MAY 1994

COMMISSION DECISIONS AND ORDERS

ADMINISTRATIVE LAW JUDGE DECISIONS

ADMINISTRATIVE LAW JUDGE ORDERS

MAY 1994

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

Secretary of Labor, MSHA v. Mission Valley Concrete, Docket Nos. WEST 92-702-M, etc. (Judge Cetti, Default Order of March 21, 1994 - unpublished)

Secretary of Labor, MSHA v. Power Operating Company, Docket No. PENN 93-51. (Judge Weisberger, March 23, 1994)

Secretary of Labor, MSHA v. U.S. Coal, Inc., Docket No. SE 93-119. (Judge Fauver, March 29, 1994)

Lion Mining Company v. Secretary of Labor, MSHA, Docket No. PENN 94-71-R. (Judge Hodgdon, March 29, 1994)

Secretary of Labor, MSHA v. Doss Fork Coal Company, Inc., Docket No. WEVA 93-129. (Judge Melick, April 12, 1994)

Secretary of Labor, MSHA v. Energy West Mining Company, Docket No. WEST 93-169. (Judge Morris, April 18, 1994)

Jim Walter Resources, Inc., v. Secretary of Labor, MSHA, Docket No. SE 93-56-R, etc. (Judge Melick, April 18, 1994)

Keystone Coal Mining Corporation v. Secretary of Labor, MSHA, Docket No. PENN 91-451-R - Master Docket No. 91-1. (Judge Broderick, April 20, 1994)

The following is a list of cases in which review was denied:

Secretary of Labor, MSHA v. United States Steel Mining Company, Docket No. WEVA 92-783. (Judge Fauver certification of Interlocutory Ruling, April 15, 1994)

Secretary of Labor, MSHA v. L & J Energy Company, Docket No. PENN 93-15. (Judge Weisberger, April 12, 1994)

COMMISSION DECISIONS AND ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

May 2, 1994

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket Nos. WEST 92-702-M
ADMINISTRATION (MSHA)	:	WEST 92-703-M
	:	WEST 92-704-M
v.	:	
	:	
MISSION VALLEY CONCRETE	:	
	:	

BEFORE: Jordan, Chairman; Backley, Doyle, and Holen, 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 August 24, 1993, Administrative Law Judge August F. Cetti issued a Prehearing Order to Mission Valley Concrete ("MVC"). MVC did not respond to the Prehearing order. On February 4, 1994, the judge issued an Order to Show Cause directing MVC to respond to the Prehearing Order. MVC failed to respond to that Order. On March 21, 1994, the judge issued an Order of Default to MVC and assessed a civil penalty of $1,949. For the reasons that follow, we vacate the default order and remand for further proceedings.

On March 28, 1994, the Commission received a letter, filed by facsimile transmission, from MVC. The letter, signed by MVC President W. Greg Harding, asked that the case be reconsidered. MVC asserted that it had two settlement discussions with an attorney representing the Secretary of Labor and that, notwithstanding a commitment to respond to its settlement offer, the Secretary's attorney had not done so.

The judge's jurisdiction in this matter terminated when his decision was issued on March 21, 1994. Commission Procedural Rule 69(b), 29 C.F.R. § 2700.69(b)(1993). 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 within 30 days of its issuance. 30 U.S.C. § 823(d)(2); 29 C.F.R. § 2700.70(a). We deem MVC's 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).

We note that MVC has not asserted that it did not receive the judge's Prehearing Order or his Order to Show Cause. On the basis of the present record, we are unable to evaluate the merits, if any, of MVC's position. Accordingly, we remand this matter to the judge, who shall determine whether default is warranted. See Hickory Coal Co., 12 FMSHRC 1201, 1202 (June 1990).

Mary Lu Jordan, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

Arlene Holen, Commissioner

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Administrative Law Judge August F. Cetti
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

May 10, 1994

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. WEVA 92-783
UNITED STATES STEEL MINING CO., INC.	:	

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

ORDER

BY THE COMMISSION:

The issue in this civil penalty proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988), is whether interlocutory review should be granted. See Commission Procedural Rule 76, 29 C.F.R. § 2700.76 (1993)("Rule 76"). The Commission remanded this case to Administrative Law Judge William Fauver for his determination, within the framework of Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984), of whether the violation at issue was "significant and substantial." U.S. Steel Mining Co., 15 FMSHRC 2445, 2448-49 (December 1993). On April 15, 1994, the judge issued a "Decision on Remand," in which, on his own motion, he certified his ruling for interlocutory review. See Rule 76(a)(1)(i). Both parties have filed in opposition to interlocutory review.

We conclude that Judge Fauver's ruling does not meet the criteria for interlocutory review set forth in Rule 76(a)(2) and, accordingly, review is denied. The judge is directed to issue a final disposition, on the existing record, pursuant to the Commission's previous remand instructions. 15 FMSHRC at 2448-49.

Mary Lu Jordan, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

Arlene Holen, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

May 26, 1994

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. KENT 92-549
PRABHU DESHETTY, employed by ISLAND CREEK COAL COMPANY	:	

BEFORE: Backley, Doyle and Holen, Commissioners[1]

DECISION

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" or "Act"). The issue is whether Prabhu Deshetty, employed by Island Creek Coal Company ("Island Creek"), knowingly authorized a violation of a mandatory standard (30 C.F.R. § 75.400)[2] and, thus, is individually liable under section 110(c) of

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[1] Chairman Jordan has elected not to participate in this matter. She assumed office after this case had been considered at a Commission decisional meeting. A new Commissioner possesses legal authority to participate in pending cases, but such participation is discretionary. Commissioner Nelson participated in the consideration of this case but passed away before the decision was issued. Pursuant to section 113(c) of the Mine Act, 30 U.S.C. § 823(c), we have designated ourselves a panel of three members to exercise the powers of the Commission.

[2] Section 75.400 provides:

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

the Mine Act, 30 U.S.C. § 820(c).[3] Administrative Law Judge Gary Melick concluded that a violation of section 75.400 occurred and that Deshetty was individually liable for it under section 110(c) of the Act. 15 FMSHRC 830 (May 1993)(ALJ). He assessed a $1,500 civil penalty. Id. at 835. Deshetty filed a petition for discretionary review challenging the judge's liability and penalty findings. For the reasons set forth below, we affirm the judge's decision.

I.

Factual and Procedural Background

Island Creek operates the Hamilton No. 2 Mine, an underground coal mine in Union County, Kentucky. On January 15, 1991, Inspector Harold Gamblin of the Department of Labor's Mine Safety and Health Administration ("MSHA"), observed a black area near the header of the No. 1 belt drive, consisting of fine coal and float coal dust 100 to 125 feet in length. I Tr. 41-42.[4] Inspector Gamblin also observed another pile of fine coal and coal dust 36 inches in height near the belt takeup. 15 FMSHRC at 831-32; I Tr. 42-43. The inspector saw additional substantial accumulations along the belt, which he determined had been there for a week or longer. 15 FMSHRC at 831, 832, 834; I Tr. 43, 45-47, 56-58.

The inspector orally ordered the closing of the belt and issued an order, pursuant to section 104(d)(2) of the Mine Act, 30 U.S.C. § 814(d)(2), alleging a violation of section 75.400. In the belt examiners' books from January 7, 1991, through the date of the inspection, he found 12 entries noting that the No. 1 belt needed cleaning. 15 FMSHRC at 834; G. Ex. 3. The inspector determined that Island Creek's negligence was aggravated. MSHA

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[3] Section 110(c) provides:

> 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 (a) of this section or section [105(c)] ..., any director, officer, or agent of such corporation who knowingly authorized, ordered, or carried out such violation, failure, or refusal shall be subject to the same civil penalties, fines, and imprisonment that may be imposed upon a person under subsections (a) and (d) of this section.

30 U.S.C. § 820(c) .

[4] A hearing in this matter was held on November 18-19, 1992. "I Tr." refers to the transcript for November 18; "II Tr." refers to the transcript for November 19.

conducted a special investigation into the circumstances surrounding the alleged violation and brought section 110(c) civil penalty proceedings against Prabhu Deshetty, the general mine foreman, and other supervisory personnel.[5]

At the hearing, Deshetty defended on the grounds that no violation had occurred and that, even if a violation had occurred, he had not been responsible for it within the meaning of section 110(c).[6] The judge found that significant loose coal and coal dust accumulations existed along the No. 1 belt in violation of section 75.400. 15 FMSHRC at 832. Id. The judge determined that Deshetty knowingly authorized, ordered or carried out the violation of section 75.400, and was therefore liable under section 110(c) of the Mine Act. Id. at 833-35. In assessing a $1,500 civil penalty against Deshetty, the judge found both high gravity and high negligence. Id. at 835.

II.

Disposition

Section 110(c) of the Mine Act provides that, whenever a corporate operator violates a safety or health standard, an agent of the corporate operator who "knowingly authorized, ordered, or carried out such violation" shall be subject to individual civil penalty under the Act. Deshetty contends on review that no violation of section 75.400 occurred. He contends alternatively that, if the finding of violation is affirmed, he had not knowingly authorized, ordered, or carried it out. Deshetty also argues that the civil penalty is excessive because the judge's findings of high gravity and negligence are not supported by substantial evidence and are contrary to law. The Secretary responds that substantial evidence supports the judge's findings that an accumulation violation occurred and Deshetty knowingly authorized, ordered, or carried out that violation.

A. Section 110(c) Liability

1. Violation of section 75.400

Deshetty raises both legal and evidentiary objections to the judge's finding of violation. He asserts that the cited coal accumulations were wet and, therefore, were incombustible material not subject to section 75.400.

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[5] The Secretary also brought section 110(c) penalty proceedings against Curtis Crick, mine shift foreman, James Bo Jones, shift belt foreman, and Charles Wright, mine foreman, which were consolidated before Judge Melick. The judge dismissed the proceedings against Crick, Jones and Wright because the Secretary failed to file the penalty petitions within the 45-day time limit set forth in former Commission Procedural Rule 27(a), 29 C.F.R. § 2700.27(a)(1992)(penalty proposal). 15 FMSHRC 735 (April 1993) (ALJ).

[6] The Secretary also proceeded against Island Creek for the alleged violation. Island Creek Coal Co., Docket No. KENT 92-1034-A. Upon the request of the parties, that proceeding was stayed by Judge Melick in October 1993, pending resolution of the present matter.

However, the Commission has held, as the judge noted, that material consisting of wet or damp coal falls within the prohibition of section 75.400 because such material may, when it dries out, ignite or propagate a mine fire.[7] See Black Diamond Coal Mining Co., 7 FMSHRC 1117, 1120-21 (August 1985); Utah Power & Light Co., Mining Division, 12 FMSHRC 965, 969 (May 1990), aff'd, 951 F.2d 292 (10th Cir. 1991)("UP&L").

Deshetty also argues that a violation of section 75.400 occurs only when an accumulation of combustible materials has built up over a period of time and that the spillage in question had not been present long enough to qualify as an accumulation. He contends that the cited coal material was merely the type of spillage that is inevitable in mining operations.

We reject Deshetty's assertions. Congress intended to proscribe "masses of combustible materials which could cause or propagate a fire or explosion." UP&L, 12 FMSHRC at 968, quoting Old Ben Coal Co., 2 FMSHRC 2806, 2808 (October 1980). We conclude that the accumulations in question, which were substantial, were prohibited within the meaning of the standard.

Further, the inspector, whose testimony was credited by the judge, testified that a 36-inch high accumulation near the belt takeup had been there for some time and that the operator was aware of it because it had been rockdusted at least twice. 15 FMSHRC at 831-32; I Tr. 41-45; G. Ex. 4. Island Creek witness Stan Bealmar, who had accompanied the inspector, conceded this accumulation and testified that it probably had developed over two or three shifts. 15 FMSHRC at 832; II Tr. 207. Both Deshetty and shuttle car driver James Hill acknowledged the existence of a pile of coal near the header. 15 FMSHRC at 831-32; II Tr. 88-89, 219.

The inspector also discovered various other accumulations along 800 feet of belt, ranging from 4 to 36 inches in depth and including a black area consisting of fine coal and float coal dust that extended 100 to 125 feet. I Tr. 41-49. The inspector determined that these accumulations had also been there for some time because they consisted of fine coal and coal dust. I Tr. 46-47. According to the inspector, a new spillage would consist of "large lumps of coal." I Tr. 47. The evidence of long-standing accumulations is corroborated by the belt examiners' reports, which indicated that the No. 1

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[7] We also note that, as Inspector Gamblin explained, there was a likelihood under the circumstances that the cited coal accumulations would dry out:

> We were in the winter alert which was from October through March. We're about to mid-point in it in January. That's at the time when the [dry air] enters the mine ventilation system traveling through the mines ... causing very dry and hazardous conditions, if the combustible materials are allowed to accumulate and not be cleaned up.

Tr. 73.

belt was dirty or needed cleaning on 12 out of the 13 shifts immediately preceding the order. G. Ex. 3.

We conclude that substantial evidence[8] supports the judge's determination that the cited accumulations violated section 75.400 and, therefore, we affirm it.[9]

2. Deshetty's liability under section 110(c)

On both legal and evidentiary bases, Deshetty challenges the judge's conclusion that he knowingly authorized, ordered, or carried out the violation. Deshetty raises arguments concerning the proper interpretation and scope of section 110(c). See D. Br. 17-33. Based on Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984), he asks the Commission to revisit its interpretation of the term "knowingly" in Kenny Richardson, 3 FMSHRC 8 (January 1981), aff'd on other grounds, 689 F.2d 632 (6th Cir. 1982), cert. denied, 461 U.S. 928 (1983), and to redefine the level of awareness or conduct sufficient to subject a corporate agent to individual liability. Deshetty proposes that "knowingly" in section 110(c) signifies actual knowledge or "egregious conduct, not ... mere negligence." See D. Br. 21. We do not reach these issues. Substantial evidence supports the judge's conclusion that Deshetty possessed actual knowledge of the accumulation problem along the No. 1 beltline. His failure to address that ongoing problem was a knowing authorization of the violation within the meaning of section 110(c).

During the time in question, Deshetty, as general mine foreman, was in charge of the day-to-day operations of the mine. II Tr. 52. He was familiar with the workings and maintenance of the belt, and he reviewed and countersigned the belt examiners' reports for every shift. II Tr. 62, 73-78. Those reports revealed that the No. 1 belt was "dirty" or "need[ed] cleaning" every working day from January 7 to January 15, the day of the inspection. G. Ex. 3. Deshetty testified that, when he read a report indicating the belt

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[8] The Commission is bound by the terms of the Mine Act to apply the substantial evidence test when reviewing factual determination in an administrative law judge's decision. 30 U.S.C. § 823(d)(2)(A)(ii)(I). The term "substantial evidence" means "such relevant evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion." Rochester & Pittsburgh Coal Co., 11 FMSHRC 2159, 2163 (November 1989), quoting Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938).

[9] Deshetty also contends that the inspector possessed a faulty recollection of what he had written in his order. Although the inspector did not remember the exact locations of the accumulations, he recalled the 36-inch pile as well as the existence of other coal piles and their overall characteristics. The inspector's notes, written contemporaneously with his inspection, support the inspector's testimony at the hearing. G. Ex. 2. The notes indicated that loose fine coal and coal dust had been found along approximately 800 feet of the belt. Id. The order similarly described the accumulations. G. Ex. 4.

"need[ed] cleaning" or was "dirty," he understood that a violative or hazardous accumulation was present. II Tr. 131, 133-34. Thus, he had actual knowledge of the specific accumulation problem along the No. 1 beltline. He acknowledged that he knew he was "supposed to verify that corrective action was taken with respect to each and every entry [of] violation or hazard reported by the belt examiner," but that, in fact, he did not know whether those conditions had been corrected. II Tr. 131, 132, 152.

Deshetty also reviewed all citations for the mine. II Tr. 129. During the preceding year, the mine was cited 45 times for accumulations of combustible materials. 15 FMSHRC at 833; G. Ex. 1. Inspector Gamblin testified that he had discussed with Deshetty the large number of violations and had recently warned him that the mine needed to "take a closer look" at the accumulation problem. I Tr. 33-34. Deshetty admitted that he knew of these prior violations as a result of his review of the mine's citations. 15 FMSHRC at 833; II Tr. 129, 140. The record thus supports the judge's finding that Deshetty was placed on "specific notice of problems regarding combustible accumulations at this mine." 15 FMSHRC at 833. This notice should have engendered in Deshetty a heightened awareness of a serious accumulation problem. Cf. Peabody Coal Co., 14 FMSHRC 1258, 1264 (August 1992)(for purposes of determining whether a violation resulted from an operator's unwarrantable failure to comply with a standard (see 30 U.S.C. § 814(d)(1)), a "history of similar violations at a mine may put an operator on notice that it has a recurring safety problem").

Deshetty was aware of the ongoing spillage problem along the No. 1 beltline that ultimately resulted in the citation, but failed to take measures to remedy the problem. Such inaction by the responsible supervisor, placed on actual notice by MSHA of the problem, constituted a knowing authorization of the violation.

In defense, Deshetty argues that, although he was aware that spillage existed along the No. 1 beltline, he was not aware of its extent and, thus, of whether it was a prohibited accumulation. See II Tr. 133.[10] In Warren Steen Construction, Inc. and Warren Steen, 14 FMSHRC 1125 (July 1992), the Commission explained: "In order to establish section 110(c) liability, the Secretary must prove only that an individual knowingly acted, not that the individual knowingly violated the law." 14 FMSHRC at 1131. Thus, Deshetty's claim of ignorance fails.

Deshetty also asserts that he relied on his foremen to remedy the accumulations and asks the Commission to assess his liability in light of Roy Glenn, 6 FMSHRC 1583 (July 1984). As noted, however, Deshetty admitted that it was his responsibility to verify that the foremen took corrective action on the belts and that he only assumed the foremen had done so. See II Tr. 131-32. In Roy Glenn, the Commission said that supervisors "could not close their eyes to violations, and then assert lack of responsibility for those

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[10] As the judge found, Deshetty believed that, to be violative, an accumulation must touch a frictional area and be of a very substantial mass. 15 FMSHRC at 832; II Tr. 139, 163.

violations because of self-induced ignorance." 6 FMSHRC at 1587. Deshetty ignored the specific warnings from MSHA about the large number of accumulation violations at the mine and disregarded the repeated entries in the belt examiners' reports indicating that the No. 1 belt was in serious need of cleaning. Therefore, we affirm the judge's determination that Deshetty knowingly authorized the violation of section 75.400.

B. Penalty

Deshetty challenges the judge's penalty assessment, contending that the judge's findings of high gravity and high negligence are not supported by the record and are contrary to law. The Commission has stated: "When a judge's penalty assessment is at issue on review, the Commission must determine whether the penalty is supported by substantial evidence and is consistent with the statutory penalty criteria set forth in section 110(i) of the Mine Act, 30 U.S.C. § 820(i)." Warren Steen, 14 FMSHRC at 1131.[11]

With respect to gravity, the judge determined that the violation was very serious because of the long-standing nature of the accumulations and because, in places, the belt rollers were in physical contact with the accumulations. 15 FMSHRC at 834-35. Deshetty takes issue with the finding that the rollers were actually in the coal and Island Creek witnesses did not recall seeing them there. Although Inspector Gamblin could not identify the exact locations where the accumulations touched the rollers, he testified that such contact occurred. I Tr. 55-56; II Tr. 354-55. The judge credited and accorded great weight to this testimony. 15 FMSHRC at 834. A "judge's credibility findings ... should not be overturned lightly." Quinland Coals, Inc., 9 FMSHRC 1614, 1618 (September 1987), quoting Robinette v. United Castle Coal Co., 3 FMSHRC 803, 813 (April 1981). The fact that the inspector did not recall the specific areas where the coal touched the rollers is not a sufficient basis on which to overturn the judge's credibility determinations. Deshetty also asserts that the accumulations posed no grave danger because the coal was damp. For the reasons set forth above, we reject this argument. Accordingly, we affirm the judge's gravity finding.

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[11] Section 110(i) sets forth six criteria for assessment of penalties under the Act:

> 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).

Deshetty argues that a finding of high negligence was not appropriate under the Secretary's penalty regulations at 30 C.F.R. Part 100 because he had no actual knowledge of the prohibited accumulations and because there were other mitigating circumstances. It is well settled that the Secretary's Part 100 regulations apply only to the Secretary's penalty proposals and that the Commission exercises independent authority to assess penalties pursuant to the six statutory criteria set forth in section 110(i). Sellersburg Stone Co., 5 FMSHRC 287, 291 (March 1983), aff'd, 736 F.2d 1147 (7th Cir. 1984). We have concluded that Deshetty had actual knowledge of the accumulations along the No. 1 belt and that he failed to remedy the conditions, thereby displaying a high degree of negligence.

We conclude that the findings relied upon by the judge in assessing a $1,500 penalty are supported by substantial evidence and that the penalty is consistent with the statutory penalty criteria. Therefore, we affirm the judge's penalty assessment.

III.

Conclusion

For the reasons set forth above, we affirm the judge's decision.

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

Arlene Holen, Commissioner

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ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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MAY 9 1994

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. WEST 93-627-M
	:	A.C. No. 02-01138-05529
v.	:	
	:	Rillito Mill
	:	
ARIZONA PORTLAND CEMENT, Respondent	:	

DECISION

Appearances: Susanne Lewald, Esq., Office of the Solicitor, U. S. Department of Labor, San Francisco, California, for Petitioner; William S. Jameson, Esq., O'Melveny & Myers, Los Angeles, California, for Respondent.

Before: Judge Amchan

Factual Background

On April 29, 1993, Michael Pritchard, a welder-repairman employed by Respondent, fell through the roof of the old mill building at the company's Rillito, Arizona concrete plant (Jt. Exh-1, Stipulation # 6, Tr. 69). A small section of the roof, which had rusted, gave way when Pritchard stepped on it (Tr. 26, Exh. R-1, G-4). He landed on a catwalk 20 feet below and sustained a concussion and broken elbow (Tr. 9).

Pritchard and his partner, Charles Doty, went to the roof to repair an exhaust fan in accordance with the instructions from their supervisor, Joe Vigil (Tr. 69, Exh. R-1). Mr. Vigil did not check the integrity of the roof, on which employees rarely worked, before assigning Pritchard and Doty to their task (Tr. 28).

The roof, which apparently was the original one installed on the building in 1969, had last been inspected in May 1992, by David Carrekner, a mechanical engineer employed by Respondent (Exh R-1, R-2, Tr. 102-106). At that time, Mr. Carrekner found nothing wrong with the roof (Exh. R-2, Tr. 104). Sections of this roof had been replaced in June, 1991 (Exh. R-2). Prior to the accident, an inspection of the roof had been scheduled for May, 1993 (Tr. 106).

The roof was made of corrugated steel supported by steel beams running perpendicular to the corrugations in the steel at four foot intervals (Tr. 47, 107). It was approximately 28 feet long, 39 feet wide and 72 feet above the ground (Exh. R-1)[1]. At no time on April 29, did Mr. Pritchard and Mr. Doty approach the edge of the roof (Tr. 73).[2]

The accident was immediately reported to MSHA (Tr. 109). The next day inspector Benito Orozco came to Respondent's Rillito plant to conduct an investigation (Tr. 9). As a result of that investigation he issued citation number 4124227 to Respondent. This citation alleged a "significant and substantial" violation of section 104(a) of the Act and the regulation found at 30 C.F.R. § 56.15005. The regulation provides:

> Safety belts and lines shall be worn when persons work where there is a danger of falling...

Subsequently, a $1,800 civil penalty was proposed for the violation.

Analysis

In deciding whether an operator has violated MSHA's regulations pertaining to the use of safety belts, the Commission determines whether a reasonably prudent person familiar with the mining industry would recognize a danger of falling warranting the wearing of safety belts and lines. Great Western Electric Company, 5 FMSHRC 840, 842 (May 1983); Lanham Coal Company, 13 FMSHRC 1341 (September, 1991).[3]

A threshold issue in the instant case is whether you evaluate Respondent's conduct in light of what it knew or should have known prior to the accident, or in light of what it knew after Mr. Pritchard fell through the roof. I find that Respondent's conduct is to be judged in the context of what it

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[1]The dimensions of the roof of the old mill building given at hearing by inspector Orozco appear to be those of the adjacent structure (Tr. 12, Exh. R-1).

[2]Mr. Pritchard testified that he was never closer to the edge than 15 feet (Tr. 73). Exhibit R-1, however, indicates that the fan on which he was working was only 8 feet from the North end of the building.

[3]The cited cases involve standards with identical wording to section 56.15006, which are found at 30 C.F.R. § 57.15-5 and § 77.1710.

knew or reasonably should have known prior to sending Mr. Pritchard to repair the fan on the roof of the old mill building.

One can speculate that the fact that the April 29, 1993, accident occurred establishes that either the Respondent's May 1992 inspection of the roof was inadequate or that the roof, given its age, needed to be inspected more frequently than once a year to assure employee safety. However, nothing in the record of this proceeding provides any basis for converting such speculation into a finding of fact.

Inspector Orozco, the Secretary's only witness, opined that a prudent employer cannot rely on a roof inspection made 11 months earlier (Tr. 41). However, he does not have a background in chemical or structural engineering and has had no training with regard to how frequently roofs should be inspected (Tr. 42-43).

So far as this record shows, Respondent conducted a roof inspection in May, 1992, that was adequate. Further, there is nothing in this record to suggest that a prudent employer would have inspected the roof of the old mill building more frequently. Finally, the evidence suggests that the appearance of the roof from above and below provided no basis for suspecting that any part of it would not support the weight of the employees working on it.

Mr. Pritchard testified that the roof looked fine to him before he fell (Tr. 71-72). Employee safety representative Frank Obregon testified that examination of the roof from below, after the accident, revealed no obvious signs of deterioration (Tr. 92-93).

An employer may be obligated to require the use of safety belts if it has an inadequate basis for assuming that the roof will support an employee's weight. However, the record in this case allows only an inquiry as to whether a reasonably prudent operator would require his employees to wear a safety belt, tied off to a safety line, when he is going on a roof which the operator can reasonably assume will not collapse, and the employees will not approach the edge of the roof.

There is nothing in this record to indicate that a reasonably prudent operator would require his employees to use safety belts in such a situation. While Inspector Orozco may be very capable at other aspects of his job, nothing in the record indicates that he has any experience which would qualify him to determine whether a reasonably prudent operator would have required the use of safety belts on April 29.

Respondent was unaware of any other instance in which a

person had fallen through a corrugated steel roof (Tr. 110-111). Given this fact and the fact that on this record there was no reason to believe that the roof might not support the weight of the employees, the company safety rule requiring the use of safety belts only when employees were working near the edge of the roof fulfills Respondent's obligations under the cited standard.

Since the Secretary has failed to prove that a reasonably prudent operator would have required the use of safety belts by the employees working on the roof of the old mill building on April 29, 1993, citation number 4124227 is VACATED.

ORDER

Citation number 4124227 is hereby VACATED and this case is DISMISSED.

Arthur J. Amchan
Administrative Law Judge
703-756-6210

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

MAY 1 0 1994

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. CENT 93-216-M
	:	A. C. No. 03-01619-05502
v.	:	
	:	Docket No. CENT 93-238-M
BLUE BAYOU SAND & GRAVEL, Respondent	:	A. C. No. 03-01619-05503
	:	
	:	Blue Bayou Sand and Gravel

DECISION

Appearance: Nancy B. Carpentier, Esq., Office of the Solicitor U.S. Department of Labor, Dallas, Texas for Petitioner;
David J. Potter, Esq., Texarkana, Texas for Respondent

Before: Judge Weisberger

Statement of the Case

The Respondent, Blue Bayou Sand and Gravel, operates a gravel mine on a 10 acre portion of the subject site.[1] At issue herein is whether Respondent violated various mandatory regulatory standards set forth in Title 30 of the Code of Federal Regulations. Pursuant to notice, a hearing was held in Little Rock, Arkansas on February 9, 1994. Subsequent to the hearing, Respondent waived its right to file a post-hearing brief, and in lieu thereof presented oral argument, and reserved the right to file a reply to Petitioner's brief within seven days after service of the brief. Petitioner's brief was to have been filed three weeks after receipt of the transcript. The transcript was received by the Commission on March 3, 1994. To date, Petitioner has not filed any brief.

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[1] Danny Jewell took over the operation of the subject site on April 13, 1993. On May 6, 1993, Articles of Incorporation were issued to D. Jewell Co., Inc., ". . . a corporation owned and created for D. Jewell Co., Inc. for the purpose of owning this mine owned by Danny Jewell" (sic) (Tr. 6). A fictional name, Blue Bayou Sand and Gravel, was issued on December 18, 1993.

Findings of Fact and Discussion

I.

Citation No. 4116494

Larry D. Slycord has been an MSHA inspector for the last three years. Prior to that time, his work experience included working in a quarry for 12 years as a mechanic and, as a supervisor in the maintenance department.

On April 28, 1993, at approximately 9:30 a.m. Slycord, in the presence of his supervisor, Billy G. Ritchey, inspected the subject site. He observed a pump located on a barge. The barge was floating in a creek that was approximately 4 feet deep. The barge was secured by cables that ran from each of the two front corners of the barge to the bank where they were attached to steel stakes. Slycord said that he "would guess" (Tr. 27) that the barge was 10 feet from the shore.

According to Slycord, the pump, which is attached to a pipe, pumps water from the creek to the shore. Slycord said that the pipe was above the water, but he did not recall if it was suspended. He estimated that the diameter of the pipe was between 8 to 10 inches.

According to Slycord, when he made his inspection, he was told that persons go to the barge for maintenance purposes, but he could not recall the source of this information. Slycord assumed that Respondent's employees walked on the pipe to get to the barge to perform maintenance on the pump. He said there were no handrails on the pipe, nor was there any walkway or catwalk to the barge. Slycord said that, in essence, a person walking on the pipe would have been reasonably likely to have slipped and fallen. In this event, the person could have hit his head on an object, or could have drowned. He issued a citation alleging a violation of 30 C.F.R. § 56.11001 which provides as follows: "Safe means of access shall be provided and maintained to all working places." (Emphasis added.) The term "working place", is defined in 30 C.F.R. § 56.2 as follows: ". . . any place in or about a mine where work is being performed."

J.E. Jewell, Respondent's safety supervisor, who works at the site in question, explained that the hose (pipe) running from the pump to the shore is 6 inches in diameter and

flexible. According to J.E. Jewell, because the pumps' valves are located underwater, repairs to the pump are made on the shore.[2] J.E. Jewell indicated that he has not observed anyone walking on the pipe to go from the shore to the barge.

Slycord did not observe any person working on the pump while it was on the barge in the creek. Nor has his testimony established that, in Respondent's normal operations, persons go to the barge. I do not accord any weight to his hearsay testimony that someone whom he could not identify informed him that such was Respondent's practice. I thus conclude that it has not been established that the barge, when located on the creek with a pump on it, was a "working place." Accordingly, there was no requirement, pursuant to Section 56.1101 supra, to provide access to the barge while it was floating in the water. Hence, citation no. 4116494 should be dismissed.

Citation No. 4116495

Slycord testified that on April 28, he climbed on the loader platform of a K-85ZII loader. He noticed that the windshield, which he described as having an irregular shape that he estimated to be 30 inches high at the highest point, and 26 inches wide at the widest point, had several cracks that extended from the top to the bottom, and from one side to the other side. Slycord said that when he observed the windshield, he was outside the loader, but that his field of vision was level with the operator's field of vision. According to Slycord, he looked through the windshield from the inside out. He indicated that it was his opinion that visibility was obscured by the cracks to the extent that the operator of the vehicle could not operate it safely. He said that the glare of the sun on the cracks would "impede" the safe operation of the loader. (Tr. 67) According to Slycord, due to the impeded vision, a crushing injury could result if the operator did not see a person in the area, and ran over him, or ran into another vehicle.

Slycord issued a citation alleging a violation of 30 C.F.R. § 56.14103(b). Section 56.14103(b), supra, as pertinent, provides as follows: "If damaged windows obscure visibility necessary for safe operation, or create a hazard to the equipment operator, the windows shall be replaced or removed."

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[2] J.E. Jewell indicated that the pump is picked up from the water by a front-end loader located on the shore, and then set out on the bank to be serviced. He indicated that, in addition, it is possible to move the barge to the shore by pulling it in by its cables. Also, a board, 2 inches by 12 inches, located on the shore can be used to gain access to the barge.

Danny Jewell testified that he saw the windshield on April 28, after it was cited. He opined that vision was not obscured. He testified that the previous Saturday he had operated the loader lifting motors out of a houseboat. He said that, in general, vision was not obscured. Specifically he said he was able to see chains, and persons in the area. He said that he could see everything, and nothing was blocking his vision.

J.E. Jewell testified that he operated the loader before the windshield had been replaced. He testified that there was nothing outside the vehicle that he could not see due to cracks. He opined that the cracks did not obstruct vision.

Section 56.14103(b), supra, provides that, in essence, damaged windows shall be replaced or removed, if they either obscured visibility, or created a hazard to the equipment operator. The evidence does establish that the windshield was cracked as described by Slycord. His testimony, however, does not establish with any degree of specificity, the extent of the cracks, i.e., the percentage of total windshield space that was cracked. He opined, in essence, that the cracks would "impede" an operator's vision creating the hazard of an injury to another person. However, he indicated that although he observed the cracks, he did not look at anything through the windshield from the operator's position inside the cab. Hence, his opinion that vision was impeded, is not supported by his own observations, I also take cognizance of the testimony of Respondent's witnesses who operated the vehicle in question, looked through the windshield, and did not have their vision obscured. On this record, I find that it has not been established that the cracks in the windowshield obscured visibility necessary for safe operation. Slycord does not allege, nor does the evidence establish, that the cracks created any hazard to the equipment operator as opposed to a hazard to persons outside the vehicle. I thus conclude that it has not been established that Respondent violated Section 56.14103(b) supra. Accordingly, Citation No. 4116495 shall be dismissed.

Order/Citation No. 4116491, Citation No. 4116493, and Citation No. 4116492.

Slycord testified that he observed a Euclid haul-truck loaded with material. He indicated that the material had been loaded on the truck by a "track hoe" (Tr. 100) that had removed the material from the pit. When Slycord observed the truck it

was going up an incline, but it had not yet reached the crest.[3] Slycord motioned for the driver of the truck to stop, and the truck stopped. Slycord said that he told the driver, William Jewell[4], (W. Jewell) that he wanted to test the service and parking brakes of the vehicle, and W. Jewell said that they do not work. Slycord related that W. Jewell told him that he uses the transmission to hold the truck.

Slycord then asked W. Jewell to continue driving along the next portion of the road which, according to Slycord, was almost level. As the truck continued, Slycord motioned for W. Jewell to stop. Slycord then heard "air exhaust" (sic) (Tr. 106). He estimated that the truck, which was going 2 to 4 miles an hour, continued to move, but eventually did stop. Ritchey also indicated that he heard an exhaust of air from the rear of the truck that sounded like the sound that air brakes make when they are applied. Ritchey said that the truck's wheels did not stop or slow down, and that it looked like the vehicle went faster. Slycord then had the truck continue down the road. He estimated that the road was at a 3 percent decline. According to Slycord, the truck's speed was 2 to 4 miles an hour, when he motioned for W. Jewell to stop. Slycord indicated that the truck continued to roll, and came to a stop when the truck reached a level portion of the road. Ritchey, in essence, corroborated Slycord's testimony regarding his observations.

Slycord said that he asked W. Jewell if he had inspected the brakes, and reported the problem with the brakes to the mine operator. According to Slycord, W. Jewell said that he did not, and that everybody on the job knew that the brakes did not work. Slycord indicated that W. Jewell also told him that the truck did not have any brakes when he was laid off the previous January.

Ritchey testified that when he informed the plant operator that the truck did not have any brakes, the latter said that everybody around the plant knew it did not have any brakes. Neither W. Jewell, nor the plant operator testified. I thus do not accord much weight to the hearsay testimony of Slycord and Ritchey.

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[3] He estimated that the distance from the point where the truck was loaded by the track hoe at the pit to the crest in the road was 40 to 50 feet. He also estimated that the road rises in elevation approximately 7 feet from the point where the Euclid truck was loaded, to the crest of the road.

[4] William Jewell is not related to Danny Jewell. The date the citation at issue was issued was his first day back on the site after having been laid off, during the previous winter.

According to Slycord, he also asked W. Jewell to apply the parking brake and he tried, but it did not hold.

Slycord issued an imminent danger withdrawal order under Section 107 of the Act, and citations alleging violations of 30 C.F.R. §§56.14101(a)(2), 56.14101(a), and 56.14100(d).

A. Section 107(a) Withdrawal Order (Order/Citation No. 4116491).

Section 107(a) of the Act provides as follows:

> If, upon any inspection or investigation of a coal or other mine which is subject to this Act, an authorized representative of the Secretary finds that an imminent danger exists, such representative shall determine the extent of the area of such mine throughout which the danger exists, and issue an order requiring the operator of such mine to cause all persons, except those referred to in Section 104(c), to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such imminent danger and the conditions or practices which caused such imminent danger no longer exist.

The term "imminent danger" is defined in Section 3(j) of the Act to mean ". . . the existence of any condition or practice in a coal or other mine which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated." 30 U.S.C. § 802(j).

To support a finding of imminent danger, the inspector must find that the hazardous condition has a reasonable potential to cause death or serious injury within a short period of time. An inspector abuses his discretion when he orders the immediate withdrawal of a mine under Section 107(a) in circumstances where there is not an imminent threat to miners. Utah Power & Light Co., 13 FMSHRC 1617 (1991).

Due to the presence of inclines and declines in the road on which the truck in question travels as part of its normal operations; the presence of persons working in proximity to the location of the truck at the track hoe and hopper, both of which are down an incline from the area where the truck parks in performance of its work at these locations; the possibility of another vehicle being on the road at the same time as the truck in question; and the presence of persons performing construction work in the area of the route taken by the truck, it is possible that because a truck at issue had inadequate brakes it might hit one another object and thus cause injuries. However, the record

before me does not establish that such an event was imminent given continued mining operations. Indeed, after Slycord had observed the truck not stopping, and after he was aware of the comment by W. Jewell that the truck did not have brakes, he allowed the operator to drive the truck down a grade to dump its materials at the hopper.

B. Citation/Order No. 4116491

1. Violation of 30 C.F.R. § 56.14101(a).

Citation/Order No. 4116491, as modified on May 18, 1993, in addition to alleging an imminent danger also alleges a violation of 30 C.F.R. § 56.14101(a). Section 56.14101(a), as pertinent, provides as follows: "(a) Minimum requirements. (1) Self-propelled mobile equipment shall be equipped with a service brake system capable of stopping and holding the equipment with its typical load on the maximum grade it travels."

J.E. Jewell testified that prior to April 28, 1993, the date Respondent was cited, he was not aware of any problems concerning the brakes on the truck. On April 29, he inspected the service brakes. He said that the only problem that he found in the brakes was that "there was an 'o' ring out in the air pod." (Tr. 219) According to J.E. Jewell, this leak would have affected braking ability only if the brakes were applied for about 15 minutes. The only repair he performed in order to abate the citation was to replace the "o" ring. Danny Jewell, indicated in response to leading questions, that prior to the issuance of the citation he had observed the truck operating, and it operated in a proper fashion.

In essence, Respondent argues that the citation should be dismissed because Petitioner did not perform any testing of the brakes as required by 30 C.F.R. § 56.14101(b). Section 56.14101(b), supra provides, as pertinent, that "service brake tests shall be conducted when an MSHA inspector has reasonable cause to believe that the service brake system does not function as required, ..." Section 56.14101(b) supra, further provides that the testing shall be evaluated according to stopping distances set forth in Tables M-1 and M-2. In essence, Respondent argues that had such testing been performed as required the vehicle would have stopped as required according to the tables in Section 56.14101(b) supra, and the citation would not have been issued.

While it is true that Petitioner did not test the brakes in spite of the inspector's conclusion that the service brake system did not function as required, Respondent is not relieved of its responsibilities to comply with Section 56.14101(a) supra. (Conco-Western Stone Co., 13 FMSHRC 1908 (December 1991) (Judge Maurer)). To hold, as apparently being argued by Respondent, that Section 56.14101(a) is not violated in absence

of proof that the vehicle in question had been tested pursuant to Section 56.14101(b), would render meaningless the plain language of Section 56.14101(a) which provides that the truck in question "shall be equipped with a service brake system capable of stopping and holding the equipment with its typical load on the maximum grade of travel."

The truck stopped on an incline road when initially observed by Slycord. However, both Slycord and Ritchey testified that when Slycord directed the truck to be stopped, they heard noise indicating to them that the brakes were applied, but that the truck did not stop, and it continued to roll forward. Their testimony was not contradicted or impeached. I find that the weight of the evidence establishes that Respondent did violate Section 56.14101(a) supra.

2. Significant and Substantial

Essentially, according to Slycord, the violation he cited is significant and substantial.

In Mathies Coal Co., 6 FMSHRC 1 (January 1984), the Commission set forth the elements of a "significant and substantial" violation as follows:

> In order to establish that a violation of a mandatory safety standard is significant and substantial under National Gypsum the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard--that is, a measure of danger to safety--contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and, (4) a reasonable likelihood that the injury in question will be of a reasonable serious nature. (6 FMSHRC, supra, at 3-4.)

In United States Steel Mining Company, Inc., 7 FMSHRC 1125, 1129 (August 1985), the Commission stated further as follows:

> We have explained further that the third element of the Mathies formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." U.S. Steel Mining Co., 6 FMSHRC 1834, 1336 (August 1984).

Clearly the failure of the service brakes to stop the vehicle in question violates Section 56.14101(a), and contributes to the hazard of the truck hitting and injuring a person. However, the record fails to established that such an event was reasonably likely to have occurred. In this connection, I take cognizance of the following conditions: the amount of dirt placed

between the truck and the track hoe; the placement of a "bump block" between the area where the truck stops to load in to the hopper, and the hopper; the fact that vehicle normally operates, at a speed of only, at the most, 10 miles an hour; and the lack of evidence of steep grades, or the presence of significant traffic on the road during times which the vehicle in question travels. Accordingly, I find that the violation was not significant and substantial.

3. Penalty

In evaluating the gravity of this violation, I consider the above conditions and take into account (1) the testimony of J.E. Jewell, that has not been contradicted, that the only thing wrong with the brakes was a leak in the brake pod which under normal operations would not affect the brakes; and (2) the fact that after the leak had been repaired the order at issue was terminated. I find that the violation was only of a low level of gravity. Since the problem with the brakes appears to have been only minor, and there is not sufficient evidence that the truck continued to roll for any significant distance after the brakes were applied, I conclude that Respondent's negligence was only a low degree. Taking into account the remaining factors set forth in Section 110(i) of the Act, I conclude that a penalty of $50.00 is appropriate for the violation.

C. Citation No. 4116493.

Citation No. 4116493 alleges a violation of Section 56.14100(d) which requires as follows:

> (d) Defects on self-propelled mobile equipment affecting safety, which are not corrected immediately, shall be reported to and recorded by the mine operator. The records shall be kept at the mine or nearest mine office from the date the defects are recorded, until the defects are corrected. Such records shall be made available for inspection by an authorized representative of the Secretary.

According to Slycord, he asked W. Jewell, if he did an inspection of the brakes and reported to the mine operator, and W. Jewell indicated that he did not. Slycord did not ask to examine the operator's records. He was informed by Danny Jewell subsequent to the issuance of this citation, that the latter was not aware of recordkeeping requirements. Since the service brakes did not function as required by Section 56.14110(a) supra, and since no report was made of this condition to the mine operator, I find that Respondent did violate Section 56.14100(d) supra. However, I take note of the parties' stipulation that Danny Jewell took over the operation of Respondent only 11 days prior to the issuance of the citation at issue. I also find Danny Jewell's testimony reliable that prior to the issuance of the citation, he watched the truck in operation, and did not see

any indication that the brakes were not working properly. Accordingly, I find Respondent's negligence herein to be extremely low, and find that a penalty of $20.00 is appropriate for this violation.

D. Citation No. 4116492.

Slycord testified that when he initially spoke to W. Jewell, the driver of the truck in issue, and told him that he wanted to test the service brakes and parking brake the latter driver told him that "he didn't have any brakes" (Tr. 101). According to Slycord, at the point in the road before it reaches the crest in the incline away from the track hoe, he asked W. Jewell to apply the parking brake. Slycord indicated that the latter tried to apply the parking brake, "and it wouldn't hold." (Tr. 129).

Slycord issued a Citation No. 4116492 alleging a violation of 30 C.F.R. § 56.14101(a)(2) which provides as follows:

> "(a) If equipped on self-propelled mobile equipment, parking brakes shall be capable of holding the equipment with its typical load on the maximum grade it travels." Respondent, in its defense, cites the fact that when the inspector initially motioned the truck to stop on the incline up from the track hoe, it came to a stop. Slycord did not indicate that once the truck had stopped, the parking brake at that time did not hold the truck. Also, J.E. Jewell testified that to abate the citation the day after the citation was issued, he inspected the parking brake. He explained that the parking brake is set by pulling on a stick located inside the truck. He said that when he examined the stick it was loose and, would not pull up the parking brake, and set it. J.E. Jewell tightened the stick to get the parking brake to work. He explained that this procedure is to be performed by the driver of the truck. No further repairs were performed on the parking brake, and when reinspected by the inspector the citation was abated.

The record before me does not contain any specific contradiction or impeachment of the inspector's testimony that after he asked W. Jewell to apply the parking brake it would not hold. I give considerable weight to the disinterested testimony of the inspector (See, Texas Industry Inc., 12 FMSHRC 235 (February 1990) (Judge Melick)). I thus find that Respondent herein did violate Section 56.14101(a)(2) as alleged.

Considering the mound of dirt protecting the truck from rolling into the track hoe when parked to receive a load from the track hoe, and the fact that a bump block protected the truck

from rolling into the hopper when parked in front of the hopper to dump into the hopper, I find that the violation was of a low level gravity. I find that a penalty of $20.00 is appropriate.

ORDER

It is ordered as follows:

1. Citation numbers 4116494, 4116495, and the imminent danger order set forth in Order/Citation No. 4116491 be dismissed;

2. Order/Citation No. 4116491 be amended to a non significant and substantial citation; and

3. Within 30 days of this decision, Respondent shall pay a penalty of $90.

Avram Weisberger
Administrative Law Judge

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MAY 1 1 1994

THUNDER BASIN COAL COMPANY, Contestant	:	CONTEST PROCEEDING
	:	Docket No. WEST 94-238-R
	:	Citation No. 3589040; 2/22/94
v.	:	
	:	Docket No. WEST 94-239-R
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Order No. 3589101; 2/22/94
	:	Black Thunder Mine

SUMMARY DECISION

Before: Judge Amchan

Overview of the decision

On April 20, 1994, Contestant, Thunder Basin Coal Company, filed a motion for summary decision pursuant to Commission rule 67, 29 C.F.R. § 2700.67. In response, the Secretary of Labor requested that the motion be denied. The Secretary did not file a cross-motion and contends that these matters are not ripe for summary decision for either party.

While the Secretary does not rule out the possibility that he may file a motion for summary decision in the future, he asks that these matters be set for hearing. Contestant, replying to the Secretary, asks that, if its motion is not granted, that summary decision be entered for the Secretary.

For the reasons set forth below, I grant summary decision in favor of the Secretary of Labor despite the fact that he neither asked for, nor desires such disposition of these matters. Conversely, I deny Contestant's motion for summary decision.

Rule 67 provides that summary decision shall be granted only if the entire record shows that there is no **genuine** issue as to any **material** fact; and the moving party is entitled to summary decision as a matter of law. Although there is no precedent for granting summary decision for the non-moving party under the Federal Mine Safety and Health Act, the weight of authority under Rule 56 of the Federal Rules of Civil Procedure is that such a disposition is appropriate if supported by the record.

"Even where the non-movant vigorously opposes a motion for summary judgment on the ground that triable issues of fact exist, the trial court is not precluded from entering summary judgment, if, in reality, no factual dispute exists and the non-movant is entitled to summary judgment as a matter of law." 6 James W. Moore, et al., Moore's Federal Practice, §56.12 at 165 (2d ed. 1994). F.D.I.C. v. Sumner Financial Corp., 376 F. Supp. 772 (M.D. Fla. 1974) (Court held that what non-moving party asserted was a genuine issue of fact was only a dispute regarding the legal significance of the facts); See also In re: Continental Airlines, 981 F. 2d 1450, 1458 (5th Cir. 1993).[1]

Most of the facts on which the Secretary takes issue with Respondent's "Undisputed Facts Supporting Motion for Summary Decision" pertain to the motivation of the United Mine Workers of America in fostering the designation of two of its employees as walkaround representatives for eight employees at Respondent's non-union mine under Part 40 of Volume 30 of the Code of Federal Regulations. Some of these facts also pertain to the motivation of the Thunder Basin employees who signed the "UMWA" walkaround designation.

I grant summary decision for the Secretary because I conclude that under the controlling precedent, Kerr-McGee Coal Corporation, 15 FMSHRC 352 (March 1993), appeal pending, D. C. Cir. No. 93-1250, the motivation of these individuals is irrelevant. The Secretary states at page 3 of his response to Contestant's motion, "[i]n addition, the Commission decided that designating a union member as a walkaround representative or completing a designation form for the purpose of union organizing is not an abuse of the walkaround right." As I believe that is an accurate interpretation of the Kerr-McGee decision, I conclude there are no genuine issues of material fact and that under Kerr-McGee the Secretary is entitled to summary decision as a matter of law.[2]

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[1]The Commission in Missouri Gravel Company, 2 BNA MSHC 1481, 1482 n. 2 (November 1981) stated that summary decision without a motion should not be issued except in the most exceptional circumstances. In so stating, the Commission appears to recognize that there may be situations in which summary decision may appropriately be issued without a motion from either party. Further, the analysis cited above from Moore's Federal Practice indicates that prevailing authority deems summary judgment in favor of the non-moving party more appropriate than summary judgment when neither party has asked for such disposition of the case.

[2]I essentially agree with Contestant that the disputed facts are neither material nor genuinely disputed, Contestant's reply to the Secretary's response to motion for summary decision, at

Rather than set this matter for hearing to determine, if possible, facts that I believe have no bearing of the outcome under Kerr-McGee, I conclude that is far better to allow Contestant to pursue this case before the Commission and the appropriate court of appeals. Before these tribunals Contestant can either argue that the instant case is distinguishable from Kerr-McGee or that Kerr-McGee was wrongly decided.

I am convinced that further evidentiary proceedings before the undersigned would serve little purpose. I conclude that the instant case is indistinguishable from Kerr-McGee in any manner that is material. Further, as a Commission judge, I am bound to follow Kerr-McGee unless it is overruled.

Factual Findings

In September 1990, eight miners employed at contestant's non-union mine near Wright, Wyoming, signed a form designating Dallas Wolf and Robert Butero as their representatives under section 103(f) and Part 40 of volume 30 of Code of Federal Regulations.[3] Wolf and Butero are employees of the United Mine Workers of America (UMWA) and not of Contestant (Contestant's

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page 2. For example, Judge Lasher's conclusion in Kerr-McGee at 13 FMSHRC 1898, that "[t]he use of 30 C.F.R. Part 40 and the designation of miner's representatives was part of [the] UMWA's organizing strategy and was an organizing "tool.", cannot be seriously questioned. This does not mean that the UMWA or the Thunder Basin employees who signed the UMWA walkaround designation are not also genuinely interested in safety at Contestant's mine or employee walkaround rights.

In paragraph 9, pages 2-5 of its "Response To Undisputed Facts," the Secretary contends that there is no evidence that the designation was done for organizing and that, to the contrary, the deposition testimony of the miners indicates that they wanted the opportunity to accompany MSHA inspectors and were interested in safety. Secretary's counsel has conceded to me that these employees could have satisfied their desire to accompany the inspector by designating each other as miners' representatives (Oral argument of March 17, 1994, Tr. 131-138). While this does not mean that these employees may not have a legitimate safety interest in desiring the assistance of the UMWA during MSHA inspections, I find that assisting the UMWA organizational drive was a major factor in the designation at issue.

[3]The principal function of a miners' representative is to accompany MSHA personnel during their inspections of operators' worksites.

Exhibit 2). Dallas Wolf is the principal UMWA organizer in the Powder River Basin (Contestant's Exhibit 1, pp. 39-47). Robert Butero is a health and safety representative of the UMWA, who lives in Trinidad, Colorado. He is an employee of the UMWA department of occupational safety and health, not the organizing department (Secretary's Exhibit 18). Mr. Butero's tasks include serving as an employee walkaround representative during MSHA inspections. The eight Thunder Basin employees listed themselves as alternate miners' representatives.

Thunder Basin Coal Corporation refused to recognize the validity of this designation. The primary reason for this refusal is that contestant believes that the designation of Wolf and Butero is an abuse of walkaround provisions of the Federal Mine Safety and Health Act because it is motivated solely by a desire to aid the UMWA in its effort to organize the mine. The company contends that it, thus, infringes on its rights under the National Labor Relations Act to exclude union organizers from its property (Contestant's brief in support of motion for summary judgment, pp. 6-8).[4]

In March 1992, contestant obtained an injunction in the United States District Court for the District of Wyoming prohibiting MSHA from enforcing the Part 40 designation of the UMWA employees. However, both the United States Court of Appeals for the Tenth Circuit and the United States Supreme Court held that the District Court did not have jurisdiction to issue the injunction. Thunder Basin Coal Company v. Martin, 969 F. 2d 970, 973 (10th Cir. 1992); Thunder Basin Coal Co. v. Reich, 62 U.S.L.W. at 4062 (U.S. Jan. 19, 1994).

On January 21, 1994, Thunder Basin's President, J. A. Herickoff, wrote MSHA District Manager William Holgate inviting MSHA to issue a citation in order to achieve swift resolution of the legal validity of the designation of the UMWA employees. Contestant also stated that it expected MSHA to specify an abatement time "sufficient for the parties to pursue resolution of this important issue before the Commission and the courts." (Secretary's Exhibit 22).

While MSHA accommodated contestant in its request for a citation, it declined to set an abatement period which would delay posting of the UMWA designation on the company bulletin board until Thunder Basin's challenge to the validity to that designation was resolved before the Commission and reviewing

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[4]Thus far Thunder Basin Coal has successfully resisted the UMWA's persistent efforts to organize its mine. In 1987, the UMW lost an election conducted pursuant to the National Labor Relations Act at the Black Thunder Mine by a vote of 307 to 56 (FMSHRC Docket No. WEST 93-652-D, Tr. 420).

Federal courts. At 8:10 a.m., on February 22, 1994, MSHA Inspector James M. Beam issued citation number 3589040 to Contestant for failure to post the UMWA designation on the bulletin board near the mine's bath house. He set an abatement period of 15 minutes (Citation number 3589040, blocks 2 and 18).

When 15 minutes elapsed, Inspector Beam issued order number 3589101 pursuant to section 104(b) of the Act. Within hours, Contestant filed an application for temporary relief with the Commission and an application for an expedited hearing on its application. Subsequently, MSHA informed contestant that it intends to propose a $2,000 daily penalty for the company's refusal to post the disputed designation.

On March 25, 1994, I issued an order denying temporary relief. That order was affirmed by the Commission on April 8, 1994, on the grounds that Contestant had not demonstrated a substantial likelihood that the Commission's findings would be favorable to it. The Commission also ruled that Thunder Basin had not shown that the 15 minutes allowed for abatement was unreasonable.

On April 8, 1994, Contestant abated the alleged violation by posting the disputed walkaround designation form (Exh. 1 to Contestant's Opposition to the Secretary's Motion for Extension of Time). On April 20, 1994, Contestant filed the instant Motion for Summary Decision.

The record establishes that there is no genuine issue of material fact and that the Secretary is entitled to summary decision as a matter of law.

The Commission's decision in Kerr-McGee Coal Corporation, 15 FMSHRC 352 (March 1993), appeal pending, D. C. Cir. No. 93-1250, held that it is the conduct of a miners' representative, during a walkaround under section 103(f), rather than the motivation of such representative, that must be examined to determine whether there has been an abuse of the Mine Safety Act's walkaround provisions, 13 FMSHRC at 361. The Commission also held that the Secretary is not required to integrate National Labor Relations Act concepts into his regulations implementing the walkaround provisions of the Mine Act, 13 FMSHRC at 362.

In Kerr-McGee, the Commission also addressed evidence of the sort that Thunder Basin contends distinguishes this case from Kerr-McGee. After its evidentiary hearing Kerr-McGee moved the trial judge to reopen the record to receive newly discovered evidence. Included in the evidence proffered was "a series of internal UMWA memoranda to and from [Dallas] Wolf, which it asserted, revealed that Wolf had been designated as a walkaround

representative in order to facilitate on-going UMWA organizing activities.", 13 FMSHRC at 355. The judge denied the motion to reopen, finding that the documents merely revealed that union organizing was taking place and that this was established and undisputed at trial.

The Commission's decision in affirming the trial judge's denial of the motion to reopen the record in Kerr-McGee implies that the Commission also did not consider documents indicating that the walkaround designation was motivated by UMWA organizing activities to be material. Therefore, I conclude all the documentation offered to establish the same conclusion in this case is irrelevant to its disposition.

In short, the black letter law on the issue involved in this case is the Kerr-McGee decision. That decision stands for the proposition that designation of union employees, including one whose principal function is to organize non-union mines, as walkaround representatives at a non-union mine, which they are trying to organize, is not invalid per se. That decision is controlling and leads me to conclude that the Secretary is entitled to summary decision.

CONCLUSION

For the reasons stated herein, I grant summary decision in favor of the Secretary and affirm citation number 3589040 and order number 3589101.

Arthur J. Amchan
Administrative Law Judge
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
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MAY 1 2 1994

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 91-215-M
Petitioner	:	A.C. No. 25-01054-05504
v.	:	
	:	Portable Dredge No. 3
T AND F SAND AND GRAVEL, INC.,	:	
Respondent	:	

DECISION APPROVING SETTLEMENT

Before: Judge Melick

This case is before me upon a petition for assessment of civil penalty under Section 105(d) of the Federal Mine Safety and Health Act of 1977 (the Act). Petitioner has filed a motion to approve a settlement agreement and to dismiss the case. A reduction in penalty from $227 to $105 is proposed. I have considered the representations and documentation submitted in this case, and I conclude that the proffered settlement is acceptable under the criteria set forth in Section 110(i) of the Act.

WHEREFORE, the motion for approval of settlement is **GRANTED**, and it is **ORDERED** that Respondent pay a penalty of $105 within 30 days of this order. The hearing scheduled for May 24, 1994, is accordingly canceled.

Gary Melick
Administrative Law Judge

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MAY 1 2 1994

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 93-853
Petitioner	:	A. C. No. 15-13362-03616
v.	:	
	:	RB No. 3 Mine
RB COAL COMPANY, INC.,	:	
Respondent	:	

DECISION

Appearances: Donna E. Sonner, Esq., Office of the Solicitor, U. S. Department of Labor, Nashville, Tennessee, for the Secretary;
David J. Partin, Engineer, RB Coal Company, Inc., Pathfork, Kentucky, for Respondent.

Before: Judge Maurer

This case is before me upon a petition for assessment of a civil penalty filed by the Secretary of Labor (Secretary) pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, et seq., the "Act," charging RB Coal Company, Inc. (RB) with two violations of the mandatory standards and seeking civil penalties of $4500 for those violations. Pursuant to notice, the case was heard in London, Kentucky, on January 6, 1994. Both parties have since filed post hearing submissions with proposed findings and conclusions and I have considered them in the course of my adjudication of this matter.

The two citations at bar, Citation Nos. 3829472 and 3829473, were both issued by Inspector Roger Dingess of the Mine Safety and Health Administration (MSHA) as a result of his inspection at the RB No. 3 Mine on April 8, 1993. The citations were issued pursuant to section 104(a) of the Act and allege "significant and substantial" violations of the standards cited therein, which are 30 C.F.R. § 75.220 and 30 C.F.R. § 75.202, respectively. The former charges that: "The approved roof control plan was not being complied with on 001 Section where second mining was being preformed. Breaker Post Q were not set prior to lift 17 which was cut and lift 18 was taken out." And the latter alleges that: "The roof of the No. 3 entry was not adequately supported where

persons were traveling. Dislodged conventional roof bolts which had not been replaced. An area 12 X 20 was unsupported and second mining was being conducted."

Inspector Dingess issued Citation No. 3829472 to RB because he found an area that the operator had just finished cutting, where the Q breaker post(s) were not set on either side of the intersection prior to lift 17. He further testified that the approved roof control plan in effect at that time provided for these breaker posts to be installed prior to lift 17.

While second, or pillar mining is being performed, the purpose of these breaker posts is to insure safe access from this area while the pillar supports are being removed and to prevent roof falls from occurring in the intersection.

Inspector Dingess opined that this was a "significant and substantial" violation because second mining was being performed on this section and the roof in the area was popping and moving, already in the process of breaking up, as it started to take the weight from the pillar removal. Coal ribs were also bursting off in places in that particular area. In his opinion, with some 14 years experience as a roof control specialist, the inspector believed that the lack of proper breaker posts as called for in the roof control plan exposed the continuous miner operator to a roof fall hazard, and that the failure to so comply with that provision of the roof control plan was highly likely to lead to a fatal injury to the miner operator.

The operator concedes the violation of the roof control plan. It only remains to decide the "significant and substantial" issue and set a penalty for the violation.

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

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

> In order to establish that a violation of a mandatory safety standard is significant and

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

In United States Steel Mining Company, Inc., 7 FMSHRC 1125, 1129 (August 1985), the Commission stated further as follows:

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

Based on the record evidence -- including the admission by the operator of the underlying violation, I accept and credit as modified below the inspector's expert opinion and find that in the normal course of continued mining, it was at least reasonably likely that a roof fall accident would have occurred, and in that event, injuries of a reasonably serious nature or even a fatal injury, would have been reasonably likely to occur. Accordingly, I conclude that the cited violation was "significant and substantial" and serious.

The Secretary has specially assessed this citation at $2000. I think this is plainly excessive taking into consideration all the section 110(i) criteria, particularly the fact that this is a medium-sized operator and the RB No. 3 Mine is now closed, having been sealed since July 1993. Accordingly, I am going to affirm the citation, but reduce the civil penalty to $1000.

Inspector Dingess issued Citation No. 3829473 because he found that the roof in the No. 3 entry was not adequately supported in that draw rock had fallen out around the conventional roof bolts, resulting in a 12 foot by 20 foot area being unsupported. The inspector testified that there was draw rock laying against the rib where the continuous miner had pushed or

cleaned it up, and that roof bolts were hanging down approximately 12 inches from the mine roof. The draw rock in this area ranged from 2 to 18 inches thick, and the mine roof was popping and cracking because they had just pulled a pillar in the area close to this one at the time of the inspector's visit.

The inspector opined that this violation was "significant and substantial" because of the presence of draw rock in the unsupported roof and the fact that miners were required to travel through this area to get to their work place. He stated that in his experience, miners had been killed by roof falls involving no more than 3 or 4 inches of draw rock while traveling in areas which had not been adequately supported.

The operator does not contest the proposed finding that Citation No. 3829473 recites a "significant and substantial" violation of the cited standard, and I accordingly find it to be such. The citation will therefore be affirmed. I further find that this citation involved circumstances where a potentially life-threatening situation existed and I therefore consider it a serious violation.

Turning once again to the civil penalty, I find the Secretary's proposed assessment of $2500 to be excessive under all the circumstances presented in this case. This operator is a medium-sized one and this particular mine has been shut down and sealed since July 1993. Accordingly, taking into consideration all of the statutory criteria contained in section 110(i) of the Act, I find that a civil penalty of $1600 is appropriate, reasonable, and in the public interest.

ORDER

1. Section 104(a) Citation No. 3829472 **IS AFFIRMED.** Respondent is directed to pay a civil penalty of $1000 for the violation found.

2. Section 104(a) Citation No. 3829473 **IS AFFIRMED.** Respondent is directed to pay a civil penalty of $1600 for the violation found.

3. Respondent is **ORDERED TO PAY** the above civil penalties ($2600) within 30 days of the date of this decision.

Roy J. Maurer
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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MAY 12 1994

NEW WARWICK MINING COMPANY, Contestant	:	CONTEST PROCEEDING
v.	:	Docket No. PENN 93-199-R
	:	Order No. 3658608; 2/25/93
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Mine ID 36-02374
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. PENN 93-308
	:	A.C. No. 36-02374-03863
v.	:	
NEW WARWICK MINING COMPANY Respondent	:	Warwick Mine

DECISION

Appearances: Mark V. Swirsky, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelpia, Pennsylvania, for the Petitioner; Joseph A. Yuhas, Esq., Barnesboro, Pennsylvania, for Respondent.

Before: Judge Amchan

Overview of the Case

On February 8, 9, and 10, 1993, at its Warwick mine in Greene County, Pennsylvania, New Warwick Mining Company took its bimonthly respirable dust samples underneath the face shield of RACAL airstream helmets worn by its employees working on the longwall section of the mine. The RACAL airstream helmet is a power air-purified respirator.

On February 25, 1993, MSHA issued New Warwick Order No. 3658608 alleging a violation of section 104(d)(1) of the Act and 30 C.F.R. § 70.207(a) for sampling inside the RACAL helmet. The unwarrantable failure allegation of the order was based on conversations between Rod Rodavich, the mine's safety director, and MSHA personnel about taking such samples which occurred prior to the sampling. Subsequent to the commencement of litigation before the Commission, the Secretary amended the order to allege also that the samples were taken with a sampling device that was

unapproved due to modifications made by Mr. Rodavich. An $800 civil penalty was proposed by the Secretary.

For the reasons stated below, I affirm the 104(d)(1) order with regard to sampling inside the RACAL helmet. I also find a violation of the Act with regard to the use of a modified non-approved sampling device. However, I find that the use of such device did not constitute an unwarrantable failure to comply with the Act, as did sampling underneath the helmet. I assess a $500 civil penalty.

Statement of Facts

On January 15, 1993, Rod Rodavich, the safety director at the Warwick Mine, attended a meeting of company safety directors in Western Pennsylvania, at which he inquired as to whether respirable dust sampling could be conducted underneath the RACAL airstream helmet (Tr. 203). After the meeting Rodavich and Gary Klinefelter, another safety director, stopped at the MSHA Field Office in Waynesburg, Pennsylvania, seeking to discuss the matter with Thomas Light, the supervisory coal mine inspector in that office who had responsibility for the Warwick mine (Tr. 74, 204, 250).

Mr. Light was unavailable and, therefore, Rodavich and Klinefelter spoke instead with Robert Newhouse, a field office supervisor (Tr. 114, 204). Newhouse told the two safety directors that samples taken inside a respirator had not been acceptable to MSHA in the past, but when pressed by Rodavich and Klinefelter for a specific regulation that forbid this practice, Newhouse was unable to cite one (Tr. 117-118, 204).[1]

Sometime later in January 1993, Mr. Rodavich also discussed the issue of sampling inside the RACAL helmet with MSHA Inspector William Wilson (Tr. 14-15, 229-231). Like Mr. Newhouse, Mr. Wilson was unable to point to a specific regulation that would be violated by such sampling (Tr. 15). However, he did

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[1]Mr. Rodavich's account of his conversation with Newhouse is that Newhouse said nothing other than he couldn't find anything prohibiting sampling inside the respirator (Tr. 235-238). While I find it unnecessary to resolve all the differences in the testimony of the two men, I find that Mr. Newhouse did indicate that such sampling was not permitted by MSHA and that he gave no indication that the agency would consider samples taken inside the RACAL as complying with the Act (Tr. 117-119).

indicate to Mr. Rodavich that sampling inside the RACAL helmet was not acceptable to MSHA (Tr. 15).[2]

On February 5, 1993, Supervisory Inspector Light accompanied Inspector Wilson to the Warwick mine (Tr. 79). Light and Wilson began their inspection by going to Mr. Rodavich's office. While they were in his office Mr. Rodavich again raised the question of respiratory dust sampling inside the RACAL helmet. Light told Rodavich that such samples were against MSHA policy and that he would be cited if he took such samples for compliance purposes.

Like Mr. Newhouse and Mr. Wilson, Light was unable to specify the regulation for which the citation would be issued. However, he did tell Rodavich that the MSHA regulations require sampling in the mine atmosphere and that samples taken underneath the RACAL helmet were not samples taken in the mine atmosphere (Tr. 79-80, 104).[3] Inspector Light also suggested that Rodavich read the preamble to MSHA's Part 70 regulations (Tr. 80-81).

On February 8, 9, and 10, 1993, pursuant to Mr. Rodavich's directions, sampling was conducted by Respondent of the respirable dust exposure of the longwall shear operator on the tailgate side (Tr. 23, G-8). These samples were collected underneath the visor of the RACAL airstream helmet worn by the operator (Jt. Exh. 1, p. 3, stipulations 11 and 12, Exh. G-15, Production number 5). Although Mr. Radovich had informed MSHA personnel that he intended to take such samples unless they were able to point him to the regulation that forbid them, he did not

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[2]While Mr. Wilson and Mr. Radovich disagree as to what was said in this conversation, I find that Mr. Wilson did, in some manner, communicate that Radovich's proposed sampling method was unacceptable to MSHA. There is nothing in the record to indicate that he said anything that would have led Radovich to believe that such sampling would comply with the Act. As it is clear from the record that the subject was discussed, I find it very unlikely that Mr. Wilson did not offer an opinion as to the legality or acceptability of sampling inside the RACAL helmet and I find it very unlikely that he did not indicate some manner of disapproval (Tr. 15-16, 230-231).

[3]Mr. Rodavich concedes that Light told him such sampling would be against MSHA policy (Tr. 220, 229). Although his testimony as to whether Light also said he would be cited is somewhat confusing (Tr. 220, 232-233), I find that Light specifically told Rodavich that he would get a citation and that sampling underneath the RACAL did not constitute sampling of the mine atmosphere (Tr. 104). Mr. Rodavich was also advised by Respondent's attorney that he would probably be cited if he sampled underneath the airstream helmet (Tr. 232-233).

advise any representative of MSHA that the sampling would be done on February 8-10 (Tr. 42, 80-81, 120, 228, 234, 247, 249).

In taking the samples, Mr. Radovich modified the sampling mechanism from that which he normally used so that it would fit inside the RACAL helmet. These modifications rendered invalid the approval given by the National Institute for Occupational Safety and Health (NIOSH) for both the sampling device and the RACAL helmet. (Tr. 132-133, Exh. G-11).

These modifications most likely resulted in the collection of less respirable dust than if an approved sampling assembly had been used (Tr. 157-160). Among the more significant differences between the device used by Respondent and an approved sampling device were the absence of a locking bracket which rigidly aligns and holds the major components of the sampling head (Tr. 138-139). Another was the addition to the sampling device of 14 inches of tubing which was bent inside the top of the helmet (Tr. 141-142, Exh. G-15, production 5). The bent tubing and other modifications would tend to result in some of the respirable dust adhering to the walls of the tubing, instead of reaching the sampling cassette (Tr. 143).

The cassette is also likely to pick up less dust than that to which the sampled miner is exposed because it will pick up only that dust which is exhaled by the miner. It will not pick up the dust which sticks to his lungs when inhaled (Tr. 159-160).

A few days after the sampling was completed, MSHA inspector Wilson observed carbon copies of the dust data cards (Tr. 21-22). Because he suspected that these samples had been taken inside the RACAL helmet, Wilson wrote the numbers of the samples down. He then asked his supervisor Thomas Light to ask the MSHA laboratory in Pittsburgh for the results of the sampling (Tr. 25-26).

About a week later, Light informed Wilson of the results of the samples. The highest respirable dust reading was 0.5 milligrams (Tr. 33, Exh. G-9). Since these results were less than half what one would expect for a longwall shear operator at the levels of coal production recorded, Wilson's suspicion that the samples had been taken inside the helmet increased (Tr. 27).

On February 22, 1993, Wilson was informed by a non-supervisory employee at the mine that the samples had been taken underneath the airstream helmet (Tr. 28-29). This was confirmed by Safety Director Radovich on February 23 (Tr. 28-30). Therefore, on February 25, 1993, MSHA issued Respondent order

3658608 alleging that it violated section 70.207(a) in sampling inside the RACAL helmet.[4]

On February 24, 1993, MSHA conducted its own sampling, with the filter cassette placed outside the RACAL helmet. The result of this sampling, which was reported several days later, was in excess of the permissible exposure limit of 2.0 milligrams per cubic meter (Tr. 32-34). The highest full-shift sample measured an exposure of 4.4 milligrams (Tr. 33, Exh. G-2, p. 3, G-8, p. 9).

MSHA then modified the section 104(d)(1) order at issue in this case to prohibit operation of the longwall shear until environmental dust control steps were taken which reduced the respirable dust concentrations sampled to levels below the 2.0 limit (Exh. G-2). New Warwick was able to reduce respirable dust levels below 2.0 mg/m3 and, thus, the order was terminated on April 7, 1993 (Exh G-2, p. 8). Months after the commencement of this litigation order number 3658608 was amended to also allege a violation for Respondent's use of an unapproved sampling device.

Conclusions

Respondent's use of an unapproved sampling device violated 30 C.F.R. § 70.207(a)

Even if MSHA regulations did not prohibit respirable dust sampling underneath the RACAL helmet, Respondent's samples in this case violated section 70.207(a) because they were not taken with an approved sampling device. Section 70.207(a) requires an operator to take 5 "valid respirable dust samples" from the designated occupation in each bi-monthly sampling period. A "valid respirable dust sample" is defined in section 70.2(p) as one collected and submitted as required by part 70 of the Code of Federal Regulations. "Respirable dust" is defined in 70.2(n) as dust collected with a sampling device that has been approved in accordance with 30 C.F.R. Part 74.

Respondent concedes the modifications made to the dust sampling device by Mr. Rodavich rendered the approval of the device invalid (Respondent's brief, page 8). However, it contends that it had insufficient notice of this fact to sustain a violation of 30 C.F.R. § 70.207. Although one must read through several regulations to ascertain what is required regarding sampling devices, MSHA's regulations make it abundantly clear that sampling with a modified sampling unit, which has not

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[4]The immediate predicate for the section 104(d)(1) order in this case was a 104(d)(1) order issued on January 25, 1993 (Exh. G-6).

been approved by the National Institute for Occupational Safety and Health (NIOSH), violates 30 C.F.R. § 70.207(a).

Section 74.10 requires an applicant, normally the manufacturer of the sampling device, to obtain the approval of NIOSH for a change to any feature of a certified coal mine sampling device. Therefore, I conclude that a person of ordinary intelligence who has read through MSHA's regulations pertaining to respirable-dust sampling had a reasonable opportunity to ascertain that sampling with a modified sampling device violates section 70.207(a), if the modification had not been approved by NIOSH.

None of the MSHA personnel with whom Mr. Rodavich discussed his proposal to sample underneath the RACAL helmet, including Inspector Wilson, to whom he showed a prototype of the device he used, informed Respondent's safety director of the fact that use of the device would violate the Act unless the modified device was approved by NIOSH. Moreover, MSHA apparently did not recognize that the use of the device violated its regulations until the discovery phase of this litigation.

These factors are appropriately considered in assessing the degree of negligence exhibited by Mr. Rodavich and the appropriate civil penalty, not in determining whether the regulation was violated. In view of the circumstances, I conclude that the degree of negligence on the part of Mr. Rodavich, in using an unapproved sampling device, was infinitesimal and worthy of a nominal penalty at best. However, as discussed later herein, I view the degree of negligence in proceeding with sampling underneath the RACAL helmet to be an entirely different question.

Respondent violated section 70.207 in taking respirable dust samples underneath the face shield of the RACAL airstream helmet

Although nothing in MSHA's regulations specifically states that an operator may not take respiratory dust samples underneath a RACAL helmet or other respirator, the practice is clearly prohibited by subpart A - D of 30 C.F.R. Part 70 when these regulations are considered in their totality. Section 70.100(a) requires each operator to maintain the average concentration of respirable dust, in the mine atmosphere, at or below 2.0 milligrams of respirable dust per cubic meter of air.

The sampling required by subpart C (30 C.F.R. § 70.201-70.220) is required to determine whether the operator is in compliance with section 70.100(a). If an operator's samples provide no basis for determining compliance with § 70.100(a), they cannot be considered to be valid respirable dust samples within the meaning of § 70.2(p) or § 70.207(a).

More specifically, the issue is whether a sample taken underneath a respirator can be considered a sample taken "in the mine atmosphere." If the answer is affirmative, then a reading below 2.0 mg/m3 satisfies the requirements of section 70.100(a). MSHA's regulations regarding respiratory equipment make it clear that a sample taken underneath a respirator cannot establish compliance with 70.100(a) and also that such samples cannot comply with 70.207.

Section 70.300 provides that respiratory equipment shall be made available to persons exposed to respirable dust in excess of the levels required to be maintained in 30 C.F.R. Part 70. That regulation also states," [u]se of respirators shall not be substituted for environmental control measures in the active workings." This provision makes it clear that an operator cannot comply with 70.100(a) by having miners use a respiratory device. It also makes it clear by implication that one cannot determine compliance with section 70.100 by sampling underneath a respirator.

An indication of what the regulations require is provided by the preamble to MSHA's regulations regarding respirable dust which appeared in the Federal Register when they were promulgated as a final rule in April, 1980. The agency addressed the issue of use of the airstream helmet as a substitute for engineering controls to achieve compliance with 2.0 mg/m3 standard.

> During the course of the public hearings, MSHA was urged to accept the use of a particular type of personal protective device as a means of compliance with the respirable dust standard in certain longwall mining operations. It was argued that, in these operations, it has not been proven feasible at this time to institute engineering controls adequate to reduce dust to within permissible concentrations without substantially impairing coal production. MSHA has begun a careful study of the device--known as the "airstream helmet"--to determine its potential usefulness under very limited circumstances. It is currently being field tested under close MSHA scrutiny in a coal mine in New Mexico. Until testing is completed and the results evaluated, MSHA will continue to require implementation of engineering controls in coal mines as the means of achieving compliance with the applicable dust standard. 45 Fed. Reg. 23993 (April 8, 1980)

While there is nothing in the record that indicates the results of the test performed on the airstream helmet in New Mexico, the record does establish that MSHA policy with regard to the substitution of the airstream helmet for environmental controls has not changed (Tr. 177-187, Exh. G-19).

As deference is due to MSHA's interpretation of its own regulation, I conclude that section 70.100(a) precludes compliance with the 2.0 mg/m3 respirable dust limit through use of the airstream helmet Secretary of Labor v. Western Fuels-Utah, 900 F.2d 318 (D. C. Dir. 1990). This being the case, it would be patently illogical to conclude that one can sample to determine compliance with 70.100(a) by placing the sampling cassette underneath the airstream helmet.

Respondent contends that it had inadequate notice of the requirements of the 70.207(a). I find the notice provided is not inadequate simply because one must read a number of related sections of MSHA's regulations to determine the illegality of sampling inside the RACAL helmet. Moreover, additional notice was provided in the above cited portion of the Federal Register.

The fact that MSHA personnel could not point Mr. Rodavich to the precise provision prohibiting his proposed sampling technique does not establish that the regulations are impermissibly vague. Indeed, Mr. Light's response that the regulations require sampling of the mine atmosphere was in large part a satisfactory response to Respondent's inquiry. A more formal inquiry may well have elicited from MSHA a fuller explanation as to why the Agency does not regard sampling underneath a respirator to be sampling of the mine atmosphere.

Respondent's respirable dust sampling of February 8-10, 1993 constitutes an unwarrantable failure to comply with 30 C.F.R. § 70.207(a)

The Commission has held that unwarrantable failure is aggravated conduct constituting more than ordinary negligence by a mine operator in relation to a violation of the Act. Emery Mining Corp., 9 FMSHRC 1997, 2004 (December, 1987); Youghiogheny & Ohio Coal Co., 9 FMSHRC 2007, 2010 (December 1987). In this case Respondent's violative act was not negligent, it was intentional. Mr. Rodavich did not accidently sample underneath the airstream helmet, he did so purposely. Intentional noncompliance in the absence of adequate mitigating circumstances constitutes unwarrantable failure Rochester & Pittsburgh Coal Company, 13 FMSHRC 189 (February 1991).

Respondent contends that Safety Director Rodavich's conduct does not constitute unwarrantable failure despite the fact that he conducted this sampling after being told by Inspectors Wilson, Newhouse, and Light that it was contrary to MSHA policy. Whether Respondent's conduct was "aggravated" or "unwarrantable" turns on the reasonableness of Mr. Rodavich's conduct.

The first reason for Respondent's contention that its violation was not an "unwarrantable failure" is that Mr. Rodavich did not get a satisfactory response from MSHA to his inquiries.

More specifically, the argument implies that because MSHA personnel could not specify which regulation his sampling would violate, Respondent was entitled to sample underneath the airstream helmet. I find, however, that Mr. Rodavich's conduct was highly unreasonable under the circumstances.

Mr. Rodavich was aware that his proposed sampling technique was a major departure from conventional practice (Tr. 217-218). Further, nothing in this record indicates that he followed up on Mr. Light's suggestion that he read the preamble to Part 70. Given this and the fact that three different inspectors told him that his proposal would not comply with MSHA policy, I find that Mr. Rodavich was under an obligation to proceed further with his inquiries before unilaterally deciding to conduct sampling underneath the RACAL helmet.

I conclude that Mr. Rodavich did not act reasonably in proceeding without contacting MSHA's District Office as he had on other matters (Tr. 243). When an operator essentially desires to "reinvent the wheel" on a matter as important as respirable dust sampling, I find that it is under an obligation to provide MSHA with an opportunity to focus on the issues involved and provide a comprehensive explanation as to why the operator's proposed departure from common practice and MSHA policy is or is not consistent with the Act and its regulations.

Had Mr. Rodavich proceeded up the MSHA hierarchy, he may well have received a satisfactory explanation, including a more specific reference to the April 1980 preamble. He may also have been apprised of the inconsistency of the proposed method of sampling with the designated occupation concept inherent in the MSHA sampling scheme (Tr. 181-182)[5]. It was not at all reasonable for Rodavich to proceed simply because the local MSHA inspectors could not instantaneously cite persuasive authority for their position.

The second major reason for which Respondent contends that its conduct does not constitute an "unwarrantable failure" is the fact that Mr. Rodavich had informed several MSHA inspectors and the union safety committee (Tr. 206) of his intention to sample inside the airstream helmet. Respondent thus contends that its safety director was obviously not trying to hide anything from

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[5]An obvious shortcoming of Respondent's sampling is that it gave no indication of the respirable dust exposure of employees working in the longwall operation who were not sampled. For example, the sampling inside the helmet of the shear operator provides no basis for determining the respirable dust exposure of the section foreman, who spends close to 65% of his time near the shear operator and who was not wearing an airstream helmet (Tr. 241-242).

the agency and cannot, therefore, be deemed to have unwarrantably failed to comply with the regulation.

I have no reason to believe that Mr. Rodavich was trying to conceal his sampling by failing to inform MSHA as to the exact dates on which it would occur. However, I conclude that by proceeding with this sampling and submitting it as Respondent's bimonthly sample for the January-February 1993 period, his conduct was sufficiently aggravated to constitute an "unwarrantable failure."

The result of proceeding as Mr. Rodavich did is that New Warwick submitted no valid respirable dust sample for the January-February sampling period. Although it may be fortuitous, the valid samples taken by MSHA did, indeed, indicate significant overexposure. By taking the invalid samples after having been told that MSHA would not accept them, Mr. Rodavich delayed the corrective action required to reduce atmospheric dust.

The better course, and the only prudent way to test his theories of dust sampling, would have been for Mr. Rodavich to take his samples and immediately follow them with samples taken in accordance with MSHA policy. He could then have tested the validity of his sampling method without compromising employee health.[6]

In conclusion, given the factual circumstances of this case, I find Respondent's submission of respirable dust samples taken inside the RACAL airstream helmet as its only bimonthly sample for the longwall operation to be an unwarrantable failure to comply with the provisions of section 70.207(a).

Assessment of the Civil Penalty

Considering the factors specified in section 110(i) of the Act I assess a $500 civil penalty for Respondent's violation of section 70.207(a) in taking its bimonthly respirable dust sample inside the RACAL airstream helmet. For the reasons set forth in finding the violation to be an unwarrantable failure, I find Respondent's negligence to be very high. I also find the gravity of the violation to be high, given the fact that the sampling

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[6]Although this violation was cited as a non-significant and substantial violation because the shear operator was wearing a RACAL helmet, the standard assumes that employee health is not adequately protected by any respirator, if respirable dust in the mine atmosphere exceeds 2.0 mg/m3. Moreover, given the fact that the section foreman was not wearing the airstream helmet, one could consider MSHA's characterization of the violation as non-significant and substantial to be somewhat generous to Respondent.

provided no basis for determining the exposure of the section foremen, who were not wearing a positive pressure respirator.[7]

The parties have stipulated that payment of the proposed penalty will not affect the operator's ability to continue in business and that New Warwick demonstrated good faith in abating the order. A $500 penalty is also appropriate given Respondent's size and history of prior violations (Jt. Exh. 1, stipulations 6-9).

ORDER

Order number 3658608 is affirmed and a civil penalty of $500 is assessed. Respondent is ordered to pay said penalty within 30 days of this decision.

Arthur J. Amchan
Administrative Law Judge

Distribution:

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/jf

[7]On February 8-10, 1993, Section Foremen Kevin Friday and Paul Wells wore the Dustfoe 88, a negative pressure respirator (Exh. G-13, p. 3, Responses to interrogatories 3 and 4).

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

May 13, 1994

RANDALL PATSY, Complainant	:	DISCRIMINATION PROCEEDING
v.	:	Docket No. PENN 94-132-D
	:	PITT CD 93-27
BIG "B" MINING COMPANY, Respondent	:	

ORDER OF DISMISSAL

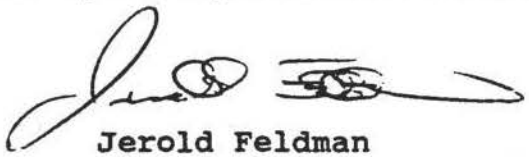
Before: Judge Feldman

On February 24, 1994, I issued a Prehearing Order in the above captioned discrimination proceeding requesting the parties to summarize their expected legal arguments on or before March 18, 1994. The alleged protected activity apparently concerns an incident that occurred on or about October 23, 1992, associated with the preparation of a trailer site in the Peter Rabbit Campgrounds. This matter was investigated by the Mine Safety and Health Administration (MSHA). As a result of its investigation, MSHA concluded, citing the Commission's decision in Cyprus Empire Corporation, 15 FMSHRC 10, 13 (January 1993), that the complainant was not a "miner" as defined by Section 3(g) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 802(g), at the time of the alleged discharge because he was not working in a mine. Consequently, MSHA determined it does not have jurisdiction over the campground job site.

The complainant responded to the Prehearing Order on April 11, 1994. In his response, the complainant expressed doubts about whether or not he had a "good case." He also indicated that there may be "...no sense of pursuing this any farther (sic)." In view of the equivocal nature of the complainant's response, on April 14, 1994, I issued an Order setting this case for trial on June 7, 1994, and ordering Patsy to show cause why this matter should not be dismissed by requesting Patsy to unequivocally state whether he wished to pursue his complaint.

Patsy responded on May 4, 1994, indicating that "I feel I would be better off to pursue this as a civil suit locally." I construe Patsy's response as an indication on the part of the complainant that he no longer wishes to pursue this matter.

Accordingly, the discrimination complaint filed by Randall Patsy in this docket proceeding **IS DISMISSED** with prejudice. Consequently, the hearing of this case scheduled for June 7, 1994, in the vicinity of Butler, Pennsylvania is canceled.



Jerold Feldman
Administrative Law Judge

Distribution:

Mr. Randall Patsy, R.D. #1, Box 290, E. Brady, PA 16028

Ms. Susan Mackalica, Big "B" Mining Co., Inc., R.D. 1, West Sunbury, PA 16061

/ll

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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MAY 13 1994

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. LAKE 93-233
	:	A.C. No. 33-01173-04015
v.	:	
	:	Meigs No. 2 Mine
SOUTHERN OHIO COAL COMPANY, Respondent	:	

DECISION

Appearances: Maureen M. Cafferkey, Esq., Office of the Solicitor, U.S. Department of Labor, Cleveland, Ohio, for the Petitioner;
David M. Cohen, Esq., American Power Service Corporation, Lancaster, Ohio, for the Respondent.

Before: Judge Koutras

Statement of the Case

This is a civil penalty proceeding initiated by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a), seeking a civil penalty assessment in the amount of $50 for an alleged violation of mandatory respirable dust standard 30 C.F.R. § 70.101. The respondent filed a timely answer contesting the alleged violation, and a hearing was held in Columbus, Ohio. The parties filed posthearing arguments, and I have considered them in my adjudication of this matter.

Issues

The issues presented in this proceeding are (1) whether the respondent violated the cited standard as alleged in the proposal for assessment of civil penalty and (2) the appropriate civil penalty that should be assessed for the violation based upon the civil penalty assessment criteria found in section 110(i) of the Act. Additional issues raised by the parties are identified and disposed of in the course of this decision.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977; Pub. L. 95-164, 30 U.S.C. § 801 et seq.

2. Section 110(i) of the 1977 Act, 30 U.S.C. § 820(i).

3. 30 C.F.R. § 70.101.

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

Stipulations

The parties stipulated to the following (Tr. 5-6):

1. The Commission has jurisdiction in this matter.

2. The respondent is a large mine operator and the Meigs No. 2 Mine is subject to the Mine Act.

3. On August 12, 1992, the Mine Safety and Health Administration ("MSHA") collected samples during one shift at the Meigs No. 2 Mine 4 South Longwall Section, MMU 023-0. Based upon five face occupational samples, the average concentration of respirable dust was 0.8 milligrams per cubic meter of air (Joint Exhibit 1).

4. By a Notice of Option to Submit dated August 20, 1992, MSHA notified SOCCO that, based upon the one sample of August 12, 1992, from the shearer operator, the designated occupation, the quartz percentage was 22%. The Notice provided that SOCCO may submit an additional sample for quartz analysis (Joint Exhibit 2).

5. By a September 17, 1992, notice, MSHA notified SOCCO that the quartz percentage in SOCCO's submitted sample was 10% and that SOCCO had the option of submitting a second sample for quartz analysis, (Joint Exhibit 3).

6. By an October 6, 1992 notice, MSHA notified SOCCO that the quartz percentage in SOCCO's submitted second sample was 10% and that the new respirable dust standard was 0.8 milligrams per cubic meter of air, (Joint Exhibit 4).

7. By a report dated January 13, 1993, American Electric Power Service Corp. Environmental Laboratory determined that there was 4.38% silica, i.e. quartz, in a sample submitted by SOCCO's Meigs Mine No. 2 (Joint Exhibit 5)

8. By a letter from James F. Tompkins, Vice President/General Manager of SOCCO, to Ronald L. Keaton, District Manager of MSHA, dated January 15, 1993, SOCCO's Meigs Mine No. 2 requested a Repeat Respirable Dust Survey based on an in-house determination of a significant reduction of quartz (Joint Exhibit 6).

9. During a January 26, 1993 inspection of the Meigs No. 2 Mine, MSHA Inspector Thomas Zirkle was informed that the Mine had requested a quartz technical inspection.

10. On February 8, 1993, MSHA collected samples during one shift at the Meigs No. 2 mine 4 South Longwall Section, MMU 023-0. Based upon five face occupational samples the average concentration of respirable dust was 1.0 milligrams per cubic meter of air (Joint Exhibit 7).

11. On February 18, 1993, MSHA issued Citation No. 3540906 alleging that five valid respirable dust samples collected during an MSHA inspection of February 8, 1993, showed the average concentration of the section average was 1.0 milligram per cubic meter, which exceeded the allowable standard of 0.8 milligram per cubic meter in the MMU 023-0, 4 South longwall section (Joint Exhibit 8).

12. By a Notice of Option to Submit dated February 19, 1993, MSHA notified SOCCO that, based upon the one sample of February 8, 1993, from the shearer operator - the designed occupation - the quartz percentage was 2% and the operator was afforded the option to submit a sample (Joint Exhibit 9).

13. On February 26, 1993, SOCCO submitted its first optional sample. SOCCO was provided the option to submit a second optional sample, but declined to do so (Joint Exhibit 11).

14. By an MSHA Advisory of Termination of Excessive Dust dated March 4, 1993, MSHA advised SOCCO that the Mine's abatement samples (which also satisfied bimonthly sampling) for January - February 1993 had an average concentration of 0.5 milligrams of respirable dust per cubic meter of air, less than the applicable standard of 0.8, see (Joint Exhibit 10).

15. On March 8, 1993, the Citation was terminated (Joint Exhibit 8).

16. By a Report of Results of Additional Quartz Samples dated March 30, 1993, MSHA notified SOCCO that its first optional sample contained 5% quartz and that the sample with the highest percentage was used to determine the new quartz percentage. The new respirable dust standard was set at 2.0 milligrams per cubic meter (Joint Exhibit 11).

17. As reported on an MSHA Conference Worksheet concerning a May 18, 1993, conference, Citation No. 3540906 was sustained because it complies with current MSHA policy, but the Citation was modified to non-S&S because the environment of the miners was only 2% quartz (Joint Exhibit 12).

The parties further agreed that the violation was timely abated in good faith, and that it resulted from moderate negligence (Tr. 7, 10).

The contested section 104(a) non"S&S" Citation No. 3540906, issued on February 18, 1993, by MSHA Inspector Thomas Zirkle, cites an alleged violation of mandatory respirable dust standard 30 C.F.R. § 70.101, and the cited condition or practice is described as follows:

> The results of five (5) valid respirable dust samples collected during an MSHA inspection (Laboratory Report, dated 2-8-93 attached) show the average concentration of the section average was 1.0 mg/m3 which exceeds the allowable standard of 0.8 mg/m3 in the MMU 023-0, 4 South Longwall Section.
>
> The mine operator shall take corrective action to lower the amount of respirable dust and then sample the longwall occupation 044 Longwall shearer operator (tailgate end) each production shift until five valid respirable dust samples are taken and submitted to the MSHA office in St. Clairsville, Ohio. The mine operator shall make available respiratory protection to all workers in the affected area.

Petitioner's Testimony and Evidence

MSHA Health Specialist Thomas Zirkle, testified that his duties include taking respirable dust samples at surface and underground coal mines, and he confirmed that he issued the citation dated February 18, 1993, and that it was based on dust samples that he took on the South Longwall MMU 23, (mechanized mining unit), on February 8, 1993 (Tr. 24). He explained the procedures that he follows in taking dust samples, including the information shown on the laboratory reports and occupation codes associated with his sampling (Tr. 24-28).

Mr. Zirkle stated that during his sampling at the mine he observed the miners working and operating their equipment, took air readings, and checked the water sprays to insure that they complied with the dust control plan, and he explained that the dust sample cassettes are then weighed and analyzed for quartz by a lab technician at the MSHA Pittsburgh Laboratory (Tr. 29-30).

Mr. Zirkle stated that the testing of the five samples that he took reflected an average concentration of 1.0 milligrams of respirable dust per cubic meter of air on the cited MMU section in question. He stated that this exceeded the applicable standard of .8, which reflects a reduced respirable dust standard because of the presence of quartz. He confirmed that he knew from a review of his mine records and file that the cited MMU section was on a .8 standard (Tr. 27-28). He stated that even though the respondent exceeded its dust control plan by having more air velocity and water sprays than required, it still exceeded the allowable respirable dust standard for the period in question (Tr. 30).

Mr. Zirkle stated that when he issued the citation, he was following MSHA procedures and inspection manual guidelines, and he confirmed that the respondent was required to comply with the applicable .8 standard that was in effect on February 8, 1993 (Tr. 31).

On cross-examination, Mr. Zirkle stated that the percentage of quartz in the mine varies with the roof conditions and location of stone which produces more quartz (Tr. 32). Referring to Joint Exhibits 2 through 4, concerning the quartz sampling which reflect the 3rd South Longwall Panel as the sampling location, Mr. Zirkle did not know whether that was the correct location, or whether it should have referenced the 4 South Longwall Panel (Tr. 34). Respondent's counsel confirmed that all of the samples were taken on the 044 occupation, which is the shearer operator, and he suggested that the notation to the 3rd South panel is a typographical error, and that the samples actually apply to the 4 South panel (Tr. 34-35).

The petitioner's counsel confirmed that the three 044 occupation sample results showed the quartz exposure for the designated occupation. Mr. Zirkle stated that once the designated occupation is placed on a particular reduced respirable dust standard because of the presence of quartz, all of the remaining miners on that MMU are also placed on the same standard because of their exposure to that same MMU environment (Tr. 37-40).

Mr. Zirkle confirmed that he was at the mine on January 26, 1993, and that he spoke with safety manager John Merrifield, who informed him that the respondent had requested MSHA to retest the mine for quartz on the cited MMU as well as a second longwall.

Mr. Zirkle stated that he was not aware of this request before he spoke to Mr. Merrified (Tr. 43). He next returned to the mine on February 8, 1993, took some samples, and then issued the February 18, citation based on those samples. He confirmed that the samples reflect the mine conditions on February 8, and not February 18 (Tr. 44).

Mr. Zirkle stated that he was at the mine on February 8, partly for the purpose of determining the quartz content. He explained that he first determines compliance with the respirable dust standard in effect at that time, and after the samples taken that day are analyzed, a new dust standard based on the new quartz content is then established. He confirmed that he took five samples and that the sample for the designated occupation was used to determine the percentage of quartz. He believed the samples were taken on the 4 South Longwall panel (Tr. 45).

Mr. Zirkle stated that when the longwall areas were sampled in August, 1992, as reflected in Joint Exhibits 2 though 4, they were considered "active workings", and those samples established the allowable respirable dust limit of 0.8 milligrams that was in effect on February 8, 1993. However, on February 8, 1993, the previously sampled August, 1992, areas had been mined out and were gob areas on February 8, 1993 (Tr. 46-49). Mr. Zirkle stated that "anywhere you sample on a longwall today is going to be gob area tomorrow" (Tr. 50). He confirmed that but for the application of MSHA's guidelines, since the February 8, 1993, samples showed 2 percent quartz, which was less than 5 percent, the allowable respirable dust limit would have been 2.0 milligrams. He stated that although the February 8, sampling showed 2% quartz and 1.0 milligrams of respirable dust, there would still be a violation until the MSHA labatory finished its analysis of the sample and established the new standard (Tr. 51).

Mr. Zirkle stated that the actual amount of quartz on the MMU on February 8, 1993, was irrelevant in determining whether there was a respirable dust violation that day, and he explained further at (Tr. 51-52):

> Q. You just ignore what the percent quartz is on February 8th?
>
> A. No, we follow the guidelines to determine the final analysis so everybody knows what the quartz is.
>
> Q. So what you are saying is it is not the percent of quartz that the man is breathing on February 8th, 1993 that determines a violation; to determine a violation

you look at actually what the last standard was that was set by MSHA. The actual conditions of the mine are immaterial, is that correct?

A. Yeah.

Mr. Zirkle confirmed that regulatory section 70.101, provides that when there is less than 5% quartz, up to 2.0 milligrams of respirable dust is allowable. He further confirmed that his February 8, 1993, samples were taken in the active workings of the mine, but these were not the same active working areas sampled in August and September, 1992 (Tr. 53). Mr. Zirkle agreed that if a miner is breathing 1.0 milligram of respirable dust in an atmosphere of 2% quartz, he is not being subjected to a health hazard (Tr. 56). He confirmed that his original "S&S" citation was subsequently modified by MSHA to non-"S&S" because of a reduced gravity finding (Tr. 56).

Mr. Zirkle confirmed that he also issued a March 1, 1993, citation for a violation on another MMU (posthearing Exhibit R-1; Tr. 58). He explained that the citation was based on samples submitted by the respondent, and the cited area was on a reduced .9 milligram standard based on the quartz content, and the violation was issued because the sample result indicated 1.4 milligrams of respirable dust, which exceeded the .9 standard. He confirmed that the citation was subsequently vacated at the direction of his supervisor, and he explained the reason for this at (Tr. 60-63; Exhibits R-2 through R-4):

A. I was directed by my supervisor. That's all I can say. It wasn't my choice.

Q. Let me ask you: Was the standard changed because shortly thereafter it was determined by MSHA that the quartz percentage had decreased in that particular MMU?

A. Well, the reason it was vacated is on the -- standard -- the new respirable dust standard of 2.0 milligram was established by the computer during the time the citation was issued for exceeding the nine-tenths that -- I was directed to put that on there. That's why -- the reason they gave me to do it.

Q. Okay. So it was basically changed because there was later a determination that at the time you wrote the violation the quartz was less than it had previously had been?

A. Yes.

* * * * * * *

Q. Mr. Zirkle, I understand that maybe what happened with the SOCCO Exhibits 1 through 4 weren't completely your doing; can you explain why SOCCO Exhibit 1 was vacated but the citation in this particular case was not vacated?

A. Well, I was told this one was vacated. The standard was set before the samples were taken. But in the other case, they wasn't.

Q. Okay. So you are saying in the case that we're discussing today, the 2 percent quartz standard wasn't established at the time the citation was written?

A. Yeah.

Q. Even though the reason why it wasn't established related to the time it took for MSHA to process it, not due to any fault of the operator; is that correct?

A. Right.

In response to further questions, Mr. Zirkle stated that he followed MSHA's policy manual in issuing the prior violation in question, and that the respondent's sample was collected before the new standard was established. He identified Exhibit P-1, as the policy in question that he followed in issuing both of the violations (Tr. 65). He stated that when he conducted his sampling on February 8, 1993, he did not know the percentage of quartz in the samples, but once this was determined, he could have issued a citation anytime after the date of the laboratory determination which was February 9, 1993 (Tr. 65-67). He confirmed that the change in the allowable respirable dust standard for the cited 023 MMU changed from 0.8 to 2.0, on March 30, 1993 (Tr. 68). He further confirmed that on most occasions MSHA considers more than one sample and an operator is afforded an opportunity to submit samples (Tr. 67).

Mr. Zirkle confirmed that he could have waited three or four days before issuing the violation, and had he done so he could have determined from the February 19, laboratory analysis that the quartz percentage for the cited MMU on February 8, was less than 5%, and the respondent would have been entitled to have up to 2.0 milligrams of respirable dust per cubic meter of air (Tr. 71).

Respondent's counsel asserted that if Mr. Zirkle had waited until February 20, he would have known the quartz percentage, and since it was less than 5%, with an allowable respirable dust limit of 2.0, there would be no violation and he would not have issued the citation (Tr. 72).

Mr. Zirkle confirmed that there was no particular time limit in which to issue the violation (Tr. 73); and he indicated that "you issue the citation as soon as you can get back to the mine" (Tr. 70, 73). However, he could not explain the delay in this case (Tr. 75). He agreed that although the respondent had the option of submitting additional samples when it was informed that it was under a 2.0 milligram standard, it would have nothing to gain by doing so (Tr. 73-74). When asked "if it made sense to issue a violation on February 8th based upon the quartz that existed in another area that is gob as of February 8th," Mr. Zirkle responded "that's been the procedure for years" (Tr. 75).

George Niewiadomski, Mine Safety and Health Specialist, MSHA, Arlington, Virginia, was qualified and admitted as an expert in MSHA health regulations and policy (Exhibit P-2; Tr. 77-78). Referring to a document labeled "Coal Mine Health Inspection Procedures", 89-V-1, February 15, 1989, (Exhibit P-3), Mr. Niewiadomski stated that MSHA has been adjusting the applicable respirable dust standard due to high quartz levels since 1971, when the formula it uses was developed by HEW, and that section 205 of the Mine Act states that the Secretary shall apply that formula in his enforcement of Title II of the Act. He further stated that from 1971 through 1985, the standards were adjusted based on MSHA single samples, and that in 1985 the procedures were changed to afford mine operators an opportunity to participate in the standard-setting process by basing the standard on one MSHA sample and up to two operator samples. He stated that "we would never adjust a standard based on a single sample" (Tr. 82-83).

With regard to the instant case, Mr. Niewiadomski stated that the standard was set on October 6, 1992, when "the average of one MSHA sample which initiated the whole process" showed that it contained 22% quartz. No citation was issued on October 6, 1992, because at that point in time it was not known what the standard would be because the respondent was not afforded an opportunity to submit samples and MSHA did not analyze the required samples. In response to a notice sent to the respondent,it submitted its first optional sample, and it showed 10% quartz. Since there was a difference of greater than 2%, the respondent was afforded an option to submit a second sample, and all three samples were used to establish the new average quartz level used to adjust the standard to .8 milligrams. Pursuant to MSHA's policy that has been in effect since 1985, once a standard is established on an entity, such as the MMU 023 in this case, when that MMU moves to a different part of the mine the standard (.8 in this case) moves with the MMU until such time it is adjusted (Tr. 83-85).

Mr. Niewiadomski stated that when Inspector Zirkle took the samples on February 8, 1993, he "only enforced what was in

place", and that the respondent "knew what the standard was and what we knew and it was aware that he had to comply with the .8" (Tr. 85). He further stated that MSHA's procedures and policies were known by the respondent, that they are available to all operators, and he believed they are reasonable. He further stated as follows at (Tr. 86-87):

> That policy very clearly states that whenever an inspector goes out to do a sampling inspection, whether it's something that originated in the office or whether it was a request made by an operator or by a representative of the miner, the inspector must first determine whether or not there is a violation of the standard in place.
>
> Those samples are then subsequently sent to Pittsburgh for quartz analysis. We analyze all samples that have sufficient weight gain and by sufficient weight gain I mean they have at least .5 milligrams of dust on the filter. All samples are analyzed.

Mr. Niewiadomski further explained the sampling of the MMU designated occupations, including the 044 and 041 occupations, and he confirmed that as a result of 5% quartz from the sampling, the new 2.0 milligram respirable dust standard was established and became effective on March 30, 1993 (Tr. 88-91). He also explained MSHA's quartz procedures and policy as reflected in Exhibits P-3 through P-5 (Tr. 94-100).

Mr. Niewiadomski explained the sequence of events in connection with the February 8, 1993 citation issued by Inspector Zirkle. The MSHA laboratory testing report (Joint Exhibit 1), for the five samples taken on August 12, 1992, reflected an average concentration of .8 milligrams of respirable dust, and this was in compliance with the 2.0 milligram standard in place at that time. Subsequent testing analysis for quartz for one of the August 12, samples for the designated 044 occupation on the 023 MMU (Longwall Tailgate operator), indicated 22% quartz, and since this exceeded the 5% threshold, the respondent was informed on August 20, 1992, that it could submit an optional additional sample. No citation was issued for the high quartz concentration at that time because MSHA's procedures required more than one sample to support a violation, and it was premature to ascertain what the standard would be for the occupation in question without additional samples to determine the average quartz level for that environment (Joint Exhibit 1, Tr. 101-103).

Mr. Niewiadomski stated that on September 17, 1992, MSHA notified the respondent that the results of the testing of the previously submitted optional sample of September 11, 1992, for the 044 occupation reflected 10% quartz, and since this differed by more than 2% from the quartz percentage obtained by MSHA's

sampling of August 12, 1992, the respondent was given a further opportunity to submit a second optional sample for quartz analysis by October 2, 1992 (Joint Exhibit 3; Tr. 103). He confirmed that at this point in time, the respondent was not under a reduced standard since the process was still ongoing and MSHA had to wait until the respondent exercised its option to submit another sample before calculating the average quartz level in the designated environment and determining a new standard (Tr. 104).

Mr. Niewiadomski stated that the respondent submitted a second optional sample on September 29, 1992, which reflected a testing analysis of 10% quartz. As a result of the testing of the MSHA sample of August 12, 1992, and the two optional samples taken by the respondent on September 11 and 29, 1992, the respondent was placed on a new respirable dust standard of 0.8 milligrams for the 023 MMU in question, effective October 6, 1992, and this standard applied to the 023 MMU regardless of where it moved to in the mine, and he stated "the standard moves along with the MMU" (Tr. 105). He confirmed that MSHA did not require the respondent to comply with the 0.8 milligram standard on the date that it collected its sample (August 12, 1992), nor would MSHA require the respondent to comply with the 0.8 standard based on its sampling in September, 1992. He stated that "It's very clear when an operator is requested to submit optional samples, those are only going to be used for quartz analysis and not for making compliance determinations" (Tr. 105).

Mr. Niewiadomski stated that Inspector Zirkle took five 023 MMU samples, including the 004 designated occupation, on February 8, 1993 (Joint Exhibit 7), and he knew at that time that the applicable standard for that MMU was still 0.8 milligrams. The calculated sampling average reflected a 1.0 milligram average concentration of respirable dust, and since this exceeded the 0.8 standard that was still in effect, the Inspector determined that the respondent was in violation and issued the citation on February 18, 1993 (Tr. 106).

Mr. Niewiadomski identified Joint Exhibit G, as the notification of the results of MSHA's quartz analysis made on February 19, 1993, for the February 8, 1993, sample and it reflects a test result of 2% quartz for the 023 MMU, and afforded the respondent an opportunity to submit an additional sample by March 6, 1993 (Tr. 107-109). He stated that the respondent could have opted not to submit an additional sample, and in that case the standard would have been adjusted automatically based on the results of MSHA's February 8, 1993, sampling and it was reported as 5% quartz (Joint Exhibit 11). Since the difference between this sample and MSHA's sample was greater than 2%, the respondent was afforded an opportunity to submit a second sample, but declined to do so. Under the circumstances, the new standard was based "on the higher of the two quartz levels, which was

5 percent divided into ten resulting in a 2.0 milligram standard effective March 30, 1993" (Tr. 109-110). He confirmed that if this 2.0 standard had been applied on February 18, 1993, when the citation was issued, the respondent would have been in compliance if the standard were in effect on that day (Tr. 110). He further explained as follows at (Tr. 110-112):

> A. - - - - there is no way to tell on February the 8th whether or not we're going to have 2 percent quartz or 50 percent quartz and so we cannot ascertain prematurely what the standard is going to be. If in fact we had waited, we had waited and no enforcement action was taken, we had waited until the quartz process was fully completed, we could have had a standard that was equal to .8 or lower or maybe higher, but if in fact it was lower and no corrective action was taken, people would have been needlessly overexposed to excessive levels of quartz.
>
> THE COURT: But in fact that wasn't the case here; was that correct? Were they in compliance on February the 8th?
>
> THE WITNESS: No, they were not.
>
> THE COURT: They weren't in compliance with the standard that was carried forward but were they in compliance with the actual quartz exposure that was tested on that day?
>
> THE WITNESS: We would not make a decision on 2 percent either. We would not make a decision on one sample. The process requires the standard to be based on multiple standards. We would not -- just because we have 2 percent, we would not adjust the standard based on that. That was the procedure we used prior to 1985.
>
> THE COURT: I understand that, but logically and realistically, you really, when you are applying a standard that's been carried forward, that actually tested in an environment that's no longer in being, you really don't know -- what are you accomplishing? Are you actually testing what the actual exposure was on the 18th, I mean on the 8th, February the 8th?
>
> THE WITNESS: We're sampling and we're enforcing, I mean, we're sampling to determine whether or not the standard that we know, the standard of record, that the operator knows that we know whether or not that standard is being violated. That's all we really know.

THE COURT: But that standard was based on some other environment, wasn't it, that's no longer in being?

THE WITNESS: It could have been the same environment.

THE COURT: But it isn't.

THE WITNESS: In this particular case, the MMU moved to another. The standard moves with it.

Mr. Niewiadomski identified Exhibit P-6 as a June 16, 1993, quartz analysis of a sample taken by the respondent on June 7, 1993, following the 2.0 milligram standard that became effective on March 30, 1993, and the sample reflected 11% quartz, which would result in a significantly reduced dust standard. However, no citation was issued based on the June 7, sample because the process required additional samples to be used in making a final determination. The respondent took a second sample on June 28, 1993, which indicated 13% quartz, and when averaged with the previous 11% quartz sample, established a new standard of 0.9 milligrams, effective July 2, 1993 (Tr. 116-117).

Mr. Niewiadomski stated that once an inspector takes samples, the entire process for determining a new standard can take from three to eight weeks because sufficient time must be allowed for an operator to collect samples and for the laboratory analysis to be completed (Tr. 119). He confirmed that the quartz content of a sample is used to establish the respirable dust standard because of the hazard associated with silicosis (Tr. 120).

On cross-examination, Mr. Niewiadomski stated that MSHA would never automatically establish a respirable dust standard based on a single quartz analysis unless the operator does not available itself of the opportunity to file another sample, and the time for doing so has expired (Tr. 121). He confirmed that MSHA's policy allows an operator to request a reevaluation of the standard based on changing mine conditions (Tr. 122). He confirmed that Joint Exhibit 6, is a letter dated January 15, 1993, from the respondent to MSHA's District Manager, requesting a reanalysis of quartz based upon changing geological mine conditions (Tr. 123). He explained that in the instant case, the inspector "is conducting a sampling inspection and is making a determination whether the existing standard is being complied with." Although the respondent believed conditions had changed, this cannot be verified until the samples are analyzed for quartz. He agreed that in the instant case the inspection that was conducted after the reevaluation request confirmed that the conditions had changed because of the quartz reduction, and as a result of the February 8, samples, the standard was adjusted as of March 30, after the sampling process was completed (Tr. 123-126).

In response to a question as to whether the quartz percentage of the active mine workings is correlated to the respirable dust in the active workings as of any particular day, Mr. Niewiadomski stated as follows at (Tr. 126-127):

> A. It is intended to be a long-term standard and in the quartz situation, that -- because percent of quartz can vary, then the applicable standard can vary from time to time and that standard really doesn't change and we have recognized that and there's a process in place to make those adjustments.
>
> Q. But that standard doesn't relate to the active workings?
>
> A. Yes, it does.
>
> Q. It relates to the active workings as of the time the sample was taken but not to the time as to when MSHA makes a determination as to what the revised standard is that correct?
>
> A. It would be unrealistic to come up with a standard every day because basically what you are implying is in the case of a longwall as Mr. Zirkle -- Inspector Zirkle indicated, today I'm sampling here. This is my location. Tomorrow, I'm further along and -- it would be unrealistic to say we have a fluctuating standard and no one knows what that standard is. So to provide the maximum level of protection, we have to come up with a reasonable process and we feel that's what it is.
>
> Now I realize that in this particular instance you felt that the citation was not a valid one. But there are two other circumstances that I have talked -- that I have mentioned where in fact there was a quartz problem. We did not go back and cite you for violating that standard.

Mr. Niewiadomski stated that in order for an operator to develop a sound dust control strategy it must know what the standard is going to be that it has to comply with. He stated that section 70.101, states that if there is quartz in the environment, the dust standard will be reduced and the respondent would be expected to comply. The standard "doesn't say on what the quartz percentage was on that very day" (Tr. 129). He stated further at (Tr. 133-134):

> Q. What would have been wrong in this particular instance with Mr. Zirkle having the authority under MSHA policy to say based upon the percent quartz and

the amount of respirable dust in the mine atmosphere on February 8th, 1993, SOCCO was in compliance and no violation should be issued?

A. Inspector Zirkle is required to enforce the applicable standard. The applicable standard was .8 and Inspector Zirkle in fact did enforce that. He can't -- first of all, he can't make -- ascertain what the standard would be at the time that he collected those samples.

Q. But he can establish that prior to issuing the violation, is that correct?

A. No, he is required to issue the violation as soon as a determination is made that the standard has been violated. Because -- because we need to implement corrective action immediately so people are not needlessly overexposed.

Mr. Niewiadomski confirmed that once the respirable dust standard is established for the MMU, the standard would follow the MMU, even if it were moved to another mine. He stated that the geological conditions in the other mine "are probably the same". He explained that an evaluation of the environmental conditions would be done subsequent to the move, and not before, but that an operator could request a reevaluation if he can provide evidence that its dust controls warranted such a reevaluation. However, notwithstanding any reevaluation request, the inspector must enforce the standard of record (Tr. 135-136). He further explained as follows at (Tr. 141):

THE WITNESS: I want to clarify something. We have over a thousand reduced dust standards in place. We do thousands of quartz analyses, and as far as we know this policy is well understood and everyone knows that there are established procedures how a standard is set. They know exactly how samples are used and they know exactly what standards are being enforced and we make it very clear, even in policy, the policy manual, which was issued back in '88, exactly -- when you have a reduced dust standard in place, how our samples are evaluated based on that reduced dust sample because the operator collects bimonthly samples. He collects additional samples. He may collect citation samples. So that's pretty clearly explained which standard applies when.

Respondent's Testimony and Evidence

Stephen Doe, employed by the respondent as a Senior Geologist, testified that he holds a B.S. Degree in Geology from

West Virginia University, and has taken graduate courses at Ohio University. He is certified by the American Institute of Professional Geologists, and has been employed by the respondent for eleven years. He confirmed that he is familiar with the roof conditions at the mine in question, and that he has walked the entries and "mapped the roof rock types, the lithologies and I also drill core holes". This information will indicate what the future mining conditions will be with regard to the quartz that is in the mine atmosphere (Tr. 147).

Mr. Doe stated that the normal mine roof is limestone, and that quartz is related to the sandstone systems that are in the roof above the coal seam. He confirmed that the respondent occasionally takes samples of its own to determine the quartz content in the mine atmosphere. He identified Joint Exhibit 5, as a sample analysis by the respondent's laboratory of the quartz percentage in the mine atmosphere on January 18, 1993, the date the sample was taken. The report reflects a 4.38 percent quartz content (Tr. 148).

On cross-examination, Mr. Doe stated that the sample in question was received on January 8, 1993, but he did not know when it was taken. Although Mr. Doe stated that the reports shows the sample was taken on the "230 South Longwall, tailgate operator", a handwritten notation on the document shows "237 (South) L/W tail operator" (Joint Exhibit 5, Tr. 149). Although he indicated that at the time the sample was taken, the mine roof was limestone and the bottom was sandstone, he confirmed that he did not take the sample and did not know what dust controls were in place at that time (Tr. 151).

Discussion

The essential facts in this case are not in dispute. Based upon five (5) respirable dust samples taken by MSHA on August 12, 1992, in the 4 South Longwall Section from Mechanized Mining Unit (MMU) 023-0, MSHA determined that the average concentration of respirable dust in that location was 0.8 milligrams per cubic meter of air. One of the five samples was from the longwall shearer operator, the "designated occupation" that was determined by the samples to have the greatest respirable dust concentration. That sample was analyzed for quartz content, and it was determined that the quartz percentage was 22%.

Pursuant to MSHA policy, the respondent was afforded an opportunity on August 20, 1992, to submit an additional sample for quartz analysis, and it did so. The sample was determined to contain 10% quartz. On September 17, 1992, the respondent was given the option to take and submit a second sample for quartz analysis, and it did so. That sample showed 10% quartz content. Based upon an average of the three quartz sample percentages and the application of the formula found in 30 C.F.R. § 70.101, MSHA

established a new respirable dust standard of 0.8 milligrams per cubic meter of air, and the respondent was informed of this by an MSHA notice of October 6, 1992.

Subsequent to MSHA's notification to the respondent of the newly established 0.8 standard, the respondent submitted a sample to its laboratory for analysis and it was determined in a January 13, 1993, report that there was 4.38% silica (quartz), in the sample submitted. Thereafter, on January 15, 1993, the respondent wrote to MSHA's district manager requesting a "Repeat Respirable Dust Survey" to determine the quartz content in the active longwall section, and this request was based on the respondent's in-house determination of a significant reduction of quartz. Inspector Zirkle was informed of this request during a mine inspection on January 26, 1993.

In the course of the inspection on February 8, 1993, which was unrelated to the respondent's request for a dust survey, Inspector Zirkle collected five face occupational samples during one shift on the 4 South Longwall Section MMU 023-0. The sampling results showed that the average concentration of respirable dust was 1.0 milligrams per cubic meter of air, which exceeded the allowable standard of 0.8 milligrams per cubic meter of air in the 4 South Longwall Section MMU-023-0. The analysis for the sample taken from the shearer operator designated occupation reflected a quartz percentage of 2%.

On February 18, 1993, Inspector Zirkle issued the disputed citation based on the results of the five respirable dust samples that he collected on February 8, and he did so because the sample results of 1.0 milligrams per cubic meter of air exceeded the existing allowable standard of 0.8 milligrams that was in place at that time.

Pursuant to section 70.100, the respondent is required to maintain the average concentration of respirable dust during each shift to which each miner in the active workings of the mine is exposed at or below 2.0 milligrams of respirable dust per cubic meter of air. However, pursuant to section 70.101, if the respirable dust in the atmosphere of the active workings contains more than five percent quartz, the respondent is required to comply with a reduced dust standard computed in accordance with section 70.101. In the instant case, the February 8, quartz sample for the designated occupation reflected two percent quartz, which was less than the five percent that would ordinarily trigger a reduced respirable dust standard for compliance with section 70.101. Under the circumstances, the respondent believes that it was entitled to rely on a two percent respirable dust standard because the quartz content in the sampled atmosphere was less than five percent.

Even though the February 8, 1993, respirable dust samples taken by the inspector reflected 1.0 milligrams per cubic meter of air, which was below the normal 2.0 milligram standard, MSHA refused to vacate the citation and held the respondent to the 0.8 milligram reduced standard and required it to meet that reduced standard in order to abate the violation.

On February 19, 1993, MSHA notified the respondent of its option to submit an additional sample for quartz analysis, and it did so. The respondent subsequently declined an invitation to submit a second optional sample, and on March 4, 1993, MSHA advised the respondent that its abatement samples had an average concentration of 0.5 milligrams of respirable dust per cubic meter of air, less than the applicable standard of 0.8 milligrams, and the citation was terminated on March 8, 1993, MSHA notified the respondent that its new respirable dust standard was 2.0 milligrams.

The respondent availed itself of an MSHA citation conference on May 18, 1993. The violation was sustained "because it complies with current MSHA policy", but the citation was modified from "S&S" to non-"S&S", because the environment of the miners was only 2% quartz.

Petitioner's Arguments

MSHA states that the facts in this case are not in dispute and that the critical issue is whether or not its policy and procedure with respect to the application and enforcement of mandatory standard 30 C.F.R. § 70.101, as stated in its Program Policy Manual, Health Manual, and other memoranda is consistent with the regulatory language (Exhibits P-1, P-3 through P-5).

MSHA asserts that pursuant to the requirements of section 205 of the Mine Act, it has applied the appropriate formula found in section 70.101, to insure the health of coal miners, by reducing the standards for respirable dust when excessive levels of quartz are detected in the atmosphere of any mine working place, and that it has determined the procedures to be followed in implementing such a formula, citing American Mining Congress v. Marshall, 671 F.2d 1251, 1256 (10th Cir. 1982).

MSHA believes that its action in reducing the dust standard for the cited MMU 023-0 when the mine atmosphere was found to include greater than 5 percent quartz is reasonable and entirely consistent with the plain wording of both the standard and the Mine Act. MSHA maintains that it must apply section 70.101, in a realistic setting, and must formulate a policy and procedure which can be complied with and enforced. To do this, MSHA concludes that it must establish a standard which is known to the respondent so it may establish dust controls and a dust control

mine atmosphere supports its position. MSHA points out that in this case it is undisputed that the 0.8 milligram dust standard applicable to MMU 023-0 was established on October 6, 1993, on the basis of an MSHA dust sample that had a quartz content of 22 percent (collected on August 12, 1992) and two operator optional samples that had a quartz content of 10 percent each (collected on September 11, 1992 and September 29, 1992, respectively). Accordingly, MSHA concludes that its action in reducing the dust standard for MMU 023-0 "when" the mine atmosphere was found to include greater than 5 percent quartz is entirely consistent with the plain wording of both the standard at issue and the Mine Act. Further, as previously argued, MSHA believes that interpreting "active workings" as following the MMU is reasonable and entirely consistent with the regulation and the Act.

In response to the respondent's argument that neither the inspector nor MSHA's conference officer thought the 2.0 quartz atmosphere on February 8, 1993, presented a health hazard to miners, MSHA asserts that what these individuals thought is irrelevant and that they were not qualified to give an opinion as to the health consequences of exposure to quartz. Although MSHA maintains that the classification of the violation was wrongly changed from S&S to non-S&S, it does not believe this is relevant because the S&S classification is not an issue in this case. MSHA also believes that the violation issued by Inspector Zirkle in March, 1993, is also irrelevant.

In response to the respondent's argument that MSHA should have sampled in response to its January 15, 1993, request, and that it was unfair to cite it when it requests a resurvey, MSHA asserts that it did not have the resources to resurvey at the time it was requested, and that its policy clearly states that even in a resurvey the inspector will first determine compliance with the applicable standard of record. MSHA believes this is fair because that standard of record is known by the operator and the operator is aware that it must comply with that standard.

Respondent's Arguments

The respondent asserts that for purposes of determining the average concentration of respirable dust in the mine atmosphere for compliance with section 70.101, the samples must be taken at approximately the same time and location in which the sample to determine the percentage of quartz in the mine atmosphere of the active workings is taken.

Citing the dictionary definition of the word "when", the first word in section 70.101, as "at or during the time that," and the definition of the phrase "active workings," the respondent concludes that the concentration of respirable dust must be determined during the time that the percentage of quartz is determined.

taken is unrealistic. However, MSHA points out that this is exactly what is being advanced by the respondent in this case. MSHA believes that not knowing what standard to comply with or to enforce on any particular day would create an untenable situation from a compliance and enforcement standpoint, and would be unreasonable.

MSHA further explains that following established procedures, the respondent was given the opportunity to submit an optional sample, which was taken on June 28, 1993, and submitted to MSHA for analysis. That sample contained 13.8 percent quartz, and in accordance with established MSHA procedures, since the 2 samples were within 2 percent, they were averaged and a new standard of 0.9 milligrams was set and became effective on July 2, 1993. From March 30, 1993 to July 2, 1993, the respondent was on a 2.0 milligram standard, and even though the designated MMU occupation was exposed to 11 percent quartz on June 6, 1993, the respondent did not receive a citation nor was the dust standard adjusted based on that sample because this would be inconsistent with established policy.

MSHA concludes that its current dust standard setting procedure is fair because operators had adequate notice of how the standard would be adjusted and that it would be applied to everyone, and on any given day, operators and MSHA know what standard is in effect. MSHA believes that the procedures, known to everyone since 1985, have a scientific basis, and constitute a reasonable approach to enforcing Section 70.101, since everyone knows to what standard they are held, and because specific features of the program are advantageous to the operator.

As a further safeguard for operators, MSHA points out that to ensure that the quartz levels at entities on a reduced dust standard are periodically evaluated and that operators are not unduly penalized by a reduced standard that may no longer be valid, MSHA procedures also provide for automatic reevaluation of quartz levels every six months. If an entity is on a reduced standard and has not been sampled by MSHA during a six month period, an operator's bimonthly sample is automatically selected by the computer for quartz processing to determine whether the applicable dust standard should be adjusted. Additionally, should conditions change that may significantly impact the amount of quartz dust in the work environment to which miners are exposed, operators can request MSHA to resample as the respondent did in this case. But MSHA makes it clear that an inspector will first make a determination of compliance with the existing standard.

MSHA argues that its policy is not inconsistent with the requirements or language of section 70.101. MSHA asserts that the statutory and regulatory requirement for a reduced dust standard "when" there is greater than 5 percent quartz in the

dust control plan, daily. MSHA concludes that if it were to do this, the respondent would cry "foul," and would argue that this constant monitoring would be an impossible burden and it would have no up-to-the-minute knowledge of changes in conditions, and would have no knowledge of whether or not it was on a reduced standard. MSHA points out that it does not obligate an operator to comply with an unknown, and concludes that the existing procedures that it follows in adjusting dust standards are reasonable because mine operators always know to what standard they are being held, thereby assuring that miners are protected on a continuous basis as the Act requires.

MSHA points out that the contested procedure in question has been in place since 1985, has been followed consistently and applied to everyone, and reflects its interpretation as to the intended meaning and application of Section 70.101. As such, MSHA concludes that it is entitled to considerable deference. MSHA points out further that prior to 1985, dust standards were adjusted based solely on the results of MSHA samples, with no operator participation in the process. The current procedure establishes a dust standard to be complied with on a continuous basis based on the results of up to three samples (one MSHA and up to two operator samples). Operators know what standard they are being held to on any given day and, as set forth in the Program Policy Manual, know how respirable dust samples taken by either MSHA or the operator will be processed against a reduced dust standard.

MSHA states that in this case, the respondent knew it was on a reduced standard of 0.8 milligrams on February 8, 1993, and knew it had to comply with that standard. Following the established procedures referred to in MSHA's policy and health manuals, the February 8th inspector sample, which indicated 2 percent quartz, triggered a computer message to the respondent affording it the opportunity to submit a quartz sample. The respondent opted to participate by collecting a sample on February 26, 1993, which was found to contain 5 percent quartz. Not until March 30, 1993, was the dust standard for MMU 023-0 adjusted back to 2.0 milligrams.

MSHA further explains that it conducted another inspection in June 6, 1993, and the 2.0 milligram standard was in effect at that time. The average of the five inspector dust samples was less than the applicable standard, and following established procedures, one of the samples was analyzed for quartz and was found to contain 11 percent quartz. However, the standard was not reduced based on that sample's quartz content, nor was a citation issued for exceeding the reduced standard based on that sample because the respondent was aware of only the particular standard in effect at the time the sample was taken. Requiring the respondent to maintain compliance with a standard to be established at a later date on the day the particular sample was

miners will not be exposed to the same levels of quartz. MSHA concludes that in order to provide the maximum level of health protection on every shift it is not unreasonable to have the respirable dust standard follow the unit upon which it was established, as provided for in MSHA's Health Manual (Exhibit P-3 at paragraph 8, pg. 1.26), and as stated by Mr. Niewiadomski that "... when MMU 023 moves to a different part of the mine, the standard moves with that entity until such time when that standard is adjusted." (Tr. 85).

MSHA points out that in American Mining Congress v. Marshall, 671 F.2d 1251 (10th Cir. 1982) the Tenth Circuit upheld its "designated area sampling" program which was designed to measure the concentration of respirable dust to which coal miners were exposed as they worked and traveled in outby areas. The Court held that this method, although not perfect, was not beyond the scope of MSHA's discretion, stating as follows.

> Since there is no perfect sampling method, the Secretary has discretion to adopt any sampling method that approximates exposure with reasonable accuracy. The Secretary is not required to impose an arguably superior sampling method as long as the one he imposes is reasonably calculated to prevent excessive exposure to respirable dust. On this record, the difference between area and personal sampling is not shown to be so great as to make the Secretary's choice of an area sampling program irrational. American Mining Congress, at 1256.

MSHA acknowledges that its interpretation of "active workings" as following the MMU may not be perfect. However, it takes the position that it is rational and well within its discretion, and maintains that in light of the need for the respondent to comply with a set standard, and the need for an inspector to enforce a set standard, this interpretation of "active workings" is the only viable one. MSHA further believes that if there is evidence that the operating conditions in the area of the mine where the MMU has moved to do not pose a quartz risk, it has procedures in place which the respondent is familiar with, by which it can request a reevaluation of the quartz levels in the environment.

MSHA maintains that if it were to follow the respondent's logic the standard would need to be adjusted whenever MSHA detected a quartz level of over 5 percent. This could result in the issuance of dust citations if the actual dust concentration exceeded the adjusted standard. In this case, a citation would have issued after the August 12, 1992, sample of 22 percent quartz. Therefore, to comply with section 70.101, as the respondent interprets it, the respondent would have to monitor dust daily and would have to change its dust controls, and its

of controlling weight unless it is plainly erroneous or inconsistent with the regulation." (citation omitted). MSHA concludes that its interpretation of section 70.101, is neither erroneous nor inconsistent with the regulation, although the respondent argues that its interpretation of "active working" is unreasonable.

In reply to the respondent's contention that since the 0.8 milligram reduced standard was established from a sample collected on August 12, 1992, from an area that was an "active workings" at that time, but not an "active workings" on February 8, 1993, MSHA must use samples collected on February 8, 1993, to determine compliance with section 70.101, MSHA asserts that the respondent would never be on a reduced standard, and it concludes that the respondent's argument is flawed in two respects: the reduced standard was not established solely from the August 12, sample, and following the respondent's reasoning "active workings" could never be measured because it changes from day to day.

MSHA states that the reduced dust standard was not established from a sample collected on August 12, 1992, and that this sample began a process within which the respondent was able to and did participate. MSHA points out that the August 12 sample was sent to Pittsburgh to be analyzed for quartz, and on August 20, 1992, it was determined that the designated occupation miner was exposed to 22 percent quartz, well over the 5 percent quartz permitted by the standard. The respondent was immediately notified of this and given the opportunity to submit an optional sample, and no citation was issued even though the designated occupation was exposed to 22 percent quartz on August 12, 1992. The MSHA Program Policy Manual and Health Manual was followed. The respondent submitted its own sample on September 17, 1992, which indicated 10 percent quartz. Since there is more than a 2 percent difference between 10 percent and 22 percent, the respondent was given the opportunity to submit a second optional sample, and it did so. This sample revealed 10 percent quartz. On October 6, 1992, the standard was reduced to 0.8 mg/m3 and this reduction was based upon one MSHA sample and two of the respondent's samples. Again, no citation was issued based upon that 22 percent exposure because at that time, the respondent did not know of the overexposure, and MSHA believed it would be unfair to hold the respondent to a standard it did not know.

MSHA argues that the mine "active workings" change from day to day on a longwall and would be impossible to measure. It believes that a reasonable determination of the "active workings" in the case of respirable dust sampling is to follow the mechanical mining unit (MMU). Since the same type of coal extraction equipment is involved in the MMU, and since the same occupations are working that MMU, including the designated occupation, MSHA concludes that there is no reason to assume that

plan to decrease the amount of respirable dust a miner inhales. MSHA further concludes that it must also establish this standard so that it is able to enforce section 70.101, and that without a known respirable dust standard, it would be impossible to enforce this regulation.

Citing the testimony of its expert witness George Niewiadomski that compliance and enforcement of a reduced respirable dust standard can only be achieved if the standard is known, MSHA asserts that the establishment of such a known standard is accomplished by following a reasonable and fair process set out in its Health Manual. MSHA explains that when a dust sample indicates that exposure to quartz is over 5 percent, it notifies the operator of the results of the quartz analysis and the operator is given an option to take a sample and send it to Pittsburgh to be analyzed for quartz, and no citation for a violation of section 70.101 is issued. If the difference between these two samples is more than 2 percent quartz, the operator is given a second option to submit another sample, and up to three samples may be averaged to determine the average quartz percentage which is used to establish the dust standard. Only after this process is completed is the operator placed on a reduced dust standard. At that point, the reduced dust standard is known to the operator and to MSHA. The operator can then determine the controls needed to comply with this standard and the MSHA inspector then knows what standard is to be enforced. When the inspector samples in the future, whether it is a regularly scheduled sampling, or a reevaluation requested by the operator, he must first determine whether the operator is complying with the standard in place. If the operator fails to comply with the reduced standard, a citation will be issued. MSHA states that this procedure is clearly stated at paragraph 6, page 1.24, of its Health Manual (Exhibit P-3).

MSHA further argues that it is well established that its interpretation of a regulation must be given great deference, citing Secretary of Labor v. Cannelton Industries, 867 F.2d 1432, 1435 (D.C. Cir. 1989), where the court stated that "the legislative history of the Mine Act indicates that the Secretary's interpretations of the law and regulations shall be given weight by both the Commission and the courts. S.Rep. No. 181, 95th Cong., 1st Sess. 49 (1977) reprinted in 1977 U.S. Code Cong. & Admin. News 3401, 3448."

In those instances where MSHA and a mine operator may both have reasonable interpretations of a regulation, MSHA concludes that its interpretation is preferred, citing Secretary of Labor v. Western Fuels-Utah, 900 F.2d 318, 321 (D.C. Cir. 1990), where given a choice between competing interpretations of 30 C.F.R. § 48.2 "Supervisory personnel" exception, the court held that it must defer to MSHA's interpretation, stating that "It is well settled that an agency's interpretation of its own regulation is

The respondent maintains that the citation was not issued based upon the concentration of respirable dust and percentage of quartz in the mine atmosphere of the active workings on February 8, 1993, but rather, MSHA issued the citation based upon the average concentration of respirable dust on February 8, 1993, and the percentage of quartz in the mine atmosphere at a different location during August and September 1992. The respondent points out that the percentage of quartz in the mine atmosphere of the active workings of the MMU 023-0 on February 8, 1993, was deemed by MSHA to be irrelevant in determining whether a violation of section 70.101 occurred on that day.

In further support of its position, the respondent relies on the reference in section 70.101 to the quartz content of the respirable dust in the mine atmosphere of the active workings and the average concentration of respirable dust in the mine atmosphere during each shift to which each miner in the active workings is exposed. "Acting workings" is defined by section 70.2(b) as "any place in a coal mine where miners are normally required to work or travel." The evidence establishes that the area in which the sample was taken that established the respirable dust standard that the respondent allegedly violated on February 8, 1993 (i.e., the area in which MMU 023-0 was operating during August and September 1992) was part of the gob area on February 8, 1993, and the respondent maintains that this area was unquestionably not an area where miners were normally required to work or travel on February 8, 1993. However, the MSHA samples that were taken on February 8, 1993, that determined an average concentration of respirable dust of 1.0 milligrams and two percent quartz were from the active workings.

Respondent asserts that it did not violate section 70.101, on February 8, 1993. In support of its position, the respondent relies on the fact that based on the February 8, 1993, MMU 023-0 samples, MSHA determined that the average concentration of respirable dust was 1.0 milligrams per cubic meter of air, and determined the quartz percentage to be two percent, and the inspector acknowledged that this was the case. However, the respondent points out that if the mine atmosphere contains two percent quartz, then according to section 70.101, it would be allowed up to 2.0 milligrams of respirable dust per cubic-meter of air.

The respondent concludes that on February 8, 1993, when the respirable dust in the mine atmosphere of the active workings of MMU 023-0 contained less than five percent quartz, it was in fact maintaining the average concentration of respirable dust in the mine atmosphere during the shift in which the sample was taken in the active workings below two milligrams per cubic meter of air as measured with an approved sampling device, and as determined by MSHA. Accordingly, no violation of Section 70.101 occurred as alleged in the citation.

The respondent argues that contrary to the inspector's testimony, MSHA's health specialist George Niewiadomski stated that according to MSHA policy MSHA cannot make a determination of the quartz percentage in the cited area on February 8, 1993, based upon the one sample taken that day, and that the standard would be based on multiple samples. Respondent emphasizes MSHA's contention that it could not readjust the respirable standard to 2.0 milligrams based upon the February 8, 1993 sample because, as the inspector stated, "You got to go through the guidelines." (Tr. 50).

The respondent asserts that there are many occasions in which MSHA establishes a new standard based upon one sample. It cites Mr. Niewiadomski's testimony that a quartz determination is based upon one sample when the operator does not submit any optional samples, when an optional sample lacks adequate weight for purposes of testing for quartz, or when the operator's sample is damaged in transit. Acknowledging the fact that MSHA policy allows it the right to submit one or two optional samples, the respondent believes that there is no incentive for it to do so if the quartz is determined to be less than five percent by MSHA's analysis. Based upon the one MSHA analysis of two percent quartz, the respondent would have the reduced standard eliminated and be placed again on the 2.0 milligrams per cubic meter of air respirable dust standard. Even if it had submitted two more samples for quartz analysis and MSHA determined that these two samples contained zero percent quartz, the respondent points out that it would still have been placed on the 2.0 milligram standard.

The respondent confirms that in this case it did submit a first optional sample but not a second one, and that it did so because it was informed by the MSHA district office that the quartz percentage would not be determined by the February 8, 1993 sample, but rather on a rolling basis. The respondent concludes that neither MSHA's district office nor the respondent understood the policy MSHA was enforcing and that the confusion created by the existing policy is evidenced by MSHA's need to bring a specialist from Arlington, Virginia to the hearing to explain the policy.

The respondent asserts that MSHA does establish a new respirable dust standard based upon one quartz analysis if the operator does not submit additional samples. Since an operator would receive no benefit from submitting additional samples when MSHA's quartz analysis determined the mine atmosphere to contain less than five percent quartz, the respondent believes it would be reasonable for MSHA to then eliminate the reduced standard requirement for the operator as of the date MSHA took the sample. In this case, the respondent points out that while MSHA took a sample evidencing two percent quartz on February 8, 1993, the

respirable dust standard was not adjusted to the 2.0 milligram standard until March 30, 1993, when it was officially notified of the new standard.

The respondent argues that MSHA's respirable dust compliance policy is inconsistent with the requirements of section 70.101, for determining the amount of quartz in the active workings. The respondent maintains that it is the MSHA samples that were taken on February 8, 1993, in the active workings of the 4 South Longwall Panel, and not those taken in August and September 1992, that were relevant for determining compliance with this section. Yet, MSHA policy required that compliance be based upon a sample taken approximately six months earlier in an area that was no longer part of the active workings as of February 1993.

The respondent takes the position that MSHA's policy fails to achieve the stated purpose to protect miners, and that MSHA has acknowledged that the actual amount of quartz present in the mine atmosphere of the cited MMU on February 8, 1993, is irrelevant to determining whether a violation of the respirable dust standard existed on that day. Even though it is undisputed that the amount of quartz in the atmosphere varies with the location in the mine, respondent believes that MSHA's policy does not take this into account, and, as Mr. Niewiadomski testified, the established quartz standard remains even if the MMU is moved to another mine. Conceding that it could request another survey if it provides evidence justifying a reevaluation, the respondent believes it could easily be several months before a new standard would be established following such a request.

The respondent argues that the obvious intent of the regulation is to provide for the miners to breathe a smaller concentration of respirable dust when the percent of quartz in the mine atmosphere at the active workings is higher and to provide for the issuance of a violation when the concentration of respirable dust is higher than section 70.101 permits, based upon the percent of quartz present. However, in this case, the respondent points out that it received the Citation despite the mine atmosphere at MMU 023-0 on February 8, 1993, being well in compliance with section 70.101, when the mine atmosphere contained only two percent quartz and the average concentration of respirable dust was only one milligram, one-half of the concentration deemed acceptable in a mine atmosphere containing as high as five percent quartz.

The respondent concludes that MSHA has basically acknowledged the failure of its policy to protect miners, and points out that the citation in this case was modified to non-"S&S" because the mine environment was only two percent quartz, and the inspector was of the opinion that breathing one milligram of respirable dust in an atmosphere of two percent quartz does not subject one to a health hazard.

The respondent cites the fact that MSHA vacated a citation issued in a similar situation. Respondent states that on March 1, 1993, Inspector Zirkle issued a violation based upon the result of five respirable dust samples collected by the respondent during the January/February 1993 bi-monthly sampling cycle. The average concentration of respirable dust for the applicable mechanical mining unit was 1.4 milligrams per cubic meter of air which exceeded the reduced standard then in effect of 0.9 milligrams per cubic meter of air. However, based upon the 3% quartz found in MSHA's sample from the same MMU on February 5, 1993, and the 2% quartz found in the operator's first optional sample of February 26, 1993, MSHA vacated the citation and acknowledged that the quartz percentage at the subject location was sufficiently low at the time the samples were taken that the reduced standard was applicable (Exhibits R-1 through R-4; Tr. 59-63).

The respondent states that the amount of quartz in the mine varies with the mine location and is dependent upon the material in the roof, bottom, and face areas. Respondent points out that the amount of quartz that will be encountered can be approximately determinated by its geologist Steve Doe as he explained in the course of the hearing, and that based on the anticipated mining conditions, it submitted a sample to its laboratory. The laboratory analysis showed 4.38 percent quartz in the sample, and as a result, the respondent's general manager sent a letter to MSHA's district manager on January 15, 1993, requesting a repeat respirable dust survey (Joint Exhibit 6). However, the standard was not revised until more than two months later.

The respondent believes it is clear that MSHA policy does not provide for there to be any correlation between the concentration of respirable dust and the amount of quartz that the miner is breathing in the active workings, and it points to the testimony of Mr. Niewiadonski that the entire process from the time the inspector takes a sample until a new standard is established can be from three to eight weeks, and this time is required in order for an operator to be able to collect and mail optional samples and have those samples analyzed. Respondent also believes that the February 8, 1993, quartz sampling was the result of chance rather than a response to its request. The respondent concludes that but for the chance quartz analysis of February 8, an even greater time would have expired before its request and MSHA's response.

The respondent argues that "the absurdity of the MSHA policy" is further exemplified by the procedure by which an operator is granted a repeat respirable dust survey. The respondent states that according to MSHA policy, "In those instances when a mine operator or miner representative makes a justifiable request for a repeat respirable dust survey to determine quartz content, MSHA will collect samples to first

determine whether there is compliance with the applicable dust standard before submitting for quartz analysis," (Exhibit P-3, paragraph 6, p. 1.24, Tr. 97). If there is a violation of the existing standard at the time of the repeat respirable dust survey, the inspector will issue a citation and require corrective action to be taken so that the operator will be in compliance with the then existing standard (Tr. 97-99).

The respondent further asserts that after an operator has presented a "justifiable request" for a repeat survey, which request would presumably be based upon the operator having acquired evidence that the reduced quartz standard should no longer be applicable due to changed mining conditions, MSHA will issue a violation if the operator is not in compliance with an outdated standard based upon a quartz percentage determined in an area that the operator believes to have had considerably more quartz than the area in which the operator is then mining. Thus, by requesting a survey, the respondent concludes that an operator is exposing itself to the issuance of a violation based upon a standard that the operator (and most likely in many situation MSHA) believes to be no longer applicable. Then, if a violation is issued, the operator must comply with the no longer applicable reduced standard. The respondent finds it difficult to comprehend how this policy promotes the health of the miners.

The respondent states that in the instant case MSHA took the samples on February 8, 1993, issued the violation on February 18, 1993, and issued a notice on February 19, 1993, that the quartz percentage was 2% based on the sample taken on February 8. The respondent points out that there is no particular time period during which an inspector is required to issue a citation, and had the inspector here waited until February 19, 1993, or had he been immediately notified of the results of the analysis of the quartz sample, he would have known both the quartz percentage and the average concentration of respirable dust in the mine atmosphere at the cited location on February 8, 1993, prior to issuing the citation. The respondent submits that in order for MSHA to act in accordance with § 70.101, the inspector should have then not issued the citation, although this is contrary to MSHA policy.

In response to MSHA's argument that enforcement "works both ways", and that it cannot tell on the date it takes the sample what the quartz percentage is going to be, and thus must enforce the standard that was previously established, the respondent asserts that by simply waiting until the quartz analysis is completed MSHA can at least determine in situations in which the sample has less than 5% quartz and the average concentration of respirable dust is less than the 2.0 milligram standard that no citation is warranted.

Considering how rapidly mining conditions change, the respondent maintains that MSHA is not making a determined effort to bring the time in which the average concentration of respirable dust is determined as close as possible to the time in which the quartz percentage is determined. Even though the inspector testified that he conducted sampling at the Meigs No. 2 Mine approximately 12 times per year, according to MSHA policy, MSHA determines quartz percentage only two times per year. Based upon the MSHA district manager's letter of February 23, 1993, advising that its request for a dust reevaluation "will be complied with as soon as the work load permits", the respondent concludes that months could easily pass before a justifiable request for a repeat survey to determine quartz percentage would be acted upon by MSHA.

Responding to Mr. Niewiadomski's testimony that MSHA does not know the quartz percentage in the mine atmosphere as of the date it takes the samples to determine the concentration of respirable dust, the respondent believes that MSHA could have known in this particular case because during a January 26, 1993, inspection of the mine, the inspector was informed that the respondent had requested a quartz technical inspection, and this was almost two weeks before the inspector took the samples to determine compliance with the standard that was established the previous August.

The respondent points out that MSHA has acknowledged that a policy interpretation that is inconsistent with the regulation is not controlling. The respondent asserts that while section 70.101, requires a correlation in time and location between the quartz percentage in the active workings and the concentration of respirable dust in the active workings, MSHA's interpretation of this section does not. The respondent maintains that MSHA's interpretation clearly ignores the percent of quartz in the mine atmosphere at the time during which the samples that provide the basis for a violation are taken. Citing American Mining Congress v. Marshall, 671 F.2d 1251, 1256 (10th Cir. 1982), where the court ruled that a new procedure instituting a "designated area sampling" program was proper, the respondent noted that the court observed that such a program was ". . . . designed to measure the concentration of respirable dust to which miners are exposed as they work and travel in outby areas."

On the facts of this case, the respondent concludes that MSHA's policy is not fair, logical, or reasonable, because the respirable dust standard was based upon the percentage of quartz present in an abandoned area that was mined six months earlier, and MSHA's method imposes a standard unrelated to the miner's exposure. The respondent points out that based upon changed mining conditions, it knew more than a month prior to the issuance of the citation, that the quartz percentage used by MSHA in determining compliance with § 70.101, did not approximate the

miner's exposure and so informed MSHA. Yet, according to its policy MSHA is bound to not revise the standard which it may have already determined to be outdated since the repeat respirable dust survey is done when it receives a "justifiable request."

The respondent argues that while the clear objective of section 70.101, is for miners to breath a lesser concentration of respirable dust when the percent of quartz is higher, MSHA's policy is not in harmony with this objective.

The respondent maintains that MSHA'S interpretation of section 70.101, impermissibly broadens the meaning of "active workings". The respondent attacks the correctness of MSHA's contention that the respondent's interpretation of "active workings" is impracticable because the respondent would not have knowledge of the applicable standard that it must meet if it were continually changing, that the phrase "active workings" is not intended to mean "any place in a normally required to work or travel," as defined by section 75.2, but rather the area in which the mechanical mining unit (MMU) was previously in operation, and MSHA's presumption that since the same equipment and occupations follow the MMU, there is no reason to assume that miners will not be exposed to the same levels of quartz.

In response to MSHA's contentions, the respondent argues that the percent of quartz in the mine atmosphere is related to the geological conditions, not the MMU. While the respondent may not be able to determine on a daily basis the exact percentage of quartz in the mine atmosphere, it maintains that it does know when geological conditions have changed and the quartz percentage has greatly increased or decreased, but that MSHA's policy ignores these changes. Because MSHA only takes samples for quartz percentages two times a year, the respondent concludes that it can easily take two months thereafter for a new quartz percentage to be established, and it is unlikely that MSHA policy ever results in a correlation between the quartz percentage and the amount of respirable dust in the mine atmosphere. Recognizing that MSHA policy acknowledges that changed mining conditions result in changes in the level of quartz by providing for rechecking the quartz percentage every six months and supposedly rechecking upon an operator's request, the respondent believes that the checks are too infrequent to accurately reflect mining conditions.

The respondent concludes that based on the MSHA samples taken on February 8, 1993, only MSHA policy and not section 70.101, was violated. Since it believes that the policy is inconsistent with both the plain language and purpose of section 70.101, and should not be enforced, the respondent maintains that the citation should be vacated and no penalty should be assessed.

The respondent suggests that MSHA can readily implement three improvements to its policy to reflect the requirements of section 70.101: (1) MSHA could more rapidly respond to an operator's request for a repeat respirable dust survey and expedite the process of establishing a new standard when it is appropriate; (2) MSHA could more frequently determine quartz analysis by making such a determination each time it checks to determine compliance by sampling for the average concentration of respirable dust;-and (3) MSHA should not cite an operator when the operator has requested a repeat respirable survey and determines that the quartz percentage and the amount of respirable dust in the active workings as of the day the samples are taken are in compliance with the formula set forth in § 70.101.

Findings and Conclusions

The fundamental statutory Mine Act requirement with respect to the respirable dust standard is that the average concentration of dust be continuously maintained at or below 2 milligrams per cubic meter of air (2.0 mg/m3). Section 202(b)(2) of the Act, 30 U.S.C. 842(b)(2) provides in relevant part as follows:

> . . . each operator shall continuously maintain the average concentration of respirable dust in the mine atmosphere during each shift to which each miner in the active workings of such mine is exposed at or below 2.0 milligrams of respirable dust . . . (emphasis added).

The statutory limitation of 2.0 milligrams of respirable dust is codified as part of MSHA's mandatory regulations at 30 C.F.R. § 70.100(a), which provides as follows:

> (a) Each operator shall continuously maintain the average concentration of respirable dust in the mine atmosphere during each shift to which each miner in the active workings of each mine is exposed at or below 2.0 milligrams of respirable dust per cubic meter of air as measured with an approved sampling device and in terms of an equivalent concentration determined in accordance with § 70.206 (Approved sampling devices; equivalent concentrations). (Emphasis added).

Pursuant to section 205 of the Act, whenever the respirable dust in the mine atmosphere contains more than 5 percent quartz, the 2 milligram standard must be lowered, and the operator is required to maintain the respirable dust below the 2 milligram average concentration. Section 205 of the Act, provides as follows:

> In coal mining operations where the concentration of respirable dust in the mine atmosphere of any working place contains more than 5 percent quartz, the Secretary of Health, Education and Welfare shall prescribe an appropriate formula for determining the applicable respirable dust standard under this title for such working place and the Secretary [of Labor] shall apply such formula in carrying out his duties under this title. (Emphasis Added)

The regulatory lowered respirable dust standard when more than 5 percent quartz is present is codified at 30 C.F.R. § 70.101, the regulation allegedly violated by the respondent in this case, and it states as follows:

> When the respirable dust in the mine atmosphere of the active workings contains more than 5 percent quartz, the operator shall continuously maintain the average concentration of respirable dust in the mine atmosphere during each shift to which each miner in the active workings is exposed at or below a concentration of respirable dust, expressed in milligrams per cubic meter of air as measured with an approved sampling device and in terms of an equivalent concentration determined in accordance with § 70.206 (Approved sampling devices; equivalent concentrations), computed by dividing the percent of quartz in to the number 10. (Emphasis added).

30 C.F.R. § 70.207(a) requires a mine operator to take bimonthly samples of respirable dust from the designated occupation in each mechanized mining unit (MMU). A mechanized mining unit is defined in relevant part by section 70.2(h), as "a unit of mining equipment including hand loading equipment used for the production of material." The designated occupation is defined in section 70.2(f), as "the occupation on a mechanized mining unit that has been determined by results of respirable dust samples to have the greatest respirable dust concentration." In the instant case the MMU consists of the longwall tail shearer, shield puller, headgate operator, mechanic, and foreman (Joint Exhibit-1), and the designated high risk occupation is the tail shearer.

MSHA's policies and procedures with respect to a reduced dust standard due to excessive levels of quartz are set out in four exhibits consisting of a February 15, 1989, six-page portion of MSHA's Coal Mine Health Inspection Procedures (Exhibit P-3); two pages from the July 1, 1988, Program Policy Manual (Exhibit P-1); a one-page Policy Memorandum No. 85-7c, dated November 12, 1985 (Exhibit P-5); and a four page memorandum HQ-85-133-H, dated November 11, 1985 (Exhibit P-4).

MSHA's inspection procedures provide in relevant part at pgs 1.26 and 1.27 (Exhibit P-3):

8. MSHA's procedures for applying a reduced standard will parallel those of issuing citations on an MMU. This includes keeping the reduced standard, as well as any citations issued for exceeding the reduced standard, with an entity when it moves to a new location. Some situations that may occur as sampling results are received and entities move to new locations are addressed in the following:

   a. An MMU is operating in location 1 under a reduced standard and is moved to location 2 (for example, 3000 feet away). The reduced standard remains in effect on that MMU in location 2. If subsequent sampling by MSHA or the operator indicates a violation of the reduced standard at location 2, the inspector issues a citation.

   b. An MMU is operating in location 1 under a reduced standard and a citation is in effect. Mining is completed in location 1 and the MMU is moved to location 2 (for example, 3000 feet away). The citation remains in effect until the violation is abated.

9. Revaluation of an entity's airborne quartz levels may become necessary because of the following:

   a. Changing conditions - such as cutting more or less roof or bottom variation in the coal seam parting, etc. - have resulted in increased or decreased quartz content.

   b. Improved dust controls - mine operator requests MSHA to resample because of improved mining methods, ventilation controls or engineering controls.

The evidence in this case establishes that the 0.8 milligram standard for the cited MMU was based on dust samples collected by

MSHA on August 12, 1992, and subsequent samples submitted for quartz analysis during August and September 1992. The respondent was notified on October 6, 1992, that the 0.8 milligram standard applied to the MMU. It is undisputed that the reduced respirable dust standard for the cited MMU was the result of levels of quartz in excess of five percent at the sampled MMU atmosphere. Accordingly, I conclude and find that there is a direct correlation between the presence of quartz at the MMU location where sampling is done and any reduced dust standard that may follow from such sampling.

In the instant case, the respondent is charged in a citation issued on February 18, 1993, with an alleged violation of section 70.101, that purportedly occurred on February 8, 1993, when the results of five valid respirable dust samples collected that day by MSHA reflected an average concentration of respirable dust of 1.0 mg/m3, which exceeded the allowable standard of 0.8 mg/m3 that had previously been established for the cited MMU as the result of sampling that took place some six months earlier beginning on August 12, 1992.

The term "active workings" is defined by section 70.2(b), as "any place in a coal mine where miners are normally required to work or travel". Although the evidence in this case establishes that the reduced 0.8 milligram respirable dust standard for the cited MMU was based on sampled quartz levels taken during August and September 1992, when the MMU was located in the active workings of the mine, when the citation was issued on February 8, 1993, the prior MMU location was a gob area and no longer part of the mine active workings where miners were required to work or travel. Even though the evidence establishes that the average concentration of respirable dust on the MMU on February 8, 1993, was 1.0 milligrams, and that the reduced quartz level of 2 percent would normally have allowed for 2.0 milligrams of respirable dust at that location, the inspector ignored this and issued the violation because the respondent exceeded the previously fixed reduced standard of 0.8 milligrams, based on quartz sampling at the earlier active working area which no longer existed when the violation was issued.

Inspector Zirkle confirmed that even though the respondent had more than complied with its approved dust control plan by increasing the air velocity and adding additional water sprays, it still exceeded the 0.8 milligram standard that he applied when he issued the violation on February 8, 1993, pursuant to MSHA's policy procedures that require him to consider the fact that the reduced dust standard in place at that time moves with the MMU and remains in place regardless of the actual mine atmosphere conditions at the new MMU location, and the decreased levels of quartz exposure at that location.

Inspector Zirkle agreed that the quartz percentage in the mine varies with the roof conditions and the presence and location of stone which produces quartz when it is cut (Tr. 32). Mr. Niewiadomski agreed that quartz levels can vary significantly and he confirmed that the mine conditions had changed on February 8, 1993, as reflected by the sampling on that day which indicated a reduction in the quartz present in the MMU atmosphere (Tr. 108, 124). Notwithstanding these changed mining and atmospheric conditions, and the increased air velocity and water sprays in excess of the approved dust control plan, the inspector considered the atmosphere of that unit to be irrelevant to any determination of a violation in this case.

As noted earlier, Mr. Niewiadomski agreed that quartz levels can vary significantly and he believed that it was important that any sampling that is done is representative of typical mining conditions (Tr. 108, 144). Under the circumstances, I find it difficult to comprehend the logic of MSHA's policy interpretation that the "active workings" follow the MMU, and that once a reduced respirable dust standard based on the level or percentage of quartz present in the MMU atmosphere is established, that standard follows the MMU to the new location regardless of the presence or absence of quartz at that location. Indeed, under MSHA's policy interpretation, if the MMU in this case were moved to another mine the reduced allowable average respirable dust exposure standard would move with it without regard to the atmospheric quartz environment at that new location, and the respondent would be held accountable and liable for a penalty assessment for not complying with a standard at that location based on a quartz exposure that may not exist. I cannot reconcile this contradictory logic, nor can I conclude that such a procedure provides a credible or probative evidentiary basis for establishing non-compliance and proving a violation in this case.

As correctly stated by MSHA, the Tenth Circuit in American Mining Congress v. Marshall, supra, held that the Secretary had discretion to adopt the "designated area sampling" program to measure the concentration of respirable dust to which coal miners are exposed as they go about their daily business. I agree that the Secretary need only show a rational basis for such a program as long as it is reasonably calculated to prevent excessive exposure to respirable dust. However, on the facts of the instant case, I cannot conclude that MSHA's policy interpretation of "active workings" as following the MMU, when applied in an enforcement action seeking to hold the respondent accountable for a violation of section 70.101, for exceeding the lowered respirable dust standard due to the presence of quartz is rational, particularly since it requires the inspector to ignore the absence of quartz, or reduced quartz exposure at the MMU location where the alleged violation occurred.

It seems clear to me that the objective and intent of the requirement found in Section 70.101, for maintaining a reduced respirable dust exposure level when quartz is present, is to insure that miners are protected from the hazards associated with breathing respirable dust containing quartz levels in excess of five percent in the atmosphere of the active workings. What troubles me in this case is that the alleged violation is based on a reduced quartz respirable dust standard that was based on sampling that occurred some six months earlier on an MMU in an active working area that had been mined out and no longer existed when the MMU moved to a new location where further sampling established reduced levels of quartz and compliance with the newly computed standard at that location. In short, on the facts of this case, it would appear to me that miners working at the cited MMU location on February 8, 1993, were not in fact exposed to hazards associated with breathing respirable dust containing quartz levels in excess of 5 percent in the environment of that MMU at that particular location.

I conclude that in order to establish a violation of section 70.101, in this case, MSHA must prove by a preponderance of the credible evidence that on February 8, 1993, the respirable dust in the active workings atmosphere where the cited MMU was located contained more than 5 percent quartz, and that the respondent failed to maintain the average concentration of respirable dust in the active working mine atmosphere at that location at or below a concentration computed in accordance with the formula found in section 70.101, based on the presence of quartz in excess of five percent.

Based on the facts and evidence adduced in this case, I find that on February 8, 1993, the day of the alleged violation, the respirable dust in the mine atmosphere of the cited MMU active workings contained less than 5 percent quartz, and that the respondent maintained the average concentration of respirable dust in the mine atmosphere during the shift in which the sample was taken in the active workings below 2 milligrams per cubic meter of air. Under the circumstances, I find that the respondent was in compliance with the cited standard and that MSHA has failed to prove a violation. Accordingly, the contested citation IS VACATED.

ORDER

In view of the foregoing findings and conclusions, section 104(a) non-"S&S" Citation No. 3540906, February 18, 1993, citing an alleged violatin of 30 C.F.R. § 70.101, IS VACATED, and the petitioner's civil penalty proposal IS DENIED AND DISMISSED.

George A. Koutras
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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MAY 16 1994

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 93-295-M
Petitioner	:	A.C. No. 24-01967-05505
v.	:	
	:	Crusher No. 3 Mine
REMP SAND & GRAVEL,	:	
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 three alleged violations of certain mandatory safety standards found in Part 56, Title 30, Code of Federal Regulations. The Respondent filed a timely answer.

The parties now have decided to settle the matter, and the Secretary has filed a motion pursuant to Commission Rule 31, 29 C.F.R. § 2700.31, seeking approval of the proposed settlement. The citations, initial assessments, and the proposed settlement amounts are as follows:

Citation No.	Date	30 C.F.R. §	Assessment	Settlement
4122868	07-29-92	56.14107(a)	$195	$195
4122875	07-29-92	56.14107(a)	$136	$135
4122880	07-29-92	56.14130(a)(3)	$ 84	$ 84

The record contains 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 addition, the petitioner states respondent has paid in full the proposed penalties.

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 full payment of the penalties assessed for the subject violations is warranted and that the settlement disposition is reasonable and in the public interest. Pursuant to 29 C.F.R. § 2700.31, the motion IS GRANTED, and the settlement is **APPROVED**.

ORDER

This proceeding is **DISMISSED**.

David F. Barbour
Administrative Law Judge

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MAY 16 1994

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. YORK 92-106-M
Petitioner	:	A. C. No. 30-02790-05512
v.	:	
	:	Docket No. YORK 92-107-M
W. J. BOKUS INDUSTRIES, INC.,	:	A. C. No. 30-02790-05513
Respondent	:	
	:	High Peaks Asphalt

DECISION ON REMAND

Before: Judge Weisberger

On April 21, 1994 the Commission issued a decision in this civil penalty proceeding remanding the matter to me to resolve the merits of the citations and orders issued concerning cylinders[1], a grinder[2], and a fan on a wood stove[3]. Also to be resolved are the special findings, and appropriate penalties for violations found.

I.

On October 22, 1991, MSHA Inspector Randall Gadway observed seven compressed gas cylinders which were standing unsecured. Four or five of the cylinders contain oxygen, and two or three of the cylinders contained acetylene. Gadway handled two of the oxygen cylinders, and determined that they were full. Gadway issued an order alleging a violation of 30 C.F.R. § 16005 which provides as follows: "Compressed and liquid gas cylinders shall be secured in a safe manner." There is no evidence in the record to contradict or impeach Gadway's testimony. Accordingly, based upon his testimony, I conclude that Respondent did violate Section 56.16005, supra.

---

[1] A Section 104(d)(1) order was issued alleging a violation of 30 C.F.R. § 16005, and another Section 104(d)(1) order was issued alleging violations of 30 C.F.R. § 56.16006.

[2] A Section 104(d)(1) order was issued alleging a violation of 30 C.F.R. § 56.14115.

[3] An imminent danger order was issued with an accompanying citation alleging a violation 30 C.F.R. § 56.12030.

According to Gadway, the violation resulted from Respondent's unwarrantable failure. Petitioner must establish that there was aggregated conducted on the part of Respondent (See, Emery Mining Corp., 9 FMSHRC 1997, 2004 (December 1987)). According to Gadway, when he informed Respondent's employee, James McGee, that the cylinders must be secured, McGee stated that "'I will tell Mr. Bokus about it'; but he doesn't do anything about it." (Tr. 21) (sic). McGee, who testified, did not specifically rebut or impeach this testimony. William J. Bokus, who represented Respondent at the hearing, did not testify to rebut or impeach this testimony. Hence, based upon the testimony of Gadway, I conclude that the violation herein resulted from Respondent's aggravated conduct. I thus find that the violation resulted from its unwarrantable failure. (See, Emery supra).

In essence, according to Gadway, should one of the oxygen cylinders fall or be knocked over, the valve on the cylinder could break, and cause the cylinder to become a "missile" which could strike an employee, and cause a serious or fatal injury. At the time of Gadway's observation, one of Respondent's employees and one employee of Pallette Stone Corporation were performing work in the garage where the cylinders were located. This garage was generally used by employees of Respondent and Pallette Stone for the repair of vehicles and equipment. Given these uncontested facts, I concluded that the violation herein was significant and substantial (See, Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984)).

Taking into account the factors set forth in Section 110(i) of the Act, I find that a penalty of $550.00 is appropriate for this violation.

II.

Gadway also observed that the two full oxygen cylinders were not provided with valve covers. He issued a citation alleging a violation of 30 C.F.R. § 56.16006, which provides as follows: "Valves on compressed gas cylinders shall be protected by covers when being transported or stored, and by a safe location when the cylinders are in use." The record does not contain any evidence from Respondent which impeaches or contradicts Gadway's testimony. Based upon his testimony, I conclude that since two of the oxygen cylinders lacked valve covers, Respondent did violate Section 56.16006 supra.

Since the lack of valve covers was observed by Gadway, it is likely that this condition was obvious. However, there is no specific evidence in the record to indicate how long this

condition existed until it was noted and cited by Gadway. I thus conclude that the violation herein did not result from any aggravated conduct on the part of Respondent. Hence, I find that the violation was not as a result of Respondent's unwarrantable failure. (See, Emery, supra).

According to Gadway, the unsecured oxygen cylinders could have been easily knocked over. He indicated that, since there were not any valve covers on the cylinders, the impact of hitting the floor could break the valves off. Gadway opined that in this event, the cylinders would become "missile[s]", and a fatal accident would be likely. Respondent did present any evidence to impeach or rebut Gadway's testimony in these regards. Accordingly, I conclude that the violation herein was significant and substantial (See U.S. Steel). I find that a penalty of $400.00 is appropriate for this violation.

III.

According to Gadway, when he made his inspection he observed a stationary grinder that lacked a peripheral hood. The hood enclosed the grinding wheel in order to capture any fragments in the event that the wheel bursts. Gadway indicated that the grinder also lacked an adjustable tool rest. He observed an opening of approximately an inch and a half between the wheel, and the frame of the grinder. Gadway issued an order alleging a violation of 30 C.F.R. § 56.14115 which, as pertinent, provides as follows: "Stationary grinding machines . . . shall be equipped with -

(a) Peripheral hoods capable of withstanding the force of a bursting wheel...;

(b) Adjustable tool rests set so that the distance between the grinding surface of the wheel and the tool rest is not greater than 1/8 inch...."

Respondent did not specifically rebut or impeach Gadway's testimony. Based upon his testimony I find that Respondent did violate Section 56.14115 supra.

According to Gadway, McGee told him regarding the grinder, that ". . . he tells Mr. Bokus, but he does nothing about it." (sic) (Tr. 220). McGee who testified did not impeach or contradict this testimony. Bokus did not testify to impeach or rebut this statement. Hence, based upon the testimony of Gadway, I conclude that the violation of Section 56.14115, supra resulted from Respondent's unwarrantable failure. (See, Emery, supra.)

Gadway characterized the violation as significant and substantial. According to Gadway, fatalities have resulted ". . . where the stone burst and went through the employee's head." (sic) (Tr. 218) There is no evidence in the record containing any description of any physical conditions present which would have made it reasonably likely that an injury producing event i.e. bursting of the wheel, or an operators fingers being drawn into the wheel was reasonably likely to have occurred. (See Mathies, supra.) Accordingly, I conclude that it has not been established that the violation was significant and substantial. I find that a penalty of $500.00 is appropriate for this violation.

IV.

Gadway also observed a wood stove located in the garage. This stove was used to provide heat for employees. A 110 volt electric fan was located next to the stove to circulate warm air. According to Gadway, the cord supplying electricity to the fan had a 1-1/2 inch bare spot in the insulation which was located approximately 8 inches from the stove, and 4 feet above the floor. He opined that the energized conductors were exposed to physical contact by employees. He opined that in the event that an employee came into contact with the exposed conductors, he could be electrocuted. He issued an imminent danger order, and an accompanying citation alleging a violation of 30 C.F.R. § 56.12030.

According to Gadway, he issued an imminent danger order because of the following factors: the existence of a bare energized wire; the lack of a fitting where the wire entered the fan which could cause the wire to rub against the metal frame and short out; and the lack of any ground wire which could result in the stove becoming energized. He concluded that if a person would have inadvertently touched the stove, he would have been electrocuted.

Section 107(a) of the Act provides as follows:

> If, upon any inspection or investigation of a coal or other mine which is subject to this Act, an authorized representative of the Secretary finds that an imminent danger exists, such representative shall determine the extent of the area of such mine throughout which the danger exists, and issue an order requiring the operator of such mine to cause all persons, except those referred to in Section 104(c), to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the

Secretary determines that such imminent danger and the conditions or practices which caused such imminent danger no longer exist.

The term "imminent danger" is defined in Section 3(j) of the Act to mean ". . . the existence of any condition or practice in a coal or other mine which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated." 30 U.S.C. § 802(j).

To support a finding of imminent danger, the inspector must find that the hazardous condition has a reasonable potential to cause death or serious injury within a short period of time. An inspector abuses his discretion when he orders the immediate withdrawal of a mine under Section 107(a) in circumstances where there is not an imminent threat to miners. Utah Power & Light Co., 13 FMSHRC 1617 (1991).

Within the framework of the above summarized evidence, and based on Gadway's testimony that I accept, I conclude that he did not abuse his discretion, and that the imminent danger order was properly issued.

In addition, Gadway cited Respondent with a violation of 30 C.F.R. § 56.12030 which provides as follows: "When a potentially dangerous condition is found, it shall be corrected before equipment or wiring is energized." As indicated above, there not any contradiction or impeachment of Gadway's testimony regarding the lack of insulation on the cord supplying electric to the fan being used to circulate warm air. I thus find that Respondent did violate Section 56.12030 as cited. Further, within the framework of the above summarized evidence, I conclude that the violation was significant and substantial. (See Mathies, supra.) I find that a penalty of $550 is appropriate for this violation.

ORDER

It is ordered as follows:

(1) Order No. 3593042 be amended to a Section 104(a) citation.

(2) Order No. 3599752 be amended to indicate a violation that is not significant and substantial.

(3) Respondent shall pay a civil penalty of $2,000 within 30 days of this decision.

Avram Weisberger
Administrative Law Judge

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MAY 1 8 1994

THUNDER BASIN COAL COMPANY, Contestant	:	CONTEST PROCEEDING Docket No. WEST 94-148-R Citation No. 3589022; 11/22/93
v.	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEST 94-303 A.C. No. 48-00977-03524
v.	:	
THUNDER BASIN COAL COMPANY, Respondent	:	Black Thunder Mine

SUMMARY DECISION

Before: Judge Amchan

The instant case is before me upon cross-motions for summary decision. The issue is whether Contestant, Thunder Basin Coal Company, violated section 109(a) of the Federal Mine Safety and Health Act in failing to post on its mine bulletin board the Order of Temporary Reinstatement issued by the undersigned in Commission Docket No. WEST 93-652-D. For the reasons stated below I grant summary decision in favor of Contestant.

Factual Background

On November 2, 1993, I issued an Order of Temporary Reinstatement in Commission Docket No. WEST 93-652-D, 15 FMSHRC 2290. This order was predicated on my findings that the discrimination complaints of Loy Peters, Darryl Anderson, and Donald Gregory, who were laid off by Thunder Basin in July, 1993, were "not frivolous." I also found that the Secretary of Labor's decision to seek temporary reinstatement for these employees was "not frivolous."

On November 22, 1993, MSHA Inspector James Beam was assigned to conduct an inspection of the Black Thunder Mine as a result of a written complaint filed pursuant to section 103(g) of the Act.

This complaint alleged that Thunder Basin had failed to post the temporary reinstatement order (Affidavit of Larry Keller, paragraph 3, Affidavit of Jerry W. Stanart, paragraph 2). The order had, in fact, not been posted and Beam issued Thunder Basin citation number 3589022, alleging a violation of section 109(a) of the Act.

After some discussion, the entire order was posted (Affidavit of William S. Mather, paragraph 2). Beam was asked how long the order had to be posted and replied, "long enough for me to see it up." The order remained on the company bulletin board for several days (Mather Affidavit, paragraph 3).

Issue Presented

Does Section 109(a) of Federal Mine Safety and Health Act require an operator to post on the company bulletin board an Order of Temporary Reinstatement?

Analysis and Conclusions

Section 109(a) provides:

> At each coal or other mine there shall be maintained an office with a conspicuous sign designating it as the office of such mine. There shall be a bulletin board at such office or located at a conspicuous place near an entrance of such mine, in such manner that orders, citations, notices and decisions required by law or regulation to be posted, may be posted thereon, and be easily visible to all persons desiring to read them, and be protected against damage by weather and against unauthorized removal. A copy of any order, citation, notice or decision required by this Act to be given to an operator shall be delivered to the office of the affected mine, and a copy shall be immediately posted on the bulletin board of such mine by the operator or his agent.

The Secretary contends that the language of the statute is clear on its face and that resort to rules of statutory construction is unnecessary. At first blush the language of the last sentence of section 109(a) appears determinative. When the statute refers to "decisions required by this Act to be given to an operator", the Secretary argues this can only refer to decisions of the Commission and its judges.

Nevertheless, I agree with Contestant, and conclude that section 109(a) is not clear on its face and that the last sentence must be read in the context of the rest of the section. Had Congress intended that all decisions, orders, citations and notices be posted, it would not have modified the second sentence

of section 109(a) with the phrase "required by law or regulation to be posted."

The Secretary, at page 4 of its brief in support of its motion for summary judgment, concedes that "it is not asserting that every document generated during the course of litigation must be posted, instead only those documents that evidence a final decision of the Court must be posted." Since any order issued by a Commission judge during the course of litigation, i.e. prehearing orders, notices of hearing, and discovery orders must be given to the operator, even the Secretary seems to realize that the last sentence of section 109(a) must be read in the context of something else.

The "something else" is the second to last sentence of section 109(a) which requires the operator to maintain a bulletin board for orders, citations, notices and decisions required by law or regulation to be posted. Thus, I conclude that what must be posted under the last sentence of section 109(a) are documents, that are required to be posted pursuant to another statutory provision or by a regulation, such as 30 C.F.R. § 40.4, requiring posting of an employee walkaround designation, or 30 C.F.R. § 44.9, requiring posting of petitions for modification of a standard.

I agree with Contestant that the fact that section 109(a) gives no indication as to how long a document must be posted is a further indication that it is not a free-standing requirement to post all the documents mentioned. In contrast to MSHA, the Occupational Safety and Health Administration (OSHA) has promulgated regulations requiring citations to be posted for 3 working days or until abatement is completed, whichever is later, 29 C.F.R. § 1903.16(b). OSHA also promulgated a regulation at 29 C.F.R. § 1903.2 requiring the perpetual display of a poster explaining employee rights and obligations. I conclude that Congress contemplated promulgation of similar regulations by MSHA pursuant to section 508 of the 1969 Mine Act, 30 U.S.C. § 957.

The Secretary's "interpretation" of section 109(a) is not entitled to deference.

It is well established that courts should defer to permissible agency interpretations of ambiguous legislation. Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 US 837, 843, 81 L Ed 2d 694, 104 S Ct 2778 (1984). Not all agency interpretations are entitled to the same weight. An interpretation that has gone through notice and comment rulemaking is entitled to greater deference than one which has not. An interpretative rule that appeared in the Federal Register is entitled to greater deference than an interpretation that appears only in agency internal documents.

Farther down the hierarchy of agency interpretations are those immaculately conceived in the course of litigation. Professors Kenneth Culp Davis and Richard J. Pierce, Jr., have expressed this idea as follows:

> Congress has not delegated to any agency the power to make policy decisions that bind courts and citizens through formats like letters, manuals, guidelines, and briefs. No court should allow an agency to bind citizens or courts by applying Chevron step two to agency policy decisions announced in formats Congress has not authorized for that purpose. Statements in such informal formats may not even represent the agency's choice of policies. Statements of agency lawyers in briefs and oral arguments are particularly unreliable evidence of an agency's policy, given the powerful incentive for lawyers to take any position that is likely to further their clients interests in a case and the uneven level of supervision of the work product of agency lawyers. I Davis, Kenneth Culp and Pierce, Richard J. Jr., Administrative Law Treatise, §3.5 at page 120 (3d ed. 1994).

Justice White, dissenting in National Railroad Passenger Corporation v. Boston & Maine Corp., 503 US ___, 112 S. Ct. 1394, 118 L. Ed 2d 52, 70, 72 (1992), observed that deferring to a federal agency's construction of the legislation it is charged with administering is one thing, but deferring to the post-hoc rationalization of a government lawyer is another matter entirely. The undersigned has the same reservations towards the interpretation of MSHA policy in this case.

There is no written MSHA policy or interpretation regarding the posting of Commission judge's decisions, including temporary reinstatement orders. The only evidence of such an interpretation or policy is the affidavit of supervisory coal mine inspector Larry Keller, which is attached to the Secretary's motion for summary decision. Mr. Keller states in paragraph 6 that he has always construed section 109(a) to require posting of judge's decisions. There is no indication from where his understanding arises and, indeed, no indication that Mr. Keller ever considered the issue before. Indeed, I suspect that Mr. Keller never thought much about this issue until confronted with the section 103(g) complaint in this case.

I also believe that it would be a mistake to ignore the context in which the instant case arose, before deferring to the Secretary's "interpretation" of section 109(a). This citation is but another episode in the continuing struggle between Thunder Basin and the United Mine Workers regarding the unionization of its mine, and between Thunder Basin and MSHA regarding contestant's refusal to recognize the designation of UMWA employees as miners' representatives under 30 C.F.R. Part 40, 15 FMSHRC 2290-2291. Given this context it is not surprising that,

upon receipt of the section 103(g) complaint in this case, MSHA would conclude that posting of the temporary reinstatement order was required by section 109(a).

I conclude that there is no agency "interpretation" to which deference must be paid. A subjective understanding of what the statute requires, which is not obvious and has never been communicated to the public, is not an agency interpretation entitled to deference under Chevron.

Even if Judges' decisions must be posted, there is no requirement under section 109(a) that a temporary reinstatement order be posted.

A temporary reinstatement order does not constitute a determination that a violation of the Act has occurred. It is merely a finding that the complaint of discrimination is not frivolous and enables the complainant to endure the litigation process without economic loss.

In this sense a temporary reinstatement order is much more in the nature of an interim order than a judge's decision. As the Secretary concedes that not every interim order of a judge during the course of litigation need be posted, I conclude that a temporary reinstatement order need not be posted even if section 109(a) requires the posting of final judge's decisions.

The Secretary argues that posting of temporary reinstatement orders is the means by which employees learn that they too can be protected if they chose to exercise their rights pursuant to the Mine Act (Keller affidavit, page 2, paragraph 2). This may be so but miners wouldn't have to rely on temporary reinstatement orders or judge's decisions if the MSHA exercised its authority under section 508 of the Act, 30 U.S.C. § 957, and promulgated regulations requiring the posting of appropriate notices regarding employee rights.

In this vein, I again note that the Occupational Safety and Health Administration has promulgated a regulation requiring employers to post a notice informing employees of their rights under the Act, including their right not to be discriminated against. 29 C.F.R. § 1903.2, BNA Occupational Safety and Health Reporter 27:1211.

Conclusion

For the reasons stated herein I grant Thunder Basin's motion for summary decision and vacate both citation number 3589022 and the penalty proposed for that alleged violation.

Arthur J. Amchan
Administrative Law Judge

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MAY 23 1994

KENNETH D. KELLAR, Complainant	:	DISCRIMINATION PROCEEDING
	:	Docket No. WEST 93-136-DM
v.	:	WE MD 92-31
	:	
OWL ROCK PRODUCTS, Respondent	:	Lytle Creek Mine

DECISION

Appearances: Kathryn A. Kellar, Lucerne Valley, California, pro se, for Complainant;

Patrick J. Brady, Esq., ALLEN, MATKINS, LECK, GAMBLE & MALLORY, Irvine, California, for Respondent.

Before: Judge Morris

STATEMENT OF THE CASE

This proceeding concerns a complaint of alleged discrimination filed with the Commission by Complainant against Respondent pursuant to Section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (the "Act").

Complainant Kenneth D. Kellar, age 41, was employed by Owl Rock Products, Inc. ("Owl Rock") on October 21, 1989, and terminated August 6, 1992. (Tr. 27, 28). In the course of his employment, he complained to supervisors and to the Department of Labor, Mine Safety and Health Administration ("MSHA") over safety and non-safety related issues. The evidence also deals with his job activities.

The Complainant filed his initial discrimination complaint with MSHA. After completion of its investigation, MSHA advised the Complainant that the information received during the investigation did not establish a violation of Section 105(c) of the Act. Thereafter, the Complainant filed a complaint with the Commission.

Owl Rock filed an answer denying any discrimination and asserting that it automatically terminated Complainant after two consecutive "D" job performance ratings.

A hearing on the merits commenced on September 14, 1993, in Victorville, California. Complainant did not file a post-trial brief; Owl Rock filed a brief.

Section 105(c)(1) of the Act provides, in 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 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 for employment has instituted or cause to be instituted any proceedings 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 of others of any statutory right afforded by this Act.

JURISDICTION

Owl Rock is a ready-mix sand and gravel plant operating in four counties in Southern California.

No issue is raised as to jurisdiction.

APPLICABLE CASE LAW

The general principles governing analysis of discrimination cases under the Mine Act are settled. 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 proof to establish that (1) he engaged in protected activity and (2) the adverse action complained of was motivated in any part by that activity. Secretary on behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2797-2800 (October 1980), rev'd on other grounds sub nom., Consolidated Coal Co. v. Marshall, 663 F.2d 1211 (3d Cir. 1981); Secretary on behalf of Robinette v. United Castle

Coal Co., 3 FMSHRC 803, 817-818 (April 1981). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no part motivated by protected activity. If the operator cannot rebut the prima facie case, it nevertheless may defend affirmatively by proving that it also was motivated by the miner's unprotected activity and would have taken the adverse action in any event for the unprotected activity alone. Pasula, supra; Robinette, supra; see also, Eastern Assoc. Coal Corp. v. FMSHRC, 813 F.2d 639, 642 (4th Cir. 1987); Donovan v. Stafford Construction Co., 732 F.2d 954, 958-959 (D.C. Cir. 1984) Boich v. FMSHRC, 719 F.2d 194, 195-196 (6th Cir. 1983) (specifically approving the Commission's Pasula-Robinette test). Cf. NLRB v. Transportation Management Corp., 462 U.S. 393, 397-403 (1983) (approving nearly identical test under National Labor Relations Act).

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); Sammons v. Mine Services Co., 6 FMSHRC 1391, 1398-1399 (June 1984). As the Eighth 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, 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 the protected activity; coincidence in time between the protected activity and the adverse action complained of; and disparate treatment of the complaining miner by the operator.

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

> As we emphasized in Pasula, and recently re-emphasized in Chacon, the operator must prove that it would have disciplined the miner anyway for the unprotected activity alone. Ordinarily, an operator can attempt to demonstrate this by showing, for example, past discipline consistent with that meted to the alleged discriminatee, the miner's unsatisfactory past work record, prior warning to the miner, or personnel rules or practices forbidding the conduct in question. Our function is not to pass on the wisdom or fairness of

> such asserted business justifications, but rather, only to determine whether they are credible and, if so, whether they would have motivated the particular operator as claimed.

IS COMPLAINANT'S CLAIM BARRED AS A MATTER OF LAW BASED UPON THE RULING OF THE APPEALS GRIEVANCE COMMITTEE?

As a threshold matter, Owl Rock asserts Complainant's case is barred as a matter of law.

Complainant appealed the August 1992 "D" evaluation which resulted in his termination, and the grievance committee upheld the evaluation by a 4-0 Decision. (Tr. 635, 636). Therefore, Owl Rock argues that, as set forth in the recent United States District Court decision of Delaney v. Continental Airlines, SACV 92-762 (June 1993), the ruling by the grievance committee operates to entirely bar Complainant's claim.

In the Delaney case, Continental Airlines maintained a grievance appeal procedure similar to Respondent's appeal procedure whereby a committee of individuals hears evidence from the aggrieved employee and company supervisors, and renders a decision which is "final and binding." In fact, it is argued that Owl Rock's appeal procedures are even fairer to employees than the procedures in Delaney, because Continental Airlines' committee was composed of only three executive level employees whereas Owl Rock's procedures provide for a more diverse and representative committee made up of two co-employees selected at random, two totally uninterested supervisors, and one human resources representative (who only acts as a tie-breaker if needed). (Tr. 626, 627).

After analyzing Continental Airlines' appeal process, and the strong presumption favoring upholding of such grievance committee rulings, the District Judge held that:

> The arbitration award is given the same legal effect as a judgment. Therefore, Delaney's present action must be dismissed in its entirety because none of the claims survives the arbitration award's issue preclusive effect." (Delaney Decision, p. 3).

Accordingly, Owl Rock asserts Complainant's claim should equally be barred because Complainant availed himself of Owl Rock's final, binding, and fair appeal procedures which upheld his second "D" evaluation.

I am unable to agree that Complainant is barred by the arbitration decision. Such a decision can be considered but it does not act as an absolute bar to a discrimination suit. Hollis

v. Consolidation Coal Co., 6 FMSHRC 21, 26-27 (January 1984); Casebolt v. Falcon Coal Co., 6 FMSHRC 485, 495 (February 1984).

The case at bar deals with the Federal Mine Safety Law. Delaney construes California law relating to arbitration.

Accordingly, Owl Rock's motion for a summary decision is **DENIED.**

SUMMARY OF EVIDENCE

At the time Mr. Kellar was hired, the company was engaged in a labor dispute with the Operating Engineers Union, and a large number of new employees were hired when the union went on strike. (Tr. 604).

Mr. Kellar lacked mining experience but for 19 years he had been a warehouse person and a steelworker. (Tr. 29, 264). He initially was assigned to Owl Rock's mine in Prado, California. After a week, he was transferred to the Owl Rock mine in Barstow, California. He worked there first as a repairman welder and later bid for a bulldozer operator position. (Tr. 28, 265). He bumped over to the company's Lytle Creek operation on January 6, 1992. (Tr. 295, 617).

Although there were no significant problems with Mr. Kellar's job performance after his employment began, he was at times a difficult employee who had trouble getting along with others. (Tr. 146, 199).

In 1990, Mr. Kellar was working on a guard on the head pulley on the wet side of the shaker. Mr. Kellar did as he was told by his supervisor Bob Kelley. (Tr. 30-32). However, he was unable to affect the repair. Bob Kelley said to leave the guard off and "he would look at it on his way home." (Tr. 32). Before the guard was replaced, MSHA cited Owl Rock. (Tr. 33).

Company representatives Dan Scorza, Dave Tompkins, and Bob Kelley (or Vince Bommarito) held a "mock" MSHA meeting. When Dave Tompkins got an answer he thought was a good one, he would say, "That's the kind of answer you need to put in there." (Tr. 33).

Mr. Scorza later testified that employee Ferman Romero didn't tell the MSHA Inspector the truth as to when the guards were removed. They sat down and explained it was not necessary to give false statements on Owl Rock's behalf. (Tr. 610).

Mr. Romero confirmed the company version of this incident. Mr. Romero testified he had "lied" to the MSHA Inspector. The meeting was held to tell the workers what to expect in the way

of questions. Mr. Romero agrees the company also told them to tell the truth to the Inspectors. (Tr. 514, 519, 520).

At the MSHA investigation, Mr. Kellar stated that, "Bob Kelley told me to leave the guard off."

Bob Kelley "got distant" after that and had no time for Mr. Kellar. (Tr. 34-35). He was too busy to give Mr. Kellar any help. Kelley was transferred to Victorville and was succeeded by Vince Bommarito who had no mechanical or repair experience. (Tr. 37).

There was hardly any time for safety precautions at Owl Rock. However, after the MSHA investigation, safety was no longer lax. (Tr. 40).

Dave Tompkins held Mr. Kellar directly responsible because the safety work wasn't being done. Mr. Kellar was the maintenance man. (Tr. 40, 48).

At Lytle Creek Mr. Kellar's duties included writing mechanical reports on Owl Rock equipment. (Exhibit C-2 consists of 137 such mechanical reports.) On the pink sheet for October 31, 1991, Mr. Kellar did not identify any mechanical defects but on the back of the report he wrote the following: "Bob Kelley says not to put so much on the reports cause Tommy [Craig] work [sic]) alone and this is only temp so I don't need to be filling these out." (Exhibit C-1 is page 76 of Exhibit C-2; Tr. 47-49).

On January 9, 1992, as to Equipment No. 8220, various mechanical defects were noted and on the back of the pink slip Mr. Kellar wrote: "Brian Sterling says that this can get me in the same kind of trouble like at Barstow." (Ex. C-2, p. 77; Tr. 53). This bothered Mr. Kellar because he had started complaining about the safety of the crane (Equipment No. 8220). (Tr. 53).

Concerning the writing on the pink slip, I credit Mr. Brian Sterling's contrary testimony. He testified he didn't know where the statement [attributed to him] came from. His testimony, which I find credible, basically denies any knowledge of what might have happened to Mr. Kellar at Barstow. Mr. Sterling testified as follows:

> At the time when Ken Kellar came to the plant, I went through what I normally went through with any other employee that came in. Everything was the same.
>
> At that time he seemed very concerned that he tell me and give me his side of the story of what problems he had in Barstow, and he wanted to make sure that I got his side of this story.

> The thing was I had never heard the story, and I wasn't interested in the story. I had no contact with any of the supervisory personnel at Barstow. I didn't even know who they were, I had never met any of them. I had never had any discussion about the Barstow plant; I was unfamiliar with it; I was unaware of where it even was.
>
> And so, I told him, "No, I don't care what your problems were. I don't need to hear your side of it because I haven't heard anything about it at all. I will take your performance here at this plant and my evaluation of you, and how you do here will be based strictly on what your performance is here. And what happened at Barstow is in the past. I'm not concerned with it. I don't want to know about it. Let's just go out there. You're starting with a clean slate here."
>
> You know, I'm not going to form my conclusion on each person that comes under my control by myself. I don't want all this feedback ahead of time to give me some coloration because it might be totally different.
>
> I have had people come to my plant that I found out later were considered to be very poor employees somewhere and have turned out to be outstanding employees for me. And I'm sure vice versa. People that maybe didn't work real well for me might have worked quite well for someone else.
>
> But I did tell Mr. Kellar I didn't want, I wasn't concerned with, I didn't want to hear about it. And that was the end of the discussion, and we went ahead and sent him out to get his familiarization with the plant, and we moved out from there. (Tr. 819-821).

The first time he heard about Mr. Kellar's problems (except through him) was when he had to give him his evaluation prepared by Barstow supervisors. Mr. Sterling had no real input into that evaluation. (Tr. 825).

All of the mechanical reports (pink sheets) were given to the MSHA Inspectors. (Tr. 50). In addition, during the MSHA investigation, Owl Rock's safety man and Dan Scorza (Human Resources Manager) said it was alright for Mr. Kellar to keep a copy of the reports. However, Mr. Kellar described his conversation with management as "argumentative." "MSHA said I could record it and keep the record in my possession." (Tr. 51, 53).

Rob Reid also told Mr. Kellar to quit filling out the mechanical forms. This was described by Mr. Kellar as "argumentative conversation" with management. (Tr. 52, 53).

Mr. Kellar also frequently complained about other safety and non-safety issues from almost the beginning of his employment. With respect to safety issues, he complained at the Barstow Mine to different levels of supervisors about a crane, inadequate

lighting, firearms, a head pulley, a deck, welding in water, hanging plates, of being overworked, of injuries, and other matters. (Tr. 110, 271, 274, 278-282).

Concerning the crane: the equipment had a dry cable and it would fall six to eight inches with a load. No effort had been made to grease it and a new cable was needed. (Tr. 110, 354, 355). The cable also had no load capacities and no stickers. (Tr. 355). Mr. Kellar told supervisors Kelley, Bommarito, and Tompkins about the crane. (Tr. 110, 355). The crane at Barstow was a constant safety issue. (Tr. 499, 754).[1] Mr. Kellar told MSHA the crane was unsafe and it was red-tagged when he complained about it in front of MSHA. (Tr. 111).

Concerning inadequate lighting: Mr. Kellar didn't know the dates but he complained continually about the lights in the pit after he went on the night shift. (Tr. 271). This was before the PVC and electrical disconnect incidents. (Tr.273). In response to the inadequate lighting complaint, the company hooked up a light bar and purchased drop lights.[2]

Concerning the firearms: Mr. Kellar confronted Supervisor Bob Kelley about company employees shooting firearms adjacent to company property. A bullet can ricochet and there were residences within one-quarter of mile. This occurred once or twice a week. (Tr. 91-94).

Witness De Forge testified that he, Bob Kelley, Dave Fortin, and Vince Bommarito, were shooting on property not owned by Owl Rock. The shooting was after working hours and before dark. (Tr. 147). This was not a sanctioned gun range; however, it was used by the local sheriff's department. (Tr. 148, 161).

Firearms are forbidden on company property but others who brought them on company property didn't discharge them during working hours. (Tr. 169, 400, 440). Exhibit C-13 was marked by Mr. Kellar to show the gun range. (Tr. 561).

Concerning the head pulley: Rob Reid asked Mr. Kellar to grease the head pulley on the radial arm stacker. Extension ladders were available as the head pulley was 32 feet above ground. (Tr. 849). Mr. Kellar refused the request by both

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[1] I find Mr. Kellar's uncontroverted testimony of complaints about the crane to be credible. The testimony is supported by fellow workers Faust and Romero. (Tr. 499, 537-538).

[2] I find the uncontroverted evidence by Mr. Kellar concerning the inadequate lighting to be credible.

Messrs. Reid and Sterling. Mr. Reid testified that he was not aware that Mr. Kellar had called MSHA. No one from MSHA ever talked to him about it. (Tr. 130, 132, 794, 795).

Mr. Reid felt that Mr. Kellar was a qualified maintenance mechanic. Greasing the head pulley should have been no problem. (Tr. 850).

Concerning the deck: The deck was a replacement which replaced an old Cedar Rapids with a new LJ and also replaced the old cantilevered deck made out of two-inch channel.

About the time of the first MSHA discrimination investigation or along about that time, Mr. Kellar raised a concern that the deck was not being fully welded.

Mr. Kelley had a subcontractor inspect it. He said it was adequately welded but Kelley told him to put a weld anyplace he could. (Tr. 721-722).

An employee, who the company believes to be Mr. Kellar, filed an OSHA complaint about the deck. An engineering study was done. The engineer said the deck was more than adequate and probably three times overbuilt. The engineer said it did not have to be 100 percent welded nor did the cross-ties. (Tr. 724). OSHA did not issue any citations. (Tr. 725).

Concerning welding under wet conditions: On one occasion, Mr. Kellar was working on a conveyor when the water was turned on in the plant. After being shocked, Mr. Kellar refused to work. (Tr. 127).

Mr. Kellar talked about the incident at safety meetings; everybody complained. Mr. Marlo replied that " A little shock won't hurt you." This is a common pun in the welding industry. (Tr. 461).

When Rob Reid testified, he denied directing Mr. Kellar to a specific location before turning on the water. When the water is turned on, there are areas where it can run down. (Tr. 797). According to Mr. Reid, there are times when a welder has to get wet. Mr. Reid would try to prioritize the job so it didn't have to be done in adverse weather conditions. (Tr. 798). If the welder is not using DC reverse polarity, it is not unsafe to weld in wet conditions. (Tr. 797; Ex. 4).

Hanging heavy screens (plates) and injuries: This incident occurred April 10, 1991, while four or five men were sheeting a building. The wind was blowing in 45-mile per hour gusts. Mr. Kellar's previous experience was that workers do not sheet in such wind. (Tr. 335, 364). Mr. Kellar confronted Foreman Todd

Craig who contacted Vince Bommarito. Mr. Bommarito stated they should either do the job or he'll get someone that will. Mr. Kellar took that to mean his job was on the line. (Tr. 364).

Mr. Bommarito testified and claimed the windy conditions were not a safety issue. If they could not get the job done, the company would hire a subcontractor to do the work. (Tr. 870).

[The evidence is uncontroverted that the workers all complained about the windy conditions whole hanging the plates. This was an activity protected under the Mine Act.]

A secondary issue involves whether Mr. Kellar was injured when he was struck by an 80-pound plate. Mr. Kellar claims that one of the plates struck him flat on the back. (Tr. 364).

However, Mr. Bommarito testified that Mr. Kellar told him he had "staged" the incident. He stated he had seen the plate moving about six times. He lined up so that if the plate flopped over it would hit him. (Tr. 871, 873).

Witnesses Romero and Craig stated they didn't see the plate strike him, but Mr. Kellar complained of being injured. If a worker reported an injury, it was held against him in his evaluation. (Tr. 243, 506, 507).

Supervisor Kelley also testified that Mr. Kellar stated he had "staged out" the incident of being struck by the plate. As a motive he told Kelley he wanted to "get to" Vince [Bommarito] and "worry him." (Tr. 717).

[I credit the unrebutted testimony of witnesses Bommarito and Kelley on this issue. Their unrebutted testimony is supported by the fact that Mr. Kellar declined to see a doctor.]

In the conversation that followed Vince Bommarito's redirection concerning the plates, Elbert Evans told Mr. Kellar they could either work now and grieve later, or call MSHA, or they could go home. Messrs. Byron and Evans went back to work on the screens. (Tr. 764).

Elbert Evans also testified concerning the plate incident. Based on his experience and in reviewing Exhibit T, he concluded that the accident to Mr. Kellar could not have happened as claimed. (Tr. 764-766).

The day following the alleged back injury, Mr. Kellar came in very angry and told Mr. Bommarito that he had endangered his life and he wanted to go home. However, he did not want to see a doctor. (Tr. 870, 871).

The next job performance evaluation for Mr. Kellar was in September 1991. At that time Mr. Kellar's score was a "30". In the safety category he dropped from an "8" to a "1". Under the safety category were noted the electrical disconnect, the PVC pipe (infra) as well as the injury to his finger and back. For the evaluations, definitions, rating criteria, and performance levels, see Tab E in Respondent's trial exhibits. (Tr. 664). Tab E includes evaluations of Mr. Kellar dated February 14, 1991; September 1991; February 13, 1992; June 11, 1992, and June 12, 1992; and August 5, 1992. The Owl Rock process also allows a self-evaluation by the employee involved. The self evaluation by Mr. Kellar--(a "C")--was dated August 12, 1992. (Tr. 664).

Mr. Kellar testified his second injury occurred when he was repairing a ten-inch hose. Pressure caused him to catch his finger between the hose and the barbed fitting. (Tr. 135, 365).

Complaints of overwork: Mr. Kellar complained to Rob Reid that there was too much work for the crew. (Tr. 41, 815, 816). Brian Sterling testified that when employees were overworked, they'd hire subcontractors, especially on project work. (Tr. 818).

Other incidents: On one occasion during a heavy rain, Mr. Kellar told the company he was going home. He was docked three hours but the other crew behind Mr. Kellar was not docked. (Tr. 132, 133). Mr. Kellar stated that not everyone is treated fairly. The continuation of the heavy rain or lack of it was not established. I am unable to conclude that this minimal evidence establishes discrimination.

Mr. Kellar complained to Vince [Bommarito] when he was told to drive a truck without a clutch. He ended up driving the truck that night. Karl Byron drove it for almost a week without a clutch. Mr. Kellar had already told the company that he didn't want to be a part of the team but he would be a good employee. (Tr. 108, 109).

Other incidents included the presence of rocks on the cat-walks. This condition, according to witness Barnes, was brought up at safety meetings. This was a protected activity but it adds little to the case. (Tr. 452).

Incidents involving burying oil and the use of safety glasses fail to add any dimension to the case. (Tr. 466, 467, 510, 551-553, 561-562).

Mr. Kellar also raised numerous complaints which were unrelated to safety and which he would escalate into disputes requiring excessive management time to resolve. Mr. Kellar's general approach was to be very combative and not accept any resolution until he had involved other supervisors and often the

corporate Human Resources manager. For example, these instances involve marking time cards, the cigarette incident, the crowbar fabrication, the flex-cose and belt clamp incidents.

Concerning marking time cards: Mr. Kellar refused to fill in the job code number in pencil on his time card in accordance with Owl Rock's standard procedure. (Tr. 713). He told the dispatcher it was illegal; however, internal billing procedures require a correct job number. (Tr. 714). The issue had nothing to do with safety. (Tr. 715).

Mr. Kellar was not satisfied with the explanation he received from his immediate supervisor concerning this procedure and he only acquiesced to the company's request after meetings with two highest management representatives in the district. This required approximately 10 hours of management time. (Tr. 713-715).

Concerning the "cigarette incident": This involved Messrs. Kellar and Bommarito and different versions of what occurred. According to Mr. Bommarito, once in a while Mr. Kellar would offer him a cigarette. Occasionally, Mr. Bommarito would ask for a cigarette. On one occasion, Mr. Kellar was doing some welding. His gloves were on and he had a stinger and a rod in one hand when Mr. Bommarito asked for a cigarette. Mr. Kellar started to put his gloves down and Mr. Bommarito said he would get them. He then took the pack out of Mr. Kellar's pocket. Mr. Kellar then put his gloves down, got his lighter out and lit the cigarette for Mr. Bommarito. The two men went on with their conversation. (Tr. 865, 866).

According to Mr. Bommarito, it was the next morning that Mr. Kellar accused him more or less of breaking into his house and getting involved in his personal property. (Tr. 866).

Mr. Kellar testified that he and Mr. Bommarito were not friends at all before this incident. (Tr. 360, 361). Mr. Kellar further stated that Mr. Bommarito asked for a cigarette and Mr. Kellar reached for them. At this point Mr. Bommarito grabbed the pack. This infuriated Mr. Kellar and he complained to Supervisor Bob Kelley. Mr. Kelley stated he was outside the chain of command. Mr. Kellar said he needed a mediator. Shortly after this incident the two men became friends and their attitudes

improved[3] at least until Mr. Kellar thought Mr. Bommarito lied at Mr. Kellar's grievance hearing. (T. 361, 362).

Concerning the "crowbar fabrication": Supervisor Bob Reid was in the office organizing the work for the evening's maintenance. (Tr. 785-786). Mr. Dan Anaya, shift leadman, approached and said Mr. Kellar was working the shop area and he should have been conducting his plant inspection duties. (Tr. 786-787).

Reid went to the shop area and Mr. Kellar said he was building a bar. Reid told him he should return to the plant and conduct his inspection duties. (Tr. 786-787). Reid thought that would be the end of it, but Mr. Kellar decided the leadman was out of line in questioning him. In short, no one should question what he was doing. (Tr. 788). There was a little more name calling on Mr. Kellar's part. Later that morning, the plant foreman arrived and Mr. Kellar complained about the way Reid dealt with the problem; it was unfair. (Tr. 788, 789).

Witness Barnes stated the crowbar involved a safety factor because if they don't have proper tools, they can't do the job safely.[4] (Tr. 479-480).

When Brian Sterling (plant foreman) came to the plant, Mr. Kellar said people had accused him of wasting time because he was preparing a tool to be used elsewhere on the shift. (Tr. 830). Brian Sterling said he would check it out. It was decided they would tell Mr. Kellar that management had made a mistake. The matter took an additional hour and a half because Mr. Kellar kept returning and inquiring why no one had faith in him and would this incident affect his evaluation. (Tr. 830, 831). Mr. Sterling tried to calm him down but Mr. Kellar would not "let go." (Tr. 833).

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[3] While this was not a protected activity, I credit Mr. Bommarito's version. It is uncontroverted that Mr. Kellar lit Mr. Bommarito's cigarette and the men engaged in conversation. These actions indicate Mr. Kellar was not infuriated as he claimed. In addition, he did not complain until the following day.

[4] I am not persuaded by Mr. Barnes's testimony. He made the above statement immediately after stating that Mr. Kellar made the crowbar because it would make the job "easier." Mr. Barnes also stated that he didn't think it was a safety issue. (Tr. 478). I credit the testimony of John Reid, maintenance leadman at the Lytle Creek plant during Mr. Kellar's employment. Mr. Reid would be more knowledgeable concerning this issue and he stated the crowbar fabrication had nothing to do with safety. (Tr. 791).

Rob Reid apologized in front of Mr. Kellar for any part he had in the confusion. In Reid's opinion, Mr. Kellar should not have been fabricating the crowbar. (Tr. 789, 790). Mr. Kellar claimed he was making a bar for a job they were about to do. (Tr. 790).

Concerning the use of flex-cose: John R. Reid was the maintenance leadman, night shift, at Lytle Creek. He had conflicts with Mr. Kellar over his attitude. There was always an argument over how a job would be performed.

In one case, Mr. Reid observed a rip in the splice and he directed Mr. Kellar to use flex-cose to fix the rip. [A flex-cose is a mechanical clamping device used to clamp conveyor belts together. (Tr. 815)]. About 45 minutes later he observed Mr. Kellar cutting out a patch of belting and he stated he was going to put the patch in. Mr. Reid said, "I don't think so." Mr. Kellar stormed off and ultimately he put the flex-cose in.

Concerning building belt-clamps: On another occasion Mr. Kellar was building belt clamps in the shop area. When Mr. Reid pointed out that clamps were available, he said he didn't want to spend the time looking for them. Mr. Reid walked over to the shop area and found the clamps himself. Mr. Kellar finished the job, bothered that Mr. Reid had questioned his motives. (Tr. 782-783).

Concerning light fixtures: On another occasion, Reid observed Mr. Kellar putting together a light fixture. Reid suggested that Mr. Kellar look around for a light instead of constructing one. Mr. Kellar said he didn't want to spend the time doing that. Reid found a light and gave it to Mr. Kellar. (Tr. 783, 784). Mr. Kellar was upset because Reid questioned his motive. Reid explained that if a light is available, why not use it. (Tr. 785).

RUNNING OVER PVC PIPE AND ELECTRICAL DISCONNECT

On July 27, 1991, Mr. Kellar, driving a 966 skip loader, was digging an eight-foot trench. While driving back and forth, he clipped and broke some PVC pipe. (Tr. 74-76).

Mr. Kellar advised his supervisor (Vince Bommarito) who stated they would bury the trench that night. Mr. Kellar bermed the road and continued working. (Tr. 75). Owl Rock had not furnished Mr. Kellar with a spotter. (Tr. 76). Mr. Bommarito declined to call underground services. (See Ex. C-23, California **"Call Before You Dig"** pamphlet).

On August 1, 1991, Mr. Kellar was written up when he received an "Employee Warning Report" from his supervisor Mr. Vince Bommarito. The report involved stated as follows:

> Violation of Company Rule E-22 - Careless or unsatisfactory performance of job duty - ran over electrical connector while operating skip loader. This incident warrants a one-day suspension. Another incident of this nature will result in further disciplinary action including suspension and/or discharge. [Ex. 4(a)].

Mr. Kellar opposed the warning report by filing an employee complaint resolution form. It stated in part as follows:

> Company replaced a permanent line with a temp. cable approx. 2 months ago, this left the line exposed to traffic, personnel, etc.. During the process of backfilling (per supervisor) the pipeline, the cable was pulled apart, or snapped, by the pressure of the skip loader. [Ex. C-4(b)].

The immediate supervisor's (Vince Bommarito) response in writing was as follows:

> The cord is 1.24 inch 4-4 S.O. Cord 600 v. with a Crouse-Hinds disconnect which is approved by N.E.C. as a 90-temp cord. The cord was installed on July 17, 1991. All employees were informed the cord was there and the reason for the Crouse-Hinds disconnect was to avoid drive-over traffic. The procedure was to shut down the pump, disconnect the Crouse-Hinds and move it out of the way of traffic. Ken got out of the loader twice to move the cord out of his way without disconnecting the cord. Ken ran over it to the point of breaking the Crouse-Hinds disconnect. [Ex. C-4(b)].

Bob Kelley, the immediate supervisor of Vince Bommarito, stated in writing as follows:

> I (Kelley) issued the warning report based on Ken's admission that he was aware that the connection was in danger of being run over but made no attempt to prevent doing so. This - just a few days after running over some new P.V.C.

Owl Rock's Human Resource Manager Mr. Scorza's written response stated:

> Ken indicated he did not know the electrical line's location and did in fact attempt to control his vehicle to prevent damage but got too close. Ken's concern was in the wording which indicated he was informed of the procedure. Ken was not informed of the procedure and assumed incorrectly what should have been done, leaving the line connected and then--but not waiting until the plant--be shut down, then again by rolling over the line

Witness Bommarito confirmed that Mr. Kellar knew the electrical disconnect was in the way of the skip loader. Bommarito also believed the one-day suspension was proper. (Tr. 861).

OWL ROCK'S JOB PERFORMANCE EVALUATION SYSTEM

Witness Daniel P. Scorza, Human Resources manager for Owl Rock, testified concerning the company's performance evaluation system. He explained that the system applicable to the hourly employees rates the employees in categories of A, B, C, and D. "A" is exceptional; "B" is good; "C" is standard; and "D" is below standard.

An evaluation is made every six months. The Owl Rock policy is to cover six months in all categories except safety which covers the previous 12 months. (Tr. 680). The five categories are:

VERSATILITY AND JOB SKILLS
ATTITUDE
ATTENDANCE AND DISCIPLINE
SAFETY
JOB PERFORMANCE

About 50 percent of the employees are in the category A and B; the remaining (less D ratings) are in Category C.

FRIENDLY WARNINGS

On November 7, 1991, Mr. Kellar received a "friendly" warning[5] from Supervisor Elbert Evans for erratic behavior in operating a bulldozer. (Ex. C).

Mr. Kellar also received a separate "friendly" warning from Bob Burmeister on December 10, 1991, for refusing to use a pencil to write the job code on his time card. (Ex. C; Tr. 615).

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[5] A "friendly warning" is an option on the employee counseling form. The available "action taken" can be:

FRIENDLY WARNING
WRITTEN WARNING
SUSPENSION
DISCHARGE
COMMENDATION

Exhibit C.

The same date, December 10, 1991, he received a friendly warning from supervisor Kelley for pushing oversized rocks through the plant after they had been ejected by the No. 5 belt. (Ex. C; Tr. 615).

If these supervisors had given Mr. Kellar formal (instead of friendly) warnings, he would have been terminated under the company's disciplinary program. (Tr. 615).

PARTICULAR JOB PERFORMANCE RATINGS

(See Exhibit C for employee warning reports and friendly warnings; see Exhibit E for evaluations, criteria, performance levels, definitions, and Job Performance).

Mr. Kellar's initial job performance evaluation was in February 1991 when he scored a 42, a "B" rating. (Ex. E).

In September 1991, Mr. Kellar received a "C" evaluation. He appealed this evaluation under the appeals grievance process available to Owl Rock employees for resolving disputes regarding such an evaluation. (Tr. 626, 627; Ex. E).

In accordance with the evaluation program, the grievance committee was composed of two of Mr. Kellar's hourly co-workers selected at random, two supervisors who had no prior working experience with the employee, and one Human Resources representative to act as a tie breaker if needed. (Tr. 626-628; Ex. A; Ex. O).

Mr. Kellar and supervisors Vince Bommarito and Todd Craig, who prepared the "C" evaluation attended the hearing to present evidence.

During the hearing, Mr. Kellar became very angry and walked out before the hearing was completed. (Tr. 318, 319, 628). The grievance committee ruled in a unanimous 4-0 decision to uphold the "C" rating. The Human Resources representative abstained. (Tr. 635).

About February 13, 1992, Mr. Kellar was given a "D" performance evaluation. (Ex. E, 2-13-92 review). The valuation covered the period of August 1, 1991, to January 31, 1992. It was based solely on input from his supervisors at Barstow concerning his performance at that mine. (Tr. 868).

At the new mine and with new supervisors, Mr. Kellar continued to engage in disputes with his supervisors about non-safety issues.

At Lytle Creek, Mr. Kellar also received two warnings as a result of failing to follow proper time card procedures. (Tr. 834-836). Other employees at Lytle Creek received similar warnings but Mr. Kellar called Mr. Scorza to complain about the warnings, requiring 45 minutes of his time. (Tr. 617, 618, 834, 836). Brian Sterling, the Lytle Creek foreman, gave himself a one-day suspension for failing to clock out properly. (Tr. 835-836).

In June 1992 Mr. Kellar received an informal review from Mr. Scorza and two supervisors from Lytle Creek. The two supervisors were Brian Sterling and Marlo Ommen, the assistant operations manager. (Ex. E, 6-12-92 review; Tr. 621). In light of Owl Rock's policy of immediate termination after two consecutive "D" performance evaluations, the operator's purpose in giving Mr. Kellar this review was to discuss how his current performance could improve from a "D" to a "C" and thereby avoid being terminated. (Tr. 621). Although Mr. Kellar's supervisors offered him numerous suggestions during this meeting for improving his performance to a "C" rating, Mr. Kellar's attitude remained argumentative and combative. He told his supervisors he would not be a team player and he had no loyalty to the company. (Tr. 320, 623, 842, 843).

Some of Mr. Kellar's other statements confirming his confrontational approach to supervisors were:

> I will not ask any more questions at these meetings because of your response, and if you continue to talk to me this way, I'll deal with you myself.
>
> * * *
>
> Give me the job performance area because I am not going to change in the attitude area. This is me, and I'll only give in the area I want to.
>
> * * *
>
> You cut me off and that aggravates me, and this is not the way to deal with a person that has an attitude problem. (Ex. N; Tr. 622).

Mr. Kellar was given a "D" rating in his next performance evaluation on August 5, 1992. (Ex. E, 8-5-92 review). This evaluation was prepared by Brian Sterling with input from John Reid, the shift leadman, and Mr. Ommen. Mr. Sterling also consulted Mr. Scorza to discuss the review. (Tr. 844, 847).

Mr. Kellar filed an appeal to his second "D" valuation. (Tr. 632). The grievance committee for this appeal was completely different from the prior review committee that considered his "C" evaluation in Barstow. (Tr. 632, 633, 634). Messrs. Kellar and Sterling presented their evidence and the committee unanimously voted 4-0 to uphold the "D" evaluation with the Human Resources representative abstaining. (Tr. 634-636). Based on the second "D" evaluation, Mr. Kellar was terminated.

Exhibit M shows various factors were involved in Mr. Kellar's evaluation. The following chart combines various facets of the evidence.

	Date	Period	Event	Evaluation	Score	Exhibit
MSHA Investigation	10-21-89 6-19-90		K. Kellar hired			
Evaluation	2-14-91	8-01-90 to 1-31-91		Barstow	42 (B)	E
Warnings	7-27-91 7-31-91	One-day suspension	PCV pipe disconnect			C
Evaluation	9-X-91	2-01-92 to 7-31-91		Evaluation	30 (C)	E
Three friendly warnings	11-91 and 12-91		Time cards, Buried #5 belt, Oversized rock returned to system			C
Evaluation	2-13-92	8-01-91 to 1-31-92		D	23 (D)	E
Informal evaluation	6-92	Four-month review				
Warning	7-92	One-day suspension	Failure to punch in	D	23 (D)	C

See detailed analysis of evaluations, infra.

DISCUSSION AND FURTHER FINDINGS

Mr. Kellar made various complaints to MSHA concerning safety. These activities and other safety related complaints were protected under the Act. Mr. Kellar has established a prima facie case of discrimination under the Act. The issue thus presented is whether the adverse action complained of was motivated in any part by his protected activities. In other words, would Owl Rock have taken adverse action in any event for Mr. Kellar's unprotected activity alone.

Mr. Kellar's unprotected activities included his argumentative and antagonistic attitude towards Owl Rock's management. His attitude is reflected in the matter of the time cards, the cigarette incident, the crowbar fabrication, use of flex-cose, building belt clamps and light fixtures, and running over the PVC pipe and electrical disconnect.

Brian Sterling was the Owl Rock plant foreman while Mr. Kellar was at Lytle Creek. When Mr. Kellar came to Lytle Creek, Mr. Sterling instructed him in the safety ramifications, work rules, locking out, etc.

As the plant foreman, Mr. Sterling would be in the best position to know Mr. Kellar's attitudes. He testified at length stating:

> Ken Kellar was a difficult employee in that he was very rebellious. He was very antagonistic against management. He came to Lytle Creek with an apparent attitude that he was going to be discriminated against, not treated fairly, that I wouldn't give him a fair shake or be straight up with him.
>
> And one of the problems we had right off the bat, was he constantly questioned management and supervisory personnel. It didn't matter what it was. If we gave him a job, he would have to question it. He would have to say, "Well, it should be done this way; it should be done that way."
>
> In a lot of situations due to the time frame that we had to get work done. We would have to patch something, we wouldn't have time to take the whole plant apart and put it together right. We are building a bridge. We are putting a piece of metal back in where we are just going to wear it right back out by beating rock against it. And, we would want him to just cut a piece of metal put [it] up there, stab it in, burn it in, and leave it there. "Don't worry about it."
>
> But he would insist that it was necessary and the correct way would be to cut that out, trim it up, polish it up, cut a new piece of steel. It's steel that's laid on the ground; it's all rusty. He wants

to polish it up, he wants to put it in there, he wants 100 percent penetration weld to get through there, and it was a constant ongoing battle to get him to do this.

One time--and we had this discussion several times--about whether to patch or whether to fix. One time I had a bunch of work to do, and they were staying over to get some of it done; and I came out there, and he was supposed to be preparing some patches to be put on and all he should have had to do was go over there and cut it.

Ken Kellar represented himself as being an expert welder, an expert fabricator; this was his background, this was his trade. Yet, he comes in there, and I said, "I just want a patch on there."

I came back a little while later, and he is over there, and he's got his patches cut, and he is grinding the corners, and he is polishing the metal.

I got a little impatient, and I told him, "Hey, look. Don't bother with that. Just take it over there and put it on."

His comment to me at that time was that wasn't the right way to do it. He didn't want to do it that way. He didn't think we were doing things correctly, and that he was afraid that he would forget how to do his trade correctly if he continued to it the way we were doing it; that we would detrain him to a point where he would have to worry about whether he could go back to his old job and still be able to do the job correctly.

And that was his statement to me: that he didn't want to do a quick patch job because he wouldn't be able to--he could lose his ability to correct welding. And this to me seemed like an unrealistic attitude, but we had that problem.

Q. Let me stop you for a minute. Does the issue whether metal is polished or a weld is polished have anything to do with safety?

A. Not unless you're talking about structural welds, not unless you're building a bridge or putting up a catwalk or something like that.

If you're just patching up a bunker, or you are just patching a chute that you're going to run rock down, water, sand, and gravel down, then there is no safety involved here. All you are trying to do is keep it from leaking and keep the gravel inside the chute.

(Tr. 826-829).

Mr. Kellar himself confirmed Mr. Sterling's views when he testified without equivocation at trial that as far as he was

concerned, the two write-ups (involving the operation of the skip loader) was "the point of no return" and "my attitude turned negative towards the company on July 31, 1991." (Tr. 286).

The Judge is aware that witnesses Bazzelle, Barnes, and Romero described Mr. Kellar as a "good and safe worker," "good employee," and "not a difficult employee." (Tr. 442, 443, 463, 500). However, it is apparent from the credible record that Mr. Kellar's negative attitude confirmed by Mr. Kellar himself, was towards his immediate supervisors.

Numerous actions by Owl Rock demonstrate the operator lacked retaliatory intent as a result of the MSHA investigation or safety complaints thereafter. These actions included giving Mr. Kellar a "B" (good) performance evaluation in February 1991 and a "C" (standard) performance evaluation in July 1991. In addition, the company by Supervisor Kelley granted Mr. Kellar's request to change positions from a welder repairman to a bulldozer operator. Further, Mr. Kellar was given "friendly" warnings in late 1991 carrying no disciplinary consequences. Formal written warnings could have resulted in Mr. Kellar's termination.

Finally, Mr. Kellar's performance at Barstow involved a separate group of supervisors and co-employees from the second "D" at Lytle Creek in August 1992.

EMPLOYEE EVALUATION PROCESS

Was it merely a transparency for Disparate Treatment?

Mr. Kellar seeks to persuade the Commission that the evaluation process is merely a show to disguise discriminatory intent.

Witness Raymond Barnes testified that "this evaluation system was set up to eliminate blacks, minorities, and other undesirables on the job." (Tr. 482).

Mr. Barnes bases his view of disparate treatment on an occasion when Owl Rock hired a maintenance trainee. At the time, Mr. Barnes, a repairman, went on vacation. The trainee scored higher than Mr. Barnes did. However, Owl Rock brought in three men to replace him. In short, Mr. Barnes was not promoted to journeyman mechanic and he felt the evaluation system was penalizing him because he couldn't perform certain types of duties. (Tr. 482, 484).[6]

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[6] Mr. Barnes simply fails to offer a credible testimony to support his broad allegations.

On one occasion, Mr. Reid said Mr. Barnes had a negative influence on Mr. Kellar. Mr. Barnes got upset because there were no other blacks on the job and he felt they were discriminating against him. (Tr. 453, 454).

Witness Ferman Romero testified[7] that whether someone was written up depends on the person involved. He (Romero) would probably be written up but Bill DeForge[8] (front-end loader operator) would not. (Tr. 512).

Witness Faust also described the appeal process as a "joke." (Tr. 549). It would have been fairer if he had been able to ask questions. (Tr. 550). You couldn't bring in witness statements and Bob Kelley was asked not to be at the hearing. (Tr. 551).

Contrary to Complainant's position, I credit Owl Rock's evidence which shows numerous other employees routinely received warnings or were disciplined for careless or erratic operation of equipment, safety violations, time card, attendance, or performance problems. (Tr. 195, 312, 511, 665, 666, 711, 732, 745). With respect to the time card warnings, discussed supra, Mr. Sterling estimated that out of 436 employees at that facility, 40 received warnings for failure to follow time card procedures. (Tr. 834, 836). (See also Exhibit F for analysis of 1990 and 1991 Disciplinary Actions. It shows that in 1991 the company issued 233 warning notices and 108 suspensions; there were 15 discharges.)

Further, supervisors and co-workers testified they frequently raised safety issues to management and they did not receive any discriminatory treatment for doing so. In addition, Owl Rock encouraged its employees to raise safety issues. (Tr. 757, 758, 853, 856).

Elbert Evans testified that even though he complained to MSHA with Owl Rock's full knowledge, he was never discriminated against or subjected to any discipline for having done so. (Tr. 758).

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[7] I do not find Mr. Romero's testimony to be credible. If there is a degree of discretion involved as to a write-up, the record fails to establish how the person involved affects such a write-up.

[8] William De Forge testified but neither party explored this issue with him. (Tr. 144-167). However, Mr. De Forge testified Mr. Kellar's attitude towards the company was "very negative. He always had something bad to say about them." (Tr. 163).

Many employees, including some of Mr. Kellar's supervisors, raised some of the same safety concerns as Mr. Kellar. (Tr. 718, 720, 721). Mr. Evans testified he gave Mr. Kellar a pamphlet with MSHA's phone number so he could call MSHA with his safety concerns. (Tr. 757). Even though Mr. Evans complained about safety he was described as the type of employee Owl Rock liked. (Tr. 103, 104, 315).

Mr. Kellar admitted there was an emphasis on safety as time went by after the union strike at Barstow. Further, management was encouraging employees to report safety violations and other employees also received written warning and a suspension for safety-related violations. [For example, Ferman Romero was written up for not putting the lock on an electrical box. (Tr. 311, 312)].

A lack of disparate treatment is also shown by the uncontroverted evidence that Mr. Kellar was one of five employees with a "DD" in 1992. (Tr. 693). In 1990 Owl Rock discharged 13 employees; in 1991, 15 were discharged. (Tr. 690-694).

The evaluations of Mr. Kellar's job performance are critical to a resolution of this case. (Exhibit M is a written chronology of a portion of the evidence.)

HISTORY OF COMPLAINANT'S JOB EVALUATIONS

As previously noted, Mr. Kellar's first evaluation from Vince Bommarito in February 1991 covered the period from August 1, 1990, to January 31, 1991. He received a "B" (Good) rating with a total score of 42. A maximum rating is a score of 50.

In July 1991 he received two warnings and a one-day suspension for the skip loader incident. His next evaluation from Vince Bommarito was in September 1991 for the period from February 1, 1991, to July 31, 1991. His "versatility and job skills" dropped one point from 8 to 7. His "attitude" dropped from an 8 to 7. "Attendance and discipline" dropped from a 10 to an 8. "Safety" dropped from an 8 to 1. The form reflects the safety items involved the electrical disconnect, the PCV pipe, and a finger and back injury. A total score of 30, a "C" was recorded.

It is apparent the incidents involving the electrical disconnect and the PVC pipe had the most severe effect on Mr. Kellar's subsequent evaluations. However, the record fails to reveal any discriminatory intent by Owl Rock for activities protected by the Mine Act.

Mr. Bommarito testified the 1991 evaluation for safety was a "1." This was due to a lost-time injury and two warnings in July. (Tr. 866-867).

In November and December 1991 Mr. Kellar received three friendly warnings. In January 1992, Mr. Kellar exercised bumping rights and moved to Lytle Creek. His next evaluation from Vince Bommarito and Elbert Evans was in February 1992 for the period of August 1, 1991, to January 31, 1992. In this evaluation, his "versatility and job skills" remained at a 7. His attitude dropped from a 7 to a 3. The category of "Attendance and Discipline" dropped from an 8 to a 7. The category of "Safety" remained a 1 and "Job Performance" went from 7 to 5. His total score was 23, a "D."

In March 1992, Mr. Kellar received a warning for failing to punch out at the end of a shift.

In June 1992 Brian Sterling gave Mr. Kellar a four-month informal review. "Versatility and Job Skills" remained at a 7. "Attitude" [9] increased to a 4 from a 3. "Attendance and Discipline" decreased from a 7 to a 5. "Safety" increased from a 1 to a 4. "Job Performance" remained a 5. Using the same criteria, the score was 25 for the four-month review.

In July 1992 Mr. Kellar received a warning and a one-day suspension.

His next evaluation was in August 1992 for the period from February 1, 1992, to July 31, 1992. The evaluation by Mr. Omman remained the same as the informal evaluation of June 1992. It was a "D" evaluation scoring 25 points.

In finding Owl Rock's performance evaluation to be credible, I note that each of the five performance categories contains specific criteria to be followed when rating an employee. The valuation further contains definitions of performance. A careful review of the evaluation as to Mr. Kellar fails to show any intent by Owl Rock to discriminate against him in violation of the Mine Act. (See Exs. E and M).

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[9] Exhibit M shows a score of 23 points, but I credit the individual evaluations for August 1992 as the individual categories add up to 25 points.

The following format indicates the performance evaluations for Mr. Kellar:

	2-14-91	3-X-91	2-13-92	6-11-92	6-12-92	8-5-92	*Self 8-12-92
Versatility & Job Skills	8	7	7	7	7	6	8
Attitude	8	7	3	4	4	3	7
Attendance & Discipline	10	8	7	5	5	5	5
Safety	8	1	1	4	4	4	7
Job Performance	8	7	5	5	5	5	6
Total	42	30	23	25	25	23	33

* Mr. Kellar's self-serving evaluation is not persuasive since attitude, safety, and job performance are excessively high.

HOSTILITY

The record fails to establish hostility on the part of Owl Rock in relation to Mr. Kellar's protected activities.

The evidence also establishes legitimate reasons for Mr. Kellar to receive the written and friendly warnings as well as the "C" and two "D" evaluations.

Mr. Kellar received a "C" in September 1991, based mainly on problems with the PVC pipe and electrical connector on July 1991, as well as attendance and Mr. Kellar's performance in his new job as a bulldozer operator. [Ex. E (9-91 review); Tr. 867].

Mr. Kellar's evaluation in February 1992 dropped from a "C" to a "D" because of continuing problems with his attendance and job performance, and problems with his attitude. [Tr. 748, 868; Ex. E (2-13-92 review)]. Mr. Kellar's supervisor Vince Bommarito, who prepared both the "C" and "D" evaluations, testified that after Mr. Kellar was given the written warnings for the PVC pipe and electrical connector accidents in July 1991 he became very argumentative and negative and was unable to concentrate on his job tasks. (Tr. 868).

Similarly, the written warnings for running over the PVC pipe and the electrical connector were justified. Even though Mr. Kellar was fully aware of the location of both the PVC pipe and the electrical connector, he carelessly operated his skip loader and ran over them. (Tr. 243, 245). Mr. Kellar admitted to Robert Kelley, Elbert Evans, and Vince Bommarito that he had

made a mistake; he felt "so stupid"; he had been in a hurry; he was wrong; and he knew he was going to be written up. (Tr. 709, 743, 861).

Brian Sterling also testified at length why Mr. Kellar received his second "D" evaluation in August 1992. Mr. Sterling's evaluation was based in part on Mr. Kellar's poor work attitude. (Ex. E (8-5-92 review); Tr. 844, 847). In addition, the appropriateness and fairness of the evaluations and warnings are evidenced by the fact that independent appeals committees upheld his "C" and second "D" evaluations as well as the grievance regarding the warning for the electrical disconnect. (Tr. 624, 625, 635, 636).

In sum, Mr. Kellar was at times a difficult, hostile, and combative employee, who constantly debated and challenged his supervisors' directions, who told his supervisors that he did not want to be a team player, and that he had no loyalty and who experienced job performance problems for things such as the careless operation of equipment, attendance and failure to follow time card procedures. (Tr. 285, 286, 618, 703, 704, 780, 785, 826, 829, 842, 844).

Even though Owl Rock attempted to assist Mr. Kellar to improve his performance, as evidenced by the personal meetings and informal reviews, Mr. Kellar did not make the effort to try to improve his performance. (Tr. 842, 844).

Contrary to any "hostility," Owl Rock encouraged employees to raise safety issues and investigated and took corrective action when employees (including Mr. Kellar) did so. (Tr. 718-720, 751, 753).

The MSHA investigation occurred in June 1990. The record here fails to show any coincidence in time, particularly when Mr. Kellar received a "B" evaluation in February 1991.

In sum, Mr. Kellar has not proven that Owl Rock discriminated against him.

CLOSING ARGUMENT

Mr. Kellar, through his representative, Ms. Kellar, argues the Owl Rock appeals process is biased because they don't give you any witnesses or rights to bring into the hearing, but the the company can bring in supervisors and management personnel.

Further, the company can carry over a safety incident up to one-year or two evaluations. Mr. Kellar argues that such a carryover would leave Mr. Kellar with only 33 days to bring up his score. (Tr. 881-884).

These two issues relate to the employment contract between Owl Rock and its employees. It is the Judge's function to determine whether Owl Rock discriminated against Mr. Kellar in violation of the Federal Mine Law. I find no such discrimination on this record. Whether the employment contract is fair or unfair is a matter to be resolved by the parties.

Whether an employee can bring witnesses and present evidence at a company hearing was only minimally developed in the evidence. (Faust, Tr. 549-551). However, the failure to furnish such an opportunity, depending on the evidence, could tarnish the results of the hearing.

However, on the record of this case and assuming that the operator's actions were motivated in part by Mr. Kellar's protected activities, the operator established by a clear preponderance of the evidence that it was also motivated by business reasons (its employee job performance requirements) and Mr. Kellar's unprotected activities, and on that basis the operator would have taken the adverse action of termination in any event.

Accordingly, I enter the following:

ORDER

For the reasons stated herein, this proceeding is **DISMISSED.**

John J. Morris
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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MAY 23 1994

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS Docket No. CENT 92-329 A.C. No. 29-00097-03540 Docket No. CENT 93-272 A.C. No. 29-00097-03545
v.	:	
	:	Navajo Mine
BHP MINERALS INTERNATIONAL, Respondent	:	

DECISION

Appearances: Nancy B. Carpentier, Esq., Office of the Solicitor, U. S. Department of Labor, Dallas, Texas, for Petitioner;
K. T. Johnson, Jr., Esq., BHP Minerals International, Inc., San Francisco, California, for Respondent.

Before: Judge Amchan

Overview

These cases involve 6 citations issued as the result of 2 inspections at Respondent's Navajo surface coal mine in northwestern New Mexico. The first inspection occurred in the spring of 1992 and the second in the spring of 1993.

Five of the citations allege violations of electrical safety standards. Three allege violations of 30 C.F.R. § 77.516 for insufficient clearance in front of a circuit breaker box. One alleges an improper setting on a circuit breaker and another alleges a failure to examine a breaker box inside of a contractor's trailer. The 1 non-electrical citation alleges improper storage of an 11-foot high, 4 1/2 foot wide tire.

For the reasons stated below, I vacate all the citations at issue except for the one alleging a violation with regard to Respondent's failure to perform an electrical inspection in its

contractor's trailer. I affirm a non-significant and substantial violation in this instance and assess a $50 civil penalty.

The tire storage violation

On June 1, 1993, MSHA Inspector Larry Ramey observed a 11 foot high, 4 1/2 foot wide tire, which weighed 4 tons, stored in a vertical position in the front of the tire shop at the Navajo mine (Tr. 13-15, 29-30). The tire was not restrained in any way, except possibly for a chock on one side (Tr. 21-22, 34-35, 49-51).[1]

Ramey issued Respondent citation number 4061294 for this condition, alleging a violation of 30 C.F.R. § 77.208(a). That standard provides that, "Materials shall be stored and stacked in a manner which minimizes stumbling or fall-of-material hazards." The citation was characterized as non-significant and substantial because although the tire was standing next to an exit door at the front of the building, employees generally used the back entrance (Tr. 15-17).

The cited standard does not state that tires may not be stored vertically; its requirements are of a very general nature. Therefore, the test as to whether Respondent violated the standard is whether a reasonably prudent person, familiar with the mining industry and the protective purposes of the standard, would have recognized that vertical storage of this tire violated the regulation, Ideal Cement Company, 12 FMSHRC 2409 (November 1990), Alabama By-Products Company, 4 FMSHRC 2128, 2129 (December 1982).

I conclude that the Secretary has not met his burden of proving a violation of this standard. Jack Vaughn II, the supervisor of Respondent's tire shop, testified without contradiction that wide-based tires are generally stored upright to keep the beads (the inside edge of the tire) from coming together (Tr. 29-32, 43-44). Mr. Vaughn worked for B. F. Goodrich and for Goodyear Tire Company (Tr. 28-29). He testified that all the companies he worked for stored wide-based tires upright, without the use of tireracks (Tr. 46). He has never seen such a tire fall (Tr. 47)

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[1]I have not resolved the conflicting testimony regarding the presence or the absence of the chock because Mr. Ramey would have issued the citation even if the tire was chocked. The essence of the citation is the vertical storage of the tire without a means to prevent it from falling (Tr. 44-46, 51). Moreover, the record indicates that there was little, if any chance, that the tire would roll due to the absence of a chock (Tr. 30, 45-46).

Mr. Vaughn testified that it is "very, very unlikely that the tire would fall (Tr. 29)." While I assume that there is some possibility that the tire could fall, or roll, I cannot conclude that a reasonably prudent person, familiar with the storage of tires in the mining industry, would recognize that storing wide-based tires vertically is sufficiently hazardous that use of tire racks, horizontal storage, or other means of restraint, was necessary.

Mr. Vaughn's testimony indicates that industry practice is to store the wide-based tires vertically. While industry practice may not be controlling as to what a "reasonably prudent person" would do in this situation, there is no evidence in this record that the industry practice is not reasonably prudent. Therefore, I conclude that Respondent's vertical storage of the tire in question did not violate section 77.208(a).

The setting on the circuit breaker for the compressor of the high wall drill

On April 28, 1992, MSHA electrical Inspector Daniel Head observed a circuit breaker for the 350 horsepower, 480-volt, 3-phase motor for an air compressor of a high wall drill belonging to Respondent (Tr. 61-64). The highest setting on the circuit breaker, according to Head, was 6,000 amperes, which is the point at which the breaker will shut off power to the compressor motor if there is a short circuit (Tr. 64-66).

Inspector Head concluded that the circuit breaker setting was too high to comply with the requirements of the National Electric Code and, therefore, issued citation number 4060870, alleging a violation of 30 C.F.R. § 77.506. That regulation provides:

> Automatic circuit breaking devices or fuses of the correct type and capacity shall be installed so as to protect all electric equipment and circuits against short circuits and overloads.

The danger of setting a circuit breaker too high is that, in case of a short circuit, dangerous amounts of current may reach the motor in the event of a short circuit, even if the tripping of the circuit breaker is delayed 1/200 or 1/300 of a second, thus, exposing miners to electrical burns or shock (Tr. 66, 109-112). The parties agree that the criteria for complying with section 77.506 are found in the National Electric Code (NEC) and, more specifically, NEC section 430-52. That section provides that the setting of an instantaneous trip circuit-breaker be no more than 1300% of the motor's full-load current (Respondent's brief at page 7, Petitioner's brief at page 4).

The dispute between the parties is whether the circuit breaker setting in this case exceeded 1300%. Inspector Head utilizes a figure of 400 amperes for the full load current of the motor (Tr. 64-65). He obtained this number from the nameplate of the motor (Tr. 65). Respondent, through Lynn Byers, the chief mechanic at the Navajo mine, contends that the motor's full load capacity is 438 amperes, which you derive from the manufacturer's instructions (Tr. 97-102). Inspector Head appeared at times to concede that one was not limited to the nameplate in calculating the full load capacity (Tr. 76-78, 91). Therefore, with regard to this issue, I credit Mr. Byers and find that the full load capacity of the motor was 438 amperes, or as the Secretary's expert Terrence Dinkel testified, "a few amps less," (Tr. 97-102, 121-122).

The parties also disagree as to the setting on cited circuit breaker. Inspector Head concluded that the breaker would trip at 6000 amperes, which is in excess of 5694 amperes, which is 1300% of the full load capacity of the motor--using Mr. Byers' figures (Tr. 73-76). Mr. Byers, however, believes that the circuit breaker will trip at 5400 amperes, within the 1300% of the full load motor current allowed by the NEC (Tr. 104).

Terrence Dinkel, an electrical engineer in MSHA's technologies center (Tr. 115), testified that Mr. Byers was correct in stating that General Electric, the manufacturer of the circuit breaker, advises that the circuit breaker will trip between 9 and 11 times the breaker rating of 600 amperes (Tr. 102-105, 120-121). However, Mr. Dinkel further stated that given this range one must assume the average figure of 10 times the breaker rating as the point at which the circuit breaker will trip (6000 amperes) (Tr. 120-121).

I credit the testimony of Mr. Dinkel and find that Respondent's circuit breaker was set to trip at 6000 amperes at the high setting. This figure exceeds the 1300% limit in the NEC. Nevertheless, I do not conclude that Respondent violated section 77.506.

Neither the cited regulation nor the NEC is crystal clear in specifying the allowable circuit breaker settings for motors with a 600 ampere thermal rating. As with the prior citation, I believe the Commission must apply the "reasonably prudent person" test in adjudicating this citation. As the proper setting for Respondent's circuit breaker was far from obvious, I cannot conclude that a reasonably prudent operator's electrician would have recognized that BHP's circuit breaker was set in violation of the standard or the NEC.

Mr. Byers was a master electrician at the Navajo mine for 12 years and appears to be quite competent in his field (Tr. 93-94). I see nothing in the record that would lead me to conclude that

Mr. Byers did not act in reasonably prudent manner in setting the cited circuit breaker or that he should reasonably have known that it was not set in conformance with the standard or the NEC. Applying the test set forth in Alabama By-Products, supra, I conclude that the standard did not provide Respondent with notice of its requirements that was adequate to sustain a violation under the circumstances in this case.

Failure to examine the electrical panel box in a contractor's trailer

An independent contractor of Respondent, Navajo Engineering Construction Authority (NECA) maintained a trailer on Respondent's property (Tr. 126-128, 149). This trailer was used infrequently by the contractor for such purposes as filling out timecards and planning its work (Tr. 149-150).

In May 1992, MSHA Inspector Ramey found an electrical circuit breaker box inside this trailer, which did not comply with MSHA's electrical standards (Tr. 129-130). Most notably, there were exposed buss bars which are live electrical parts. These buss bars are in an opening several inches long and several inches wide. They are recessed approximately 2 inches from the face of the panel box (Tr. 139-141, 150-151). The Secretary cited NECA for the specific violations found and also issued citation number 3588747 to Respondent, alleging a violation of 30 C.F.R. § 77.502 for failing to inspect the panel box during the prior 2 months (Exhibit P-5).

Respondent concedes that it did not inspect the panel box in the contractor's trailer (Tr. 153); however, it argues that it was under no legal obligation to do so, and that the record does not establish that its contractor failed to inspect the circuit-breaker box.

Mr. Byers conceded that, "[o]f the hundreds and hundreds of detailed inspections of areas and individual equipment, we missed it (Tr. 153)." From this concession, I infer that Respondent had assumed the responsibility for conducting the necessary examinations of its contractors' electrical equipment. I also infer from the violations found by MSHA that the panel box had not been inspected by NECA. Even if Respondent were relying on NECA to inspect the electrical installations in its trailer, BHP would be liable for its contractor's failure to do so, Bulk Transportation Services, Inc., 13 FMSHRC 1354, 1359-60 (September 1991). Therefore, I affirm citation number 3588747.

Respondent's violation of section 77.502 was non-significant and substantial

The Commission formula for a "significant and substantial" violation was set forth in Mathies Coal Co. 6 FMSHRC 1 (January 1984):

> 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 conclude that it was not reasonably likely that anyone would be shocked or burned in the normal course of mining operations, due to the hazards created by Respondent's failure to inspect the NECA panel box. First of all, it was rare that anyone used the trailer (Tr. 150, 153-4). Secondly, rarely would anyone need to open the panel box, which is no different than a circuit breaker box in a person's home (Tr. 142, 148). Finally, even if a person opened the panel box to manipulate the circuit breakers, it is not reasonably likely that they would stick their fingers or another object beyond the circuit breakers and contact the exposed buss bars (Tr. 151-153). Therefore, I find this violation to be non-significant and substantial at step 3 of the Mathies test.

Assessed Civil Penalty

The Secretary proposed a $903 civil penalty for this violation. I conclude that under the statutory criteria in section 110(i), a $50 civil penalty is appropriate. Of the 6 criteria, the 2 that are most important in determining the appropriate penalty for this violation are the gravity and the Respondent's negligence. Given the fact that the trailer in question was often padlocked and rarely used, I conclude that Respondent's negligence was fairly low.

Similarly, since employees were rarely exposed to the uninspected circuit breaker box and it is not reasonably likely that they would have been injured due to Respondent's failure to inspect the box, even if they did open it, I believe that the gravity of this violation is also low. After also considering the other four statutory criteria, I assess a $50 civil penalty.

The clearance below the electrical panel boxes

Three of the citations in this case, numbers 4061289, 3588749, and 3588744, allege violations of 30 C.F.R. § 77.516,

which requires that all electrical equipment and wiring installed after June 30, 1971, meet the requirements of the National Electrical Code (NEC) in effect at the time of installation.

More specifically, these 3 citations allege that Respondent violated section 110-16(a) of the NEC which requires a working space of 30 inches in the direction of access to live parts, operating at not more than 600 volts, which are likely to require examination, adjustment, servicing or maintenance while alive. The 3 citations involve 3 different circuit breaker boxes.

Citation number 4061289 involved a breaker box in Respondent's safety trailer, which a had a metal file cabinet directly below it. The top of the file cabinet was 30" long x 19" wide, and 12 - 18 inches below the breaker box (Tr. 156-159).

Citation number 3588749 involved a circuit breaker box in the BHP lube area complex which had 6 5-gallon buckets directly underneath it (Tr. 164-165). Finally, citation number 3588744 involved a box in the main shop complex, which had a metal desk directly below it (Tr. 167-168).

Respondent contends that while NEC section 110-16 is applicable to the boxes, 110-16(a) is not because the breaker boxes do not contain live parts which are likely to require examination, adjustment, servicing, or maintenance while alive.

In all 3 cases there was nothing directly in front of the electrical panel box, but there were objects directly below the box. Section 110-16 of 1968 NEC requires that "sufficient access and working space be provided and maintained about all electrical equipment to permit ready and safe operation and maintenance of such equipment (Exhibit P-2)."

I conclude that Respondent complied with section 110-16 and that 110-16(a) does not apply to the conditions cited. I credit the opinion of BHP's Lynn Byers, a master electrician, that circuit breaker boxes do not normally have exposed live parts (Tr. 190) and that there is no reason to work inside such a box when the box is energized (Tr. 181-3, 187-190). I, therefore, vacate all three citations.

ORDER

Citation number 3588747 is affirmed as a non-significant and substantial violation and a $50 civil penalty is assessed. This penalty shall be paid within 30 days of this decision.

Citation numbers 4060870, 3588744, 3588749, 4061289, and 4061294 are vacated.

Arthur J. Amchan
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FALLS CHURCH, VIRGINIA 22041

MAY 25 1994

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. KENT 94-125
	:	A.C. No. 15-17301-03516
v.	:	
	:	No. 1 Mine
DONNIE SKIDMORE, d/b/a 3-BOY COAL and T & H CONSTRUCTION, Respondent	:	

DECISION

Appearances: Thomas A. Grooms, Esq., Office of the Solicitor U.S. Department of Labor, Nashville, Tennessee, for Petitioner.

Before: Judge Barbour

In this proceeding the Secretary of Labor (Secretary), on behalf of Mine Safety and Health Administration (MSHA) and pursuant to Sections 105 and 110 of the Federal Mine Safety and Health Act of 1977 (Mine Act or Act), seeks assessment of a civil penalty of $5,000 against Donnie Skidmore, d/b/a 3-Boy Coal and T & H Construction for a violation of 30 C.F.R. § 48.6, a mandatory safety standard requiring training for newly employed experienced miners. The alleged violation was cited in an order of withdrawal issued on June 16, 1993, pursuant to section 104(g)(1) of the Act. 30 U.S.C. § 814(g)(1). The order states that six named employees were observed working at the Respondent's mine and that no record exists of the employees having received newly employed experienced miner training as required by the standard. The proposed assessment was calculated through implementation of the Secretary's special assessment regulations found at 30 C.F.R. § 100.5.

Donnie Skidmore answered on behalf of the Respondent, asserting that he was not a partner of T & H Construction when the alleged violation was cited, that four of the cited employees had received the required training, although their training records had been destroyed subsequently. He further stated that two of the cited employees had been trained but their training records had not been completed. Skidmore requested that "the assessment be waived."

Following the issuance of a prehearing order and a responsive verbal communication from Skidmore, in which he listed the witnesses he intended to call, the case was noticed for hearing on March 14, 1994 in London, Kentucky. Subsequently, the hearing was rescheduled to be heard on April 21, 1994, commencing at 8:30 a.m. On April 12, 1994, a notice of hearing site was issued that set forth the address in London wherein the hearing would be convened.

All of the orders and notices were mailed to Skidmore at the Respondent's address of record by certified mail. None were returned as undeliverable by the U.S. Postal Service. Tr. 10.

THE HEARING

On April 21, 1994, at 8:30 a.m., and as previously noticed I called the matter for hearing in the City Hall, 501 South Main Street. No person representing the Respondent was present and I delayed the hearing for one hour, during which time counsel for the Secretary, at my request, made several telephone calls in an effort to locate Donnie Skidmore or some other representative of Respondent.

At approximately 9:30 a.m. the hearing commenced. Counsel for the Secretary entered an appearance. No one was present to represent the Respondent. Tr. 7. I questioned counsel regarding his contacts with Donnie Skidmore or any representatives of the Respondent. Counsel advised me that he had a telephone number for the Respondent and that a week or two prior to April 21, he had tried to call the Respondent. The attempt was unsuccessful because the number was for a mobile telephone that had been taken out of its service area. Counsel further stated that on April 20, he had received a telephone call from Sherry Crawford, a person identified as a witness in Respondent's prehearing response. Ms. Crawford asked counsel about the time and location of the hearing and counsel provided the information. Counsel explained to Ms. Crawford that he had been unable to contact Donnie Skidmore or anyone from the company. Ms. Crawford gave counsel a different telephone number, which counsel tried. However, again counsel got a recorded message that the telephone to which the number connected was out of range of its signal.

In addition to these attempts to contact Skidmore, or other representatives of the Respondent, on April 21, between the hours of 8:30 a.m. and 9:30 a.m., and, as noted previously, counsel placed several more unsuccessful telephone calls to the Respondent's telephone numbers. Counsel also called his office and determined a representative of the Respondent had not attempted to contact counsel there. Tr. 7-9.

Finally, I determined that no person representing Respondent had called the City Hall to speak with me.

FINDING OF DEFAULT

After describing his efforts to locate the Respondent, counsel moved for a default judgement and an order requiring Respondent to pay the proposed penalty. Tr. 13-14. I expressed reservations about the amount of the proposed penalty based on what appeared to be the Respondent's small size and no history of previous violations. In response counsel stated in part:

> [T]o require . . . the Secretary, where [a] party fails to attend [a hearing and] in a situation where the Secretary and the [C]ommission have been put to the expense of appearing . . . to benefit from . . . a determination of a penalty less than proposed, sets a bad precedent for [r]espondents who are so neglectfully cavalier as not to appear at the hearing.

Tr. 13-14.

As I noted at the hearing, the rules of the Commission are clear regarding the judge's powers if a party fails to attend a scheduled hearing. "The Judge, where appropriate, may find the party in default . . . without issuing an order to show cause." Further, "[w]hen the Judge finds a party in default in a civil penalty proceeding, the Judge shall also enter an order assessing appropriate civil penalties and directing that such penalties be paid." 29 C.F.R. §§ 2700.66(b), 2700.66(c). Whatever reservations I may have had about the amount of the penalty, I find counsel's point to be well taken. Therefore, I will hold Respondent in default and will assess the penalty as proposed. See Tr. 15-16.

The hearing process will function efficiently and as intended only if the parties take seriously their obligations under the Act. One of the most important obligations is to comply with the notices and orders of the Commission. Disregarding the Commission's directives, especially a notice to appear at a hearing, results in a waste of the Commission's and other parties' limited resources. Perhaps even more important, it indicates a disdain for the hearing process that can undermine public confidence in the Act and its administration. As counsel implied, rewarding such contemptuous conduct with anything less than the penalty proposed encourages its repetition.

Therefore, I find that Donnie Skidmore, d/b/a 3-Boy Coal and T & H Construction, is in DEFAULT, that the violation of section 48.6 existed as charged and that it is appropriate to assess Respondent the proposed civil penalty of $5,000.

ORDER

Order No. 3831991 is **AFFIRMED.** Donnie Skidmore, d/b/a 3-Boy Coal and T & H Construction, is **ORDERED** to pay a civil penalty of $5,000 to MSHA within 30 days of the date of this decision and upon receipt of payment this matter is **DISMISSED.**

David F. Barbour
Administrative Law Judge

Distribution:

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Donnie Skidmore, d/b/a 3-Boy Coal and T & H Construction, P.O. Box 1798, Corbin, Kentucky 40702

/fb

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MAY 25 1994

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. WEVA 92-783
	:	A.C. No. 46-01816-03805
v.	:	Gary No. 50 Mine
UNITED STATES STEEL MINING COMPANY, INCORPORATED, Respondent	:	

DECISION ON REMAND

Appearances: Javier I. Romanach, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for the Petitioner;
Billy M. Tennant, Esq., United States Steel Mining Company, Inc., Pittsburgh, Pennsylvania, for the Respondent

Before: Judge Fauver

Beginning in 1981, the Commission has held that a "significant and substantial" violation under § 104(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., [1] requires proof of "a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (1981); Mathies Coal Co., 6 FMSHRC 1, 3-4 (1984). In Mathies the Commission further stated:

> 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

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[1] Section 104(d) defines a significant and substantial violation as a violation of such nature as "could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard."

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

In my original decision in this case, I interpreted the Mathies "reasonable likelihood" test to mean that an S&S violation exists if there is a substantial possibility that the violation will result in injury or disease, and that the Secretary is not required to establish that it was more probable than not that injury or disease would result.

The Commission reversed my decision, holding that a "substantial possibility test" is "contrary to Commission precedent" and "does not lend itself to review under the third Mathies standard." It remanded "for proper application of the third Mathies element, i.e., whether there was a reasonable likelihood that the hazard contributed to would result in an injury."

On remand, the parties remain in sharp conflict as to the meaning of the Mathies test. U.S. Steel contends that "an objective reading of Mathies compels the conclusion that the Secretary must prove that it was more probable or likely than not that the hazard contributed to would result in an injury." Respondent's Brief on Remand, p. 4. The Secretary contends that "the Mathies test does not require proof that it is more probable than not that a violation will result in an injury." Secretary's Brief on Remand, p. 3.

The Commission has not resolved this issue. Although it ruled that a "substantial possibility test" is contrary to Mathies, it has not ruled whether the term "reasonable likelihood" in Mathies means "more probable than not" or includes a lesser degree of possibility or probability. To comply with the remand "for proper application of the third Mathies element," it will be necessary to decide this issue.

The parties' conflict is understandable because the term "reasonable likelihood" may convey different meanings. To U.S. Steel, the word "likelihood" governs, and the term "reasonable likelihood" means "more probable than not." To the Secretary, the word "reasonable" modifies "likelihood" to mean a reasonable potential, not "more probable than not."

For the reasons that follow, it is my interpretation that the third Mathies element -- "a reasonable likelihood that the hazard contributed to will result in an injury or illness" -- does not mean "more probable than not."

I begin by noting the Commission's discussion of a "significant and substantial" violation as falling "between two extremes" (in National Gypsum):

> Section 104(d) says that to be of a significant and substantial nature, the conditions created by the violation need not be so grave as to constitute an imminent danger. (An "imminent danger" is a condition "which could reasonably be expected to cause death or serious physical harm" before the condition can be abated. Section 3(j)). At the other extreme, there must be more than just a violation, which itself presupposes at least a remote possibility of an injury, because the inspector is to make significant and substantial findings in addition to a finding of violation. Our interpretation of the significant and substantial language as applying to violations where there exists a reasonable likelihood of an injury or illness of a reasonably serious nature occurring, falls between these two extremes -- mere existence of a violation, and existence of an imminent danger . . . . [3 FMSHRC at 828.]

As the Commission observed, a "significant and substantial" violation in § 104(d) is less than an "imminent danger" in § 3(j). The legislative history of the Act makes clear that an "imminent danger" is not to be defined in terms of "a percentage of probability":

> The Committee disavows any notion that imminent danger can be defined in terms of a percentage of probability that an accident will happen; rather the concept of imminent danger requires an examination of the potential of the risk to cause serious physical harm at any time. It is the Committee's view that the authority under this section is essential to the protection of miners and should be construed expansively by inspectors and the Commission. * * * [2]

It follows that an S&S violation, which by statute is less than an imminent danger, [3] is to be defined not "in terms of a percentage of probability" but in terms of "the potential of the risk" of injury or illness (Legislative History cited above). Tests such as "more probable than not" or some other percentage of probability are inconsistent with § 104(d) and the Act's legislative history.

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[2] S. Rep. No. 95-181, 95th Cong. 1st Sess. (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977 at 626 (1978).

[3] Section 104(d) excludes imminent dangers from its definition of an S&S violation.

This interpretation is also indicated by Commission decisions finding an S&S violation where the facts do not show injury or illness was "more probable than not." For example, in U.S. Steel Mining Co., 7 FMSHRC 327 (1985), the issue was whether the failure to install a bushing for a cable entering a water pump was an S&S violation. The judge found that the pump vibrated, vibration could eventually cause a cut in the insulation, and if the circuit protection systems failed, a worn spot in the cable could energize the pump frame and cause an electrical shock. The judge found an S&S violation, holding that injury was "reasonably likely" to occur. 5 FMSHRC 1788 (1983). In affirming, the Commission stated, inter alia:

> On review, U.S. Steel argues that the facts indicated that the occurrence of the events necessary to create the hazard, the cutting of the wires' insulation and failure of the electrical safety systems, are too remote and speculative for the hazard to be reasonably likely to happen and, consequently, that the judge erred in concluding that the violation was significant and substantial.
>
> * * *
>
> * * * The fact that the insulation was not cut at the time the violation was cited does not negate the possibility that the violation could result in the feared accident. As we have concluded previously, a determination of the significant and substantial nature of a violation must be made in the context of continued normal mining operations. U.S. Steel Mining Co., 6 FMSHRC 1673, 1574 (July 1984). The administrative law judge correctly considered such continued normal mining operations. He noted that the pump vibrated when in operation and that the vibration could cause a cut in the power wires' insulation in the absence of a protective bushing. In view of the fact that the vibration was constant and in view of the testimony of the inspector that the insulation of the power wires could be cut and that the cut could result in the pump becoming the ground, we agree that in the context of normal mining operations, an electrical accident was reasonably likely to occur.

In U.S. Steel Mining Co., the finding that injury was "reasonably likely to occur" was based upon a reasonable potential for injury, not a finding that it was more probable than not that injury would result. Indeed, based upon the facts found by the trial judge and relied upon by the Commission, one could not find that it was "more probable than not" that, had a bare spot in the cable touched the frame, the circuit protection systems would have failed to function to prevent injury.

For the above reasons, I conclude that the term "reasonable likelihood" as used in the Mathies test does not mean "more probable than not."

Based on the record as a whole, I find that the violation of the safeguard was significant and substantial. The reliable evidence shows the area in which the violation occurred was lower in height than other areas of the mine and uneven, with grades and swags. These conditions increased the likelihood of injuries resulting from a disconnected trolley pole. When the trolley pole falls off the trolley wire, it de-energizes the vehicle, resulting in an immediate loss of lights, communication, and electrical powered brakes. If the vehicle lost power at the bottom of a rise or dip in the trackway, the vehicle would not be seen by other vehicles. The disconnected trolley pole could strike miners, dislodge rocks from the roof striking miners, or cause sparks that could ignite methane. Also, a wide gauge between the track and trolley wire could tempt employees or supervisors to block out the anti-swing device in order to keep the pole from disconnecting. This would create another hazard of the pole striking miners. Inspector Cook testified that, taken as whole, the hazards presented by this violation made it reasonably likely that serious injuries would result. I find that the reliable evidence supports this finding.

Considering the criteria for a civil penalty in § 110(i) of the Act, I find that a penalty of $690 is appropriate.

ORDER

Respondent shall pay a civil penalty of $690 within 30 days of the date of this decision.

William Fauver
William Fauver
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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May 27, 1994

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) on behalf of MITCHELL BOSTIC AND WILLIAM WOOD, Complainants	:	DISCRIMINATION PROCEEDING
	:	Docket No. SE 93-629-D
	:	No. 4 Mine
v.	:	
JIM WALTER RESOURCES, INC., Respondent	:	

DECISION APPROVING SETTLEMENT

Before: Judge Melick

This Discrimination Proceeding is before me pursuant to Section 105(c) of the Federal Mine Safety and Health Act of 1977 (the Act). The Secretary, with the concurrence of the individual complainants, has filed a motion to approve a settlement agreement and to dismiss the case. I have considered the representations and documentation submitted in this case, and I conclude that the proffered settlement is acceptable.

WHEREFORE, the motion for approval of settlement is GRANTED and this case is DISMISSED. It is therefore ORDERED that Respondent pay a civil penalty of $1,000 within 30 days of this order, that Respondent pay each Complainant, Mitchell Bostic and William R. Wood, damages of four hours premium time, plus corresponding interest, within 30 days of this order, and that Respondent post a copy of the settlement agreement on the mine bulletin board for a period of 60 days.

Gary Melick
Administrative Law Judge

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MAY 2 7 1994

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE AND SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. SE 93-386
Petitioner	:	A. C. No. 40-02045-03595
	:	
v.	:	Docket No. SE 93-587
	:	A. C. No. 40-02045-03596
S & H Mining, INC.,	:	
Respondent	:	Docket No. SE 93-595
	:	A. C. No. 40-02045-03597

DECISION

Appearances: Thomas A. Grooms, Esq., Office of the Solicitor, U. S. Department of Labor, Nashville, Tennessee, for the Petitioner;
Imogene A. King, Esq., Franz, McConnell & Seymour, Knoxville, Tennessee, for the Respondent.

Before: Judge Feldman

The above matters were called for consolidated hearing on May 3, 1994, in Knoxville, Tennessee. The respondent, S & H Mining, Incorporated, stipulated that it is a mining operator subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977 (the Act), 30 U.S.C. § 801 et. seq. These matters concern petitions for civil penalty filed by the Secretary of Labor pursuant to Section 105(d) of the Act.

These cases involve five citations that were all designated as significant and substantial. Proposed penalties for three of the citations were derived under the Secretary's special assessment procedures set forth in Section 100.5 of the regulations, 30 C.F.R. § 100.5. The total proposed penalty for all citations was $3,913. After the parties presented their direct cases on two of the subject citations, the parties requested to confer for the purpose of reaching a comprehensive settlement of all matters in issue. The parties ultimately reached an accord and presented their settlement motion on the record. (Tr. 200-208). The terms of the settlement agreement include the respondent's payment of a total civil penalty of $1,424. In return, the Secretary has agreed to remove the special assessment from Citation Nos. 4041554, 4041544 and 4041553. In addition, the Secretary moves to delete the significant and substantial designation from Citation

No. 4041559. The Secretary also moves to vacate Citation No. 4041555. The specific citation numbers, initial proposed penalties, and agreed upon penalties are as follows:

Dkt. No.	Citation No.	Initial Proposed Penalty	Settlement
SE 93-386	4041554	$900	$362
	4041555	$235	Vacated
SE 93-587	4041544	$1,400	$600
	4041559	$178	$100
SE 93-595	4041553	$1,200	$362
	TOTAL	$3,913	$1,424

In view of the information presented on the record pertaining to the statutory penalty criteria in Section 110(i) of the Act as well as information related to the appropriate circumstances for imposition of a special assessment under Section 100.5 of the regulations, I issued a bench decision approving the settlement terms noted above.

ORDER

Accordingly, the parties' Motion to Approve Settlement **IS GRANTED.** The settlement terms presented on the record and summarized above are incorporated herein. **IT IS ORDERED** that the respondent pay a total civil penalty of $1,424 in total satisfaction of the citations in question. Payment is to be made to the Mine Safety and Health Administration within 30 days of the date of this Decision. Upon timely receipt of payment, these cases **ARE DISMISSED.**

Jerold Feldman
Administrative Law Judge
(703) 756-5233

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/ll

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

MAY 3 1 1994

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. PENN 93-86
Petitioner	:	A. C. No. 36-07783-03528
v.	:	
	:	Slope No. 1
HICKORY COAL COMPANY,	:	
Respondent	:	

DECISION

Appearances: Pedro P. Forment, Esq., Office of the Solicitor, U. S. Department of Labor, Philadelphia, Pennsylvania, for the Secretary; William Kutsey, Hickory Coal Company, Pine Grove, Pennsylvania, for Respondent.

Before: Judge Maurer

This case is before me upon a petition for assessment of civil penalty filed by the Secretary of Labor (Secretary), pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U. S. C. § 801, et seq., the "Mine Act" or "Act," charging Hickory Coal Company (Hickory) with three violations of the mandatory standards and seeking civil penalties of $112 for those violations. Pursuant to notice, the case was heard in Easton, Pennsylvania, on April 21, 1994.

The three citations at bar, Citation Nos. 3079885, 3079890, and 3079891, were all issued by Inspector Howard J. Smith of the Mine Safety and Health Administration (MSHA) as a result of his inspection at Hickory's Slope No. 1 on August 28, 1991.

Citation No. 3079885, issued pursuant to section 104(a) of the Mine Act, alleges a "significant and substantial" violation of 30 C.F.R. § 75.1401 and charges that:

> The hoist indicator, located on the hoist was not operational. A miner was being hoisted at the time this was observed. An accurate and reliable indicator of the position of the gunboat shall be provided.

Citation No. 3079890, issued pursuant to section 104(a) of the Act, alleges a "significant and substantial" violation of 30 C.F.R. § 75.1402 and charges that:

> The operator has failed to provide two effective methods of signaling between the No. 7 West Slant and the hoist room. The operator has provided a bell system and needs to provide one which shall be a telephone or speaking tube.

Citation No. 3079891, also issued pursuant to section 104(a) of the Mine Act, alleges a violation of 30 C.F.R. § 75.303(a) and charges that:

> The results of the pre-shift examinations were not recorded as required. The last entry was 4-23-91.

Inspector Smith testified that when he arrived in the hoist house on the day in question, Mr. Kutsey was underground working. He spoke with a Mr. Deeter, who identified himself as the hoisting engineer. After some discussion about how to contact Mr. Kutsey, it was decided to shut the compressor off as a signal and Mr. Kutsey would then know to come out of the mine.

While Mr. Kutsey was in the process of coming out, the inspector checked the hoist indicator, that indicates the position of the gunboat in the slope. It was not working. The indicator is supposed to indicate the position of the gunboat in the slope, whether it is being raised or lowered. The hoist indicator moves along a graph to show exactly where the gunboat is in the slope. Apparently, the hoisting engineer was using a mark on the cable for some sort of guidance, but the inspector testified that this is not an approved method of indicating where the mine gunboat might be because it only shows the position of the gunboat in the slope while that mark is visible. There was some evidence that there was a mark on the cable for the top of the slope and another to mark the bottom of the slope where Mr. Kutsey would be working.

The operator also had a pull cord and a horn arrangement that could be used for signalling. For instance, if Mr. Kutsey was underground and he wanted the gunboat to be raised or lowered he could give whatever prearranged signal to the hoisting engineer to raise or lower the gunboat. This is an approved signalling method, but it does not satisfy the requirement for a hoist indicator contained in 30 C.F.R. § 75.1401.

While I find this violation of the cited standard to be proven, I do not believe that the Secretary has carried his burden of proof with respect to the "significant and substantial" special finding because the markings on the cable at least provided sufficient information as to the whereabouts of the

gunboat near the top and bottom of the slope, which are the two most critical locations and, accordingly, it will be deleted. Mathies Coal Co., 6 FMSHRC 1,3-4 (January 1984).

It is also a significant factor in this case that this is a very small mining operation and the owner/operator, Mr. Kutsey, is the only miner who goes underground. His only other employee or two remain on the surface at all times.

I also conclude that based on the evidence contained in this record, respondent's negligence was "ordinary" or "moderate" and an appropriate penalty for the violation is $20.

While waiting for Mr. Kutsey to come out of the mine, Inspector Smith checked the pre-shift examiner's book and found the last entry to be 4/23/91. Clearly, this is a violation of the cited standard as Mr. Kutsey was operating the mine on the date of the inspection and had operated the mine between April 23 and August 28, 1991. Based on the record evidence, I conclude that it is a properly issued non "S&S" citation, due to the operator's ordinary negligence and the Secretary's proposed assessment of $20 is appropriate.

The inspector also determined that day that the operator had failed to provide two effective means of signalling between the Seven West Slant and the hoist room. He further explained that Mr. Kutsey has a bell system and a phone system, but on the day in question the phone was located at the Six West Slant while Mr. Kutsey was working at the Seven West Slant. Essentially, the violation is that he only had one system available at No. 7. He could either have moved the existing phone at No. 6 to No. 7, or he could have installed another phone at No. 7. The standard and the record are clear that the phone system was required to be installed and available where the miner was working. Again, the violation is clear cut, but I conclude that it has not been established that the violation was "significant and substantial," since at least one usable system of communications was in working order, i.e., the bell system. See, Mathies, supra. Once again, I also find the respondent's negligence to be "ordinary" or "moderate" and will assess a civil penalty of $20.

ORDER

In view of the above, **IT IS ORDERED** that:

1. Citation No. 3079891 **IS AFFIRMED.**

2. Citation Nos. 3079885 and 3079890 **ARE MODIFIED** by deleting the "significant and substantial" designations.

3. Respondent shall pay a total civil penalty of $60 within 30 days of the date of this decision.

Roy J. Maurer
Administrative Law Judge

Distribution:

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ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

MAY 2 1994

DOUGLAS E. DEROSSETT, Complainant	:	DISCRIMINATION PROCEEDING
v.	:	Docket No. KENT 94-278-D
	:	MSHA Case Nos. PIKE CD 93-10
MARTIN COUNTY COAL CORP., Respondent	:	PIKE CD 93-20
	:	Diamond No. 1 Mine

ORDER OF PARTIAL DISMISSAL

Appearances: Douglas E. DeRossett, Allen, Kentucky, pro se; Diane M. Carlton, Esq., Stoll, Keenon and Park, Lexington, Kentucky, for Respondent.

Before: Judge Melick

On May 19, 1993 and on July 29, 1993, pursuant to Section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, et seq., the "Act," Complainant DeRossett filed separate complaints of discrimination with the Department of Labor's Mine Safety and Health Administration (MSHA) alleging separate and distinct factual circumstances (MSHA Case Nos. PIKE CD 93-10 and PIKE CD 93-20, respectively).[1] On December 11, 1993, DeRossett filed a complaint with this Commission which, although not an example of clarity, made reference to both of the above MSHA cases. DeRossett has failed, however, after many opportunities, to produce any correspondence from the Secretary (or MSHA) finding no violation of the Act in regard to these complaints. He did not do so in his original complaint before this Commission, nor in response to the specific request for such correspondence in Chief Judge Merlin's Order dated December 16, 1993, nor in response to the Show Cause Order issued February 16, 1994, nor at the hearing on the Respondent's Motion to Dismiss held April 26, 1994.

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[1] Section 105(c)(2) provides, in part, as follows:
"Any miner or applicant for employment of representative of miners who believes that he has been discharged, interfered with, or otherwise discriminated against by any persons in violation of this subsection may, within 60 days after such violation occurs, file a complaint with the Secretary alleging such discrimination."

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

> Within 90 days of the receipt of a complaint filed under paragraph (2), the Secretary shall notify, in writing, the miner, applicant for employment, or representative of miners of his determination whether a violation has occurred. If the Secretary, upon investigation, determines that the provisions of this subsection have not been violated, the complainant shall have the right, within 30 days of notice of the Secretary's determination, to file an action in his own behalf before the Commission, charging discrimination or interference in violation of paragraph (a).

In the absence of evidence that the Secretary has issued such notification, this Commission is, therefore, without jurisdiction to proceed under that section of the Act.

Since Respondent produced at hearing from its own files a copy of MSHA's letter dated November 22, 1993, finding no violation of the Act regarding its Case No. PIKE CD 93-20, I find that the jurisdictional prerequisites have been met for that part of DeRossett's Complaint before this Commission under Section 105(c)(3). In the absence of any evidence of such a letter relating to the complaint under MSHA Case No. PIKE CD 93-10, I do not find that the jurisdictional prerequisite has been met for that complaint. Accordingly, that part of the complaint before this Commission that is based upon the allegations set forth in MSHA Case No. PIKE CD 93-10 is therefore **DISMISSED**. A hearing limited to the four corners of the complaint initially filed under MSHA Case No. PIKE CD 93-20 will accordingly be scheduled in the near future.

Gary Melick
Administrative Law Judge
703-756-6261

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

May 27, 1994

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. YORK 93-149-M A. C. No. 19-00008-05522
v.	:	Chelmsford Quarry
FLETCHER GRANITE COMPANY, INCORPORATED, Respondent	:	

ORDER DISAPPROVING SETTLEMENT
ORDER TO SUBMIT INFORMATION

Before: Judge Merlin

This case is before me upon a petition for assessment of civil penalties under section 105(d) of the Federal Mine Safety and Health Act of 1977.

On March 9, 1994, I issued a prehearing order directing the parties to confer about possible settlement and advise by May 4, 1994, the results of these discussions. I also set a hearing date of May 26, 1994. The Solicitor orally advised my law clerk by May 4 that this case settled and subsequently on May 9, 1994, filed a motion to approve settlement for the four violations involved in this case. In his motion for approval of settlement filed May 9, 1994, the Solicitor seeks a reduction in the penalties from $7,500 to $5,250.

The four violations in this case were all designated significant and substantial and found to be a result of unwarrantable failure on the part of the operator. In addition, the violations were specially assessed.

In his motion for settlement approval the Solicitor gives no reasons to support the proposed reductions in the penalties. Where, as here, the violations are serious and the operator's conduct has been characterized as unwarrantable, the Solicitor must provide a basis to support the settlements for which he seeks approval. The fact that the suggested penalties remain substantial does not in and of itself, warrant approval.

The Solicitor is 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 judge's responsibility to determine the appropriate amount of penalty, in accordance

with the six criteria set forth in section 110(i) of the Act. 30 U.S.C. § 820(i); Sellersburg Stone Company v. Federal Mine Safety and Health Review Commission, 736 F.2d 1147 (7th Cir. 1984).

Based upon the Solicitor's motion, I have no grounds upon which to conclude that the recommended penalties of $5,250 are appropriate under the six criteria of section 110(i).

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

It is further **ORDERED** that within 30 days of the date of this order the Solicitor submit additional information to support his motion for settlement. Otherwise, this case will be set for hearing.

Paul Merlin
Chief Administrative Law Judge

Distribution: (Certified Mail)

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Ms. Cheryl A. Gaulin, Payroll Coordinator, Fletcher Granite Co., Inc., Groton Road, West Chelmsford, MA 01863

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