that it would take approximately 30 minutes to repair the vehicle. (Tr. 352).

Bennett replied that he did not need him at the H2 Mine. The respondent then told Bennett that he quit. He also told Bennett that the Dixie No. 1 Mine was unsafe.⁴

FURTHER FINDINGS AND CONCLUSIONS

Applicable Case Law

In order to establish a prima facie case of discrimination under Section 105(c) of the Act, a complaining miner bears the burden of establishing (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 Co., 2 FMSHRC 2768 (1980), rev'd on other grounds sub nom., Consolidation Coal Company v. Marshall, 663 F.2d 1211 (3rd 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 (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 that either no protected activity occurred, or, that the adverse action was in no way motivated by the protected activity. Robinette, 3 FMSHRC at 810 n.20.

If the operator fails to rebut the complaint, it may nevertheless affirmatively defend against the prima facie case by proving that it was also motivated by unprotected activity and that it would have taken the adverse action in any event for the unprotected activity alone. See also Donovan v. Stafford

⁴ Bennett's account of these telephone conversations is consistent with Burgan's testimony during his unemployment case wherein he told the hearing officer, "Yeah, [I quit], I told [Bennett], I said if you have anywhere else for me to work where I can get to work close to home ... [Bennett] could have put me up there if he wanted to...." (Joint Ex. 1, pp. 26-27). Burgan's unemployment testimony is also consistent with his testimony in this proceeding where he testified that Bennett never told him that he was fired from the Dixie mine. (Tr. 146-147, 363). Burgan also opined that the Dixie mine was unsafe during a telephone conversation on June 11th. Bennett states that this statement was made during a subsequent telephone call on June 11th approximately one hour after Burgan told Bennett that he quit. Burgan cannot recall whether he made a second telephone call. (Tr. 146). However, resolution of whether a second telephone call was made by Burgan is not dispositive, particularly in view of the complainant's abandonment of the unsafe theory. (See fn. 2 supra; Tr. 333-336).

Construction Co., 732 F.2d 954, 958-59 (D.C. Cir. 1984); Boich v. FMSHRC, 719 F.2d 194, 195-96 (6th Cir. 1983) (specifically approving the Commission's Pasula-Robinette test).

The Complaint Against Harlan Cumberland Coal Company

The Complainant's Direct Case

As a threshold matter, in order to determine if Burgan engaged in a protected activity, it is first necessary to identify the alleged conduct which serves as the basis for the complaint. In this case, Burgan maintains that Foreman Matthew Coots who was under the direct supervision of Burgan's brother, Superintendent Robert Burgan, engaged in a course of conduct, i.e., blocking in breakers, presumably with the knowledge and acquiescence of electrician Wendell Griffin. It is alleged that this conduct negated the circuit breaker protection and exposed shuttle car operators, such as Burgan, to electric shock and possible electrocution. These are serious charges which, if established, would subject the offending individuals to personal liability for civil penalties under Section 110(c) of the Mine Act, 30 U.S.C. §820(c).⁵

In support of his complaint, Burgan relies on the testimony of Gary Lee Couch who replaced Burgan as a shuttle car operator at the H2 Mine when Burgan was transferred to the D3 Mine on January 20, 1992. (Tr.172). Couch continued to work at the H2 Mine until April 8, 1992, when he reportedly sustained a job related back injury. Bennett subsequently rehired Couch for light duty work as a night watchman. Couch performed these duties for approximately six weeks until he was fired for repeatedly sleeping on the job. (Tr.184-185, 350). Couch is a litigant in his workman's compensation case against the Harlan Cumberland Coal Company. (Tr.186).

Couch testified that Coots blocked breakers and instructed Couch how to do it. Thereafter, Couch stated that he blocked breakers at Coots' request. (Tr.174-175, 178, 188). Couch testified that he subjected himself to electric shock as a result of blocking breakers. (Tr.175). Couch described an awkward maneuver by which he entered the shuttle car so as to avoid electric shock. Couch described this shuttle car entry procedure as follows:

⁵ Section 110(c) of the Mine Act provides that whenever a corporate operator violates a mandatory safety standard, any agent of such corporation who knowingly authorized, ordered or carried out such violation, shall be subject to the same civil and criminal penalties that can be imposed upon the operator under the Act.

Well, after a while you kind of learned how to get in and off the car without getting shocked. You jumped with both feet at one time to get off or you jump on all at one time. If you're touching the ground when you lay your hand on the car you got shocked if it was hot (Tr.175).

Couch reportedly was so concerned about his personal safety that he told a friend to tell his wife about the breakers if "something stupid [happened] that got [him] killed." (Tr.176-178). Despite the fact that Couch testified that he feared for his life, he never reported the breaker problem to Bennett or the Mine Safety and Health Administration (MSHA).⁶ (Tr.186, 192).

Burgan also called James Edward Skidmore who was a fellow employee at the H2 Mine. Skidmore witnessed the January 14, 1992, altercation between Burgan and his brother Allen. Skidmore's recollection of the incident is consistent with Coots' testimony that Burgan threatened to hit Allen with a piece of roof bolting steel. (Tr.215-216, 376). Skidmore testified that neither Burgan nor Couch ever told him about blocked shuttle car breakers. (Tr.211-212). He stated that he never observed anyone routinely "jumping out of a shuttle car in a funny way so as to avoid shock or injury" (Tr.217). Although he is a roof bolt operator and does not use a shuttle car frequently, he stated that he had no fear or reluctance to ride in the H2 shuttle cars. (Tr.217).

Finally, the complainant called his brother Robert Burgan who was Superintendent at the H2 Mine and directly in charge of Coots. Robert Burgan last worked for the respondent Harlan Cumberland Coal Company on January 7, 1992, because of a job related back injury. He is receiving workman's compensation which is still pending final litigation. (Tr.306, 309). Robert Burgan testified that the complainant told him that Coots was

⁶ The respondent Harlan Cumberland Coal Company stipulated that anonymous complaints about blocked breakers were apparently communicated to MSHA in April 1992. (Tr. 372). As a result of these complaints, on April 24, 1992, MSHA inspected the H2 Mine. This inspection resulted in several citations. The record was kept open for entry of copies of these citations into the record after trial. (Resp. Ex. 3). The MSHA inspection did not substantiate the complaints. (Tr. 369-372, 422). The failure of the Secretary to confirm the alleged misconduct accounts for the Secretary's disinclination to prosecute the subject complaints on behalf of Burgan. Moreover, these unsubstantiated complaints to MSHA lodged several months after Burgan's January 1992 transfer from the H2 Mine and contemporaneous with his April 30, 1992, discrimination complaint are self-serving and do not establish the protected activity alleged by Burgan. (See Comp. Ex 1).

blocking breakers and that he had a meeting with Coots and H2 electrician Wendell Griffin in November or December 1991 at which time they denied that blocking of breakers occurred. (Tr.300-302). In their testimony, Coots and Griffin deny that this meeting ever occurred. (Tr.382, 414). Significantly, Robert Burgan's testimony indicates that he could not confirm the complaints about blocking breakers in that he never fired or otherwise disciplined anyone for this activity. In fact, Robert Burgan testified that, "I never had proof" that Coots or anyone else was engaged in blocking breakers. (Tr.309). This accounts for Robert Burgan's failure to report this matter to his immediate boss, Clyde Bennett. (Tr.262).

With respect to the altercation, Robert Burgan testified that suspension, termination, or separation of employees who engage in fighting are appropriate sanctions. (Tr.311-312,315). He also testified that personnel actions should be based upon seniority. (Tr.315-316). Although Robert Burgan questioned the transfer of the complainant, it was consistent with seniority considerations in that Allen Burgan had 16 to 18 years experience which gave him more seniority than the complainant. (Tr.316).

The Respondent's Direct Case

The respondent called Coots who unequivocally denied the allegations of the complainant. In this regard, Coots stated that he never had a meeting about blocked breakers with Robert Burgan. He also testified that he did not know how to block in a breaker. (Tr.395). Coots conceded that supervision of the complainant was difficult because he (Coots) was supervised by the complainant's brother. Coots stated that the complainant would always run to Robert Burgan whenever he was told to do something he didn't like to do. (Tr.378-379). Coots described the altercation between the complainant and Allen Burgan. (Tr.384). After this incident Coots recommended to Bennett that the complainant and Allen Burgan be separated. (Tr.389).

Electrician Wendell Griffin also denied any pertinent meetings or discussions with Robert Burgan. (Tr.414,421). Griffin testified that he never blocked in breakers. He also testified that neither Coots nor Couch knew how to block in a breaker. (Tr.423-424). Griffin denied receiving any pertinent complaints from the complainant or Couch. (Tr.413).

Finally, Clyde Bennett testified that after talking to Coots about the January 14, 1992, fight between the Burgan brothers, he decided to transfer Burgan to the D3 Mine. The transfer was motivated solely by Burgan's fight (Tr.278). Bennett explained his decision as follows:

It was based on fighting in the mine. That's against the law, you know, it's very dangerous and I just won't have that in our mines and I made the decision to give him three days off and transfer him to another mine. If I'd made any other decision it would have been to fire him right then. I thought I give him a break (sic). (Tr. 293).

Bennett suspended Burgan for the three workdays following the fight and transferred him to the D3 Mine on Monday, January 20, 1992. The D3 Mine was closed on January 24, 1992, when the entire crew, including Burgan, was transferred to the C3 Mine. (Tr.279). The C3 Mine was closed on March 14, 1992, because the sulphur content in the coal was too high to satisfy the respondent's existing orders. (Tr.279). Two individuals at the C3 Mine were reassigned and the eight remaining crewmen were laid off. (Tr.314). At trial, and, in his unemployment hearing, Burgan testified that Danny Cochran was given preferential treatment because, unlike Burgan, Cochran continued to pump water at C3 and was not laid off. (See Joint Ex. 1. pp. 26-27). Bennett explained that Cochran has foreman's papers which allows him to go into a mine alone and that Cochran was obviously better qualified than Burgan. (Tr.347, 364). Most of the employees laid off from the C3 Mine were called back to the Dixie No. 1 Mine in May or June 1992.

The Complaint Against Dixie Fuel Company

The Complainant's Direct Case

Burgan was laid off from the C3 Mine in Louellen on March 14, 1992. He was subsequently called back to work on June 3, 1992, to open the Dixie No. 1 Mine in Cawood, Harlan County, Kentucky. At trial, the complainant presented considerable testimony concerning a June 4, 1992, conveyor belt incident that caused smoke and evacuation. Burgan testified at length regarding his alleged severe smoke inhalation suffered during this event as well as the fact that he feared returning to the Dixie mine although he conceded the belt problem was immediately remedied. In fact, there is no evidence that Burgan ever received treatment for smoke inhalation or that he ever experienced any problems when he returned to work at Dixie on June 8 and June 9, 1992. (Tr.88). Burgan's witnesses Monus Peace and Danny Cochran failed to support Burgan's claim that the Dixie mine was unsafe. In fact, Cochran rebutted Burgan's testimony that Cochran had requested a transfer from the Dixie mine because

he believed it to be unsafe.⁷ At the hearing, Burgan's counsel distanced herself from the safety issue as a basis for Burgan's discrimination complaint. (Tr.153-160, 272-278, 288-289, 337). Counsel now alleges that Bennett's denial of Burgan's transfer from Dixie to H2 was motivated by discrimination because of Burgan's earlier safety related complaints concerning Coots. (Tr.275, 277, 289).

The Respondent's Direct Case

The respondent called Ron Osborne, the Foreman at the Dixie mine who testified that he was with Burgan when they escaped from the smoke on June 4th by entering a fresh air course from the belt entry and that they were only exposed to smoke for a short period of time. Osborne also stated that Burgan never complained of smoke related injuries on that day or when he returned to work on June 8th. Bennett was called upon to testify regarding his telephone conversations wherein Burgan called on June 10 and stated he had car problems. In addition to his car problems, Burgan testified that his driver's license was revoked for DUI. (Tr.132-133). Bennett testified that he did not know that Burgan had lost his license. (Tr.270-271). Bennett recalled that Burgan telephoned on the following day and requested a transfer to the H2 Mine because it was closer to his home. Bennett told him that he did not need him there whereupon Burgan said he quit. Burgan called back an hour later and stated that he quit because the mine was unsafe rather than because of his car problems.

ULTIMATE FINDINGS AND CONCLUSIONS

As noted above, in order for Burgan to benefit from the protection afforded by Congress under Section 105(c) of the Mine Act, he must bear the burden of establishing that he was the victim of discriminatory adverse action as a result of his alleged protected activity. Specifically, Burgan must show that he complained about Coots' conduct concerning the blocking of breakers and that he had a good faith belief for such complaints. As Burgan's complaints are based on his alleged personal

⁷ At the hearing it was obvious that Danny Cochran suffers from a significant hearing impairment. (Tr. 219-220). Burgan testified that Cochran told him that he requested Bennett to transfer him from the Dixie mine back to a Harlan mine in Louellen after the belt smoke incident "...because of (sic) he wasn't going to be scared like that." (Tr. 99). However, Cochran denied this statement when he was called upon to testify on behalf of the complainant. (Tr. 226, 231). In fact, Cochran explained that he requested a transfer on the advice of his physician who recommended that Cochran avoid the damp conditions in the Dixie mine which could exacerbate his hearing disorder. (Tr. 230-231).

knowledge of Coots' behavior, his good faith belief must be demonstrated by proving that this unsafe activity actually occurred. In addition, if Burgan can establish his protected activity as alleged, he must also show that the adverse action complained of, i.e., his transfer from the H2 Mine, was in part influenced by his protected activity. Burgan's principal witnesses supporting his allegations against Coots and Griffin are former employee Gary Couch and Burgan's brother, former Superintendent Robert Burgan.⁸ Their testimony should be evaluated in the context of whether it is credible and whether it is effectively rebutted by other witnesses. In addition, in determining the evidentiary value of their testimony, consideration must be given as to whether they are disinterested or biased.

Couch is currently litigating a workman's compensation claim filed against the Harlan Cumberland Coal Company. Moreover, it is uncontroverted that Couch was fired by Bennett for repeatedly sleeping on the job as a night watchman after he was placed on light duty following his reported job related back injury. Thus, Couch must be considered a biased witness.

Moreover, the credibility of Couch's testimony is suspect notwithstanding his apparent bias. It is difficult to imagine Couch's assertion that he knowingly and repeatedly exposed himself to electric shock or electrocution by personally blocking shuttle car breakers. It is equally incredible that he then proceeded to awkwardly jump in and out of the shuttle cars so as to avoid injury or electrocution. It is also difficult to understand how he could continue to engage in such activity, having testified that he feared for his life to such an extent that he told a friend to tell his wife what he was doing in the event he was killed because of "something stupid." Couch's testimony that he engaged in these activities because he was afraid of losing his job is also unconvincing. Finally, Couch's allegations were rebutted by the testimony of fellow employee James Skidmore, called as a witness by Burgan, as well as the testimony of Coots and Griffin.

⁸ At trial complainant's counsel also sought to call Allen Burgan as a corroborating witness. Counsel stated that Allen Burgan is no longer employed by Harlan Cumberland Coal Company and that she thought that he also had a workman's compensation case pending. (Tr. 324, 439). At the conclusion of the hearing counsel moved to keep the record open to depose Allen Burgan. The motion was denied as Allen Burgan was not served with a subpoena and the information sought to be introduced through his testimony was already adequately reflected in the record. (Tr. 440-441).

Burgan's alleged protected activity was also not adequately supported by the testimony of his brother, Robert Burgan, who also has a back related workman's compensation case pending against the respondent. In this regard, Robert Burgan testified that he never took any disciplinary action against anyone; that he could not prove that Coots was engaging in the activity alleged by his brother; and that he never reported his brother's complaints to Bennett. Simply put, if the complainant's brother, the superintendent on the scene, could not confirm the validity of Burgan's alleged complaints, I am similarly unconvinced. It is noteworthy that Coots and Griffin both deny ever discussing blocked breakers with Robert Burgan. Moreover, Robert Burgan's failure to report these alleged meetings to Bennett further supports the denials of Coots and Griffin.

Thus, I conclude that Burgan has failed to demonstrate by a preponderance of the evidence that he engaged in the alleged protected activity. However, even if I were to find that Burgan did make generalized isolated safety related complaints that qualify as protected activity under Section 105(c) of the Mine Act, the evidence reflects that Burgan's three day suspension and transfer was motivated by Bennett's desire to separate Burgan from his brother Allen after their serious encounter.⁹ In this regard, Robert Burgan testified that suspension, transfer and termination are all appropriate sanctions for fighting in an underground mine. In addition, Robert Burgan stated that Allen Burgan had more seniority than the complainant further justifying the transfer of the complainant rather than Allen. The immediate suspension and transfer after the subject altercation is further evidence that the adverse action complained of was not influenced by any other considerations. Moreover, the record does not reflect that Burgan received any disparate treatment in that he was laid off from the C3 Mine and rehired at the Dixie mine with other individuals. (Tr.245-246).

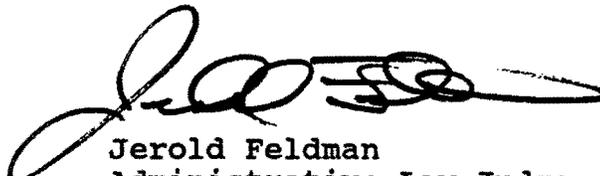
Finally, turning to Burgan's complaint against the Dixie Fuel Company, it is clear that Burgan quit his job at Dixie on June 11, 1992, after Bennett refused to transfer Burgan to the H2 Mine which is closer to Burgan's home. (Tr.155). The complainant has not rebutted Bennett's testimony that Burgan was not needed at the H2 Mine. While mining is inherently dangerous, smoke

⁹ Although Burgan's alleged complaints concerning blocked breakers served as the basis for the discrimination complaints that are the subject of this proceeding, Burgan also testified about a variety of other alleged complaints. These included complaints about inoperable lights and poor brakes on shuttle cars, and unfair treatment he endured at the hands of Coots. (Tr. 38-45). Assuming that these complaints occurred, the evidence fails to demonstrate that Burgan's suspension and transfer were in any way motivated by such complaints.

caused by a belt slippage does not establish that a mine is unsafe if the condition is corrected. In this case, the belt malfunction was immediately repaired and there is no evidence of reoccurrence. Under these circumstances, Burgan's assertion that he was afraid to go back to the Dixie No. 1 Mine because it was unsafe and not suitable for work is without merit. Moreover, this assertion is inconsistent with Burgan's own testimony and the testimony of his own witnesses Monus Peace and Danny Cochran. (Tr.154-158, 223, 226, 249-250). It is clear that Burgan's decision not to return to the Dixie mine was motivated by the commuting distance from his residence. Section 105(c) of the Mine Act protects a broad array of activities so as to encourage mine safety. However, car problems and the hardship associated with a driver's license revocation for driving under the influence (DUI) go beyond the scope of the protected activities contemplated by the Act.

ORDER

ACCORDINGLY, Elmer Darrell Burgan's Complaints against the Harlan Cumberland Coal Company in Docket No. KENT 92-915-D and the Dixie Fuel Company in Docket No. KENT 93-101-D ARE DISMISSED.



Jerold Feldman
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 17 1993

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	
	:	Docket No. LAKE 92-342
	:	A.C. No. 12-02090-03502
	:	
v.	:	Docket No. LAKE 92-343
	:	A.C. No. 12-02090-03503
WALLACE ENTERPRISES, INC., Respondent	:	
	:	Docket No. LAKE 92-344
	:	A.C. No. 12-02090-03504
	:	
	:	Middle Fork Mine

DECISION

Appearances: Rafael Alvarez, Esq., U.S. Department of Labor,
Office of the Solicitor; U.S. Department of Labor,
Chicago, Illinois for Petitioner;
No Appearance for Respondent.

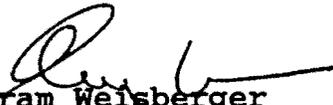
Before: Judge Weisberger

Respondent did not appear at the hearing in these cases that was scheduled for March 16, 1993, and Petitioner made a Motion for Default Decision on March 20, 1993. An Order to Show Cause was issued which inter alia provided as follows:

Therefore, it is ORDERED that within 10 days of this order, Respondent shall, in writing, show cause why a default decision shall not be entered in these cases. If the Respondent does not respond to this order, or fails to establish why a default decision shall not be issued, a decision will be issued ordering Respondent to pay \$1,540 the full penalties proposed by Petitioner in these cases.

Respondent has not responded to the order to show cause. Accordingly, the Motion for Default Decision is GRANTED.

It is ORDERED that the judgment be issued in these cases in favor of Petitioner. It is further ORDERED that Respondent pay \$1,540 the full penalties proposed by Petitioner in these cases.


Avram Weisberger
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

MAY 17 1993

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. WEVA 92-798
Petitioner : A.C. No. 46-01968-03980
: :
v. : Blacksville No. 2
: :
CONSOLIDATION COAL COMPANY, :
Respondent :

SUMMARY DECISION

Appearances: Caryl L. Casden, Esq., U.S. Department of Labor
Office of the Solicitor, Arlington, Virginia
for Petitioner;
Daniel Rogers, Esq., Consolidation
Coal Company, Pittsburgh, Pennsylvania,
for Respondent.

Before: Judge Feldman

A hearing in this proceeding was held on November 17, 1992, in Morgantown, West Virginia. At trial the parties moved to settle one of the two citations in issue. The parties also sought to stay this matter with respect to remaining Citation No. 3720751.¹ This citation was issued on December 19, 1991, for violation of 30 C.F.R. § 70.201(d) as a result of the respondent's alleged failure to correct a respirable dust concentration condition that exceeded the permissible respirable dust levels specified in the mandatory health and safety standard contained in 30 C.F.R. § 70.100(a). The underlying violation of

¹ Citation No. 3720751 was initially issued as a 104(d)(2) order. It was modified to a 104(a) citation as a result of a MSHA health and safety conference conducted on February 12, 1992. At that time it was decided that the respondent's degree of negligence associated with this citation should be reduced from high to moderate. The Secretary now seeks to ignore MSHA's conference findings and urges me to reinstate the unwarrantable failure order. However, the record fails to support any reckless or conscious disregard on the part of the respondent. I also believe that, absent new and material information, it is inappropriate to ignore MSHA's conference findings to the detriment of the respondent. Therefore, as noted herein, Citation No. 3720751 is affirmed as modified with the significant

the Section 70.100(a) dust concentration standard was cited in Citation No. 3720747 which is not a subject of this proceeding.²

In the case at bar, the violation of Section 70.201(d) cited in Citation No. 3720751 allegedly occurred because the respondent failed to take remedial action by December 18, 1991, to ameliorate the underlying excessive dust condition that was identified on December 11, 1991, during the course of the Secretary's spot inspection program.³ Pursuant to this program,⁴ the alleged excessive dust level was determined by a single respirable dust sample taken during one shift rather than the customary averaging of five dust samples collected on consecutive shifts.⁵ See Secretary's Motion for Summary Judgment, p.4.

At the hearing the respondent acknowledged its responsibility to timely correct the alleged excessive dust concentration. However, the parties noted that the significant and substantial issue and the appropriate civil penalty

² Citation No. 3720747 is before Judge Weisberger. This citation involves the identical issues in Keystone Coal Mining Corp., 14 FMSHRC 2017 (December 1992), appeal pending. Further action on Citation No. 3720747 was stayed by Judge Weisberger on July 6, 1992, pending the outcome of the Keystone case.

³ Section 70.201(d) requires the operator to take corrective action to lower the respirable dust concentration to permissible levels within the abatement period set forth in a citation for violation of Section 70.100(a). In the instant case, Citation No. 3720747 set December 16, 1991, as the termination of the abatement period. This period was subsequently extended through December 18, 1991, because additional time was required for MSHA to weigh and evaluate the five dust samples required by Section 70.201(d) in order to establish whether corrective action had been taken.

⁴ The Secretary's spot inspection program is based upon the proposition that a single shift sample measuring 2.5 milligrams per cubic meter of air (mg/m³) or higher provides the equivalent degree of confidence as five samples averaging over 2.0 mg/m³ that the 2.0 mg/m³ respirable dust concentration standard in Section 70.100(a) is violated.

⁵ Citation No. 3720747 was issued on December 11, 1991, for alleged exposure to excessive respirable dust concentration by the non-designated occupation, 041 (Longwall Jack Setter). The citation was based upon the results of single samples taken the previous days on the December 9 afternoon shift and the December 10 midnight shift. The results revealed dust concentrations of 2.5 and 3.1 mg/m³, respectively. Thus, the December 9, 1991, sample barely satisfied the Secretary's 2.5 mg/m³ spot inspection

assessment were dependent upon the validity of the Secretary's single shift spot inspection procedure which was pending consideration by Judge Weisberger in Keystone Coal Mining Corp., supra. Consequently, the parties' motion to stay further consideration of Citation No. 3720751 pending the outcome of Keystone was granted on the record and formalized in my December 4, 1992, Partial Decision Approving Settlement and Stay Order, 14 FMSHRC 2133.

On December 7, 1992, Judge Weisberger invalidated the Secretary's single shift spot inspection procedure.⁶ See Keystone Coal Mining Corp., 14 FMSHRC at 2029. Thereafter, I lifted the stay and set this case for hearing. In so doing, I noted that the contested citation involves the respondent's efforts to correct an excessive respirable dust condition determined by a single shift sample rather than the condition itself. I also noted that Judge Weisberger's disposition in Keystone is of substantive value with regard to the issue of mitigating circumstances. See Order Lifting Stay and Notice of Consolidated Hearing Proceedings, February 16, 1993.

The February 16, 1993, notice scheduling this matter for hearing was followed by another request for stay by the Secretary. During the course of a telephone conference with the parties, I expressed my disinclination to grant another stay. However, the parties convinced me that this matter could be disposed of by summary decision as there are no outstanding unresolved issues of material fact. Therefore, the parties were ordered to file pertinent motions specifying the number of dust samples necessary to establish that a violative dust condition has been corrected, and whether the respondent's failure to correct the alleged condition from December 18, 1991, (the extended termination due date in Citation No. 3720747) until December 19, 1991, (when Citation No. 3720751 was issued) contributed to a hazard that was reasonably likely to result in injury or illness of a serious nature consistent with the Commission's Mathies test.⁷

As the respondent has stipulated to the fact of the occurrence of the violation, the only remaining issues are whether the violation was properly designated as significant and substantial and the appropriate penalty to be assessed. As a threshold matter, the propriety of the significant and

⁶ Judge Weisberger ruled that the single shift sample procedure was invalid because it was not implemented pursuant to a rulemaking proceeding.

⁷ This test is set forth in Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984). See also Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (April 1981).

substantial designation for Citation No. 3720751 must be viewed in the context of the Keystone decision and in the context of the provisions of Section 70.201(d), the cited mandatory safety and health standard in this case. While it would be inappropriate to relitigate the issues in Keystone which are now on appeal before the Commission, it is clear that the procedural and substantive merits of the Secretary's single shift sample procedure are in doubt.

While Judge Weisberger addressed the procedural problems associated with the lack of a rulemaking proceeding implementing the Secretary's single shift sample policy, the substantive value of this procedure is suspect in that Section 70.201(d) does not recognize a single shift sample as a valid method for establishing that corrective action has been taken.⁸ Thus, Section 70.201(d) of the regulations, promulgated by the Secretary, undermines the reliability of the single sample method. Consequently, I conclude that the uncertainties associated with the underlying respirable dust standard violation cited in Citation No. 3720747 create mitigating circumstances warranting the deletion of the significant and substantial characterization in Citation No. 3720751.⁹

Notwithstanding the above sample method issues, the traditional Mathies test provides an independent basis for concluding that Citation No. 3720751 does not establish a significant and substantial violation. As previously noted, this citation was issued on December 19, 1991, for the respondent's failure to take corrective action by December 18, 1991. The Secretary's motion for summary decision, citing Secretary of Labor v. Halfway, Inc., 8 FMSHRC 8, 12 (1986), and, U.S. Steel Mining, 6 FMSHRC 1573, 1574 (July 1984), asserts that the potential for serious illness or injury must be viewed in the context of continued mining operations. In effect, therefore, the Secretary contends that there is a presumption that the

⁸ Section 70.201(d) provides, in pertinent part:

"...the operator shall take corrective action to lower the concentration of respirable dust to within the permissible concentration and then sample each production shift until five valid respirable dust samples are taken (emphasis added)."

⁹ The Secretary points out that the average of five samples taken from December 12 through December 16, 1991, was 2.9 mg/m³ which confirms the single shift results. Secretary's Motion for Summary Judgment, p. 14. However, this after the fact confirmation process is not dispositive of whether there was a basis for the issuance of Citation No. 3720747 on December 11, 1991. Moreover, this approach of relying on multi-sample results is inconsistent with the Secretary's confidence in the single sample procedure.

failure to timely correct a significant and substantial violation is itself significant and substantial. I reject this approach. Rather, each violation should be evaluated independently within the context of the statutory provisions and the Congressional intent of the Mine Act. In this regard, the underlying excessive respirable dust concentration provides the vehicle for the imposition of a civil penalty for a significant and substantial violation. Moreover, the inspector has the option of issuing a 104(b) order in order to achieve compliance.¹⁰ Therefore, a non-significant and substantial finding with respect to a citation issued for the failure to timely correct a violation, particularly in this case where the failure to take remedial action was cited shortly after the abatement period expired, does not undermine the Mine Act's fundamental goal of encouraging mine safety. Accordingly, I conclude that the respondent's failure to timely correct the alleged underlying violation one day after the time established for abatement does not constitute a significant and substantial violation.

Turning to the question of the appropriate civil penalty in this matter, I note that the Secretary, in his motion for summary decision, has amended the proposed penalty from \$1,155 to \$350.¹¹ Significantly, a plan to correct the underlying dust condition was submitted to the MSHA District Manager on December 23, 1991. The plan was approved on the following day and implemented by the respondent on December 26, 1991, when Citation No. 3720751 was terminated. In view of the respondent's abatement efforts, belated as they may be, and the other pertinent statutory criteria in Section 110(i) of the Mine Act, I am assessing a civil penalty of \$100 for the cited violation of Section 70.201(d).

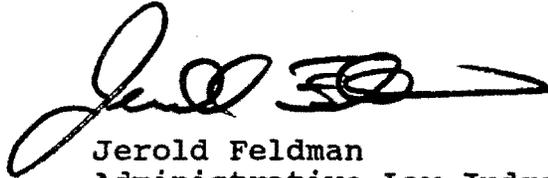
ORDER

Consistent with this decision, summary decision in favor of the respondent IS GRANTED. Accordingly, the significant and substantial designation SHALL BE DELETED from Citation No. 3720751.

¹⁰ In fact, 104(b) Withdrawal Order No. 3720750 was issued in this case on December 19, 1991. Secretary's Motion for Summary Judgment, Ex. F. This order is also not a subject of this proceeding.

¹¹ I note, parenthetically, that this reduction in the proposed assessment is inconsistent with the Secretary's attempt to resurrect the unwarrantable failure charge in this matter. See fn. 1, supra.

IT IS ORDERED that the respondent pay a civil penalty of \$100 within 30 days of the date of this decision. Upon receipt of payment, this matter **IS DISMISSED**.

A handwritten signature in black ink, appearing to read 'Jerold Feldman', with a long horizontal flourish extending to the right.

Jerold Feldman
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

MAY 19 1993

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. KENT 92-611
Petitioner : A.C. No. 15-12209-03538
:
: No. 2 Surface Mine
V. :
:
KEM COAL INCORPORATED, :
Respondent :

DECISION APPROVING SETTLEMENT

Before: Judge Barbour

Statement of the Proceeding

This proceeding concerns proposals for assessment of civil penalties filed by the Petitioner against the Respondent pursuant to Section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a), seeking civil penalty assessments for four alleged violations of certain mandatory safety standards found in Part 77, Title 30, Code of Federal Regulations. The Respondent filed a timely answer denying the alleged violations, and the case was docketed for hearing on the merits.

The parties now have decided to settle the matter, and they have filed a motion pursuant to Commission Rule 30, 29 C.F.R. § 2700.30, seeking approval of the proposed settlement. The citations, initial assessments, and the proposed settlement amounts are as follows:

Table with 5 columns: Citation No., Date, 30 C.F.R. Section, Assessment, Settlement. Rows include citations 3216278, 3216179, 3216041, and 3216042 with corresponding dates, sections, and amounts.

In support of the proposed settlement disposition of this case, the parties have submitted information pertaining to the six statutory civil penalty criteria found in Section 110(i) of the Act, included information regarding Respondent's size, ability to continue in business and history of previous violations.

In particular, with regard to Citation No. 3216278, the parties note that the violation was caused by "differing, but equally valid interpretations of the ground control plan" and that had the violation been regularly assessed the proposed penalty would have been \$655. Joint Motion To Approve Settlement 3. With regard to Citations No. 3216179 and 3216041, the parties note that Respondent has agreed to pay in full the proposed civil penalty. Finally, with regard to Citation No. 3216042, the parties agree that the vehicle cited for an inaudible backup alarm was not the type of truck required to have such an alarm and that the citation should be vacated.

CONCLUSION

After review and consideration of the pleadings, arguments, and submissions in support of the motion to approve the proposed settlement of this case, I find that approval of the suggested reduction in the penalties assessed for the subject violations is warranted and that the proposed settlement disposition is reasonable and in the public interest. Pursuant to 29 C.F.R. § 2700.30, the motion IS GRANTED, and the settlement is APPROVED.

ORDER

Respondent IS ORDERED to pay civil penalties in the settlement amounts shown above in satisfaction of the violations in question. Further, the Secretary IS ORDERED to vacate Citation No. 3216042. Payment is to be made to MSHA within thirty (30) days of the date of this proceeding and upon receipt of payment, this proceeding is DISMISSED.


David F. Barbour
Administrative Law Judge
(703)756-5232

Distribution:

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

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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 19 1993

SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH : CIVIL PENALTY PROCEEDING
ADMINISTRATION (MSHA), :
Petitioner : Docket No. KENT 93-59
: A.C. No. 15-10180-03532
: No. 1 Surface Mine
v. :
KEM COAL INCORPORATED, :
Respondent :

DECISION APPROVING SETTLEMENT

Before: Judge Barbour

Statement of the Proceeding

This proceeding concerns proposals for assessment of civil penalties filed by the Petitioner against the Respondent pursuant to Section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a), seeking civil penalty assessments for seven alleged violations of certain mandatory safety standards found in Parts 71 and 77, Title 30, Code of Federal Regulations. The Respondent filed a timely answer denying the alleged violations, and the case was docketed for hearing on the merits.

The parties now have decided to settle the matter, and they have filed a motion pursuant to Commission Rule 30, C.F.R. § 2700.30, seeking approval of the proposed settlement. The citations, initial assessments, and the proposed settlement amounts are as follows:

<u>Citation No.</u>	<u>Date</u>	30 C.F.R. <u>Section</u>	<u>Assessment</u>	<u>Settlement</u>
3399676	09/09/92	71.400	\$ 50	\$ 50
3399677	09/09/92	77.1605(d)	\$362	\$100
3399678	09/09/92	77.410(c)	\$362	\$ 50
3399679	09/09/92	77.1605(d)	\$362	\$100
3399680	09/09/92	77.1605(d)	\$362	\$-0-
3399441	09/11/92	77.1605(d)	\$362	\$100
3399442	09/11/92	77.410(a)	\$362	\$100

In support of the proposed settlement disposition of this case, the parties have submitted information pertaining to the six statutory civil penalty criteria found in Section 110(i) of the Act, included information regarding Respondent's size, ability to continue in business and history of previous violations.

In particular, with regard to Citation No. 3399676, the parties noted that Respondent has agreed to pay in full the proposed civil penalty.

With regard to Citation No. 3399677, the parties note that although the audible backup warning device and tail and brake lights did not work on the cited rock truck, the gravity of the violation was greatly mitigated by the fact that the backup lights worked, there was no pedestrian traffic and minimal vehicular traffic where the truck worked and the truck rarely operated at a speed in excess of 20 mph. Moreover, the parties agree that no injury was reasonably likely to occur because of the violation and that the violation was not a significant and substantial contribution to a mine safety hazard ("S&S" violation).

With regard to Citation No. 3399678, the parties agree the inoperative backup alarm on the cited rock truck failed during the shift on which the violation was cited and that the alarm was scheduled to be repaired at the close of that same shift. Moreover, as with the previous violation, the parties agree that no injury was reasonably likely to occur due to the violation and that the violation was not S&S.

With regard to Citation No. 3399679, the parties agree that although the tail and brake lights on the cited rock truck were not operating, the gravity of the violation was greatly mitigated for the reasons set forth with respect to Citation No. 3399677 and by the additional fact that the truck was operated only 1 shift per day during a day light shift. Moreover, the parties agree that no injury is reasonably likely to occur because of the violation and the violation not S&S.

With regard to Citation No. 3399680, the parties note the violations is similar to that alleged in Citation No. 3399679 and that for the same reasons expressed concerning that violation the gravity is greatly mitigated and the violation is not S&S.

With respect to Citation No. 3399441, the parties note that although the horn on the welding truck was inoperative as alleged the truck was not licensed for highway use and was rarely used in the vicinity of pedestrians. The parties therefore agree the gravity of the violations is greatly mitigated. Because no injury was reasonably likely to occur due to the violation the parties also agree that it was not S&S.

Finally, with regard to Citation No. 3399442, the parties note that although the cited truck lacked an operable backup alarm the gravity of the violation was greatly mitigated by the fact that outside rear view mirrors on both sides of the truck provided the driver with almost complete vision of what was

behind the truck. They also agree that no injury was reasonably likely to occur because of the violation and that the violation was not S&S.

CONCLUSION

After review and consideration of the pleadings, arguments, and submissions in support of the motion to approve the proposed settlement of this case, I find that approval of the suggested reduction in the penalties assessed for the subject violation is warranted and that the proposed settlement disposition is reasonable and in the public interest. Pursuant to 29 C.F.R. § 2700.30, the motion IS GRANTED, and the settlement is APPROVED.

ORDER

Respondent IS ORDERED to pay civil penalties in the settlement amounts shown above in satisfaction of the violations in question. In addition, the Petitioner IS ORDERED to modify Citations No. 3399677, 3399678, 3399679, 3399680, 3399441 and 3399442 by deleting their S&S designations. Payment is to be made to MSHA within thirty (30) days of the date of this proceeding and upon receipt of payment, this proceeding is DISMISSED.



David F. Barbour
Administrative Law Judge
(703)756-5232

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

MAY 19 1993

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. VA 92-188
Petitioner	:	A.C. No. 44-04517-03693
v.	:	
	:	Mine: VP-6
GARDEN CREEK POCAHONTAS	:	
COMPANY,	:	
Respondent	:	

DECISION APPROVING SETTLEMENT

Before: Judge Barbour

Statement of the Proceeding

This proceeding concerns proposals for assessment of a civil penalty filed by the Petitioner against the Respondent pursuant to Section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a), seeking a civil penalty assessment for one alleged violation of a certain mandatory safety standard found in Part 75, Title 30, Code of Federal Regulations. The Respondent filed a timely answer denying the alleged violation.

The parties now have decided to settle the matter, and they have filed a motion pursuant to Commission Rule 30, C.F.R. § 2700.30, seeking approval of the proposed settlement. The citation, initial assessment, and the proposed settlement amount is as follows:

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. Section</u>	<u>Assessment</u>	<u>Settlement</u>
4002121	08/05/92	75.1102	\$189	\$136

In support of the proposed settlement disposition of this case, the Petitioner has submitted information pertaining to the six statutory civil penalty criteria found in Section 110(i) of the Act, included information regarding Respondent's size and ability to continue in business and history of previous violations.

In particular, with regard to Citation No. 4002121, Petitioner notes that the violation concerned the malfunctioning of Respondent's belt conveyor which was periodically starting erroneously when being idled on the sequence mode. Petitioner asserts that unbeknownst to the inspector, Respondent was fully aware of the problem and was making good faith attempts to correct it. Thus, Respondent's negligence was less than supposed

CONCLUSION

After review and consideration of the pleadings, arguments, and submissions in support of the motion to approve the proposed settlement of this case, I find that approval of the suggested reduction in the penalty assessed for the subject violation is warranted and the proposed settlement disposition is reasonable and in the public interest. Pursuant to 29 C.F.R. § 2700.30, the motion IS GRANTED, and the settlement is APPROVED.

ORDER

Respondent IS ORDERED to pay a civil penalty in the settlement amount shown above in satisfaction of the violation in question. Payment is to be made to MSHA within thirty (30) days of the date of this proceeding and upon receipt of payment, this proceeding is DISMISSED.


David F. Barbour
Administrative Law Judge
(703)756-5232

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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 25 1993

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. PENN 92-531
Petitioner : A.C. No. 36-07813-03553
: :
v. : No. 2 Vein Slope Mine
: :
C&B MINING COMPANY, :
Respondent :

DECISION

Appearances: Anita Eve-Wright, Esq., Office of the Solicitor
U.S. Department of Labor, Philadelphia,
Pennsylvania, for the Petitioner;
Gary Lorenz, Representative of Operator, Shamokin,
Pennsylvania, for the Respondent.

Before: Judge Barbour

STATEMENT OF THE CASE

In this civil penalty proceeding initiated by the Secretary of Labor ("Secretary"), on behalf of the Mine Safety and Health Administration ("MSHA"), pursuant to Sections 105(a) and 110(i) of the Federal Mine Safety and Health Act of 1977 ("Mine Act" or "Act"), 30 U.S.C. §§ 815(a), 820(i), the Secretary seeks the assessment of a civil penalty against C&B Mining Company ("C&B") for C&B's alleged violation of Section 103(a) of the Act, 30 U.S.C. § 813(a).¹

The Secretary asserts that on January 28, 1992, MSHA inspector Dennis Myers was denied entry to C&B's No. 2 Vein Slope Mine by Glenn Parks, the mine's hoisting engineer. According to the Secretary, Parks was acting on the orders of Gary Lorenz, an owner of C&B. The Secretary asserts that because Myers was at the mine to conduct an inspection pursuant to Section 103(i), 30 U.S.C. § 813(i), of the Act, C&B violated section 103(a) when

¹ Section 103(a) authorizes MSHA inspectors to conduct frequent investigations and inspections of the nation's mines, to determine, among other things, whether an imminent danger exists and whether there is compliance with applicable mandatory health and safety standards promulgated pursuant to the Act. To accomplish these purposes MSHA is authorized "to make inspections of each mine in its entirety at least four times a year."

it denied him entry.² The Secretary proposes a civil penalty of one-thousand dollars (\$1,000) be assessed for the alleged violation.

Lorenz, on behalf of C&B, contests the proposed penalty. A hearing was conducted in Williamsport, Pennsylvania, at which Anita Eve-Wright represented the Secretary and Myers and James Schoffstall, Myers' supervisor, testified for the Secretary. Lorenz represented C&B and testified for the company. At the close of the hearing the parties orally summarized their positions.

THE SECRETARY'S WITNESSES

Myers stated that he first inspected the No. 2 Vein Slope Mine -- a small anthracite mine -- in October 1991. Tr.12. The inspection in October was the beginning of the regular quarterly inspection required by Section 103(a) of the Act. According to Myers, in January 1992, coal was being extracted at the mine in the vicinity of uncharted, abandoned workings. In order to make certain that C&B personnel were drilling ahead and into the coal they intended to mine, so as to give themselves warning if they were approaching the old workings, MSHA put the mine on a section 103(i) "spot inspection" basis. Under the spot inspection program Myers was required to conduct unscheduled weekly inspections at the mine. Tr. 12-13. Myers explained that the inspections were needed because in the anthracite coal fields water or contaminated air frequently collects in old workings and if there is an unintended breakthrough into the old workings a rapid and potentially deadly inundation of water or release of contaminated air can occur into the active workings of the mine.

On January 24, 1992, Myers went to the mine to conduct one of the required weekly inspections. Myers stated that he arrived at approximately 8:45 a.m. He met Parker and told Parker he was there "for a weekly hazard inspection." Tr. 13. Myers testified that while he was changing his clothing to go underground, Parker told Myers that Lorenz had said "to run [Myers] off if [he] showed up." Id. In the meantime, the miners had come out of the mine to eat, and Lorenz, who was there, spoke with Myers about why the mine had been placed on a spot inspection schedule. Lorenz then left the mine, telling Myers that he had a personal problem at home. Id.

² Section 103(i) provides that if MSHA finds that there exists in a coal mine some "especially hazardous condition" that is not gas related, it shall provide a minimum of one spot inspection of all parts of the mine every five working days at irregular intervals. Section 103(a) provides the right of entry that allows MSHA's inspectors to accomplish this purpose.

Myers testified that after Lorenz left, Parker took a truck of coal to the stockpile. When he failed to return, another C&B employee went to find out what was wrong. Myers was told that the truck had developed a mechanical problem and that the mine would have to close at the end of the day. Myers and the miners left the mine. Tr. 13-14.

After leaving, Myers stated that he went to the MSHA field office in Shamokin, Pennsylvania, and told his supervisor, Schoffstall, what had happened. Tr. 14. Schoffstall instructed Myers to return to the mine the next working day (Monday, January 27, 1992) and to again try to conduct an inspection. Tr. 14-15.

Myers returned as directed. Upon arriving at the mine he met Lorenz and Lorenz's brother, Cal Lorenz. Tr. 15. (Myers stated that Cal Lorenz is the foreman at the mine.) Lorenz told Myers that Schoffstall had told him "to think it over about letting [Myers] inspect," that he had done so and that he had decided Myers could not inspect the mine. Id. Lorenz stated that "[t]he Federal could inspect but [Myers] couldn't inspect." Id. Myers understood Lorenz to mean that any MSHA inspector other than himself could conduct an inspection but that he could not.

Also, Lorenz indicated to Myers that he did not like Myers' attitude. Myers asked Lorenz what was wrong with his attitude but Lorenz did not reply. Id.³ Myers advised the brothers that he would leave so they could "think it over" but if they continued to refuse to let him inspect the mine he would have to issue to C&B a citation for "denial of entry." Tr. 16. Myers then telephoned Schoffstall and recounted the situation. He told Schoffstall that he would return the following day and would try to conduct the inspection. Tr. 17.

Myers came back the next morning. He met Parker at the hoist building and Parker reiterated that Lorenz had instructed him not to let Myers into the mine. Tr. 18. In that case, Myers responded, he would issue to C&B a citation for denying him entry, and that the violation was a significant and substantial ("S&S") contribution to a mine safety or health hazard. He also stated he would ask that the violation be specially assessed.⁴

³ In addition, Myers stated that Cal Lorenz told him C&B had begun retreat mining and therefore spot inspections were not longer necessary. Tr. 16. Myers agreed that if, in fact, C&B was retreat mining, inspections conducted pursuant to section 103(i) no longer would have been required. Tr. 18.

⁴ The Secretary's regulations for the determination of penalty by special assessment are set forth at 30 C.F.R., Part 100. Section 100.5(d) provides that when a violation has been issued for a failure to permit an

(continued...)

Myers issued the citation and returned to the MSHA office where he discussed the situation with Schoffstall. Schoffstall sent Myers back to the mine and instructed MSHA inspector Paul Sargent to accompany him. Once back, Myers asked Parker if he could conduct the inspection? Parker said "no," and Myers issued to C&B an order of withdrawal pursuant to Section 104(b) of the Act, 30 U.S.C. § 814(b), for failing to abate the violation of section 103(a).⁵ Myers and Sargent then met Cal Lorenz who told Myers that Sargent could inspect but that Myers could not. Tr. 19-20.

Myers and Sargent returned to the MSHA office. Later in the day Lorenz came to the office and, according to Myers, confronted him. Myers described what happened:

Lorenz came stalking into the office in a very aggressive manner, walked over to me, started pointing his finger and telling me I would not dictate to him . . . anymore. That was his property, that was his mine, he would say who would go in and who wouldn't . . . He was putting no trespassing signs up and I was to be nowhere around.

Tr. 20-21. Schoffstall intervened and called Lorenz into his office. After a "behind closed doors" conference, Schoffstall asked Myers to join them. Myers testified that he asked Lorenz what he had done to cause Lorenz to object to his presence at the mine. Myers maintained that Lorenz would not respond except to ask Schoffstall why C&B could not be assigned another inspector?⁶ When Schoffstall explained why he could not appoint another inspector for the mine, Lorenz left the office. Tr. 21.

⁴(...continued)

inspector to perform an inspection or investigation, MSHA will review the violation to determine whether a special assessment is appropriate.

⁵ Section 104(b) states in relevant part that if an inspector finds that the violation described in a citation has not been abated and that the operator should not be given further time to abate, the inspector shall promptly issue an order requiring the withdrawal of miners and prohibiting their reentry until the inspector determines the violation has been abated.

⁶ During cross-examination Lorenz asked Myers if he recalled coming to a garage owned by Lorenz on January 26 and confronting Lorenz about an alleged failure of C&B to comply with a mandatory standard? Lorenz asked if Myers remembered pointing a finger at him and telling him in a loud voice that if C&B did not comply, Myers would shut down the mine? Myers responded he recalled coming to the garage shortly after Christmas but did not recall pointing a finger at Lorenz or "carrying on" and he denied that he had told Lorenz to fix the condition or he would "write it." Tr. 30-31.

Myers testified that the following day (January 29) Lorenz called Schoffstall and told him that Myers could inspect. Myers went to the mine and conducted the inspection. When he came out of the mine he discussed with Cal Lorenz and C&B's miners "the type of pillaring method they could use, the ventilation they needed and . . . safe mining practices in pillaring." Tr. 22. As a result of the inspection Myers determined that C&B had begun retreat mining and that section 103(i) spot inspections were no longer needed. Therefore, the mine was taken off a spot inspection schedule. Id.

Myers testified that he found the violation to be S&S because without inspecting the mine MSHA could not determine if C&B was drilling ahead as it advanced toward the old workings. Without drilling there was no way to know for certain if C&B's mining process would cut into the old workings and whether those old workings contained water or contaminated air. If they did, he believed there was a very real danger to C&B's underground miners of at least permanently disabling injuries. Tr. 22-23, 24.

Myers also stated he believed the denial of entry to have been caused by C&B's reckless disregard of the law. He noted that he had explained to Lorenz why he was there to inspect and that Lorenz, who was fully aware of the consequences of refusing to let him into the mine, nonetheless persisted in his refusal. Tr. 24.

Schoffstall was the next witness to testify. He confirmed that he had first assigned Myers to inspect the mine as part of the regular quarterly inspection during October 1991. Tr. 41. In December, when the mine map showed the mine to be within 200 feet of old, abandoned workings, MSHA placed the mine on a section 103(i) inspection program. Id.

Schoffstall explained in detail the dangers posed by old, abandoned workings -- the dangers of a sudden and unexpected inundating or contamination. He recalled the Porter Tunnel disaster of 1979 when 9 miners were killed by a sudden mine flood and he indicated that another life had been lost similarly in the early 1980's. He termed the need for advance drilling "one of [MSHA's] top priorities" in the anthracite region. Tr 42. According to Schoffstall, C&B was placed on an section 103(i) inspection schedule "to see that the drilling program was carried out." Tr. 43.

In addition, Schoffstall gave his version of the events of January. He confirmed that on January 24, 1992, Myers told him about being barred from inspecting the mine and Schoffstall told Myers to go back on the 27th. Schoffstall added that on January 24, 1992, Lorenz had called and stated that he would permit another inspector to enter the mine but that he would not

allow Myers in. Tr. 44. Schoffstall testified he told Lorenz that he should reconsider, that a denial of entry was a very serious matter and that no mine operator had ever won a denial of entry case. Id.

Schoffstall also stated that this was not his only conversation with Lorenz on the subject, that on January 27, 1992, and after Myers had returned to the office, Lorenz again called Schoffstall and requested another inspector be assigned to the mine. Lorenz told Schoffstall that he had a verbal disagreement with Myers at Lorenz's garage. Schoffstall responded that he did not feel a change was warranted and he warned Lorenz again about the serious nature of a denial of entry. Tr. 45.

In addition, Schoffstall testified that following the issuance of the order of withdrawal Lorenz came to the MSHA office and confronted Myers. Schoffstall described Lorenz as "worked up" and Schoffstall stated that after Lorenz calmed down he told Lorenz to go home and reconsider, that the quickest way to solve the problem was to let Myers in. Tr. 46-47. The following morning, Lorenz called Schoffstall and told him Myers could conduct the inspection. Tr. 47.

Schoffstall testified that he went to the mine with Myers and accompanied him during the inspection. When Lorenz was able to show that the mine was not being advanced any longer, Schoffstall recommended to the MSHA district manager that the mine be taken off the section 103(i) spot inspection schedule, which was done. Tr. 47.

Schoffstall stated that he had reviewed Myers' findings after Myers issued the citation and order and that he agreed the violation was S&S. He echoed Myers' concerns regarding possible inundation of water or contaminated air should C&B's miners have cut into old workings. Id., Tr. 57. He also agreed with Myers that the violation was due to C&B's reckless disregard of the requirements of the Act. Tr. 48-49.

Under questioning by Lorenz, Schoffstall related that during October 1991 and January 1992, Lorenz frequently called him and asked that a different inspector be assigned to the mine. Tr. 50. Schoffstall stated that he recalled Lorenz asserting that he "didn't like [Myers'] attitude[,]" that he "didn't like the way he inspected[,]" and that Lorenz had asked for a different inspector "right from the first day." Id. Schoffstall agreed C&B had no problems with any other of MSHA's inspectors and he described C&B as a "very cooperative" and safe operator. Tr. 50-51.

With regard to his refusal to change inspectors, Schoffstall was of the opinion that MSHA could not allow an operator to dictate who would or would not inspect and that while there might be instances where he and the MSHA district manager would find cause to change an inspector, he did not believe there had been any reason to change in this instance. Tr. 53-54.

C&B'S WITNESSES

Lorenz explained that he is one of two partners who own C&B, the other being Cynthia Lorenz, his sister-in-law. Tr. 7-8. Regarding his relationship with Myers, Lorenz stated that he had a conflict with Myers from the first time Myers was at the mine, but he denied that C&B was trying to dictate to MSHA who would be allowed to inspect the mine. Rather, he was trying to impress upon MSHA the fact that a change of inspectors was truly needed. Tr. 59-60.

With respect to the danger to miners presented by the alleged violation, he indicated that when the citation and order were issued mining was no longer advancing. The coal had narrowed to a 17 inch seam and the company had only 100 feet to go before it reached the limit of its coal lease. For these reasons, the company had started retreat mining. Therefore, there was no hazard. Tr. 60.

DISCUSSION AND FINDINGS

THE VIOLATION

The right of entry is clearly set forth in the Mine Act. Section 103(a) of the Act provides that "for the purpose of making any inspection or investigation under this [Act] " MSHA inspector's "shall have a right of entry to, upon or through any coal . . . mine." As the Commission has noted, the right is broad, and while the Commission has also stated that the right is not without limits, the record does not suggest, nor does C&B argue, that Myers was acting outside the bounds of statutory authority on January 28, 1992, when he sought to inspect the mine. Tracy & Partners, et al., 11 FMSHRC 1457, 1461 (August 1989).

In Tracy & Partners a majority of the Commission concluded that while all inspections of mines under section 103 are conducted pursuant to the basic authority of section 103(a), when MSHA attempts to conduct a spot inspection pursuant to section 103(i), the spot inspection must be valid in the first instance

under section 103(i) itself. 11 FMSHRC at 1464.⁷ Section 103(i) provides for spot inspections whenever the Secretary "finds . . . that . . . [a] hazardous condition exists" other than excessive liberation of methane or other explosive gases or an explosion or ignition of methane or other gases within the previous five years. Here, Myers and Schoffstall testified without contradiction of the hazards associated with cutting into old, abandoned workings. Without entering the mine and inspecting, MSHA did not know and could not tell whether C&B's miners were being protected from those hazards by drilling ahead. Nor, as Lorenz agreed, was there any way for MSHA to know, aside from taking Lorenz's word, that the mine was no longer being advanced and that retreat mining had started. Tr.61.

Obviously, MSHA cannot be expected to carry out its enforcement responsibilities by relying solely on the representations of those subject to the Act's mandates, if it could there would be no need for inspections. I therefore find that on January 28, 1992, MSHA properly concluded that "a hazardous condition exist[ed]" at the mine and that the spot inspection it sought to conduct was valid in the first instance under section 103(i).

This being the case, when Myers requested entry on January 28, 1992, C&B was legally bound to admit him and I conclude that in refusing him admission C&B violated section 103(a) as charged.

Nor can C&B's willingness to permit entry to any inspector other than Myers in any sense lessen its liability. The Act provides that authorized representatives of the Secretary shall make frequent inspections and leaves enforcement in the Secretary's hands. It does not provide for inspections by authorized representatives of the Secretary as approved by the operator, and clearly the power to designate inspectors must be MSHA's if the Act is to be effectively enforced.⁸

⁷ I, of course, am bound by the reasoning of the majority, but for another view on the statutory basis for a valid spot inspection see the dissent of Commissioners Backley and Lastowka. 11 FMSHRC at 1466-70.

⁸ This is not to say that situations warranting the removal of an inspector upon the complaint of an operator may never arise. On the contrary, Schoffstall indicated such circumstances can exist. Tr. 53-54. Rather, it is simply to recognize that the final decision is first, last and always MSHA's, not the operator's.

S&S VIOLATION

Following the hearing I requested a written statement of position from the parties regarding the following question:

Can a violation of Section 103(a) of the Mine Act be a S&S violation?

In requesting the statement I took note of the fact that the wording of Section 104(d) of the Act, 30 U.S.C. 814(d), appears to restrict an inspector's S&S finding to "a violation of any mandatory health or safety standard" (emphasis added). C&B's representative did not respond. However, counsel for the Secretary stated in part:

[P]lease be advised that the Secretary . . . submits that a finding that a violation of Section 103(a) . . . need not be based on the additional finding that the violation was a [S&S] contribution to a mine safety hazard. Whereas the gravity associated with the violation of a mandatory safety or health standard is determined to be [S&S], it must be determined whether the gravity involved in a violations of Section 103(a) of the Act is serious.

Letter from Anita Eve-Wright (February 1, 1993).

I conclude from this that the Secretary is dropping his allegations regarding the S&S nature of the violation at issue, and I will therefore order the Secretary to vacate the inspector's S&S finding.

CIVIL PENALTY CRITERIA

In assessing a civil penalty for the violation of section 103(a), I must consider the statutory civil penalty criteria contained in Section 110(i) of the Act.

GRAVITY

This was a very serious violation. The right of an inspector selected by MSHA to enter a mine to conduct an inspection or investigation is a keystone for the Act's structure of enforcement. As I have already observed, if an operator can selectively bar entry to an inspector, effective enforcement will be severely compromised.

It matters not for purposes of assessing the gravity of the violation that at the time Myers was denied permission to enter there was no need to drill ahead because mining was retreating. The violation for which C&B is charged is a denial of entry not a failure to practice a particular mining technique.

NEGLIGENCE

Myers' and Schoffstall's testimony that Lorenz was advised that a refusal to admit Myers would be a violation of the Act, was not refuted. While Lorenz may have believed that in offering to accept any inspector other than Myers he was within his rights as an operator, he was mistaken and in ordering Myers' barred from the mine, Lorenz acted at his company's peril. I conclude that C&B was highly negligent in allowing the violation to exist.

HISTORY OF PREVIOUS VIOLATIONS

The company's history of previous violations is negligible and counsel for the Secretary stated that there is no record of any prior violation of section 103(a). Tr. 9.

SIZE

Myers stated that C&B employs 4 miners as well as hoist engineer Parks and foreman Cal Lorenz. Although he did not know the tonnage of anthracite coal produced annually by the company, he was of the opinion that C&B is a small operator, and I so find. Tr. 36-37.

ABILITY TO CONTINUE IN BUSINESS

The record does not contain any information regarding C&B's financial condition, and Lorenz did not contend that the amount of any penalty assessed would adversely affect C&B's ability to continue in business. Therefore, I find that it will not.

CIVIL PENALTY

While I have found that the violation of section 103(a) was very serious and that C&B was highly negligent, I nonetheless conclude that this violation is an aberration in an otherwise enviable record of compliance. I particularly note Schoffstall's testimony that aside from the problems involving Myers, he found C&B to be very cooperative and I also note Schoffstall's affirmative response when Lorenz asked if he considered the mine to be very safe. Tr. 51-52. This overall positive attitude toward compliance is also witnessed by C&B's negligible history of previous violations.

Considering these factor's, and in light of the other civil penalty criteria, I conclude that the one-thousand dollar (\$1,000) civil penalty proposed by the Secretary is excessive. Instead, I assess a civil penalty of five-hundred dollars (\$500.) It should go without saying that any repeat violations of section 103(a) that come before me may be subject to substantially higher penalties.

In assessing a civil penalty lower than that proposed by the Secretary I am in no way implying criticism of Myers. From what appears in this record it is apparent that he is a conscientious inspector who with diligence and great patience attempted to carry out the duties required of him.

ORDER

Citation No. 3080842 is affirmed. Within thirty (30) days of the date of this decision C&B **IS ORDERED** to pay a civil penalty of five-hundred dollars (\$500) for the violation of section 103(a) found herein. In addition, the Secretary **IS ORDERED** to modify Citation No. 3080841 and Order No. 3080842 by deleting the S&S designations.


David F. Barbour
Administrative Law Judge
(703) 756-5232

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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 25 1993

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 93-89-DM
on behalf of Paul H. Brooks,	:	
Complainant	:	NE MD 92-03
v.	:	
	:	Greystone Quarry and Plant
R.B.S., INCORPORATED,	:	
Contestant	:	

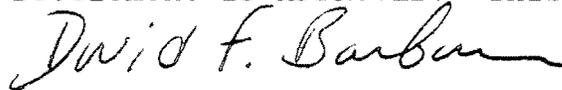
ORDER APPROVING SETTLEMENT

Before: Judge Barbour

The Secretary, on behalf of Paul H. Brooks, Complainant, has moved to approve settlement of this discrimination proceeding. The Secretary's motion fully sets forth the terms on conditions of the settlement, including the fact that the Secretary requests no civil penalty be assessed against R.B.S., Incorporated, Contestant, because the evidence at trial may not establish that the complainant adequately communicated his legitimate safety concerns to the Contestant and thus a violation of section 105(c) of the Act may not have occurred.

Obviously, the Complainant, who has signed the motion, believed the proposed settlement is in his best interest, and I conclude that it is in the public interest as well. It resolves allegation of discrimination as set forth in the Secretary's complaint and, that being the case there is no further reason for the parties to contest this case.

ACCORDINGLY, the settlement is APPROVED. This matter is DISMISSED.



David Barbour
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 26 1993

RALEIGH R. HUNT,	:	DISCRIMINATION PROCEEDING
Complainant	:	
	:	Docket No. KENT 92-367-D
v.	:	PIKE CD 91-20
	:	
CANADA COAL COMPANY,	:	No. 1 Prep Plant
Respondent	:	

ORDER OF DISMISSAL

This case involves a discrimination complaint under § 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq.

The parties have moved to dismiss the case based upon a settlement.

The motion is GRANTED, and this case is DISMISSED.

William Fauver

William Fauver
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1244 SPEER BOULEVARD #280
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MAY 7 1993

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. CENT 92-88-M
Petitioner : A.C. No. 39-01378-05506
v. : T & D Construction
T & D CONSTRUCTION, :
Respondent :

ORDER OF DEFAULT

Before: Judge Morris

Respondent failed to respond to prehearing orders issued November 5, 12992, and December 8, 1992.

Further, Respondent failed to respond to an Order to Show Cause issued March 17, 1992.

Consequently, a judgment of **DEFAULT** is entered in favor of the Secretary.

Accordingly, I enter the following:

ORDER

1. The two Citations herein and the proposed penalties are **AFFIRMED**.

2. Respondent is **ORDERED TO PAY** to the Secretary of Labor the sum of \$120.00 **IMMEDIATELY**.


John J. Morris
Administrative Law Judge

ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

FEB 3 1993

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. PENN 92-849
Petitioner : A. C. No. 36-02713-03572
v. :
: Docket No. PENN 92-850
POWER OPERATING COMPANY, : A. C. No. 36-02713-03573
INCORPORATED, :
Respondent : Frenchtown Mine

ORDER DENYING MOTION TO DISMISS
ORDER DIRECTING SERVICE
ORDER DIRECTING OPERATOR TO ANSWER

On October 29, 1992, the Solicitor filed the penalty petitions in the above-captioned cases. On November 25, 1992, the operator filed identical motions to dismiss for these cases because the penalty petitions were not file within the prescribed time limits and were not properly served. On January 4, 1993, the Solicitor filed a motion in opposition to the operator's motions to dismiss.

Commission Rule 27 requires that the Secretary file the penalty proposal within 45 days of the date he receives an operator's notice of contest for the proposed penalty. 29 C.F.R. § 2700.27. An operator ordinarily contests the proposed penalty by mailing in the so called "blue card" which has been provided to it for this purpose. And such contest is effective upon mailing. J. P. Burroughs, 3 FMSHRC 854 (April 1981). In these cases the operator's counsel filed documents entitled notice of contest of citation and assessment and MSHA created corresponding blue cards copies of which were sent to the Commission. The blue cards show that the Secretary received the operator's notices of contest on August 19, 1992. The petitions filed at the Commission on October 29 were, therefore, 24 days late.

The Commission has not viewed the 45 day requirement as jurisdictional or as a statute of limitation. Rather, the Commission has permitted late filing of the penalty proposal upon a showing of adequate cause by the Secretary where there has been no showing of prejudice by the operator. Salt Lake County Road Department, 3 FMSHRC 1714, 1716 (July 1981).

The Solicitor's motion in opposition represents that the delay occurred because the cases were not received in her office until October 23, 1992. The Solicitor attaches a memorandum from C. Bryon Don, Chief, Civil Penalty Compliance Office, Office for Assessments for MSHA which states that the delay in sending the

cases was due to the increase number of cases received in that office. In Salt Lake County Road Department, supra, decided early in the administration of the Act, the Commission held that the extraordinarily high caseload and lack of personnel confronting the Secretary at that time constituted adequate cause for late filing. At the present juncture, I take note of the precipitous rise in the volume of contested cases over the last few years, as indicated by the Commission's own records.¹ I find these circumstances constitute adequate cause for the short delay in the filing of the penalty petitions. Finally, the record does not indicate any prejudice to the operator from the 24 day delay.

The operator's assertion that these penalty petitions be dismissed because of defective service is without merit. The Solicitor served copies of the petitions upon the operator's safety director who was identified as the individual to receive such service in the legal identity report filed by the operator with MSHA and therefore noted as such on MSHA's computer. The Secretary was unaware the operator had retained counsel, but the Solicitor represents that MSHA's computer has now been changed to reflect counsel as the proper recipient of service.

Courts have broad discretion on whether to dismiss an action because of inadequate service or require the service be made properly. Montalbano v. Easco Hand Tools Inc., 766 F.2d 737 (2d Cir. 1985); 5A C. Wright & A. Miller, Wright & Miller, Federal Practice & Procedure, § 1354 (1990); 2A J. Moore & J. Lucas, Moore's Federal Practice, ¶ 12.07[2.-4] (2d ed. 1992). As a general matter the action will be preserved in those cases in which there is a reasonable prospect that the service can be accomplished properly. Novak v. World Bank, 703 F.2d 1305 (D.C. Cir. 1983); Wright & Miller, Federal Practice & Procedure, supra; Moore's Federal Practice, supra. In this case it is clear that service can be made upon operator's counsel in accordance with MSHA's updated computer.

In light of the foregoing, the operator's motions to dismiss the penalty petitions are **DENIED**.

It is **ORDERED** that the within 10 days of the date of this order the Solicitor serve operator's counsel with copies of the penalty petitions for these cases.

It is further **ORDERED** that within 40 days of the date of this order the operator file its answers to the penalty petitions.


Paul Merlin
Chief Administrative Law Judge

¹ The number of new cases received for FY 90 was 2,029, for FY 91 was 2,267 and for FY 92 was 6,032.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

MAY 3 1993

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 92-613-M
Petitioner	:	A. C. No. 45-01288-05509-R
	:	
v.	:	Docket No. WEST 92-614-M
	:	A. C. No. 45-01288-05510-R
TRIANGLE SAND & GRAVEL	:	
COMPANY, INCORPORATED,	:	
	:	Portable Plant
	:	

ORDER DISAPPROVING SETTLEMENTS
ORDER TO SUBMIT INFORMATION

Before: Judge Merlin

These cases are before me upon petitions for assessment of the civil penalties under section 105(d) of the Federal Mine Safety and Health Act of 1977. The parties have filed joint motions to approve settlements of the twenty-two violations involved in these cases. The parties seek approval of reductions in the following penalty amounts:

WEST 92-613	\$3,242	to	\$1,520
WEST 92-614	\$868	to	\$480

No reasons were given to support the approximately 50% reductions proposed in the original assessments for each of the twenty-two violations. A review of the files shows that eleven of the twenty two violations were designated significant and substantial and one of these had an unwarrantable failure finding. The parties offer absolutely no reasons to support the very large reductions they seek. Rather they have filed brief form motions which merely list the citations and give nothing more than bare statistics regarding the six criteria of section 110(i) of the Act. 30 U.S.C. § 820(i). The recommended settlements are not justified by relating the citations to any of the six criteria. I cannot approve what appears to be nothing more than across the board percentage reductions for all the violations.

The parties are reminded that the Commission and its judges bear a heavy responsibility in settlement cases pursuant to section 110(k) of the Act. 30 U.S.C. § 820(k); See, S. Rep. No. 95-181, 95th Cong., 1st Sess. 44-45, 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 632-633 (1978). It is the Commission's responsibility to determine the appropriate amount of penalty, in

accordance with the six criteria set forth in section 110(i) of the Act. Sellersburg Stone Company v. Federal Mine Safety and Health Review Commission, 736 F.2d 1147 (7th Cir. 1984).

Based upon the parties' motion, I cannot conclude that the recommended penalty reductions are warranted. The parties must provide explicit reasons for the action they recommend.

In light of the foregoing, it is ORDERED that the motions for approval of settlement be DENIED.

It is further ORDERED that within 30 days of the date of this order the parties submit additional information to support their motions for settlement. Otherwise these cases will be assigned and set for hearing.



Paul Merlin
Chief Administrative Law Judge

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