MAY 1996

COMMISSION DECISIONS AND ORDERS

ADMINISTRATIVE LAW JUDGE DECISIONS

ADMINISTRATIVE LAW JUDGE ORDERS

MAY 1996

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

Secretary of Labor, MSHA v. DCL Construction Inc., Docket No. WEST 95-189-M. (Chief Judge Merlin, unpublished Default decision issued August 3, 1995).

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

Secretary of Labor, MSHA v. James Yancik, Neal Merrifield & Freeman United Mining Co., Docket Nos. LAKE 95-262, etc. (Judge Fauver, March 29, 1996).

Secretary of Labor, MSHA v. Doss Fork Coal Company, Docket No. WEVA 93-129. (Judge Melick, April 5, 1996).

Secretary of Labor, MSHA v. Wallace Brothers, Inc., Docket No. WEST 94-710-M. (Judge Amchan, April 12, 1996).

COMMISSION DECISIONS AND ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

May 3, 1996

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	: : :	
v.	:	Docket No. KENT 94-972
BROKEN HILL MINING COMPANY, INC.	:	

BEFORE: Jordan, Chairman; Holen, Marks and Riley, 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. (1994) ("Mine Act"). On October 11, 1995, the Commission granted the petition for discretionary review filed by Broken Hill Mining Company, Inc. ("Broken Hill"). Pursuant to Commission Procedural Rule 75, 29 C.F.R. § 2700.75 (1995),[1] Broken Hill's opening brief was due to be filed by November 13, 1995. Broken Hill has not filed its brief and has proffered no reason for its failure to do so.

---

[1] Rule 75 provides, in part:

> (a) *Time to file.* (1) *Opening and response briefs.* Within 30 days after the Commission grants a petition for discretionary review, the petitioner shall file his opening brief. If the petitioner desires, he may notify the Commission and all other parties within the 30-day period that his petition and any supporting memorandum are to constitute his brief. . . .

On January 26, 1996, the Secretary of Labor filed a Motion to Dismiss for Want of Prosecution pursuant to Commission Procedural Rule 75(e), 29 C.F.R. § 2700.75(e).[2] The Secretary states that Broken Hill failed to file its opening brief or designate its petition as such. Mot. at 1. The Secretary notes that he has not been able to reach Broken Hill by telephone or facsimile. *Id.* at 2 & n.2. He asserts that no injustice would result from the dismissal of Broken Hill's petition. *Id.* at 2. The Secretary requests that the petition be dismissed with prejudice. *Id.* at 3. Broken Hill has not filed an opposition to the motion.

On March 14, 1996, the Commission issued an order directing Broken Hill to show cause within 14 days why its appeal should not be dismissed. The file contains the return receipt showing that Broken Hill received the show cause order on March 22, 1996. Broken Hill has not responded to the show cause order. The Commission may vacate its direction for review if a petitioner fails to file an opening brief in accordance with Rule 75. *See* 29 C.F.R. § 2700.75(e).

---

[2] Rule 75(e) provides:

> *Consequences of petitioner's failure to file brief.* If a petitioner fails to timely file a brief or to designate the petition as his brief, the direction for review may be vacated.

In light of the foregoing considerations, we grant the Secretary's motion. Accordingly, the direction for review is vacated and this proceeding is dismissed.

Mary Lu Jordan, Chairman

Arlene Holen, Commissioner

Marc Lincoln Marks, Commissioner

James C. Riley, Commissioner

Distribution:

Hobart W. Anderson, President
Broken Hill Mining Company, Inc.
P.O. Box 356
Sidney, KY 41564
(Certified Mail)

Cheryl C. Blair-Kijewski, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd., Suite 400
Arlington, VA 22203
(Certified Mail)

Administrative Law Judge T. Todd Hodgdon
Federal Mine Safety & Health Review Commission
5203 Leesburg Pike, Suite 1000
Falls Church, VA 22041

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

May 3, 1996

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	: : :	
v.	:	Docket Nos. SE 91-97, etc.
FAITH COAL CO.	:	

BEFORE: Jordan, Chairman; Holen, Marks and Riley, Commissioners

ORDER

BY THE COMMISSION:

These civil penalty proceedings arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act"). On August 28, 1995, the Commission granted the cross-petitions for discretionary review filed by Faith Coal Company ("Faith") and the Secretary of Labor. Pursuant to Commission Procedural Rule 75, 29 C.F.R. § 2700.75 (1995),[1] Faith's opening brief was due to be filed by September 27, 1995. Faith, however, failed to file its brief.

---

[1] Rule 75 provides, in part:

> (a) *Time to file*. (1) *Opening and response briefs*. Within 30 days after the Commission grants a petition for discretionary review, the petitioner shall file his opening brief. If the petitioner desires, he may notify the Commission and all other parties within the 30-day period that his petition and any supporting memorandum are to constitute his brief. . . .

On January 26, 1996, the Secretary filed a Motion to Dismiss for Want of Prosecution pursuant to Commission Procedural Rule 75(e), 29 C.F.R. § 2700.75(e).[2] The Secretary states that Faith failed to file its opening brief or designate its petition as such. Mot. at 1. The Secretary notes that he has not been able to reach Faith by telephone, facsimile, or mail. *Id.* at 2 & n.2. He asserts that no injustice would result from the dismissal of Faith's petition. *Id.* at 2-3. The Secretary requests that the petition be dismissed with prejudice. *Id.* at 3. Faith has not filed an opposition to the motion.

On March 14, 1996, the Commission issued an order directing Faith to show cause within 14 days why its appeal should not be dismissed. The file contains the return receipt showing that Faith received the show cause order on April 1, 1996, 18 days after its issuance. On April 8, 1996, Faith filed a response to the show cause order stating that, as a *pro se* operator, it was unaware that a written statement was required to designate the petition as its brief. Faith requests that the Commission accept its late correspondence as its motion to designate the petition as such. Faith also states that it opposes the Secretary's motion to dismiss because it "should not be penalized nor denied the privilege of due process of appeal because of financial poverty and lack of knowledge" of the Commission's rules. The Secretary has not filed an opposition to Faith's motion to designate the petition as its brief.

Whether the Commission vacates its direction for review due to a petitioner's failure to file an opening brief in accordance with Rule 75 is a matter within the Commission's discretion. *See* 29 C.F.R. § 2700.75(e). Faith has proffered a reason for its failure to file its brief, i.e., as a *pro se* operator, Faith was unaware of the filing requirement. Under the circumstances, we excuse Faith's late-filed response to the show cause order and grant its motion to designate the petition as its brief.

---

[2] Rule 75(e) provides:

> *Consequences of petitioner's failure to file brief.* If a petitioner fails to timely file a brief or to designate the petition as his brief, the direction for review may be vacated.

For the foregoing reasons, we deny the Secretary's motion.

Mary Lu Jordan, Chairman

Arlene Holen, Commissioner

Marc Lincoln Marks, Commissioner

James C. Riley, Commissioner

Distribution

Lonnie Stockwell
Faith Coal Company
Route 1, Box 196
Palmer, TN 37365 (Certified)

Cheryl C. Blair-Kijewski, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd.
Arlington, VA 22203

Administrative Law Judge David Barbour
Federal Mine Safety & Health Review Commission
5203 Leesburg Pike, Suite 1000
Falls Church, VA 22041

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

May 22, 1996

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. KENT 91-179-R
PEABODY COAL COMPANY	:	

BEFORE: Jordan, Chairman; Holen and Marks, Commissioners[1]

DECISION

BY THE COMMISSION:

This contest proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act" or "Act"). At issue is a citation,[2] issued by the Department of Labor's Mine Safety and Health Administration ("MSHA"), alleging that Peabody Coal Company ("Peabody") violated 30 C.F.R. § 75.316 (1991) by operating a mine without an approved ventilation plan.[3] The Commission previously remanded this matter to the

---

[1] Commissioner Doyle participated in the consideration of this matter but resigned from the Commission before its final disposition. Commissioner Riley assumed office after this case had been considered and decided at a Commission decisional meeting. A new Commissioner possesses legal authority to participate in pending cases, but such participation is discretionary. *Mid-Continent Resources, Inc.*, 16 FMSHRC 1218 n.2 (June 1994). In the interest of efficient decision making, Commissioner Riley has elected not to participate in this matter.

[2] Originally, this proceeding involved a second citation at another of Peabody's mines, the Camp No. 2 Mine (15 FMSHRC 381, 382 (March 1993)); however, that mine is no longer operating and the Secretary has withdrawn the citation against it. S. Br. at 4 n.3.

[3] Former 30 C.F.R. § 75.316 implemented section 303(o) of the Mine Act, 30 U.S.C. § 363(o), and provided:

> A ventilation system and methane and dust control plan and revisions thereof suitable to the conditions and the mining system of the coal mine and approved by the Secretary shall be adopted by

administrative law judge to determine whether a disputed ventilation plan provision was "suitable" to the conditions at Peabody's mines. *Peabody Coal Co.*, 15 FMSHRC 381, 388 (March 1993) ("*Peabody I*"). The Commission stated that the Secretary of Labor bears the burden of proving the suitability of a disputed plan provision. *Id.* On remand, Administrative Law Judge Gary Melick concluded that the Secretary established that the disputed plan provision was suitable. *Peabody Coal Co.*, 15 FMSHRC 1703 (August 1993) (ALJ). The Commission granted Peabody's petition for discretionary review ("PDR"). For the reasons that follow, we affirm the judge.

I.

Procedural and Factual Background

A. *Peabody I*

The background facts in this proceeding are fully set forth in *Peabody I*, 15 FMSHRC at 382-85, and are summarized here. Peabody's Martwick Mine utilizes a method of continuous mining known as "deep cut" or "extended" mining that involves making cuts deeper than 20 feet from the last full row of permanent roof supports. *Id.* at 382 & n.2. In January 1991, as a result of its regular 6-month review of Peabody's ventilation plan at the mine, MSHA insisted that Peabody include in the plan a deep cut ventilation provision applicable to the roof bolting stage of the mining cycle. The new provision required Peabody to extend the line curtain during roof bolting in deep cut entries to within 10 feet of the last row of bolts being set and to supply 3,000 cubic feet per minute ("cfm") of air at the inby end of the curtain. In Peabody's previously approved plan, the line curtain was not placed in deep cuts until completion of roof bolting and there was no prescribed minimum air volume during roof bolting. *Id.* at 15 FMSHRC at 382-83; 15 FMSHRC at 1703 (ALJ decision on remand).

Peabody objected to inclusion of the new provision. After unsuccessfully negotiating with Peabody, the Secretary refused to approve a revised ventilation plan that did not contain the

---

> the operator and set out in printed form on or before June 28, 1970. The plan shall show the type and location of mechanical ventilation equipment installed and operated in the mine, such additional or improved equipment as the Secretary may require, the quantity and velocity of air reaching each working face, and such other information as the Secretary may require. Such plan shall be reviewed by the operator and the Secretary at least every 6 months.

When MSHA revised and renumbered its ventilation plan standards in 1992, 30 C.F.R. § 75.316 was superseded by 30 C.F.R. § 75.370 (1995), 57 Fed. Reg. 20,868, 20,910-12, 20,924 (May 15, 1992).

disputed provision and issued a citation to Peabody alleging a violation of section 75.316 for operating without an approved plan. Peabody submitted, under protest, a plan containing the provision required by the Secretary. *Peabody I*, 15 FMSHRC at 382-84.

Peabody filed a notice of contest and a hearing was held. In his first decision, Judge Melick concluded that the new deep cut ventilation provision was mine-specific and not a standard of general application that was subject to rulemaking requirements. He determined that Peabody had failed to negotiate with the Secretary in good faith over the provision and affirmed the citation. 13 FMSHRC 1332, 1335-37 (August 1991) (ALJ). On review, the Commission affirmed the judge's finding that the deep cut ventilation provision was mine-specific but, contrary to the judge, found that Peabody had negotiated in good faith. 15 FMSHRC at 385-88. The Commission remanded the case to the judge with the following instruction:

> We remand to the judge to decide whether the disputed provision was "suitable" to Peabody's mine[], as contemplated by 30 U.S.C. § 863(o). The Secretary bears the burden of proving that the plan provision at issue was suitable to the mine[] in question.

Id. at 388.

Peabody filed a petition for reconsideration with the Commission requesting clarification that the Secretary's burden of proof included a showing that Peabody's previously approved ventilation plan was unsuitable in addition to demonstrating that the disputed plan provision was suitable. The Secretary responded that, because he sought to have Peabody make changes in a previously approved plan, he had no objection to bearing the burden of proving both the unsuitability of the previously approved plan and the suitability of the new plan provision. The Commission denied the petition and ordered that the issues raised by Peabody be determined in the first instance by the judge on remand. *Peabody Coal Co.*, 15 FMSHRC 628 (April 1993) (*"Peabody II"*).

B. Present Proceeding

On remand, the judge took further evidence on the issues of the unsuitability of the previously approved ventilation plan and the suitability of the new plan provision the Secretary had proposed. Tr. III. 3-4.[4] At the hearing, the Secretary modified the proposed plan provision because further testing revealed that, with airflow of 3,000 cfm at the inby end of the line curtain, there was sufficient ventilation to the face areas with a shorter line curtain. Under the modified

---

[4] The judge conducted two hearings in this matter, the first on August 7 and 8, 1991, and the second, after remand, on June 17, 1993. "Tr. I" refers to the transcript volume of the hearing on August 7; "Tr. II" to the August 8 hearing transcript; and "Tr. III" to the June 17 hearing transcript.

plan provision, the line curtain was to be extended only to the fourth row of roof bolts outby the row being installed (about 20 feet from the last row of roof bolts); under the earlier proposed provision, the line curtain was extended to the second row of roof bolts outby the row being installed (about 10 feet from the last row of roof bolts). 15 FMSHRC at 1704 n.2; Tr. III 19-21; Gov't Ex. 6A. The Secretary presented testimony and test results to support his position that the purpose of the new ventilation provision was to remove methane, respirable dust, and fumes from the face area during roof bolting and that, without such ventilation, an ignition was possible because of the presence of the roof bolter. Peabody introduced the results of its own ventilation studies regarding the sources and quantities of methane released in the mine. 15 FMSHRC at 1703-05.

The judge concluded that the Secretary met his burden of proving that the prior plan was no longer suitable to the mine and that the proposed plan provision was suitable. 15 FMSHRC at 1705-06. The judge found that the mine liberates large amounts of methane and is subject to 15-day spot inspections under section 103(i) of the Mine Act, 30 U.S.C. § 813(i), for mines liberating more than 200,000 cubic feet of methane during a 24-hour period. He also found, based on Peabody's tests, that methane is liberated from the working faces of the mine. 15 FMSHRC at 1703-05. The judge relied on the Secretary's tracer gas tests, which showed that, under the previously approved ventilation plan, little or no methane present in unventilated deep cut areas would be diluted or removed and that methane would accumulate in increasing concentrations while the roof bolting machine was in operation. 15 FMSHRC at 1704-05. He noted that the roof bolting machine could at any time become an ignition source. *Id.* at 1705. Finding the prior plan unsuitable to address this safety hazard, he determined that the new plan provision addressed the hazard because "the ventilating air clearly sweeps the face area." *Id.* at 1704. Accordingly, he affirmed the citation and dismissed the contest. *Id.* at 1706.

II.

Disposition

A. Position of the Parties

Peabody argues that the judge's formulation of the test for suitability was erroneous. PDR at 2; P. Br. at 16. Peabody asserts that the judge permitted the Secretary to articulate only a "possible hazard, without making any showing that the hazard exists or is reasonably likely to occur at Martwick . . . ." P. Br. at 16. Peabody also argues that the Martwick Mine has operated safely for years without the provision in question. P. Br. at 17. Peabody further asserts that: the showing the judge imposed on the Secretary was inconsistent with the Commission's remand instructions; the judge's suitability determination was premised on the incorrect assumption of a requirement that there be adequate ventilation to the face during roof bolting; evidence was lacking that methane accumulated at the face during roof bolting; and the previous plan provision required adequate ventilation of face areas during active mining. P. Br. at 18, 20, 27, 29-31.

The Secretary argues that substantial evidence supports the judge's determination that the previously approved plan was unsuitable and the proposed plan provision was suitable. S. Br. at 9-19. The Secretary further argues that plan provisions should be given the same legal effect as a mandatory standard adopted through rulemaking and should therefore be reviewed under an arbitrary and capricious standard of review. S. Br. at 26-34. In response, Peabody contends that, because the procedural safeguards of notice-and-comment rulemaking are absent in the plan approval context, the arbitrary and capricious standard of review is inappropriate. P. Reply Br. at 17-20.

B. Analysis

Section 303(o) of the Mine Act, the statutory sponsor of the ventilation plan regulation at issue, provides:

> A ventilation system and methane and dust control plan and revisions thereof *suitable to the conditions and the mining system of the coal mine* and approved by the Secretary shall be adopted by the operator . . . .

30 U.S.C. § 863(o) (emphasis added). As the Commission noted in *Peabody I,* "[M]ine ventilation or roof control plan provisions must address the specific conditions of a particular mine." 15 FMSHRC at 386. *See UMWA v. Dole*, 870 F.2d 662, 669 (D.C. Cir. 1989). While the contents of a plan are based on consultation between the Secretary and the operator (*see, e.g., Penn Allegh Coal Co.,* 3 FMSHRC 2767, 2773 (December 1981)), "the Secretary must independently exercise his judgment with respect to the content of such plans in connection with his final approval of the plan." *UMWA v. Dole,* 870 F.2d at 669 n.10, *quoting* S. Rep. No. 181, 95th Cong., 1st Sess. 25 (1977), *reprinted* in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2nd Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977,* at 613 (1978).

We reject Peabody's proposal that the Secretary be required to prove the hazard addressed by a new plan provision either exists or is reasonably likely to occur. Section 303(o), in setting forth the requirement that a ventilation plan be suitable to mining conditions, does not require that plan provisions be based on the existence of specific hazards or the likelihood that specific hazards may occur. In the absence of a statutory definition or a technical usage of the term "suitable," we apply the ordinary meaning of the word. *See Thompson Brothers Coal Co.,* 6 FMSHRC 2091, 2096 (September 1984). "Suitable" is defined as "matching or correspondent," "adapted to a use or purpose: fit," "appropriate from the viewpoint of . . . convenience, or fitness: proper, right," "having the necessary qualifications: meeting requirements." *Webster's Third New International Dictionary* 2286 (1986). We conclude that the Secretary carried his burden of proving the unsuitability of the former plan and the suitability of the new provision once he identified a specific mine condition not addressed in the previously approved ventilation plan and addressed by the new provision.

In order to establish that, under former section 75.316, Peabody improperly refused to include a provision in its ventilation plan, the Secretary agreed for purposes of this litigation to assume the burden of proving: (1) the previously approved plan is no longer suitable to the conditions and the mining system of the coal mine, and (2) the new plan provision is suitable. *Peabody II,* 15 FMSHRC 628. The Commission is bound by the substantial evidence test when reviewing an administrative law judge's factual determination. 30 U.S.C. § 823(d)(2)(A)(ii)(I). "Substantial evidence" means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *See, e.g., Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (November 1989), *quoting Consolidation Edison Co. v. NLRB,* 305 U.S. 197, 229 (1938). We are guided by the settled principle that, in reviewing the whole record, an appellate tribunal must also consider anything that "fairly detracts" from the weight of the evidence that may be considered as supporting a challenged finding. *Universal Camera Corp. v. NLRB,* 340 U.S. 474, 488 (1951).

The Secretary's concern with ventilation of deep cuts during roof bolting originated with a report by MSHA's Pittsburgh Safety and Health Technology Center, "Ventilation Requirements and Procedures for Extended (Deep) Cuts with Remote Controlled Continuous Miners." Tr. I 26-31; Gov't Ex. 2. In response to that report, the Secretary began reviewing plans to determine whether and how deep cuts should be ventilated. Tr. I 48-49. The Secretary concluded that Martwick's previous plan requiring no ventilation during the roof bolting stage was inadequate. Tr. II 14-15, 82-84; Tr. III 71.

Further, Peabody's own ventilation study revealed that methane was released at faces following deep cuts. The Martwick Mine liberates large amounts of methane and is subject to 15-day review under section 103(i) of the Mine Act. 15 FMSHRC 1703-04. The record confirms the inherently unpredictable nature of methane liberation. Tr. III 28, 41-42, 71, 215-17, 224-25. Additionally, as the judge found, the roof bolter presented an ignition source and posed an "extreme potential hazard" under the prior plan if methane were to accumulate at dangerous levels. 15 FMSHRC at 1705. The Secretary's tracer gas tests also demonstrated that, without the recommended provision, sufficient air to dilute methane concentrations did not reach the face. Concerning the suitability of the new provision, the Secretary's tracer gas tests showed that the new provision would adequately ventilate the face and dilute any methane concentrations present.

Accordingly, we find that substantial record evidence supports the judge's finding that the previously approved plan was unsuitable and the new provision was suitable to conditions at the Martwick Mine.

We reject Peabody's assertion that the judge based his decision, in part, on a mistaken belief that the Secretary's regulations require a certain level of ventilation during roof bolting. PDR at 8; P. Br. at 21-22. We agree with the Secretary (S. Br. at 19 n.9) that the judge did not rest his determination on an assumption that ventilation of deep cuts during roof bolting was

required by mandatory standards. Rather, the judge concluded that the Secretary had presented sufficient evidence to prove that such ventilation was suitable to the Martwick Mine. 15 FMSHRC at 1705.[5]

Peabody also asserts that its prior plan required a deflector curtain in deep cuts. PDR at 13; P. Br. at 27-28. If this is an argument that the prior plan contained the same line curtain requirement as the proposed provision, we reject it. The prior plan did not require installation of curtain before completion of roof bolting and did not specify minimum airflow or a particular length of line curtain, the requirements that the Secretary sought to impose in the new provision.

We need not reach the Secretary's argument that, because a plan provision once approved by the Secretary has the same legal effect as a mandatory standard, he is to be accorded deference and the plan provision is to be reviewed under an arbitrary and capricious standard of review. S. Br. 26-28. The Secretary's position on this issue was rejected by the judge (*see* Order Denying Motion for Summary Decision, May 22, 1991) and the Secretary did not seek review. The issues on review were defined by the Commission's remand order and are narrowly focused--whether the Secretary carried his burden of proving that the previously approved plan was unsuitable and that the new plan provision was suitable to the conditions at the Martwick Mine. While we note, as did the court in *UMWA v. Dole,* 870 F. 2d at 669 n.10, that the plan approval process involves an element of judgment on the part of the Secretary,[6] when that judgment is challenged, the Secretary must sustain his burden of proof with regard to suitability.

---

[5] Given our conclusion, we need not rule on Peabody's assertion that no minimum level of ventilation is required during roof bolting. However, we note that section 303(b) of the Mine Act, 30 U.S.C. § 863(b), requires delivery of a minimum quantity of 3,000 cfm of ventilating air at each "working face."

[6] *See also Monterey Coal Co.,* 5 FMSHRC 1010, 1019 (June 1983) (withdrawal of approval of water impoundment plan was not arbitrary or capricious where MSHA's conduct throughout the process was reasonable).

III.

Conclusion

For the foregoing reasons, we affirm the judge's decision.

Mary Lu Jordan, Chairman

Arlene Holen, Commissioner

Marc Lincoln Marks, Commissioner

Distribution

David R. Joest, Esq.
Peabody Coal Company
1951 Barrett Court
P.O. Box 1990
Henderson, KY 42420

Jerold S. Feingold, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd., Suite 400
Arlington, VA 22203

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

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

May 23, 1996

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	: : :	
v.	:	Docket No. PENN 94-71-R
LION MINING COMPANY	:	

BEFORE: Jordan, Chairman; Holen, Marks, and Riley, Commissioners[1]

DECISION

BY THE COMMISSION:

This contest proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act" or "Act"), involves a citation issued to Lion Mining Company ("Lion") alleging a violation of 30 C.F.R. § 75.220(a)(1) (1995) for failure to comply with its approved roof control plan.[2] Administrative Law Judge T. Todd Hodgdon concluded that Lion violated the standard, but that the violation was not significant and substantial ("S&S") and was not the result of Lion's unwarrantable failure. 16 FMSHRC 641 (March 1994) (ALJ). The Commission granted the Secretary of Labor's petition for discretionary review, which challenges the judge's S&S and unwarrantable failure determinations. For the reasons that follow, we vacate those determinations and remand.

---

[1] Commissioner Doyle participated in the consideration of this matter but resigned from the Commission before its final disposition.

[2] Section 75.220(a)(1) provides in pertinent part:

> Each mine operator shall develop and follow a roof control plan, approved by the District Manager, that is suitable to the prevailing geological conditions, and the mining system to be used at the mine. . . .

I.

Factual and Procedural Background

On November 17, 1993, Inspector Kenneth Fetsko of the Department of Labor's Mine Safety and Health Administration ("MSHA") inspected the four and one-half right pillar section ("4½ section") at Lion's Grove No. 1 underground coal mine near Jennerstown, Pennsylvania. 16 FMSHRC at 641; Gov't Ex. 9. He was accompanied by Lion's safety director, Mike Bittner. Tr. 32-33. At the 37/44 crosscut, between Pillar Block ("Block") 37 and Block 44, Fetsko observed a continuous miner loading coal into three or four shuttle cars in the roadway between Blocks 37 and 38. 16 FMSHRC at 641-42. Fetsko also saw Mine Superintendent Arthur Jones and Section Foreman Ted Marines across the roadway in the crosscut between Blocks 38 and 39. *Id.* The 38/39 crosscut had been roof bolted and breaker posts and radius turn posts had been installed, but roadway posts had not. *Id.* at 642, 646. Fetsko then observed the continuous miner make a notch cut from the right side of Block 37. *Id.* at 642; Joint Ex. 1; Tr. 71. Marines left for a short time and, upon returning, ordered roadway posts delivered to the crosscut. 16 FMSHRC at 647. Fetsko issued a citation to Lion under section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), for violating its roof control plan by failing to install roadway posts in the 38/39 crosscut before making the notch cut.[3] 16 FMSHRC at 642; Gov't Ex. 1. Fetsko designated the violation S&S and alleged that it was the result of Lion's unwarrantable failure. *Id.* Lion abated the violation by installing four roadway posts in the crosscut. 16 FMSHRC at 642; Gov't Exs. 1, 4; Tr. 74, 86-87.

Lion conceded the violation but contested the S&S and unwarrantable failure designations. 16 FMSHRC at 643. Accordingly, the judge found a violation. *Id.* The judge concluded, however, that the violation was not S&S. *Id.* at 645-46. He found that the Secretary failed to establish that a serious injury was reasonably likely to have resulted from Lion's failure to install the roadway posts. *Id.* at 645. The judge determined that Lion, at the time, had several other means of preventing a roof fall. *Id.* at 646. He emphasized that the area in question had been completely roof bolted and that breaker posts and radius turn posts had also been installed. *Id.* Additionally, the judge stated it was not clear that the sole, or even the primary function, of roadway posts was roof support. *Id.* at 645. The judge also concluded Inspector Fetsko was mistaken in believing Block 37 had been mined previously, before the notch was cut. *Id.* at 646 & n.4.

The judge additionally concluded the violation did not result from Lion's unwarrantable failure, but rather resulted from moderate negligence. *Id.* at 647-48. He concluded record evidence was insufficient to demonstrate either that the mine superintendent or the section

---

[3] Lion's roof control plan requires that roadway posts be installed in roof bolted entries, rooms, and crosscuts to limit the roadway width to 18 feet. Gov't Ex. 2, note 7 to Drawing A (Plan for Installing Roof Supports for Pillar Recovery).

foreman "deliberately and consciously failed to act or engaged in aggravated conduct." *Id.* at 647. Furthermore, he found that additional mining of Block 37 would not have taken place until after the roadway posts were installed. *Id.*

II.

Disposition

A. Significant and Substantial

The Secretary argues the judge erroneously determined the violation was not S&S because he failed to find that the function of roadway posts was roof support and because he improperly gave weight to Lion's compliance with other parts of the roof control plan. S. Br. at 5, 7-8. The Secretary also argues that the judge failed to consider adequately the history of roof falls in the 4½ section and roof conditions at the time of the citation and that he failed to consider general evidence that roof falls are the leading cause of fatalities in mines. *Id.* at 5-6.

In response, Lion submits that substantial evidence supports the judge's finding that the violation was not S&S. L. Br. at 7-16. Lion points to other roof support in the area. *Id.* at 10. It also argues that, at the time of citation, only a small part of the pillar had been mined and that further mining would not have taken place until after roadway posts were installed. *Id.* at 10-11.

The S&S terminology is taken from section 104(d)(1) of the Act and refers to more serious violations. A violation is S&S if, based on 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 Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825-26 (April 1981). In *Mathies Coal Co.*, 6 FMSHRC 1 (January 1984), the Commission further explained:

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

Id. at 3-4 (footnote omitted). *See also Buck Creek Coal, Inc. v.* FMSHRC, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Secretary of Labor*, 861 F.2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria).

Substantial evidence does not support the judge's S&S determination.[4] The judge's approach to weighing record evidence was unduly restrictive and reflects a misunderstanding as to the purpose of roadway posts. In concluding that the Secretary had not satisfied the third *Mathies* element, the judge emphasized that the area was completely roof bolted and contained breaker and radius posts. 16 FMSHRC at 646. Under the roof control plan, however, Lion was required to install roadway posts before it could commence mining Block 37, which would cause a reduction in roof support. *Id.* at 643; L. Posthearing Br. at 6; S. Posthearing Br. at 4-5. The judge failed to recognize that roof bolting and other posts were adequate support for roof conditions only *before* mining of the pillar. Thus, we conclude the judge erred in placing undue weight on the operator's compliance with the applicable roof bolting, breaker, and radius post requirements.

The judge also failed to understand that the function of required roadway posts was to provide roof support. The judge stated:

> [A]ccording to the *Dictionary of Mining, Mineral, and Related Terms* 931 (1968) ["*DMMRT*"], roadway supports, which include roadway posts, serve two functions, to: "(1) ensure safety by preventing falls of ground, and (2) maintain the maximum possible roadway size by resisting the tendency of the roadway to contract and distort." It is not at all clear from Lion Mining's roof control plan that the sole, or even the primary, function of the roadway posts in this case was to serve as roof support.

16 FMSHRC at 645 (footnote omitted). The judge erred in failing to find that a principal function of roadway posts is roof support. He apparently did not realize that "falls of ground," cited by the *DMMRT* as a hazard against which roadway supports protect, refers to "[r]ock falling from the roof into a mine opening." *DMMRT* at 410. He also noted that section 75.207(c), 30 C.F.R. § 75.207(c), does not require installation of roadway posts until mining on

---

[4] The Commission is bound by the substantial evidence test when reviewing an administrative law judge's factual determinations. 30 U.S.C. § 823(d)(2)(A)(ii)(I). "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). While we do not lightly overturn a judge's factual findings and credibility resolutions, neither are we bound to affirm such determinations if only slight or dubious evidence is present to support them. *See, e.g., Krispy Kreme Doughnut Corp. v. NLRB*, 732 F.2d 1288, 1293 (6th Cir. 1984); *Midwest Stock Exchange, Inc. v. NLRB*, 635 F.2d 1255, 1263 (7th Cir. 1980). We are guided by the settled principle that, in reviewing the whole record, an appellate tribunal must also consider anything in the record that "fairly detracts" from the weight of the evidence that supports a challenged finding. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951).

the final stump commences, which had not occurred here. 16 FMSHRC at 645 n.3. The judge's reliance upon section 75.207(c) is misplaced. That standard specifies procedures for pillar recovery that are required "unless otherwise specified in the roof control plan."[5] Lion concedes that its plan required roadway posts to be installed before pillars are mined in order to provide additional roof support. *See* Tr. 26, 38, 129; L. Br. at 4.

We agree with the Secretary that the judge also erred in failing to consider the history of roof falls in the section. The area experienced roof falls on five occasions within two years prior to the instant violation. Gov't Exs. 3, 5, 6; Tr. 43; S. Br. at 6-7. Indeed, the previous day a roof fall occurred only two pillar blocks away from Block 37.[6] Tr. 43, 50-51; Gov't Exs. 3, 5, 6. We reject the Secretary's argument, however, that the judge erred in failing to consider general evidence on the danger of roof falls. The Commission has held that an S&S determination must be based on the particular facts surrounding the violation, including the nature of the mine. *See Texasgulf, Inc.*, 10 FMSHRC 498, 501 (April 1988).

For the foregoing reasons, we vacate the judge's S&S determination and remand for further analysis.

B. Unwarrantable Failure

The Secretary argues that the judge failed to address adequately evidence that Lion had a history of roof falls and roof control plan citations in the section, including several for failing to install roadway posts. S. Br. at 9-11. The Secretary also notes that both the mine superintendent and the section foreman observed the continuous miner removing coal from the pillar in violation of the roof control plan without ordering mining to cease. *Id.* at 9-12.

Lion avers that, as soon as the section foreman became aware of the cited condition, he immediately ordered cessation of mining and the delivery of posts to the area. L. Br. at 18. Lion

---

[5] Section 75.207 provides in pertinent part:

> Pillar recovery shall be conducted in the following manner, unless otherwise specified in the roof control plan:
>
> . . . .
>
> (c) Before mining is started on a final stump . . . .

[6] Inspector Fetsko testified that, between Blocks 38 and 39, he observed that the "rib was rolling," i.e., that pieces of the rib were breaking off. Tr. 39, 65-66. While the judge generally referred to this testimony in his decision, 16 FMSHRC at 645, he apparently did not consider it in his S&S analysis. On remand, he should do so.

also submits that the mine superintendent was not negligent because he had only recently been employed at the mine and was not familiar with all details of the roof control plan. *Id.* at 18-19. Lion further argues that the violation existed for only the last ten seconds of the 20- to 30-minute period the inspector observed the continuous miner working. *Id.* at 20.

The unwarrantable failure terminology is taken from section 104(d)(1) of the Act and refers to more serious conduct by an operator in connection with a violation. In *Emery Mining Corp.*, 9 FMSHRC 1997 (December 1987), the Commission determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Id.* at 2001. Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference" or a "serious lack of reasonable care." *Id.* at 2003-04; *Rochester & Pittsburgh Coal Corp.*, 13 FMSHRC 189, 193-94 (February 1991); *see also Buck Creek Coal, Inc. v. FMSHRC,* 52 F.3d at 136 (approving Commission's unwarrantable failure test).

In *Mullins and Sons Coal Co.,* 16 FMSHRC 192, 195 (February 1994), the Commission set forth factors to be considered in making an unwarrantable failure analysis: "the extensiveness of the violation, the length of time the violative condition has existed, the operator's efforts to eliminate the violative condition, and whether an operator has been placed on notice that greater efforts are necessary for compliance." The Commission has also examined conduct of supervisory personnel in determining unwarrantable failure. A heightened standard of care is required of such individuals. *See Youghiogheny & Ohio Coal Co.,* 9 FMSHRC 2007, 2011 (December 1987); *S&H Mining, Inc.*, 17 FMSHRC 1918, 1923 (November 1995).

The judge erroneously determined that Lion had never been cited for failing to install roadway posts. *See* 16 FMSHRC at 647. Lion received two such citations within two months of the subject citation for violations on the same section. Gov't Ex. 8. In addition, during the preceding nine months, MSHA cited Lion for four other roof control violations in the section. *Id.* There were also five roof failures in the section within two years of the citation, including one roof fall the day before the citation. Gov't Exs. 3, 5, 6; Tr. 43; S. Br. at 6-7. This history of roof violations and roof falls should have placed Lion on notice that greater efforts were necessary for compliance. *See Youghiogheny & Ohio,* 9 FMSHRC at 2010-11; *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (August 1992).

The judge also observed that record evidence was not sufficient to establish that Mine Superintendent Jones and Section Foreman Marines "deliberately and consciously failed to act or engaged in aggravated conduct."[7] 16 FMSHRC at 647. Superintendent Jones saw the notch being mined and did not order mining to be stopped. Tr. 125, 128. The judge, however, noted

---

[7] A "deliberate and conscious failure to act" is not determinative of an unwarrantable finding. *See S&H,* 17 FMSHRC at 1923. The judge, however, references and applies the correct test for determining unwarrantability. 16 FMSHRC at 646-47. *See Emery,* 9 FMSHRC at 2003-04; *Rochester & Pittsburgh*, 13 FMSHRC at 193-94.

Jones' testimony that he did not know about the roof control plan provisions concerning roadway posts and was not required to know all provisions of the plan. 16 FMSHRC at 647, *citing* Tr. 124. Accordingly, the judge found that, even if Jones had a duty to know the roof control plan and breached that duty, the breach was "not necessarily an 'unwarrantable failure.'" 16 FMSHRC at 647. The judge did not consider that Jones had approximately 21 years of mining industry experience, had been employed by Lion as mine superintendent for eight months, and was in charge of safety and health at the mine. Tr. 121-22, 125. Jones also conceded that erecting roadway posts was "a common part of the roof control plan." Tr. 127. In addition, the judge should consider Jones' testimony that he believed the roof control plan allowed roadway posts to be erected after pillar extraction began (Tr. 128-29) and whether that interpretation was reasonable. *See Cyprus Plateau Mining Corp.*, 16 FMSHRC 1610, 1615 (August 1994). Consideration should also be given to the Secretary's admission that the plan did not expressly require that roadway post installation should occur before commencement of pillar extraction. S. Br. at 8 n.5.

With respect to Foreman Marines, the judge found that Marines "left [the] area for a short time . . . and that when he returned the last shuttle car was being loaded, including coal from the notch" and that "he told the shuttle car operator to return with timber to install the roadway posts . . . ." 16 FMSHRC at 647. Marines testified that he saw the notch being cut and did not order mining to cease "till [the continuous miner operator] finished that shuttle car." Tr. 134, 135, 137. The judge should have considered in his analysis that Marines observed the violation in progress and failed to immediately order cessation of mining. The continuous miner operator also testified that he intended to continue mining at the time in question. Tr. 112. The judge should reconsider his findings in light of this testimony.

The judge did not determine whether Inspector Fetsko's presence served as the impetus for ordering the roadway posts. Although he relied on Marines' testimony that the inspector did not explicitly remind him to install the posts, 16 FMSHRC at 647, the judge did not evaluate the potential influence of the inspector's presence. Moreover, the inspector had conversations with other management officials in which he pointed out the lack of roadway posts.[8] In reconsidering his finding that "further mining of Pillar Block 37 would not have taken place until after the roadway posts were installed," the judge should take into account the inspector's presence and the conversations between the inspector and mine officials. *Id.*

We vacate the judge's determination and remand for further analysis of whether the violation resulted from Lion's unwarrantable failure. Clarification by the judge of the

---

[8] According to the inspector's notes and testimony, immediately after he pointed out the problem to one of the management officials, that official looked over to where Jones and Marines were in the crosscut and then went over and started measuring for posts. Gov't Ex. 5; Tr. 34-36. During the time Inspector Fetsko observed the area, he could see that Jones was in the crosscut between Blocks 38 and 39 the entire time, while Marines left the area and returned. Tr. 40.

chronology of events will be relevant to his analysis. A judge must analyze and weigh the relevant testimony of record, make appropriate findings, and explain the reasons for his decision. *Mid-Continent Resources, Inc.*, 16 FMSHRC 1218, 1222 (June 1994).

III.

Conclusion

For the foregoing reasons, we vacate the judge's determinations that the violation was not S&S and not the result of unwarrantable failure. We remand for analysis consistent with this opinion.

Mary Lu Jordan, Chairman

Arlene Holen, Commissioner

Marc Lincoln Marks, Commissioner

James C. Riley, Commissioner

Distribution

Susan E. Long, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd., Suite 400
Arlington, VA 22203

Joseph A. Yuhas, Esq.
1809 Chestnut Avenue
P.O. Box 25
Barnesboro, PA 15714

Administrative Law Judge T. Todd Hodgdon
Federal Mine Safety & Health Review Commission
5203 Leesburg Pike, Suite 1000
Falls Church, VA 22041

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

May 28, 1996

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket Nos. WEST 95-95-M
	:	WEST 95-112-M
GENERAL CHEMICAL CORPORATION	:	WEST 94-583-RM through
	:	WEST 94-591-RM

BEFORE: Jordan, Chairman; Holen, Marks and Riley, Commissioners

ORDER

BY THE COMMISSION:

These civil penalty and contest proceedings arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994). In June and July 1994, the Secretary of Labor issued nine citations to General Chemical Corporation ("General Chemical") alleging insubstantial stoppings in violation of 30 C.F.R. § 57.22218(a) (1995) and a citation alleging a failure to report an accident in violation of 30 C.F.R. § 50.10 (Citation No. 4338810). In August 1994, General Chemical filed notices of contest for all the citations except Citation No. 4338810. The nine citations became the subject of contest and civil penalty proceedings, while Citation No. 4338810 became the subject of only a civil penalty proceeding. On November 29, 1995, the Secretary filed a motion to vacate the civil penalty and contest proceedings. On December 12, 1995, Administrative Law Judge August Cetti issued an Order of Dismissal.

On March 18, 1996, the Commission received an Unopposed Motion for Amended Order of Dismissal from General Chemical. General Chemical states that, although Citation No. 4338810 was part of the civil penalty proceeding that was dismissed, it was not specifically referenced in the dismissal order. Mot. at 3. It asserts that confusion may exist as to whether the dismissal order includes Citation No. 4338810. *Id.* at 2. It therefore requests that an amended dismissal order be issued, specifically referencing Citation No. 4338810. *Id.* at 3.

The judge's jurisdiction over this case terminated when his dismissal order was issued on December 12, 1995. 29 C.F.R. § 2700.69(b) (1995). 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). If the Commission does not direct review within 40 days of a decision's issuance, it becomes a final decision of the Commission. 30 U.S.C. § 823(d)(1). General Chemical's motion was received by the Commission on March 18, after the judge's dismissal order had become a final decision of the Commission. Under these circumstances, we shall treat General Chemical's motion as a late-filed petition for discretionary review requesting amendment of a final Commission decision. *See Transit Mixed Concrete Co.*, 13 FMSHRC 175, 176 (February 1991).

A final Commission judgment or order may be reopened under Fed. R. Civ. P. 60(b)(1) & (6) in circumstances such as mistake, inadvertence, excusable neglect, or other reasons justifying relief. 29 C.F.R. § 2700.1(b) (Federal Rules of Civil Procedure apply "so far as practicable" in the absence of applicable Commission rules); *e.g., Lloyd Logging, Inc.*, 13 FMSHRC 781, 782 (May 1991). The judge did not directly refer to Citation No. 4338810 in the caption or the body of the dismissal order. General Chemical asks that the order be amended to specifically reference Citation No. 4338810. The Secretary does not oppose the motion. Accordingly, we reopen these proceedings, grant the motion, and issue an Amended Order of Dismissal. *See Martin Marietta Aggregates*, 16 FMSHRC 189, 190 (February 1994).

Mary Lu Jordan, Chairman

Arlene Holen, Commissioner

Marc Lincoln Marks, Commissioner

James C. Riley, Commissioner

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR

WASHINGTON, D.C. 20006

May 28, 1996

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. WEST 95-95-M
	:	MSHA Case No. 48-00155-05644
	:	Citation Nos. 4338810, 4338812, and 4338820
v.	:	
GENERAL CHEMICAL CORPORATION, Respondent	:	Docket No. WEST 95-112-M
	:	MSHA Case No. 48-00155-05643
	:	Citation Nos. 4338813 through 4338819
	:	General Chemical Mine
	:	Mine I.D. 48-00155
GENERAL CHEMICAL CORPORATION, Contestant	:	CONTEST PROCEEDINGS
	:	Docket Nos. WEST 94-583-RM through WEST 94-591-RM
v.	:	Citation Nos. 4338812 through 4338820
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	General Chemical Mine
	:	Mine I.D. 48-00155

BEFORE: Jordan, Chairman; Holen, Marks and Riley, Commissioners

AMENDED ORDER OF DISMISSAL

BY THE COMMISSION:

General Chemical Corporation ("General Chemical") has filed a Motion for Amended Order of Dismissal and the motion is unopposed by counsel for the Secretary of Labor, Mine Safety and Health Administration ("MSHA"). The motion having been considered, and good cause appearing:

Wherefore, it is ordered that the Order of Dismissal issued December 12, 1995, be amended to reflect that Citation No. 4338810 was included therein and is therefore dismissed.

Mary Lu Jordan, Chairman

Arlene Holen, Commissioner

Marc Lincoln Marks, Commissioner

James C. Riley, Commissioner

Distribution:

Matthew F. McNulty, III
General Chemical Corporation
50 South Main Street
Suite 1600
P.O. Box 45340
Salt Lake City, UT 84145

Chris Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd.
Arlington, VA 22203

Kristi Floyd, Esq.
Office of the Solicitor
U.S. Department of Labor
1999 Broadway, Suite 1600
Denver, Colorado 80202-5716

Administrative Law Judge August F. Cetti
Office of the Administrative Law Judges
Colonnade Center, Room 280
1244 Speer Boulevard
Denver, Colorado 80204

ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1244 SPEER BOULEVARD #280
DENVER, CO 80204-3582
303-844-5266/FAX 303-844-5268

MAY 2 1996

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEST 94-452 A.C. No. 42-01697-03669
v.	:	Bear Canyon No. 1
C.W. MINING COMPANY, Respondent	:	

DECISION

Appearances: Robert Cohen, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Petitioner;
Carl E. Kingston, Esq., Salt Lake City, Utah, for Respondent.

Before: Judge Cetti

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, 30 U.S.C. § 801 et seq. the "Act." The Secretary of Labor on behalf of the Mine Safety and Health Administration, (MSHA), charges the Respondent, C.W. Mining Company, the operator of the Bear Canyon No. 1 Mine with four regulatory safety violations found in Part 57 Title 30 Code of Federal Regulations.

Respondent filed a timely answer denying each of the alleged violations. Pursuant to notice to the parties, this matter came up for hearing in Salt Lake City on April 2, 1996.

At the hearing, counsel for the Secretary stated that Citation No. 3588363 is a 104(d)(1) citation for an alleged inadequate preshift examination for the second east pillar section of the mine. As part and reason for the inadequate preshift examination this citation mentions two other citations, Nos. 3588361 and 3588362, not in this docket which describe the actual conditions that were cited but allegedly were not observed in the preshift examination. These two underlying citations were in another docket heard by a different judge, i.e. Docket No. WEST 94-380. With respect to the instant Citation No. 3588363, counsel for the Secretary stated:

> That based on the decision in WEST 94-380 we reviewed again the instant citation for inadequate preshift examination and "because the two underlying citations have been changed now, and the (other) Judge held that the loose coal dust violation was a Non S and S violation, we felt that we should reduce this particular (d)(1) citation to a 104(a) citation and remove the S and S findings and reduce the penalty from $2,800.00 to $200.00, and that's what the parties have agreed to."

The remaining three violations issued for a violation of sections 75.400, 75.1725(a) and 75.512 were discussed and re-evaluated. After speaking to the inspector, a more accurate picture of the conditions stated in the citations was obtained. The parties agreed to modify Citation No. 3588365 from a 104(d)(1) order to a 104(d)(1) citation and reduced the penalty to $1,000.00 pointing out that the underlying 104(d)(1) citation for the order no longer existed.

The parties agreed on a penalty of $500.00 for Citation No. 3588367 and $500.00 for Citation No. 3588367.

Upon review of the record, including the information given at the hearing, I conclude the settlement agreed upon on the record at the hearing is consistent with the criteria in section 110(i) of the Act.

ORDER

In view of the foregoing it is **ORDERED:**

1. Citation No. 3588363 is modified to a 104(a) citation with the S&S finding deleted and as so modified is **AFFIRMED** and a penalty of $200.00 is assessed for this violation.

2. Order No. 3588365 is modified to a 104(d)(1) citation and as so modified is **AFFIRMED** and a penalty of $1,000.00 is assessed for the violation.

3. Citation No. 3588366 is **AFFIRMED** as written and a penalty of $500.00 is assessed for this violation.

4. Citation No. 3588367 is **AFFIRMED** as written and a penalty of $500.00 is assessed for this violation.

It is further ordered that C.W. Mining Company is shall **PAY** the Secretary of Labor civil penalties in the sum of $2,200.00 within 30 days of this decision.

August F. Cetti
Administrative Law Judge

Distribution:

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

Carl E. Kingston, Esq., C.W. MINING COMPANY, 3212 South State Street, P.O. Box 15809, Salt Lake City, UT 84115
(Certified Mail)

/sh

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1244 SPEER BOULEVARD #280
DENVER, CO 80204-3582
303-844-3993/FAX 303-844-5268

MAY 2 1996

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEST 94-560-M A.C. No. 48-00152-05636
v.	:	
	:	FMC Trona Mine
FMC WYOMING CORPORATION, Respondent	:	

DECISION

Appearances: Robert Cohen, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Petitioner;
Matthew F. McNulty, III, Esq., Van Cott, Bagley, Cornwall & McCarthy, P.C., Salt Lake City, Utah, for Respondent.

Before: Judge Cetti

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, 30 U.S.C. § 801 et seq. the "Act." The Secretary of Labor on behalf of the Mine Safety and Health Administration, (MSHA), charges the Respondent, FMC Wyoming Corporation (FMC), the operator of the Trona Mine with two violations of 30 C.F.R. § 57.14213 which require use of arc shields when arc welding is performed where persons could be exposed to the arc flash. [1]

Respondent filed a timely answer contending there was no violation. Pursuant to notice to the parties, the matter was set for hearing on April 2, 1996, at Salt Lake City.

During the hearing, the parties on the record entered into a settlement agreement. It is undisputed that the inspector came by and saw a momentary arc flash that was promptly abated in each case. The operator, explaining why the matter had not been set-

[1] Originally this docket included 2 other citations charging violations involving methane monitoring and methane levels. Those citations were bifurcated into Docket No. WEST 94-560-M-A and previously resolved by my Decision Approving Settlement.

tled prior to hearing, stated that representatives of the local union felt the union welders involved were not violating the standard and were urging the operator not to settle the case. The operator requested the record to reflect that it is not admitting a violation but for "litigation purposes" is agreeing to a settlement of the issues involved in this case. Under the proffered agreement, FMC will pay a $50.00 civil penalty for each of the alleged violations.

Upon review of the record, including the information given at the hearing, I conclude the settlement agreed upon on the record at the hearing is consistent with the criteria in section 110(i) of the Act.

ORDER

Accordingly, Citation No. 3906527 is **AFFIRMED** as written and a penalty of $50.00 is assessed.

Citation No. 4405824 is **AFFIRMED** as written and a penalty of $50.00 is assessed.

It is further **ORDERED** that FMC Wyoming Corporation **PAY** the approved civil penalties in the sum of $100.00 to the Secretary of Labor within 30 days of this decision. Upon receipt of pay-payment, this case is dismissed.

August F. Cetti
Administrative Law Judge

Distribution:

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

Matthew F. McNulty, III, Esq., VAN COTT, BAGLEY, CORNWALL & McCARTHY, P.C., 50 South Main Street, Suite 1600, P.O. Box 45340, Salt Lake City, UT 84145 (Certified Mail)

/sh

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1244 SPEER BOULEVARD #280
DENVER, CO 80204-3582
303-844-3993/FAX 303-844-5268

MAY 2 1996

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEST 94-699-M A.C. No. 48-00152-05639
v.	:	
FMC WYOMING CORPORATION, Respondent	:	FMC Trona Mine

DECISION

Appearances: Robert Cohen, Esq., Office of the Solicitor U.S. Department of Labor, Arlington, Virginia, for Petitioner;
Matthew F. McNulty, P.C., Salt Lake City, Utah, for Respondent.

Before: Judge Cetti

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, 30 U.S.C. § 801 et seq. the "Act." The Secretary of Labor on behalf of the Mine Safety and Health Administration, (MSHA), charged the Respondent, FMC Wyoming Corporation (FMC), the operator of the Trona Mine with the violation of two regulatory safety standards set forth in Part 57 Title 30 Code of Federal Regulations.

The operator filed a timely answer contending there were no violations of the cited safety standards. Pursuant to notice to the parties, the matter came up for hearing at Salt Lake City on April 2, 1996.

Citation No. 4405834 alleges a violation of 30 C.F.R. § 57.14107(a) which requires the guarding of moving machine parts. At the hearing, counsel for the Secretary, after viewing pictures of the affected area, stated for the record that Citation No. 4405834 was being vacated. He explained on the record the reason why it was determined that the citation should be vacated.

The coupling and drive shaft between the motor and the hoist was indeed guarded but there was a close question whether it was adequately guarded. At the hearing, after viewing the picture of

the guard and its related drive shaft and the coupling, the parties agreed the citation should be vacated.

Originally this docket included Citation No. 4125239 which charged the operator with the violation of 30 C.F.R. § 57.5050 involving exposure limits for noise. This citation was vacated by MSHA.

ORDER

Both Citation Nos. 4405834 and 4125239 are **VACATED** and this case is **DISMISSED.**

August F. Cetti
Administrative Law Judge

Distribution:

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

Matthew F. McNulty, III, Esq., VAN COTT, BAGLEY, CORNWALL & McCARTHY, P.C., 50 South Main Street, Suite 1600, P.O. Box 45340, Salt Lake City, UT 84145 (Certified Mail)

/sh

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1244 SPEER BOULEVARD #280
DENVER, CO 80204-3582
303-844-3993/FAX 303-844-5268

MAY 2 1996

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEST 95-193 A.C. No. 42-01697-03675
v.	:	Bear Canyon #1
C.W. MINING COMPANY, Respondent	:	

DECISION

Appearances: Robert Cohen, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Petitioner;
Carl E. Kingston, Esq., Salt Lake City, Utah, for Respondent.

Before: Judge Cetti

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, 30 U.S.C. § 801 et seq. the "Act." The Secretary of Labor on behalf of the Mine Safety and Health Administration, (MSHA), charges the Respondent, C.W. Mining Company, the operator of Bear Canyon #1 Mine, with the violation of a respirable dust violation of the regulatory safety standard 30 C.F.R. § 70.100(a).

The single citation at issue describes the violation as follows:

> Based on the results of five valid dust samples collected by the operator, the average concentration of respirable dust in the working environment of the designated occupation code 036 in mechanized mining united 003-0 was 1.9 milligrams which exceeded the applicable limit of 1.2 milligrams. Management shall take corrective actions to lower the respirable dust and then sample each production shift until five valid samples are taken and submitted to the Pittsburgh Respirable Dust Processing Laboratory. Approved respiratory equipment shall be made available to all persons working the area.

At the hearing, counsel for the Secretary stated that an older continuous miner, MMU 003-0, was operating under a reduced respirable dust level of 1.2 milligrams of respirable dust per cubic meters of air. The operator placed this older machine in a non-producing status and it was later scrapped. A new continuous miner was purchased and the new machine was also designated as MMU 003-3. MSHA inadvertently assigned the reduced standard of the old machine, MMU 003-0, to the new machine. The new machine should have been operating on a 2.0 milligrams or respirable level per cubic meters of air and not on the old reduced standard of 1.2 milligrams applicable to the old machine. When the operator sent in his samples on the new mechanized unit 003-3, the average concentration of respirable dust was 1.9 milligrams which was above the 1.2 milligrams standard which had erroneously been assigned to the new machine but within the correct 2.0 milligrams standard.

Thus, it was clear that the citation was issued in error. Consequently Citation No. 9997061 is vacated.

ORDER

Citation No. 9997061 is **VACATED** and this case, Docket No. WEST 95-193 is **DISMISSED.**

August F. Cetti

August F. Cetti
Administrative Law Judge

Distribution:

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

Carl E. Kingston, Esq., C.W. MINING COMPANY, 3212 South State Street, P.O. Box 15809, Salt Lake City, UT 84115
(Certified Mail)

/sh

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

MAY 7 1996

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. PENN 95-75
Petitioner	:	A.C. No. 36-05018-04044
v.	:	
	:	Cumberland Mine
CYPRUS CUMBERLAND RESOURCES	:	
CORPORATION,	:	
Respondent	:	

DECISION

Appearances: Joseph T. Crawford, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for the Petitioner;
R. Henry Moore, Esq., Buchanan Ingersoll, P.C., Pittsburgh, Pennsylvania, for the Respondent.

Before: Judge Feldman

This matter is before me as a result of a petition for civil penalty filed by the Secretary of Labor pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, (the Act), 30 U.S.C. § 801 *et seq.* The petition seeks a civil penalty of $2800.00 for an alleged violation of a notice to provide safeguard that had been issued pursuant to section 75.1403, 30 C.F.R. § 75.1403. The subject safeguard violation was designated as significant and substantial (S&S), and allegedly was attributable to the unwarrantable failure of Cyprus Cumberland Resources Corporation (Cumberland).

This case was heard on the merits on February 28, 1996, in Washington, Pennsylvania. The parties' posthearing briefs are of record. For the reasons discussed below, the safeguard violation shall be affirmed. However, the Secretary has failed to carry his burden of establishing that the violation was properly characterized as S&S, or, attributable to the respondent's unwarrantable failure. Consequently, a nominal civil penalty of $100.00 shall be imposed.

Background

Section 75.1403 authorizes a Mine Safety and Health Administration (MSHA) Inspector to issue safeguards that, in the inspector's judgement, are necessary to "minimize hazards with respect to transportation of men and materials...." In 1980, Cumberland voluntarily installed a signal block light system to control traffic on its track haulage at the Cumberland Mine. Under this system, a track section, of varying length, is designated as a "block" by installation of a red light at each end. The red light at both ends of the block can be turned on or off from either end. The operator of a transport vehicle turns on the block lights upon entering the block, and turns off the block lights upon leaving the block. The block lights signal would-be operators seeking to enter a block whether the track in the block is in use.

Over the last 15 years, since the installation of Cumberland's signal block system, MSHA has issued numerous safeguards at the Cumberland Mine. These safeguards include a safeguard requiring Cumberland to maintain its signal blocks, and a safeguard requiring a distance of 300 feet between vehicles traveling in the same block.

Cumberland communicates information to personnel about its haulage system by various methods, including safety messages. On September 27, 1993, Cumberland issued the following safety message concerning use of its signal block system:

1. Stop before pulling onto the main line from any switch. Make sure nothing is coming before pulling out. Remember there may be more than one piece of equipment in a block light. Just because a block light isn't on, doesn't give you the right-of-way. Don't just pull onto the haulage. It's possible the power is off, the block light doesn't work or the operator of the on-coming vehicle missed the block light. If a block light is on, wait for a reasonable length of time, then proceed with caution.

2. Block lights must be used by everyone as they travel the haulage. If a light doesn't work, you should proceed with caution. Report any lights that don't work. (Ex. R-4).

MSHA Supervisor Robert Newhouse and MSHA Inspector Robert Santee testified the safety procedures outlined above were acceptable to MSHA. Cumberland disciplines employees who fail to follow proper haulage procedures.

Preliminary Findings

On October 25, 1993, MSHA Inspectors Frank Terrett and Robert Santee were inspecting the Cumberland facility. On that day, as Terrett was waiting to enter the mine in a mantrip, a crew exiting the mine in their mantrip was traveling too fast and bumped the vehicle in which Terrett was sitting. As a result of this incident, Terrett issued a safeguard, not in issue in this proceeding, requiring vehicles to be operated at speeds consistent with the conditions and the equipment used.

Later that day, on October 25, 1993, Santee encountered a signal block light that had apparently been left on after the vehicle had left the block. Given this condition, and the previous incident involving Terrett, Santee issued Safeguard No. 3655478. This safeguard provided:

> The operator has installed signal block lights along the track haulage at several different locations to be used by track haulage equipment operators to assure such operators that a clear road exists. The signal block lights installed for the 60 Mains to "0" Butt switch were left on.
>
> This is a notice to provide safeguard requiring track haulage equip. operators to use the block lights installed along supply track haulage at the mine, to clear such lights (turn off after use) in order to assure approaching haulage equipment a clear road exists and also only 1 piece of haulage equipment shall be operated in the same block light except trailing locomotives that are an integral part of a trip may be operated the same block light. (Joint Stip. 2)

On November 1, 1993, after discussions between Cumberland and MSHA, Santee, under the direction of his supervisor, modified the safeguard as follows:

> Safeguard No. 3655478 is hereby modified to delete the wording on the last 4 lines in the body of this notice to provide safeguard beginning after the word "and" which is the 8th word on line 9, and to be replaced with the following wording to read as: haulage equipment operating in the same block light, shall maintain a safe distance which will allow them to stop within the limits of visibility, but at no time shall they be closer than 300 feet. Haulage equipment operating in the same block light shall communicate, by some means, to be assured the signal block light will be turned off after the last haulage equipment exits the last block. (Id.)

Thus, the modified safeguard removed the prohibition of more than one vehicle in the same block, and, substituted the requirement that vehicles in the same block must maintain a minimum distance of 300 feet. The modified safeguard also required operators of equipment in the same block to communicate (by hand signals) to ensure that the operator of the last vehicle turns off the block light as he exits the block.[1]

Cumberland transports material and miners in two different varieties of battery powered mantrips called duckbills and crickets. Generally speaking, mantrips are personnel carriers with covered compartments on either end for passengers. Mantrips are operated from a position between the two passenger compartments. Duckbills are similar to mantrips except the cover for one of the compartments is removed to enable supplies to be transported in the open end. Crickets are small, slow-moving personnel carriers that hold four persons. Duckbills are faster than crickets, but travel only 5 to 8 miles per hour.

---

[1] Inspector Santee and MSHA Supervisory Inspector Robert Newhouse testified that Cumberland's haulage car operators relied on verbal communication or hand signals. MSHA does not require the haulage vehicles to be equipped with two-way radios. (Tr. 74-75, 86, 112, 158-59).

On July 14, 1994, maintenance foreman Doug Conklin and hourly mechanic Mark Zuspan were entering the mine in a duckbill operated by Zuspan. Zuspan was an experienced operator. He frequently used the haulage track, and he was familiar with the signal block system. Zuspan and Conklin traveled in the duckbill down the 57 Mains Haulage to where the 55 North haulage turns to the left. The 1A block (first block) on the 55 North haulage off the 57 Mains is 1,200 feet long. There is a curvature in the track entering the 55 North haulage that obscures visibility down the full length of the track. Conklin and Zuspan testified that, as they approached the signal switch for the 1A block in the 55 North haulage, they observed the 1A block lights were illuminated.

A motor attached to two rockdust tanks and a trailing motor were coming out of the 55 North haulage and about to enter the 57 Mains. Conklin exited the duckbill to throw the track switch so Zuspan could pull the duckbill past the 55 North haulage. This permitted the rockdust cars to turn right on the 57 Mains to continue out of the mine. As the dustcars passed the duckbill, Zuspan and the operator of the first motor signaled to each other that they could "have" the others' block light. However, due to a curvature in the track, the operator of the second motor could not see Zuspan's signal to the first motor operator. As Zuspan was moving his duckbill inby on the 57 Mains to clear the way for the outby route of the dustcars, the second motor operator apparently turned off the 1A block light. Both Zuspan and Conklin lost sight of the 1A block because of Zuspan's maneuvering of the duckbill and Conklin's switching of the track to allow the duckbill to turn onto the 55 North haulage.

During the interim period when the second motor operator turned off the signal lights and Conklin had switched the 57 Mains track back to the direction of the 55 North haulage, an inspection party in a cricket turned on the signal lights as it entered the 1A block in the North haulage 1200 feet from the intersection with the 57 Mains. The inspection party consisted of Inspector Santee, Cumberland's representative Mike Konosky, and UMW representative David Chipps. After Conklin reentered the duckbill, Zuspan entered the 55 North haulage under the mistaken belief that the lights activated by the inspection party were left on by the dustcar motorman.

As Zuspan came out of the curve at the beginning of the 1A Block, he observed the lights from the inspection party's cricket at the other end. The track was straight, visibility was good, and the cricket was slow moving. Zuspan had plenty of time and pulled into the 55 North switch and waited for the cricket to pass. While Zuspan and Conklin were waiting, Conklin exited the duckbill to check on a nearby belt drive.

The inspection party had also observed the duckbill from the other end of the block. As they traveled down the 1A Block, Santee informed Konosky that he was issuing a citation for violation of the signal block safeguard. Santee testified that the first conversation he had with Zuspan upon arriving at the 1A switch was about Zuspan's assumption that the block lights had been left on by the motor crew. (Tr. 99, 226). When Conklin returned from the belt drive, Santee learned that Conklin was a foreman who had accompanied Zuspan in the duckbill. Consequently, Santee informed Konosky that the citation "just became an unwarrantable failure." (Tr. 238, Gov. Ex. 5, p.17-18). Santee testified Conklin "confirmed" Zuspan's statement concerning the block lights and the motor crew. (Tr. 99).

As a result of Santee's observations and discussions with Zuspan and Conklin, Santee issued 104(d)(2) Order No. 3672055 alleging the following safeguard violation:

> The ML204 motor being operated by Mark Zuspan under the supervision of Doug Conklin (Maint. Foreman) entered the signal block lights off 57 Main East Supply truck haulage onto 55 Face North signal track haulage between 1A junction as such lights had been turned on by the operator of the ML408 crickett which was traveling outby towards 57 Face North area 57 Main East junction. The ML 204 motor entered such signal block light without assuring that a clear road exists and the Maint. [F]oreman is an acting agent of the operator. There were 16 violations issued during the last inspection period from 04-01-94 to 06-30-94 of 30 CFR 75.1403. (G-1).

Further Findings and Conclusions

a. The Validity of the Safeguard

The threshold issue in this proceeding is whether Safeguard No. 3655478, issued by Santee on October 25, 1993, as amended, is valid. The Commission has noted that section 314(b) of the Act, 30 U.S.C. § 874(b), commits to the Secretary, through his MSHA inspectors, broad discretion to issue safeguards, without operator consultation, in order "to guard against all hazards attendant upon haulage and transport[ation] in coal mining." Southern Ohio Coal Company, 14 FMSHRC 1, 8 (January 1992); Jim Walter Resources, Inc., 7 FMSHRC 493, 496 (April 1985).

In order to issue a notice to provide safeguards, an inspector must: (1) determine that there exists at the mine an actual transportation hazard not covered by a mandatory standard; (2) determine that a safeguard is necessary to correct the hazardous condition; and (3) specify the corrective measures that the safeguard should require. 14 FMSHRC at 8.

In considering Cumberland's obligations to maintain and use its block light system, it is axiomatic that one who chooses to act although there is no duty to act, must act prudently to avoid exposing others to harm. Thus, although Cumberland was not required to install its signal block system, having elected to do so, Cumberland is resposible for maintaining the system and ensuring that its personnel comply with its block light safety procedures. Cumberland recognized this responsibility in its September 27, 1993, safety message which reminded its personnel that "[b]lock lights must be used by everyone as they travel the haulage." (Ex. R-4).

Santee's testimony that he observed a block light on when he issued the subject safeguard on October 23, 1993, is uncontradicted. Although the circumstances surrounding this condition are unknown, this condition manifested a failure to adhere to Cumberland's block light procedures. Thus, it was within Santee's discretion to conclude that the failure to follow Cumberland's block light safety policy posed a transportation hazard at the Cumberland Mine, and that a safeguard notice was necessary to ensure compliance. As noted below, the safeguard, as amended, adequately set forth the corrective measures

required. Consequently, I conclude that Safeguard No. 3655478 was validly issued.

b. Fact of Violation

The subject safeguard, as amended, established four things that operators of haulage equipment must do. They are:

1. Equipment operators are to use the signal block lights installed along supply track haulage at the mine.

2. Equipment operators are to clear such lights (turn off after use) in order to assure approaching haulage equipment a clear road exists.

3. Haulage equipment operating in the same block light, shall maintain a safe distance which will allow them to stop within the limits of visibility, but at no time shall they be closer than 300 feet.

4. Haulage equipment operating in the same block light shall communicate, by some means, to be assured the signal block light will be turned off after the last haulage equipment leaves the light block. (J-3)

In applying the safeguard requirements to the facts in this case, it is necessary to rule on the credibility of Zuspan and Conklin concerning their testimony that they mistakenly assumed the dustcar motor operators had left the block lights on for them. While self-serving exculpatory statements must be viewed cautiously, such statements are entitled to greater weight if they were made spontaneously to the on-site inspector, rather than if the explanation was first presented at trial.

In this case, Santee's testimony is entirely consistent with the testimony of Zuspan and Conklin concerning the exculpatory statements they made to Santee when the 104(d)(2) Order was issued on July 14, 1994. Moreover, although given the opportunity at trial, Santee did not discredit the story related to him by Zuspan and Conklin. In fact, Santee testified that, although he did not recall seeing any motors in the 1A block, he had no reason to doubt Zuspan's story. (Tr. 135-36). Accordingly, I conclude that Zuspan maneuvered the duckbill into

the 55 North haulage under the mistaken belief that the block lights had been left on by the dustcar motorman.

Under this scenario, the first three requirements of the safeguard were not violated in that the block lights were used, they were turned off by the rear motorman, and, there was no operation of vehicles in the same block within 300 feet of each other (in the same direction). However, the Secretary has prevailed in establishing a violation of the safeguard's fourth requirement. By Zuspan and Conklin's own admissions, there was a failure of communication between them and the dustcar motormen to assure that there was no misunderstanding concerning the status of the block lights as Zuspan's duckbill entered the 1A block of the 55 North haulage. Consequently, the record supports the fact of the violation of the safeguard in question.

c. Significant and Substantial

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

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

See also Austin Power Co. v. Secretary, 861 F.2d 99, 104-05 (5th Cir. 1988), *aff'g* 9 FMSHRC 2015, 2021 (December 1987) (approving Mathies criteria).

As noted above, it is crucial that resolution of whether a particular violation is S&S must be based "on the particular facts surrounding the violation...." Texasgulf, Inc., 10 FMSHRC 498, 501 (April 1988). With the exception of respirable dust violations that are presumed to be S&S because of the cumulative effects of respirable dust inhalation, issues concerning S&S and unwarrantable failure must be decided on a case-by-case basis. See Consolidation Coal Co., 8 FMSHRC 890, 898 (June 1986), aff'd 824 F.2d 1071 (D.C. Cir. 1987). In fact, the Commission has recently rejected the concept of relying on rebuttable presumptions to resolve questions of unwarrantable failure. Peabody Coal Company, 18 FMSHRC __, slip op. at 5 (April 19, 1996).

Thus, although violations may appear to be S&S and/or unwarrantable, an examination of the particular facts surrounding the violation may preclude such characterizations. For example, although mining a pillar in violation of a roof control plan would ordinarily manifest an unwarrantable failure, the violation is not unwarrantable where the facts of the particular violation support the operator's contention that contact with the pillar by the continuous miner operator was inadvertent. S & H Mining, Inc., 18 FMSHRC 50 (January 1996) (ALJ).

In the instant matter, this violation of the safeguard did not occur because of a conscious, reckless, or even careless, disregard of the operational block lights. Such conduct surrounding a violation would justify an S&S designation, particularly when viewed in the context of continued normal mining operations. Halfway Incorporated, 4 FMSHRC 8, 12-13 (January 1986).

Here, this violation occurred because of Zuspan's mistaken belief that the block light was left on intentionally by the motorman who had just exited the block. Under such circumstances, it was highly unlikely that a haulage vehicle would be trailing closely behind the dustcars, and pose a hazard to occupants in Zuspan's duckbill. In other words, Zuspan was provided with cover by entering the 55 North haulage track immediately after the dustcars exited the track.

In the final analysis, the Secretary has the burden of proving that a violation is S&S. Union Oil of Cal., 11 FMSHRC 289, 298-99 (March 1989). Given the 1200 foot length of straight track in the 1A block immediately after the initial curve off the 55 Mains, the good visibility, the slow speed of haulage vehicles, and the protection from other vehicles provided by the exiting dustcars, the Secretary has failed to satisfy the third element of Mathies that there was a reasonable liklihood that the hazard contributed to by this violation would result in an accident causing injury. Accordingly, the S&S designation shall be deleted.

d. Unwarrantable Failure

Unwarrantable failure is "aggravated conduct, constituting more than ordinary negligence, by a mine operator in relation to a violation of the Act." Emery Mining Corporation, 9 FMSHRC 1997 (December 1987); Youghiogheny & Ohio Coal Company, 9 FMSHRC 2007 (December 1987); Secretary of Labor v. Rushton Mining Company, 10 FMSHRC 249 (March 1988). In distinguishing aggravated conduct from ordinary negligence, in Youghiogheny & Ohio the Commission stated:

> We stated that whereas [ordinary] negligence is conduct that is 'inadvertent,' 'thoughtless,' or 'inattentive,' unwarrantable conduct is conduct that is described as 'not justifiable' or 'inexcusable.' Only by construing unwarrantable failure by a mine operator as aggravated conduct constituting more than ordinary negligence, do unwarrantable failure sanctions assume their intended distinct place in the Act's enforcement scheme. 9 FMSHRC at 2010.

Under the Act, an operator is liable for its employees' violations of the Act and the mandatory standards. Western Fuels-Utah, Inc., 10 FMSHRC 256, 260-61 (March 1988), aff'd on other grounds, 870 F.2d 711 (D.C. Cir. 1989); Asarco, Inc., 8 FMSHRC 1632, 1634-36 (November 1986), aff'd, 868 F.2d 1195 (10th Cir. 1989); Southern Ohio Coal Co. ("SOCCO"), 4 FMSHRC 1459, 1462 (August 1982). Once liability is determined, the

negligent actions of an operator's "agent"[3] are imputable to the operator for the purpose of assessing civil penalties. Mettiki, 13 FMSHRC at 772; R&P, 13 FMSHRC at 194-98; SOCCO, 4 FMSHRC at 1463-64. However, "[t]he conduct of a rank-and-file miner is not imputable to the operator in determining negligence for penalty purposes." Fort Scott Fertilizer-Cullor, Inc., 17 FMSHRC 1112, 1116 (July 1995) (citing SOCCO, 4 FMSHRC at 1464). "Rather, the operator's supervision, training, and disciplining of [rank-and-file] miners is relevant." Id. (citing SOCCO, 4 FMSHRC at 1464; Western Fuels, 10 FMSHRC at 261).

The evidence reflects Santee initially was inclined to issue a 104(a) citation that did not charge Cumberland with an unwarrantable failure. Significantly, Santee did not view Zuspan's conduct as aggravated conduct. (Tr. 134-35). It was only after Santee learned that Foreman Conklin accompanied Zuspan in the duckbill that Santee charged the violation was unwarrantable. (Tr. 138-40). As noted above, Zuspan's negligence, as a rank-and-file employee, normally cannot not be imputed to Cumberland even if Zuspan's conduct was aggravated conduct. Only if Conklin engaged in aggravated conduct, or, if Conklin failed to adequately supervise Zuspan, can the unwarrantable failure charge be affirmed.

In the first instance, the Secretary has failed to persuade me that either Zuspan or Conklin's conduct manifested more than ordinary negligence. As I noted at trial, it is difficult to imagine what would motivate both Zuspan and Conklin to recklessly or consciously turn on to a single track with block lights reflecting that a vehicle was proceeding down the track in the opposite direction. (See Tr. 206-09).[4] The futility of two vehicles heading in opposite directions on a single haulage track

---

[3] Section 3(e) of the Mine Act defines "agent" as "any person charged with responsibility for the operation of all or a part of a ... mine or the supervision of the miners in a ... mine ...." 30 U.S.C. § 802(e).

[4] The Secretary conceded the only reason Zuspan and Conklin would enter the block with the light on was if they believed the light was left on for them and no other traffic was coming in the opposite direction. (Tr. 208-09).

supports Cumberland's assertion that this incident occurred because of a misunderstanding between Zuspan and Conklin, and the dustcar motormen. This misunderstanding, while unfortunate, cannot be characterized as aggravated conduct. In addition, Zuspan's failure to wait a reasonable period of time before entering the block is not indicative of high negligence given his mistaken belief that the block lights had been left on for him.

Having concluded that there was a simple miscommunication, the record does not reflect a lack of supervision or training by Conklin with respect to his oversight of Zuspan. Santee also agreed that Zuspan's conduct was not attributable to a lack of training. (Tr. 138). Although it is true that a foreman is held to a higher standard of care given his management role, a violation is not unwarrantable *per se* simply because it occurred in the presence of supervisory personnel. See S&H Mining, Inc., 17 FMSHRC 1918, 1923 (November 1995), citing Youghiogheny & Ohio, 9 FMSHRC at 2011. Accordingly, Order No. 3672055 shall be modified to a 104(a) citation to reflect the cited violation of the safeguard was not attributable to Cumberland's unwarrantable failure.

e. Civil Penalty

Section 110(i) of the Mine Act requires the consideration of six penalty criteria in assessing the appropriate civil penalty. 30 U.S.C. § 820(i); see generally Sellersburg Stone Co., v. FMSHRC, 736 F.2d 1147, 1150-51 (7th Cir. 1984). Significant considerations among these statutory penalty criteria are the gravity of the violation and the degree of the operator's negligence.

Having determined that it was unlikely, given the circumstances of this case, that the hazard contributed to by the instant safeguard violation would result in an injury related accident, the gravity of the violation is most appropriately characterized as non-serious. Although Order No. 3672055 specified the degree of Cumberland's negligence as "high," as discussed above neither Zuspan nor Conklin's conduct was indicative of more than ordinary, moderate negligence, and there is no basis for imputation of Zuspan's negligence to Cumberland.

The remaining criteria in section 110(i) are not particularly meaningful in assessing the appropriate civil penalty in this matter. The prior notice provided by MSHA's issuance of 16 citations citing alleged safeguard violations in the two year period preceding the issuance of the subject citation is not material because this violation resulted from a misunderstanding rather than a disregard of the block light procedures.

Given the reduction in gravity from serious to non-serious, and the reduction in the degree of negligence from high to no more than moderate, consistent with the 110(i) penalty criteria, I am assessing a civil penalty of $100.00 for modified 104(a) Citation No. 3672055.

ORDER

Accordingly, 104(d)(2) Order No. 3672055 **IS MODIFIED** to a 104(a) citation to reflect that the cited violation was not attributable to Cypress Cumberland Resources Corporation's unwarrantable failure. In addition, 104(a) Citation No. 3672055 **IS FURTHER MODIFIED** to delete the significant and substantial designation.

IT IS ORDERED that Cypress Cumberland Resources Corporation pay a civil penalty of $100.00 in satisfaction of Citation No. 3672055. Upon timely receipt of payment, this docket proceeding **IS DISMISSED**.

Jerold Feldman
Administrative Law Judge

Distribution:

Joseph T. Crawford, Esq., Office of the Solicitor, U.S. Department of Labor, 3535 Market Street, Room 14480, Philadelphia, PA 19104 (Certified Mail)

R. Henry Moore, Esq., Buchanan Ingersoll, One Oxford Centre, 301 Grant Street, 20th Floor, Pittsburgh, PA 15219-1410 (Certified Mail)

/mca

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1244 SPEER BOULEVARD #280
DENVER, CO 80204-3582
303-844-3577/FAX 303-844-5268

MAY 7 1996

ROSS S. STEWART, Complainant	:	DISCRIMINATION PROCEEDING
	:	Docket No. WEST 95-27-D
v.	:	
TWENTYMILE COAL COMPANY, Respondent	:	Foidel Creek Mine

DECISION

Appearances: Brian L. Lewis, Esq., Denver, Colorado, for Complainant;
R. Henry Moore, Esq., Buchanan Ingersoll, Pittsburgh, Pennsylvania for Respondent.

Before: Judge Manning

This case is before me on a complaint of discrimination brought by Ross S. Stewart against Twentymile Coal Company ("Twentymile") under section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(1988)("Mine Act"). For the reasons set forth below, I find that Mr. Stewart did not establish that his discharge by Twentymile was motivated by his protected activity. Accordingly, I find that Mr. Stewart was not discriminated against by Twentymile in violation of the Mine Act.

Mr. Stewart filed a discrimination complaint with the Department of Labor's Mine Safety and Health Administration ("MSHA") pursuant to section 105(c)(2) of the Mine Act, 30 U.S.C. § 815(c)(2). MSHA concluded that the facts disclosed during its investigation did not constitute a violation of section 105(c). Mr. Stewart then instituted this proceeding before the Commission pursuant to section 105(c)(3), 30 U.S.C. § 815(c)(3). A hearing was held in Steamboat Springs, Colorado. The parties presented testimony and documentary evidence, and filed post-hearing briefs.

FINDINGS OF FACT

Mr. Stewart was employed by Twentymile at the Foidel Creek Mine for about ten years. During that period, he held a number of positions with Twentymile and was a shuttle car operator at the time of his discharge. The Foidel Creek Mine is an underground coal mine in Routt County, Colorado, and employs about 280 people.

On the day shift of May 16, 1994, Mr. Stewart was operating a shuttle car in a continuous miner section. The section was developing entries in preparation for longwall mining. Two shuttle cars were transporting coal from the continuous mining machine to the belt. The shuttle cars dumped the coal at the feeder breaker for the belt. In a typical shift, Mr. Stewart would make about 50 trips from the continuous miner to the feeder breaker. A shuttle car is a large piece of mobile mining equipment. The operator sits in a small compartment and faces the opposite side of the shuttle car. He can see to the front and back of the shuttle car through openings in the operator's compartment.

Allen Meckley was Mr. Stewart's supervisor from late September 1993 through May 16, 1994. On May 16 Mr. Meckley was in the vicinity of the feeder breaker when he observed Mr. Stewart dump several loads of coal. On one trip Mr. Meckley noticed that the conveyor on the shuttle car continued to operate after all of the coal was dumped. (Tr. 419). Because Mr. Stewart did not back away from the feeder breaker after the coal was dumped, Mr. Meckley was concerned that Mr. Stewart was asleep. (Tr. 431, 499). Meckley approached the shuttle car and stood to the side of the operator's compartment. Mr. Stewart did not react to his presence. (Tr. 500). Mr. Stewart's head was down, his hands were in his lap, and Mr. Meckley believed that his eyes were closed. (Tr. 30, 154-55, 430, 500-01). The conveyor of the shuttle car was still running. (Tr. 27, 154). Meckley tapped Stewart on the shoulder. When Stewart looked up, Meckley said, "Ross, are you sick?" (Tr. 28, 419, 501). Mr. Stewart replied, "No." Id. Meckley told Stewart to park his shuttle car and get his lunch. They then proceeded out of the mine. On the way out Meckley said, "I think you know why we are going outside, I told you the next time I caught you sleeping we were going out." (Tr. 32-33, 157, 435, 501-02). Mr. Stewart replied, "Yeh, I know" or "If that's what you want to call it." (Tr. 33, 435).

At the surface, Mr. Stewart was advised that he was suspended pending an investigation as to the appropriate discipline. Mine management conducted an investigation into the matter, met with Mr. Stewart to obtain his views, and reached the conclusion that he should be terminated for sleeping on the job. In reaching this conclusion, management took into consideration Mr. Meckley's belief that he caught Mr. Stewart sleeping underground in October 1993 and in December 1993. Mr. Stewart admits that he was drowsy when Mr. Meckley observed him in December 1993, but denies that he was asleep on May 16, 1994. (Tr. 143-44).

Mr. Stewart maintains that he was terminated for engaging in activities that are protected under section 105(c)(1) of the Mine Act. 30 U.S.C. § 815(c)(1). First, he contends that he complained to management that Mr. Meckley and other members of the crew reported to work with the smell of alcohol on their breath.

Second, he argues that he complained about the safety of the wheel rims on his shuttle car. Third, he maintains that he testified at a hearing before former Administrative Law Judge John A. Morris in a discrimination proceeding brought by Fred Peters against Twentymile. Mr. Stewart contends that these activities were protected under the Mine Act and that he was terminated, at least in part, because of these activities.

SUMMARY OF THE LAW

Section 105(c)(1) of the Mine Act protects miners from retaliation for exercising rights protected under the Mine Act. The purpose of the protection is to encourage miners "to play an active part in the enforcement of the Act" recognizing that, "if miners are to be encouraged to be active in matters of safety and health, they must be protected against any possible discrimination which they might suffer as a result of their participation." S. Rep. No. 181, tb Cong., 1st Sess. 35 (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 623 (1978).

A miner alleging discrimination under the Mine Act establishes a prima facie case by proving that he engaged in protected activity and that the adverse action complained of was motivated in any part by that activity. Secretary on behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2799-2800 (October 1980), rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3d Cir. 1981). The mine operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no way motivated by the protected activity. Secretary on Behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 803, 817-18 (April 1981). If an operator cannot rebut the prima facie case in this manner, it may nevertheless affirmatively defend by proving that it was also motivated by the miner's unprotected activity and would have taken the adverse action in any event for the unprotected activity alone. Haro v. Magma Copper Co., 1935, 1937 (November 1982).

Because direct evidence of actual discriminatory motive is rare, illegal motive may be established through circumstantial evidence or a reasonable inference of discriminatory intent. Secretary on behalf of Chacon v. Phelps Dodge Corp., 3 FMSHRC 2508, 2510-11 (November 1981), rev'd on other grounds sub nom. Donovan v. Phelps Dodge Corp., 709 F.2d 86 (D.C. Cir. 1983). Examples of circumstantial evidence that tend to show discriminatory intent on the part of the mine operator include: (1) knowledge of the protected activity; (2) hostility or animus towards the protected activity; (3) coincidence in time between the protected activity and the adverse action; and (4) disparate treatment of the complainant. Chacon, 3 FMSHRC at 2510.

DISCUSSION WITH FURTHER FINDINGS OF FACT AND CONCLUSIONS OF LAW

There is no doubt that Mr. Stewart had a statutory right to voice his concerns about the safety of his workplace without fear of retribution by management. I find that Mr. Stewart's complaints about alcohol use and the safety of the wheel rims of the shuttle car, and his testimony at the Peters hearing were protected under the Mine Act. The issue is whether his discharge was motivated in any part by this protected activity.

1. Testimony at the Peters Hearing

Mr. Stewart was subpoenaed to testify at a hearing before former Administrative Law Judge John A. Morris in Fred L. Peters v. Twentymile Coal Company. Mr. Stewart contends that Twentymile's decision to terminate him was motivated, at least in part, by the fact that he testified in this proceeding. The hearing was held on December 8, 1992. The adverse action in that case was a letter of discipline that was placed in Mr. Peters' file. In his decision, Judge Morris dismissed the discrimination complaint because he determined that the adverse action was not motivated in any part by Mr. Peters' protected activity. 15 FMSHRC 704, 734 (April 1993). Stewart believes that his participation in the hearing angered mine management. He points to the fact that other employees were allowed to carry over vacation time from one year to the next and that he lost vacation days because he did not use them by a certain date. (Tr. 60-63). He attributes this disparate treatment to the fact that he testified at the Peters hearing. (Tr. 61).

I find that Mr. Stewart's termination was not motivated in any part by the fact that he testified at the Peters hearing. First, it is worth noting that Mr. Peters, the complainant in that case, is still employed by Twentymile. It is highly unlikely that Twentymile would be motivated, in whole or in part, to terminate an employee because he testified under subpoena in a Commission proceeding while retaining the employee who brought the case in the first place. Other miners were subpoenaed to testify in that case and did not suffer any adverse consequences. (Tr. 105-07). It does not appear from the judge's decision that Mr. Stewart's testimony was particularly important in that case.

Mr. Stewart lost his vacation days well before the Peters hearing. The record demonstrates that a number of employees including Mr. Stewart were allowed to carry over 1991 vacation leave into early 1992. He lost the vacation days that he carried

over because he did not use them by March 31, 1992.[1] The Peters hearing was held on December 8, 1992. Thus, he did not lose vacation days in retaliation for his testimony.

Finally, I credit the testimony of the applicable management witnesses that they did not consider the fact that he testified in the Peters case when they determined that Stewart should be terminated. Mr. Meckley was not involved in the Peters case and was an hourly employee at the time of the hearing. Ronald K. Spangler, Twentymile's manager of human resources, was a key player in the decision to terminate Mr. Stewart. He was not employed by Twentymile at the time of the Peters hearing. Mr. Spangler testified that, during his investigation of the Stewart matter, the Peters hearing was only mentioned once. He was told by Daryl Firestone that Mr. Stewart was under the mistaken belief that Twentymile management was mad at him for testifying at the Peters hearing. (Tr. 298, 350-51). Mr. Firestone was Peters' supervisor who issued the disciplinary letter that was the subject of that case. Mr. Spangler further testified that Firestone told him that Stewart's testimony was "more in favor of the Company." Id. Mr. Firestone testified that he was present when Stewart testified at the Peters hearing and believed that his testimony supported the company. (Tr. 634, 636). I conclude that Mr. Spangler did not consider Stewart's participation at the Peters hearing when he recommended to the general manager that Stewart be terminated. William Ivy, general manager at Twentymile, made the ultimate decision to terminate Mr. Stewart and he testified that Stewart's participation in the Peters hearing was not a factor in his decision to terminate Mr. Stewart. (Tr. 595).

2. Split Rim Complaint

In May 1991, Mr. Stewart refused to operate his shuttle car because he believed it to be unsafe. (Tr. 97-98; Ex. R-4). Specifically, he complained about the split rim wheel assembly on the shuttle car. He contends that the rim exploded and a nearby miner could have been injured. (Tr. 54-55). Each wheel rim on his shuttle car consisted of two pieces that were designed to be held together by the air pressure in the tire. Mr. Stewart believed that the rims were faulty and created a safety hazard. There is no question that this complaint was protected under the Mine Act.

---

[1] Other employees who were allowed to carry over vacation days from 1991 to 1992 did not lose any of this leave because they used it before the deadline of March 31, 1992. Mr. Stewart lost 10 days of vacation because he failed to use them in time, rather than in retaliation for protected activity under the Mine Act.

I find, however, that Mr. Stewart's termination was not motivated in any part by his complaint. The split rim incident was remote in time from the events in May 1994 that resulted in his termination. Mr. Meckley was not his supervisor in May 1991, but was an hourly employee on his crew. He has no recollection of the complaint. (Tr. 468-69). Mr. Spangler did not work for Twentymile at the time of the split rim complaint and did not learn about it until after Mr. Stewart was terminated. (Tr. 323). Mr. Stewart did not raise this issue with Mr. Spangler during their meeting of June 2, 1994, when he was given the opportunity to present his views. (Ex. R-18). Mr. Ivy, the general manager, testified that he remembers hearing that about problems with the rims but he does not recall any of the details. (Tr. 602).

When Mr. Stewart complained about the safety of the wheel rims, his supervisor, Mr. Firestone, looked into the matter. (Tr. 637-38). Mr. Stewart's complaint was that the locking ring tab was not connected on the wheel rim. (Tr. 88, 539, 637-38, 656). Mr. Firestone discussed the matter with the shift foreman. Id. Joseph F. Hampton, a maintenance supervisor, and William G. Kendall, the manager of maintenance for Twentymile, called the company that supplied tires and rims for the mine. (Tr. 540, 656-57). The supplier replied that the locking tabs are necessary only when the tire is being inflated and that they were not necessary after that. (Tr. 540, 659-62). Mr. Kendall met with a representative of the rim supplier to discuss the split rim issue. He circulated a memorandum on May 24, 1991, explaining why the locking tabs are not necessary after the tire is inflated. (Tr. 658-59; Ex. R-4). Mr. Hampton also discussed the matter with Stewart. (Tr. 541-42).

Mr. Stewart relies heavily on the fact that Twentymile had to scrap the wheel rims on his shuttle car as a result of his complaint, at a cost of up to $24,000.00,[2] and that the shuttle car was shut down for several hours. The record reveals that the rims had to be replaced because Frank Pavlisick, a maintenance foreman, welded the two parts of the wheel rims together without consulting his supervisors. (Tr. 662-63). The welding was unsafe and damaged the wheel rims. Id. It is apparent that mine management was concerned about the welding rather than Mr. Stewart's safety complaint. (Tr. 663). There is no credible evidence that the company held Mr. Stewart accountable for this matter. In addition, I cannot draw a reasonable inference of discriminatory intent. Management handled his complaint with the same degree of concern that it does all safety complaints. The record makes it clear that employees frequently shut down equip-

[2] It is not clear from the record how many of the rims had to be replaced. For the purposes of Mr. Stewart's argument, I assume that all four were replaced.

ment for safety reasons and that employees are not disciplined for such conduct. Mr. Stewart did not have a history of shutting down equipment for safety reasons. (Tr. 98). He was not disciplined at the time of these events and I find that his termination was not motivated, directly or indirectly, by this safety complaint.

3. Alcohol Use Complaints

Mr. Stewart complained to management that miners were coming to work with the smell of alcohol on their breath. His concern was that the miners' judgment could be impaired and that mine safety was affected. Mr. Stewart testified that about four or five miners would come to work with the smell of alcohol on their breath. (Tr. 42-43). One of these miners was Allen Meckley, who was a bolter on his crew at the time. Stewart contends that when Meckley became his supervisor in September 1993, Meckley set out to get him fired in retaliation for his protected activity. He believes that Meckley harbored a grudge against him because of these complaints.

All of the evidence relied upon by Mr. Stewart is circumstantial. Mr. Stewart maintains that Mr. Meckley was overtly hostile from the moment he became his supervisor. He argues that the issue of whether Twentymile had cause to discharge him "boils down to a 'swearing contest' between Mr. Stewart and Mr. Meckley." (Br. at 5). Stewart contends that because Meckley had an ulterior motive for alleging that he was sleeping, Meckley's testimony should not be credited. Mr. Stewart points to the fact that Meckley admitted that Stewart did not get along well with his fellow crew members. (Br. 7; Tr. 475). Stewart contends that the crew had a grudge against him because he was a "snitch". He points to the testimony of Charles L. Moss to support his position. Moss testified that when he was the crew's foreman, one of the crew members complained to him that Stewart was a snitch. (Tr. 180). In addition, Stewart testified that Hansel Burum, a former member of the crew, told him that he was a snitch. (Tr. 66). Finally, Stewart heard rumors in Craig, Colorado, where he lived, that "Allen [Meckley] finally got me." (Tr. 73).

Mr. Stewart discussed his concern about alcohol use with several of the mine's supervisors. When Mr. Moss was his supervisor, he complained that members of the crew had alcohol on their breath. (Tr. 182-83). On at least one occasion, Mr. Moss checked it out and could not detect any alcohol on the individual's breath. (Tr. 190-91). Around February 1993, Stewart complained to Mr. Ivy about alcohol abuse at the mine. (Tr. 47-49, 112, 389, 595-99). He did not name any particular individuals. Mr. Ivy discussed the issue in a general manner at a crew meetting. Apparently several members of the crew made snide comments to Stewart about this. Mr. Meckley, who was a bolter at the

time, did not make any comments. (Tr. 118). Stewart also testified that he complained to Meckley, when Meckley was his supervisor. (Tr. 42-47). Stewart said that Meckley did not have any particular response. Meckley could not recall any such discussion. (Tr. 469).

There is no direct evidence linking Mr. Stewart's termination with his complaints about alcohol use. Mr. Stewart maintains that there is "ample circumstantial indicia of discriminatory intent ... ." (Reply Br. at 4). I used a two-step process to analyze this issue. First, I considered the guidelines set forth by the Commission in Chacon, 3 FMSHRC at 2510, to determine whether I could draw a reasonable inference of discriminatory intent. Second, I examined the facts surrounding Mr. Stewart's termination to determine whether his termination appeared to be internally consistent with Twentymile's position.

The first factor set forth in Chacon is whether the company had knowledge of the protected activity. I find that there is sufficient circumstantial evidence to establish that Meckley had knowledge of Mr. Stewart's complaints about alcohol use, despite the fact that he could not recall such complaints at the hearing. Mr. Spangler testified that he did not know that Mr. Stewart had complained about alcohol use at the time he recommended that Mr. Stewart be terminated for sleeping on the job. (Tr. 323). He was not employed at Twentymile at the time of the complaints. Mr. Hampton could not recall that Mr. Stewart complained about alcohol use. (Tr. 554). Mr. Ivy remembers meeting with Stewart at the end of a shift in February 1993, but could not recall the contents of the discussion. (Tr. 595-96). Mr. Ivy stated that they may have discussed alcohol and he may have raised it at a crew meeting. (Tr. 596-97). Accordingly, I find that mine management had knowledge of the protected activity.

The next factor is whether there was hostility or animus towards the protected activity. I find that circumstantial evidence does not establish such hostility or animus. Management witnesses testified that they would not tolerate miners coming to work under the influence of alcohol or drugs. (Tr. 182, 595-96). I credit this testimony. There is no evidence, other than the testimony of Mr. Stewart, that anyone came to work with alcohol on his breath or was under the influence of alcohol at the mine.[3] Mr. Meckley denied that he ever came to work with alcohol on his breath and does not remember the issue being raised. (Tr. 469-70). Mr. Moss testified that when he was the crew's supervisor,

---

[3] Mr. Peters, however, had been in alcohol abuse counseling and Mr. Firestone smelled alcohol on his breath on one occasion. (Tr. 639-40; 15 FMSHRC at 721).

Meckley never came to work with alcohol on his breath. (Tr. 182). Some of Stewart's fellow crew members mocked him about his complaints in 1993 but I cannot draw an inference that this was a factor in his termination. Mr. Stewart relies on the fact that he did not get along with the other members of the crew to establish that there was hostility towards his protected activity. I find that the animus directed towards Mr. Stewart by the crew and his immediate supervisors was the result of the fact that they believed that he did not pull his weight on the crew. (Tr. 179-181, 183-84, 187-89, 193, 195-6, 207-08, 211-12, 322-23, 465, 475-76, 488-89, 544-46, 554, 641, 647). I cannot ascertain whether or not Mr. Stewart was a hard worker, but the evidence shows that he was perceived as someone who was reluctant to help others on the crew and the crew sometimes gave him a hard time as a result. Id.

The third Chacon factor is the coincidence in time between the protected activity and the adverse action. Mr. Stewart's complaints about alcohol use occurred well before his termination. He was very vague about when he made these complaints, but it is clear that the complaint to the general manager was made around February 1993, about 15 months before his discharge. Mr. Meckley was his supervisor for about eight of these months. While it is certainly possible for a supervisor to hold a grudge for 15 months and take action in retaliation in the manner described by Mr. Stewart, I cannot make such an inference in this case. The linkage is simply too tenuous to reach such a conclusion.

The final factor is whether there was disparate treatment of the complainant. This factor is difficult to analyze because there is no evidence that other employees complained that miners were coming to work with the smell of alcohol on their breath. As stated above, however, I credit the testimony of management witnesses that the company would not tolerate employees coming to work under the influence of alcohol. In addition, other employees who were caught sleeping at work were terminated unless management determined that there were mitigating circumstances. One employee was discharged for sleeping underground. (Tr. 395-96). Two other employees were caught sleeping in a truck on the surface and were given a two-week suspension, lost all bonus pay, and were placed on probation for a year. (Tr. 224, 393). Mr. Spangler determined that they should not be terminated because it was a first offense, they were not operating equipment at the time, their supervisor was against termination, and they cooperated during Twentymile's investigation of the incident. (Tr. 391-94). I credit Mr. Spangler's testimony describing the reasons why Mr. Stewart was terminated and these other two miners were not. I find that Mr. Stewart failed to establish disparate treatment. I cannot draw a reasonable inference that he was

treated differently because of his safety complaints.[4]

Twentymile's stated reason for terminating Mr. Stewart is consistent with the evidence. The testimony about the events of May 16, 1994, differ in some of the details. Stewart testified that Meckley approached him from the left and tapped him on his left shoulder, while Meckley testified that he observed Stewart from the right side and tapped his right shoulder. (Tr. 423-26, 693). Stewart testified that Meckley could not have determined that his eyes were closed or that he was sleeping because of the design of the cab on the shuttle car. (Tr. 22) He further stated that Meckley's testimony that he tapped Stewart on the right shoulder is not credible because the right side of the shuttle car was against the coal feeder. (Tr. 693-94). Meckley testified that there was enough space for him to stand to the right of the cab. (Tr. 422-24; Ex. R-39). Stewart testified that his eyes were open and that he kept the conveyor on his shuttle car running to make sure that all of the coal was discharged onto the feeder breaker. (Tr. 29-31). He testified that he had on his ear plugs and did not see or hear Meckley until he tapped him on his shoulder. Id. He stated that he immediately turned to Meckley and asked him what he wanted. Id.

These discrepancies are not as significant as Mr. Stewart believes and do not provide a basis for discrediting Meckley's testimony. I find that Mr. Meckley had an honest, good faith belief that Mr. Stewart was asleep on May 16, 1996. I also find that Meckley believed that Stewart was asleep in his shuttle car at the feeder in October 1993. (Tr. 445-47). Meckley verbally warned him not to sleep underground. Id. Meckley also believed that Stewart was asleep on December 21, 1993. In that incident, the operator of the continuous miner and Meckley signaled Stewart to tram his shuttle car forward to be loaded with coal. (Tr. 448-49). Stewart did not respond to the signal. Meckley approached Stewart and said, "Ross, Ross, you need to get a load." (Tr. 449).

Mr. Spangler had worked at Twentymile for about six weeks when Stewart was suspended on May 16. As the human resources manager, he was responsible for investigating the incident. He performed a thorough, independent and professional investigation

---

[4] Mr. Stewart also contends that there were other instances where he was mistreated because of his safety complaints. He states that he was temporarily transferred to another crew, temporarily removed from his position as shuttle car operator, and lost some vacation leave because of his protected activity. He did not lose any pay or benefits because of these transfers. Based on the record, I find that the temporary reassignments and loss of vacation time were unrelated to any of his protected activities.

into the matter. I find his testimony to be particularly persuasive and credible. He made several attempts to get Stewart's position on the incident. Mr. Spangler believes that Stewart was uncooperative and evasive during the investigation. As discussed above, Spangler knew very little about any of Stewart's protected activities and knew nothing about his complaints concerning the smell of alcohol. I credit his testimony that Stewart's protected activities were not a factor he considered in recommending that he be terminated. I believe that if Meckley had set Stewart up in retaliation for his safety complaints, it is likely that Spangler would have uncovered it.

Mr. Stewart contends that Twentymile's hostility toward him can be inferred because of its "irregular handling of [his] termination." (Br. at 9). He bases this argument on the fact that Mr. Meckley's notes regarding the sleeping incidents were not kept in Stewart's personnel file and the company failed to follow its own internal disciplinary procedures. Twentymile's disciplinary system is rather informal and subjective. It has a set of procedures known as the Green Answer Book, that it follows when dealing with personnel issues. (Ex. R-28). I find that Twentymile generally followed its procedures and Mr. Spangler gave Mr. Stewart an opportunity to present any mitigating factors. The Mine Act does not mandate any particular type of disciplinary system. I do not have the authority to determine whether Mr. Stewart's discharge was fair or reasonable. The "Commission does not sit as a super grievance board to judge the industrial merits, fairness, reasonableness, or wisdom of an operator's employment policies except insofar as those policies may conflict with rights granted under section 105(c) of the Mine Act." Delisio v. Mathies Coal Co., 12 FMSHRC 2535, 2544 (December 1990) (citations omitted).

I conclude that Mr. Stewart's discharge did not violate section 105(c) of the Mine Act. I find that Mr. Stewart engaged in protected activity but that his termination was not motivated in any part by his protected activity. I also find that, even if his protected activity were a factor, he would have been terminated in any event for his unprotected activity alone.

ORDER

Accordingly, the complaint filed by Ross S. Stewart against Twentymile Coal Company under section 105(c) of the Mine Act is **DISMISSED.**

Richard W. Manning
Administrative Law Judge

Distribution:

Brian L. Lewis, Esq., 10200 E. Girard Avenue, No. B-233, Denver, Colorado 80231-5508 (Certified Mail)

R. Henry Moore, Esq., BUCHANAN INGERSOLL, One Oxford Tower, 20th Floor, 301 Grant Street, Pittsburgh, PA 15219-1410 (Certified Mail)

RWM

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

MAY 10 1996

MAJOR TONY THOMPSON, Complainant	:	DISCRIMINATION PROCEEDING
v.	:	Docket No. KENT 94-1191-D
	:	PIKE CD 94-13
AERO ENERGY, INCORPORATED, Respondent	:	Mine No. 1

DECISION

Appearances: Herbert Deskins, Jr., Greg Bentley, and Robert Wright, Esqs., Pikeville, Kentucky, for the Complainant;
Michael Heenan, Esq.; William I. Althen, Esq., Smith, Heenan, and Althen, Washington, D.C., for the Respondent.

Before: Judge Weisberger

Statement of the Case

This case is before me based upon a Complaint filed by Major Tony Thompson alleging that he was discriminated against by Aero Energy Incorporated (Aero) in violation of Section 105 of the Federal Mine Safety and Health Act of 1977 (The Act). Pursuant to notice, the case was heard in Louisa, Kentucky on January 29 and 30, 1996.[1]

---

[1]Initially the case was scheduled for hearing on December 20, 1994. Based upon the parties' agreement, an order was issued on January 3, 1995, continuing the hearing due to a pending parallel proceeding in the Pike Circuit Court in Kentucky. On May 4, 1995, an order was issued granting Complainant's Motion to Continue and Staying Proceedings for 60 Days. On October 6, 1995, an order was issued lifting the

Findings of Fact and Discussion

I. Complainant's Case

A. Complainant's Work History at Aero

Aero operates the Aero Energy Mine No. 1, an underground coal mine, which it had acquired in March 1989. In March 1989, Major Tony Thompson was hired as mine superintendent by Rex Fought, Aero's President, for whom he had previously worked. Fought made Thompson responsible for the overall operation of the mine. Once the mine became operational, production increased, production per man hour increased, and miners were given bonuses based on increased production usually three to four times a week. Thompson also received production bonuses through the end of 1993, and received a Christmas bonus in 1993. He received increases in salary during the term of his employment with Aero.

B. Complainant's Activities and Aero's Responses

According to Thompson, in August 1989, he reported to Fought a methane reading of between four and six percent. Fought told him to "be sure that I don't put it in the book because it was over two percent" (Tr. 30). Thompson indicated that in September 1995, Fought was very upset at a withdrawal order issued by an MSHA inspector who had found methane.

On November 3, 1993, Thompson indicated that he learned that a methane reading of seven to nine percent had been found in the old works of the mine, which was not an active section. Thompson said that he notified Fought who told him to be sure not to report it. According to Thompson, on November 4, he was informed by a belt attendant, Harold Baisden, that he had overheard the .

Footnote 1 cont'd.

stay, and scheduling the case for hearing on November 13, 1995. On October 23, 1995, an order of continuance was issued based upon Respondent's request that was not opposed by Complainant, and the case was rescheduled for hearing on January 29.

fireboss, Bob Boyd, report a methane reading of between seven to nine percent in the old works. Thompson then went underground, and testing by him indicated a methane reading of one and a half percent. Thompson then reported to Fought and told him that the methane reading should be reported in the preshift book, and Fought told him not to report it.

On November 5, Thompson talked to MSHA inspector Arlie Webb. On November 8, 1993, the site was inspected by MSHA inspectors but no citations were issued for any methane accumulations.

On November 9, 1993, five MSHA inspectors inspected the site to check for methane. The inspectors reported that they had received a complaint about methane in the old works. Thompson testified that at approximately 12:30 p.m., he had a conversation with Fought, and told him that he thought that the inspectors were present because of a complaint. At about 3:30 in the afternoon, in Thompson's office, Fought informed him that there was reason to believe that he (Thompson) had called the inspectors. According to Thompson, Fought informed him that he talked to the foremen, and they did not trust him "for calling the inspectors" (Tr. 75). Thompson stated that he informed Fought that he had not called the inspectors. According to Thompson, Fought told him that the foremen could not trust him anymore, and that he was going to have to let him go "for calling the inspectors" (Tr. 76). Thompson maintained that the methane problems that had been observed on November 3 and 4, were taken care of shortly after the methane had been discovered by shifting the ventilation in the area, and accordingly, there was no need to call the inspectors on November 8 and November 9. Thompson indicated that Fought told him that he was going to send him home until he had time to investigate. According to Thompson, Fought told him to take the rest of the week off. Thompson stated that he thought that Fought was sending him home because he had called the inspectors.

On Tuesday November 16, at 6:00 p.m., Thompson returned to the mine, and Fought informed him that he was still investigating, and trying to find out if he (Thompson) had called the inspectors, and that he (Fought) would get back to him. Between November 16, 1993, and January 7, 1994, Thompson tried to call Fought eight or nine times, and talked to him three four times.

On January 7, 1994, Thompson received a letter from Fought. In the letter, Fought indicated that he had discussions with Thompson concerning Thompson's job performance, lack of interest, and lack of commitment to the job. The letter further accused Thompson of having "a major problem of substance abuse." On January 10, 1994, Thompson confronted Mr. Fought about the letter, and Fought insisted on him undergoing drug rehabilitation. Thompson refused because he maintained that he had no drug problem.

It was Thompson's testimony that prior to November 9, he had never been reprimanded or suspended by Fought. Nor did Fought indicate that he was dissatisfied with his work. Thompson maintained that he had not been insubordinate to Fought. Thompson indicated that prior to receipt of Fought's letter on January 7, Fought had never discussed with him his lack of commitment. According to Thompson, Fought had never told him that his job was suffering because of drug abuse, and that Fought had never suggested that he take any drug test. Thompson indicated that prior to November 9, 1993, he underwent drug testing on one occasion, and it was negative. According to Thompson, he was never arrested for drugs or alcohol, and has never had a substance abuse problem. He also maintained that there were no problems with morale at the site.

According to Thompson, he had a good relationship with Fought through November 1993. He was not reprimanded by him during that time and followed whatever Fought told him to do. According to Thompson, he saw his foremen daily, and had safety talks with them weekly. Thompson stated that he never refused to go underground at the request of Fought, or at a foreman's request.

Walter Thomas Kirk, a miner employed by Double Construction Company, (Double C), to work at the subject mine as a general laborer, testified for Complainant. Kirk, who is a personal friend of Thompson, indicated that on November 9, 1993, at approximately 3:45 in the afternoon, he was walking toward Thompson's office and the door was open.[2] Kirk indicated that

---

[2]Records kept in the ordinary course of business by Double C indicate that Kirk did not work on November 9.

no one else was in the area. According to Kirk, he was six to eight feet away from the door, and overheard a conversation between Thompson and Fought that was "pretty loud" (Tr. 104). Kirk testified that he heard Fought say as follows: "Tony you know we had eight and nine percent methane, and you had no right to call the federal men or inspectors in at no time" (Tr. 105). According to Kirk, Thompson said that he did not call the inspectors, and Fought said "I have reason to believe you called them Tony and I'm going to have to let you go" (Tr. 105).

According to Kirk, about a week and a half or two weeks later, Fought met with all first and second shift employees in the shower house. Kirk indicated that Fought was "in an outrage," and stated that "[t]hese rumors going around is going to stop. Now, I don't know who is spreading them but they're going to stop and whoever spread this rumor about methane, they ain't no methane up there. And another thing . . . it's none of your god dam business . . . If this don't stop, I will fire every one of you . . . " (Tr. 107).

II. Respondent's Case

Fought indicated that sometime toward the end of the winter of 1993, he began to get concerned about Thompson, as he did not feel that Thompson was communicating as much as he had done in the past. Fought indicated that John Ratliff, a shift foreman, and Steven Cordial, the maintenance chief, commented to him that Thompson was not helping them as much as he used to. According to Fought, there was general talk in the mine that Thompson was not going underground to help out. Fought indicated that in the last two or three months prior to November 1993, he felt that Thompson was "ignoring some things I would tell him or finding excuses not to do them" (Tr. 140).

Fought stated that Thompson was authorized to order materials. He was responsible for checking invoices in the bookkeeping office in order to see if Aero was being properly charged. Fought stated that Thompson had stopped checking the invoices, and had to be reminded to do this task. He also indicated that Thompson was no longer getting to work prior to the commencement of the shift, as he had been doing for the last couple of years.

Fought stated that sometime in the late summer or early fall 1993, Cordial informed him that occasionally it appeared as if Thompson was under the influence of some substance. According to Fought, on three occasions between the early summer of 1993 and November 9, 1993, Thompson was listless, and exhibited slurred speech, and uncoordinated movements. In the summer of 1993, on one occasion, Fought sent Thompson home because he had placed his head on the desk, and his speech was slurred.

According to Fought, in August 1993, he spoke to Thompson and told him that he did not seem to be going underground as much as he should, that supplies were disappearing, and that it appeared that, in general, he had lost interest. According to Fought, he asked Thompson whether he realized that mine personnel were of the opinion that he was taking drugs. According to Fought, sometime around October 1993, he had the same conver-versation with Thompson who responded that he did not see what the problem was, and that he was doing a good job. Fought testified that on the first Wednesday in November, he told Thompson as follows: "[i]f you don't do another thing tomorrow, go to the office and okay your invoices" (sic) (Tr. 155). According to Fought, Thompson did not work the next day. Fought indicated that two days later he told Thompson that he "wasn't going to put up with it anymore," and that Thompson should take off the next week and think about it, "and then when he came back, see if we could figure out someway that we both could stay there and work together" (Tr. 156). The following Monday when Fought called the mine, Thompson answered the telephone. Fought concluded that Thompson had ignored him by coming to work.

According to Fought, on November 9, at approximately 4:30 in the afternoon, he and Thompson had the same conversation they had on the previous Friday. According to Fought, Thompson told him that the inspectors had come to the mine because there was a complaint about methane. Thompson said that he thought he was doing a good job. Fought indicated that he told Thompson that he was not satisfied, and that Thompson must satisfy him before he could come back. Fought indicated that he did not think that Thompson could work at the mine anymore. Fought indicated that he told Thompson to go home and to think about what they had talked about, and to see if he could conclude that there was a problem. Fought did not make a notation in Thompson's personnel file concerning the conversation he had with him about his "bad

performance" (Tr. 180). He could not remember any specific problem that Thompson "didn't help them or look at" (Tr. 197).

Fought said that he did not discuss methane at a meeting with all personnel subsequent to November 9. Instead, he told the assembled personnel that he wanted to stop the rumors as to why Thompson was no longer at the mine. According to Fought, he told them that Thompson was off on personal leave.

Fought indicated that on or about January 7, 1994, he sent Thompson a disciplinary letter, (Defendant's Ex. 5) because he needed to bring the matter to an end.

Fought maintained that it is not true that he told Thompson not to report methane. Fought said that on November 3, and November 4, 1993, Thompson had not complained to him about methane. He also indicated that he did not receive any report that the fireboss, Boyd, had found methane in the explosive range or at three, four, or five percent. Fought stated that it is not true that he told Thompson not to put methane readings more than two percent in the preshift book. He indicated that there was no problem controlling methane in the mine.

On cross-examination it was elicited that Fought never saw Thompson take drugs, and did not ask whether anyone else saw him take drugs. Fought also indicated that he had never smelled alcohol on Thompson's breath.

John Ratliff, who was the day shift mine foreman for the period in question, stated that in 1992, Thompson went underground every two to three weeks. Ratliff indicated that in the last six months prior to November 1993, Thompson went underground only one time. Ratliff indicated that he would have benefited from more underground visits by Thompson, as there were matters that could have been resolved more efficiently had the latter gone underground and observed the situation. He noted that in 1993, Thompson stopped asking about what was going on in the mine. According to Ratliff, Thompson's speech was slurred, he stayed in the office by himself a lot, and took no interest in the mine. Ratliff said that five or six miners told him that they thought that Thompson was on dope or drugs. Ratliff also noted that morale was down, and that in general his relations with Thompson had deteriorated.

According to Ratliff, on November 8, at approximately 8:00 a.m., Thompson told him as follows: "John, there's all kind of talk on the bottom about a high methane build up in the old works . . . You know they'd be all kinds of inspectors here before the day's out" (sic)(Tr. 230-231). He indicated that Thompson kicked the wall and a chair, and slapped the wall.

Ratliff corroborated Fought's version of the meeting that was held in the shower house sometime after November 9.

According to Boyd, testing at the old works on November 4, indicated a methane reading of nine-tenths of one percent which he entered in the preshift examination book. He said that methane had not been found at that site before. Boyd indicated that no one told him not to report methane, and no one told him not to enter any methane readings. He corroborated Fought's version of the meeting held with the miners after Thompson had left the mine.

Cordial indicated that he told Fought that Thompson showed favoritism, and that some men were resentful and thinking of quitting. He indicated that when he started to work at the mine in 1991, Thompson was going underground four to five times a week, "[a]nd it would be probably ninety percent of the time he was underground." (Tr. 347) Cordial indicated that starting around March 1993, Thompson "wasn't going underground as much" (Tr. 347). According to Cordial, miners made comments to him as follows: "Tony's on his stuff today." (Tr.348) According to Cordial, on several occasions, Thompson evidenced slurred speech, and "would seem either completely down or really hyper" (Tr.348). Cordial indicated that he discussed these problems with Fought in October or September 1993, and the latter was "really concerned about it" (Tr. 349).

Cordial also corroborated Fought's version of the meeting in the shower room.

III. Analysis

The principles governing analysis of a discrimination case under the Mine Act are well established. A miner establishes a

prima facie case of prohibited discrimination by proving that he engaged in protected activity and that the adverse action complained of was motivated in any part by that activity. Secretary on behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2797-2800 (October 1980), rev'd on other grounds, sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3d Cir. 1981); Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 803, 817-18 (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. Pasula, 2 FMSHRC at 2799-2800. If the operator cannot rebut the prima facie case in this manner, 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, 2 FMSHRC at 2800; Robinette, 3 FMSHRC at 817-18; see also Eastern Assoc. Coal Corporation, v. United Castle Coal Co., 813 F.2d 639, 642 (4th Cir. 1987).

A. Protected Activities

At a minimum, Thompson engaged in protected activities when he spoke to an inspector on the evening of November 5, 1993. The actions that he took in response to reports of various methane readings, and his comments to Fought that excessive methane readings should be recorded in the preshift reports are all protected.

B. Motivation

According to Thompson, he was sent home by Fought on November 9, because Fought thought he had complained to MSHA inspectors about methane at the mine, and had requested an inspection which resulted in the inspection on December 8 and 9.

In Thompson's version of relevant events, Fought (1) never expressed any dissatisfaction with his work prior to March 9; (2) manifested an animus toward his activities in reporting methane findings, and (3) told him expressly on November 9, that he was being let go "for calling the inspectors" (Tr. 76). I find Thompson's version to be without merit for the reasons that follow.

1. Thompson's Performance Prior to November 9

Fought was generally satisfied with Thompson's work until about six months prior to November 1993. He increased his salary, and had given him bonuses based upon production. According to Thompson, he had never been reprimanded by Fought prior to November 9, and Fought had never expressed any dissatisfaction with his work.

On the other hand, Fought referred to four specific instances prior to November 9, 1993, wherein he expressed dissatisfaction with various aspects of Thompson's work.[3] It is significant that Thompson did not testify on rebuttal to rebut or contradict this specific testimony. Therefore, I accept Fought's testimony in these regards.

In general, Fought's version that he had been dissatisfied with Thompson prior to November 9, as the latter had exhibited various behavioral problems, is corroborated by Ratliff, and Cordial, who noted that Thompson exhibited slurred speech, and in his last six months at the mine, did not go underground as frequently as he had in the past. In this connection, Thompson did not rebut Fought's testimony that in the summer of 1983 he had suggested to Thompson to go home because he was exhibiting slurred speech, and had placed his head on the desk, and the former complied. For these reasons, I accept Fought's version.

2. Fought's Animus Regarding Reports of Methane

According to Thompson, in September 1989, after an MSHA inspector issued a withdrawal order based upon finding the presence of methane, Fought was "very upset" and "very irate" (Tr. 34). Fought did not rebut or impeach this testimony. According to Thompson, when he reported to Fought methane readings in excess of two percent in August 1989, November 3,

---

[3]Some corroboration for Fought's testimony in this regard is found in the testimony of Cordial, whom I found to be a very credible witness, that in October and September 1993, he discussed Thompson's problems with Fought, and the latter was "really concerned about it" (Tr. 349).

and November 4, Fought told him not to enter the findings in the preshift examination books. On the other hand, Fought denied that he had told Thompson not to report methane, and not to put methane readings more than two percent in the examination book. Fought also indicated that Thompson did not report to him that Boyd had found methane in an explosive range, or more than three percent. I observed the witnesses' demeanor, and found Fought to be more credible in these regards.

I also find that Fought's version finds corroboration in the testimony of Boyd that no one told him not to report methane findings, and not to enter methane readings. Indeed the examination book indicates that methane readings were noted by Boyd (Defendant's Ex. 4).

3. The November 9 Conversation Between Fought and Thompson

According to Thompson, on November 9, the date of the MSHA inspection of the mine, Fought told him he was going to let him go "for calling the inspectors" (Tr. 76). In support of his version, Thompson offered the testimony of Kirk. Kirk testified that at 3:45 p.m., on November 9, he overheard Fought telling Thompson that he was going to let him go because he had called the inspectors.

I discount Kirk's testimony. Based upon my observations of his demeanor, I find Fought the more credible witness. I also note that records kept by Kirk's employer in the ordinary course of business indicate that Kirk did not work in the mine on November 9.

Further, since I find more credible Fought's version of Thompson's work history prior to November 9, (See, (I)(C)(2)(b) infra,), it follows that Fought's version of the November 9 conversation is more credible. I therefore accept Fought's testimony that on November 9, he expressed his dissatisfaction with Thompson, and told him to go home to think about their conversation, and to acknowledge there were problems.

For all the above reasons, I conclude that Fought's actions in sending Thompson home on November 9, and sending him a disciplinary letter (Defendant's Ex. 5) were motivated solely by

Thompson's unprotected activities which Fought was dissatisfied with. I thus find that Thompson has failed to establish that he was discriminated against in violation of Section 105(c) of the Act.

ORDER

It is **ORDERED** that this case be **DISMISSED**.

Avram Weisberger
Administrative Law Judge

Distribution:

Herbert Deskins, Jr., Esq., P.O. Box 1199, 105 ½ Division Street, Pikeville, KY 41501 (Certified Mail)

Michael T. Heenan, Esq., and William I. Althen, Esq., Smith, Heenan & Althen, 1110 Vermont Avenue, N.W., Suite 400, Washington, DC 20005-3593 (Certified Mail)

/ml

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1244 SPEER BOULEVARD #280
DENVER, CO 80204-3582
303-844-3577/FAX 303-844-5268

MAY 10 1996

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	: : : : :	CIVIL PENALTY PROCEEDING Docket No. WEST 95-220-M A.C. No. 24-01951-05508
v.	:	Red Pioneer Portable Crusher
A.M. WELLES, INC., Respondent	: :	

DECISION

Appearances: Kristi Floyd, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
Alfred Hokanson, President, A.M. Welles, Inc., Norris, Montana, for Respondent.

Before: Judge Manning

This case is before me on a petition for assessment of a civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration ("MSHA"), against A.M. Welles, Inc. ("A.M. Welles"), pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820. The petition alleges two violations of the Secretary's safety regulations. Orders of withdrawal were issued under section 104(b) of the Mine Act alleging that A.M. Welles failed to timely abate the cited conditions. For the reasons set forth below, I affirm the citations and orders, and assess penalties in the amount of $330.00.

A hearing was held in Butte, Montana. The parties presented testimony and documentary evidence, but waived post-hearing briefs.

I. DISCUSSION WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW

A.M. Welles operates the Red Pioneer Portable Crusher. It is a very small operation that recorded about 4,360 hours worked in 1993. It has a history of four citations in the two years preceding the inspection in this case.

A. Citation No. 4405454

On May 12, 1994, MSHA Inspector Ronald Goldade inspected the Red Pioneer Portable Crusher. At the time of his inspection the crusher was at the Belgrade Pit near Bozeman, Montana. He issued Citation No. 4405454 alleging that the guard on the fin type tail pulley on the product discharge conveyor system needed to be extended on the sides of the conveyor frame. The citation states that the existing guard needed to be extended about ten inches to provide sufficient coverage of the moving machine parts. The citation alleges a violation of 30 C.F.R. § 56.14107(a). Inspector Goldade determined that it was unlikely that anyone would be injured and that the violation was not of a significant and substantial nature ("S&S"). A guard was present at the time of the inspection, but the inspector did not believe that it provided sufficient protection against the moving parts. The safety standard states that "moving machine parts shall be guarded to protect persons from contacting ... head, tail, and takeup pulleys, ... and similar moving parts that can cause injury."

The tail pulley was about two feet above the ground. (Tr. 12; Ex. G-2). Inspector Goldade testified that he was concerned that someone could inadvertently come in contact with the moving pulley when cleaning around the area. (Tr. 13). He determined that the negligence was moderate because the violation was obvious. (Tr. 14). The conveyor had been recently purchased and the existing guard was installed by the manufacturer. (Tr. 14; Ex. G-2).

Inspector Goldade discussed the condition with William Haugland, the crusher superintendent, and told him that it should be abated by 8:00 a.m. on May 16, a period of four days. (Tr. 15). The inspector also wrote that abatement date on the citation. The condition could have been abated by welding or wiring old screening material over the open area. (Tr. 16). He estimated that it would take an hour to abate the condition. Neither Mr. Haugland nor anyone else from A.M. Welles told the inspector that the time set for abatement was too short.

On August 1, 1994, MSHA Inspector Seibert Smith inspected the crusher, which had been moved to a pit near Big Sky, Montana. He issued Order No. 4410028 under section 104(b) of the Mine Act because he believed that the condition described in Citation No. 4405454 had not been abated. The order states that no apparent effort was made by the operator to extend the guard to cover the moving parts of the fin type tail pulley on the product discharge conveyor under the pioneer crusher by the termination due date of May 16, 1994. He issued the order to Mike Nunn, who did not know anything about the citation. (Tr. 32). Inspector Smith left the mine shortly thereafter. When he returned on August 5 a guard made of solid metal and screening was in place, so he terminated the order. (Tr. 33).

A.M. Welles contends that the conveyor pulley observed by Inspector Smith on August 1, was not the same pulley that Inspector Goldade cited on May 12. (Tr. 46-50, 60). It states that it abated the citation issued by Inspector Goldade and that the withdrawal order issued by Inspector Smith was for a different conveyor at the crusher. Id. Mr. Haugland and Alfred Hokanson, President of A.M. Welles, believe that they abated the condition cited by Inspector Goldade before August 1, 1994.

I credit the testimony of Inspectors Goldade and Smith, and find that the condition cited on May 12 had not been abated on August 1. Inspector Smith testified that the tail pulley he observed was the same pulley that was cited by Inspector Goldade and that no abatement effort had been made. (Tr. 63).

An MSHA inspector is authorized to issue an order under section 104(b) of the Mine Act if he determines on a subsequent inspection that: (1) the violation described in the citation has not been totally abated within the period of time originally fixed in the citation; and (2) the period of time for abatement should not be further extended. Upon discovering a failure to abate, an inspector must apply a rule of reason in determining whether to issue a section 104(b) order or to extend the abatement time. Martinka Coal Co., 15 FMSHRC 2452 (December 1993). I find that Inspector Smith did not abuse his discretion in issuing the order. Accordingly, I affirm the citation and the order.

Ordinarily, an operator's failure to timely abate a citation warrants a substantially greater penalty than the citation. An unabated violation presents a potential threat to the safety and health of miners. When an inspector does not require that the condition be abated on the day of the inspection, it is important for the mine operator to abate it within the reasonable period of time set forth in the citation. If the operator fails to do so a significantly higher penalty is warranted.

With respect to this violation, however, I believe that there are several mitigating circumstances that compel a reduction in the penalty. I find that A.M. Welles genuinely believed that it corrected the condition cited by Inspector Goldade within the time set for abatement. A number of other guarding citations were issued during the same inspection and A.M. Welles believed that it abated all of them. I credit the testimony of Mr. Haugland that it is the practice of A.M. Welles to immediately correct conditions found by MSHA inspectors. (Tr. 50, 70). I believe that this citation inadvertently fell between the cracks, in part because of the fact that different names are often used for the same conveyor. Apparently, A.M. Welles often refers to the conveyor cited by Inspector Goldade as the "stacking conveyor" rather than the product discharge conveyor. (Tr. 46).

MSHA proposed a penalty of $1,500.00. The Commission is not bound by the MSHA's penalty assessment regulations or practices. The Commission assesses penalties *de novo* by applying the statutory criteria set forth in section 110(i) of the Mine Act to the evidence of record. Sellersburg Stone Co., 5 FMSHRC 287, 292 (March 1983), aff'd 736 F.2d 1147, 1151-52 (7th Cir. 1994). I agree with Inspector Goldade that the violation was not S&S. There is no dispute that A.M. Welles is a small operator and that it has a history of only four prior violations. I find that the gravity was low. With respect to the citation, I find that the negligence of A.M. Welles was not as great as the inspector believed. The cited equipment was new, had been recently purchased, and was extensively guarded by the manufacturer. It was not unreasonable for A.M. Welles to have relied on this guarding. Based on the criteria in section 110(i), I find that a penalty of $130.00 is appropriate.

B. Citation No. 4405457

On May 12, 1994, Inspector Goldade issued Citation No. 4405457 to A.M. Welles at the Red Pioneer Portable Crusher alleging that a guard was not provided around the alternator and V-belt drive for the cooling drive motor on the Caterpillar generator. The citation was issued at the Belgrade Pit and charged a violation of 30 C.F.R. § 56.14107(a) The citation states that the height of the contact area is between two and five feet above the ground, and the pinch point was within four inches of the motor frame and two feet of the throttle control. The citation further alleges that employees are exposed to the hazard on a daily basis.

Inspector Goldade testified that he measured the distances set forth in the citation with a tape measure. (Tr. 20). He testified that an employee would have to start and stop the generator at least once a day and would be exposed to the hazard created by the pinch points of the V-belt drives if he were to trip or stumble. (Tr. 21-22). The only guard present on the generator was around the fan blades. (Tr. 23; Ex. G-4). The inspector determined that the violation was S&S because, based on his experience, it was reasonably likely that someone would eventually be injured by the unguarded V-belt drives. (Tr. 23). He determined that the violation was caused by A.M. Welles' moderate negligence because the condition was clearly visible.

Inspector Goldade discussed the citation with Mr. Haugland and required abatement by May 16. (Tr. 24). The inspector believed that the condition could be abated with a fabricated guard in a couple of hours. Id. Mr. Haugland did not tell the inspector that the time for abatement was too short. Id.

On August 1, 1994, Inspector Smith inspected the crusher after it had been moved to another pit near Big Sky, Montana. He issued Order No. 4410029 under section 104(b) of the Mine Act because he believed that the condition described in Citation No. 4405454 had not been abated. The order states that a guard was not installed on the alternator and V-belt drive system by the termination due date of May 16. The generator was running and Mike Nunn did not know anything about the citation. (Tr. 36). When Inspector Smith returned on August 5 a guard made of solid metal and screening was in place, so he terminated the order. (Tr. 36-38: G-5).

A.M. Welles contends that it abated the citation before the generator was moved from Belgrade to Big Sky by installing a solid metal guard in front of the cited area. (Tr. 41, 45, 51-52, 70-72). It contends that it merely added some screening material after Inspector Smith issued the order on August 1. (Tr. 45, 51-54).

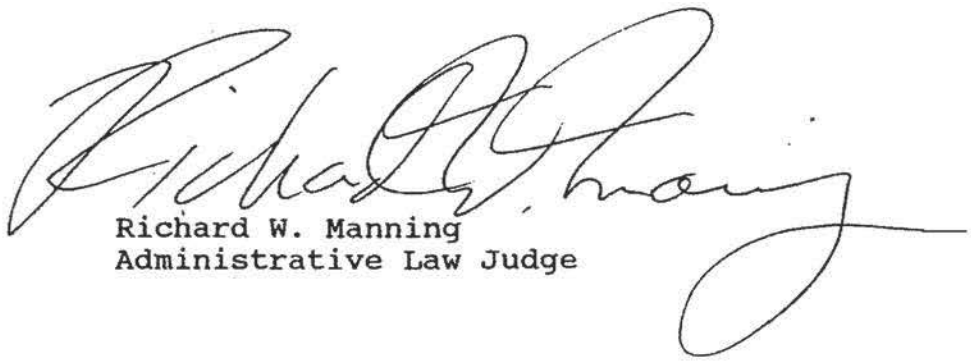
I credit the testimony of Inspectors Goldade and Smith, and I find that the condition cited on May 12 had not been totally abated on August 1. Inspector Smith testified that he did not observe any guard on August 1. (Tr. 63, 65-66). Messrs. Haugland and Hokanson testified that part of the guard was installed prior to the time the generator was moved to Big Sky. In any event, there is no question that additional guarding material was installed after August 1 and the order was terminated on August 5. I find that Inspector Smith did not abuse his discretion in issuing the order. Accordingly, I affirm the citation and the order.

I also affirm that the violation was serious and S&S. The evidence establishes that there was a reasonable likelihood that the hazard contributed to would result in an injury of a reasonably serious nature. Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984).

MSHA proposed a penalty of $2,200.00. As stated above, an operator's failure to abate a citation generally mandates a high penalty. In this instance, however, I believe that there are mitigating circumstances. With respect to the citation, I find that the negligence of A.M. Welles was not as great as the inspector believed. The record as a whole makes clear that A.M. Welles tries in good faith to quickly abate all citations. Its managers genuinely believed that they had abated the cited condition. I have also taken into consideration that the violation created a serious safety hazard and A.M. Welles is a small operator with a history of four previous violations. Based on the civil penalty criteria, I assess a penalty of $200.00 for this violation.

II. ORDER

Accordingly, the citations and section 104(b) orders of withdrawal are **AFFIRMED** and A.M. Welles, Inc. is **ORDERED TO PAY** the Secretary of Labor the sum of $330.00 within 40 days of the date of this decision.



Richard W. Manning
Administrative Law Judge

Distribution:

Kristi Floyd, Esq., Office of the Solicitor, U.S. Department of Labor, 1999 Broadway, Suite 1600, Denver, CO 80202-5716 (Certified Mail)

Alfred Hokanson, President, A.M. WELLES, P.O. Box 8, Norris, MT 59745 (Certified Mail)

RWM

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, 1996

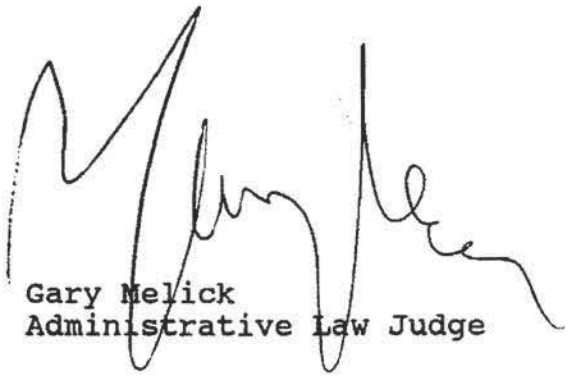
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 96-17
Petitioner	:	A.C. No. 11-00877-04131
v.	:	
	:	Wabash Mine
AMAX COAL COMPANY,	:	
Respondent	:	

AMENDED DECISION

Appearances: Ruben R. Chapa, Esq., Office of the Solicitor, U.S. Dept. of Labor, Chicago, Illinois for Petitioner;
R. Henry Moore, Esq., Buchanan Ingersoll P.C., Pittsburgh, Pennsylvania for Respondent.

Before: Judge Melick

Pursuant to Commission Rule 79, the attached corrected page in the decision made May 2, 1996, is hereby substituted.



Gary Melick
Administrative Law Judge

Distribution:

Ruben R. Chapa, Esq., Christine M. Kassak, Esq., Office of the Solicitor, U.S. Dept. of Labor, 230 S. Dearborn Street, 8th Floor, Chicago, IL 60604 (Certified Mail)

R. Henry Moore, Esq., Buchanan Ingersoll, 301 Grant Street, 20th Floor, Pittsburgh, PA 15219-1410 (Certified Mail)

\jf

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, 1996

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. LAKE 96-17
	:	A.C. No. 11-00877-04131
v.	:	
	:	Wabash Mine
AMAX COAL COMPANY, Respondent	:	

DECISION

Appearances: Ruben R. Chapa, Esq., Office of the Solicitor, U.S. Dept. of Labor, Chicago, Illinois for Petitioner;
R. Henry Moore, Esq., Buchanan Ingersoll P.C., Pittsburgh, Pennsylvania for Respondent.

Before: Judge Melick

This case is before me upon the petition for civil penalty filed by the Secretary of Labor pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, *et seq.*, the "Act," charging the Amax Coal Company (Amax) with two violations under the Act and proposing civil penalties of $2,809 for those violations.

Order No. 4263998

At hearing petitioner filed a motion to approve a settlement agreement as to this order. A reduction in penalty from $2,500 to $2,000 was proposed. Based on the representations and documentation submitted I concluded that the proffered settlement was acceptable under the criteria set forth in Section 110(i) of the Act. That determination is here reconfirmed and an order directing payment of the penalty is incorporated herein.

Citation No. 4264052

This citation charges as follows:

> "The 25/3W haulageway was not kept free of wet and muddy conditions. At No. 29 and from 10 to 12 crosscuts mud and water up to 24 inches in depth affected the control of equipment."

This citation was issued by MSHA Inspector Robert Stamm on September 5, 1995, based upon Safeguard No. 3536015 issued

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

MAY 2 1996

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 96-17
Petitioner	:	A.C. No. 11-00877-04131
v.	:	
	:	Wabash Mine
AMAX COAL COMPANY,	:	
Respondent	:	

DECISION

Appearances: Ruben R. Chapa, Esq., Office of the Solicitor, U.S. Dept. of Labor, Chicago, Illinois for Petitioner;
R. Henry Moore, Esq., Buchanan Ingersoll P.C., Pittsburgh, Pennsylvania for Respondent.

Before: Judge Melick

This case is before me upon the petition for civil penalty filed by the Secretary of Labor pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, *et seq.*, the "Act," charging the Amax Coal Company (Amax) with two violations under the Act and proposing civil penalties of $2,809 for those violations.

Order No. 4263998

At hearing petitioner filed a motion to approve a settlement agreement as to this order. A reduction in penalty from $2,500 to $2,000 was proposed. Based on the representations and documentation submitted I concluded that the proffered settlement was acceptable under the criteria set forth in Section 110(i) of the Act. That determination is here reconfirmed and an order directing payment of the penalty is incorporated herein.

Citation No. 4263995

This citation charges as follows:

> "The 25/3W haulageway was not kept free of wet and muddy conditions. At No. 29 and from 10 to 12 crosscuts mud and water up to 24 inches in depth affected the control of equipment."

This citation was issued by MSHA Inspector Robert Stamm on September 5, 1995, based upon Safeguard No. 3536015 issued

April 27, 1992. The safeguard had been issued pursuant to the criteria set forth in the standard at 30 C.F.R. § 75.1403-10(i). That standard provides that "[o]ff-track haulage roadways should be maintained as free as practicable from bottom irregularities, debris, and wet or muddy conditions that affect the control of equipment."

The underlying safeguard provided as follows:

> "The haulage road in the Number 3 entry on the 1st S/1st W/ MWS entries was not being maintained free of wet and muddy conditions that affected the control of the Gettman tractor(oil car) from spad number 35170 to 200 feet outby. This is a notice to provide safeguards requiring this roadway and other roadways at this mine to be maintained free as practical from wet or muddy conditions that affect the control of equipment."

The Secretary's general authority to issue safeguards is derived from Section 314(b) of the Act. This Commission has held that the language of that section is broad and "manifests a legislative purpose to guard against all hazards attendant upon haulage and transport [ation] in coal mining." *Jim Walter Resources, Inc.*, 7 FMSHRC 493, 496 (April 1985). The Commission has also observed that while other mandatory safety and health standards are adopted through the notice-and-comment rulemaking procedures of Section 101 of the Act, Section 314(b) extends authority to the Secretary to create on a mine-by-mine basis what are, in effect, mandatory standards, without the formalities of rulemaking. *Southern Ohio Coal Company*, 7 FMSHRC 509, 512 (April 1985). The Commission has recognized that "this unusually broad grant of regulatory authority must be bounded by a rule of interpretation more restrained than that accorded promulgated standards." *Id.*

The Commission also held in *BethEnergy Mines, Inc.*, 14 FMSHRC 17 (January 1992) that a safeguard must be based upon the specific conditions at a mine. Further, in *Southern Ohio Coal Company*, 14 FMSHRC 1 (January 1992), the Commission held that the Secretary has the burden of proving that the inspector evaluated the specific conditions at the particular mine at issue and determined that a safeguard was warranted in order to address a transportation hazard. The safeguard notice must also identify with specificity the nature of the hazard at which it was directed and the conduct of the operator necessary to remedy such hazard.

The initial question presented in this case, therefore, is whether the instant safeguard was validly issued. I find, upon the credible testimony of the issuing inspector, that it was.

According to the undisputed testimony of the issuing inspector, Wilbur Deuel, he observed on April 27, 1992, a Gettman diesel tractor which was unable to climb a hill in the mine because of "slick" conditions, described in his safeguard as wet and muddy. Deuel was concerned that the Gettman could lose control on the slick incline, which he noted was one of the steepest in the mine. This evidence adequately establishes that the inspector evaluated specific conditions at the mine in determining that this safeguard was warranted.

The identification of the nature of the cited hazard was also made in the notice to provide safeguard with the requisite specificity. It is not material to this issue that the wet and slippery conditions may have been found in a different location in the mine or on an incline. Although the wet and slippery conditions may have been aggravated by the incline, the underlying hazard was wet and slippery conditions on a haulageway. The criteria for a valid issuance of the safeguard have, therefore, been met.

The issue then, is whether Amax violated the safeguard in this case. The evidence is overwhelming that it did. According to MSHA Inspector Robert Stamm, on September 5, 1995, during the course of his inspection, he discovered standing water and mud at two locations. At crosscut No. 29 there was 30 feet of water along the 15-foot-wide entry and at the No. 15 to 20 crosscuts the body of water was 150 feet long, 15 feet wide and up to 24 inches deep. At the time he issued the citation a Gettman tractor was also stuck in the mud. Stamm noted that the hazard was from the mud itself and he observed that the Gettman tractor had been sliding toward the rib. This was evident from its tire tracks. According to Stamm, the condition should have been known to the operator as the section foreman must travel this area each day. He also observed that pumps had been installed in the area but they were not then operating. Amax representative Ray Evans told Stamm that in any event it would be difficult to pump mud with these pumps.

Stamm believed that the violation was "significant and substantial" and of high gravity because of the possibility of running into a rib and passengers being thrown around. He also observed that material falling into the water, such as cement blocks and roof bolts, could be hit by vehicles, thereby causing accidents.

Mine examiner and United Mine Workers of America (UMWA) safety committee chairman, Joe Hoover, testified that he saw these conditions on September 5, 1995, and noted that the water extended from rib to rib. The Gettman tractor was also "hung up" with the oil and fuel cars it was pulling. Hoover noted that pickup trucks also traveled through the cited area and that he

had seen such trucks drive up to 30 miles per hour. He noted that it was not uncommon for wet conditions to exist at the face areas and in the returns and primary intakes. He further observed that the cited area was a secondary escapeway and that employees passed through this area to get to the working section.

Within this framework of evidence, it is clear that the violation has been proven as charged, that the violation was "significant and substantial" and the violation was the result of negligence. A violation is properly designated as "significant and substantial" if, based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. *Cement Division, National Gypsum Co.*, 3 FMSHRC 822, 825 (1981). In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (1984), the Commission explained:

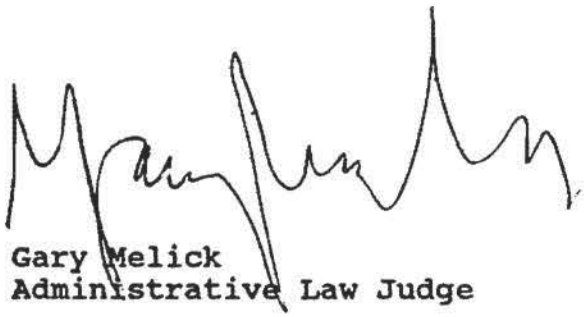
> In order to establish that a violation of a mandatory standard is significant and substantial under *National Gypsum* the Secretary must prove: (1) the underlying violation of a mandatory safety standard, (2) a discrete safety hazard -- that is, a measure of danger to safety -- contributed to by the violation, (3) a reasonable likelihood that the hazard contributed to will result in an injury, and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.
>
> See also *Austin Power Co. v. Secretary*, 861, F.2d 99, 103-04 (5th Cir. 1988), *aff'g* 9 FMSHRC 2015, 2021 (1987) (approving *Mathies* criteria.

The third element of the *Mathies* formula requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury (*U.S. Steel Mining Co.*, 6 FMSHRC 1834, 1836 (1984), and also that the likelihood of injury be evaluated in terms of continued normal mining operations. *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1473, 1574 (1984); see also *Halfway, Inc.*, 8 FMSHRC 8, 12 (1986) and *Southern Oil Coal Co.*, 13 FMSHRC 912, 916-17 (1991). It may reasonably be inferred from the record herein that large vehicles such as diesel tractors and pickup trucks driving through muddy, wet and slick conditions would likely skid into other equipment or vehicles, a miner or a rib thereby causing serious injuries. The operator's negligence may also be inferred from the evidence that the cited area was traveled by foremen each shift who would thereby necessarily have observed the cited violative conditions.

Under the circumstances and considering the criteria under Section 110(i) of the Act, I find that the penalty proposed by the Secretary is reasonable.

ORDER

Order No. 4263998 and Citation No. 4264052 are affirmed. Amax Coal Company is directed to pay a civil penalty of $2,309.00 within 30 days of the date of this decision.



Gary Melick
Administrative Law Judge

Distribution:

Ruben R. Chapa, Esq., Christine M. Kassak, Esq., Office of the Solicitor, U.S. Dept. of Labor, 230 S. Dearborn Street, 8th Floor, Chicago, IL 60604 (Certified Mail)

R. Henry Moore, Esq., Buchanan Ingersoll, 301 Grant Street, 20th Floor, Pittsburgh, PA 15219-1410 (Certified Mail)

\jf

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1244 SPEER BOULEVARD #280
DENVER, CO 80204-3582
303-844-3993/FAX 303-844-5268

MAY 1 3 1996

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEST 95-188-M A.C. No. 48-00152-05644
v.	:	FMC - Trona Mine
FMC WYOMING CORPORATION, Respondent	:	

DECISION

Appearances: Robert Cohen, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Petitioner;
Matthew F. McNulty, III, Esq., Salt Lake City, Utah, for Respondent.

Before: Judge Cetti

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, 30 U.S.C. § 801 et seq. the "Act." The Secretary of Labor on behalf of the Mine Safety and Health Administration, (MSHA), charged the Respondent, the operator of Trona Mine, with a permissibility violation of mine safety standards set forth in 30 C.F.R. § 57.22305.

The operator filed a timely answer contesting the alleged violation and the amount of the proposed penalty. This matter, originally noticed for hearing to be held on April 3, 1996, but was by oral stipulation of the parties and consent of the Judge, it was heard on April 2, 1996, in Salt Lake City where other cases involving the same parties were heard.

The Trona mine is a large underground mine. The mine has a level horizontal body of ore with approximately 1,500 to 1,600 feet of cover. MSHA charged that the proximity switches for the number 4 hoist located at the top of the number 4 shaft were not maintained in permissible condition as required by 30 C.F.R. § 57.22305.

At the hearing, counsel for the Secretary stated the issues with respect to the permissibility violation alleged in Citation No. 4338843, were (1) whether or not there was a violation of the safety standard and (2) if there was a violation, whether or not the violation was significant and substantial and (3) the appropriate penalty.

The Secretary presented the testimony of the MSHA mine inspector, Danny Frey, who issued the citation in question. He testified the Trona mine was a large underground mine. The mine releases some methane gas during the mining process. Frey stated if the methane is not properly controlled, there can be an explosion hazard. To have an explosion, there must be 5 to 15 percent methane in the mine atmosphere and the oxygen content can be as low as 12 percent and of course, there must be an ignition source. The mine is a gassy mine that liberates more than one million cubic feet of methane in 24 hours and is subject to spot inspection on a five day interval under § 103(i) of the Act. The mine has a forced air ventilation system. The shaft, in question, is used for hoisting muck from the mine. It's not a man hoist and is not used to transport miners. It is used to expel the return (exhaust) air from the mine. This shaft extended from the surface of the mine to the mine workings some 1,500 to 1,600 feet below. The return air enters the No. 4 shaft at the bottom of the shaft and goes straight up through the vertical shaft, in question, into the atmosphere at the surface. The switches, in question, are located above ground level. The switches, nevertheless, are required to be permissible because the exhaust air as it comes out of the shaft has the potential of containing methane. Since the switches were not permissible, there was a violation of 30 C.F.R. § 57.22305. The primary question remaining was whether the violation was properly designated S&S.

The inspector took readings of the methane content of the exhaust air as it entered the bottom of the No. 4 shaft approximately 1,500 to 1,600 feet below the location of the proximity switches. The inspector on cross-examination testified that using the methane readings obtained, there was not enough methane content in the return air at the proximity switches to have an ignition or explosion. There would have to be a minimum of 5 percent methane content to have an explosion and the methane readings obtained shows the methane content of the exhaust air to be less than 1 percent. (Govt. Ex. 1 & 2). Consequently, the likelihood of an explosion was remote rather than reasonably likely.

After all the evidence was presented, there was an off the record discussion of the evidence and it was agreed and stated for the record that based upon the evidence presented at the hearing that Citation No. 4339843 should be classified as non S&S. This conclusion was based on the lack of evidence of

sufficient methane in the area of the proximity switches to create a reasonable likelihood that the hazard contributed would result in an injury of a reasonable serious nature. Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984).

Upon consideration of the statutory criteria in section 110(i) of the Mine Act, the appropriate penalty of this violation of the cited safety standard is $100.

Order 4338895 issued September 9, 1994, is vacated at the request of Petitioner as it is now believed an extension of the abatement period should have been issued rather than a 104(b) order since the operator was moving towards compliance.

ORDER

In view of the foregoing, Order No. 4338893 is **VACATED;** Citation No. 4338834 is modified to delete the S&S finding and as so modified the citation is **AFFIRMED.** FMC shall pay a civil penalty of $100 to the Secretary of Labor within 30 days of the date of this order. Upon receipt of payment, this case is dismissed.

August F. Cetti
Administrative Law Judge

Distribution:

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

Matthew F. McNulty, III, Esq., Eric E. Vernon, Esq., 50 South Main Street, Suite 1600, P.O. Box 45340, Salt Lake City, UT 84145
(Certified Mail)

/sh

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

MAY 15 1996

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 95-203-M
Petitioner	:	A. C. No. 23-02086-05503
v.	:	
	:	HWY 54 South Quarry
BECK MATERIALS COMPANY,	:	
Respondent	:	

DECISION

Appearances: Margaret A. Miller, Esq., Office of the Solicitor, U. S. Department of Labor, Denver, Colorado, for the Secretary;
Keith A. Wenzel, Esq., Inglish & Monaco, P.C., Jefferson City, Missouri, for Respondent.

Before: Judge Maurer

STATEMENT OF THE CASE

This case is before me upon the petition for assessment of civil penalty filed by the Secretary of Labor (Secretary) against the Beck Materials Company (Beck Materials) pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815. The petition charges Beck Materials with three violations of the mandatory standards found in 30 C.F.R. Part 56 and seeks civil penalties of $3500, as a result of a serious injury accident which occurred on December 7, 1994, at Beck Materials' Highway 54 South Quarry.

Pursuant to notice, this case was heard at Columbia, Missouri, on December 5, 1995. Both parties have subsequently filed written proposed findings of fact and conclusions of law, which I have considered along with the entire record in this case in arriving at the following decision.

STIPULATIONS

At the commencement of the hearing, the parties proffered a signed set of stipulations, dated December 5, 1995, which I accepted into the record (Tr. 5-6) as follows:

1. Beck Materials Company is engaged in mining and selling of limestone in the United States, and its mining operations affect interstate commerce.

2. Beck Materials Company is the owner and operator of Highway 54 South Quarry Mine, MSHA ID No. 23-02086. The Highway 54 South Quarry Mine is a limestone mine using conventional mining methods to drill and blast limestone.

3. Beck Materials Company is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. ("the Act").

4. The administrative law judge has jurisdiction in this matter.

5. The subject citations were properly served by a duly authorized representative of the Secretary upon an agent of respondent on the date and place stated therein, and may be admitted into evidence for the purpose of establishing their issuance, and not for the truthfulness or relevancy of any statements asserted therein.

6. Doug Laird, Plant Foreman, was seriously injured at approximately 4:30 p.m., on December 7, 1994, when he slipped or tripped and fell onto a moving conveyor belt. His right arm was pulled between the drive pulley and the moving conveyor belt.

7. Mr. Laird had 1 year and 1 month total mining experience, all at the Beck Materials Mine.

8. The exhibits to be offered by respondent and the Secretary are stipulated to be authentic but no stipulation is made as to their relevance or the truth of the matters asserted therein.

9. The proposed penalties will not affect respondent's ability to continue in business.

10. The operator demonstrated good faith in abating the violations.

11. Beck Materials Company is a limestone mine operator with 98,214 production hours worked in 1994. The mine employs about 10 miners who work 9 ½ hour shifts each day, 5 days per week.

12. The certified copy of the MSHA Assessed Violations History accurately reflects the history of this mine for the 2 years prior to the date of the citations.

FINDINGS, CONCLUSIONS AND DISCUSSION

On January 31, 1995, MSHA Inspector Robert D. Seelke, subsequent to an accident investigation, issued section 104(d)(1) Citation No. 4329266 to Beck Materials for a violation of 30 C.F.R. § 56.12016[1] alleging that:

> At approx (sic) 4:30 pm on Dec. 7, 1994, plant foreman, Doug Laird, who was filling in as the plant operator, was seriously injured when his right arm was pulled between the drive pulley and the moving conveyor belt of the under scalping screen conveyor. The injured

---

[1]/ 30 C.F.R. § 56.12016 provides: "Electrically powered equipment shall be deenergized before mechanical work is done on such equipment. Power switches shall be locked out or other measures taken which shall prevent the equipment from being energized without the knowledge of the individuals working on it. Suitable warning notices shall be posted at the power switch and signed by the individuals who are to do the work. Such locks or preventive devices shall be removed only by the persons who installed them or by authorized personnel."

employee elected to make adjustments to the tracking of the belt without deenergizing the conveyor system. While checking the adjustments the employee slipped or tripped while walking on the framework of the screen, bin, conveyor system and fell over the top of the side guard on the drive pulley. His right hand & arm contacted the moving conveyor which pulled his right arm into the pinch point of the drive pulley & conveyor belt. This is an unwarrantable failure.

On that same date, Inspector Seelke also issued section 104(d)(1) Order No. 4329267 to Beck Materials for a violation of 30 C.F.R. § 56.11001[2] alleging that:

> At approx (sic) 4:30 pm on Dec. 7, 1994, plant foreman, Doug Laird, who was filling in as the plant operator, was seriously injured when his right arm was pulled between the drive pulley & the moving conveyor belt of the under scalping screen conveyor. The employee was not using a safe means of access to check the adjustments he had made on the belt. The injured elected to walk the 9" I-beam, that is part of the scalping screen and conveyor frame, to check the belt movement after making adjustments. While attempting to step from the 9" I-beam to the tail pulley guard of the #1 product belt he slipped or tripped and fell causing his right arm to contact the moving under scalping screen conveyor, which pulled his arm into the pinch point between the drive pulley and the belt. This is an unwarrantable failure.

---

[2]/ 30 C.F.R. § 56.11001 provides: "Safe means of access shall be provided and maintained to all working places."

Additionally, the inspector issued section 104(a) Citation No. 4329268 to Beck Materials for a violation of 30 C.F.R. § 56.14107(a)[3] alleging that:

> At approx (sic) 4:30 pm on Dec. 7, 1994, plant foreman, Doug Laird, who was filling in as the plant operator, was seriously injured when his right arm was pulled between the drive pulley and the moving conveyor belt of the under scalping screen conveyor. Upon investigation of the accident site it was concluded that the drive & the tail pullies (sic) of the conveyor were not sufficiently guarded to prevent contact with the pinch point.

On December 7, 1994, the date of the accident, the plant had crushed rock until early afternoon when due to rain, they ran out of dry material in the pit and had to shut the plant down. Danny Foster, the plant superintendent, sent some of the men home at that time, but kept Doug Laird, a plant foreman and the accident victim, there to do some work on the plant. More specifically, Laird was adjusting the under scalping screen conveyor belt[4] when he was injured.

Earlier that day, Laird and Andrew Mitchem, a loader operator, had attempted to make tracking adjustments to the belt, but were unable to get it to track properly. After the plant

---

[3]/ 30 C.F.R. § 56.14107(a) provides in pertinent part that: "Moving machine parts shall be guarded to protect persons from contacting gears, sprockets, chains, drive, head, tail, and take up pulleys. . . that can cause injury."

[4]/ The under scalping screen conveyor is a horizontal in-house manufactured conveyor that Beck Materials Company manufactured in approximately 1989. The conveyor belt is 30-inches wide and the conveyor measures approximately 20-feet from the head pulley to the tail pulley. It is electrically powered and travels at approximately 250 feet per minute. The top of the conveyor belt is approximately 6 ½ feet above ground level.

shut down, Laird testified that he went back to this task. He started just that one belt back up, went to the south side of the plant and got up on the framework where he could reach the adjustment screws and bolts. In order to climb up there, he utilized the wheels and axles that run underneath the plant and climbed from there to a 9-inch wide I-beam rail from where he could reach the adjustment screws and bolts. He testified that there was no ladder available to climb up there to make these adjustments.

He adjusted the belt several times, but he stated that the belt was not responding so he went back around to the other side of the plant to see if the belt was hanging up on anything but could not locate any problem. At this point, he climbed up onto the I-beam framework again and looked to see what might be holding the belt up. Not seeing anything blocking the conveyor belt, he was moving back along the I-beam framework of the bin and conveyor on the north side, getting ready to go back around to the other side and make further adjustments when he fell. His right hand was pulled up into the head pulley of the still running belt. As a result of the accident, his right shoulder and arm were amputated and he sustained a severe injury to his spinal cord which causes him chronic and severe pain. He is disabled from further employment.

Inspector Seelke issued Citation No. 4329266 because Laird had been making mechanical adjustments to the electrically powered equipment without deenergizing and locking out that equipment, all in violation of 30 C.F.R. § 56.12016.

It is beyond dispute that the cited conveyor belt was in fact running and therefore not deenergized and locked out at the time of the accident, and it is also undisputed that Laird was performing mechanical work on it. Accordingly, that, without more, is sufficient to find that a violation of 30 C.F.R. § 56.12016 occurred and I do so find.

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 U.S.C. § 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).

In this case we do not have to deal with likelihoods, possibilities or probabilities. A serious injury accident did in fact occur, as a direct result of this violation and as a result

of that accident, Laird was permanently disabled from gainful employment. I therefore find this cited violation to be significant and substantial ("S&S") and serious.

The Secretary also alleges the violation was the result of the respondent's "unwarrantable failure" to comply with the cited standard.

In Emery Mining Corp., 9 FMSHRC 1997, 2004 (December 1987), the Commission determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. This determination was derived, in part, from the plain meaning of "unwarrantable" ("not justifiable" or "inexcusable"), "failure" ("neglect of an assigned, expected or appropriate action"), and "negligence" (the failure to use such care as a reasonably prudent and careful person would use, and is characterized by "inadvertence," "thoughtlessness," and "inattention"). 9 FMSHRC at 2001. Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference" or a "serious lack of reasonable care." 9 FMSHRC at 2003-04; Rochester & Pittsburgh Coal Co., 13 FMSHRC at 189, 193-94 (February 1991). The Commission has also stated that use of a "knew or should have known" test by itself would make unwarrantable failure indistinguishable from ordinary negligence, and accordingly, the Commission rejected such an interpretation. A breach of a duty to know is not necessarily an unwarrantable failure. The thrust of Emery was that unwarrantable failure results from aggravated conduct, constituting more than ordinary negligence. Secretary v. Virginia Crews Coal Co., 15 FMSHRC 2103, 2107 (October 1993).

Respondent's defense to the "unwarrantable failure" charge contained in this citation is basically that Laird did not follow established company procedures in attempting to adjust the conveyor belt tracking. Several witnesses testified to the effect that respondent has a lock-out procedure in place and it has been addressed repeatedly over the years at safety meetings. However, that testimony aside, I find that that "official" policy was not actually being observed in practice. Mr. Laird very credibly testified that he was performing the tracking

adjustments in the manner that he had been taught personally by Mr. Foster, the superintendent, that is, with the belt running. I therefore find and conclude that this violation occurred as a result of the aggravated negligence of the operator. Accordingly, Citation No. 4329266 will be affirmed herein, as issued, in its entirely.

On the basis of the foregoing findings and conclusions, and taking into account the civil penalty assessment criteria found in section 110(i) of the Act, I conclude and find that a civil penalty of $1500, as proposed by the Secretary for this citation, is a reasonable and appropriate civil penalty that will serve to satisfy the public interest in this matter.

Inspector Seelke issued section 104(d)(1) Order No. 4329267 on January 31, 1995. He testified that Laird did not use a safe means of access to make or check the adjustments he had made on the belt. Several times Laird climbed up on or walked along the I-beam of the framework of the machinery to make adjustments to the belt or check those adjustments. In Seelke's opinion, which I accept, a secured ladder should have been used to make and check the adjustments on both sides of the equipment. This becomes even more obvious when you consider that the belt was running at the time Laird was attempting to adjust the tracking on it. If Laird had used a safe means of access, such as a secured ladder, he would not have fallen onto the running belt.

There was testimony to the effect that ladders were available on the premises, but they were inside a trailer rather than in place on the equipment. Mr. Laird testified that no ladder was available to him, and he saw no other way to access the belt to make the needed adjustments other than to climb up onto the I-beam.

I find that there was a violation of the cited standard since no safe means of access was readily available and in any case, no safe means of access was used by Laird in this instance, even if one could argue that he should have gone wherever he had to to locate a suitable ladder.

Applying the Mathies test, I find that the violation is a significant and substantial one given that the lack of a safe means of access contributed to the serious injury sustained by Mr. Laird.

I also find that the negligence involved in this violation demonstrates aggravated conduct on the part of the operator and it is properly designated as an "unwarrantable failure" order. Mr. Foster, the mine superintendent, who did not appear to testify in this case, was on the premises at the time, knew that Laird was working alone and in fact, had personally instructed Laird at an earlier date regarding the procedure for adjusting the tracking on these belts, including making the adjustments without a ladder or other safe means of access to do so. Furthermore, on many previous occasions, Laird had observed Foster, and others, adjust the belts without deenergizing the equipment and without using a safe means of access to reach the adjustments on the equipment. Accordingly, Order No. 4329267 will be affirmed herein, as issued, in its entirety.

On the basis of the foregoing findings and conclusions, and taking into account the civil penalty assessment criteria found in section 110(i) of the Act, I conclude and find that a civil penalty of $1000, as proposed by the Secretary for this order, will serve to satisfy the public interest in this matter.

Inspector Seelke also issued a section 104(a) citation on January 31, 1995, to Beck Materials (Citation No. 4329268). This was basically a guarding violation. Allegedly, the drive pulley on the under scalper conveyor was not sufficiently guarded.

The equipment was in fact guarded sufficiently for anyone approaching the pinch point from the ground, the more foreseeable hazard. The problem in this case and the reason that the inspector issued the citation was that an employee, Laird, found a way, by using the I-beam as a walkway, to get into the pinch point between the conveyor belt and the drive pulley of the under scalping screen conveyor despite the existing guarding.

The finding of violation follows from the fact that Laird did in fact make contact with the unguarded moving parts from above, no matter how difficult it might have been to foretell

that occurrence beforehand. Likewise, the violation is significant and substantial ("S&S") simply because of the gravity of the occurrence and the resultant very serious injury to Mr. Laird.

The only issue I take with the inspector who wrote the instant citation is that of the negligence factor contained in Block No. 11 of the citation. I am going to modify that negligence factor from "moderate" to "low," based on what I perceive to be the relative unforseeability of contact with the pinch point from above the pulley as opposed to from the direction of the ground, from whence it was adequately guarded. With that modification, Citation No. 4329268 will be affirmed herein.

On the basis of the foregoing findings and conclusions, and taking into account the civil penalty assessment criteria contained in section 110(i) of the Act, I conclude and find that a civil penalty of $300 is a reasonable and appropriate civil penalty that will serve to satisfy the public interest in this matter.

ORDER

1. Citation No. 4329266 and Order No. 4329267 **ARE AFFIRMED.**

2. Citation No. 4329268, as modified herein, **IS AFFIRMED.**

3. The Beck Materials Company **IS ORDERED TO PAY** the Secretary of Labor a civil penalty of $2800 within 30 days of the date of this decision.

Roy J. Maurer
Administrative Law Judge

Distribution:

Margaret A. Miller, Esq., Office of the Solicitor, U. S. Department of Labor, 1999 Broadway, Suite 1600, Denver, CO 80202-5716 (Certified Mail)

Keith A. Wenzel, Esq., Inglish & Monaco, P.C., 237 East High Street, Jefferson City, MO 65101 (Certified Mail)

dcp

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

MAY 15 1996

PEABODY COAL COMPANY,	:	CONTEST PROCEEDINGS
Contestant	:	
v.	:	Docket No. KENT 93-318-R
	:	Citation No. 3551261; 1/6/93
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. KENT 93-319-R
ADMINISTRATION (MSHA),	:	Order No. 3551262; 1/6/93
Respondent	:	
	:	Docket No. KENT 93-320-R
	:	Order No. 3551263; 1/20/93
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 93-437
Petitioner	:	A.C. No. 15-02709-03840
v.	:	
	:	Camp No. 1 Mine
PEABODY COAL COMPANY,	:	Mine ID No. 15-02709
Respondent	:	

DECISION ON REMAND

Before: Judge Amchan

The Commission Decision and Remand Order

On April 19, 1996, the Commission reversed and remanded my January 5, 1994 decision in these matters. I had found Peabody's violations of the respirable dust limit in 30 C.F.R. §70.100(a) with regard to three of its six mechanized mining units to be due to an "unwarrantable failure" to comply the standard and due to high negligence. This Commission concluded:

> ... Peabody's remedial measures clearly demonstrate a good faith, reasonable belief that it was taking steps necessary to solve its dust problems and this record cannot support a finding of high negligence or unwarrantable failure. (Slip opinion at page 6.)

This matter is now before me to reassess the civil penalties with regard to these violations.

Findings of Fact

Violative conditions and prior respirable dust violations in the two years before the instant citation and orders

On January 6, 1993, MSHA inspector Arthur Ridley reviewed the results of Respondent's bimonthly sampling for respirable dust for the period of November-December 1992 (Tr. 16-18). These records indicated that for the five samples taken in the sampling period, the average exposure of the continuous miner operator on mechanized mining unit (MMU) 044 was 2.4 mg/m3 (Jt. Exh. 4).

Ridley therefore issued Citation No. 3551261, alleging a violation of 30 C.F.R. § 70.100(a), which requires that:

> 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 ... .

The citation was issued pursuant to section 104(d)(1) of the Act in that it alleged that the violation was "significant and substantial" (S&S) and due to the "unwarrantable failure" of Peabody to comply with the standard. A $4,000 civil penalty was proposed for this alleged violation.

On January 6, 1993, the inspector also reviewed the results of the November-December 1992 sampling of the continuous miner operator on MMU 056. The five samples also averaged 2.4 mg/m3 (Tr. 58-59, 63). Ridley issued section 104(d)(1) Order No. 3551262. The Secretary subsequently proposed a $6,000 civil penalty.

Ridley returned to Camp 1 on January 20, 1993 and reviewed samples taken between January 4 and 6, 1993, on MMU 047 for the January-February 1993 bimonthly sampling period. These averaged 2.2 mg/m3. The inspector issued section 104(d)(2) Order No. 3551263. The proposed penalty for this order was $6,000.

While Peabody conceded that the violations were "S&S," it challenged the allegations of unwarrantable failure and high negligence. These allegations were predicated on the number of citations issued within the prior two years for violations of the respirable dust standard on each on the mechanized mining units cited in January, 1993 (Tr. 34-39, 65, 74-75, 83-85, 100-102).[1] These violations were considered only on a MMU-by-MMU basis; the Secretary did not consider Respondent's compliance record as a whole (Tr. 74-75, 100-102).

In the two years prior to January 1993, Unit 044 had been sampled in 10 of the 12 bimonthly sampling periods. Respondent had been out of compliance with the respirable dust standard on four of these occasions. On February 8, 1991, Respondent received a citation because the samples on Unit 044 averaged 3.3 mg/m3 for the January-February 1991 bimonthly sampling period (Exhibit G-1). On March 28, 1991, a section 104(b) order was issued because the samples for the March-April 1991 bimonthly period averaged 2.2 mg/m3. On December 2, 1991, a section 104(a) citation was issued because the samples for the November-December 1991 bimonthly period averaged 2.7 mg/m3 (Exhibit G-2, page 2). On February 11, 1992, another citation was issued because the samples for the January-February 1992 bimonthly period averaged 2.8 mg/m3 (Exhibit G-2, page 3).

In the 12 bimonthly sampling periods during calendar year 1991 and 1992, mechanized mining Unit 056 was out of compliance with the respirable dust standard five of the 12 times it was sampled. In February 1991, Respondent was cited because the January-February samples averaged 2.2 mg/m3 (Exhibit G-2). In July 1991, Peabody was cited again because the May-June samples averaged 2.7 mg/m3. In February 1992, another citation was issued because the January-February samples averaged 2.9 mg/m3 (Exhibit G-2, page 3). In April 1992, MSHA cited Peabody again because the samples for the March-April period averaged 2.6 mg/m3. The fifth violation during 1991-1992 occurred in the November-December 1992 sampling period and is addressed by Order No. 3551262.

---

[1] At the time of the January 1993 citation and orders, Peabody had six mechanized mining units in operation at the Camp No. 1 mine.

Mechanized mining Unit 047 was available for sampling in only four of the 12 bimonthly sampling periods of 1991-1992. In May 1991, a citation was issued because the March-April samples averaged 3.0 mg/m3. The next time Unit 047 was sampled was for the July-August 1992 sampling period when it was barely in compliance at 1.9 mg/m3 (Exhibit G-3, page 4). For the September-October sampling period the average concentration was 2.4 mg/m3, precipitating another citation (Exhibit G-3, page 4). MMU 047 was in compliance for the November-December 1992 sampling period, then out of compliance again for the January-February 1993 period, which is covered by Order No. 3551263.

Measures Taken Prior to January 1993 to improve dust control

Beginning in January 1992, Peabody implemented a number of measures to increase the water supply to its MMUs and thereby improve dust control. In January 1992, it began a 6-month project to install water flow gauges on its continuous miners. This allows the operator of the machine to monitor the amount of water coming through his machine (Tr. 179).

In February, Respondent began a six to seven month project to increase the size of the fittings on the water lines leading to the continuous miners from ½ inch to 2 inches (Tr. 181 - 82). In March 1992, Peabody increased the water volume on its four continuous miners that are shuttle car units by 25 percent. The water volume of its two continuous miners that are continuous haulage units was increased by 50 percent (Tr. 182-83).

Beginning in February 1992, Respondent replaced the 2-inch plastic pipe in its water lines with 2-inch metal pipe, thus allowing it to use greater water pressure (Tr. 183). In March 1992, Peabody increased the size of the water lines going to the miners from 1 inch to 1 ½ inches (Tr. 184).

In July 1992, the company replaced its water pumps with pumps that allowed for increased water pressure (Tr. 188). Finally, over a six-week period in November and December, 1992, Peabody installed water sprays inside the ductwork of the scrubbers on the continuous miners to improve scrubber efficiency

(Tr. 185). Peabody also began working with the manufacturer of its continuous miners to reduce restrictions in the water line of these machines (Tr. 187).

Assessment of Civil Penalties

In my prior decision I assessed a $5,000 civil penalty for each of the three respirable dust violations cited by Inspector Ridley in January, 1993. Given the fact that the Commission has concluded that the record does not support a finding of "unwarrantable failure" or high negligence upon which these assessments were predicated, penalties of substantially less than $5,000 are clearly indicated by the remand order.

The Six Statutory Criteria for Assessing Civil Penalties

The effect on the operator's ability to stay in business: The parties stipulated that penalties of the magnitude of those proposed would not effect Peabody's ability to stay in business.

Size of the operator: Peabody produces in excess of 10,000,000 tons of coal a year and is thus a relatively large operator. Other things being equal, this would indicate that a somewhat larger penalty is more appropriate than for a smaller operator.

Good faith in attempting to achieve rapid compliance after notification of the violation: Peabody immediately acted upon Inspector Ridley's suggested method to terminate (or abate) the violations. It assigned additional supervisory personnel to monitor its employees while they were being sampled for respirable dust exposure (Tr. 72-73, 96, 190). These supervisors insured that miners positioned themselves where they would minimize dust exposure and checked on ventilation and water pressure (Tr. 191). Respondent should be given credit for exercising good faith in terminating the citations even though implementation of the inspector's suggestions may violate 30 C.F.R. § 70.207, which requires that sampling be taken during a normal production shift. Sampling results obtained under conditions that are abnormal are likely to be unrepresentative of the miners' regular, daily exposure to respirable dust.

Gravity of the violations: The gravity of the violations is quite high. The parties have stipulated that the violations are "S&S." The record also suggests that Respondent's miners have been regularly exposed to respirable dust levels above those allowed by the standard for a 2-year period.

Prior History and Negligence: These factors must be considered in unison when assessing a civil penalty in these matters. Citation No. 3551261 was the fifth respirable dust violation on MMU 044 in a 2-year period. Order No. 3551262 was the fifth on MMU 056. Order No. 3551263 was the third violation out of five sampling periods on MMU 047. Although MSHA appears to have considered each MMU in isolation, I believe one must consider that in January 1993, after numerous prior respirable dust violations, three of Respondent's six mechanized mining units were in violation of the respirable dust standard. Although it is true that two of these violations were for one bimonthly sampling period and one was for another, I deem it significant that in the same month MSHA cited Respondent for respirable dust violations on half of its production units.

The Commission has found that this record does not support a finding of high negligence. Thus, the question becomes whether the violations were the result of negligence at all, or simply bad luck[2]. Since January 1993, Respondent's management has watched its continuous miner operators while their dust exposure is being sampled (Tr. 214-15). Miner operators have been observed on several occasions improperly positioning the curtain or line brattice to direct air towards the working face, and positioning themselves in the exhaust current, rather than the intake current (Tr. 215-16).

The Commission noted that employee work practices were also addressed before the issuance of the instant citations (slip

---

[2] The Commission concluded that "Peabody's remedial measures clearly demonstrate a good faith, reasonable belief that it was taking the steps necessary to solve its dust problems and this record cannot support a finding of high negligence or unwarrantable failure." Slip opinion at page 6. I infer that the record may support a finding of ordinary negligence; otherwise the Commission would have concluded that it did not do so.

opinion at page 6). The contents of the approved dust control plan were covered in annual refresher training and at least at some unspecified number of recurring safety meetings (Tr. 213). Additionally, in May, 1992, the Superintendent and chief mine manager of Camp No. 1 Mine went to employees in each working section and explained in detail Respondent's dust control program (Tr. 213).

I conclude that the instant violations were the result of Respondent's "ordinary" negligence. Sampling by MSHA in 1991 and 1992 indicated that compliance with the standard was achievable with the equipment already on site, thus putting Peabody on notice that something else, such as improper work practices, was partially the cause of its excessive respirable dust readings (Tr. 48, 89). Moreover, the results of the company's sampling in the latter part of 1992 was not such that it should have led Respondent to believe that it had solved the problem. For the three bimonthly sampling periods May-October 1992, the results of Peabody's sampling on the three cited machines was as follows:

Sampling Period	MMU 044	MMU 056	MMU 047
May-June '92	1.5mg/m3	1.3mg/m3	Non Producing
July-Aug '92	Non Producing	1.2mg/m3	1.9mg/m3
Sept.-Oct. '92	Non Producing	1.6mg/m3	2.4mg/m3 (violation)

I conclude that these results were insufficient to give a reasonably prudent operator assurance that it had solved its respirable dust problem, and should have put it on notice that greater attention to employee work practices was necessary. Thus, I conclude that the violations found in the November-December 1992 sampling period on MMU 044 and 056, and the violation found on MMU 047 in the January-February 1993 sampling period, were the result of some degree of negligence.

Considering all six criteria in section 110(i) of the Act in unison, I conclude that a penalty of $1,500 is appropriate for each section 104(a) citation in this case.

ORDER

1. Citation Nos. 3551261, 3551262 and 3551263 are affirmed as section 104(a) violations.

2. Peabody Coal Company shall, withing 30 days of the date of this decision, pay to the Secretary $4,500 for the violations found herein.

Arthur J. Amchan
Administrative Law Judge

Distribution:

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

David R. Joest, Esq., 1951 Barrett Court, P.O. Box 1990, Henderson, KY 42420-1990 (Certified Mail)

/lh

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

MAY 1 5 1996

LANCE A. PAUL,	:	DISCRIMINATION PROCEEDING
Complainant	:	
v.	:	Docket No. WEST 95-228-DM
	:	MSHA Case No. WE MD 95-04
NEWMONT GOLD COMPANY,	:	
Respondent	:	Gold Quarry
	:	Mine ID 26-00500

DECISION APPROVING PROPOSED CIVIL PENALTY

Before: Judge Feldman

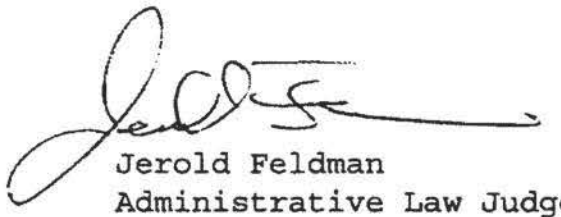
This matter is before me based upon a discrimination complaint filed on March 1, 1995, pursuant to section 105(c)(3) of the Federal Mine Safety and Health Act of 1977 (the Mine Act), 30 U.S.C. § 815(c)(3) by the complainant, Lance A. Paul, against the respondent, Newmont Gold Company (Newmont). On February 22, 1996, a decision on liability was released wherein it was determined that Newmont's November 10, 1994 discharge of Lance Paul was discriminatorily motivated and in violation of section 105(c) of the Mine Act. 18 FMSHRC 181. A Supplemental Decision approving the parties' Joint Stipulation for Settlement awarding Lance Paul economic reinstatement in lieu of reemployment was issued on April 11, 1996. 18 FMSHRC __.

The February 22, 1996 decision on liability, citing Commission Rule 44(b), 29 C.F.R. § 2700.44(b), requested the Secretary to consider filing with this Commission an appropriate petition for the purpose of proposing a civil penalty for Newmont Gold Company's violation of section 105(c) of the Mine Act.

On March 18, 1996, the Secretary filed a Petition for Assessment of Civil Penalty proposing imposition of a civil penalty of $9,000.00 in this matter. On May 7, 1996, Newmont, through counsel, filed a response to the Secretary's Petition stating that, "in the interests of completing this matter without further cost and expense of litigation, [it] does not contest the proposed penalty assessment." I construe the respondent's decision to pay the proposed civil penalty as a motion to approve settlement.

ORDER

I have considered the record in this case, and I conclude that the proffered settlement is appropriate under the criteria set forth in Section 110(i) of the Act. **WHEREFORE, IT IS ORDERED** that Newmont Gold Company tender payment of a civil penalty of $9,000.00 to the Mine Safety and Health Administration in satisfaction of the subject violation of section 105(c) of the Mine Act. Payment shall be made within 30 days of this decision. Upon timely receipt of this civil penalty, and Newmont's timely payment to Paul of the stipulated relief as specified in the April 11, 1996, decision on damages, this case **IS DISMISSED.**



Jerold Feldman
Administrative Law Judge

Distribution:

Lance A. Paul, P.O. Box 21115, Crescent Valley, NV 89821 (Certified Mail)

Lance A. Paul, c/o Operating Engineers Local 3, 1094 Lamoille Highway, Elko, NV 89801 (Certified Mail)

Charles W. Newcom, Esq., Sherman & Howard L.L.C., First Interstate Tower North, 633 Seventeenth Street, Suite 3000, Denver, CO 80202 (Certified Mail)

Don R. Hullinger, Director, Human Resources, Newmont Gold Company, P.O. Box 669, Carlin, Nevada (Certified Mail)

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

/mca

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1244 SPEER BOULEVARD #280
DENVER, CO 80204-3582
303-844-3577/FAX 303-844-5268

MAY 2 0 1996

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS Docket No. WEST 95-201-M A.C. No. 04-04678-05522
v.	:	Docket No. WEST 95-496-M A.C. No. 04-04678-05523
AGGREGATE PRODUCTS INC., Respondent	:	API Pit & Plant

DECISION

Before: Judge Manning

These cases are before me on petitions for assessment of civil penalties filed by the Secretary of Labor, acting through the Mine Safety and Health Administration ("MSHA"), against Aggregate Products, Inc. ("API"), pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988)("Mine Act"). The petitions allege seven violations of the Secretary's safety regulations.

The parties filed a joint stipulation of facts in lieu of presenting evidence at a hearing. The only issue in the case is whether MSHA has jurisdiction over API's screening plant. This issue was fully briefed by the parties. For the reasons set forth below, I find that MSHA does have jurisdiction over the screening plant. Accordingly, I assess penalties in the amount of $380.00.

I. STIPULATED FACTS

The parties presented the following stipulated facts:

1. The citations in this proceeding are true and accurate in their statement of conditions existing at Aggregate Products Inc., screening plant.

2. The said proposals were duly filed against Respondent in accordance with the Rules of the Federal Mine Safety and Health Review Commission published in Title 29, Code of Federal Regulations, Section [2700.25] and duly contested.

3. Respondent has contested the instant violations on the basis of MSHA's alleged lack of jurisdiction over the Screening Plant operated by API, and in the context of said contest has sought a formal legal opinion to that effect.

4. OSHA is not asserting jurisdiction over the subject screening plant, and has not issued citations or inspected API's screening plant.

5. The Civil Penalties as proposed will not adversely affect the operator's ability to remain in business.

6. The citations in this proceeding were timely abated by the respondent in good faith.

7. John Corcoran, President of Aggregate Products, Inc., owns the property on which the extraction, milling, and asphalt operations are situated.

8. The contractor, DCL hired and paid by API, is responsible for the initial extraction process of the material. DCL operates its own equipment including front-end loaders, crusher, and conveyors.

9. DCL produces crushed sand and gravel for API according [to] size specifications mandated by API. DCL employs approximately three to four employees in this operation. The material produced by DCL is stockpiled for use by API.

10. API employs approximately 15 to 20 employees in its operation which consists of a screening plant and asphalt plant.

11. API, using API employees and equipment, transports the crushed material by use of a front-end loader from the stockpile provided by DCL to the Screening Plant feed bin operated by API. The screening plant is located approximately 300 feet from the DCL stockpile. The material is then conveyed approximately 80 feet to the top of the Screening Plant where it is processed into the size necessary for the production of Asphalt.

12. The screening plant owned and operated by API screens the crushed sand and gravel into specific sizes required for the Asphalt operation. The Screening Plant is a 6' X 16' "Simplicity" Screening Plant consisting of three screening decks for the required size and several conveyors which transport the sized rock to their respective stockpile. Normally, there are four separate stockpiles consisting of 3/8, 1/2, 3/4 inch size rock for use in the Asphalt Plant [for] the production of asphalt.

13. API collects the appropriate sized rock and deposits the rock in the required cold feed bin for mixing with the Asphalt Operation.

14. Approximately 1% to 4% of the material from these specific stockpiles is sold to the consuming public. The remainder is sold to other contractors or used within the asphalt operation.

II. SUMMARY OF THE PARTIES' ARGUMENTS

A. Secretary of Labor

The Secretary argues that the definition of the term "coal or other mine" in section 3(h)(1) of the Mine Act should be broadly construed to include Respondent's screening plant. He argues that Respondent's screening plant is a mill that sizes the material mined by DCL. He contends that a screening plant need not be owned by the same firm that extracts the minerals for Mine Act jurisdiction to attach. In making its arguments, the Secretary relies upon the Interagency Agreement between the Occupational Safety and Health Administration ("OSHA") and MSHA. 44 Fed. Reg. 22827 (April 17, 1979) and several court decisions that discuss Mine Act jurisdiction.

B. API

API contends that the mining and milling cycle consists of the extraction of the material, the crushing and screening of the material by DCL, and the storage of the crushed and screened product by DCL in a stockpile. It believes that the hot-mix asphalt cycle begins when the previously milled material arrives at API's hot-mix screening facility for refining to the grade necessary for asphalt. Thus, it contends that Mine Act jurisdiction ends at DCL's stockpile of crushed aggregate. API argues that its screening plant is incident to and part of its manufacture of hot-mix asphalt and is not subject to MSHA jurisdiction.

III. DISCUSSION WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW

The starting point for any analysis of Mine Act jurisdiction is the definition of coal or other mine. A coal or other mine is defined, in pertinent part, as: "(A) an area of land from which minerals are extracted ..., (B) private ways and roads appurtenant to such area, and (C) lands, excavations ... structures, facilities, equipment, machines, tools, or other property ... used in, or to be used in the work of milling of such minerals, or the work of preparing ... minerals." 30 U.S.C. § 802(h)(1).

The Senate Committee that drafted this definition stated its intention that "what is considered to be a mine and to be regulated under this Act be given the broadest possible interpretation, and ... that doubts be resolved in favor of inclusion of a facility within the coverage of the Act." S. Rep. No. 181, 95th

Cong., 1st Sess. 14 (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 602 (1978)(Legis. Hist.).

The issue is whether API is milling minerals at its screening plant in Imperial County, California. The term "milling" is not defined in the Mine Act and the parties base their arguments, in part, on the MSHA-OSHA Interagency Agreement ("Interagency Agreement"). It is important to understand that in some respects the Interagency Agreement is not applicable to API's facility. API's screening plant is not subject to inspection by OSHA because the State of California has assumed responsibility for occupational safety and health inspections under its own program ("Cal/OSHA"). In California, mines are subject to periodic inspection by Cal/OSHA despite the fact that MSHA also inspects these facilities. *See generally*, Cal. Lab. Code § 6303.5; 30 U.S.C. § 955(a). Thus, there is overlapping safety and health jurisdiction at mines in California. The Interagency Agreement is relevant in this case only as it describes the Secretary's interpretation of the boundaries of MSHA jurisdiction, not the limits of OSHA jurisdiction.

The Interagency Agreement provides, in pertinent part, that "milling consists of one or more of the following processes: crushing, grinding, pulverizing, sizing, concentrating, washing, drying...." 44 Fed. Reg. at 22829 (emphasis added). Sizing is defined as "the process of separating particles of mixed sizes into groups of particles of all the same size, or into groups in which particles range between maximum and minimum sizes." Id. The Interagency Agreement further states that "OSHA jurisdiction includes ..., whether or not located on mine property: ... asphalt batch, and hot-mix plants." Id. at 22827. Finally, the Interagency Agreement provides that OSHA authority commences at an asphalt-mixing plant "after arrival of sand and gravel or aggregate at the plant stockpile." Id. at 22829-30. These provisions of the Interagency Agreement provide an appropriate guideline for analyzing this case. The Commission is required to give "weight" to the "Secretary's interpretations of the law." Legis. Hist. at 637.

All of the citations were issued at API's screening plant. If the screening plant is part of the milling process then MSHA has jurisdiction over it. If, on the other hand, the screening plant is part of API's hot-mix plant, MSHA does not have jurisdiction over it. API contends that it takes finished product from DCL and uses this product in connection with its production of hot-mix asphalt. It maintains that it "uses its screening facility solely for the purpose of separating gravel into various sizes which in turn is used by API itself to manufacture hot-mix asphalt." (Br. at 5). According to API, its screening of gravel is part of the manufacturing process.

I conclude that the screening plant is subject to MSHA jurisdiction. I have analyzed this case without regard to ownership or control. The facts show that DCL owns equipment at this facility and controls part of the operation, API owns equipment and controls other parts of the operation, and Mr. Corcoran, President of API, owns the real property on which the extraction, milling, and hot-mix production takes place. The issue of jurisdiction in this case does not hinge on questions of ownership and control. *See, e.g.* United Engineering Services, Inc. v. FMSHRC, 35 F.3d 971, 975 (4th Cir. 1994). The result would be the same if one individual or corporation owned and controlled the entire facility. The key to this case is what happens at each stage of the operation as the material flows through the facility.

The first stage is the extraction of material from the ground. This function is clearly subject to MSHA jurisdiction. Next, the material is crushed. This stage is part of the milling process and all agree that it is under MSHA's jurisdiction. The third stage is the initial screening. Two piles are produced by this screening, a product stockpile and a waste stockpile. The parties do not dispute that this initial screening is under MSHA jurisdiction. Next, a front-end loader takes the material from the product stockpile and transport it about 300 feet to a hopper. The material is then transported on a conveyor belt to the top of the screening plant that is the subject of this case. As described in the stipulation, this screening plant separates the material by size. Three or more stockpiles are generally created, each with its own distinct mix of material. It is this material that is deposited in the cold feed bin of the hot-mix asphalt plant for use in the production of asphalt.[1]

API's screening plant sizes the material for use in the asphalt plant. Sizing is included in the definition of milling in the Interagency Agreement. This plant takes particles of mixed sizes that are present in DCL's product stockpile and separates the particles into groups of particles of the same size or range of sizes. This screening process fits precisely into the Secretary's definition of sizing in the Interagency Agreement. As stated above, the fact that API performs this function rather than DCL is irrelevant in this case. DCL's initial screening to remove waste material occurs about 300 feet from the screening that sizes the material. I find that both screening facilities are part of the milling operation despite the fact that two different companies accomplish these tasks.

In addition, under the Interagency Agreement, OSHA's authority at asphalt mixing plants "commences after arrival of sand and gravel or aggregate at the plant stockpile." 44 Fed. Reg. at

---

[1] The parties agree that the hot-mix plant is not subject to MSHA jurisdiction.

228830. In this case, I find that API's stockpiles containing the screened material is the "plant stockpile" for purposes of the Secretary's interpretation. Although Cal/OSHA has jurisdiction over the entire operation, this portion of the Interagency Agreement still provides guidance as to the boundaries of MSHA's jurisdiction. MSHA's jurisdiction ends upon arrival of the sized material at API's stockpiles.

API asserts that neither the courts nor the Commission has "asserted jurisdiction over a facility that handles and/or processes minerals in connection with its manufacturing operations." (Br. at 2). API distinguishes the facts of a number of Commission and court cases and states that these cases held that an employer is subject to MSHA jurisdiction "where the employer is only engaged in the transportation and processing of raw materials." (Br. at 8) (emphasis in original). It states that the decision in Donovan v. Carolina Stalite Co., 734 F.2d 1547 (D.C. Cir. 1984), is not applicable because the Stalite facility processed slate and sold its raw slate product to other companies that manufactured masonry blocks. API believes that it is significant that the employer in that case did not manufacture masonry blocks. API also believes that the decision in United Engineering, 35 F.3d 971, does not apply because the employer handled and processed raw coal as an end product. API believes that Mine Act jurisdiction attached to the employer's facilities because the coal it transported and processed was not used in any manufacturing process or incorporated into some other product. Rather, the coal was consumed in its raw state at the employer's power plant.

API contends that its activities are analogous to the situation that existed in Oliver M. Elam, 4 FMSHRC 5 (January 1982). The Commission determined that MSHA did not have jurisdiction over the employer in that case because it crushed and conveyed coal solely to load it for shipment and not to meet customer specifications or to render the coal fit for any particular use. API maintains that it does not operate its screening plant to meet customer specifications or to render the product fit for any particular use, but rather it operates the plant as part of its hot-mix asphalt plant.[2]

---

[2] The parties dispute the meaning of paragraph 14 of their stipulated facts. Apparently, some of the material in API's stockpiles is sold to the public, but the parties disagree as to the amount that is sold. API contends that the amount sold is insignificant while the Secretary maintains that API is in the business of selling screened sand and gravel. Because of this dispute, I have assumed that all of the material screened by API is used in its hot-mix asphalt plant.

I disagree with API's arguments. First, contrary to API's position, API does not take "finished" product from the DCL product stockpile. API screens this material to produce stockpiles of different-sized rock. The material in DCL's stockpile is not a finished product but is raw material. Second, API screens the material to render it fit for a particular use, the production of asphalt. The material is not sized to make it easier to handle or to ship, as in Elam, it is sized so that it can be used to make asphalt. Thus, it is sized to meet customer specifications. The fact that API is also the customer is not important. The material is sized to meet the specifications of API's asphalt plant.

Finally, the fact that the sized rock is ultimately used in a manufacturing process does not change the result. The material produced by the employer in Carolina Stalite was used to manufacture masonry blocks. The employer did not own the manufacturing plant and such a plant was not located at the site, but those facts do not change the result. There is no indication in Carolina Stalite that the court would have reached a different conclusion if the employer also operated a masonry block plant on the same site. In addition, United Engineering cannot be distinguished on the basis that the coal was burned "in its raw state" at a power plant rather than incorporated into a product. In the case of coal, it is crushed, sized, and prepared for use in a particular power plant. The crushed material that API obtained from DCL was sized for use in a particular asphalt plant. In United Energy, the fact that the prepared coal was a fossil fuel that was consumed as it was used is not determinative.

IV. CIVIL PENALTY ASSESSMENT

API did not contest the specific allegations set forth in the seven citations. Accordingly, I affirm the citations. MSHA proposed a penalty of $380.00 for the citations. I have considered the representations and documentation submitted in these cases, and I conclude that the proposed penalty is appropriate under the criteria set forth in section 110(i) of the Mine Act.

V. ORDER

Accordingly, the citations in these proceedings are **AFFIRMED**, and Aggregate Products Inc. is **ORDERED TO PAY** the Secretary of Labor the sum of $380.00 within 40 days of the date of this decision.

Richard W. Manning
Administrative Law Judge

Distribution:

Paul A. Belanger, Conference and Litigation Representative, Mine Safety and Health Administration, 3333 Vacavalley Parkway, #600, Vacaville, CA 95688 (Certified Mail)

Gregory D. Wolflick, Esq., WOLFLICK & SIMPSON, 130 N. Brand Boulevard, Suite 410, Glendale, CA 91203 (Certified Mail)

Armida Castro, Safety Director, AGGREGATE PRODUCTS INC., P.O. Box 5215, Salton City, CA 92275-5215 (Certified Mail)

RWM

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

MAY 21 1996

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. PENN 95-1-D
on behalf of	:	MSHA Case WILK CD 94-01
WILLIAM KACZMARCZYK,	:	
Complainant	:	Ellangowan Refuse Bank
v.	:	No. 45
	:	
READING ANTHRACITE COMPANY,	:	
Respondent	:	

DECISION ON REMAND APPROVING SETTLEMENT

Before: Judge Amchan

On March 15, 1996, the Commission remanded this case to me to apportion the stipulated damages between lost overtime wages, which are subject to Federal Income Tax withholding and past-due workers compensation benefits, which are not subject to withholding. Pursuant to my order after the remand, the parties have entered into a joint stipulation that accomplishes this apportionment. The parties have agreed as follows:

1. Complainant sustained damages in the amount of $4,225.92 for both lost overtime and additional worker's compensation payments.

2. A reasonable approximation of the amount of money Mr. Kaczmarczyk would have earned in over-time compensation had he been actively employed by Respondent between October 15, 1993 and September 18, 1994, is $1,630[1].

[1] On May 24, 1995, I concluded that Complainant's transfer from light duty to workers compensation status during this period violated section 105(c) of the Act, 17 FMSHRC 784 (ALJ May 1995).

3. Complainant would have received $2,595.92 in worker's compensation payments between October 15, 1993 and September 18, 1994, had he earned $1,630 in overtime.

4. While Complainant may attempt to recover monies withheld by Respondent from the Internal Revenue Service, or other taxing authority, Reading Anthracite Company is not liable to Complainant for any payment that may be associated with over-withholding on monies paid as damages in this matter.

ORDER

I have considered the parties' stipulations in this matter and conclude that they are consistent with the Federal Mine Safety and Health Act. Therefore, I approve the stipulation as a settlement of this matter and **DISMISS** this case.

Arthur J. Amchan
Administrative Law Judge

Distribution:

Stephen D. Turow, Esq., Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Blvd., Suite 400, Arlington, VA 22203 (Certified Mail)

Martin J. Cerullo, Esq., Cerullo, Datte & Wallbillich, P.C., Second Street & Laurel Blvd., P.O. Box 450, Pottsville, PA 17901 (Certified Mail)

/lh

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

MAY 2 2 1996

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. SE 95-339
Petitioner	:	A.C. No. 01-01401-04078
v.	:	
	:	Docket No. SE 95-344
JIM WALTER RESOURCES,	:	A.C. No. 01-01401-04080
Respondent	:	
	:	Docket No. SE 95-367
	:	A.C. No. 01-01401-04086
	:	
	:	Docket No. SE 95-369
	:	A.C. No. 01-01401-04089
	:	
	:	Docket No. SE 95-476
	:	A.C. No. 01-01401-04103
	:	
	:	No. 7 Mine
	:	
	:	Docket No. SE 95-358
	:	A.C. No. 01-01322-04013
	:	
	:	No. 5 Mine

DECISION

Appearances: William Lawson, Esq., U.S. Department of Labor, Office of the Solicitor, Birmingham, Alabama, for the Petitioner;
R. Stanley Morrow, Esq., Jim Walters Resources, Inc., Brookwood, Alabama, for the Respondent.

Before: Judge Weisberger

Statement of the Case

These cases are before me based upon several Petitions for Assessment of Civil Penalty filed by the Secretary (Petitioner) alleging violations by Jim Walter Resources (Respondent) of various mandatory safety standards set forth in Title 30 of the Code of Federal Regulations. Pursuant to Notice, Docket No. SE 95-369 was heard in Hoover, Alabama on January 17 and 18, 1996, and February 27, 1996. The parties settled four of the six orders at issue,[1] and the two remaining orders were litigated.

The parties each waived the opportunity to file a post hearing brief, and in lieu thereof, presented a closing oral argument.

Findings of Fact and Discussion

I. Order No. 3192511

A. Petitioner's Case

On April 10, 1995, at approximately 11:00 p.m., Keith Plylar, Chairman of the UMWA safety committee, performed a bimonthly examination of the East A and B belts. At approximately 12:30 a.m., he observed float coal dust in the air, several "bad" top and bottom rollers (Tr. 24), and several bottom rollers turning in coal on the floor[2]. He indicated that the belt was not aligned, the tail roller was running in an accumulation of coal that was twenty four to thirty six inches deep, and coal dust was being blown in the air. Plylar also

---

[1]On February 27, 1996, Respondent, with the concurrence of Petitioner, presented motions to approve settlements regarding these four orders, and the remaining docket numbers (infra, III and IV).

[2]The rollers are metal and are approximately four feet long. Sets of three top rollers were located about five feet apart along the length of the belt. A single bottom roller was located about every ten feet.

noted that the belt was cutting into the belt frames[3] which were hot to the touch. He also noted accumulations under the rollers, and on the roof and ribs of the entry.

Plylar indicated that the conditions that he observed presented a hazard in that friction could be created, and additional coal dust could be thrown into the air.

Plylar opined, based upon fifteen years experience working underground in coal mines, that the amount of the accumulations of coal that he observed, and its black color indicated a "continuing buildup" over a "[m]atter of days" (Tr. 33). In this connection, he noted that the coal accumulations varied between three inches and twenty-four inches deep, and extended for the entire length of the belt from the header inby to the tailpiece. He opined that due to the extensive amount of float dust on the roof, ribs, and floor, the material had not accumulated "within a matter of hours" of his examination (Tr. 79).

At 1:45 a.m., Plylar pointed out the above conditions to Bobby Taylor, Jim Walter's Safetyman, and asked him to shut down the belt in order to clean it, as there was a "severe hazard" to miners working near the belt line (Tr. 24). According to Plylar, Taylor told him that he agreed that the condition was bad enough to shut down the belt, but that he did not have any authority to do so. Plylar suggested that Taylor get in touch with someone who did have this authority. Taylor called Trent Thrasher the shift foreman. Plylar indicated that after Taylor talked to Thrasher, he (Taylor) informed him (Plylar) that ". . . they didn't have anyone to put on this belt line at this time" (Tr. 26).

Plylar indicated that on "several occasions," (Tr. 45) he had observed "smoldering" or "glowing spots" (Tr. 43, 44), and smoke on the belt line. He opined that these conditions were caused by the belt not being aligned properly, and the belt

---

[3]The terms "belt frames," "belt stands," and "belt structures," are all synonymous.

"cutting into the belt stands" (Tr. 45). Also he indicated that, "pretty frequently", (Tr. 45) miners had reported fires to him that they had seen in the mine.

Plylar came out of the mine at approximately 4:30 a.m. At that time, no one was cleaning the belt line. Plylar called the MSHA office at approximately 7:00 a.m., to report the conditions that he had observed, and to request a section 103(g) inspection.

John Thomas Terbo, an MSHA inspector, testified for Petitioner. On April 11, 1995, at approximately 9:45 a.m., Terbo inspected the East B-belt in the presence of Larry Morgan, the day shift mine foreman and Larry Spencer, the union representative. He indicated that he commenced his examination of the outby and of the B-belt, and continued inby down to the tail roller, a distance of approximately 5,000 feet. Terbo indicated that to the best of his recollection the belt was running when he arrived at the site.[4] According to Terbo, he observed coal dust in the atmosphere. Also, he noted that the floor, ribs, and roof, including the cross cuts, were black for the entire length of the belt. He indicated that since normally these areas are white due to the presence of rock dust, the black color was "very obvious" (Tr. 94). He also observed an accumulation of coal dust on the starter box. Terbo testified that there was float dust, black in color, on top of all components inside the starter box.[5] He noted that opening and closing of electrical contacts in the box, which occurs when power to the belt is turned on and off, can cause arcing. He opined that the coal dust "[a]bsolutely" did not result from spillage (Tr. 100).

---

[4]Keith Wayne Ely, an MSHA supervisory ventilation specialist, indicated that at 10:07 a.m., the A-belt was not running. He indicated that, in general, if the A-belt is not in operation, then the B-belt is not in operation. It is not necessary to make a finding as to whether the belt was operating, when the order at bar was issued. The issues presented by the order will be resolved based on a consideration of continued normal operations which includes activation of the belt line.

[5]On cross examination, it was elicited that dust in the starter box can only be seen when the cover is removed.

According to Terbo, the tail roller and "numerous" (Tr. 101) metal belt rollers were turning in coal dust on the floor. He indicated that the eventual grinding of the coal dust caused by these conditions can result in the production of fine dust which could become airborne, and provide fuel for a fire. Terbo noted that some rollers were hot, and the belt stands were "extremely hot" (Tr. 106). Also, the belt was cutting into the stands, and there were accumulations on the stands. Terbo indicated that with continued normal operations, it was "highly likely" that these conditions would contribute to a fire hazard (Tr. 105). Terbo opined that, in the event of a fire, injuries to miners at the face as a result of smoke inhalation would have occurred, inasmuch as the belt entry was ventilated by intake air which flowed inby to the face.

Access to the face was by way of vehicles that traveled on a track located next to, and parallel to the belt. According to Terbo, "[i]t was very obvious if you traveled this track entry, and supervisors travel this track entry on a shift by shift basis, that you could see these conditions were there" (Tr. 111). He also noted that the accumulations extended 5,000 feet, and that "these conditions" (Tr. 111), were noted in the fire boss book "dating back to April 4th of '95" (Tr. 109). He opined that the accumulations he observed did not occur in one day, and that they had existed "[f]or days" (Tr. 115). He based this opinion upon the extent of the totally black accumulations that extended for 5,000 feet, and covered the roof, ribs, and floor.

Terbo issued an order alleging a violation of 30 C.F.R. § 75.400 which provides that "coal dust, . . . shall be cleaned up and not be permitted to accumulate in active workings, . . ."

B. Respondent's Case

David Gable, the assistant mine foreman at the No. 7 Mine, has sixteen years experience as a miner. He did not observe the belt in question on April 11, prior to its inspection by Terbo. Gable first observed the belt on April 11, around noon. He indicated that there was not an "inordinate amount of spillage" on the belt line (Tr. 156).

Gable testified that Morgan, who was present when the area was inspected by Terbo, told him that he (Morgan) did not feel

that the spillage was enough to warrant an order, and "[t]hat we had people working in the area trying to take care of this problem . . ." (Tr. 198).

Gable indicated that, in general, coal normally slips off from the ribs, and that spillage from belts is an everyday occurrence. According to Gable, when he observed the entry at issue it was "[b]lack to gray" (Tr. 188). He also indicated that he did not see the tail roller, or other rollers turning in coal dust.

C. Analysis

1. Violation of 30 C.F.R. § 75.400

Respondent did not proffer the testimony of Morgan or other eyewitness to the conditions observed by Terbo on April 11. Hence, there is no eyewitness testimony to contradict Terbo's testimony regarding his observations on April 11. In this regard, I note that Gable testified that the entry was black to gray when he observed it a few hours after Terbo's inspection, and that he did not see the tail roller or other rollers turning in coal dust. I find this testimony insufficient to rebut Terbo's testimony as to what he observed during his inspection. I thus accept Terbo's testimony. I find that there was an accumulation of coal dust in the B-belt entry to the extent and degree testified to by Terbo. (See, Old Ben Coal Company, 1 FMSHRC 1954 (December 1979)).

Plylar testified that, as observed by him at approximately 12:30 a.m., on April 11, there was an accumulation of coal, black in color, between three inches and twenty-four inches deep, for the entire length of the belt at question. There is no evidence that the material observed by Plylar had been cleaned prior to Terbo's inspection, and that the coal dust observed by Terbo had just accumulated. There is no evidence to establish specifically when the coal dust observed by Terbo had been deposited in the areas noted by him. I discount entirely Morgan's hearsay opinion that the spillage was an everyday occurrence, and was not enough to warrant a section 104(d) order. I find that hearsay opinion is inherently unreliable, and hence this testimony is disregarded.

Gable indicated that spillage from belts is a "common occurrence" (Tr. 154), and that what he observed midday on April 11, was not "an inordinate amount of spillage" (Tr. 156). However, taking into account the black color, depth, and extent of the coal dust accummulations,[6] I find that the coal dust had been "permitted to accumulate" in the entry at issue, and in the starter box. I thus find that it has been established that Respondent did violate section 75.400 supra.

2. Significant and Substantial

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

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

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

---

[6]I find that the accumulations covered the roof, floor and ribs of the entry at issue for the entire length of the entry.

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

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

As set forth above, (I)(C)(1) infra, the evidence clearly establishes a violation of section 75.400 supra. Based upon the testimony of Terbo, as corroborated by Plylar, I find that due to the extensive presence of coal dust, fine coal dust in the air, and rollers turning in dust, the violation contributed to the hazard of a fire or explosion. The belt may not have been running when initially observed by Terbo. However, taking cognizance of the extent of the violative conditions herein, I find that the hazard of a fire or explosion would have been contributed to given the continuation of normal mining operations, i.e., the mining of coal and the running of the belt.

In analyzing the third element set forth in Mathies, supra, i.e., the likelihood of an injury producing event, I note that carbon monoxide sensors were placed at intervals along the entry, the belt was flame retardant and resistant, and no injuries had been reported at Respondent's mines due to the type of conditions observed by Terbo. However, I place more weight on the existence of the following: the extent and depth of the coal dust accumulations, the presence of float coal dust in suspension, the presence of coal in a starter box where arcing is possible, the presence of hot rollers and stands, the fact that the belt was cutting into some stands, the accumulation of coal on and around the stands, and the presence of rollers turning in dust. I conclude, based on all these circumstances, that given continued mining operations, the hazard of a fire or explosion was reasonably likely to have occurred. Further, based upon the

uncontradicted testimony of Terbo, I conclude that should this event have occurred, it was reasonably likely to have resulted in an injury of a reasonably serious nature. For these reasons, I conclude that the violation was significant and substantial.

3. Unwarrantable Failure

In essence, it appears to be Respondent's position, as articulated by Gable, that spillages are common, and that the conditions observed by Terbo were not out of the ordinary and did not have to be cleaned up. Also, it appears to be Respondent's position that, in general, extensive accumulations can occur in a short time.[7] However, the record clearly establishes that accumulations had existed as early as midnight April 11, and had been reported to management at approximately 1:45 a.m., on April 11. Terbo indicated that two persons were observed cleaning at the tail of the B-belt. However, there is no evidence of any other efforts made to clean the extensive accumulations that extended for 5,000 feet. I thus find that the record fails to establish that significant efforts were made to clean the accumulations until Terbo's inspection. In addition, taking into account the depth of the accumulations, their extent, and their obvious black color, I conclude that the violation herein was the result of more than ordinary negligence and constituted aggravated conduct. I thus find that the violation resulted from Respondent's unwarrantable failure (see, Emery Mining Corp., 9 FMSHRC 1997 (1987)).

4. Penalty

I find, consistent with the discussion above, (I)(C)(3) infra,) that Respondent's negligence was more than ordinary. I also find that the violation herein was reasonably likely to have resulted in a fire or explosion causing a serious injury. I thus find that the level of gravity was high. Further, taking into

---

[7] In this connection, I note the testimony of Plylar, on cross examination, wherein he indicated that if a belt is out of alignment, large accumulations, black in color, can result in a "short amount of time" (Tr. 63). He also indicated that this can occur if the header becomes "jammed up with rocks" (Tr. 62).

account the history of section 75.400 violations at this mine, I find that a penalty of $6,500 is appropriate.

II. Order No. 3194841.

A. Violation of 30 C.F.R. § 75.1725

1. Petitioner's Case

Plylar inspected the A-belt on April 10, at approximately 11:30 p.m. At that time, he observed that the belt was out of alignment, and was cutting into the belt stands. He testified, in essence, that the belt was running on top of some rollers that were partially lying on the floor, as both ends of these rollers were no longer attached to the stand. Plylar noted that several rollers were missing, and several top rollers were "jammed up together" (Tr. 238). He indicated that the belt frame was hot to the touch. According to Plylar, there was an accumulation of coal under the belt drive and the take-up rollers, which extended the entire length of the belt line.

Plylar indicated that the accumulations had been covered by rock dust, and extended for the entire belt length which was more than 4,000 feet. According to Plylar, he had seen the conditions that he had testified to in the past, and that "several of these conditions" had been written up in the fire boss book "for the last several days." (Exh. G-1, Par. 10). Plylar noted that he had never seen a belt line " . . . with this extent of damage to it or this extent of belt cutting into the frames . . ." (Tr. 246).

At approximately 12:35 a.m., Plylar recommended to Taylor to turn off the belt. Taylor responded that he did not have the authority to shut it down. According to Plylar, he requested of Taylor to shut the belt down because of the hazard resulting from the belt cutting into the frames which could cause the belt to smolder.

On April 11, Keith Wayne Ely, an MSHA supervisory ventilation specialist, inspected the East A-belt, and walked the entire length of the belt inby to the B-belt. According to Ely's contemporaneous notes, (Exh. G-6), at the first crosscut inby the take-up roller, a roller was lying on the floor, but was

not rubbing against any material on the floor, as the belt was not in operation. At a half crosscut outby brattice No. 13[8] , one end of a roller had come loose from where it was suspended by a hanger, and was lying on the floor. At brattice No. 14, a bottom roller was missing which allowed the belt to rub against the belt stand. At brattice No. 16, two stands were being rubbed by the belt. At brattices Nos. 21 and 22, there were rollers on the bottom. At brattice No. 24, there was a roller with one end on the floor. At brattices Nos. 29, 31, 32, and 38, the belt was rubbing against the belt stand. A roller was missing at brattice No. 38. At brattice No. 42, there was an accumulation of coal that was eight inches deep, ten inches wide, and extended for twenty-four inches. At brattice No. 44, the stands were too hot to touch.

Ely noted that the belt was rubbing against the belt stand causing grooves up to one inch deep.[9] According to Ely, at one location the belt structure had worn to the point where it was no longer solid, but had been cut into two pieces. Ely indicated that he had touched the belt structure with the back of his hand, and it was so hot that he had to remove his hand.

Ely indicated that if one end of a roller had become detached, and was lying on the floor, the end that was still attached and not rotating could become heated by the belt rubbing against it. Also, the movement of the belt could cause the roller end that was on the floor to rub against the floor, and create friction and heat. According to Ely, if the belt is not aligned properly, and travels from side to side, it can rub against the metal belt stands, and cause the belt to become frayed. Should this occur, the frayed ends can get wrapped up around the bearings resulting in an "embers" type condition (Tr. 347).

---

[8]Ely had identified the various brattices as brattice 13, etc. In the test of this decision, the brattices are identified as brattice No. 13, etc.

[9]On cross examination it was elicited that only nine stands were damaged.

Ely indicated, in general, that the conditions that he observed would lead directly to a fire. He explained that this conclusion was based upon the presence of coal which was a fuel for the fire, along with an ignition source i.e., friction along the belt caused by the rubbing of the belt against the stands, and some rollers rolling in coal dust. According to Ely, since the cited entry was in intake air, and the working section was located inby, it was highly likely that the resulting fire would cause injuries due to smoke inhalation.

Ely opined that the violation resulted from Respondent's unwarrantable failure. In this connection, he indicated that the belt was examined each shift, and that the cited conditions could be seen from the track which ran alongside ninety percent of the belt line. He noted that the black discoloration of the stands was "very evident" (Tr. 310). He termed the condition of the rollers as "obvious" (Tr. 310). He stated that the ignition sources, i.e., the coal accumulations, were "obvious" (Tr. 310). Further, because the belt traveled from one side to another and was not aligned properly, he concluded that it had not been well maintained.[10] Ely concluded that the cited conditions had not been created within one shift, and that it took several days for the conditions to have developed. His conclusion was based on the large number of missing rollers, the existence of grooves in the metal stands, and the observation that a number of rollers were connected to the stand on only one end, leaving the other end lying on the floor.

Ely issued a section 104(d)(2) order alleging a violation of 30 C.F.R. § 75.1725(a) which provides as follows: "Mobile and stationary machinery and equipment shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately."

---

[10] Ely also indicated that entries in the fire boss book confirmed that the cited conditions existed for some time. I do not place any weight on this testimony. The fire boss book is the best evidence of its contents. However, the fire boss book was not offered in evidence.

2. Respondent's Evidence

On April 11, Gable accompanied Ely was during the entire inspection of the East A-belt, which was approximately one mile long, and contained 4,000 to 5,000 rollers. Gable indicated, in response to a leading question, that it is "not uncommon" for eleven rollers to be missing (Tr. 387-388). Gable opined, in essence, that the conditions cited by Ely did not present any safety hazard to miners.

Gable indicated that the belt, and cords contained in it, are rubber, and fire resistant. Gable indicated that, in normal operations, spillages are cleaned by twenty-five miners whose sole task is to clean the belt line.

Bill Woodward, a self employed consultant, who has designed and helped install belt lines in underground mines, testified for Respondent. Woodward indicated that as a consultant, he visits an underground mine five or six times a month, and inspects belt lines. Woodward opined that if bottom rollers are making contact with the belt stands, the belt would not be unsafe to people. He opined that the main problem with missing rollers is damage to the belt. He indicated that if eleven rollers were bad or missing along a one mile long belt line, the belt would become unsafe if the problems with the rollers existed for "[p]robably four or five days a week" (Tr. 40) (February 27, 1996).[11] He opined that should this occur, " . . . that would be more damage to the belt than anything else" (Tr. 40) (February 27, 1996).

According to Woodward, if a belt is rubbing against a stand, it can take two to three days, or "weeks," "months," or "a few days," for the belt to cut into the stand (Tr. 42) (February 27, 1996). He explained that it depends upon how hard the belt is rubbing against the stand, and the type of belt involved. Woodward stated that, in essence, stuck rollers, and belts not being aligned properly are "very common" conditions (Tr. 47) (February 27, 1996). He said that it is "[v]ery, very common" for belts to be frayed at their edges, and it is "common" for

---

[11] The transcript of the continued hearing on Februray 27, 1996, is cited by reference to the page of the transcript and the date i.e., February 27, 1996.

belts to come in contact with the stands (Tr. 47) (February 27, 1996). Woodward opined that the conditions listed in the order at issue were not unsafe for miners.

3. Analysis

In essence, it appears to be Respondent's position that the belt was not unsafe to miners, since less than two tenths of a percent of the rollers on the belt were bad, and only nine stands, i.e., less than nine tenths of a percent of the stands, were damaged. I reject this argument for reasons that follow.

I accept Ely's opinion that the belt in question was not maintained in a safe condition. Respondent did not rebut or impeach Ely's testimony regarding the following conditions: the belt was not in alignment and was contacting some belt stands, ten rollers were missing, and at three locations one end of a roller was lying on the floor. These condition can cause heat and friction which can lead to smoke or a fire.[12] I reject Gable's opinion that the belt was safe, as the record does not set forth in sufficient detail the facts that he took into account which formed the basis for this opinion. I also reject Woodward's opinion that the cited conditions were not unsafe to miners. On cross-examination, Woodward was asked to explain why the following conditions do not present any hazards to miners: the belt being out of alignment, the belt running into the stands, and the presence of stuck rollers. His response is as follows: "[i]t just don't" (Tr. 67) (February 27, 1996). The only other expressed basis for his opinion was his reliance on the assumption that the belt in question satisfied MSHA requirements, and would not burn. There is insufficient evidence in the record to predicate a finding regarding the composition of the belt, and the degree to which it was flamable. Further, as set forth in Ely's credible testimony, other conditions were present which could have caused a fire. I thus find that there is an insufficient basis to put any reliance upon Woodard's opinion.

[12] See, Exs. G-13, G-14 (Par 2.13), and G-15.

For the above reasons, I find that the belt was in "unsafe condition", and no unsafe components had been removed when cited. I thus find that it has been established that Respondent did violate section 75.1725(a) supra.

4. Significant and Substantial

There is no evidence in the record that there have ever been any injuries to miners at the subject mine, resulting form the cited conditions. Also, carbon monoxide monitors were in place along the belt line. Further, there is no evidence that there was any violative coal accumulation along the belt line. Nor is there any evidence that the belt material did not meet MSHA specifications.

However, I note the following: The combination of the violative conditions, the presence of coal, the presence of friction as testified to by Ely and not contradicted or impeached, the uncontradicted testimony of Ely that the stands were hot to the touch, and the fact that the entry was ventilated by intake air which would have carried any smoke generated by the friction resulting from the violative conditions down to the working section. Based on these factors, I conclude that the violation was significant and substantial (See, Mathies, supra).

5. Unwarrantable Failure

Respondent did not impeach or contradict Ely's testimony that the violative conditions observed by him were obvious, and would have been noted by a person traveling alongside the beltway performing an inspection. There is no evidence as to how long in fact the violative conditions noted by Ely had existed. However, I take cognizance of the following: the extent of the conditions observed by Ely, the fact that grooves had been cut into a stand to a depth of one inch, the fact that the belt was out of alignment and not corrected, the fact that conditions had been observed by Plylar the shift before, the lack of evidence that these conditions were corrected between the time observed by Plylar and reported by him to Taylor, and subsequently observed by Ely the following shift, and the lack of evidence that Respondent made any significant attempt to correct these

conditions. Based on all these factors, I conclude that the violation herein resulted from more than ordinary negligence, and reached the level of aggravated conduct. I thus find that the violations resulted from Respondent's unwarrantable failure (See, Emery, supra).

6. Penalty

Considering the factors set forth in section 110(i) of the Act, I find that a penalty of $6,500 is appropriate.

III. Order Nos. 3016179, 3192505, 3021493, and 3192465

At the hearing, Respondent, with the concurrence of Petitioner, made a motion to approve the settlement the parties arrived at regarding these orders. It is proposed to reduce the total penalty from $13,000 to $8,600. I have considered the representations and documentation submitted, and I conclude that the proffered settlement is appropriate under the criteria set forth in section 110(i) of the Act.

IV. Docket Nos. SE 95-358, SE 95-339, SE 95-367, SE 95-344 and SE 95-476

At the hearing, Respondent, with the concurrence of Petitioner, made a motion to approve the settlement the parties arrived at regarding these cases. It is proposed to reduce the total penalty from $41,289 to $14,621. I have considered the representations and documentation submitted, and I conclude that the proffered settlement is appropriate under the criteria set forth in section 110(i) of the Act.

ORDER

It is ORDERED that, within 30 days of this decision, Respondent shall pay a total penalty of $36,221.

Avram Weisberger
Administrative Law Judge

Distribution:

William Lawson, Esq., Office of the Solicitor, U.S. Department of Labor, Suite 150, Chambers Bldg., Highpoint Office Center, 100 Centerview Drive, Birmingham, AL 35216 (Certified Mail)

R. Stanley Morrow, Esq., Jim Walter Resources, Inc., P.O. Box 133, Brookwood, AL 35444 (Certified Mail)

/ml

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

May 24, 1996

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. YORK 95-115-M A. C. No. 18-00017-05551
v.	:	
	:	Union Bridge Maryland
LEHIGH PORTLAND CEMENT COMPANY, Respondent	:	

DECISION APPROVING SETTLEMENT
ORDER TO PAY

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. The Solicitor has filed a motion to approve settlements for the two violations in this case. A reduction in the penalties from $7,000 to $3,500 is proposed.

Citation No. 3591774 was issued for a violation of 30 C.F.R. § 56.5002 which requires that dust, gas, mist, and fume surveys be conducted as frequently as necessary to determine the adequacy of control measures. The inspector issued the citation because two miners became ill in the area around the mill feed control center and kiln stack where he believed toxic gases had accumulated. It appeared to the inspector that the gases came from the stack of the kiln, which was in the process of being preheated by three oil torches. According to the inspector's description on the citation, statements obtained from company personnel at the scene indicate that the torches may not have been burning properly. Shortly after the first miner became ill, a company foreman measured greater than 2 ppm of sulfur dioxide and 19% oxygen between the 4th and 5th pier on the south side of the kiln. The citation was designated significant and substantial and negligence was rated as high. The originally assessed penalty was $5,000 and the proposed settlement is $2,500.

The Solicitor represents that the reduction is warranted because negligence and gravity are less than originally thought. According to the Solicitor, the allegation in the citation that the two employees suffered headaches due to exposure to sulphur dioxide is not fully supported by available evidence. The Solicitor states that six gas readings were taken by the foreman

immediately prior to the display of symptoms. Only one of these readings revealed a measurable quantity of sulphur dioxide but that reading was unreliable because radio frequency interference from the foreman's portable radio may have triggered a false reading. According to the Solicitor, although the symptoms displayed indicated exposure to some gas accumulation, identification and quantity cannot factually be established.

It appears from his motion that the Solicitor will be unable to prove the degree of gravity or even the correctness of evidence regarding the gas readings. However, since readings were taken, the degree of negligence is lessened. Accordingly, I accept the Solicitor's representations, and approve the proffered settlement which remains a substantial amount.

Citation No. 3591775 was issued for a violation of 30 C.F.R. § 56.4330(a) which requires operators to establish emergency firefighting, evacuation, and rescue procedures and directs that these procedures be coordinated in advance with available firefighting organizations. This citation was issued at the same time as the one discussed above. A Lehigh Cement Management employee entered a taped off area despite a request from a fire department officer to wait for properly equipped and trained personnel. The inspector stated on the citation that the management employee wanted to remove an employee of an independent contractor from the area.

The violation was designated significant and substantial and negligence was rated as moderate. The originally assessed penalty was $2,000 and the proposed settlement is $1,000. The Solicitor represents that the reduction is warranted because negligence is not as high as originally thought. According to the Solicitor, the management official who had just monitored the area, found no problem with excess gas levels and did not experience any physical symptoms. The Solicitor states that the official only entered the area in order to evacuate the employee of a contractor. In addition, my review of the file shows that on the day after the citation was issued, the inspector modified it by reducing the likelihood of injury from occurred to highly likely and the number of miners affected from two to one. Finally, I note that no mention was made in the narrative findings to the effect that this violation caused an injury. In light of the foregoing, I approve the proffered settlement which remains a substantial amount and find it is appropriate under section 110(k) of the Act, 30 U.S.C. § 820(k).

I note that these violations do not represent the first time the operator has encountered problems like those described in the subject citations. The operator should consider itself on notice that if violations like these occur in the future, I will not approve penalty reductions of this magnitude.

WHEREFORE, the motion for approval of settlements is GRANTED, and it is ORDERED that the operator PAY a penalty of $3,500 within 30 days of this decision.

Paul Merlin
Chief Administrative Law Judge

Distribution:

Joseph T. Crawford, Esq., Office of the Solicitor, U.S. Department of Labor, Gateway Bldg., Rm. 14480, 3535 Market St., Philadelphia, PA 19104

Dennis J. Morikawa, Esq., Morgan, Lewis & Bockius, LLP, 2000 One Logan Square, Philadelphia, PA 19103-6993

Mr. Walter E. Smith, Mine Representative, 601 S. Springdale Road, New Windsor, MD 21776

/gl

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1244 SPEER BOULEVARD #280
DENVER, CO 80204-3582
303-844-3993/FAX 303-844-5268

MAY 2 8 1996

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. WEST 93-62-M
	:	A.C. No. 04-03404-05509
v.	:	Docket No. WEST 93-406-M
	:	A.C. No. 04-03404-05510
CONTRACTORS SAND & GRAVEL SUPPLY, INCORPORATED, Respondent	:	Docket No. WEST 93-407-M
	:	A.C. No. 04-03404-05511
	:	Docket No. WEST 93-463-M
	:	A.C. No. 04-03404-05512
	:	Scott River Plant
	:	Docket No. WEST 93-117-M
	:	A.C. No. 04-04679-05506
	:	Docket No. WEST 93-141-M
	:	A.C. No. 04-04679-05507
	:	Docket No. WEST 93-408-M
	:	A.C. No. 04-04679-05508
	:	Docket No. WEST 93-409-M
	:	A.C. No. 04-04679-05509
	:	Docket No. WEST 93-462-M
	:	A.C. No. 04-04679-05510
	:	Montague Plant

DECISION AFTER REMAND APPROVING SETTLEMENT

Before: Judge Cetti

These consolidated civil penalty proceedings are before me upon petitions for assessment of civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., (Mine Act). The Secretary of Labor on behalf of the Mine Safety and Health Administration, charged the operator of the Scott River Plant and Montague Plant with numerous violations of safety standards set forth in Part 56, Title 30, Code of Federal Regulations.

A Default Decision was issued July 21, 1994, when there was no response to my Show Cause Order. Thereafter, the Commission reopened the matter and vacated the Default Decision and remanded the matter to this Judge.

Respondent then obtained counsel who filed a timely answer contesting the alleged violations. The matter was set for hearing which had to be canceled because of the medical condition of the principal witness. The parties then filed cross motions for summary decision. On March 25, 1996, I issued a Summary Decision vacating Citation No. 3911909 in Docket Nos. WEST 93-462-M and WEST 94-409-M and dismissing WEST 94-409-M.

At this time, the remaining consolidated cases are before me on petitions for assessment of civil penalties under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d). The parties, by counsel, filed an amended motion to approve a settlement agreement of all the remaining citations. Under the proffered settlement there is a reduction in the amount of the proposed penalties for 12 of the citations and no changes in the original proposed penalties for 15 of the citations as follows:

Citation No.	Health and Safety Standard Cited (CFR Title 30)	Original Proposed Penalty	Proposed Amended Penalty
3911911	56.14107(a)	$3,000.00	$ 100.00
3636680	56.12013	267.00	100.00
3911916	56.12013	1,457.00	100.00
3911919	56.14132(b)(1)	987.00	100.00
3636674	56.14109(b)	168.00	100.00
3636675	56.14107(a)	220.00	100.00
3636676	56.14109	168.00	100.00
3914031	56.5050(b)	50.00	50.00
3911912	56.4200	50.00	50.00
3911914	56.4402	50.00	50.00
3911917	56.12013	50.00	50.00
3913895	56.12028	382.00	100.00
3913890	56.14112	147.00	100.00
3913891	56.14112(a)	147.00	100.00
3913892	56.15001	50.00	50.00
3913893	56.18002	50.00	50.00
3913894	56.14100	50.00	50.00
3913897	56.14107	50.00	50.00
3913883	56.15001	50.00	50.00
3911799	56.12041	50.00	50.00
3911903	56.12032	50.00	50.00
3911907	56.14107(a)	119.00	100.00
3911901	56.4200	50.00	50.00
3911904	56.14107(a)	50.00	50.00
3911905	56.14109(b)	50.00	50.00

3911902	56.12013	50.00	50.00
3911906	56.12020	337.00	100.00
		TOTAL	$1,950.00

Under the proffered settlement agreement it is also agreed that, with the exception of those claims for fees and expenses set forth in Docket No. EAJ 96-3 filed with the Commission on April 24, 1996, each side shall bear its own costs and legal fees.

I have considered the representations and documentation including the pleadings, the detailed responses to the prehearing orders, the affidavits and various transcripts of the depositions submitted in this case, and I conclude that the proffered settlement is appropriate under the criteria set forth in section 110(i) of the Act.

WHEREFORE, the motion for approval of settlement is **GRANTED**, and it is **ORDERED** that Respondent, Contractors Sand and Gravel Supply, Inc., **PAY** a penalty of $1,950.00 to the Secretary of Labor within 30 days of this decision.

Payment shall be made to the Office of Assessments, Mine Safety and Health Administration, P.O. Box 160250-M, Pittsburgh, Pennsylvania 15251. Upon receipt of payment, the above-captioned proceedings are dismissed.

August F. Cetti

August F. Cetti
Administrative Law Judge

Distribution:

Steven R. DeSmith, Esq., Office of the Solicitor, U.S. Department of Labor, 71 Stevenson Street, Suite 1110, San Francisco, CA 94105

C. Gregory Ruffennach, Esq., RUFFENNACH LAW OFFICES, 1675 Broadway, Suite 1800, Denver, CO 80202

\sh

ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

May 15, 1996

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 96-69
Petitioner	:	A.C. No. 11-02846-03710
v.	:	
	:	Eagle Valley Mine
COAL MINERS INCORPORATED,	:	
Respondent	:	

ORDER DISAPPROVING SETTLEMENT AGREEMENT

This case is before me on a Petition for Assessment of Civil Penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d). The Secretary, by counsel, has filed a motion to approve a settlement agreement. A reduction in penalty from $1,298.00 to $649.00 is proposed.

The citation alleges a violation of section 75.517 of the Regulations, 30 C.F.R. § 75.517, because a shuttle car cable had damaged splices and was not insulated in two places. The violation is alleged to be "significant and substantial" and of "moderate" negligence. As justification for the settlement, the agreement provides that: " The penalty is reduced in recognition of Respondent's efforts in abating the cited condition within the time granted by the MSHA inspector. Further, the Respondent is strongly committed to enforcing compliance more strenuously in the future."

The Mine Act was passed with the intention that the Commission "assure that the public interest is adequately protected before approval of any reduction in penalties." S. Rep. No. 95-181, 95th Cong., 1st Sess. 45 (1977), *reprinted in Legislative History of the Federal Mine Safety and Health Act of 1977*, at 633 (1978). In this connection, it is the judge's independent responsibility to determine the appropriate amount of penalty, in accordance with the six criteria set out 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, 1151 (7th Cir. 1984); *Wallace Brothers, Inc.*, 18 FMSHRC 481 (April 1996).

For this reason, Commission Rule 31(b)(3), 29 C.F.R. § 2700.31(b)(3), requires that a motion to approve a settlement include "[f]acts in support of the penalty agreed to by the parties" so that the judge can confirm that the reduced penalty is appropriate. No such facts are provided with this agreement. The Respondent's abatement efforts were presumably considered, as required by section 100.3(f) of the Regulations, 30 C.F.R. § 100.3(f), when the penalty was originally assessed. Likewise, a commitment to comply with the law in the future is one of the desired results of assessing a penalty.

Neither reason provides a basis for reducing the penalty. Consequently, having considered the representations and documentation submitted, I am unable to approve the proffered settlement.

ORDER

Accordingly, it is **ORDERED** that the motion for approval of settlement is **DENIED**. The parties have **15 days** from the date of this order to submit additional information to support the motion for settlement. Failure to submit additional information, or to resubmit a new agreement, within the time provided will result in the case being scheduled for hearing.

T. Todd Hodgdon
Administrative Law Judge

Distribution:

Gay F. Chase, Esq., Office of the Solicitor, U.S. Department of Labor, 230 S. Dearborn St., 8th Floor, Chicago, IL 60604 (Certified Mail)

Mr. James A. Tabor, Coal Miners, Inc., 999 Barrett Cemetery Rd., Equality, IL 62934 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

May 24, 1996

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. YORK 95-74-M A. C. No. 19-00371-05505
v.	:	
	:	West Sand and Gravel
S. M. LORUSSO & SONS, INCORPORATED, Respondent	:	

DECISION DISAPPROVING SETTLEMENT
ORDER TO SUBMIT INFORMATION

Before: Judge Merlin

This case is a petition for assessment of civil penalties filed under section 105(d) of the Federal Mine Safety and Health Act of 1977. 30 U.S.C. § 815(d). On June 13, 1995, I issued an order directing the parties to confer and advise with respect to possible settlement or hearing. On July 27, 1995, upon a motion of the Solicitor, the matter was stayed pending completion of a special investigation under Section 110(c) of the Act. On October 26, 1995, an order was issued continuing the stay.

On April 25, 1996, the Solicitor filed a motion to approve settlements in this case. A reduction in the penalties from $17,000 to $5,500 is proposed. The motion is wholly inadequate and must be denied.

This case contains two violations which were issued in connection with an accident at the operator's mine. The accident resulted in an injury to the operator of a haul truck. Citation No. 4424827 was issued pursuant to 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), for a violation 30 C.F.R. § 56.9301 because a berm or other restraint was not provided at the dump site. According to the citation, the haul truck traveled onto unstable ground and overturned, causing serious injury to the driver. The originally assessed penalty was $9,000 and the proposed settlement is $2,912. Order No. 4424828 was issued pursuant to 104(d)(1) of the Act for a violation of 30 C.F.R. § 56.9304(a) because an adequate visual inspection of the dumping location was not conducted prior to the commencement of work at this location.

The citation recites that ground conditions are constantly changing when the plant is in operation and blasting operations are taking place. The originally assessed penalty was $8,000 and the proposed settlement is $2,588.

In her motion the Solicitor states that she is submitting the proposed assessment of penalty prepared by MSHA which she asserts contains findings concerning the six criteria specified in section 110(i) of the Act, 30 U.S.C. § 820(i), as the basis for determining an appropriate penalty amount. However, the proposed assessment contains no such data except for two unexplained numbers regarding prior history. Information regarding the criteria are provided on the sheet for regular assessments. This case however is a special assessment and the Solicitor has even failed to provide the narrative findings MSHA prepares for special assessments. The only other materials furnished by the Solicitor are the citation and order which contain findings of very high gravity, significant and substantial, unwarrantable failure, and high negligence.

As a further basis for the proposed settlement, the Solicitor alleges the employee in the accident was not following work procedures which the operator had instructed its employees to follow. But the Solicitor offers no facts or analysis to support her statements. What were the procedures? How were they communicated to the employee and others? Who was the injured employee and what was his position? In what ways did he fail to follow prescribed procedures? Most importantly, how does the employee's conduct relate to the violations described in the citation and order? None of these questions have been answered. Therefore, I have no information that would permit assessment of appropriate penalties and reductions from the original amounts.

The Solicitor's representations that the operator has a good prior history and that it abated the violations promptly are insufficient to justify the ⅔ reduction she seeks in the penalty assessments. What the Solicitor must bear in mind is that an injury occurred and that the alleged violations are contained in a citation and order issued under section 104(d). Although the Solicitor suggests extremely large reductions, she fails to recommend any modifications to the high negligence, high gravity, significant and substantial, and unwarrantable failure findings. Such modifications would be necessary to support the proposed penalty reductions and provide a basis for penalty assessments at the Commission level.

The Solicitor is reminded that pursuant to section 110(k) of the Act Commission judges bear a heavy responsibility in settlement cases. 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); Sellersburg Stone Company v. Federal Mine Safety and Health Review Commission, 736 F.2d 1147 (7th Cir. 1984).

I previously granted the Solicitor's request for a stay in this case. The stay lasted almost a year. After this long delay I find submission of this motion particularly egregious.

Wherefore, it is ORDERED that the motion for approval of settlements be DENIED.

It is further ORDERED that within 30 days of the date of this order the Solicitor submit appropriate information to support her settlement motion. Otherwise, the case will be set for hearing.

It is further ORDERED that within 30 days the Solicitor submit the narrative findings for special assessment.

Paul Merlin
Chief Administrative Law Judge

Distribution: (Certified Mail)

Gail E. Glick, Esq., Office of the Solicitor, U.S. Department of Labor, One Congress Street, 11th Floor, P.O. Box 8396, Boston, MA 02114

Douglas White, Esq., Counsel, Trial Litigation, Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Blvd., Suite 414, Arlington, VA 22203

Thomas E. Nannicelli, Esq., Nannicelli & Woods, P. O. Box 68, 470 Washington Street, Suite 30, Norwood, MA 02602

/gl

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1244 SPEER BOULEVARD #280
DENVER, CO 80204-3582
303-844-3577/FAX 303-844-5268

May 31, 1996

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS Docket No. WEST 95-434-M A.C. No. 26-00500-05542
v.	:	Docket No. WEST 95-467-M A.C. No. 26-00500-55443
NEWMONT GOLD COMPANY, Respondent	:	South Area Gold Quarry

ORDER DENYING MOTION FOR SUMMARY DECISION
PREHEARING ORDER

Newmont Gold Company ("Newmont") filed a motion for summary decision in these cases pursuant to Commission Rule 67, 29 C.F.R. § 2700.67. The Secretary of Labor opposes Newmont's motion. For the reasons set forth below, I deny Newmont's motion.

Commission Rule 67(b) sets forth the grounds for granting summary decision, as follows:

> A motion for summary decision shall be granted only if the entire record, including the pleadings, depositions, answers to interrogatories, admissions, and affidavits, shows:
>
> (1) That there is no genuine issue as to any material fact; and
> (2) That the moving party is entitled to summary decision as a matter of law.

On March 13 and 14, 1995, MSHA Inspector Michael Drussell issued two citations and two orders at Newmont's South Area Gold Quarry in Eureka County, Nevada. One citation and one order allege violations of 30 C.F.R. § 56.20011 and the other citation and order allege violations of section 56.20014. All four enforcement actions relate to alleged mercury contamination at the mine.

I. BACKGROUND INFORMATION

A. Alleged Violations of Section 56.20011

Section 56.20011 provides:

> Areas where health or safety hazards exist that are not immediately obvious to employees shall be barricaded, or warning signs shall be posted at all approaches. Warning signs shall be readily visible, legible, and display the nature of the hazard and any protective action required.

Citation No. 4140248, issued under section 104(a) of the Mine Act, alleges that:

> The old screen removed from the ZADRA was placed near the containment area at the AARL Building, visible mercury was on the screen. No warning signs were posted warning of the hazard.

Order No. 4140247, issued under section 104(d)(1) of the Mine Act, alleges that:

> The old scrubber removed from the AARL was cleaned then tested for mercury contamination. This scrubber was stored at the boneyard. Mercury contamination test results received in Nov. 1994 showed mercury contamination. The scrubber was not removed from the boneyard or marked of the hazard. When the scrubber was inspected to show visible mercury, Jerome reading showed mercury vapors present.

It is undisputed that (1) the old screen referenced in the citation was outdoors in a "containment area;" (2) visible mercury was on the screen; and (3) there is no proof that the threshold limit value ("TLV") for mercury adopted by MSHA was exceeded in the area around the old screen. The Secretary alleges that the "containment area" was not completely enclosed or barricaded. The citation alleges that warning signs were not posted to advise miners of the hazard.

It is also undisputed that when the old scrubber referenced in the order was removed from the AARL, it was cleaned by a contractor, wipe samples were obtained which showed that mercury was present, and the scrubber was placed in the outdoor "boneyard." Newmont contends that the boneyard is a "fenced and

signed restricted area used for storage of old equipment, old spare parts, and waste." (Motion at 6). It also alleges that it is "an isolated and barricaded area, where there is no routine personnel exposure." (*Id.* at 7). The Secretary alleges that the boneyard was "fenced on three sides with a sign prohibiting unauthorized entry, not a sign that displayed the nature of the hazard and required protective action." (Opposition at 6). The wipe samples were taken by Newmont to help it determine how it should dispose of the old scrubber. There is no proof that the TLV for mercury was exceeded in the area around the old scrubber.

B. Alleged Violations of Section 56.200014

Section 56.20014 provides:

> No person shall be allowed to consume or store food or beverages in a toilet room or in any area exposed to a toxic material.

Citation No. 4140245, issued under section 104(d)(1) of the Mine Act, alleges that:

> The office in the AARL building contained mercury vapor as measured with a Jerome mercury vapor analyzer. The average reading was 23.2 ug/m^3. The company routinely takes 6 Jerome readings a day in this office as part of their mercury monitoring program. These readings show mercury has been present in this office. Visible mercury was found on the desk top on Feb. 28, 1995. The AARL operator was required to use this office for eating lunch. No person shall be allowed to consume food or beverages in any area exposed to a toxic material.

Order No. 4140246, issued under section 104(d)(1) of the Mine Act, alleges that:

> The lunchroom for the ZADRA employees contained mercury vapors as measured with a Jerome mercury vapor analyzer. The average reading was 23.2 ug/m^3. The company routinely takes 6 Jerome readings a day in this lunchroom as part of their mercury monitoring program. These readings showed mercury vapors have been present in this lunchroom. The ZADRA employees were required to use this lunchroom for eating their lunch. No person shall be allowed to consume food or beverages in any area exposed to a toxic material.

It is undisputed that the Jerome readings obtained by the inspector indicate that the mercury levels were less than 50 percent of that allowed under the MSHA's TLV. MSHA has adopted the TLV established by the American Conference of Governmental Industrial Hygienists ("ACGIH"), as set forth in 30 C.F.R. § 56.5001.

II. SUMMARY OF THE PARTIES' ARGUMENTS

A. Newmont Gold Company

Newmont argues that, as a matter of law, 30 C.F.R. §§ 56.20011 and 56.20014 must be read in conjunction with 30 C.F.R. § 56.5001, which establishes MSHA's TLV for mercury and other substances. It contends that section 56.5001 is the only regulation applicable to surface metal and nonmetal mines that provides guidance for safe mercury exposure levels. It states that the Secretary has not defined the terms "health or safety hazard" or "toxic," as those terms are used in the cited standards. It contends that those terms must be defined in connection with the TLV standard, section 56.5001. It argues that unless sections 56.20011 and 56.20014 are interpreted with section 56.5001, they are too vague to be enforceable.

There is no dispute that in order to establish that a TLV has been exceeded, air quality measurements satisfying the time-weighted average requirements must be taken. It is also undisputed that such time-weighted air quality readings were not taken by Inspector Drussell when he issued the citations and orders in these cases. For that reason, Newmont contends that the citations and orders must be vacated.

Newmont uses silica as an example of a substance that is "toxic" if the TLV is exceeded. It contends that, under the Secretary's interpretation, a mine operator could be in violation of section 56.20014 if there is silica dust in a lunchroom even though the TLV has not been exceeded. Under such circumstances, the operator would be forced to prohibit miners from eating at the mine because silica is found virtually everywhere on earth. It argues that without reference to the TLV, the standards do not have a concrete meaning and there is no objective standard against which to measure compliance. Newmont labels the Secretary's enforcement stance in these cases as a "zero tolerance policy" because it would prohibit "any mercury everywhere in the mine site." (Motion at 9).

B. Secretary of Labor

The Secretary argues that summary decision is not appropriate because there are genuine issues of material fact in dispute. For example, it disputes Newmont's claim that the bone-

yard was barricaded. Second, the Secretary maintains that the cited standards are separate and independent from section 56.5001. He contends that the cited standards provide for a "different independent measure of protection for workers." (Opposition at 11). He argues that there is no dispute that mercury was present at the cited locations. The Secretary contends that whether or not the TLV was exceeded is irrelevant in these cases. He maintains that mercury is toxic in all forms and that the cited standards are "performance oriented standards [that] regulate mercury whether it is visible or not, and whether it is above the TLV or not." (*Id.* at 5). He states that, while section 56.5001 is aimed at airborne contaminants, the cited standards also protect against mercury being ingested or absorbed into the skin through direct contact.

The Secretary also contends that the cited standards are not overly vague and Newmont was not denied due process or fair notice of their meaning. He argues that the Commission's reasonably prudent person test, used when interpreting performance standards, protects mine operators against unconstitutionally broad interpretations of these standards. He maintains that the Secretary's application of cited standards in these cases does not violate the Commission's reasonably prudent person test.

III. ANALYSIS

I deny Newmont's motion because I find that it is not entitled to summary decision as a matter of law under Commission Rule 67(b)(2).[1] Newmont contends that there cannot be a violation of the cited standards unless the Secretary proves that the TLV for mercury was exceeded. Thus, the Secretary would be required to prove a violation of 56.5001 in this case before it could establish that either 56.20011 or 56.20014 were violated. I do not agree with Newmont's interpretation of these standards.

As a general matter, the Secretary is not required to prove a violation of one safety or health standard as a prerequisite to establishing a violation of another standard. Each standard generally stands on its own and is not dependent on other standards for its interpretation. Moreover, in this instance, the cited standards address different hazards than section 56.5001. That health standard is concerned solely with air quality in the working environment. The cited standards cover a much broader range of hazards.

---

[1] I also find that there are genuine issues of material fact. For example, it is not clear whether the boneyard was barricaded in compliance with section 56.20011.

In the present cases, it appears that the TLV for mercury was not exceeded. Thus, there was no violation of section 56.5001. The citations and orders state that mercury was present at the cited locations and allege that this condition violated the cited standards. Under Newmont's interpretation there could be no violations of the cited standards. Yet, health hazards could still be present. For example, a worker could get mercury on his fingers, wipe his eye, and suffer ill effects as a consequence. If mercury is present in an eating area, a worker could get mercury in his food and ingest mercury with his meal. Section 56.5001 does not address these hazards.[2] Thus, I conclude that, as a matter of law, the Secretary is not required to establish a violation of section 56.5001 in order to prove violations of sections 56.20011 and 56.20014.

This issue was previously litigated before former Commission Administrative Law Judge Michael A. Lasher in FMC Wyoming Corp., 8 FMSHRC 264 (February 1986). In that case, the mine operator was cited for violating section 56.20-11, the predecessor of 56.20011, because of an alleged asbestos hazard. The mine operator argued that the Secretary could not establish a violation of section 56.20-11 absent a showing of exposure to airborne contaminants at levels that violated section 56.5-1, the predecessor of 56.5001. Judge Lasher rejected the operator's argument. He held that neither the Mine Act nor MSHA's regulations indicated that the two standards should be read together. *Id.* at 273. He held that section 56.20011 "provides a different, separate, and independent measure of protection for miners ... that is not dependent on ... sampling ... the air in the working environment" *Id.* I agree with Judge Lasher's conclusion in this regard.

Newmont cites the Commission's decision in Aluminum Company of America, 15 FMSHRC 1821 (September 1993) in support of its position. In that case, however, the issue was whether an accident control order was properly issued to Alcoa under section 103(k) of the Mine Act when an MSHA inspector observed mercury at

---

[2] The TLVs adopted by the ACGIH recognize that maximum ceiling standards are required for certain fast-acting substances. The TLVs also recognize that certain substances require a "skin" notation because of the "potential contribution to the overall exposure by the cutaneous route including mucuous membranes and eye, either by airborne, or more particularly, by direct contact with the substance." (*TLVs for Chemical Substances in Workroom Air Adopted by ACGIH for 1973*, at 4). Newmont contends that because mercury is not subject to a ceiling standard or a skin notation, MSHA has recognized that mercury does not constitute a "health hazard" and is not "toxic" unless it is found to violate the time-weighted average set forth in the TLV. The position advanced by Newmont lacks merit for the reasons discussed herein.

Alcoa's plant. That case is not applicable to the facts in these cases. The Secretary is not alleging that the presence of mercury at the South Area Gold Quarry constituted an "accident," as that term is defined at section 3(k) of the Mine Act. I also find that Newmont's reliance on the Commission's decision in Tammsco, Inc., 7 FMSHRC 2006 (December 1985) is misplaced because in that case the Secretary tried to establish a violation of section 56.5001 without sampling for airborne contaminants.

Newmont's principal concern appears to be that without the guidance of section 56.5001, the cited standards become so vague that compliance would become impossible. It uses the silica example to support its position. It raises the specter of MSHA issuing citations because miners are eating lunch in a room that contains silica bearing dust. I agree with Newmont that the cited standards are broadly written and are capable of absurd interpretations, but Commission case law provides a means of curbing overly vague interpretations.

The standards at issue in these cases are not detailed but are of a type made "simple and brief in order to be broadly adaptable to myriad circumstances." Kerr-McGee Corp., 3 FMSHRC 2496, 2497 (November 1981); Alabama By-Products Corp., 4 FMSHRC 2128, 2130 (December 1982). Nevertheless, such broad standards must afford reasonable notice of what is required or proscribed. U.S. Steel Corp., 5 FMSHRC 3, 4 (January 1983). "In order to afford adequate notice and pass constitutional muster, a mandatory standard cannot be 'so incomplete, vague, indefinite or uncertain that [persons] of common intelligence must necessarily guess at its meaning and differ as to its application.'" Ideal Cement Co., 12 FMSHRC 2409, 2416 (November 1990)(citation omitted). The Commission has consistently recognized that a safety standard must "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." Lanham Coal Co., Inc., 13 FMSHRC 1341, 1343 (September 1991). In this context, the Commission further explained:

> When faced with a challenge that a safety standard failed to provide adequate notice of prohibited or required conduct, the Commission has applied an objective standard, *i.e.*, the reasonably prudent person test. The Commission recently summarized this test as 'whether a reasonably prudent person familiar with the mining industry and the protective purpose of the standard would have recognized the specific prohibition or requirement of the standard.'

Id. (citations omitted).

Accordingly, the application of sections 56.20011 and 56.20014 to the facts of these cases must be subjected to the Commission's reasonable prudent person test. This objective test will ensure that the application of these standards to the facts of these cases do not violate the due process requirements of the constitution.

I agree with Newmont that it has not been shown that mercury is "toxic in all its forms." (Opposition at 5, Reply at 5). It may be toxic under certain circumstances. I must first determine if the mercury detected by the inspector created a "health or safety hazard" and whether persons consumed food in an "area exposed to a toxic material." The Secretary has the burden of proof with respect to these issues. If the Secretary establishes a prima facie case, Newmont may attempt to establish that it did not have fair notice of the prohibitions or requirements of sections 56.20011 and 56.20014, as those standards were applied by the Secretary in these cases. The record does not contain a sufficient factual foundation to apply the reasonable prudent person test at this time.

Finally, Newmont contends that the unwarrantable failure allegations alleged in one of the citations and both orders cannot be upheld as a matter of law since Newmont was never informed of MSHA's new "zero tolerance policy." I cannot reach the unwarrantable failure issue until after I determine whether Newmont violated the cited standards. Accordingly, the motion is also denied with respect to the unwarrantable failure issue.

For the reasons set forth above, Newmont's motion for summary decision is **DENIED.**[3]

PREHEARING ORDER

The parties shall again confer to discuss settlement of these cases. If a settlement is not agreed upon, the parties, by **August 2, 1996**, shall send to each other and to me lists of witnesses who may testify (unless privileged), exhibits which may be introduced, matters to which they can stipulate at the hearing, and an estimate of the time required for hearing.

Richard W. Manning
Administrative Law Judge

[3] The Secretary's motion that Newmont pay the costs incurred by the Secretary in opposing this motion is also denied.

Distribution:

Jeanne M. Colby, Esq., Office of the Solicitor, U.S. Department of Labor, 71 Stevenson St., Suite 1110, San Francisco, CA 94105-2999

Henry Chajet, Esq., PATTON BOGGS, 2550 M Street, NW, Washington, DC 20037-1350

RWM

*U.S. GOVERNMENT PRINTING OFFICE: 1996-405-710/53381