MAY 1997

COMMISSION DECISIONS AND ORDERS

ADMINISTRATIVE LAW JUDGE DECISIONS

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

Marvin E. Carmichael v. Jim Walter Resources, Inc., Docket No. SE 93-39-D. (Judge Hodgdon, April 16, 1997)

Secretary of Labor, MSHA v. Unique Electric, Docket No. WEST 95-333-M. (Judge Manning, April 23, 1997)

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

Secretary of Labor, MSHA v. Walker Stone Company, Inc., Docket No. CENT 94-97-M. (Judge Barbour, April 8, 1997)

COMMISSION DECISIONS AND ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR

WASHINGTON, D.C. 20006

May 5, 1997

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. PENN 93-233
AMBROSIA COAL & CONSTRUCTION COMPANY	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. PENN 94-15
WAYNE R. STEEN, employed by AMBROSIA COAL & CONSTRUCTION COMPANY	:	

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

DECISION

BY THE COMMISSION:

These civil penalty proceedings, arising under the Federal Mine Safety and Health Act of 1977 ("Mine Act" or "Act"), 30 U.S.C. § 801 et seq. (1994) ("Mine Act" or "Act"), are before the Commission for a second time. The Commission previously remanded this matter to Administrative Law Judge William Fauver to reassess penalties against Ambrosia Coal & Construction Company ("Ambrosia") and Wayne R. Steen. *Ambrosia Coal & Constr. Co.*, 18 FMSHRC 1552 (September 1996) ("*Ambrosia I*"). On remand, the judge assessed penalties of $5,000 against Ambrosia and $3,500 against Steen. 18 FMSHRC 1874 (October 1996) (ALJ). The Commission granted Steen's petition for discretionary review challenging the $3,500 penalty. The Commission also granted Ambrosia's petition for discretionary review challenging the $5,000 penalty and stayed briefing on Ambrosia's appeal. For the reasons that follow, we vacate the judge's penalty assessment against Steen and remand for reassessment, and affirm the penalty against Ambrosia.

I.

Factual and Procedural Background

The background facts in this proceeding are fully set forth in *Ambrosia I*, 18 FMSHRC at 1553-56, and are summarized here. On June 3, 1992, during an inspection of the Ambrosia Tipple, Charles Thomas, an inspector trainee with the Department of Labor's Mine Safety and Health Administration ("MSHA"), examined a highlift he had observed having difficulty stopping. *Id.* at 1553-54. Thomas was accompanying MSHA Inspector David Weakland during an inspection of the mine. *Id.* at 1553. Thomas asked the Ambrosia employee operating the highlift, William Carr, about the condition of the vehicle's brakes. *Id.* at 1554. Carr replied that they were bad. *Id.* Thomas instructed Carr to test the highlift's parking and service brakes on an incline, but when applied, neither set of brakes prevented the highlift from rolling down the incline. *Id.*

Thomas called Inspector Weakland, who, accompanied by Steen, joined Thomas at the highlift. *Id.* In response to Weakland's questions about the brakes, Carr replied that they were not working. *Id.* At Weakland's direction, Carr tested the highlift's brakes on fairly level ground with the vehicle's bucket raised, but both the service and parking brakes failed to prevent the highlift from drifting. *Id.* Carr informed Weakland that the highlift had not had brakes for several weeks, that he had notified Steen of this problem and recorded the bad brakes in a maintenance log. *Id.* Upon returning to the mine office, Weakland and Thomas confirmed that the bad brakes were noted by both Carr and Steen in a log entitled "Daily Work and Cost Record," and that the highlift had been operated for over a month with bad brakes. *Id.*

Weakland issued an order under section 104(d)(1) of the Mine Act, 30 U.S.C. § 814(d)(1), alleging an S&S and unwarrantable violation of 30 C.F.R. § 77.1605(b), later modified to charge a violation of 30 C.F.R. § 77.404(a).[1] *Id.* After further tests of the brakes in the presence of Carmen Ambrosia, the owner of the mine, the highlift was removed from service. *Id.* at 1555. Later that day, the brakes were successfully repaired and the order was terminated. *Id.* Several days later, Steen falsified the highlift maintenance records by adding entries noting the highlift's bad brakes for May 30 and June 2 and 3, and stating that the highlift was being repaired on June 4. *Id.*

On the basis of an MSHA special investigation, the Secretary proposed that a $3,500 penalty be assessed against Steen individually under section 110(c) of the Act, 30 U.S.C.

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[1] Section 77.404(a) provides:

> Mobile and stationary machinery and equipment shall be maintained in safe operating condition and machinery or equipment in unsafe operating condition shall be removed from service immediately.

§ 820(c). *Id.* The Secretary also proposed that a $7,000 penalty be assessed against Ambrosia for its alleged violation of section 77.404(a). *Id.* Ambrosia and Steen challenged the Secretary's enforcement actions, and the matters were consolidated and proceeded to a hearing before Judge Fauver. *Id.*

In his first decision, the judge found that the lack of operable brakes on the highlift amounted to an unsafe condition and that the operator had failed to remove the equipment from service despite its knowledge that the brakes were bad. *Id.* at 1555-56. He concluded that Ambrosia violated section 77.404(a), and that the violation was S&S and the result of Ambrosia's unwarrantable failure to comply with the standard. *Id.* The judge further concluded that, as foreman, Steen was a corporate agent under section 110(c) of the Mine Act, and that he had knowingly authorized Ambrosia's violation because he knew that the brakes were bad for at least 5 days before the inspection, yet failed to repair them or remove the highlift from service. *Id.* at 1556. The judge assessed civil penalties of $11,000 against Ambrosia and $4,000 against Steen. *Id.* He based the penalties, in part, on his finding that Ambrosia's vice-president for operations, Carmen Shick, participated in the falsification of the maintenance log, and that the attempted cover-up by Shick and Steen increased the need for deterrence provided by higher penalties. *Id.* at 1555-56.

On review, the Commission affirmed the judge's findings of a violation of section 77.404(a), that the violation was S&S and unwarrantable, and that Steen was liable for the violation under section 110(c). 18 FMSHRC at 1556-63. The Commission further held that because the Secretary had not alleged any wrongdoing against Shick, the judge abused his discretion when he increased Ambrosia's penalty for deterrence purposes based on *his* findings regarding the falsification of Ambrosia's records by Shick. *Id.* at 1565. The Commission noted that "although deterring future violations is an important purpose of civil penalties, deterrence is achieved through the assessment of a penalty based on the six statutory penalty criteria." *Id.* (footnote omitted). Regarding Steen's penalty, the Commission concluded that the judge erred because he "failed to set forth findings applying the statutory criteria to Steen as an individual." *Id.* The Commission remanded the case to the judge with instructions to reassess the penalties. *Id.* at 1566.

On remand, with respect to Ambrosia, the judge reiterated the findings he made in his original decision on the six statutory penalty criteria. 18 FMSHRC at 1875. In reassessing a penalty against Ambrosia, the judge recognized that the Commission had instructed him not to increase the penalty based on a separate deterrence criterion, and concluded that a penalty of $5,000 was warranted against the company. *Id.* at 1875-76.

Regarding Steen, the judge stated:

> I also considered Respondent Steen's financial situation in my original decision. He has a number of financial obligations, which I found would warrant amortizing the payment of a civil

> penalty. He has no record of prior violations charged under § 110(c) of the Act.
>
> As stated, I have found that the violations . . . were significant and substantial and were due to high negligence and an unwarrantable failure to comply with the safety standard.

Id. at 1875. After noting that he was "[e]xcluding consideration of Respondents' false records and false statements to MSHA to cover up the violation," the judge reduced Steen's penalty from $4,000 to $3,500 and ordered him to pay the penalty in 10 monthly installments of $350 each. *Id.* at 1876.

II.

Disposition

A. Ambrosia's Penalty

In its petition for discretionary review, Ambrosia argues that the penalty assessed against it by the judge on remand "is excessive in terms of the statutory criteria, and therefore contrary to law." A. PDR at 2. Maintaining that the judge's penalty assessment against the company was affected by the judge's findings with respect to the behavior of Steen and Carr, Ambrosia argues that it should not be unduly penalized for the negligence of its two employees. *Id.* at 3-6. Ambrosia also argues that the penalty assessed by the judge is excessive in light of the six statutory criteria. *Id.* at 6-10. The company asserts that the penalty should be reduced in light of the company's modest history of previous violations and small size, the cooperation shown by the company during MSHA's inspection of the highlift, and the small degree of risk associated with the violation, notwithstanding the judge's S&S and unwarrantable failure findings. *Id.* Ambrosia suggests that a penalty of $3,500 would be appropriate. *Id.* at 10.

We find Ambrosia's petition for discretionary review unpersuasive. On remand, the judge reduced Ambrosia's penalty by $6,000 (from $11,000 to $5,000) in accordance with our remand instructions. The judge acted well within his discretion after proper consideration of the statutory criteria. *Sellersburg Stone Co.*, 5 FMSHRC 287, 294 (March 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984). Based on the facts developed in the adjudicative record, we cannot say that the penalty is inconsistent with the statutory criteria. Accordingly, we affirm the penalty assessed by the judge against Ambrosia.

B. Steen's Penalty

Steen argues that the judge's penalty assessment on remand lacks requisite factual findings on his income or net worth. Steen Br. at 2-3. Steen also argues that the penalty assessed by the judge is excessive in light of his net worth, income, and other penalties assessed against

section 110(c) defendants. *Id.* at 3-9. He requests that the Commission reduce the penalty against him to $575. *Id.* at 9-10.

In response, the Secretary asserts that the judge properly considered the six statutory penalty criteria. S. Br. at 3-6. Regarding the appropriateness of the penalty to Steen's "size," the Secretary contends that the judge considered this criterion when he reviewed the evidence on Steen's financial situation and concluded that Steen's financial obligations warranted amortizing the payment of the penalty. *Id.* at 4. The Secretary further argues that the cases on which Steen relies are irrelevant because of the fact-specific nature of penalty assessment, and that Steen's argument for uniform penalties is, in effect, a plea for adopting a new criterion that "the penalty in every case shall ultimately be adjusted so that it comports with penalties assessed in other cases against individuals similarly situated economically." *Id.* at 6-10. The Secretary asserts that the penalty assessment against Steen was within the sound discretion of the judge. *Id.* at 9-10.

Section 110(i) of the Mine Act requires the Commission to consider six criteria in assessing appropriate civil penalties:

> [1] the operator's history of previous violations, [2] the appropriateness of such penalty to the size of the business of the operator charged, [3] whether the operator was negligent, [4] the effect on the operator's ability to continue in business, [5] the gravity of the violation, and [6] the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

30 U.S.C. § 820(i). Findings of fact on each of these statutory criteria must be made. *Sellersburg*, 5 FMSHRC at 292. Such findings "not only provide the [individual] with the required notice as to the basis upon which [he or she] is being assessed a particular penalty, but also provide the Commission and the courts, in their review capacities, with the necessary foundation upon which to base a determination as to whether the penalties assessed by the judge are appropriate, excessive, or insufficient." *Id.* at 292-93. We have recently reiterated that with respect to individual respondents under section 110(i), "Commission judges must make findings on each of the criteria as they apply to *individuals*." *Sunny Ridge Mining Co.*, 19 FMSHRC 254, 272 (February 1997) (emphasis in original). In keeping with these principles, in *Ambrosia I* we instructed the judge "to set forth [on remand] findings applying the statutory criteria to Steen as an individual." 18 FMSHRC at 1565.

In his remand decision, the judge made findings on Steen's negligence, the gravity of the violation, and Steen's history of previous violations. 18 FMSHRC at 1875. The judge made no findings with respect to good faith abatement, but in his earlier decision, he found that "[s]ince the inspector red-tagged the vehicle, the question of the operator's abatement does not arise." 16 FMSHRC 2293, 2305 (November 1994) (ALJ). The Commission affirmed the judge's finding

on this criterion in *Ambrosia I.* 18 FMSHRC at 1565. The judge's findings on each of these criteria, although terse, meet the minimum requirements of the Act and our *Sellersburg* decision.

In light of the amount of the penalty relative to Steen's income, the judge's findings on the criteria of the penalty's effect on the ability to continue in business and the appropriateness of the penalty to the size of the business are inadequate. Under our *Sunny Ridge* decision issued after the judge's decision on remand, the relevant inquiry with respect to the criterion regarding the effect on the operator's ability to continue in business, as applied to an individual, is whether the penalty will affect the individual's ability to meet his financial obligations. 19 FMSHRC at 272. The judge ordered that, "[i]n light of his financial obligations," Steen should pay his penalty in 10 monthly installments of $350 each. 18 FMSHRC at 1876. However, the judge did not make *specific findings* as to the extent and nature of these obligations. On remand, the judge must make the requisite findings and explain how they affect the penalty.

With respect to the "size" criterion, we held in *Sunny Ridge* that, as applied to an individual, the relevant inquiry is whether the penalty is appropriate in light of the individual's income and net worth. 19 FMSHRC at 272. Although the judge stated that he "considered Respondent Steen's financial situation" (18 FMSHRC at 1875), he failed to make any *specific findings* on Steen's income and net worth. On remand, the judge must make the requisite findings and explain how they affect the penalty.

In the case of an individual, consideration of these criteria is especially critical in light of the legislative history of section 110(i), which was carried over with no significant changes from section 109 of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 et seq. (1976) (amended 1977) ("Coal Act"). The drafters of the Coal Act did not intend to tie an individual's liability under sections 110(c) and 110(i) to an operator's conduct and financial resources; instead, Congress intended that "the agent stand on his own." H.R. Rep. No. 563, 91st Cong., 1st Sess. 11-12 (1969), *reprinted in* Senate Subcommittee on Labor, Committee on Labor and Public Welfare, 94th Cong., 1st Sess., Part I *Legislative History of the Federal Coal Mine Health and Safety Act of 1969*, at 1041-42 (1975). But Congress also did not intend that agents "bear the brunt of corporate violations." *Id.* at 1042. The Commission has thus held that inordinately high penalties should not be assessed against individuals under sections 110(c) and 110(i). *Sunny Ridge*, 19 FMSHRC at 272.

III.

Conclusion

For the foregoing reasons, we affirm the judge's assessment of a $5,000 penalty against Ambrosia. We vacate the penalty assessed against Steen and remand a second time for reassessment.

Mary Lu Jordan, Chairman

Marc Lincoln Marks, Commissioner

James C. Riley, Commissioner

Theodore F. Verheggen, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

May 5, 1997

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. PENN 97-114
	:	A.C. No. 36-05018-04109 A
GARY J. KLINEFELTER	:	

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act"). On March 25, 1997, the Commission received from Gary J. Klinefelter ("Klinefelter") a request to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a). It has been administratively determined that the Secretary of Labor does not oppose the motion for relief filed by Klinefelter.

Under section 105(a) of the Mine Act, an operator has 30 days following receipt of the Secretary of Labor's proposed penalty assessment within which to notify the Secretary that it wishes to contest the proposed penalty. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 30 U.S.C. § 815(a).

Klinefelter asserts that he did not timely submit his request for a hearing ("Green Card") to the Department of Labor 's Mine Safety and Health Administration ("MSHA") because he never received a copy of the proposed penalty assessment in the period following its issuance in December 1996. Klinefelter asserts that he only received a copy of the proposed assessment on March 19, 1997, at the request of his attorney, after he received a letter from MSHA's Civil Penalty Compliance Office, dated February 26, 1997, indicating that payment of a civil penalty was delinquent. A copy of the February 26, 1997 letter is attached to Klinefelter's motion as

Exhibit C. The evidence indicates that the proposed assessment was sent by MSHA to Klinefelter at his correct home address by certified mail, and attempts were made to serve him with the proposed assessment in this manner on at least three occasions. There is no evidence as to why service by certified mail was not successful, and Klinefelter did not receive the proposed penalty assessment. Klinefelter requests the Commission to reopen this matter.

The Commission has held that, in appropriate circumstances and pursuant to Fed. R. Civ. P. 60(b), it possesses jurisdiction to reopen uncontested assessments that have become final under section 105(a). *Jim Walter Resources, Inc.*, 15 FMSHRC 782, 786-89 (May 1993); *Rocky Hollow Coal Co.*, 16 FMSHRC 1931, 1932 (September 1994).

The Commission has observed that default is a harsh remedy and that, if the defaulting party can make a showing of adequate or good cause for the failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Preparation Services, Inc.*, 17 FMSHRC 1529, 1530 (September 1995). In accordance with Rule 60(b)(1), the Commission has previously afforded parties relief from a final order of the Commission on the basis of inadvertence or mistake. *See General Chemical Corp.*, 18 FMSHRC 704, 705 (May 1996); *Kinross DeLamar Mining Co.*, 18 FMSHRC 1590, 1591-92 (September 1996).

On the basis of the present record, we are unable to evaluate the merits of Klinefelter's position.[1] In the interest of justice, we remand the matter for assignment to a judge to determine whether Klinefelter has met the criteria for relief under Rule 60(b). If the judge determines that

[1] In view of the fact that the Secretary does not oppose Klinefelter's motion to reopen this matter for a hearing on the merits, Commissioner Marks concludes that the motion should be granted.

such relief is appropriate, this case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

Mary Lu Jordan, Chairman

Marc Lincoln Marks, Commissioner

James C. Riley, Commissioner

Theodore F. Verheggen

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
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May 14, 1997

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. LAKE 96-137-M
CHRISTMAN QUARRY	:	

ORDER

BY THE COMMISSION:

Counsel for the Secretary of Labor has filed an unopposed motion to dismiss this proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act"). For the reasons that follow, we grant the motion.

On March 7, 1996, an inspector from the Department of Labor's Mine Safety and Health Administration ("MSHA") issued to Christman Quarry ("Christman") a citation alleging a violation of 30 C.F.R. § 56.14207. Christman contested the citation and the matter proceeded to hearing before Administrative Law Judge Gary Melick. Judge Melick determined that Christman violated the standard, affirmed the citation, and assessed a $1 civil penalty. 18 FMSHRC 2151, 2154 (December 1996) (ALJ). The Commission subsequently granted Christman's petition for discretionary review, challenging the judge's decision.

On May 6, 1997, the Commission received the Secretary's Motion to Dismiss Petition for Discretionary Review as Moot. The Secretary stated that, after reviewing the record in this case, the Secretary vacated the underlying citation on May 5, 1997. Mot. at 1. The Secretary attached a copy of the vacated citation to her motion. The Secretary also represented that counsel for Christman has no objection to the dismissal of this matter. *Id.* at 2.

The Commission has "responsibility under the Mine Act . . . to ensure that a contested case is terminated . . . in accordance with the Act." *Youghiogheny & Ohio Coal Co.*, 7 FMSHRC 200, 203 (February 1985). A motion by the Secretary to dismiss a review proceeding in which she has vacated an underlying citation will ordinarily be granted if "adequate reasons" to do so are present. *See C.W. Mining Co.*, 15 FMSHRC 773, 774 (May 1993). We conclude that adequate reasons exist in this case. The Secretary, as prosecutor charged with enforcing the Mine Act, determined that she should vacate the citation and seek to dismiss this appeal. The operator does not object to the Secretary's motion.

For the foregoing reasons, the Secretary's dismissal motion is granted.[1] Accordingly, the Commission's direction for review is vacated, as is that part of the judge's decision wherein he affirmed the citation, and this civil penalty proceeding is dismissed.

Mary Lu Jordan, Chairman

James C. Riley, Commissioner

Theodore F. Verheggen, Commissioner

[1] Commissioner Marks voted to deny the motion to dismiss. He concludes that review of the motion and the attached vacation of citation, which is based upon "prosecutorial discretion," fails to establish "adequate reasons" for the requested dismissal. Commissioner Marks notes that in this case the Secretary prevailed in establishing that a violation occurred. Because of the brevity of the motion, it is unclear whether the Commission is to conclude from the motion that the Secretary now believes that no violation occurred, or whether the Secretary is advising the Commission that, notwithstanding the existence of a violation, the Secretary has the authority to abandon her prosecutorial duty. Commissioner Marks submits that, in either case, the Secretary should be required to furnish more support for her motion.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
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May 15, 1997

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) on behalf of SAMUEL KNOTTS,	:	Docket No. WEVA 94-357-D
v.	:	
TANGLEWOOD ENERGY, INC., FERN COVE, INC., RANDY BURKE and RANDALL KEY	:	

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

DECISION

BY THE COMMISSION:

This discrimination 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 challenges to decisions by Administrative Law Judge Roy J. Maurer. After an evidentiary hearing, the judge issued his decision on liability in favor of complainant Samuel Knotts. 17 FMSHRC 1044 (June 1995) (ALJ). Subsequently, the judge issued his decision on damages. 17 FMSHRC 1667 (September 1995) (ALJ). Tanglewood Energy, Inc. ("Tanglewood") filed a petition for discretionary review of the judge's finding that Tanglewood[2] violated section 105(c) of the Mine Act, 30 U.S.C. § 815(c), and his holding that both the corporate and individual respondents are jointly and severally liable. The Secretary of Labor filed a petition for discretionary review of the remedy and the civil penalty assessed. The Commission granted both petitions. For the reasons that follow, we affirm the liability ruling, reverse the judge's deduction of unemployment compensation from the backpay award, and vacate and remand the penalty determination.

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[1] Commissioner Verheggen 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 Verheggen has elected not to participate in this matter.

[2] The Secretary also charged Fern Cove, Inc. ("Fern Cove"), a successor in interest to Tanglewood, Randy Burke (President of Fern Cove and Tanglewood) and Randall Key (part owner and officer of Fern Cove and Vice President of Tanglewood). We refer to all of these respondents as "Tanglewood."

I.

Factual and Procedural Background

At the time of his discharge on January 28, 1994, Samuel Knotts had been employed by Tanglewood for approximately three years as an "outside man." Tr. I 137.[3] Knotts' duties as an outside man included loading trucks, stockpiling coal, sweeping the men's dressing rooms, ordering supplies, watching the belts to ensure they were running, checking the mantrips, answering questions from visitors to the mine and performing mechanical work on equipment. 17 FMSHRC at 1053; Tr. I 138.

During the time he worked at the mine, Knotts communicated information about safety violations at the site to state and local inspectors. 17 FMSHRC at 1046-1048. Mine management was aware of Knotts' actions. *Id.* at 1048; Tr. I 41.

On September 1, 1993, Knotts testified on behalf of the Secretary in the case of *Secretary of Labor on behalf of Poddey v. Tanglewood Energy, Inc.*, 15 FMSHRC 2401, 2411 (November 1993) (ALJ). 17 FMSHRC at 1048. Knotts' testimony was specifically cited by the administrative law judge in that case to support his finding of discrimination. 15 FMSHRC at 2411. On January 25, 1994, the administrative law judge in the *Poddey* case issued his decision on damages. 17 FMSHRC at 1048.

On January 27, 1994, Randy Campbell, a representative of the mine landowner, arrived at the mine office to investigate conditions in order to submit a productivity report to the landowner. *Id.* at 1049. Knotts attempted to secure Campbell a ride underground but was told there was no transportation available for this purpose. Tr. I 102, 103, 105. Campbell then spoke by telephone with Randall Key, vice president of Tanglewood, who at the time was working underground. Tr. I 106. After his telephone conversation with Key, Campbell remained in the mine office and asked Knotts questions about the mine. Tr. I 106-07. Key was able to listen to this conversation from underground, via the telephone. Tr. II 130.

During the conversation, Campbell and Knotts discussed the general condition of the belts, problems with production, the amount of downtime, equipment problems and morale at the mine. Tr. I 111. They also discussed the ram cars, the mine vacation policy, bypassed components on mantrips, previous safety violations at the mine, and the purchase of a new truck by Randy Burke, Tanglewood's president. 17 FMSHRC at 1049. The judge found that the conversation could have lasted as long as 1 hour and 30 minutes. *Id.* at 1050.

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[3] References to "Tr. I" are to the January 19, 1995 transcript; references to "Tr. II" are to the January 20, 1995 transcript.

The next morning, Key called Knotts into the mine office and discharged him. Tr. I 164-167, 260. Knotts testified that, prior to discharging him, Key stated, "[w]e have suspected for a long time that you've been telling them what is going on." Tr. 164. Key maintains he fired Knotts because he sat in the office for two hours and talked to Campbell, instead of doing his work. Tr. II 140. Key's testimony indicates that he was also upset about Knotts' statements criticizing mine management. Tr. II 131, 133, 138.

Knotts filed a complaint of discrimination with the Department of Labor's Mine Safety and Health Administration ("MSHA"), which determined that Knotts had been discriminated against in violation of section 105(c) of the Mine Act. The Secretary then filed a complaint of discrimination with the Commission.

The judge determined that Tanglewood violated section 105(c) by discharging Knotts. 17 FMSHRC at 1054. He concluded that Knotts had engaged in protected activity and that his discharge was motivated at least in part by his protected activity. *Id.* at 1051-54. He found that Tanglewood did not meet its burden of proving its affirmative defense by showing that it would have taken the adverse action in any event. *Id.* at 1054. He rejected Tanglewood's argument that it fired Knotts for talking to Campbell for a long period of time instead of doing his job, concluding that Knotts was "essentially doing his job" during the conversation. *Id.* at 1053. He did not accept Tanglewood's contention that Knotts was fired due to the critical nature of his comments because, according to the judge, "in the context of the coal mining industry this was pretty mild stuff." *Id.*

With respect to the remedy, the judge found Tanglewood, Fern Cove, Burke and Key jointly and severally liable. 17 FMSHRC at 1667. He awarded Knotts $20,760 in backpay, and ordered that $3,640 Knotts received in state unemployment benefits be deducted from that amount. *Id.* He assessed a civil penalty of $1,000 against the respondents, although the Secretary had sought a penalty of $25,000. *Id.* at 1668. The judge based his penalty assessment in part on his conclusion that this was "a relatively close 'mixed-motives' case." *Id.* He also noted that the mine was experiencing serious financial difficulties including several hundred thousand dollars in civil penalties that it had not paid. *Id.* He suggested that the backpay award to Knotts would serve as a disincentive against future discrimination violations. *Id.*

II.

Disposition

Tanglewood argues that it took no adverse action against Knotts for cooperating with mine inspectors, or for being a witness in the *Poddey* case, noting that these events occurred well before the discharge. T. Reply Br. at 2. Tanglewood asserts that it had perceived Knotts' testimony as neutral, not adverse to the company. *Id.* It argues that Knotts' conversation with Campbell was not protected activity, because the discussion was either "production related, or of a gossiping nature." T. Br. at 7. Tanglewood insists that it would have taken the adverse action in any event for Knotts' unprotected activity alone, and that the duration and content of the conversation warranted his termination. *Id.* at 12. Tanglewood contends that Knotts was not doing his job during the lengthy conversation with Campbell. T. Reply Br. at 4.

As to the penalty issues, Tanglewood contends that individual liability may only be based on section 110(c) of the Mine Act, 30 U.S.C. § 820(c), which provides for civil penalties against certain directors, officers or agents of a corporate operator for knowing violations. T. Br. at 13. Tanglewood argues that, since Burke and Key acted in good faith, they could not have knowingly violated the law. *Id.* With respect to the penalty against Tanglewood, it claims that the judge did not ignore the penalty criteria of section 110(i), 30 U.S.C. § 820(i), and that the penalty was appropriate because of large financial losses experienced by Tanglewood in the last two years of its existence. T. Reply Br. at 7-8. It supports the judge's deduction of unemployment compensation. *Id.* at 8.

The Secretary contends that Knotts made safety complaints to Campbell during their conversation, which suffices to establish that Knotts engaged in protected activity under the Mine Act. S. Br. at 10. He relies on the judge's holding that parts of the conversation containing mildly "inflammatory language" were "an inextricable part of the safety discussion," and did not motivate Knotts' discharge. *Id.* at 14. The Secretary argues that the operator failed to prove its affirmative defense that it would have taken the adverse action in any event for the unprotected activity alone. *Id.* at 11-14.

The Secretary claims that the question of individual liability is not before the Commission because the operator did not raise it before the judge. S. Br. at 14. In the alternative, the Secretary relies on prior Commission cases where joint and several liability for 105(c) violations has been imposed on individual respondents. *Id.* at 15. He argues that it is appropriate to impose liability on Burke and Key because they are president and vice president of the corporate respondents and because they personally made and carried out the decision to fire Knotts. *Id.* at 15-16. The Secretary also contends that the judge failed to consider and properly apply the six statutory penalty criteria of section 110(i) of the Mine Act when he assessed a civil penalty of $1,000 for the violation, and that he improperly reduced Knotts' backpay award by the amount of unemployment compensation he received. *Id.* at 22-29.

A. General principles

A miner alleging discrimination under the Act 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 of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2797-800 (October 1980), *rev'd on other grounds,* 663 F.2d 1211 (3d Cir. 1981); *Secretary of Labor 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 2799-800. 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 for the unprotected activity alone. *Id.*; *Robinette*, 3 FMSHRC at 817-18; *see also Eastern Assoc. Coal Corp.* v. FMSHRC, 813 F.2d 639, 642 (4th Cir. 1987).

B. Liability

1. Protected Activity

The judge's finding that Knotts engaged in protected activity is supported by substantial evidence.[4] Although remote in time from the discharge, it is undisputed that Knotts had previously engaged in protected activity by testifying in *Poddey* and assisting inspectors. His conversation with Campbell was also protected, as it included complaints about unsafe equipment at the mine. Knotts testified that his purpose in telling Campbell about violations at the mine was to make conditions there safer. Tr. I 179-80. The judge found that Knotts was motivated by his belief that Campbell's report to the landowner could positively influence safety at the mine.[5] 17 FMSHRC at 1051. The operator's claim that the discussion was either "production related, or of a gossiping nature," T. Br. at 7, is not supported by the record. Substantial evidence supports the judge's finding that the conversation included the mine's violation history, the condition of the batteries on the ram cars, and the condition of the mantrips. Tr. I 112-113, 179.

Moreover, Knotts met his burden of proving that the discharge was motivated at least in part by his protected activity. Because direct evidence of discriminatory motive is rare, it may be established by circumstantial evidence. *Secretary of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (November 1981), *rev'd on other grounds,* 709 F.2d 86 (D.C. Cir. 1983). Here, Knotts proved discriminatory intent by showing that the operator had full knowledge of his protected activities and that only a short period of time elapsed between the final protected activity (his conversation with Campbell) and the discharge.

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

[5] By making this finding, the judge implicitly held that Knotts met the requirement that a complaint be made "under or related to this Act" in order to come under the protection of section 105(c)(1). That section defines "under or related to this Act" as "*including* a complaint notifying the operator or the operator's agent, or the representative of the miners . . . of an alleged danger or safety or health violation." 30 U.S.C. § 815(c)(1) (emphasis supplied). Congress' use of the term "including" indicates that this list of persons to whom complaints may be made is not exclusive. Because we conclude that Campbell, as the representative of the mine owner, was in a position to affect mining operations (Tr. I 97; P. Ex. 7) and, hence, safety, we need not specify here all the different categories of individuals to whom protected complaints may be made. Accordingly, we find that Knotts safety complaints to Campbell were "under or related to" the Act.

2. Affirmative Defense

The intermediate burdens of producing evidence and of persuasion shift to the operator to prove the elements of the affirmative defense that it would have taken the adverse action in any event based on the miner's unprotected activity. *Robinette*, 3 FMSHRC at 818 n.20. The Commission has cautioned that this affirmative defense should not be "examined superficially or be approved automatically once offered." *Haro v. Magma Copper Co.*, 4 FMSHRC 1935, 1938 (November 1982). In reviewing affirmative defenses, the judge must "determine whether they are credible and, if so, whether they would have motivated the particular operator as claimed." *Id.* (citation omitted).

The Commission has articulated ways in which an operator may prove its affirmative defense. These include showing "past discipline consistent with that meted out to the alleged discriminatee, the miner's unsatisfactory past work record, prior warnings to the miner, or personnel rules or practices forbidding the conduct in question." *Bradley v. Belva Coal Co.*, 4 FMSHRC 982, 993 (June 1982).

Substantial evidence supports the judge's finding that Tanglewood failed to prove its affirmative defense. It offered no evidence of past discipline, prior work record, or personnel practices showing that it would have terminated Knotts regardless of his protected activity. In fact, it admitted that Knotts was "one of the best employees." Tr. II 144. Instead of addressing the *Bradley* criteria, Tanglewood's affirmative defense relies on two other asserted reasons why it would have fired Knotts in any event. First, it contends it would have fired Knotts despite his protected activity because he was neglecting his work during his lengthy conversation with Campbell. We conclude, however, that the judge's finding that Knotts was essentially doing his job during the time he spoke with Campbell is supported by substantial evidence. Knotts' foreman admitted that miners were permitted to answer questions posed by engineers and inspectors. Tr. I 265. At the hearing, Key affirmed his deposition testimony that he wouldn't have fired Knotts for answering questions for 30 minutes. Tr. II 161-164.[6] Moreover, Knotts' job duties included answering questions of visitors such as Campbell, 17 FMSHRC at 1053, and substantial evidence supports the judge's finding that most of Knotts' conversation consisted of "embellished responses to questions put to him by Campbell." *Id.*

Campbell's testimony that he initiated questions to Knotts because Knotts was knowledgeable, Tr. I 107, further supports the judge's finding that Knotts was performing his job duties by speaking with Campbell. The purpose of Campbell's visit was to represent the mineral owners, inspect the mine and to ask questions concerning the production and the manner in which coal was mined. Tr. I 123. His inspection report included information he learned during his conversation with Knotts. Tr. I 117-19. Campbell's testimony indicates that the conversation was business-oriented, and that during the discussion Knotts provided relevant information to the

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[6] The operator's contention that Campbell had not posed safety-related questions to Knotts during the conversation is simply not dispositive, as Key testified that Knotts' job duties included answering questions "on things that pertained to the mines," Tr. II 162, not solely those that were safety-related.

landowners' agent, who, according to Burke's testimony, had the right to be at the mine gathering data for his report. Tr. II 80-81.

Tanglewood also asserts that, notwithstanding Knotts' protected activity, it would have fired Knotts in any event for expressing disparaging views about mine management during his conversation with Campbell.[7] PDR at 12-13; Tr. II 135, 138-39. The conversation between Knotts and Campbell contained both protected and unprotected elements. The parts of the conversation that were protected included a discussion of the origin, condition and batteries on the ram cars; the mantrips and the fact that a lot of them were junked or needed substantial repairs; bypassed components on mantrips; and the history of violations at the mine. 17 FMSHRC at 1049. On the other hand, the discussion regarding morale at the mine, the prior foreman, problems with management, vacation pay issues, problems with the bucket count, the purchase of a new company truck, and a statement allegedly made by Knotts that the mine manager "sets outside with his feet on the desk and acts like a bigshot coal operator,"[8] Tr. I 253, was unprotected.

In effect, the judge made a credibility determination that Key would not have fired Knotts based on these unprotected statements alone. *See Bradley*, 4 FMSHRC at 993 (judge must assess credibility of justification offered as affirmative defense). The Commission does not lightly overturn credibility determinations, which are entitled to great weight. *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1878 (November 1995) (citations omitted). Generally, we will uphold a judge's credibility determination unless compelling evidence supporting reversal is offered. *See, e.g., S&H Mining, Inc.*, 15 FMSHRC 956, 960 (June 1993); *Bjes v. Consolidation Coal Co.*, 6 FMSHRC 1411, 1418 (June 1984). When a judge's finding rests upon a credibility determination, we will not substitute our judgment for that of the judge absent a clear indication of error. *Metric Constructors, Inc.* 6 FMSHRC 226, 232 (February 1984), *aff'd* 766 F.2d 469 (11th Cir. 1985).

Here, although the record is silent regarding the judge's assertion that "in the context of the coal mining industry this was pretty mild stuff compared to many other cases which come before the trial judges of this Commission," 17 FMSHRC at 1053, we find no compelling reason to overturn the judge's credibility finding. Key's testimony that "it wasn't a very good feeling" listening to Knotts "hammer . . . [him and his] partner . . . criticizing everything we done [,]" Tr. II 138-39, appears to refer to protected as well as unprotected activity. Moreover, a significant portion of the conversation between Campbell and Knotts concerned safety issues.

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[7] The operator's reliance on Knotts' statement during the conversation that he could be fired if management could hear his comments is misplaced. T. Br. at 9-10. Tanglewood's construction of this comment as an admission of wrongdoing is not the only possible reading. It is equally plausible that Knotts was making a prediction about his manager's unlawful reaction to Knotts' safety complaints.

[8] This is arguably the most "inflammatory" remark attributed to Knotts, but both he and Campbell deny that he said it. Tr. I. 115, 160. The judge did not make a finding regarding this disputed fact.

We think these protected safety concerns expressed by Knotts were inextricably linked with the unprotected statements made during the conversation. As the Supreme Court has stated, "[i]t is fair that . . . [the employer] bear the risk that the influence of legal and illegal motives cannot be separated." *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 403 (1983). *See also Secretary of Labor on behalf of Nantz v. Nally & Hamilton Enterprises, Inc.*, 16 FMSHRC 2208, 2214 (November 1994).

Because Tanglewood failed to produce any other evidence (such as prior discipline of Knotts or others for similar conduct) that Knotts' statements warranted discharge, the judge correctly determined that Tanglewood did not meet its burden of establishing its affirmative defense that Knotts' unprotected statements, by themselves, led to his dismissal. Consequently, he correctly found that both the corporate and individual respondents discriminated against Knotts in violation of section 105(c)(2).[9]

C. Penalty Assessment

The judge erred in his assessment of the civil penalty. He considered only one of the six statutory penalty criteria of section 110(i), the operator's ability to stay in business. 17 FMSHRC at 1668. We remand the case for consideration of the other five criteria. *See Dolese Bros. Co.*, 16 FMSHRC 689, 696 (April 1994). On remand, the judge should make findings of fact regarding the criteria that provide the respondents with the required notice as to the basis upon which they are being assessed a particular penalty, and "also provide the Commission and the courts . . . with the necessary foundation upon which to base a determination as to whether the penalties assessed by the judge are appropriate, excessive, or insufficient." *Sellersburg Stone Co.*, 5 FMSHRC 287, 292-93 (March 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984). *See also Sunny Ridge Mining Co.*, 19 FMSHRC 254, 272 (February 1997).

In concluding that a $1,000 penalty was appropriate the judge considered that "[t]his was a relatively close 'mixed-motives' case where the complainant prevailed by the thinnest of margins." 17 FMSHRC at 1668. Commission precedent makes clear that the judge must confine himself to the statutory penalty criteria. *See Dolese*, 16 FMSHRC at 695. Nonetheless, the Commission has recently held that a judge is permitted to determine whether mitigating factors exist that would reduce the level of negligence, one of the statutory factors to be considered. *Secretary of Labor on behalf of Poddey v. Tanglewood Energy, Inc.*, 18 FMSHRC 1315, 1319-20 (August 1996). Similarly, when the judge evaluates the degree of operator negligence in this case, he may take mitigating circumstances into account, including the unprotected part of Knotts' conversation with Campbell.

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[9] Tanglewood's contention that the individual respondents could only be found liable in this case if they had been charged under section 110(c) is not before the Commission because Tanglewood failed to raise this question before the judge. 30 U.S.C. § 113(d)(2)(A)(iii); *see United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 36 (1952); *U. S. Steel Mining Co.*, 8 FMSHRC 314, 318 n.4 (March 1986); *Jones & Laughlin Steel Corp.*, 5 FMSHRC 1209, 1211-12 (July 1983).

However, the judge mistakenly concluded that the $25,000 penalty proposed by the Secretary was not appropriate because the backpay award to Knotts would serve as a deterrent. The legislative history of the Mine Act makes clear that "[t]he relief provided under section [105(c)] is in addition to that provided . . . for violation of standards." S. Rep. No. 181, 95th 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) (emphasis added). The judge also erred when he reduced the civil penalty on the basis that the operator had failed to pay large civil penalties in the past. "An operator's delinquency in payment of penalties is not one of the criteria set forth in section 110(i) of the Mine Act for consideration in the assessment of penalties." *Secretary of Labor on behalf of Johnson v. Jim Walter Resources, Inc.*, 18 FMSHRC 841, 850 (June 1996).

Finally, we reverse the judge's order deducting Knotts' unemployment compensation from his backpay award. *Poddey*, 18 FMSHRC at 1323-25.

III.

Conclusion

For the foregoing reasons, we affirm the judge's finding that the corporate and individual respondents discriminated against the complainant in violation of section 105(c). We vacate the judge's penalty assessment and remand to the Chief Administrative Law Judge for reassignment[10] and for proper consideration. We reverse the judge's order deducting unemployment compensation from the backpay award.

Mary Lu Jordan, Chairman

Marc Lincoln Marks, Commissioner

James C. Riley, Commissioner

[10] Judge Maurer has transferred to another agency.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

May 21, 1997

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. LAKE 94-79
AMAX COAL COMPANY	:	

BEFORE: Jordan, Chairman; Marks, Riley and Verheggen, 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) ("Act"). Following an evidentiary hearing, Administrative Law Judge Jerold Feldman sustained Citation No. 4054831, alleging a significant and substantial ("S&S")[1] violation of 30 C.F.R. § 75.400 by Amax Coal Company ("Amax"). 16 FMSHRC 1837, 1838-43 (August 1994) (ALJ).[2] Amax petitioned the Commission to review the S&S determination. The Commission vacated and remanded the S&S determination for further consideration of the evidence. 18 FMSHRC 1355, 1357-59 (August 1996). On remand, Judge Feldman again determined that the violation was S&S and directed Amax to pay a civil penalty of $309. 18 FMSHRC 1868 (October 1996) (ALJ). The Commission thereafter denied Amax's petition for discretionary review.

Subsequently, Amax filed a petition for review in the U.S. Court of Appeals for the District of Columbia Circuit. On April 26, 1997, the Secretary moved to dismiss the petition because she had modified Citation No. 4054831 to vacate the S&S determination. Accordingly,

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

[2] This proceeding originally included Docket No. LAKE 94-55, which is no longer at issue.

on May 8, 1997, the court dismissed the petition for review as moot and remanded the case to the Commission for reassessment of penalty.

Pursuant to the court's order, we remand the case to the judge for reassessment of civil penalty.

Mary Lu Jordan. Chairman

Marc Lincoln Marks. Commissioner

James C. Riley, Commissioner

Theodore F. Verheggen, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

May 23, 1997

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. LAKE 94-74
AMAX COAL COMPANY	:	

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

DECISION

BY THE COMMISSION:

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act" or "Act"). At issue is the decision of Commission Administrative Law Judge William Fauver finding that a violation of 30 C.F.R. § 75.400,[1] involving an accumulation of combustible materials in two intersecting belt entries conceded by AMAX Coal Company ("AMAX"), was significant and substantial ("S&S") and due to the operator's unwarrantable failure. 17 FMSHRC 1127, 1129-36 (July 1995) (ALJ). The Commission granted AMAX's petition for discretionary review. For the reasons that follow, we affirm.

I.

Factual and Procedural Background

AMAX operates the Wabash Mine, a bituminous coal mine located in Wabash County, Illinois. Tr. 18. The mine has two portals and approximately 26 miles of conveyor belts. 17

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[1] Section 75.400 provides:

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

FMSHRC at 1129. On September 1, 1993, while inspecting belts and transfer points at the mine, Steve Miller, an inspector with the Department of Labor's Mine Safety and Health Administration ("MSHA"), found an accumulation of dry, loose coal and float coal dust where the Main South No. 1 belt intersected the mother belt. *Id.* at 1128; Tr. 19. The accumulation stretched 85 feet along the Main South belt and 200 feet along the mother belt, and varied in depth from 6 inches to 3 feet and in width from 4 to 8 feet. 17 FMSHRC at 1128. The mother belt was running in the packed and loose dry coal for a distance of approximately 15 feet. *Id.* The accumulation was wet in places, generally beneath the surface layer. *Id.*

Accumulations were reported in the cited area in the mine preshift report for the morning of September 1. Tr. 122-23; Ex. R-3. The preshift examiner told Ricky Walker, the day shift manager, that one person could clean up the accumulation. Tr. 122-23. Walker sent Rick Snow to clean the area. Tr. 123. Snow was working in the cited area when Inspector Miller arrived. 17 FMSHRC at 1135; Tr. 28. Miller issued a section 104(d)(2) order alleging an S&S and unwarrantable violation of section 75.400. The Secretary proposed a penalty of $9,600 against AMAX. The company challenged the Secretary's penalty proposal, and the matter proceeded to a hearing before Judge Fauver.

At the hearing, AMAX conceded that it violated section 75.400 in connection with the cited accumulation. 17 FMSHRC at 1127. With respect to the S&S allegation, the judge rejected AMAX's contention that the phrase "reasonable likelihood," as used in determining whether a violation is S&S, means "more probable than not." *Id.* at 1130. He concluded that an S&S violation "is determined in terms of 'the potential of the risk' of injury or illness, not a 'percentage of probability.'" *Id.* at 1131. The judge concluded that the violation was S&S, finding that a fire could have been started by the belt running in coal, that the accumulation provided a large amount of fuel to propagate a fire, and that such a fire could cause serious injuries such as burns or smoke inhalation. *Id.* at 1133.

The judge also concluded that the violation was the result of AMAX's unwarrantable failure to comply with section 75.400 based on his findings that the mine had a poor history of compliance with the standard, that MSHA had repeatedly counseled mine management regarding accumulation problems, that the cited accumulation was extensive and had built up over several days, and that before the order was issued, mine management kept the belt running in coal and assigned only one person to clean the area. *Id.* at 1135. The judge found AMAX's conduct "aggravated" and to constitute "more than ordinary negligence." *Id.* He also noted that efforts made by mine management to improve compliance with section 75.400 after the order was issued were irrelevant as to the question of unwarrantability. *Id.* at 1135-36. The judge assessed a penalty of $9,600 against AMAX. *Id.* at 1136.

II.

Disposition

A. Significant and Substantial

AMAX argues that the proper S&S test is whether it is "more probable than not" that a cited hazard will result in an injury. AMAX Br. at 9-13. AMAX contends that, contrary to Commission precedent, the judge adopted what amounts to a per se S&S standard for section 75.400 violations when he focused on the potential for, rather than the probability of, serious injury. *Id.* at 13-18. AMAX also argues that the judge's S&S determination was not supported by substantial evidence. *Id.* at 19-23. The Secretary argues that the judge was correct in declining to use a "more probable than not" standard in determining whether AMAX's violation was S&S. S. Br. at 12-19. The Secretary maintains that the judge did not in effect hold that section 75.400 violations are per se S&S. *Id.* at 20-26. Highlighting Inspector Miller's testimony, the Secretary argues that the judge's S&S determination is supported by substantial evidence. *Id.* at 26-29.

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 (April 1981). In *Mathies Coal Co.*, 6 FMSHRC 1 (January 1984), we 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, 135-36 (7th Cir. 1995) (approving *Mathies* criteria). An evaluation of the reasonable likelihood of injury should be made assuming continued normal mining operations. *United States Steel Mining Co.*, 7 FMSHRC 1125, 1130 (August 1985). When evaluating the reasonable likelihood of a fire, ignition, or explosion, we have examined whether a "confluence of factors" was present based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498, 501 (April 1988). These factors include the extent of accumulations and the presence of possible ignition sources. *Id.* at 500-03.

At issue here is the third element of the *Mathies* test. As to the legal issue, we are unpersuaded by AMAX's argument that the judge erred by failing to apply a "more probable than

not" standard in assessing the reasonable likelihood of injury. AMAX Br. at 9-13. We rejected an identical argument in *United States Steel Mining Co.*, 18 FMSHRC 862, 865 (June 1996).

In addition, the judge's determination that there was a reasonable likelihood of an injury-producing event is supported by substantial evidence.[2] There is no dispute that the cited accumulation of loose, dry coal and float coal dust was extensive. Inspector Miller testified that it varied in depth from 6 inches to 3 feet, and measured 85 feet along the Main South No. 1 belt line and approximately 200 feet along the mother belt. Tr. 19-20. One of AMAX's shift managers, Gary Bennett, characterized the cited accumulation as "a major spill." Tr. 171. Bennett testified that accumulations occurred frequently in the cited area, which was at the intersection of two major belts, and that "any time you do have a spill you can figure that it's a fairly major spill." Tr. 177; *see also* AMAX Br. at 21 (characterizing accumulation as "significant"). The cited area was also "covered with accumulations of float coal dust." Tr. 21, 53. A 15-foot section of the mother belt running on packed dry coal and in loose coal was a potential source of an ignition. Tr. 20, 22.

Ricky Walker, an AMAX shift manager, admitted that a belt running in coal is a "dangerous condition" and poses the threat of a fire. Tr. 121. Walker also admitted that although much of the coal was wet in the area, which AMAX argues would have delayed combustion (Br. at 14-16), the surface layer of the cited coal accumulation was dry. Tr. 145. In addition, we have held that accumulations of damp or wet coal can dry out and ignite. *Mid-Continent Resources, Inc.*, 16 FMSHRC 1226, 1230 (June 1994). The presence here of an ignition source and large amounts of coal and coal dust that could propagate a fire or fuel an explosion satisfies the third *Mathies* element. As we have recognized, "ignitions and explosions are major causes of death and injury to miners." *Black Diamond Coal Mining Co.*, 7 FMSHRC 1117, 1120 (August 1985).

AMAX's additional arguments are unpersuasive. We reject AMAX's contention that the violation was not S&S because very few belt fires have resulted in injuries. AMAX Br. at 22-23. That injuries have been avoided in the past in connection with a particular type of violation may be fortunate, but is not determinative of an S&S finding. *New Warwick Mining Co.*, 18 FMSHRC 1568, 1576 (September 1996); *United States Steel*, 18 FMSHRC at 867. Also unavailing are AMAX's arguments that a miner working in the area at the time the order was

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[2] The Commission is bound by the terms of the Mine Act to apply 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)). In reviewing the whole record, an appellate tribunal must consider anything in the record that "fairly detracts" from the weight of the evidence that supports a challenged finding. *Midwest Material* Co., 19 FMSHRC 30, 34 n.5 (January 1997) (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951)).

issued "would have detected the smell of any combustion" and taken appropriate measures to alert the mine's communication center, and that the presence of fire detection systems, self-contained self rescuers, and fire fighting equipment in the cited area minimized the risk of injuries from a fire. AMAX Br. at 16, 18. While we believe that these measures could be effective in minimizing the consequences of a fire, in the event of an explosion they would make no difference. Even in the event of a fire, the mere presence of a miner and fire detection and fighting equipment "does not mean that fires do not pose a serious safety risk to miners." *Buck Creek*, 52 F.3d at 136.[3] As we have noted, for purposes of analyzing whether a violation is S&S, a "hazard continues to exist regardless of whether caution is exercised." *Eagle Nest, Inc.*, 14 FMSHRC 1119, 1123 (July 1992). Accordingly, we affirm the judge's S&S determination.[4]

B. Unwarrantable Failure

With respect to the judge's finding that the violation was due to AMAX's unwarrantable failure, AMAX faults the judge for ignoring evidence that it was addressing the accumulation and for holding the company to a "should have known" standard. AMAX Br. at 25-28. AMAX argues that the mine's history of compliance with section 75.400 does not demonstrate "a significant incidence rate." *Id.* at 29. AMAX also contends that the judge ignored its efforts to improve its compliance with section 75.400 before the order was issued. *Id.* at 29-30.

In support of her argument that substantial evidence supports the judge's unwarrantable failure determination, the Secretary contends that the cited accumulation was extensive and present for several days, that the mine had a poor history of compliance with section 75.400, that mine management was on ample notice that it needed to improve its compliance with the standard, and that inadequate efforts were made to remove the accumulation before the order was issued. S. Br. at 31-39. The Secretary asserts that, even if AMAX had taken some steps to improve its compliance with section 75.400, any such efforts "were plainly unsuccessful in avoiding the massive and dangerous accumulation in this case." *Id.* at 37-38.

In *Emery Mining Corp.*, 9 FMSHRC 1997, 2001 (December 1987), we determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. 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 &*

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[3] The very report on which AMAX relies to demonstrate the minimal chance of a miner being injured in a belt-entry fire reports two injuries that occurred during the *fighting* of such fires after they had been detected. AMAX Br. at 22; Ex. R-4 at 8-9.

[4] Commissioner Marks agrees that the violation was S&S. However, for the reasons set forth in his concurring opinions in *United States Steel*, 18 FMSHRC at 868, and *Buffalo Crushed Stone, Inc.*, 19 FMSHRC 231, 240 (February 1997), he continues to urge that the ambiguous language of the Commission's *Mathies* test, 6 FMSHRC at 3-4, be replaced with a clear test that is consistent with Congressional intent.

Pittsburgh Coal Co., 13 FMSHRC 189, 193-94 (February 1991); *see also Buck Creek*, 52 F.3d at 136 (approving the Commission's unwarrantable failure test). We examine various factors in determining whether a violation is unwarrantable, including the extent of a violative condition, the length of time that it has existed, whether the violation is obvious or poses a high degree of danger, whether the operator has been placed on notice that greater efforts are necessary for compliance, and the operator's compliance efforts made prior to the issuance of the citation or order. *Enlow Fork Mining Co.*, 19 FMSHRC 5, 11-12, 17 (January 1997); *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (February 1994); *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (August 1992); *Quinland Coals, Inc.*, 10 FMSHRC 705, 709 (June 1988); *Kitt Energy Corp.*, 6 FMSHRC 1596, 1603 (July 1984). Repeated similar violations may be relevant to an unwarrantable failure determination to the extent that they serve to put an operator on notice that greater efforts are necessary for compliance with a standard. *Peabody*, 14 FMSHRC at 1263-64.

Here, the cited accumulation was very extensive, stretching 200 feet in one direction and 85 feet in another direction. Tr. 19-20. The accumulation was so large that it took approximately 16 miners 4½ hours to clean it up. Tr. 29. Despite ongoing efforts to keep the cited area clean, at no time during the several shifts preceding the issuance of the order was the area free of accumulations. Exs. R-3, R-5, R-6, R-9 (noting accumulations that were "cleaned on," a notation that was used when clean-up efforts were not finished, Tr. 185-86). The cited accumulation was obvious by virtue of its enormous size, and also because it was in an area where mine management knew major spills were the rule rather than the exception. Tr. 177; *see also* AMAX Br. at 21. Mine management's effort to clean up the accumulation before the order was issued by sending one miner to the area (Tr. 122-23) was inadequate, a fact mine management knew or should have known, particularly in light of its knowledge that spills in the cited area were almost always large. Finally, AMAX was on more than ample notice that greater efforts were necessary for compliance with section 75.400. From October 1992 through August 1993, MSHA cited the Wabash Mine 98 times for violations of section 75.400. Tr. 35-36. Moreover, in the eight months of 1993 before the order was issued, MSHA had repeatedly met with mine management to discuss section 75.400 compliance problems. Tr. 31-32 ("This has been an on-going problem . . ."), 85-86, 107. As Inspector Miller testified, "[s]eldom do[es MSHA] have a meeting with [mine management] that you don't talk about 75.400 violations." Tr. 32.

We find unconvincing AMAX's argument that its conduct did not result from unwarrantable failure because Walker's decision to send only one miner to clean up the accumulation was based on the good faith, albeit mistaken, belief of the preshift examiner that one miner could clean up the spill. AMAX Br. at 26-27. We have held that unwarrantable failure does not result from an operator's good faith, but mistaken, belief that its conduct was the safest method of complying with the Mine Act and MSHA's regulations. *Wyoming Fuel Co. n/k/a Basin Resources, Inc.*, 16 FMSHRC 1618, 1628-29 (August 1994). But we have also held that the operator's good faith belief must be reasonable under the circumstances. *Id.* at 1628.

Here, the preshift examiner's mistaken assessment of the spill was not reasonable in light of the size of the spill.[5]

AMAX also argues that its various efforts to control accumulation problems at the Wabash Mine should exonerate it from a finding of unwarrantability. However, most of the improvements advanced by AMAX occurred after the order was issued, and are therefore irrelevant in determining the level of negligence associated with the violation. *Enlow Fork*, 19 FMSHRC at 17. Nor did AMAX demonstrate that any of the improvements in place at the time of the violation[6] had been implemented in the cited area, which AMAX concedes was an area in which large spills occurred. Tr. 177; *see also* AMAX Br. at 21.

In sum, we find that substantial evidence supports the judge's conclusion that AMAX's conduct was aggravated and constituted more than ordinary negligence. Accordingly, we affirm the judge's unwarrantable failure determination.

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[5] At oral argument, counsel for AMAX emphasized the rank-and-file status of the miner who conducted the preshift examination in question. Regardless of the miner's status, however, he was AMAX's agent for the purpose of conducting a preshift examination, and his actions – and mistakes – are fully imputable to AMAX. *Rochester & Pittsburgh*, 13 FMSHRC at 194-96.

[6] These improvements included installation of automatic rock dusting devices (Tr. 231), the use of portable concrete mixers to "pour more extensive [belt support] pads or do more concrete work around drives and belts" (Tr. 206, 232), elimination of short drive assemblies called pony drives (Tr. 212, 234-35), and renovation of belt lines (Tr. 236-37).

III.

Conclusion

For the foregoing reasons, we affirm the judge's conclusion that AMAX's violation of section 75.400 was significant and substantial and caused by an unwarrantable failure to comply with the standard.

Mary Lu Jordan, Chairman

Marc Lincoln Marks, Commissioner

James C. Riley, Commissioner

Theodore F. Verheggen, Commissioner

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ADMINISTRATIVE LAW JUDGE DECISIONS

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MAY 5 1997

SECRETARY OF LABOR	:	DISCRIMINATION PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	
on behalf of	:	
JAMES HYLES,	:	Docket Nos. WEST 93-336-DM
	:	WEST 93-436-DM
DOUGLAS MEARS,	:	WEST 93-337-DM
	:	WEST 93-437-DM
DERRICK SOTO,	:	WEST 93-338-DM
	:	WEST 93-438-DM
GREGORY DENNIS,	:	WEST 93-339-DM
Complainants	:	WEST 93-439-DM
	:	WEST 94-021-DM
	:	
v.	:	
	:	All American Aggregates
ALL AMERICAN ASPHALT,	:	
Respondent	:	

DECISION

Before: Judge Cetti

These consolidated cases are before me upon remand by the Commission for further consideration, more specific credibility findings, and analysis consistent with its December 1996 decision, 18 FMSHRC 2096, 2103 (December 1996).

FACTUAL AND PROCEDURAL BACKGROUND

The basic factual framework and procedural background of these cases is set forth in my decision, 16 FMSHRC 2232 (November 1994) and is also more concisely and ably set forth in the Commission's remand decision 18 FMSHRC 2096 as follows:

> AAA is a general contractor in Corona, California that operates an asphalt plant, a quarry, and a plant that produces rock-based aggregates for its own use and sale to other contractors. Tr. 1136-39. In April 1991, AAA was in the process of completing an addition to its rock finishing plant. 16 FMSHRC at 2235. On Thursday, April 18, James Hyles, a leadman on AAA's third or "graveyard" shift, learned that AAA

equipment was not in place. Hyles voiced his concern about safety conditions in the plant to Mike Ryan, plant supervisor and a vice president of AAA. Hyles also spoke to Patrick McGuire, business representative of Local 12 of the International Union of Operating Engineers ("Operating Engineers"), which represented AAA's employees. Id. Thereafter, McGuire visited the plant and saw the plant running without numerous pieces of equipment in place. Id.; Tr. 177-78.

During the weekend of startup operations, Ryan assigned Hyles to work as leadman on a combined second and third shift. 16 FMSHRC at 2236. When Hyles reported to work on Friday, April 19, at 7:00 p.m., he saw equipment lacking guards, ladders, catwalks, decks, handrails and trip cords. Id. at 2235-36. Working under Hyles' supervision in the finish plant area were Greg Dennis, Doug Mears, and Derrick Soto. Hyles warned them to be careful, and they complained to Hyles about conditions in the plant. Later, during the weekend, Hyles videotaped the plant in operation and spoke to Dennis, Mears, and Soto about what he was doing. Id. at 2236. Other employees on the videotape observed Hyles' videotaping, including leadman Gary Richter. Tr. 365-70. On Sunday night, Hyles was involved in a minor accident when he fell through a gap in decking. Tr. 367-70; Gov't Ex. 23. Hyles spoke to Dennis, Mears, and Soto about taking the videotape to the field office of the Mine Safety and Health Administration (MSHA). They all agreed that the plant's condition posed dangers to employees and that the tape should be turned in. 16 FMSHRC at 2236; Tr. 370.

On Monday morning, Hyles went to the MSHA field office and turned in the videotape. 16 FMSHRC at 2236; Gov't Ex. 54. After viewing the videotape, MSHA inspectors went to the AAA plant and saw it in operation. MSHA issued numerous citations, including 29 unwarrantable failure violations. 16 FMSHRC at 2236. Later that day, Ryan called Hyles at home and told him not to report to work that evening because someone had turned them in and MSHA had shut the plant down. Id.

About a week later on the first day that the plant reopened, Hyles had lunch with Ryan and Gary White, leadman on the maintenance shift. Ryan asked if either man knew who turned him in. Ryan added that he wanted to find out who it was so he

could make life so miserable for them that they would be happy to go to work someplace else. Id.; Tr. 375-76. Also after the plant reopened, AAA President William Sisemore stated that he wanted to find out who turned in the company and make it worth their while to go elsewhere. 16 FMSHRC at 2237, Tr. 391-504.

In June 1991, during a subsequent MSHA investigation, Hyles, Dennis, Mears, and Soto, in addition to other employees, were interviewed in an investigation into Ryan's conduct under 30 U.S.C. § 820(c). Id. at 2237, Gov't Exs. 2, 3, 4, and 5.

In October 1991, Ryan, without explanation, demoted Hyles from his position as leadman. When asked why he was demoting Hyles, Ryan responded that they no longer saw eye-to-eye. 16 FMSHRC at 2237. [1] On July 7, 1992, due to an equipment move, AAA laid off 16 of its 27 employees, including Hyles, Dennis, Mears, and Soto. Over the succeeding weeks, all employees but the four complainants were called back to work, and some employees were working overtime. When Hyles and Soto went to the plant and saw less senior employees working, the four filed grievances under the collective bargaining agreement between AAA and the Operating Engineers. The grievants contended that the contract required AAA to conduct a "bumping" meeting prior to layoffs where employees could bid on jobs held by less senior employees and bump those employees out of jobs for which the more senior employee was qualified to perform. Id. at 2238-39. The grievances went to arbitration, and the arbitrator found that AAA had violated the contract by laying off employees without conducting a bumping meeting; however, he concluded that only Hyles was entitled to relief to bump less senior employees, based on his qualifications. 16 FMSHRC at 2238-39, Gov't Ex. 51, at 11-14.

In September 1992, Hyles, Dennis, Mears, and Soto filed discrimination complaints with MSHA. Following the institution of temporary reinstatement proceedings, AAA reinstated

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[1] The Commission in footnote 3. Id. at 2402 ruled the judge's determination that Hyles demotion did not violate 105(c) of the Mine Act is final since the Secretary did not preserve the demotion issue for review through a timely filed petition, nor did the Commission order sua sponte review of the issue.

the four complainants on February 11, 1993. 16 FMSHRC at 2239-40. Upon their reinstatement, they were assigned to production work on the day shift. Id. at 2240.

In early March 1993, AAA reestablished a third shift as a result of decreased production due to wetness of material that was being processed through the plant. AAA temporarily assigned four of its most senior plant repairmen to perform production work, while paying them at their higher rate of pay as repairmen. It was unusual for senior employees to work the night shift, because the day shift was seen as more desirable and the most senior employees generally bid on it. Id. Three weeks later, on March 23, AAA discontinued the third shift and announced a layoff. Rather than reassigning the four repairmen to their regular positions, AAA required the repairmen to participate in a bumping meeting. Rather than bumping into repairmen positions, they bumped into the production jobs held by Hyles, Dennis, Mears, and Soto. As a result the complainants were the only four employees laid off. AAA discontinued the third shift and announced a layoff. Rather than reassigning the four repairmen to their regular positions, AAA required the repairmen to participate in a bumping meeting. Rather than bumping into repairmen positions, they bumped into the production jobs held by Hyles, Dennis, Mears, and Soto. As a result, the complainants were the only four employees laid off. AAA subsequently hired new employees to fill the vacant repairmen positions. Id. at 2240-41; Tr. 457, 481, 1693.

On March 24, the four complainants were called into the layoff meeting and told that they had been bumped by more senior employees and that they were to bid on jobs held by less senior employees. They were reluctant to exercise their bumping rights at the meeting for fear that Ryan would refuse to allow them to bump into other jobs because they were not qualified. Hyles and Soto requested that they be given time to consult with counsel from the Solicitor's office because of the pendency of their discrimination complaints. 16 FMSHRC at 2241. Shortly after the meeting, Operating Engineers Business Agent McGuire called Ryan to let him know that Hyles had decided to bump into the plant operator position. Ryan refused the request, stating that it was untimely. AAA refused to accept any of the complainants' subsequent written requests to bump for the same reason. Id.

Following the second layoff, Hyles, Dennis, Mears, and Soto filed a second discrimination complaint, alleging that the March 1993 layoff was in retaliation for their MSHA related safety activity. AAA reinstated the complainants on April 26, 1993. After their reinstatement, the complainants were frequently given reduced working hours. In April 1993, AAA began hiring ten new employees and increased its output of finished material. In August 1993, AAA posted a seniority list indicating that Dennis, Mears and Soto had seniority dates of January 1993. When Mears asked why the list did not reflect his original seniority date, Ryan responded that he had no seniority. Id. at 2242.

The Secretary issued four complaints for each of the two layoffs, and an eight day hearing was held. At the close of the hearing, the judge issued a bench decision granting the complainants temporary reinstatement, and a written decision followed. 16 FMSHRC 31 (January 1994)(ALJ). Thereafter, the judge issued his decision on the merits of the complaints. Initially, the judge dismissed several procedural defenses raised by AAA, including that the complaints were time barred under the Mine Act and that the discrimination complaints were preempted by the National Labor Relations Act, 29 U.S.C. § 141 et seq. (1994). 16 FMSHRC at 2233-35. On the merits, the judge found that AAA had violated section 105(c) of the Mine Act by laying off the complainants on two occasions in retaliation for their MSHA related safety activity. Id. at 2247-49.

APPLICABLE LAW

The principles governing analysis of discrimination cases under the Mine Act are well settled. In order to establish a prima facie case of discrimination under Section 105(c) of the Act, a complaining miner bears the burden of production and proof in establishing that (1) he engaged in protected activity and (2) the adverse action complained of was motivated in any part by that protected activity. Secretary on behalf of Pasula v. Marshall, 663 F.2d 1211 (3rd Cir. 1981); Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 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. If an 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, supra; Robinette, supra. See also Eastern Assoc. Coal Corp. v. FMSHRC, 813 F.2d 639, 642 (4th Cir. 1987); Donovan v. Stafford Construction Co., 732 F.2d 954,

958-59 (D.C. Cir. 1984); Boich v. FMSHRC, 719 F.2d 194, 195-96 (6th Cir. 1983) (specifically approving the Commission's Pasula-Robinette test). Cf. NLRB v. Transportation Management Corp.; 462 U.S. 393, 397-413 (1983) (approving nearly identical test under National Labor Relations Act).

Direct evidence of actual discriminatory motive is rare. Short of such evidence, illegal motive may be established if the facts support a reasonable inference of discriminatory intent. Secretary on behalf of Chacon v. Phelps Dodge Corp., 3 FMSHRC 2508, 2510-11 (November 1981), rev'd on other grounds sub nom. Donovan v. Phelps Dodge Corp., 709 F.2d 86 (D.C. Cir. 1983); Sammons v. Mine Services Co., 6 FMSHRC 1381, 1398-99 (June 1984). As the Eighth Circuit analogously stated with regard to discrimination cases arising under the National Labor Relations Act in NLRB v. Melrose Processing Co., 351 F.2d 693, 698 (8th Cir. 1965):

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

Circumstantial indicia of discriminatory intent by a mine operator against a complaining miner or miners includes hostility towards the miner because of his protected activity and disparate treatment of the complaining miner by the operator. Chacon, supra at 2510.

Docket Nos. WEST 93-336-DM, WEST 93-337-DM, WEST 93-338-DM, WEST 93-339-DM

With respect to these four dockets (first set of dockets) for reasons set forth below, I find and conclude that each of the four Complainants in April 1991 engaged in protected activity, that Ryan, the plant supervisor and vice-president, as well as the president, Sisemore, blatantly expressed hostility to the protected activity and a desire to find out who "turned them in" so as to make it so miserable for them they would be glad to seek employment elsewhere. Over a period of time, Respondent was able to determine who the employees were that engaged in the April 1991 protected activity and took adverse discriminatory action against them in retaliation for their having engaged in the protected activity. The adverse action taken included not recalling Complainants back to work for a prolonged period of time after the July 1992 layoff while less senior employees were working and at other times between July 1992 and December 16, 1993, all of which are

covered by the back-pay stipulation set forth in the stipulation marked as Exhibit A. [2] This adverse action resulted in a loss of wages (back-pay) for each of the Complainants in the dollar amounts set forth in my decision dated November 2, 1994, 16 FMSHRC 2232, which in turn, is based on the record and the agreed dollar amounts set forth in the stipulation signed and filed by all parties. This stipulation was and is accepted by the undersigned Judge. On the same basis, after consideration of the relevant statutory criteria, I find the appropriate penalty to be assessed for the violations of Section 105(c) found in this first set of four dockets is $14,000.00.

Docket Nos. WEST 93-436-DM, WEST 93-437-DM, WEST 93-438-DM, WEST 439-DM

This second set of dockets, listed above, arose out of the second set of discrimination complaints that the four complainants filed with MSHA in September 1992. With respect to these dockets, Docket Nos. WEST 93-436-DM, WEST 93-437-DM, WEST 93-438-DM and WEST 93-439-DM, I find that each of the Complainants did indeed engage in protected activity which included taking an active part in the Section 110(c) investigation of the plant supervisor, Ryan. It is undisputed that the Respondent was fully aware of the Claimants' protected activity. I find, however, that Respondent took no adverse action against the Complainants that was motivated by the protected activity involved in their participation in the 110(c) investigation or in their filing the second set of discrimination complaints. I find that all the adverse action taken against the Complainants, except for the demotion of Hyles from his leadman position to a journeyman position, was motivated by Respondent's animosity towards Complainants for their April 1991 protected activity, and not motivated by the protected activity involved in the 110(c) investigation. There maybe suspicion but there is no persuasive evidence of a causal nexus between any adverse action and the Complainant's protected activity involved in the 110(c) investigation of Ryan.

It is on this basis that I find and concluded the Secretary has not proved there was a violation of Section 105(c) with respect to this second set of dockets. I, therefore, dismiss these dockets and vacate the corresponding proposed $14,000.00 penalty assessments for the alleged violations in the second set of dockets. Likewise, I dismiss Docket No. WEST 94-21-DM in view of the failure to prosecute and stipulation number four of Ex. A which clearly states "there shall be no penalty in the case bearing Docket No. WEST 94-21-DM."

CREDIBILITY FINDINGS

Having heard and observed the demeanor of the witnesses as they testified at the hearings, I make the following credibility findings:

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[2] The stipulation signed by all parties is attached to this Decision as Exhibit A.

I credit the testimony of William S. Smillie, particularly his testimony that he heard Respondent's President Sisemore and its Vice-President and Plant Manager Mr. Ryan having a conversation that clearly showed they wanted to find out who filed the hazard complaint with MSHA. He heard them say in a loud voice, as though intending him to hear, that they would like to know who filed the hazard complaint so they could make it worthwhile for them to leave. This was a blatant threat against miners who engaged in statutorily protected activity and clearly showed their intent to retaliate against the miners who engaged in the protected activity.

I credit the testimony of the complainant James Hyles, that Ryan asked him and leadman Gary White if they had any idea who "turned him in" and that Ryan told them he wanted to find out who it was and that he would make it so miserable for them, they would be happy to go to work someplace else. I credit Hyles' testimony that while he was in the office of President Sisemore, he heard Sisemore say he would like to "find out who was causing him all the problems and that he would make it worth their while to seek employment elsewhere."

I credit the testimony of the Complainants, Hyles, Mears, Soto and Dennis, including their testimony as to their training, experience and their job qualifications. In view of Ryan's blatant hostility to the Claimants' protective activity and to his express desire to get rid of those who "turned him in". I do not credit Ryan's testimony as to the job qualifications of the applicants during the relevant time period through the date of the final hearing in this matter December 16, 1993.

I do <u>not</u> credit Ryan's testimony that neither he nor Mr. Sisemore said anything to the effect that they wanted to find out who had made the complaints to MSHA so that they (Management) could make it worth their (Complainants) while to leave. I do <u>not</u> credit Ryan's testimony that he did not find out who "turned in" Respondent to MSHA in April 1991 until MSHA sent him the discrimination complaints filed by the four Complainants.

I credit the testimony of Cathy Ann Matchett, the Special Investigator with Mine Safety and Health Administration who pursuant to her MSHA assignment investigated the complaints of discrimination filed by the Complainants with MSHA. Although much of her testimony consisted of hearsay, I credit her with accurately summarizing the information given to her in the course of her investigation. (See Exhibits G-18, G-19, G-31, G-32). I credit the testimony of Patrick McGuire and Martin Collins, the business representatives for the International Union of Operating Engineers, Local 12. Martin Collins specializes in rock, sand and gravel agreements for Local 12. (Tr. 1084). Collins was called as a witness, respectively, by both Respondent and Complainants.

OPERATOR'S HOSTILITY TO THE PROTECTED ACTIVITY AND THREATS OF RETALIATION

There is strong convincing evidence of the operator's animosity and hostility towards the protected activity and their intention to retaliate against those employees who engaged in the protected activity when they determined their identity. Management's conduct was exacerbated by their making loud vocal threats as to how they were going to retaliate against said employee(s) once they determined who they were. Such blatant expressions of hostility has a chilling effect on all employees. It is an indirect threat of adverse action in retaliation against any employee who dares to engage in protected activity. This blatant intimidating conduct is the antithesis of the very intent and purpose of Section 105(c) of the Mine Act. Such conduct on the part of an operator flies in the face of the purpose and the intent of the Mine Act. The effect and the probable intent of such expression of hostility is to intimidate employees from engaging in protected activity. Such expression of animosity towards the protected activity and the express desire and attempts to find out who "turned them in" with threats of retaliation against those employees once their identity is known followed by adverse action against the Complainants, supports a reasonable inference that Respondent did, in fact, determine the identity of the employees who participated in the protected activity that caused Respondent "so much trouble." Knowledge of the Respondent is reasonably inferred from the established facts and circumstances.

THE ARBITRATOR'S DECISION

A miner's rights under a union contract are different and subservient to the statutory protected rights of a miner under Section 105(c) of the Mine Act. The crucial issues and procedures are different.

The record reveals practically nothing about the arbitrator nor does it demonstrate the adequacy of the record on which arbitrator's conclusions were based. I have never seen the record before the arbitrator and the decision does not appear to name all the witnesses who testified in the arbitration proceeding. Assuming the same witnesses testified in the arbitration proceeding as in these discrimination cases under Section 105(c) of the Mine Act, it is quite clear I have made different credibility findings than the arbitrator. Based upon the record before me I do not give any weight to the arbitrator's decision. In view of Management's blatant hostility to the protected activity of the Claimants and Management's obvious desire to get rid of Claimants, I place very little credence in Ryan's testimony as to the qualifications of the claimants for available jobs, particularly as compared to qualifications of less senior employees who were working or returned to work before the Complainants after the July 1992 layoff. I based my opinion that All American Asphalt violated its collective bargaining agreement in implementing the layoff in July 1992 without conducting a pre-layoff bumping meeting, not on the decision of the arbitrator, but on the provisions of the union contract, the testimony of business agents for Local 12 of the Union of Operating Engineers, and the admission of Ryan at page 2 of Ex. G-7.

PROTECTED ACTIVITY

I find that Ryan, Respondent's vice-president and plant manager, started running the plant in April 1991 with full knowledge that mandatory basic safety equipment such as trip cords, handrails, ladders, catwalks, decks and guards, were not in place. I credit the testimony of James Hyles, the leadman of the combined crew, that he complained to Ryan, to no avail, about running the plant without the basic safety equipment in place. I also credit the testimony of the Complainants that they complained about the unsafe conditions to their leadman Hyles and to leadman Gerald Richter. Hyles' protected activity, in addition to his safety complaint to Ryan, included the making of a video tape of the plant running in its unsafe condition and his turning the video tape over to MSHA after his discussion with the other three Complainants as to the danger involved to employees and as to whether he should take the video tape to MSHA.

The protected activity of Mears, Soto and Dennis consisted of their safety complaints to leadman Hyles and Richter and their discussion with Hyles as to the danger to employees involved in running the plant in its unsafe condition and their support and agreement that the Hyles video tape showing the many violations of mandatory safety standards should be turned over to MSHA.

In the vacated decision, I apparently was willing to go along with Respondent's contention that they had no knowledge of Hyles' protected activity at the time Respondent demoted Hyles in October 1991 from his leadman position to a journeyman. I did this only because there was no direct evidence on this point and, most importantly, because it made no difference as to the legality of the demotion in view of my finding and conclusion that Respondent properly demoted Hyles for his admitted on the job misconduct alone, irrespective of Hyles' protected activity. While the Secretary presented some evidence that the plant had a lax policy for inadvertent falling asleep on the job, there was no evidence that Hyles' degree of misconduct was tolerated in other employees. Hyles' unprotected conduct was clearly unsuitable for an employee in a leadman position and Respondent demoted him for his unprotected conduct alone. I find no disparate treatment in demoting Hyles from a leadman position to a journeyman position.

Although there is no direct evidence as to the exact time Respondent determined the identity of those who "turned them in", based on the reasonable inference to be drawn from the established facts, I find that it was sometime before the July 1992 layoff and recall. First, it is established that Hyles was observed making the video of the plant by many of the employees who worked with Hyles on the weekend just before the Monday MSHA shutdown of the plant. Those who observed Hyles making the video tape of the plant's many hazardous safety violations included leadman Richter. In this connection it is worthy of note, for example that Smillie, a very credible witness, testified he assumed Hyles was the one who turned the company in because Hyles was the one who video taped the plant in its unsafe condition. The other three Complainants worked under Hyles and along with Hyles were exposed to the hazardous work conditions on the weekend before the Monday morning

MSHA shutdown of the plant. When the four Complainants were not called back to work following the July 1992 layoff while less senior employees were working, it is reasonable, in view of the established facts, to infer that Respondents had determined that Complainants were the ones that engaged in the protected activity that caused them so much trouble and for that reason retaliated against them by not calling them back to work.

In addition, it is established that the Plant Manager, Vice-President Ryan and President Sisemore expressed great hostility to the protected activity and a strong desire to know who turned the company in and caused them so much trouble. They threatened to make life so miserable for those who engaged in the protected activity so they would be only too glad to seek employment elsewhere. These facts, plus the fact that the Claimants were clearly subject to disparate treatment by the Respondent not calling them back to work after the July 1992 layoff, while less senior employees were working lends support to a reasonable inference that Respondent had knowledge of the identity of the employees who participated in the protected activity that led to the MSHA shutdown of the plant, the issuance of 29 unwarrantable citations, and the 110(c) investigation of the plant supervisor. It is reasonable to infer from the evidence presented that sometime before the July 1992 layoff and recall, Management determined the identity of the employees who participated in the protected activity that Respondent so deeply resented.

SENIORITY

The Union contract in effect at the relevant time (July 1992 - March 1993) states in Article XIII Section 3 the following:

> Section 3: Seniority Termination. Seniority shall be terminated by ...(3) if the employee performs no work for the Employer within the bargaining unit for a period of six months ....

In view of the miners' statutorily protected rights, I find this provision has no effect on the Claimants' seniority at any time relevant to this decision. Any failure of Complainants to perform work for Respondent for any six months or longer period during the relevant time period up through December 16, 1993, was due to Respondent's illegal discrimination against the Claimants. As stated before, the Union agreement is subservient to the miners statutorily protected rights under the Mine Act.

The Respondent's seniority list for the Claimants and other operating engineers under the Local 12 Union contract is as set forth in Government Exhibits 13, 14, and 15. I find Claimants seniority date at all time relevant to this decision, is their date of hire as follows:

Name	Date Hired
Hyles, James	07-09-85
Dennis, Gregory	08-21-86
Mears, Douglas	04-09-87
Soto, Derrick	07-05-88

These dates of hire establish the Claimants seniority through all period of time relevant to this decision i.e. through December 16, 1993, the date of the final hearing in these cases.

FURTHER FINDINGS

1. Respondent refused to recall the Complainants back to work after the July 1992 layoff in retaliation for Complainants having engaged in protected activity which resulted in MSHA issuing many citations and shutting the plant down.

2. Respondent's claim that Claimants were not recalled shortly after the July 1992 layoff because Complainants were not qualified for available work is pretextual.

3. Respondent manipulated the shift and job assignments in March of 1993 for the specific planned purpose of terminating the Claimants employment in retaliation of their protected activity that resulted in the shutdown of the plant, the 29 unwarrantable citations and the 110(c) investigation of Ryan, the plant manager and vice-president of the company.

BACK-PAY AND PENALTY

In the decision of November 2, 1994 (16 FMSHRC 2232) I directed counsel for the parties to confer with each other with respect to the remedies due each of the Claimants and encouraged the parties to reach a mutually agreeable resolution or settlement of these matters.

When the parties finally informed me they could not reach an agreement as to the specific dollar amount, I set the matter for hearing on May 8 - 10, 1995, in Riverside California. Just days prior to the scheduled May 1995 hearing, the parties after conference calls on May 5th and May 8, 1995, notified the Judge that they had reached an agreement on the dollar amounts due. They requested cancellation of the May hearing on the grounds that it would no longer be necessary or productive, in any way, in view of a stipulation reached by the parties. The scheduled hearing was canceled and on May 22, 1995, the parties filed the stipulation, attached hereto as Ex. A.

In the stipulation the parties, assuming liability, agree to certain dollar amounts of back-pay due each Claimant from April 1991 up through the date of the final hearing in these cases, December 16, 1993. The parties stipulate that the interest began to accrue on

March 15, 1993, on the entire back-pay award, and that Respondent shall make all legally required payroll deductions and withholdings.

Based on the record and the stipulation attached as Exhibit A, I enter the following:

ORDER

Respondent is ordered to pay the Complainants' back wages and interest for all periods through the date of the final hearing in these cases, December 16, 1993, the following amounts:

Name	Amounts
James Hyles	$20,837.24 plus interest [3]
Derrick Soto	$34,347.10 plus interest
Douglas Mears	$38,656.34 plus interest
Gregory Dennis	$36,159.32 plus interest

It is further ordered the **RESPONDENTS PAY** a civil penalty of $14,000.00 to the Secretary of Labor for Respondent's violations of Section 105(c) of the Mine Act as charged in Docket Nos. WEST 93-336-DM, WEST 93-337-DM, WEST 93-338-DM and WEST 93-339-DM. All amounts payable by Respondent pursuant to this order shall be paid within 40 days of the date of this decision.

It is further **ORDERED** that Docket Nos. WEST 93-436-DM, WEST 93-437-DM, WEST 93-438-DM, WEST 93-439-DM and WEST 94-21-DM be **DISMISSED** and their corresponding proposed penalties **VACATED**.

August F. Cetti
Administrative Law Judge

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[3] Interest shall be computed in accordance with the Commission's decision in Secretary/Bailey v. Arkansas-Carbona, 5 FMSHRC 2042 (December 1983), at the adjusted prime rate announced semi-annually by the Internal Revenue Service for the underpayment and overpayment to taxes. Interest shall be computed from March 15, 1993, until the date of payment of back-pay awarded.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

IN THE

OFFICE OF ADMINISTRATIVE LAW JUDGES

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATIVE (MSHA), on behalf of JAMES HYLES, DOUGLAS MEARS, DERRICK SOTO, and GREGORY DENNIS, Complainants, vs. ALL AMERICAN ASPHALT, Respondent.	DISCRIMINATION PROCEEDINGS DOCKET NOS. WEST 93-336-DM WEST 93-436-DM WEST 93-337-DM WEST 93-437-DM WEST 93-338-DM WEST 93-438-DM WEST 93-339-DM WEST 93-439-DM WEST 94-021-DM STIPULATION

EXHIBIT A

It is hereby stipulated and agreed by and between the Secretary of Labor, and Respondent All American Asphalt, and Complainants James Hyles, Derrick Soto, Douglas Mears, and Gregory Dennis (collectively Complainants), through their respective counsel of record that, assuming liability as found in the Decision of Administrative Law Judge August F. Cetti dated November 2, 1994 in Docket Nos. West 93-336, 93-436, 93-337, 93-437, 93-338, 93-438, 93-339 and 93-439 (hereinafter the "Decision"), any back pay due each of the Complainants and any statutory penalty shall be as follows:

1. Each Complainant shall be awarded the gross dollar amount, plus interest, for claimed loss of earnings as set forth opposite his name below, assuming liability (and subject to the further provisions of Paragraph 6 hereof in the event of Commission review and/or appeal to the Courts). The Secretary of Labor and the Complainants seek no benefits as part of these proceedings. Respondent disputes liability and reserves its right to petition the Federal Mine Safety and Health Review Commission ("Commission") for review and to thereafter appeal to the courts from the Commission's final order. Respondent shall make all legally required payroll deductions and withholdings from said gross amounts. Respondent shall not make any deductions from said gross amounts for any alleged off-set or re-payment of unemployment benefits received by Complainants. Interest shall be calculated in accordance with the Notice of Intention by Administrative Law Judge August F. Cetti dated January 13, 1995 at footnote 1 thereof, with interest beginning to accrue on March 15, 1993 on the entire back pay award. These

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amounts constitute the full award for each Complainant to be made herein arising from the claims raised in the cases bearing Docket Nos. West 93-336, 93-436, 93-337, 93-437, 93-338, 93-438, 93-339, 93-439 and 94-021 (also referred to as 93-021) (hereinafter "Docket Numbers"), prior to December 17, 1993.

NAME	AMOUNTS
James Hyles	$20,837.24
Derrick Soto	$34,347.10
Douglas Mears	$38,656.34
Gregory Dennis	$36,159.32

2. The Secretary represents that each Complainant has, after receiving advice of counsel, concurred in the amounts set forth in paragraph 1 above.

3. This stipulation is entered into for the purpose specified in Paragraph 8 only, and the stipulation, and any agreements made herein, shall have no force or effect in any other forum or proceeding other than in the MSHA Docket Nos. specified in Paragraph 1 herein. Nothing stated herein shall prohibit or interfere with Respondent All American Asphalt from asserting the right to claim an offset of any back pay awarded in connection with the MSHA Docket Nos. specified in Paragraph 1 against any other claim made by Complainants in any other forum or proceeding, and nothing herein shall prohibit any other administrative agency, court, trier of fact or tribunal from making such an offset.

4. The civil money penalty to be awarded herein, assuming liability on the part of Respondent (and subject to the further provisions of Paragraph 6 hereof in the event of

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Commission review and/or appeal to the Courts), shall be Three Thousand Five Hundred Dollars ($3500.00) per violation for each of the eight alleged violations (i.e., two alleged layoffs for each Complainant) for a total of Twenty Eight Thousand Dollars ($28,000.00). Three Thousand Five Hundred Dollars ($3500.00) is the maximum penalty to be awarded per alleged violation in the cases bearing the Docket Numbers set forth in paragraph 1 above (except there shall be no penalty in the case bearing Docket No. 94-021).

5. Nothing herein shall interfere with or prohibit Respondent from pursuing all avenues and rights of review and/or appeal of liability found in the above captioned matters.

6. The amounts specified in paragraphs 1 and 4 above shall be reduced, or eliminated in their entirety, in accordance with any determination by the Commission or by the Courts to that effect on appeal (or on a remand ordered by the Commission or the Courts, subject to further petition for review and/or appeal by any party) in the event the finding of liability is not upheld in its entirety upon review and/or appeal. In no event shall the monetary award to each Complainant and penalty in the cases bearing the Docket Numbers set forth in paragraph 1 above exceed the amounts set forth in paragraphs 1 and 4 above, for the period prior to December 17, 1993.

7. No provision is made herein with respect to the payment of any amount that may or may not be due to any benefit trust fund.

8. The parties acknowledge that neither the execution nor performance of any provision of this Stipulation

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shall constitute or be construed as an admission of any liability whatsoever by Respondent or that any monetary award or penalty is due or appropriate and this Stipulation in entered into solely to agree upon a monetary award and penalty in the event of liability (and subject to the further provisions of Paragraph 6 hereof in the event of Commission review and/or appeal to the Courts) in order to avoid the expense of the hearing on remedies scheduled for May 8-10, 1995.

9. The monetary recovery amounts and penalties herein referred to are for the period prior to December 17, 1993; and this stipulation is without prejudice to the right of the Secretary to seek any back pay or civil monetary penalties for a period subsequent to December 17, 1993 in any separate proceeding, including any action to enforce the temporary reinstatement order of December 17, 1993 and/or a permanent reinstatement based on the Decision of the Administrative Law Judge dated November 4, 1994. Respondent waives no right to challenge and to raise every defense to any such separate proceedings.

10. Approval of this Stipulation by the Administrative Law Judge will have the effect of eliminating the need for the hearing presently scheduled to commence on May 8, 1995 regarding the monetary awards and penalty to be awarded in the above captioned matter. Accordingly, the parties request that said hearing be immediately taken off calendar pending the Administrative Law Judge's approval of this Stipulation. If the

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stipulation is not approved in its entirety, it will be void, and either party may request that the hearing be rescheduled.

DATED: May 19, 1995

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LAWRENCE J. GARTNER
GARTNER & YOUNG
A Professional Corporation

By: _____
LAWRENCE J. GARTNER
Attorneys for Respondent
All American Asphalt

DATED: May 17, 1995

THOMAS S. WILLIAMSON, JR.
Solicitor of Labor

DANIEL W. TEEHAN
Regional Solicitor

JOHN C. NANGLE
Associate Regional Solicitor

By: _____
J. MARK OGDEN, Trial Attorney
Attorneys for the Government

DATED: May 1, 1995

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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MAY 2 1 1997

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 95-604-D
on behalf of LONNIE BOWLING,	:	MSHA Case No. BARB CD 95-11
Complainant	:	
v.	:	Mine ID No. 15-17234-NCX
	:	Huff Creek Mine
MOUNTAIN TOP TRUCKING CO., INC.,	:	
ELMO MAYES; WILLIAM DAVID RILEY;	:	
ANTHONY CURTIS MAYES; and MAYES	:	
TRUCKING COMPANY, INC.,	:	
Respondents	:	
	:	
SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 95-605-D
on behalf of	:	MSHA Case No. BARB CD 95-11
EVERETT DARRELL BALL,	:	
Complainant	:	Mine ID No. 15-17234-NCX
v.	:	Huff Creek Mine
	:	
MOUNTAIN TOP TRUCKING CO., INC.	:	
ELMO MAYES; WILLIAM DAVID RILEY;	:	
ANTHONY CURTIS MAYES; and MAYES	:	
TRUCKING COMPANY, INC.,	:	
Respondents	:	
	:	
SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 95-613-D
on behalf of WALTER JACKSON	:	MSHA Case No. BARB CD 95-13
Complainant	:	
v.	:	Huff Creek Mine
	:	
MOUNTAIN TOP TRUCKING CO., INC.,	:	
ELMO MAYES; WILLIAM DAVID RILEY;	:	
ANTHONY CURTIS MAYES; and MAYES	:	
TRUCKING COMPANY, INC.,	:	
Respondents		

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of DAVID FAGAN, Complainant v.	:	DISCRIMINATION PROCEEDING Docket No. KENT 95-615-D MSHA Case No. BARB CD 95-14 Huff Creek Mine
MOUNTAIN TOP TRUCKING CO., INC., ELMO MAYES; WILLLIAM DAVID RILEY ANTHONY CURTIS MAYES; and MAYES TRUCKING COMPANY, INC., Respondents	:	

SUPPLEMENTAL DECISION
AND
FINAL ORDER

Appearances: Donna E. Sonner, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for the Complainants;
Tony Oppegard, Esq., Mine Safety Project of the Appalachian Research & Defense Fund of Kentucky, Inc., Lexington, Kentucky, for the Complainants;
Edward M. Dooley, Esq., Harrogate, Tennessee, for the Respondents.

Before: Judge Feldman

These consolidated discrimination proceedings are before me as a result of complaints filed by the Secretary on behalf of Lonnie Bowling, Darrell Ball, Walter Jackson and David Fagan, pursuant to section 105(c)(2) of the Mine Safety and Health Act of 1977 (the Act), 30 U.S.C. § 815(c)(2). The complaints were filed against the captioned Respondents, Mountain Top Trucking Company, Inc., (Mountain Top), Mayes Trucking Company, Inc., (Mayes Trucking), Elmo Mayes, Anthony Curtis Mayes (Tony Mayes); and William David Riley. Also before me are amended discrimination complaints, filed by the Secretary on September 15, 1995, seeking to impose total civil penalties of $9,000 on the respondents, consisting of a $3,000 civil penalty for each of the three alleged violations of section 105(c) that are the subject of these proceedings.

On October 5, 1995, I issued a Decision ordering Mayes Trucking, as the successor of Mountain Top, to temporarily reinstate Bowling to his former position as a haulage truck driver at the same rate of pay, and with the same work hours, as the other truck drivers at the Huff Creek mine site. 17 FMSHRC 1695, 1709. Bowling was never reinstated and the Secretary brought no action on his behalf to enforce the temporary reinstatement decision. Mayes Trucking was also ordered to reinstate Fagan. However, the underlying discrimination complaint filed by

Fagan was subsequently withdrawn. The Secretary withdrew the application for temporary reinstatement filed on behalf of Jackson at the beginning of the consolidated temporary reinstatement hearing that began on August 23, 1995. Ball did not seek temporary reinstatement.

On January 23, 1997, I issued an interim Decision on Liability (interim decision). 19 FMSHRC 166. The interim decision granted the withdrawal of Fagan's discrimination complaint. The interim decision also granted Jackson's discrimination complaint, and, granted, in part, the discrimination complaints filed by Bowling and Ball. It was determined the period for relief for Jackson under section 105(c) began on February 18, 1995, the day following his protected work refusal. The period for relief under section 105(c) for Bowling and Ball was determined to be from March 8, 1995, the day following their protected initial work refusals, through March 22, 1995, the day they were called back to work by Tony Mayes.

The interim decision held that Mountain Top Trucking, Inc., Mayes Trucking, Inc., Anthony Curtis Mayes and Elmo Mayes, are jointly and severally liable for the relief that shall be awarded to Jackson, Bowling and Ball in these discrimination matters. However, the interim decision dismissed the discrimination complaints in these matters as they pertain to William David Riley because Riley was not a proper party to these proceedings.

The interim decision provided the parties' with the opportunity to file proposed orders of relief with respect to the damages to be awarded to Jackson, Bowling and Ball. Jackson was requested to explain why he withdrew his application for temporary reinstatement in his proposal for relief. 19 FMSHRC at 205. A discussion of the final disposition of each of the discrimination complaints follows.

David Fagan

On June 11, 1996, at the beginning of the discrimination hearing, the Secretary and Tony Oppegard, who appeared on behalf of the complainants as their personal counsel, moved to withdraw the discrimination complaint of David Fagan. The motion to withdraw was granted on the record and Fagan's complaint, docketed as KENT 95-615-D, **IS HEREBY DISMISSED**. (I, 35-37).[1]

Lonnie Bowling and
Everett Darrell Ball

In response to the interim decision, in letters dated March 3 and March 17, 1997, the parties advised that they had reached an agreement with respect to the amount of back pay and

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[1] The hearing in these matters was conducted in three segments in June, July and August 1996. The transcripts for June, July and August are cited as I, II and III, respectively.

interest owed to Bowling and Ball for the period March 8 through March 22, 1995. The parties stipulated that back pay plus interest for Bowling and Ball during this period is $1,500.00 each. Accordingly, $1,500.00 in damages, representing back pay and interest, shall be awarded to both Bowling and Ball.

Walter Jackson

a. Background

As noted, the related consolidated temporary reinstatement hearing in these matters was conducted on August 23 and August 24, 1995. At the reinstatement hearing, counsel for the Secretary moved to withdraw the temporary reinstatement application filed on behalf of Walter Jackson. Consequently, Jackson's temporary reinstatement application was dismissed in the temporary reinstatement decision released on October 5, 1995. 17 FMSHRC 1695. The temporary reinstatement decision ordered the immediate reinstatement of Lonnie Bowling and David Fagan to their former positions as coal haulage truck drivers. Id. at 1709.

On March 6, 1997, Jackson, in response to the request in the January 23, 1997, interim decision, explained why he withdrew his application for temporary reinstatement. Jackson stated he withdrew his request for temporary reinstatement on August 23, 1995, because he "had obtained full-time employment" with Cumberland Mine Service as of August 1, 1995. Jackson indicated he was employed at Cumberland Mine Service from August 1, 1995, through October 10, 1995, when he was laid-off. Jackson earned gross wages of $3,342.60 during this period. Jackson also worked for Garland Company, Inc. for two weeks in January 1996, where he earned gross wages of $415.00. Thus, Jackson's total gross wages earned at these two jobs was $3,757.60.

In his proposed order of relief, Jackson claims back pay of $104.00 per day, or $520.00 per five day work week, calculated at eight loads per day @ $13.00 per load. Jackson's proposed order of relief reflects that he "did not incur any other damages as a result of the Respondents' unlawful discharge of him." *Jackson's March 3, 1997, Statement of Back Pay,* at p. 3.

Jackson's claim for relief based upon eight loads per day is consistent with the respondents' estimate that the number of loads driven by each truck driver averaged 8.289 loads per day. *Resps.' March 17, 1997, Statement of Back Pay for Jackson,* at p.2. However, the respondents assert, as an inexperienced truck driver, Jackson only averaged 6.47 loads per day. Assuming Jackson would have gained trucking experience, but for his discriminatory discharge, the calculation for relief purposes shall be eight loads per day @ $13.00, or $520.00 wages per five day work week.

Jackson asserts the respondents are liable for $32,642.00 back pay, plus interest, representing back pay of $36,400.00 ($520.00 per week) minus Jackson's gross earnings of

$3,758.00, for the 70 week period from February 18, 1995, until June 21, 1996, when the respondents reportedly stopped hauling coal for Lone Mountain Processing.[2]

On the other hand, the respondents argue Jackson is only entitled to relief from the date of his discharge on February 18, 1995, until he withdrew his application for temporary reinstatement on August 23, 1995, less pertinent wages from other employment.

The case law concerning a complainant's obligation to mitigate back-pay awards by seeking other employment is clear. Thus, back-pay awards must be reduced in situations "where a miner fails to mitigate damages, for example, by failing to remain in the labor market or to search diligently for other work." *Metric Constructors, Inc.*, 6 FMSHRC 226, 231-32 (February 29, 1984) (*citing Dunmire and Estle*, 4 FMSHRC at 144), *aff'd* 766 F.2d 469 (11th Cir. 1985). Obviously, the filing of an application for temporary reinstatement, which *can only be filed* on behalf of a complainant *by the Secretary* pursuant to section 105(c)(2) of the Act, is not a prerequisite for the filing of a discrimination complaint. However, Jackson's case presents the novel question of what mitigation obligation, if any, did Jackson, as an unemployed discriminatee, have to seek temporary reinstatement, after he had previously withdrawn his initial reinstatement application brought by the Secretary because he secured other employment.

Consequently, on March 24, 1997, I issued an Order requesting the parties to comment on the appropriate period for calculating Jackson's relief. 19 FMSHRC 661. The Order requested Jackson to comment on whether Jackson sought to reopen his temporary reinstatement case. Specifically, Jackson was requested to address, given the prior withdrawal of his application for temporary reinstatement, "whether he was required to seek temporary reinstatement in order to mitigate back-pay damages, citing pertinent statutory provisions, legislative history, or case law to support his position." 19 FMSHRC at 664. The Order requested the respondents to reply to Jackson's comments.

Responses on behalf of Jackson were filed by Mr. Oppegard on April 22, 1997, and the Secretary on April 23, 1997. The Secretary responded that "[t]here is no correspondence or other information indicating when the Secretary was informed that Mr. Jackson had been laid off." *Sec'y's Resp.* p.1. The Secretary also stated, "Mr. Jackson did not request that his application for temporary reinstatement be reopened." *Id.* Mr. Oppegard characterized the question of "why Jackson had not sought to reapply for temporary reinstatement" as "irrelevant because it has long been established that a miner on whose behalf a §105(c) Complaint has been filed is not required to seek temporary reinstatement. *Secretary of Labor on behalf of Dunmire & Estle v. Northern Coal Co.*, 4 FMSHRC 126, 144 (1982)." *Jackson Resp.*, p.2. The respondents replied on May 9, 1997, asserting that the facts in *Northern* are distinguishable from Jackson's case.

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[2] In view of this decision that Jackson is entitled to relief from February 18, 1995, through December 9, 1995, the issue of the termination date of the respondents' haulage contract with Lone Mountain Processing is not material.

b. Discussion

In determining the appropriate relief to be awarded to Jackson, I initially note the legislative history of the relief provisions in section 105(c) of the Act. The Senate report states:

> It is the Committee's intention that the Secretary propose, and the Commission require, all relief that is necessary *to make the complaining miner whole* and to remove the deleterious effects of the discriminatory conduct *including*, but not limited to *reinstatement* with full seniority rights, *back-pay with interest*, and recompense for any special damages sustained as a result of the discrimination. The specified relief is only illustrative . . . .

S. Rep. No. 181, 95th Cong., 1st Sess. (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 625 (1978) (emphasis added). In furtherance of the "make whole" provisions of the Act's legislative history, the Commission has observed "[t]he remedial goal of section 105(c) is 'to restore the [victim of illegal discrimination] to the situation he would have occupied but for the discrimination . . . .'" *Sec'y of Labor and UMWA v. Jim Walter Resources, Inc.*, 18 FMSHRC 552, 561 (April 1996) *citing Sec'y of Labor ex rel Bailey v. Arkansas-Carbona Co.*, 5 FMSHRC 2042, 2049 (December 1983); *see also Robert K. Roland v. Sec'y of Labor*, 7 FMSHRC 630, 634-35 (May 1985). Thus, while the parties may agree to economic reinstatement in lieu of actual reemployment, the principal "make whole" remedy awarded to successful complainants is reinstatement, with back pay awarded for interim periods of unemployment or under-employment.

The Commission and its judges "possess considerable discretion in fashioning remedies appropriate to varied and diverse circumstances." 4 FMSHRC at 142. In this regard, section 105 (c)(2) of the Act empowers the Commission to *remedy* discrimination by "such affirmative action to abate the violation as *the Commission deems appropriate*, including, but not limited to, the rehiring or reinstatement of the miner to his former position with back pay and interest." (Emphasis added). Thus, the remedies available to victims of discrimination are equitable in nature, in the form of restitution. Consequently, while back pay is ordinarily calculated on the basis of the gross pay the complainant would have earned minus interim earnings, when equity dictates, "back pay may be reduced in appropriate circumstances where an employee incurs a 'willful loss of earnings' (fails to mitigate damages)." Id. at 144. Therefore, the issue to be determined is whether Jackson's failure to seek to reopen his withdrawn application for temporary reinstatement in the face of his longstanding unemployment constitutes a "failure to mitigate damages."

Jackson's reliance on *Northern* for the proposition that whether a complainant seeks temporary reinstatement is "irrelevant" on the issue of damages is unwarranted for several reasons. In the first place, unlike Jackson's case where the Secretary had investigated and determined that Jackson's complaint "was not frivolously brought," a temporary reinstatement

application was not brought by the Secretary in *Northern*. Secondly, and most importantly, the central issue in *Northern* was whether the complainant, Estle, "made reasonable efforts to mitigate his loss of income." In finding that Estle had indeed made adequate efforts to mitigate his loss, the Commission emphasized that Estle offered to drop his discrimination complaint if Northern would rehire him. 4 FMSHRC at 130, 144. Moreover, the Commission noted Estle "found employment in a reasonably short time." Id. at 144.

The degree of Jackson's efforts to mitigate damages is distinguishable from those of the complainant, Estle, in *Northern*. Here, with the exception of two weeks of employment, there is no evidence of Jackson's gainful employment during the 1½ years since Jackson was laid-off in October 1995. While Jackson admitted the respondents had sent fellow truck driver Benny Ray Carver to speak to him about returning to work shortly after his February 17, 1995, discharge, Jackson admittedly made no efforts to contact the respondents. (Tr. III, 94-97). Carver testified re-employment was offered with no strings attached. (III, 240-43). However, Jackson testified he did not contact the respondents because Tony Mayes wanted him to "apologize." (Tr. III, 94-97). The interim decision found that the respondents' efforts to rehire Jackson were inadequate and, thus, did not impact on the validity of Jackson's discrimination complaint. Nevertheless, Jackson's failure to take the initiative after speaking to Carver, by contacting the respondents about the possibility of his returning to work, is relevant on the issue of mitigation given the subsequent events in this case.[3] 19 FMSHRC at 183.

Although *Northern* deals with the issue of the impact on the failure to seek temporary reinstatement on the mitigation question, *Northern* does not support Jackson's assertion that whether or not he reapplied for temporary reinstatement is "irrelevant." This Commission frequently disposes of 105(c) discrimination issues by citing analogous case authority related to the enforcement of section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. § 158(a)(1) (1994). *Sec'y of Labor o/b/o Poddey v. Tanglewood Energy, Inc.*, 18 FMSHRC 1315, 1321 (August 1996). Thus, in *Northern*, the Commission relied on *OCAW v. NLRB*, 547 F.2d 598 (D.C. Cir. 1976) on the mitigation of damages question. 4 FMSHRC at 144. In *OCAW*, two employees, who had been wrongfully discharged for union activities, had moved several hundred miles away from the former employer's job site to obtain new employment at higher earnings. Under these circumstances, the Court concluded the failure of these two employees to accept the employer's (respondent's) offer of temporary reinstatement did not constitute a "willful loss of earnings." 547 F.2d at 604-05. The Court explicitly stated it was unreasonable to require these individuals to relocate and leave permanent positions at higher salaries to accept an offer of temporary employment at a lower salaries. *Id.*

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[3] The interim decision noted that Jackson had been contacted by Carver about returning to work. However, there was "no credible evidence" that Jackson had been offered his job back by Tony Mayes or any other Mountain Top management official. 19 FMSHRC at 183.

Thus, *OCAW* does not support the theory advanced by Jackson that, having withdrawn his application for temporary reinstatement, he was under no obligation to seek to reopen his temporary reinstatement application, regardless of how long he remained unemployed. Rather, the failure to seek the opportunity for temporary reinstatement in the face of extended unemployment justifies application of the "wilfull loss of earnings doctrine" which the Supreme Court has stated is intended to "encourage 'the healthy policy of promoting production and employment.'" *Id.* at 602 *citing Phelps Dodge Corp. V. Labor Board*, 61 S.Ct. 845, 855 (1941).

Jackson reportedly worked for Cumberland Mine Service from August 1 through October 10, 1995, when he was laid-off. Thus, the August 23, 1995, withdrawal of Jackson's application for temporary reinstatement at the beginning of the temporary reinstatement hearing was reasonable. However, Jackson was laid-off by Cumberland Mine Service only five days after the release of the October 5, 1995, decision in the consolidated temporary reinstatement proceeding. That decision granted the Secretary's request to withdraw Jackson's reinstatement application. The decision also ordered Mayes Trucking, Inc., as the successor of Mountain Top Trucking, to immediately temporarily reinstate Lonnie Bowling and David Fagan, former colleagues of Jackson, to their former positions as coal haulage truck drivers.

While, consistent with *OCAW*, it may have been reasonable for Jackson to pursue permanent employment for a reasonable period of time after his October 10, 1995, lay-off, there comes a point in time when one who has been unsuccessful at securing other employment, and who is seeking reinstatement relief in this proceeding, is obliged to make efforts to reopen his temporary reinstatement application. For, in the final analysis, working only two weeks since October 10, 1995, and earning only $415.00, without so much as an inquiry with the Secretary about the possibility of reopening his temporary reinstatement case, particularly in view of the fact that his former colleagues had been ordered reinstated, does not persuade me that Jackson has demonstrated reasonable efforts to mitigate his loss of earnings.[4] Under these circumstances, I conclude that the 60 day interval after Jackson's October 10, 1995, lay-off was a reasonable period for Jackson, who had not otherwise obtained employment, to have deferred seeking the reopening his application for temporary reinstatement.[5] Accordingly, the period of relief

---

[4] As a party to the consolidated temporary reinstatement proceeding, Jackson had knowledge of the October 5, 1995, Decision ordering the temporary reinstatement of Bowling and Fagan. Jackson's assertion that the respondents were reluctant to abide the October 5, 1995, decision to reinstate Bowling and Fagan has not been established and is not material in view of Jackson's failure to pursue temporary reinstatement.

[5] Only the Secretary can bring an action for temporary reinstatement. Jackson's failure to mitigate his damages is not based on the Secretary's failure to reopen Jackson's reinstatement application. Rather, Jackson's failure to mitigate his loss of earnings is based on his failure to timely inform the Secretary that he was again unemployed, or, that he was interested in reinstatement.

awarded to Jackson under section 105(c) shall be from February 18, 1995, the day following his discriminatory discharge, through December 9, 1995, the approximate 60 day period following his October 10, 1995, lay-off.

The period February 18, 1995, through December 9, 1995, contains 42 work weeks. The total back wages due Jackson for this 42 week period calculated @ $520.00 per week is gross earnings of $21,840.00 minus gross earnings of $3,342.60 earned at Cumberland Mine Service from August 1 through October 10, 1995. Thus, the net relief to be awarded to Jackson in this matter is $18,497.40, plus interest, less appropriate federal, state and local income tax withholdings. *Schaefer v. Tannian*, 902 F.Supp. 746, 748 (E.D. Mich. 1995); *Tanaka v. Department of Navy*, 788 F.2d 1552, 1553 (Fed. Cir. 1986) *citing* Rev. Rul. 78-336, 1978-2 C.B. 255; Internal Revenue Service, Pub. No. 525 (1996) at p.2.

Civil Penalties

The remaining issue to be resolved is the appropriate civil penalties to be imposed pursuant to section 110(a) of the Act, 30 U.S.C. § 820(a), for the 105(c) violations concerning the discriminatory discharges of Bowling, Ball and Jackson. The Secretary proposes civil penalties of $3,000.00 for each act of discrimination. As a threshold matter, as discussed in the interim decision, there is joint and several liability for the discriminatory acts in these matters because all of the respondents, with the exception of truck foreman William David Riley, were the "real operators" in that they were the "real persons in control of the personnel actions" in these cases. *See* 19 FMSHRC at 198-203, *citing Robert Simpson v. Kenta Energy, Inc., & Roy Dan Jackson*, 11 FMSHRC at 780. As such, discriminatory acts committed by one operator are imputable to the other operators.

Turning to the specific acts of discrimination, the March 7, 1995, discharges of Bowling and Ball must be viewed in the context of the respondents' contractual obligations to haul coal for Lone Mountain Processing. In this regard, it was Lone Mountain Processing that established the extended cut-off times in order to haul the backlogged coal that had accumulated due to inclement winter weather. Thus, the respondents' insistence that Bowling and Ball continue to drive long hours on March 7, 1995, after they had expressed concerns about their fatigue, was motivated by business concerns rather than a desire to retaliate as a result of the safety related complaints of Bowling and Ball. In other words, the evidence does not reflect disparate treatment as all other drivers were also expected to drive long hours. Although the respondents' March 7, 1995, response to Bowling and Ball's protected complaints of fatigue did not adequately "quell their fears," the wisdom and justification for the business decision to insist that drivers work long hours is beyond the scope of these proceedings. *Gilbert v. FMSHRC*, 866 F.2d 1432, 1441 (D.C Cir. 1989); *Bradley v. Belva* 4 FMSHRC 982, 993 (June 1982).

Thus, the circumstances surrounding the March 7, 1995, discharges constitute mitigating factors. In addition, the failure of Bowling and Ball to establish, by a preponderance of the evidence, that they were the victims of constructive discharges upon their return to work is a further mitigating consideration. Accordingly, a total civil penalty of $1,500.00 constituting $750.00 for each of the discharges of Bowling and Ball on March 7, 1995, shall be assessed. This reduction in the civil penalties sought by the Secretary is based on a reduction in the degree of the respondents' negligence associated with these 105(c) violations in that the violations were attributable to contractual concerns rather than willful and retaliatory acts.

Finally, addressing the civil penalty to be imposed for Jackson's February 17, 1995, discriminatory discharge, the mitigating factors discussed above with respect to Bowling and Ball are absent in Jackson's case. Jackson, an inexperienced truck driver, was selected as the cut-off driver at 9:00 p.m. on February 17, 1995, after having driven approximately 16 hours, solely because he expressed safety related concerns about the condition of his truck, a condition that the respondents' own expert witness, Hank Villadsen, characterized as "scary." 19 FMSHRC at 182. Under such circumstances, there is no adequate basis for reducing the $3,000.00 civil penalty proposed by the Secretary for Jackson's discharge.

ORDER

ACCORDINGLY, the discrimination complaint filed by the Secretary on behalf of David Fagan, docketed as KENT 95-615-D **IS DISMISSED**. The remaining discrimination complaints filed in these matters as they pertain to William David Riley **ARE DISMISSED**.

IT IS ORDERED that respondents Mountain Top Trucking, Inc., Mayes Trucking, Inc., Anthony Curtis Mayes and Elmo Mayes are jointly and severally liable for the relief awarded to Lonnie Bowling, Everett Darrell Ball and Walter Jackson in these proceedings.

IT IS ALSO ORDERED that respondents Mountain Top Trucking, Inc., Mayes Trucking, Inc., Anthony Curtis Mayes and Elmo Mayes are jointly and severally liable for the civil penalties imposed in these discrimination matters.

IT IS FURTHER ORDERED that the respondents shall pay Lonnie Bowling the agreed upon sum of $1,500.00, representing back pay and interest for the period March 8, 1995, through March 22, 1995. Payment is to be made within 30 days of the date of this decision.

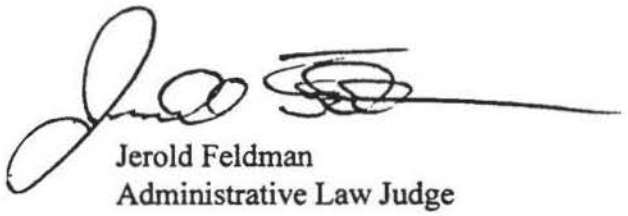
IT IS FURTHER ORDERED that the respondents shall pay Everett Darrell Ball the agreed upon sum of $1,500.00, representing back pay and interest for the period March 8, 1995, through March 22, 1995. Payment is to be made within 30 days of the date of this decision.

IT IS FURTHER ORDERED that the respondents shall pay Walter Jackson $18,497.40, constituting back wages, less interim earnings, for the period February 18, 1995, through December 9, 1995, plus interest, less withholdings for federal, state and/or local income taxes. The interest is to be computed in accordance with the Commission's decision in *Sec'y o/b/o Bailey v. Arkansas-Carbona Company*, 5 FMSHRC 2042 (December 1983). Payment is to be made within 30 days of the date of this decision.

IT IS FURTHER ORDERED that the respondents shall pay a total civil penalty of $4,500.00 as a consequence of the discriminatory discharges of Bowling, Ball and Jackson. Payment of this civil penalty is to be made to the Mine Safety and Health Administration within 30 days of the date of this decision.

IT IS FURTHER ORDERED that the respondents shall expunge from their personnel records all references to the March 7, 1995, discharges of Bowling and Ball, and, the February 17, 1995, discharge of Jackson.

IT IS FURTHER ORDERED that the January 23, 1997, Decision on Liability and this Supplemental Decision shall constitute the Administrative Law Judge's final disposition in these proceedings.



Jerold Feldman
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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MAY 2 2 1997

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. KENT 96-292
Petitioner	:	A. C. No. 15-07475-03534
v.	:	
	:	Docket No. KENT 96-330
SOLID ENERGY MINING CO.,	:	A. C. No. 15-07475-03535
Respondent	:	
	:	Docket No. KENT 96-335
	:	A. C. No. 15-07475-03536
	:	
	:	Mine #1

DECISION

Appearances: Thomas A. Grooms, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for Petitioner;
William C. Miller, II, Esq., Jackson & Kelly, Charleston, West Virginia, for Respondent.

Before: Judge Hodgdon

These consolidated cases are before me on Petitions for Assessment of Civil Penalty filed by the Secretary of Labor, acting through her Mine Safety and Health Administration (MSHA), against Solid Energy Mining Company pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815. The petitions allege eleven violations of the Secretary's mandatory health and safety standards and seek penalties of $4,879,00. For the reasons set forth below, I affirm all of the citations and assess penalties of $3,331.00.

A hearing was held on March 4, 1997, in Pikeville, Kentucky. In addition, the parties submitted post-hearing briefs in these matters.

Docket No. KENT 96-292

This docket consists of three citations. At the hearing the Respondent's counsel stated that the company was not contesting Citation Nos. 4508988 and 4235513 and would pay the penalties assessed. (Tr. 40.) Accordingly, evidence was only presented on Citation No. 4585909.

That citation alleges a violation of section 75.370(a)(1) of the Regulations, 30 C.F.R. § 75.370(a)(1), because:

> Operator failed to follow the approved ventilation plan. The bleeder entries serving the No. 3 panel, located adjacent to the 1st right submains, was [*sic*] not being maintained free of roof falls. A roof fall was present in the No. 5 entry which prohibits travel to a bleeder evaluation point serving the No. 3 pillared area. Also permanent stoppings (1) crushed out [*sic*] and two (2) permanent stoppings, inby S.S. 2034, had not been constructed. The approved ventilation supplement date [*sic*] 9-12-1995 references "Evaluation points as shown on mine map." The evaluation point is not accessible and stoppings not maintained/constructed [*sic*] per mine map.

(Govt. Ex. 6.)

Section 75.370(a)(1) provides, as pertinent to this case, that "[t]he operator shall develop and follow a ventilation plan approved by the district manager. . . . The ventilation plan shall consist of two parts, the plan content . . . and the ventilation map . . . ." The September 12, 1995, supplement to Solid Energy's ventilation plan states the following with respect to evaluations of bleeder entries[1]:

> 1. The following methods are used to maintain all bleeder entries free from obstructions such as water or roof falls:
>
> **Bleeder entries or bleeder systems will be adequately maintained and free of water. A permissible sump pump may be installed through the bore hole to de-water the gob area.**
>
> **Coal will be extracted in a manner that will not interfere with the integrity of the bleeder systems.**
>
> 2. The following means are used to determine the effectiveness of bleeder entries:
>
> **At least every seven (7) days, a certified person designated by the operator shall evaluate the effectiveness of the bleeder systems by determining the volume and proper flow of air, concentration of oxygen and methane as shown on the mine map.**

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[1] Bleeder entries "are panel entries driven on a perimeter of block of coal being mined and maintained as exhaust airways to remove methane promptly from the working faces to prevent buildup of high concentrations either at the face or in the main intake airways. They are maintained, after mining is completed, . . . in preference to sealing the completed workings." Bureau of Mines, U.S. Department of Interior, *A Dictionary of Mining, Mineral, and Related Terms* 112 (1968).

3. The alternative method of evaluating worked-out areas will be as follows:

Evaluation point as shown on mine map.

(Govt. Ex. 7, p.3.)

The parties agree that a roof fall had occurred in the entry serving the No. 3 Panel in an area of the mine that had previously mined and pillared and that the fall prevented access to an evaluation point indicated on the ventilation plan map. They also agree that a stopping had been "crushed out" and two stoppings had not been constructed. They disagree as to whether any of this constituted a failure to follow the ventilation plan.

As set out in the supplement, the bleeder entries are supposed to be examined on a weekly basis. According to Inspector Williams, the results of these examinations are required to be recorded by the operator. He further testified that he did not know when the roof fall occurred and admitted that it was possible that it had occurred within the seven day period between inspections. It is the company's position that this is exactly what happened with the roof fall and the "crushed out" stopping. Therefore, Solid Energy argues that the ventilation plan was not violated by these occurrences.

Although the book recording the results of the examinations was not entered into evidence, and the person charged with conducting the weekly examinations did not testify, the evidence supports the company's position. Inspector Williams testified that he checked the examination book, and that as a result of this he issued a citation for failing to record the results of the examinations of Evaluation Points 2A, 3A and 14. Since the evaluation point in question is 4A, and since the company was not cited for failing to record the results of the examinations at that point, it can be inferred that the required examinations were being conducted with respect to 4A.

The Secretary did not show any of the following: (1) when the fall and the crushed stopping occurred, (2) that the company was not conducting the required weekly examinations with respect to Evaluation Point 4A or the crushed stopping, (3) that the company was required to conduct examinations more frequently than every seven days, or (4) that the company knew or should have known about those occurrences. All that the Secretary has shown is that a roof fall had occurred and a stopping had been crushed. Without more, this is not enough to establish a violation of the regulation.

That does not mean, however, that the company did not violate the regulation. The testimony of Kenneth Deskins, Mine Foreman, clearly verifies that the company violated section 75.370(a)(1) by not constructing stoppings required by the plan and shown on the ventilation map. Deskins testified as follows:

> Q. Mr. Deskins, the stopping that had not been constructed was required to be constructed by the plan, is that correct?

A. Correct.

Q. You actually had the block sitting there on pallets waiting to be installed, did you not?

A. There were two pallets blocked [*sic*].

Q. How long had those pallets been there?

A. Approximately probably a month.

. . . .

Q. Mr. Deskins, did the weekly examiner record in the weekly examination book that the stopping had not been constructed that was supposed to have been constructed?

A. I did not read it had it recorded.

Q. Pardon me?

A. I didn't read it in the exam book.

Q. Do you countersign the exam book?

A. Yes.

Q. He had never recorded that the stopping had not been constructed?

A. Correct.

Q. That would have been for at least three or four weekly exams; is that correct?

A. That's correct.

(Tr. 76, 80.) Based on this, I conclude that Solid Energy violated section 75.370(a)(1). Because the blocks to construct the stopping had been present for at least a month and the foreman apparently made no effort to determine whether it had been constructed, I further conclude that the operator's degree of negligence for this violation was "high."

Docket No. KENT 96-330

This docket consists of seven citations, Citation Nos. 4025271- 4025277, however, only Citation No. 4025272 was contested by the Respondent. (Tr. 83.) That citation alleges a violation of section 75.507-1(a), 30 C.F.R. § 75.507-1(a), in that:

A non-permissible battery charger was observed charging a Fairchild scoop in the return air course of the 003-0 working section. The charger was located approximately 40 feet outby the last open crosscut of the No. 2 entry on the return side of the return stopping line.

Methane concentrations of 0.4% were found at the No. 4 face, on this day's inspection.

(Govt. Ex. 10.)

Section 75.507-1(a) requires that "[a]ll electric equipment, other than power-connection points, used in return air outby the last open crosscut in any coal mine shall be permissible . . . ." Section 75.301 sets out the definition of "return air." As pertinent to this violation it states: "For the purposes of § 75.507-1, air that has been used to ventilate any working place in a coal producing section or pillared area, or air that has been used to ventilate any working face if such air is directed away from the immediate return is return air."

In its brief, the company states: "Although Respondent concedes the existence of the violation, the facts in this matter do not support a finding that the violation was significant and substantial." (Resp. Br. at 7.) Consequently, I conclude that Solid Energy violated section 75.507-1(a).

Significant and Substantial

The Inspector found this violation to be "significant and substantial." A "significant and substantial" (S&S) violation is described in Section 104(d)(1) of the 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." A violation is properly designated S&S "if, based upon 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 (April 1981).

In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984), the Commission set out four criteria that have to be met for a violation to be S&S. *See also Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 135 (7th Cir. 1995); Austin *Power, Inc. v. Secretary*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g Austin Power, Inc.*, 9 FMSHRC 2015, 2021 (December 1987)(approving *Mathies* criteria). Evaluation of the criteria is made in terms of "continued normal mining operations." *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (July 1984). The question of whether a particular violation is significant and substantial must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (April 1988); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 1007 (December 1987).

As is generally the case, Solid Energy argues that the third *Mathies* criterion, whether there was "a reasonable likelihood that the hazard contributed to will result in any injury," is not

present. The company asserts that the absence of explosive quantities of methane[2] and the fact that ventilation in the area was characterized by the inspector as good indicates that an injury would not likely result.

This argument, however, overlooks the guidance of *U.S. Steel, supra,* that analysis of the *Mathies* criteria should be made in terms of "continued normal mining operations." Inspector Justice testified that the mine, at the time the citation was issued, was liberating over 200,000 cubic feet of methane per day and that it now liberates 500,000 cubic feet of methane per day. Thus, the fact that at the precise time of the violation an explosive concentration of methane was not present does not mean that under continued normal mining operations an explosive concentration could not accumulate. Indeed in the inspector's opinion that is precisely what could have happened.

Inspector Justice described the situation succinctly when he testified: "We have an arcing potential. . . . We have a mine which is clearly shown to liberate methane. We have a charger that is sitting in an area where methane can be carried over top of or accumulate in this area. We have a timer which can be set and no one even be around the charger and it kick off causing an ignition . . . ." (Tr. 102.) Based on this evidence, I find that there was a reasonable likelihood that the hazard contributed to by the violation would result in an injury from a methane ignition. Accordingly, I conclude that the violation was "significant and substantial."

Docket No. KENT 96-335

This docket consists of Citation No. 4225514, which was contested. It alleges a violation of section 77.204, 30 C.F.R. § 77.204, because: "The fence was detached from the side of the elevator head frame, leaving an open space that persons could travel to the top of the elevator shaft [*sic*] that was not provided with railings barriers [*sic*] to prevent falling into the shaft, where persons are regular [*sic*] working in this area." Section 77.204 provides that: "Openings in surface installations through which men or material may fall shall be protected by railings, barriers, covers or other protective devices."

The facts surrounding this citation are not in dispute. The cement collar of an elevator shaft extended about 18 inches above the ground. The shaft, which was about 22 feet in diameter, was not covered and no railings, barriers or other protective devices existed on or around the collar. There was, however, a fence around the shaft, located some six to eight feet from it. The fence was normally attached to a steel head frame, although at the time of the inspection, it was partially detached at the top.

A mine employee regularly cuts the grass in the space between the fence and the shaft, entering the area through a gate in the fence. The only other people entering the fenced area are employees of the elevator company under contract with the operator to perform maintenance on the elevator or shaft. When performing this work the elevator employees wear safety belts.

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[2] Methane is explosive in concentrations of between five and fifteen percent. (Tr. 103.)

It is the Respondent's position that the fence satisfies the requirements of the regulation. The Secretary maintains that because employees can go inside the fence, the shaft itself must be protected.[3] Since the fence would not prevent the grass cutter from falling into the shaft, I find that section 77.204 required a railing, barrier, cover or other protective device on the shaft collar.[4] Consequently, I conclude that the company violated the regulation.

Significant and Substantial

The inspector found this violation to be "significant and substantial" because the grass cutter and the elevator examiner[5] would be subjected to the hazard of falling down the shaft. I do not concur with his, or the Secretary's, assessment.

I find that the only person subject to this hazard was the grass cutter. It is clear from the testimony that the elevator examiner conducts his examination from inside the shaft by climbing to the top of the elevator. Therefore, he would have no reason to enter the area inside the fence. In addition, I do not find that the elevator company employees would be exposed to the hazard since they would routinely be inside any railing, barrier, cover or protective device to perform their work and they wear safety belts.

While I find that the grass cutter would be vulnerable to falling into the shaft, I do not view such a happening as very likely. As a mine employee he would be aware of the presence of the open shaft and his duties would not require him to go near to the shaft because the length of weed eater that he uses to cut the grass would be between him and the shaft. Thus, the chance of him inadvertently falling would be minimal. Accordingly, I find that the third *Mathies* criterion is not met and conclude that the violation was not "significant and substantial." Moreover, because I find that the Respondent may reasonably have believed that the fence did comply with the regulation, I will reduce the level of negligence to "low."

Civil Penalty Assessment

The Secretary has proposed civil penalties of $4,879.00 for all of the violations in these cases. However, it is the judges independent responsibility to determine the appropriate amount of penalty in accordance with the six penalty criteria set out in section 110(i) of the Act, 30 U.S.C. § 820(i). *Sellersburg Stone Co. v. FMSHRC*, 736 F.2d 1147, 1151 (7th Cir. 1984); *Wallace Brothers, Inc.*, 18 FMSHRC 481, 483-84 (April 1996).

In connection with those criteria, the parties have stipulated that: (1) The proposed

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[3] There was some indication at the hearing that the inspector believed that the regulation was violated by the gap at the top of the fence. The Secretary has wisely not pursued this line of reasoning in her brief.

[4] Solid Energy abated the violation by installing a hand railing around the top of the shaft.

[5] Section 75.1400-3, 30 C.F.R. § 75.1400-3, requires that elevators be inspected daily.

penalties are appropriate to the size of the operator's business and will not affect the operator's ability to remain in business; (2) The operator demonstrated good faith in attempting to achieve rapid compliance after notification of the violations; and, (3) The Solid Energy No. 1 mine produced 1,110,210 tons of coal in the twelve months preceding these violations and during the same period the company's controlling entity, Fluor Corporation, produced 21,675,626 tons of coal. (Tr. 5-7.) In addition, I find that the company's history of violations falls in the average range. (Govt. Exs. 1A and 1B.)

Based on the penalty criteria, I will assess the penalties proposed by the Secretary on the uncontested citations. With regard to Citation No. 4585909 in Docket No. KENT 96-292, the Secretary has proposed a penalty of $900.00. While I find the degree of negligence involved in this violation to be "high," I find the gravity to be lower than determined by the inspector because the company failed to follow the ventilation plan in only one of the three ways alleged by the inspector. Furthermore, the evidence was that despite this violation the bleeder entries still appeared to be performing their function. Therefore, I will reduce the penalty to $450.00.

The Secretary has proposed a penalty of $1,019.00 for Citation No. 4025272 in Docket No. KENT 96-330. Like the Secretary, I find the gravity of this violation to be serious and the negligence to be "moderate." Based on the penalty criteria, I assess a penalty of $1,019.00.

The Secretary has proposed a penalty of $1,298.00 for Citation No. 4235514 in Docket No. KENT 96-335. I find the gravity of this violation to be considerably less serious than the Secretary and the degree of negligence to be "low" rather than "moderate." Consequently, based on the penalty criteria, I assess a penalty of $200.00.

The penalties assessed for each citation are:

Docket No. KENT 96-292

Citation No.	Penalty
4058988	$ 400.00
4585909	$ 450.00
4235513	$ 50.00

Docket No. KENT 96-330

4025271	$ 50.00
4025272	$1,019.00
4025273	$ 506.00
4025274	$ 50.00
4025275	$ 50.00
4025276	$ 50.00
4025277	$ 506.00

4235514	$ 200.00
Total	$3,331.00

ORDER

Accordingly, Citation Nos. 4508988, 4585909 and 4235513 in Docket No. KENT 96-292 are **AFFIRMED**; Citation Nos. 4025271, 4025272, 4025273, 4025274, 4025275, 4025276 and 4025277 in Docket No. KENT 96-330 are **AFFIRMED**; and Citation No. 4235514 in Docket No. KENT 96-335 is **MODIFIED** by deleting the "significant and substantial" designation and reducing the degree of negligence from "moderate" to "low" and is **AFFIRMED** as modified. Solid Energy Mining Company is **ORDERED TO PAY** civil penalties of **3,331.00** within 30 days of the date of this decision. On receipt of payment, these proceedings are **DISMISSED**.

T. Todd Hodgson
Administrative Law Judge

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\mca

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1730 K STREET, N.W., 6TH FLOOR
WASHINGTON, D. C. 20006-3868

May 23, 1997

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. YORK 96-61-M
Petitioner	:	A. C. No. 19-01034-05502 XEX
	:	
v.	:	
DREW DRILLING & BLASTING,	:	
INCORPORATED,	:	Labrie Stone Products
Respondent	:	Incorporated

DECISION APPROVING SETTLEMENT

Before: **Judge Merlin**

This case is before me upon a petition for assessment of the 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. A reduction in penalties from $2,500 to $2,000 is proposed. I have considered the representations and documentation submitted in this case, and I conclude that the proffered settlements are appropriate under the criteria set forth in section 110(i) of the Act.

WHEREFORE, the motion for approval of settlements is **GRANTED**, and it is **ORDERED** that the operator pay a penalty of $2,000 within 30 days of this order.

Paul Merlin
Chief Administrative Law Judge

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/gl

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET, N.W., 6TH FLOOR
WASHINGTON, D. C. 20006-3868

May 27, 1997

M. A. WALKER CO., INC.,	:	CONTEST PROCEEDINGS
Contestant	:	
	:	Docket No. KENT 97-83-RM
	:	Citation No. 4554008; 10/23/96
v.	:	
SECRETARY OF LABOR,	:	Docket No. KENT 97-84-RM
MINE SAFETY AND HEALTH	:	Citation No. 4554010; 10/23/96
ADMINISTRATION (MSHA)	:	
Respondent	:	Indian Creek Underground
	:	
	:	Mine ID 15-00111

ORDER OF DISMISSAL

Before: Judge Merlin

On December 31, 1996, the operator filed notices of contest of citations which were assigned the above-captioned docket numbers. On February 20, 1997, the Solicitor filed answers to the contests.

On February 27, 1997, I issued an order directing the parties to set forth their positions with respect to whether these cases should be dismissed for untimely filing. Under the Mine Act and Commission regulations, a notice of contest of a citation must be filed within 30 days of the date the citation is issued. 30 U.S.C. § 815(d), 29 C.F.R. § 2700.20(b). After a review of the files, it appeared that the operator's contests were late.

On March 31, 1997, the Solicitor filed her response to the February 27 order. The Solicitor argues that these cases should be dismissed since the contests were not filed within 30 days of the date of the issuance of the citations.

On April 30, 1997, an order to show cause was issued directing the operator to file its response to the February 27 order and on May 16, 1997, the operator filed its response. The operator states that the notices were misplaced due to limited administrative staff and no formal legal training.

As noted above, the Mine Act and Commission regulations require that the operator contest a citation within 30 days of its issuance. Notice is completed upon mailing. J.P. Burroughs, 3 FMSHRC 854 (1981). The citations in these cases were issued on October 23, 1996, and the contests mailed on December 23, 1996, which were therefore, 31 days late.

A long line of decisions going back to the Interior Board of Mine Operation Appeals holds that cases contesting the issuance of a citation must be brought within the statutory prescribed 30 days or be dismissed. Consolidation Coal Company, 1 MSHC 1029 (1972); Old Ben Coal Co., 1 MSHC 1330 (1975); Alexander Brothers, 1 MSHC 1760 (1979); Island Creek Coal Co. v. Mine Workers, 1 FMSHRC 989 (Aug 1979); Amax Chemical Corp., 4 FMSHRC 1161 (June 1982); Industrial Resources, Inc., 7 FMSHRC 416 (March 1985); Allentown Cement Company, Inc., 8 FMSHRC 1513 (October 1986); Rivco Dredging Corporation, 10 FMSHRC 889 (July 1988); Big Horn Calcium, 12 FMSHRC 463 (March 1990); Prestige Coal Co., 13 FMSHRC 93 (January 1991); Costain Coal Inc., 14 FMSHRC 1388 (August 1992); Diablo Coal Company, 15 FMSHRC 1605 (August 1993); C and S Coal Company, 16 FMSHRC 633 (March 1994); Asarco, Incorporated, 16 FMSHRC 1328 (June 1994); See also, ICI Explosives USA, Inc., 16 FMSHRC 1794 (August 1994).

Nothing in the Mine Act or applicable regulations supports relieving an operator of the 30 day time requirement because the operator lacks the staff or legal training. Nor does relevant case law support such an approach. Only when the operator's delay was caused by MSHA's own conduct has late filing been permitted. Consolidation Coal Company, 19 FMSHRC 816 (April 1997); Blue Diamond Coal Company, 11 FMSHRC 2629 (Dec. 1989), See also, Freeman Coal Mining Corporation, 1 MSHC 1001 (1970). Therefore, the contests must be dismissed as untimely.

The operator should be aware, however, that it can contest these citations when MSHA proposes civil penalty assessments for the violations. 29 C.F.R. § 2700.21.

In light of the foregoing, it is **ORDERED** that these case be **DISMISSED**.

Paul Merlin
Chief Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

MAY 28 1997

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket NO. KENT 94-1194
Petitioner	:	A.C. No. 15-15592-03594 S
	:	
v.	:	No. 1 Mine
ALPHA MINING COMPANY,	:	
Respondent	:	

ORDER OF DISMISSAL ON REMAND

Before: Judge Melick

This Civil Penalty Proceeding is moot. The Respondent failed to seek review of this proceeding before the Commission. The decision of the administrative law judge affirming the underlying citation and assessing a $10,000 civil penalty is therefore final. Under the circumstances this case on remand is dismissed.

Gary Melick
Administrative Law Judge

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FALLS CHURCH, VIRGINIA 22041

MAY 29 1997

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 95-214-M
Petitioner	:	A. C. No. 23-02072-05512 A
v.	:	
	:	Gallatin Quarry
HAROLD L. MOODY,	:	
Respondent	:	

REMAND DECISION AND ORDER APPROVING SETLEMENT

Before: Judge Koutras

Statement of the Case

This matter concerns a proposal for assessment of civil penalty filed by the petitioner against the respondent Harold L. Moody, pursuant to section 110(c) of the Federal Mine Safety and Health Act of 1977, seeking a civil penalty assessment of $1,000, for a violation of mandatory safety standard 30 C.F.R. § 56.9300(b), as stated in a section 104(d)(1) Citation No. 4322450, issued on July 21, 1994. The respondent was charged with "knowingly authorizing, ordering, or carrying out" the violation.

On January 26, 1996, former Commission Judge Arthur Amchan issued a decision concluding that the Secretary failed to establish a violation, and he dismissed the case. 18 FMSHRC 67 (January 1996).

Following an appeal by the Secretary, the Commission, on April 30, 1997, issued its decision reversing Judge Amchan's determination that the respondent was not liable under section 110(c) for the violation, and remanded the matter for assessment of a civil penalty.

In response to my May 1, 1997, Order on Remand, the petitioner has filed a motion to approve a proposed settlement requiring the respondent to pay the full amount of the proposed $1,000 penalty assessment for the violation. By agreement of the parties, the respondent proposes to pay the penalty over a scheduled six-month payment period.

Conclusion

After careful review and consideration of the pleadings, arguments and submissions in support of the motion to approve the proposed settlement of this case, I conclude and find that the proposed settlement disposition is reasonable and in the public interest. Accordingly, pursuant to 29 C.F.R. § 2700.31, the motion IS GRANTED, and the settlement IS APPROVED.

ORDER

The respondent IS ORDERED to pay a civil penalty assessment of $1,000, in satisfaction of the violation. Payment is to be made to MSHA in accordance with the following schedule:

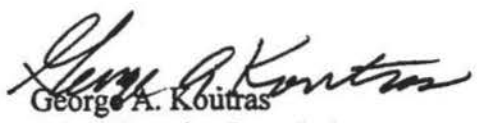
> The respondent shall make an initial installment payment of $200, within thirty (30) days of the date of this settlement decision. Thereafter, the respondent shall make three (3) successive monthly payments of $200 each, followed by two (2) successive monthly payment of $100 each until the full amount of $1,000 is paid.

Payments shall be by check or money order made payable to the Mine Safety and Health Administration, and sent to the following address:

> U.S. Department of Labor
> Mine Safety and Health Administration
> Payment Office
> P.O. Box 360250M
> Pittsburgh, PA 15251

Each payment shall include a reference to Docket No. CENT 95-214-M, and A.C. No. 23-02072-05512 A.

This decision will not become final until such time as full payment of the $1,000 is made by the respondent to MSHA, and I retain jurisdiction in this case until payment of all installments are remitted and received by MSHA. In the event the respondent fails to comply with the terms of the settlement, the petitioner may file a motion seeking appropriate sanctions or further action against the respondent, including a reopening of the case.



George A. Koutras
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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MAY 29 1997

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 94-79[1]
Petitioner	:	A. C. No. 11-00877-04034
v.	:	
	:	
AMAX COAL COMPANY,	:	
Respondent	:	
	:	Mine: Wabash Mine

DECISION ON REMAND

Before: Judge Feldman

On August 19, 1994, following a hearing on the merits, I affirmed the significant and substantial (S&S) designation in Citation No. 4054831, and assessed a civil penalty of $309.00, for the cited violation of the mandatory standard in 30 C.F.R. § 75.400. 16 FMSHRC 1837. The violation, which was admitted by the respondent (Amax), concerned significant accumulations of loose coal and oil soaked loose coal, of approximately two weeks' duration, on a Joy continuous miner. *Id.* at 1838-39, 1841-43. Amax sought Commission review of the S&S determination and ultimately participated in oral argument before the Commission.

On August 28, 1996, the Commission vacated my S&S determination and remanded for further consideration of the evidence with respect to arguments presented on appeal. 18 FMSHRC 1355, 1357-59. The thrust of Amax's argument is that impermissible, combustible coal dust accumulations on permissible pieces of equipment are not S&S in nature because the equipment is a "potential," rather than an "actual," source of ignition. On remand, I concluded the distinction between actual verses potential sources of ignition was not dispositive of the S&S question, as a potential ignition source in an underground mine, when viewed in the context of continued mining operations, can become an actual source of ignition at any time. 18 FMSHRC 1868, 1870-72 (October 1996). In this regard, I noted it was the degree of proximity of the combustible material to the potential ignition source that was determinative on the issue of S&S. *Id.* at 1871. Consequently, I determined the cited longstanding combustible material that was *located on* a potential ignition source constituted an S&S violation. *Id.* at 1872-73. Amax's petition for review of the remand decision was denied by the Commission.

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[1] This proceeding was consolidated with Docket No. LAKE 94-55, which is no longer at issue.

Amax petitioned for review in the U.S. Court of Appeals for the District of Columbia Circuit. On April 26, 1997, the Secretary moved to dismiss Amax's appeal as moot because she had modified Citation No. 4054831 by deleting the S&S designation. Accordingly, on May 8, 1997, the Court granted the Secretary's motion to dismiss Amax's petition as moot and remanded this matter to the Commission for reassessment of the appropriate civil penalty. Pursuant to the Court's Order, this proceeding was once again remanded to me by the Commission on May 21, 1997.

Civil penalties are assessed in accordance with the penalty criteria in section 110(i) of the Act, 30 U.S.C. § 820(i). The gravity of a violation is a criterion to be considered. The Secretary's removal of the S&S designation is a tacit admission that the cited violation was not serious in nature. Thus, the Secretary's action warrants a corresponding reduction in the degree of gravity associated with the cited condition. Consequently, a civil penalty of $50.00 shall be imposed for the subject citation.

ORDER

In view of the above, **IT IS ORDERED** that Amax Coal Company shall, within 30 days of the date of this decision, pay a $50.00 civil penalty in satisfaction of Citation No. 4054831. Upon timely receipt of payment, Docket No. LAKE 94-79 **IS DISMISSED**.

Jerold Feldman
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FALLS CHURCH, VIRGINIA 22041

MAY 30 1997

WHAYNE SUPPLY COMPANY, Contestant	:	CONTEST PROCEEDING
v.	:	Docket No. KENT 94-519-R Citation No. 4011760; 1/25/94
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Job No. 17A
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. KENT 95-556 A.C. No. 15-17434-03501 A25
v.	:	Job No. 17A
WHAYNE SUPPLY COMPANY, Respondent	:	

DECISION

Appearances: Brian W. Dougherty, Esq., Office of the Solicitor, U.S. Dept. of Labor, Nashville, Tennessee, on behalf of the Secretary of Labor;
Andrew J. Russell, Esq., Smith & Smith, Louisville, Kentucky, on behalf of Whayne Supply Company.

Before: Judge Melick

These consolidated Contest and Civil Penalty proceedings under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.*, the "Act," are before me upon remand by the Commission on March 7, 1997, to evaluate the issues of "unwarrantable failure", negligence and a civil penalty based on the present record and within the specified guidelines.

The relevant factual and procedural background is set forth by the Commission as follows:

> Whayne [Whayne Supply Company] is a contractor that sells and services Caterpillar machinery and equipment in Kentucky and Indiana. 17 FMSHRC at 1575.

On January 19, 1994, Whayne dispatched James Paul Blanton, an experienced field service technician with 16 years of service with Whayne, to Addington Mining Inc.'s Job #17A, a surface coal mine in Pike County, Kentucky. *Id.* at 1574-75; Tr. 244. On January 20, Blanton drove his Whayne truck to Job #17A. 17 FMSHRC at 1575. The truck was equipped with a crane (or "boom"), chain and cable "come-along" for securing raised loads. *Id.* at 1575, 1577. Addington personnel directed Blanton to repair a disabled Caterpillar D10N bulldozer. *Id.* at 1575. Blanton examined the D10N dozer and concluded that the torque converter was defective and needed to be removed. 17 FMSHRC at 1575; Tr. 155-56.

In order to gain access to the torque converter on the D10N bulldozer, one of three belly pans on the underside of the dozer had to be lowered. 17 FMSHRC at 1575n.2. The belly pan is hinged on one side and secured to the bulldozer by three bolts each on two other sides. *Id;* Tr. 51. When the belly pan is freed from the bolts, it swings down on its hinge. *Id.* The belly pan weighs about 500 lbs. 17 FMSHRC at 1576.

The normal practice for removing the belly pan in the field is to first dig a trench and place the vehicle over it. Tr. 61-62. Then a chain is run from the crane on the truck, passed under the belly pan and attached to the opposite bulldozer track to prevent the pan from falling abruptly when the bolts are loosened. 17 FMSHRC at 1575. An alternate method involves use of the come-along to secure a cable beneath the pan. *Id.* at 1577. After the pan is loosened from the bolts, the crane or come-along is used to slacken the restraint and allow the belly pan to safely swing open. *Id.* at 1575; Tr. 79-80, 160.

Consistent with this procedure, Addington employees dug a trench and then pushed the bulldozer over it so Blanton could begin removing the torque converter. 17 FMSHRC at 1575; Tr. 62-66. Blanton moved his truck so that the right rear portion, where the crane was located, was next to the bulldozer. 17 FMSHRC at 1575. The Addington employees left Blanton alone to repair the bulldozer. *Id.* at 1575-76. Shortly before noon, Blanton was discovered pinned under the belly pan, which had swung down on its hinges. *Id.* at 1576. Blanton was pulled from underneath the bulldozer but could not be revived, and probably died at the scene. *Id.*; Tr. 71-73, 138-39. Before the pan fell, Blanton had removed the nuts securing the pan to the bolts. Tr. 73-74; Gov't Ex. 6, p.¶4. In addition to the nuts, an air hose, air gun or air wrench, power drill, socket and screwdriver were discovered under the dozer at the time of the accident. Tr. 27-28, 73-74, 139-40, 158. There was no evidence that Blanton had attempted to secure the belly pan with the crane and chain, cable come-along, or any other device. 17 FMSHRC at 1576. The crane was not "on," and was not extended, but instead was in the "down" position. Tr. 227-28.

Whayne gives its field machanics general verbal instructions to minimize the time spent under raised equipment; however, its employees receive no formal training regarding the proper procedures for lowering belly pans in the field, nor does Whayne maintain a written policy on this subject. 17 FMSHRC at 1579; Tr. 216, 218, 349.

Whayne did supply formal training on removing belly pans when the vehicle is in the shop; however, the procedure for removing belly pans in the shop differs from that used in the field. Tr. 216-17, 344-45, 383-85.

Whayne hires experienced mechanics for its field service positions, and relies heavily on on-the-job training for these employees. 17 FMSHRC at 1579. New field mechanics begin as "helpers" and are assigned to jobs with more experienced field technicians. Tr. 208-09, 372. After gaining experience in the field, field mechanics may be assigned to jobs alone, or with less experienced helpers. *Id.* The field mechanic tells the helper what to do when they get to the job. Tr. 245. Whayne field mechanics are dispatched by and receive performance evaluations from the field service foreman, a supervisor. Tr. 242-45, 254. Field mechanics are dispatched to a customer's premises, and assigned by the customer to work on a particular piece of equipment. Tr. 212-13. Whayne field mechanics are not supervised by mining company employees while on mine property. *Id.* The field mechanic evaluates the problem and corrects it, without direct supervision from the field service foreman. Tr. 209, 254.

MSHA inspector Buster Stewart issued several citations and orders to Addington and Whayne on January 25, including Citation No. 4011760 to Whayne under section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), for violating section 77.405(b). Gov't Ex. 6, p.5. The citation alleged that blocking was not provided by Whayne to secure the belly pan. Gov't Ex. 3. Stewart also drafted an Accident Investigation Report, which stated, *inter alia*: "The cause of the accident was the failure to use blocking material to prevent movement of the belly pan while work was in progress." Gov't Ex. 6, p.3.

Following an evidentiary hearing, the judge concluded that Whayne violated section 77.405(b). [footnote omitted] He ruled that any negligence on Blanton's part could be "imputed" to the operator if the operator has not "taken reasonable steps to prevent the rank-and-file miner's violative conduct." *Id.* at 1578. The judge found that, although Blanton was not a "supervisory employee, " his negligence could be imputed to Whayne because the operator did not take "such reasonable stpes in training and supervising Blanton[] that it should be completely absolved of responsibility for his violative conduct. . . ." *Id.* at 1578-79. Examining Blanton's conduct in light of his finding that "Blanton's actions did not compromise the safety of others," the judge found that Blanton's conduct "defie[d] explanation: and characterized it as "'thoughtless,' rather than 'inexcusable or aggravated.'". *Id.* at 1580 & n.6. He concluded that Blanton's negligence did not rise to the level of unwarrantable failure. *Id.* [footnote omitted] The judge rejected the Secretary's proposed $50,000 penalty. *Id.* at 1582. Characterizing Whayne's negligence as "moderate," considering "both the 'thoughtlessness' of Mr. Blanton and the lack of formal training provided by Whayne Supply regarding belly pan removal[,]" the judge assessed a civil penalty of $1500. *Id.*

The Commission thereafter remanded for a new analysis, considering that since Blanton was a rank-and-file miner and not an agent of Whayne, Whayne could not be held liable for

negligence or aggravated conduct based on the actions of Blanton but that Whayne could nevertheless be held responsible for unwarrantable failure and negligence based upon its own conduct under *Southern Ohio Coal Company,* 4 FMSHRC 1459(August 1982). In *Southern Ohio Coal Company* the Commission stated that in the context of evaluating operator conduct for purposes of penalty assessment "where a rank-and-file employee has violated the Act, the operator's supervision, training and disciplining of its employees must be examined to determine if the operator has taken reasonable steps to prevent the rank-and-file miners' violative conduct".[1] In accordance with the remand order, "unwarrantable failure", negligence and the assessment of an appropriate civil penalty are here evaluated in light of Whayne's "training and supervision of Blanton".

It is noted preliminarily that, as the moving party, the Secretary has the burden of proof to establish all elements on the issues of unwarrantability and negligence and therefore also has the burden as to the limited issues now on review i.e., on the alleged inadequacy of Whayne's supervision and/or training of Blanton. 5 U.S.C., § 556(d). The Secretary acknowledges that he has the burden of proof on these issues (Oral Argument Tr. 36-37). I should also note that the parties indicated at oral argument that additional evidence existed beyond the present record on these issues. However the Commission has specifically limited the analysis on this remand to the present record.

Unwarrantable failure is defined as aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.,* 9 FMSHRC 1997 (December 1987). Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference" or a "lack of reasonable care." *Id.* at 2003-04; *Rochester and Pittsburgh Coal Company*, 13 FMSHRC 189, 193-194 (February 1991). Relevant issues therefore include such factors as whether an operator has been placed on notice that greater efforts are necessary for compliance, *Mullins and Sons Coal Company*, 16 FMSHRC 192, 195 (February 1994). On the present record in this case I find that not only has the Secretary failed to have met her burden of proving aggravated or inexcusable conduct by Whayne in relation to its supervision and training of Mr. Blanton but she has also failed to sustain her burden of proving that there was anything more than moderate negligence in this regard.

As the Commission itself observed, Blanton was "a highly experienced repair person who needed little supervison". The Secretary also agrees that, as a field technician, she would not have expected constant supervision over Blanton. However the Secretary nevertheless maintains that Blanton's supervisor could have conducted "spot" inspections of Blanton's work (Oral Argument Tr. 32, 50, 52, 64, 76) Whayne notes that the Secretary has never required such spot inspections. It is noted moreover that the Secretary did not, as a condition of abatement require

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[1] The Commission in this case remanded only for consideration of the operator's supervision and training of Blanton. Accordingly, the operator's discipline of its employees is not here considered. In any event the Secretary has not sustained her burden of proving that Whayne's progressive disciplinary procedures were inadequate.

any change in the supervisory practices of the operator, that there is no specific regulatory requirement for spot supervision, and that Whayne was apparently following industry practices in its minimal supervision of an experienced field technician.

With respect to Blanton's training the Commission observed as follows:

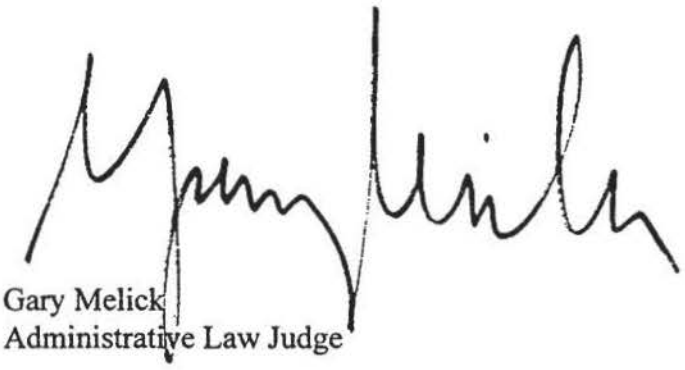
> "The Secretary's assertions that Blanton was not trained by Whayne, and did not receive performance appraisals, are inaccurate. In addition to the on-the-job training Blanton would have received on removing belly pans in the field, the record shows that Whayne field technicians received formal training on repair in the shop and from Caterpillar itself."

The Secretary nevertheless maintains that the lack of classroom training for Blanton regarding the removal of belly pans in the field by the boom and chain method is evidence of a deficient training program. Aside from the obvious difficulty, if not impossibility, of reconstructing field conditions such as Blanton encountered in this case in a classroom setting, I cannot agree with the Secretary that the lack of classroom training on belly pan removal using the boom and chain method is, in itself, evidence of a deficient training program. The record shows that newly hired field technicians work with experienced mechanics and receive on-the-job training and instructions on these procedures. Indeed the deceased himself was an experienced technician who had been observed using the boom and chain method of belly pan removal in the field and who himself had trained other employees. In addition, it is noted that the Secretary, as a condition of abatement, did not require Whayne to make any change in its training of field technicians. Moreover there is no regulatory requirement that training in such procedures be provided in a classroom setting. Finally, the record shows that the deceased had in fact successfully completed his required annual refresher training, including hazard recognition and accident prevention (Exhibit C-1).

On the other hand, the fact remains that Whayne did not have any written policy or rules governing belly pan removal in the field. This may be considered one aspect of training. Whayne was therefore not without negligence in this regard, and, under the circumstances, I find that a civil penalty of $750 is appropriate. I note that when the presiding judge found a civil penalty of $1,500 to be appropriate he also considered the moderate negligence of the deceased, Mr. Blanton, and imputed that negligence to Whayne. Eliminating Blanton's negligence from consideration of a civil penalty for Whayne warrants an appropriate reduction in penalty amount.

ORDER

"Section 104(d)(1)" Citation No. 4011760 is hereby modified to a "Section 104(a)" Citation and Whayne Supply Company is hereby directed to pay a civil penalty of $750 within 30 days of the date of this decision.



Gary Melick
Administrative Law Judge

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/jf

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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MAY 30 1997

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. KENT 96-254
	:	A. C. No. 15-07201-03681
v.	:	
	:	Docket No. KENT 96-320
HARLAN CUMBERLAND COAL COMPANY,	:	A. C. No. 15-07201-03683
Respondent	:	Docket No. KENT 96-321
	:	A. C. No. 15-07201-03684
	:	
	:	Docket No. KENT 96-322
	:	A. C. No. 15-07201-03685
	:	
	:	Docket No. KENT 96-333
	:	A. C. No. 15-07201-03686
	:	
	:	Mine C-2

DECISION

Appearances: Joseph B. Luckett, Esq. U. S. Department of Labor, Nashville, Tennessee, for the Secretary;
H. Kent Hendrickson, Esq., Rice & Hendrickson, Harlan, Kentucky, for the Respondent.

Before: Judge Barbour

These proceedings concern petitions for the assessment of civil penalties filed by the Secretary of Labor (Secretary) on behalf of her Mine Safety and Health Administration (MSHA) against Harlan Cumberland Coal Company (Harlan or the company) pursuant to sections 105(d) and 110(a) of the Federal Mine Safety and Health Act of 1977 (Mine Act or Act) (30 U.S.C. §§ 815(d), 820(a)). The Secretary alleges that Harlan violated various mandatory safety standards for underground coal mines and that several of the violations were significant and substantial contributions to mine safety standards (S&S violations). (The standards are found in Title 30 C.F.R. Part 75.)

Harlan generally denied that it violated the standards, challenged the Secretary's S&S assertions, and contested the amounts of the proposed penalties.

The mine involved is Mine C-2, a bituminous underground coal mine located in Harlan County, Kentucky. The proceedings were heard in Harlan, Kentucky. At the commencement of the hearing, counsel for the Secretary read into the record stipulations agreeable to the parties (Tr. 14-16). Counsel also announced that the parties had settle many of the violations (Tr. 8). The settlements were explained on the record, and I will approve them at the close of this decision (Tr. 8-13, 221-224).

STIPULATIONS

The parties stipulated as follows:

1. Harlan mines and produces coal that enters into and has an effect upon interstate commerce;

2. Harlan is subject to the jurisdiction of the Act, and the Administrative Law Judge has the authority to hear the cases and issue a decision;

3. A reasonable penalty will not affect Harlan's ability to continue in business;

4. During February 29, 1995, through February 29, 1996, Harlan produced 569,727 tons of coal, and the mine produced 411,803 tons of coal. Further, from June 30, 1995, through June 30, 1996, Harlan produced 691,172 tons of coal, and the mine produced 520,277 tons of coal.

5. Harlan exhibited good faith in abating the alleged violations (see Tr. 14-16).

In addition to the stipulations, counsel for the Secretary stated without contradiction that there are 58 employees at the mine and that Harlan employs approximately 80 miners. He characterized the size of the company as "at the lower end of the large size companies" (Tr. 15). Finally, counsel characterized Harlan's applicable history of previous violations as medium in size (Tr. 225; see Gov. Exh. P-73).

CONTESTED CITATIONS

KENT 96-254

Citation	Date	30 C.R.F. §	Proposed Penalty
4243656	3/11/96	75.202(a)	$309

Citation No. 4243656 states:

> The intake roadway has areas of loose broken drawrock along the roadway at several locations. The intake roadway is also the mantrip and supply access [roadway] (Gov. Exh. P-5).

In addition to alleging a violation of the standard, the citation includes an S&S finding.

Section 75.202(a) requires in part that "[t]he roof, face and ribs ... where persons work or travel shall be supported or otherwise controlled to protect person from hazards related to falls of the roof, face or ribs."

Larry Bush, an MSHA roof and ventilation specialist, who inspected Mine C-2 for the last 5 years, testified for the Secretary (Tr. 20). He stated that during an inspection on March 11, 1996, he traveled along the main intake roadway and observed that the roof contained areas of loose and hanging drawrock (Tr. 29, see also Tr. 21). (He described drawrock as "rock that's just above the coal seam between the coal seam ... and the immediate roof ... [and that] tends to separate from the main roof" (Tr. 21). The roadway, which is approximately 2 miles long, was used by the miners when they entered the mine and was used to transport supplies into the mine. It also was used as the mine's main escapeway.

The roof above the roadway was supported by roof bolts. In addition, at various locations, steel straps supplemented the roof bolts. According to Eddie Sargent, Harlan's safety director, the straps were approximately 13-14 feet long and 8 inches wide. They were perpendicular to the ribs (Tr. 34-35), and they were bolted into the roof (Tr. 35). Harlan routinely used them because, according to Sargent, the drawrock would have presented "a pretty bad situation without them" (Tr. 36).

Sargent did not see the cited conditions but was told by the mine superintendent, Louis Blevins, that the "drawrock was lying on straps ... and it was supported" (Tr. 37). Although Bush agreed that some of the hanging rock was supported by the straps, he still believed the hanging drawrock would fall. "[O]nce the rock is actually broken loose, it do[es]n't mean its going to ... stay right there over the strap. [E]ventually, it will fall" (Tr. 30). Moreover, the drawrock that was not hanging on the straps could fall at almost any time. "Because the drawrock ... was loose ... [i]t was going to fall ... within a short period of time," he stated (Tr. 23).

The height of the roof averaged between 5 and 7 feet. The pieces of drawrock that were loose and that Bush believed would fall ranged from an inch thick to a foot thick (Tr. 22, 24). In Bush's opinion, if the drawrock fell and hit a miner, the resulting injuries would range from serious to fatal (Tr. 22-23).

Supplies were transported along the roadway two or three times a day. Also, the roadway had to be preshift examined (Tr. 23, 39). Sometimes the preshift examiner walked the roadway and sometimes he or she rode in a vehicle (Tr. 39). Further, the mantrip passed under the roof as miners were brought to the active sections (Tr. 28-29). Although all mobile equipment at the mine had canopies (Tr. 31, 39), Sargent agreed that if the equipment broke down, the miners might have to get out and walk (Tr. 40).

Bush believed that a preshift examiner should have seen the hanging drawrock and should have made sure it was pulled down (Tr. 23). As Bush stated, "When it's observed ... the condition should be taken care of immediately" (Tr. 27).

To terminate the condition, Harlan pulled down the drawrock (Tr. 25).

THE VIOLATION

I credit Bush's testimony that at various points along the subject roadway the drawrock was hanging and ready to fall (Tr. 29). Sargent did not view the area, and his testimony cannot overcome Bush's first hand observations. I also credit Bush's testimony that miners traveled under the cited roof. The Secretary conclusively has established that the cited roof was not supported or otherwise controlled to protect miners who traveled under it from roof fall hazards. The violation existed as charged.

S&S and GRAVITY

A violation properly is designated 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 reasonable serious nature" (*Cement Division, National Gypsum Co.*, 3 FMSHRC 825 (April 1981)). There are four things the Secretary must prove to sustain an S&S finding:

> (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard -- that is, a measure of danger to safety contributed to be the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonable serious nature (*Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984); see also *Austin Power Co.* v. *Secretary*, 861, F.2d 99, 104-105 (5th Cir. 1988) (approving *Mathies* criteria).

Here, the Secretary has proven all four.

There was a violation of section 75.202(a). The violation resulted in a discrete safety hazard in that the failure to support or otherwise control the roof at various points above the roadway subjected miners traveling beneath the roof to injury from falling drawrock. While it is true that many of the miners who traveled the entry did so in vehicles equipped with canopies and that these canopies undoubtedly offered considerable protection from such falls, Sargent confirmed that preshift examiners at times walked the roadway and that if equipment broke down other personnel had to walk as well (Tr. 39-40).

Given the fact that the cited drawrock was "hanging," and loose, Bush believed that it would fall (Tr. 23). I accept Bush's testimony in this regard. Moreover, I agree with Bush that a miner struck by falling draw rock would be seriously injured or even killed, particularly when some of the drawrock was a foot thick (Tr. 24). Considering the number of times the roadway was traveled, or could have been traveled if it needed to be used as an escapeway, and considering the condition of the drawrock, I conclude that it was reasonably likely that as mining continued a miner would be struck and seriously injured or killed by falling rock. Therefore, I find that the violation was S&S.

In addition to being S&S, the violation was very serious. It long has been held that the gravity of a violation is determined by analyzing the potential hazard to the safety of miners and the probability of the hazard occurring (*Robert G. Lawson Coal Co.*, 1 IBMA 115, 120 (May 1972)). The potential hazard was serious injury or worse due to falling rock. Because the drawrock was hanging and would fall and because miners traveled on foot under the rock, it was probable that a miner would be hit, injured, or killed by the falling rock.

NEGLIGENCE

Negligence is the failure to exercise the care required by the circumstances. Because the condition of the roof was visually obvious, Bush believed that the foreman and/or the preshift examiner should have seen the unsupported roof and taken corrective action (Tr. 23). I agree. The evidence fully supports Buch's opinion that the condition was obvious (Tr. 27). In failing to correct the problem, the company failed to exercise the care required.

Citation	Date	30 C.F.R.§	Proposed Penalty
4243658	3/11/96	75.380(d)(1)	$288

Citation No. 4243658 states in part:

> The 004 section intake has water accumulated across both intake entries too deep to travel thru or carry an injured person if needed (Gov. Exh. P-7).

In addition to alleging a violation of the standard, the citation includes an S&S finding.

Section 75.380(d)(1) requires that escapeways be "[m]aintained in a safe condition to always assure passage of anyone, including disabled persons."

According to Bush, on March 11, 1996, the mine's main intake entries had water in them, and the water was deep enough to impede miners who might have to travel or carry an injured miner through the entries. The entries were part of the escapeway for the 004 Section, an active section that was being mined (Tr. 41, 45, 49). Although there was an alternate escapeway and although the alternate escapeway had no water in it (Tr. 48), the intake escapeway was the primary escapeway, and it provided the quickest and safest way to the surface (Tr. 48, 50-51).

The water was in a "dip," about a mile from the portal (Tr. 45, 47). It was not unusual for water to collect there, and in the past, it had been pumped out. However, March 11 was a Monday, and Blevins, the mine's superintendent, told Bush the pumps had not worked on the weekend.

Bush walked along the rib at one side of the entry. The water reached the top of his boots, making it 14 to 16 inches deep (Tr. 42, 48). Bush did not go into the middle of the entry, but he estimated that there the water was 18 inches to 2 feet deep (Tr. 42, 48). Bush also estimated that the water extended for approximately 80 feet (Tr. 42).

Bush believed it was reasonably likely the water would hinder the exit of miners using the escapeway, including any miners who were transporting an injured miner on a stretcher (Tr. 43). The water could cause the miners, especially the stretcher bearers, to slow their egress, to slip and fall, and to drop the stretcher (Tr. 44-45).

In Bush's opinion the violation was due to the company's negligence. The superintendent knew the pumps had not worked over the weekend, yet he had taken no steps to correct the situation on Monday (Tr. 43-44).

To terminate the citation, Harlan got the pumps running and pumped down the water (Tr. 45).

THE VIOLATION

The testimony establishes that the primary escapeway for the 004 Section was not maintained in a safe condition to assure that anyone could pass through it. Although the escapeway was not blocked — Bush walked along the side of the entry to get through, and I infer that other miners could have done this too — it is clear that the passage of miners would have been hindered by the water. I accept Bush's testimony that the water came to the top of his boots near the sides of the entry and his estimate that the water was 18 to 2 feet deep in the middle of the entry. Harlan offered absolutely no testimony to the contrary. It is a simple fact that walking through this much water creates a slipping and stumbling hazard and slows down anyone trying to get through it.

Chief Administrative Law Judge Paul Merlin has observed, that section 75.380(d)(1) imposes a general obligation for safe escapeways and in order to determine whether this obligation has been satisfied, each case must be examined and judged on its facts (*Jim Walter Resources, Inc.*, 16 FMSHRC 1264, 1268 (June 1994). Because a delayed exit is an unsafe exit this general requirement means that the passage of miners not be impeded so as to hinder and slow even one miner's exit from the mine. Because the water in the cited escapeway would have hindered and slowed those miners who had to go through it, I find that the violation existed as charged.

S&S and GRAVITY

The hazard contributed to by the violation was that of inhibiting the evacuation of miners trying to leave the mine due to an emergency. It is apparent to me that there was a reasonably likelihood such a delay would result in injuries of a reasonably serious nature when viewed in the context of continuing mining operations and of an emergency necessitating use of the escapeway. Indeed, if the emergency were a fire or an explosion, the delay easily could have resulted in serious injuries or even deaths. Moreover, even if miners were not injured by the effects of the fire or explosion there was a reasonble likeihood of slipping or falling injuries (see *Consolidation Coal Co.*, 16 FMSHRC 1286, 1293 (June 1994) (ALJ Feldman)). Thus, the third element of the *Mathies* test was established.

The other three elements of *Mathies* also were satisfied, given there was a violation, that it contributed to the hazards set forth above, and that serious injuries, even deaths, could have resulted.

The fact that miners could have used a secondary escapeway, does not undermine the S&S nature of the violation. As Bush pointed out, the primary escapeway was the quickest, most direct way to exit the mine (Tr. 49, 50-51). It was also the route miners were trained to use. I cannot assume that in the event of an emergency, miners would have diverted their escape to the secondary escapeway rather that travel through the water.

The violation also was serious. In an emergency, a rapid exit from the mine can mean life or death for the miners involved. Anything that impedes the rapidity of a miner's escape can have serious consequences.

NEGLIGENCE

Bush's testimony that the superintendent told him the pumps did not work all weekend, and his testimony that the company made no attempt to get the pumps working, was not refuted by Harlan. The company should have known that with the pumps not working, water would collect in the "dip". After all, that is why the pumps were there. The company either should have corrected the situation or should have been in the process of correcting it. It did neither. I therefore find that Harlan failed to exhibit the care required by the circumstances and was negligent.

Citation	Date	30 C.R.F. §	Proposed Penalty
4243659	3/11/96	75.202(a)	$309

Citation No. 4243659 states :

> The 004 section has loose[,] broken ribs across the section at several locations where men are required to work & travel (Gov. Exh. P-8).

In addition to alleging a violation of the standard, the citation includes an S&S finding.

The requirements of section 75.202(a) are set forth above.

When Bush inspected the 004 Section on March 11, 1996, he observed "[l]oose, broken ribs across the section at several locations where persons were required to work and travel" (Tr. 53). Some of the loose and broken ribs were sloughing into the entry (Tr. 60).

A rib is the wall of a pillar that is left after mining. On the 004 Section, the ribs were between 5 and 7 feet high and 60 feet long (Tr. 54). The pillars and ribs provided support for the roof (Id.). The areas where Bush believed the pillars were loose and broken were areas where mines worked (Id.).

Bush recalled in particular that two crosscuts outby the face there was a pillar where the weight of the overburden had caused the rib to fracture (Tr. 55-56). The overburden had pushed the rib outward toward the entry (Id.).

In this particular pillar there was a 12 to 15 inch thick band of rock lying between the coal seam and the immediate roof. Bush believed that when the fractured part of the rib rolled into the entry, the rock would tend to roll out with the coal. The rock could cause injuries even more serious than those caused by the rolling coal (Tr. 55-57).

To Bush, the cracks in the ribs meant that the ribs could roll at any time (Tr. 58). He explained that when a rib gave way, it would, "just roll out ... just collapse" (Tr. 59). He stated, "It was not if. It was ... a question of when" they were going to roll (Id.; see also Tr. 62). He also noted that at the mine the company had constant problems with the ribs and roof due to the pressure put on them by the overburden (Tr. 59). He believed three miners had been injured previously by rib rolls at the mine (Id.).

Bush saw two miners working in the areas of the loose ribs. One was the section foreman (Tr. 58). They were within 3 to 4 feet of the ribs and were in danger if the ribs rolled (Tr. 64). In addition, eight to ten miners worked on the section (Tr. 58). In Bush's view, during the shift all of them would have to travel in the areas where the faulty ribs were located (Id.). If any of the miners were hit by the rolling ribs, their injuries could range from minor abrasions, to broken bones, to fatalities (Id.).

Bush believed that Harlan was negligent in allowing the rib conditions to exist. The foreman was on the section and the section was producing coal when the conditions were observed and cited. The foreman should have seen the conditions and taken steps to correct them (Tr. 57). In addition, the section was required to be preshift examined, and the conditions should have been noted and corrected as a result of that examination.

The company's safety director, Sargent, testified that the company was in the process of retreat mining and this caused more weight to bear down on the ribs than otherwise would have been the case (Tr. 66). To Sargent the cracks in the ribs indicated the ribs were under increased pressure (Tr. 67). Given these conditions, the sloughing and cracking of the ribs was normal. In Sargent's view, part of effective rib control required letting the ribs slough and allowing the sloughed material to build up at the base of the ribs. This butressed the ribs (Id.).

Sargent stated the danger was not from the ribs rolling (Tr. 68), but from outbursts of coal caused by the pillars "exploding" under the pressure (Tr. 67). Although the cracks did not necessarily indicate a coal outburst was imminent, if one did occur, the rib material could strike and injure a miner (Tr. 67-68).

The condition was corrected when the loose, broken ribs were pulled down (Tr. 60).

THE VIOLATION

The Secretary bears the burden of proof. In the context of this alleged violation of section 75.202(a), the Secretary must establish that miners worked or traveled in the cited areas and that the cited ribs were not sufficiently supported so as to protect the miners from rib rolls or outbursts. The company did not offer the testimony of any witness who was with Bush during his inspection and who observed the conditions. Bush was a credible witness, and I accept his uncontroverted description of the cited ribs as being loose (meaning fractured) and as sloughing into the entries (Tr. 53-54, 55, 60). I also accept his testimony that during the course of the inspection he observed two miners working in the area, one being the section foreman, as well as his testimony that all of the section crew had to travel in the area of the cited ribs at some time during the shift (Tr. 55, 58).

Bush believed that the rock that was layered between the coal seam and the immediate roof in one of the cited ribs was likely to travel further into the entry when the ribs rolled (Tr. 55). This tesimony was not disputed, nor was his opinion that if the coal or rock hit a miner working or traveling in the vicinity of the rib, the miner could suffer abrasions, broken bones, or even be killed (Tr. 56).

The parties generally agreed that the overburden was putting increased pressure on the roof and ribs (Tr. 59, 66), and that when retreat mining was underway, more pressure was exerted on the ribs than might otherwise have been the case (Tr. 66). It is logical that this pressure caused the fractures and sloughing Bush observed. It is also logical that given the pressure, the cracked and sloughing ribs would have rolled out at any time and that the roll would have injured a miner working or traveling in the immediate vicinity of the roll (Tr. 58).

For these reasons, I conclude that the record amply supports finding that the miners on the 004 section were not protected from injuries related to rib rolls, and that the violation existed as charged.

S&S AND GRAVITY

The violation contributed to the hazard that members of the section crew would suffer abrasions, broken bones, or worse from being struck by coal and/or rock. Given the continued pressure on the ribs and their fractured state, I have concluded the ribs would have rolled at any time. Also, given Bush's unrefutted testimony that two miners were working in the immediate vicinity of one of the cited ribs when the violation was first observed, and his testimony that as mining continued all section crew members would have worked or traveled in the vicinity of the ribs, it was reasonably likely the rolling coal and/or rock would have stuck and injured miners (Tr. 68). Obviously, abrasions, broken bones, or worse are injures of a reasonably serious nature. Therefore, I conclude the violation was S&S.

In addition, the combination of the likelihood of the injuries and the potential degree of the injuries resulting from the violation meant that the violation was very serious.

NEGLIGENCE

I have accepted Bush's testimony that he observed the section foreman working in the immediate vicinity of one of the cited ribs (Tr. 57). Even though the cracking and sloughing was readily visible, the foreman had done (and was doing) nothing to correct the situation. His failure represented a lack of care required by the circumstances, and it is attributable to Harlan.

In addition, I infer from the extensiveness of the cited conditions that they had been in existence for some time and should have been observed and noted by the preshift examiner. Therefore, the conditions should have been corrected or have been in the process of being corrected.

For both of these reasons, I find that the company was negligent in allowing the violation to exist.

Citation	Date	30 C.R.F. §	Proposed Penalty
4243921	3/11/96	75.220	$431

Citation No. 4243921 states in part:

> The approved roof control plan was not followed on the 005 M.M.U. A row of pillars was mined and 4 of the pillars were cut in one direction and 2 cut in the opposite direction in the same row. The plan stipulates that [the] sequence of mining stay the same in each row (Gov. Exh. P-12).

In addition to alleging a violation of the standard, the citation includes an S&S finding.

Section 75.220 requires in part that "[e]ach mine operator shall develope 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."

Bush explained that on March 11, 1996, the 005 M.M.U. Section was in the process of retreat mining. He described retreat mining as requiring the "full extraction of the pillars that were left from advance mining" (Tr. 71). The approved sequence for the extraction of the pillars was set forth in the mine roof control plan (Gov. Exh. P-10). Under that sequence, a cut was made in the middle of the pillar (the key cut) and the roof was supported by roof bolts. Then, a second cut was made from the middle on the other side of the pillar and the pillar was split in two.

The two poritons of the pillar are the "wings". Each wing was then cut in a series of three cuts, one wing at a time. However, a small triangular portion of each wing was left standing. (Tr. 72-73; Gov. Exh. 10 at 135 (on the exhibit designated as page 24, Drawing No. 15)).

The pillars on the section were square and measured 70 feet by 70 feet. They were located on centers of approximately 90 feet, making the entries between the pillars approximately 20 feet wide (Tr. 74; Gov. Exh. P-11). The pillars were in rows of six.

On March 11, Bush was concerned with the row closest to the gob -- the most inby row (see Gov. Exh. P-11). When Bush arrived on the section, the two pillars on the furthest left when facing the gob (pillars 1 and 3 on Gov. Exh. P-11) had been mined completely, as had the two on the farthest right when facing the gob (pillars 4 and 2 on Gov. Exh. P-11) (Tr. 76-77). The two middle pillars (pillars 6 and 7 on Gov. Exh. P-11) were being mined (Tr. 74-75). Bush determined that the key cuts in pillars 1 and 3 had been made from right to left when facing the gob and that the key cuts in pillars 4 and 2 had been made from left to right. Bush observed that pillars 6 and 7 were being cut straight ahead toward the gob (Tr. 75; Gov. Exh. P-11).

As Bush understood the plan, because the key cuts in the first pillars had been cut from right to left, the rest of the key cuts were required to be cut from right to left. (Bush stated, "[H]owever you attack the first pillar, you have to follow that sequence in that row all the way across" (Id.). "[Y]ou're supposed to mine [the pillar line] the same way all the way across" (Tr. 81, see also Tr. 82)). According to Bush, Harlan's failure to cut the two right and the two middle pillars in the same direction as the two left pillars violated a provision in the plan which stated, "More than two pillars may be worked in cycle, provided that the same sequence of recovery and support is followed" (Tr. 89, see also Tr. 91-92; Gov. Exh. 10 at 136).

Bush acknowleged, however, that the roof control plan allowed deviation from the cutting sequence. A provision entitled "Additional Safety Precautions For Retreat Mining (Pillaring)" stated, "The standard cut sequence as indicated may be deviated from where adverse conditions make it impractical to attack a pillar in the locations indicated" (Gov. Exh. 10 at 116 (on the exhibit designated as page 7); Tr. 83-84). Bush stated that although this provision allowed the company in the presence of adverse conditions to change the direction in the way the pillars were "keyed" (Tr. 86), if such a deviation was made, it had to be followed consistently all of the way across the row of pillars. ("[T]hey can attack the pillar from a different direction if conditions warrant, but they have to follow that sequence all the way across" (Tr. 84)).

Although Bush stated that he observed no adverse conditions that warranted deviation from the standard cut sequence (Tr. 85), he agreed that he did not know what the actual roof conditions were when pillars 1, 3, 4 and 2 were mined, because he was not then present on the section. Nor, did he know what the conditions were when mining was started on pillars 6 and 7, because, when he arrived on the section mining had commenced (Tr. 86).

Bush believed that cutting the pillars in the same row in different directions could cause the weight distribution of the roof to shift and could lead to hazardous roof falls (Tr. 76, 79). Such a deviation from the roof control plan could also lead to some of the pillars being crushed or the wings being crushed while miners worked on them (Tr. 76). The miners most endangered were the continuous mining machine operator, his helper, and the shuttle car operator, all of

whom were engaged in mining the number 6 and 7 pillars when Bush reached the section (Tr. 78). Bush noted that 1 month prior to March 11, a continuous miner operator had been trapped twice by roof falls while mining pillars (Tr. 79).

Bush believed the company was negligent in failing to follow the plan because the section foreman was responsible for knowing what the roof control plan required and should have known how the pillars were cut (Tr. 78).

The alleged violation was abated when the continuous mining machine was pulled back from pillars 6 and 7 and the company abandoned them (Tr. 80).

Blevins, the mine superintendent, testified that he accompanied Bush to the section. Blevins confirmed that when he and Bush arrived on the section the crew was in the process of mining the center pillars. Some of the roof between pillars 6 and 7 had fallen, and the crew had installed roof bolts between the pillars. The crew also had installed two lines of breaker posts at the "lower end" of the entry between pillars 6 and 7 because of the adverse roof conditions between the pillars (Tr. 94). In Blevin's view, the key cuts in pillars 6 and 7 had to be taken from the pillars' sides furthest from the gob because of these breaker posts (Tr. 95).

In addition, Blevins maintained that the key cuts in the two pillars on the left (pillars 1 and 3) were made from right to left because there was a swag on the far left side of the section. He also maintained that the key cuts in the two pillars on the right (pillars 4 and 2) were made from left to right because of a similar swag on the right side of the section. The swags prevented the key cuts in the two groups of pillars from being mined in the same direction (Tr. 96-97). (A "swag" is defined as a "subsidence ... of the roof" (US. Department of the Interior, *A Dictionary of Mining, Mineral, and Related Terms* (1968) at 1109.)

THE VIOLATION

It is a fundamental principle of mine safety law that provisions of a plan required to be adopted by the operator and approved by the Secretary are enforceable as mandatory standards (see, *Zeigler Coal Co. v. Kleppe*, 536 F.2d 398 (D.C. Cir 1976) (enforcement of ventilation plans)). Section 75.220 requires the operator to adopt and the Secretary to approve such a plan. Thus, the question of whether there was a violation of the standard is resolved by compairing the factual situation in the mine with the requirements of the adopted and approved plan.

Bush determined that the key cuts were taken from right to left in pillars 1 and 3 and from left to right in pillars 4 and 2 (Tr. 76-77). In addition, he determined that the key cuts in pillars 6 and 7 were taken straight ahead, toward the gob (Tr. 75-77). Blevins did not disagree with Bush about the direction in which the pillars were cut (Tr. 95). Therefore, I find that the key cuts were mined as described by Bush.

Under the roof control plan, whether one pillar was mined at a time (a one pillar cycle) or whether two pillars are mined in sequence (a two pillar cycle), Harlan was required to follow "the same sequence of recovery and support" (Gov. Exh. 11 at 135, 136). To Bush, this meant taking

cuts from the pillars in the same direction (Tr. 81). Bush's interpretation conforms to both the words and the diagrams of the plan, and I conclude he was correct (Gov. Exh. 11 at 135, 136).

Since the cuts in the pillars were not made in the direction of the first key cut – i.e., from right to left — Harlan violated the plan, unless Harlan can establish the plan contained an applicable exception to the requirment.

As previously noted, the plan contained a provision titled "Additional Safety Precautions for Retreat Mining (Pillaring)." The complete provision stated:

> The standard cut sequence as indicated may be deviated from where adverse conditions make it impractical to attack a pillar in the locations indicated. Such deviation is permitted only where equivalent pillar support is maintained in the alternate method (Gov. Exh. 11 at 116 (designated page 7 on exhibit)).

Blevins maintained that roof conditions between pillars 6 and 7 and the resulting roof support (the breaker posts) between the two pillars prevented mining the key cut from right to left (Tr. 94-95). He also testified that a swag on the far right side of the entry prevented mining the key cuts on pillars 4 and 2 from right to left (Tr. 96-97). Bush candidly admitted that he did not know what the actual roof conditions were when pillars 1, 3, 4, and 2, were mined and that he did not know what the conditions were when mining started on pillars 6 and 7 (Tr. 86). I accept Blevins testimony regarding the presence of the breaker posts and the swags.

However, given these roof conditions, Harlan did not prove the exception applied. First, while the swag and the low roof caused by the swag on the right side of the section may have prevented pillars 4 and 2 from being cut from right to left, there is no reason apparent why pillar No. 7 could not have been cut from right to left. The adverse roof conditions and the breaker posts were between the middle pillars, not on their right. Second, the exception states that "deviation is permitted only where equivalent pillar support is maintained" (Gov. Exh. 11 at 116). In other words, Harlan also had to show that it maintained pillar support equivalent to the support provided by full compliance. Harlan did not introduce any evidence concerning this critical condition. Because, I cannot find that Harlan has established the applicability of the exception, I conclude that the company violated section 75.220.

S&S AND GRAVITY

The Secretary did not establish a reasonble likelihood that the hazard contributed to would result in an injury. Bush was asked why he believed an accident was reasonably likely and he responded "Because ... mining ... off-sequence like that causes ... irregular weight distributions and can cause, could cause roof falls and subject people to serious and even fatal injuries" (Tr. 78). This minimal testimony was too tentative ("can cause, could cause") to establish reasonable likelihood, and there was no additional testimony offered by the Secretary regarding "likelihood." Further, although Bush testified that some roof in the area of the

005 MMU Section had fallen twice within a month during prior pillar recovery operations, he did not link the falls to deviations in the sequence of recovery, and there is not basis to assume that such was the case.

Despite the lack of proof regarding the inspector's S&S finding, the Secretary established the violation was very serious. The parties agreed some of the roof between the middle pillars had fallen in a way not contemplated in the plan (Tr. 78, 96). This created an adverse roof condition in the middle of the pillar line. There is no indication that the mining sequence Harmon was using provided support equivalent to that provided by the plan. During retreat mining the roof is supposed to fall in a carefully controlled and predictable way. When the plan is not followed, control and predictability are lost. Pillar recovery is dangerous under the best of circumstances. Failure to follow the approved plan for recovery makes it even more so, as evidenced by the falls between the middle pillars.

NEGLIGENCE

Bush believed Harlan was negligent because the section foreman, who was responsible for knowing what the roof control plan required, should have made certain that the plan was followed (Tr. 78). Bush was right. The foreman was responsible for compliance. When there was noncompliance and when there was not an acceptable excuse for the noncompliance (as in the case of pillar No. 7, for example), the foreman, and through the foreman the company, did not meet the standard of care required.

Citation	Date	30 C.R.F. §	Proposed Penalty
42433726	2/27/96	75.1106-3(a)(2)	$288

Citation No. 4243726 states:

> The oxygen & acetelene tanks located in the No. 2 entry outby the 004 MMU last open cross cut were not secured in an upright position (Gov. Exh. P-3).

In addition to alleging a violation of the standard, the citation includes an S&S finding.

Section 75.1106-3(a)(2) requires in part that "[l]iquified and nonliquified compressed gas cylinders stored in an underground coal mine shall be [p]laced securely in storage areas designated ... for such purpose, and where the height of the coalbed permits, in an upright position ... secured against being accidentally tipped over."

MSHA inspector Rober Clay testified that on February 27, 1996, during an inspection of the 004 MMU Section, he saw one oxygen tank and one acetylene tank leaning against the rib of a coal pillar, in an active roadway, approximately 300 feet outby the face of the section (Tr. 100-101, 104). (Clay did not know if any oxzgen or acetelyne remained in the tanks (Tr. 104)).

According to Clay, the tanks should have been stored securely in an upright position to prevent them from being damaged by falling rocks or mobile equipment. The roadway was used by "very large equipment" (diesel scoops, battery scoops, diesel personnel carriers). He described the diesel scoops as being "big as an automobile" and the battery powered scoops as being 25 feet long and 10 feet wide. He also explained that the diesel scoops and the diesel personnel carriers provided their operators with very limited visibility (Tr. 103).

Tracks on the mine floor indicated to Clay that equipment had come within 12 inches of the tanks (Tr. 105). If the tanks had been hit and punctured, any gas they contained, could have become very volatile and could have exploded (Tr. 101, 102). If the acetylene and ozygen mixed, the explosion could have been even more violent. In fact, Clay maintained that two miners had been killed in an explosion caused by the puncturing of tanks identical to the cited tanks (Tr. 102, 103). Clay had seen a tank rupture and produce a "very violent expolsion and fire" at the mine (Tr. 103).

Clay was asked why he found the alleged violation to be S&S, and he replied it was because serious burns or fatalities likely would occur as the result of damage to the tanks. He graphically described what happened when one tank exploded, "[A] miner was literally blown to bits. There were very, very few body parts left intact" (Tr. 103).

The citation was issed after the section had been both preshift examined and onshift examined. In addition, there was a foreman on the section. Further, according to Clay, everyone who worked on the section had traveled past the tanks during the course of the shift (Tr. 101-102). Even though the tanks were in plain view, they had not been placed upright and secured.

The condition was corrected when the tanks were tied upright (Tr. 103).

THE VIOLATION

The standard requires compressed gas cylinders, such as those cited by Clay, to be placed in designated storage areas and secured against accidentally tipping over. Harlan did not dispute Clay's testimony that the cylinders were leaning against the rib, as Clay put it, "like a chair... against a wall" (Tr. 104). The cylinders were not secured against accidentally tipping over, and I find that the violation existed as charged. Clay testified that he did not know whether the cylinders contained oxygene and acetylene, but this lack of knowledge does not impact on the violation. The standard makes no distinction between empty or full cylinders.

S&S AND GRAVITY

Clay's testimony regarding the hazards posed by the violation was compelling. Acetelyne and ozygen tanks are indeed potentially very hazardous, and I agree with Clay that were both to rupture at the same time, the hazard would be compounded (Tr. 102-103). The fact that mining equipment passed within 1 foot of the tanks, and the fact that on some of the equipment, the driver's field of vision was restricted, in my opinion made it reasonably likely that as mining continued on the section, the tanks would have been knocked over, punctured and

a "very violent explosion and fire" would have resulted (Tr. 103). Since one of the pieces of equipment that regularly passed by the tanks was a mantrip, it was also reasonably likely that the explosion and fire would have resulted in serious injuries or death to one or more miners (Tr. 103). Accordingly, I conclude Clay was correct when he found that the violation was S&S (see, *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 2305, 2306-10 (October 1984); *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1834, 1838-40 (August 1984)).

In addition, this was a serious violation. The inspector compellingly testified about what could happen if the unsecured tanks were knocked over and punctured. The explosion and fire the inspector described could have been catastrophic to those in the immediate vicinity of the tanks (Tr. 103).

NEGLIGENCE

The area had been preshift and onshift examined. A foreman was working on the section (Tr. 102). The tanks were in plain view. The visually obvious condition should have been noticed and corrected. In allowing the tanks to remain leaning against the rib, Harlan negligently failed to exercise the care required of it.

KENT 96-320

Citation	Date	30 C.F.R. §	Proposed Penalty
4244151	4/28/96	75.202(a)	$252

Citation No. 4244151 states:

> A loose inadequately supported coal rib approximately 3 [feet] high, 5 [feet] long & 14 [inches] thick was observed on the 9 Right Section[,] No. 3 entry. The rib was on the corner of the No. 3 Entry on 9 Right (Gov. Exh. P-15).

(The citation describes the dimensions of the rib as "3' high, 5" long & 14" thick". Clay's testimony confirms that "5"" is a typographical error and that he meant to write "5'" (Tr. 122).)

In addition to alleging a violation of the standard, the citation includes an S&S finding.

The requirements of section 75.202(a) are set forth above.

Clay arrived at the 9 Right Section, No. 3 Entry during the third shift, a service shift. Mining equipment was being moved on the section to prepare the area for the day shift. Three or four miners were working (Tr. 121-122).

Clay noticed that a pillar on the section had a fractured rib (Tr. 122, 125-126). The fracture had caused part of the rib to pull away from the rest of the pillar (Tr. 122). (Clay described the part as 3 feet high by 5 feet long by 14 inches thick, or as "approximately the size

of a file cabinet" (Tr. 124)). The part was leaning out from the rib toward the roadway. Clay could see rock dust behind the fracture (Tr. 122, 124). The rock dust indicated to Clay that the rib had been fractured for some time, but he agreed that ribs can fracture at any time, especially in an area where the pillars have not yet been mined (Tr. 124, 128).

The rib was coal, but Clay noticed that the fractured part of the rib had a vein of rock running through it. The rock added weight to the leaning part of the rib, and Clay believed it was going to fall into the entry (Tr. 122).

When it fell, Clay feared it would seriously injure or kill a passing miner (Tr. 123). Because preparations were underway to move the section, there was much activity in the immediate area of the fracture, and Clay cautioned a miner who was walking by the fractured rib to walk in the middle of the entry (Tr. 124).

Clay explained that in a 24-four hour period, the area where the loose rib was located had to be preshift examined three times. Further, it had to be onshift examined during each of the three shifts. The fractured rib was obvious.

The condition was abated when the loose rib was pulled down (Tr. 125).

THE VIOLATION

Clay's testimony that miners both worked and traveled in the area of the fractured rib was not disputed, nor was his description of the fractured rib's size, composition, and condition. I credit his testimony and his opinion that the fractured rib would have fallen into the entry and injured or killed any miner unlucky enough to be passing by. I conclude that the cited rib was not supported or otherwise controlled to protect miners and that the violation existed as charged.

S&S AND GRAVITY

The violation was both S&S and very serious. The hazard contributed to by the violation was that the inadequately supported rib would fall into the entry and seriously injure or kill a passing miner. The fact that the fractured part of the rib was leaning into the entry, the fact that it carried the added weight of a rock vein, and the fact that miners worked on the section who frequently passed the rib, made it reasonable likely that as mining continued an accident would occur. Further, given the size of the fractured rib, I agree with Clay that at the least the resulting injuries would have been of a reasonably serious nature.

The gravity of the violation was attested to by the fact that the rib was more than just loose, it was leaning into the entry, a fact from which I infer that it was getting ready to fall. When a rib part that was the size of a file cabinet was ready to topple on passing miners, the failure to support or otherwise to control the rib was very serious indeed.

NEGLIGENCE

Clay's testimony established the inadequately supported or otherwise controlled rib was due to the preshift examiner's failure to exercise the care required by the circumstances and thus was due to Harlan's negligence. The presence of rock dust behind the fracture permits the inference that the fracture was is in existence at least at the beginning of the shift during which Clay found it. (No rock dusting was done on the service shift.) The preshift examination for the service shift had been conducted and the preshift examiner should have detected the condition and have had it corrected.

Citation	Date	30 C.R.F. §	Proposed Penalty
4244150	4/29/96	75.202	$252

Citation No. 4244150 states:

> Loose inadequately supported coal ribs were observed at various locations on the 004 MMU where men normally work and travel (Gov. Exh. P-23).

In addition to alleging a violation of the standard, the citation includes an S&S finding.

The requirements of section 75.202(a) are set forth above.

Clay was conducting an inspection, on April 29, 1996, on the 004 MMU Section when he observed loose, inadequately supported coal ribs at various locations where miners normally worked and traveled. He described one area where he saw the ribs as "[i]n the last open crosscut" (Tr. 135). This including an area "near the ratio feeder on the belt line" (Tr. 130). Clay especially remembered the loose rib by the ratio feeder because the roadway narrowed there from 18 or 20 feet to 6 feet, and miners had to travel right past the rib (Id.). He also saw some loose ribs outby the last open crosscut (Tr. 135).

All of the loose ribs were within 300 feet of each other (Tr. 135). Some, but not all, of the ribs had rock dust behind where they had fractured (Tr. 136). Because of weight from the overburden, some of the ribs had begun to separate from the pillars and the separated portions of the ribs were leaning out toward the roadway (Tr. 131, 134). In addition, some of the ribs contained a vein of rock (Tr. 131).

Harlan's safety director, Sargent, took issue with the number of ribs that were fractured and leaning. Sargent, who did not accompany Clay on April 29 (Tr. 138), stated that Harlan routinely pulled down such ribs (Tr. 137-138), although "[y]ou might find one occasionally that needs [to be taken] down" (Tr. 137). He believed if the ribs had been of the number and condition described by Clay, they would have been detected by the preshift examiner and the situation would have been corrected (Tr. 138).

Clay inspected the section during the early morning hours when the maitenance shift was underway. Work was being done on the section, including the area containing the ribs, and the area therefore had to be both preshift and onshift examined (Tr. 130-131, 132). Clay did not know how long the ribs had been in the condition in which he observed them.

Should the ribs have fallen on a miner, a broken foot, leg, or even a fatality could have resulted. Separation of the ribs from the pillars indicated to Clay that "massive weight" was being exerted on the pillars. In addition, the rock in the ribs indicated that the separating ribs weighed more than if they were comprised solely of coal (Tr. 131). The fact that the ribs were beginning to separate from the pillars and were leaning into the entry, or, as Clay put it, were "pitching out," in Clay's opinion made it likely that the ribs would fall (Tr. 131).

The ribs were pulled down to abate the condition (Tr. 132).

THE VIOLATION

I credit Clay's testimony regarding the presence of the loose ribs. Harlan did not present any testimony by persons with first-hand knowlege of the conditions on the section (see, Tr. 138).

I also credit Clay's testimony that the ribs had fractured to the extent that they were leaning into the roadway and that "massive weight" on the pillars was causing them to fracture and lean (Tr. 131). Harlan did not offer any evidence to dispute this, nor did it offer anything to suggest that Clay's description of and explanation for the fractured ribs was other than accurate.

It is clear from the testimony that miners were working on the section when Clay observed the ribs and that miners worked and traveled in the immediate vicinity of the ribs during the shift (Tr. 130-131, 135). I agree with Clay that the ribs could have fallen, and if they struck a miner, that a serious injury or worse could have resulted.

Given all of this, the conclusion is inescapable that the cited ribs were not supported or otherwise controlled to protect the miners from rib falls. In other words, the conclusion is inescapable that Harlan violated the standard as charged.

S&S AND GRAVITY

The violation was both S&S and very serious. The violation created a danger that miners would be injured by a rib fall — a hazard that otherwise should not have existed. That such an injury was reasonably likely was established by Clay's unrefuted testimony regarding the massive weight that was pressing down on the pillars (Tr. 131), by the fact that the weight had caused the pillars to fracture and the ribs to separate and lean into the roadway (Tr. 131, 134), and by the fact that during the course of continuing mining on the section, miners would travel

and work in close proximity to the ribs. In this regard, I note expecially Clay's testimony regarding the area near the ratio feeder where miners could not help but travel in harm's way (Tr. 130-135). Finally, Clay accurately stated that rib fall injuries could range from broken bones to a fatality, all of which are reasonably serious results (Tr. 131).

The widespread nature of the violation, extending as it did for 300 feet, increased the likelihood of injury. This, and the type of injuries the violation could have caused, leads me to conclude that the violation was very serious.

NEGLIGENCE

Clay testified without contradiction that some of the fractured ribs had rock dust in areas where they had pulled away from the pillars (Tr. 136). I infer from this that at least those ribs were in violation of the standard prior to the April 29 maitenance shift. Their condition should have been noted by the preshift examiner for that shift and reasonable care required the fractured ribs to be pulled down. They were not, nor was there any indication the company intended to correct the situation. Therefore, I conclude that Harlan negligently failed to exercise the care required by the circumstances.

Citation	Date	30 C.R.F. §	Proposed Penalty
4250669	5/8/96	75.604(b)	$252

Citation No. 4250669 states:

> A premanent splice in the 2 AWG, 480 VAC trailing cable extending to and serving the 004 MMU Fletcher roof bolter would not exclude moisture as required. The splice is approximately 150 [feet] from the machine itself. The cable is handled frequently (Gov. Exh. P-26).

In addition to alleging a violation of the standard, the citation includes an S&S.

Section 75.604(b) requires in part that "permanent splices in training cables ... shall be ... [e]ffectively insulated and sealed so as to exclude moisture."

Clay noticed, on May 8, 1996, during an inspection of the 004 MMU Section, the trailing cable to the section's roof bolting machine contained a defective permanent splice. The ends of the splice had not been taped (Tr. 107, 110), and Clay could "see down into the splice" (Tr. 107). The splice was damp and there was water on the section (Tr. 109, 110).

The trailing cable was handled frequently by miners. Several times during the mining cycle it was picked up and suspended from the ceiling to allow the continuous mining machine to travel under it (Tr. 109, 110). To lift and move the cable, miners used their hands rather than hot sticks or ropes or other devices (Tr. 112).)

The cable carried 480 volts of electricity, which Clay described as "five times enough current to cause an electrocution" (Tr. 109). Clay felt that a miner who picked up the cable and touched the open splice could receive a serious electrical burn (Id.). In fact, because there was water on the section, and because the splice was damp, Clay believed it more likely that the miner would be killed (Tr. 110).

In Clay's opinion, Harlan was negligent because the roof bolting machine had to be examined on a weekly and monthly basis. Further, the cable was lying in an area that had to be examined by both the preshift and onshift examiners. Clay maintained that the open splice was "very obvious" (Tr. 110, see also Tr. 110-111). The splice appeared to Clay to have been "open for a while," Clay guessed for more than 24 hours (Tr. 112).

The condition was abated when the ends of the splice were taped (Tr. 111).

THE VIOLATION

Section 75.604(b) requires permanent splices on trailing cables to be "effectively insulated and sealed so as to exclude moisture". Clay's testimony regarding the condition of the splice was not challenged, and I find that it was not taped at the ends, was open, and damp. As such, the splice did not conform to the requirements of the standard, and the violation existed as charged.

S&S AND GRAVITY

The violation was both S&S and very serious. I have accepted Clay's unrefutted testimony that the open splice was damp. I have also accepted his testimony that there was water on the section and miners frequently picked up the cable. As mining continued the cable would be picked up, and rehung again and again. In view of this, and in view of the fact that this would have been done on a section where water was present, I conclude that it was reasonably likely that a miner would have been injured seriously. Indeed, a serious injury was the "best" that could have been expected under the circumstances. These factors are more than enoungh to support the inspector's S&S finding (see, *ABM Coal Co.*, Inc. 16 FMSHRC 2345, 2352 (Hodgdon, ALJ)).

The violation was very serious because it presented the very real likelihood that a miner would be electrocuted while handling the cable.

NEGLIGENCE

Clay testified without dispute the violation was readily visible. From the appearance of the splice, Clay believed it had been open for at least 24 hours. Clay's opinion was a reasonable inference, and I credit it.

Given the fact that the defective splice was visually obvious, it should have been detected at least by the preshift examiner prior to Clay's arrival in the area, and perhaps by the onshift examiner as well. Had the preshift examiner exercised the care required, the splice would have been repaired or the cable would have been removed from service before Clay observed the violation. The failure of the examiner is attributable to the company and represents negligence on Harlan's part.

Citation	Date	30 C.R.F. §	Proposed Penalty
4250670	5/8/96	75.517	$252

Citation No. 4250670 states in part:

> The 2 AWG, 480 VAC trailing cable extending to and serving the 004 MMU Fletcher twin head roof bolter was not adequately insulated and fully protected where the outer jacket of the cable has been ruptured and the energized power conductors were visible. The cable's damaged area is approximately 250 [feet] from the machine & is frequently handled (Gov. Exh. P-27).

In addition to alleging a violation of the standard, the citation includes an S&S finding.

Section 75.517 requires in part that "power cables ... shall be insulated adequately and fully protected."

During an inspection of the 004 MMU Section, Clay noticed a rupture in the outer jacket of the trailing cable of the section's roof bolting machine. Clay could see the insulated power conductors inside the jacket (Tr. 141). The ruptured area was about 250 feet from the machine, and was readily visible (Id.). Mining was in progress on the section (Tr. 151).

The jacket was designed to protect the conductors (Tr. 147). Clay believed that in order for the jacket to be torn open, some sort of extensive force had been applied to the cable. He stated, "[A]t some point in time, this [cable] ... had a heck of a lick on it" (Tr. 143). Clay also believed it likely that the same force that ruptured the jacket did internal damage to the conductors (Tr. 145). He maintained, that the cable could not be ruptured without damaging the conductors (Tr. 152). He noted that if even a small portion of a conducter were damaged to the point of being exposed it could conduct enoungh electricity to electrocute a miner (Id.).

The cable was moved by hand to the sides of the entries so that mobile equipment could pass by (Tr. 148). Therefore, as mining continued the cable was being handled constantly. It was also dragged through wet areas of the section (Tr. 143). Clay feared that miners who picked up the cable would be seriously burned or electrocuted (Tr. 143).

Clay found the breech in the cable around 7:00 p.m. A foreman was in the area. Miners also were present (Tr. 149). Clay admitted he did not know when the cable had ruptured and he agreed the condition could have "just happened" (Tr. 151).

The condition was corrected when the ruptured area was patched (Tr. 149).

THE VIOLATION

Clay's testimony that the cable's outer jacket was ruptured and the interior insulated conductors were exposed, was not refutted. A cable with an opening in its outer jacket through which its interior insulated conductors are exposed is not a fully protected cable. The outer jacket not only protects the conductors inside the cable, it provides them with insulation additional to the insulation with which each conductor is wrapped. Therefore, when the jacket is ruptured, the cable is not insulated as designed. In other words, it is not "adequately insulated" as required by the standard (see, *Beech Fork Processing, Inc.*, 16 FMSHRC 1346, 1354 (Hodgdon, ALJ)).

S&S AND GRAVITY

The violation was both S&S and very serious. I have accepted Clay's testimony that the rupture exposed the cable's interior conductors (Tr. 141). I also accept his testimony that mining was in progress, and as it continued, miners working on the section would have to manually move the cable to the side of the entry to allow equipment to pass (Tr. 148).

I recognize that the Secretary presented no conclusive evidence that anything was wrong with the conductors or with their interior insulation. Nonetheless, I conclude the violation was S&S. I agree with Clay that whatever caused the cable to rupture probably did so with such force that the interior conductors were damaged and presented an immediate shock hazard (Tr. 152). I note Clay's testimony that a small strand of a conductor, sticking through a pin size hole in the conductor's insulation, was enough to electrocute a miner (Tr. 145).

I also conclude it was reasonably likely that as mining continued a miner would pick up the cable and be seriously injured or electrocuted. In reaching this conclusion, I am congnizant that Commission Judge Avram Weisberger has held that a violation of the standard was not S&S when there was no evidence of defects in any of the inner conductors (*Harlan Cumberland Coal Co.*, 18 FMSHRC 1447, 1454 (August 1996)). However, I read the Commission's decision in

U.S. Steel Mining Co., Inc. as recognizing that a defect in the outer jacket weakens the protection afforded by the inner insulation to the extend that it is reasonbly likely the defect will contribute to a miner being seriously injured or electrocuted as mining continues (7 FMSHRC 1573 (July 1984)).

The violation was very serious because it presented the very real likelihood that a miner would be seriously burned or electrocuted when handling the cable.

NEGLIGENCE

The testimony does not support finding that Harlan was negligent. While the violation was visually obvious, Clay did not testify regarding evidence suggesting the jacket had ruptured during previous shifts, or was ruptured when the preshif or onshift examinations were conducted for the shift during which he found the condition. Rather, he agreed that the break in the cable's jacket could have "just happened" (Tr. 151). I cannot find that Harlan knew or should have known of the cable's condition.

KENT 96-321

Citation	Date	30 C.R.F. §	Proposed Penalty
4250624	5/14/96	75.604(b)	$252

Citation No. 4250624 states:

> A permanent splice approximatley 300 [feet] from the machine would not exclude moisture at this location in the 2/0 995 VAC trailing cable extending to and serving the 005 MMU ... continuous miner ... located in the No. 3 entry (Gov. Exh. P-36).

In addition to alleging a violation of the standard, the citation includes an S&S finding.

The requirements of section 75.604(b) are set forth above.

Clay inspected a continuous mining machine on the 005 MMU Section. The power to the machine was disconnected and he inspected the machine's trailing cable. Approximately 300 feet from the machine, he came upon a permanent splice that was open. Clay could see into the splice. He could see the interior conductors. It was obvious to Clay that the splice would not exclude moisture (Tr. 113-115).

The cable carried 995 volts of electricity, voltage Clay dscribed as "very lethal" (Tr. 116, see also Tr. 114). Because the splice was open, water — an excellent conductor of electricity — could get into the cable and around the conductors (Tr. 115). There was water in the section and some of the cable was lying in water. Moreover, the continous mining machine itself was provided with water (Tr. 115).

Clay terstified that during the shift, the cable was handled frequently by miners — at least, 100 times a shift. The miners pulled the cable to the side of the roadway to get it out of the way of passing equipment (Tr. 115-116, 117). Given the number of times the cable was handled, Clay believed a miner would be electrocuteed because of the defective splice (Tr. 116-117).

The splice had been properly taped, but the tape had worn away. Clay estimated the splice had been open to moisture "for a couple of shifts at least" (Tr. 119). Because the defective splice was visually obvious, Clay thought the preshift examiners should have detected the condition (Tr. 117). He also observed that the equipment had to be examined by a certified electrician on a weekly basis (Id.).

The condition was abated when additional insulation was applied to the spliced area and when both ends of the splice were taped (Tr. 118).

THE VIOLATION

Clay's testimony that the splice on the trailing cable was open and he could see into the splice was not disputed. An open splice is not effectively insulated and sealed to exclude moisture. The violation existed as charged.

S&S AND GRAVITY

The violation was both S&S and very serious. I accept Clay's unrefutted testimony that there was water on the section and parts of the cable were lying in water (Tr. 115). I also accept his testimony that during the course of a shift, miners frequently pulled the cable to the side of the roadway (Tr. 115-116, 117). There is no dispute that the cable carried 995 volts of electricity and Harlan did not contest Clay's description of the voltage as "very lethal" (Tr. 116).

Whether or not the open splice became wet, it posed a very dangerous shock hazard to miners. The presence of water on the section intensified that hazard, and the fact that the cable was handled at least a 100 times a shift, as Clay testified (Tr. 117), made it reasonably likely that as mining continued on the section, a miner would be severly shocked or electrocuted.

In addition, the condition of the splice, the "very lethal" voltage carried by the cable, and the fact that the cable was handled frequently meant this was a very serious violation.

NEGLIGENCE

The defective splice was readily visible. The tape had worn away. I credit Clay's estimate, based upon the appearance of the splice, that the slice had been in violation of the standard for at least two shifts (Tr. 119). I conclude that had the preshift examiners exercised the care required, the defective nature of the splice would have been detected and the splice would have been repaired or the cable would have been taken out of service. The examiners were negligent, and their negligence is attributable to Harlan.

Citation	Date	30 C.R.F. §	Proposed Penalty
4250672	5/18/96	75.400	$252

Citation No. 4250672 states:

> Combustible material in the form of float coal dust has acumulated in and on the energized power conductors of the 150 KVA 4,160 VAC line power center located outby the 004 MMU tailpiece (Gov. Exh. P-30).

In addition to alleging a violation of the standard, the citation includes an S&S finding.

Section 75.400 requires in part that "[c]oal dust, including float coal dust ... shall be cleaned up and not be permitted to accumulate in active workings, or on electric equipment therein."

Clay conducted an inspection of the power center for the 004 MMU Section. The power center was located approximately 500 feet outby the section's tail piece. The power lines into the center carried 4,160 volts of electricity. Two transformers in the center "stepped down" the voltage to make it useable by mining equipment (Tr. 153-154).

Clay shone a flashlight through a window in the side of the power center. Clay saw black float coal dust in and on the energized conductors of the center (Tr. 153, 155). Clay believed the presence of the float coal dust created an explosion and fire hazard. He noted that there were exposed conductors inside the power center, that the conductors could arc, and that an electrical arc could provide an ignition source for the float coal dust (Tr. 154). In addition, there were circuit breakers on the transformers and they too could arc and ignite the dust (Tr. 157, 160). He also noted that when the transformers "stepped down" the voltage the transformers generated a great deal of heat (Tr. 154-155). This heat as well could ignite the float coal dust (Tr. 155). He described float coal dust as extremely combustible (Tr. 160).

If the float coal dust ignited there was the possibility that miners could be burned in the resulting explosion and fire (Tr. 156). Clay believed that 10 to 12 people worked inby the power center. This constituted a normal production shift at the mine (Id.). All of the miners inby the center were endangered by the violation.

Clay thought the float coal dust entered the power center through the center's ventilation louvers (Tr. 158-159). In Clay's opinion, it "took some time[,] ... more than ... a shift or two[,] for th[e] float dust to accumulate" (Tr. 159). Therefore, the accumulation should have been detected and eliminated (Tr. 157, see also Tr. 158).

The condition was abated by removing the dust (Tr. 158).

THE VIOLATION

The standard specifically prohibits the accumulation of float coal dust on electrical equipment in active workings. Clay's unrebutted testimony establishes the presence of the cited dust on the conductors in the power center — in other words, on the electrical equipment. Clay testified the power center is moved as mining progresses (Tr. 160). To do this miners must work around the power center. I infer from this that the power center was in an active working. The violation existed as charged.

S&S AND GRAVITY

The violation was both S&S and very serious. As Clay testified, float coal dust is extremely combustible (Tr. 154). Moreover, I credit his testimony that electrical arcing inside the power center was not uncommon and the transformers in the power center generated a great deal of heat (Tr. 157,160). I find, the arcing and heat provided potential ignition sources for the float coal dust (Tr. 157, 160).

An explosion and/or fire at the power center would have subjected miners working around the center to injury due to burns or to smoke inhalation. I conclude that given the presence of the arcing, the heat, and the extreme combustability of the float coal dust, it was reasonably likely that as mining continued the dust would have ignited, and miners would have been injured. Commission Administrative Law Judge Jerold Feldman has said it best, "to allow combustible materials to accumulate on [or adjacent to] potential ignition sources is a very bad idea" (*Amax Coal Co.*, 18 FMSHRC 1868, 1871 (October 1996) (Feldman, ALJ) (appeal pending D.C. Cir. No. 1487)).

Obviously, the consequences to a miner who suffered burns due to the resulting explosion and/or fire, would be serious, perhaps even catastrophic. This was a very serious violation.

NEGLIGENCE

Clay was the only person to testify who viewed the accumulated float coal dust. He noted both the amount of the coal dust and its dark black color (Tr. 153-155). Therefore, I credit his belief that it took more than one or two shifts for the dust to accumulate (Tr. 160).

However, the testimony falls short of establishing Harlan's negligence, because Clay only testified that the power center is required to be examined weekly and monthly (Tr. 157), and there is no basis to infer the accumulation was present when such examinations were conducted, or that the propensity of float coal dust to accumulate in the power center was such that the power center should have been examined more frequently. Therefore, I find that Harlan was not negligent in allowing the prohibited accumulation to exist.

Citation	Date	30 C.R.F. §	Proposed Penalty
4250623	5/13/96	75.1713-7(b)	$252

Citation No. 4250623 states:

> The 004 MMU first aid kit was inadequate in that the required 2 cloth blankets were missing (Gov. Exh. P-35).

In addition to alleging a violation of the standard, the citation includes an S&S finding.

Section 75.1713-7(b) requires in part that among the first aid equipment keep underground are "[t]wo cloth blankets".

Clay testified that the required cloth blanks were not present on the 004 MMU Section. He maintained that cloth blanks are especially important underground, where they can provide warmth in a very cool environment (Tr. 163). In the event a miner is injured, and needs to be carried by stretcher, one blanket can provide insulation over the miner's body and the other can furnish insulation between the miner's body and the aluminum stretcher (Tr. 164). (Most stretchers are made of aluuminum and are cold to the touch (Tr. 163).) In Clay's opinion, the retention of body heat is important because is can keep the injured miner from going into severe shock (Tr. 164).

The first-aid equipment is required to be examined weekly by the section foreman (Tr. 163).

The condition was abated when two blankets were provided (Tr. 165).

THE VIOLATION

The parties stipulated that two cloth blanks were not among the first-aid supplies kept on the 004 MMU Section and that the violation existed as charged (Tr. 162).

S&S AND GRAVITY

The violation was not S&S and was not serious. The inspector's S&S finding is defective in that it does not meet the third element of the *Mathies* test. It was not reasonably likely that the hazard contributed to (the loss of body heat following an injury) would result in another injury. There are simply too many variables to allow a contrary conclusion — for example, it would be critical to know the type of injury sustained by the miner. Did it require him or her to be transported on a stretcher, and if so, was it an injury that might induce shock? How far was the injured miner from the portal? Of what was the stretcher constructed? (With regard to the latter unknown, the standard does not require all strethers to be made of aluminum).

Nor was the violation serious. The lack of blankets need not lead to an injured miner going into shock. While it is undeniably true that an injured miner may require protection from the cold, and while the required blankets are the most convenient way to provide the production, there are alternatives — for example, the outer garments of other miners and/or the cloth used to direct ventilation in the mine.

NEGLIGENCE

Also, the testimony falls short of establishing negligence on Harlan's part. Clay testified that the first-aid equipment must be examined weekly but did not offer an opinion as to how long the blankets had been missing or whether any special circumstances in the mine put Harlan on notice that it should have checked more frequently to make certain the blankets were present (Tr. 163).

Citation	Date	30 C.R.F. §	Proposed Penalty
4250628	5/14/96	75.518	$252

Citation No. 4250628 states:

> Adequate overload protection was not provided for the twin head Fletcher roof bolter on the 005 MMU. The instantaneous unit in the 480 VAC three phase breaker is a 6/12. The instantaneous unit was set on 11 and is required to be set on 6 as this is a 3 AWG cable (Gov. Exh. P-40).

In addition to alleging a violation of the standard, the citation includes an S&S finding.

Section 75.518 requires in part that "[a]utomatic circuit-breaking devices ... of the correct type and capacity shall be installed so as to protect all electrical equipment and circuits against short circuit and overloads." In addition, it requires, "[t]hree-phase motors on all electrical equipment [to] be provided with overload protection that will deenergize all three phases in the event that any phase is overloaded."

Clay testified that electrical circuits providing power to underground equipment are required to have overload and short circuit protection to protect miners who operate, handle, and work on the equipment (Tr. 167). While conducting an inspection of the 005 MMU Section, Clay found that the trip setting on the circuit breaker for the 480 volt, three-phase cable to the roof bolting machine was incorrectly set at almost twice the allowable setting (Tr. 167-168).

Clay explained that to determine whether a circuit breaker is of the correct capacity, it is necessary to refer to 30 C.F.R. § 75.601, and in particular to section 75.601-1, which contains a schedule that sets forth the maximum allowable instantaneous settings for circuit breakers providing short circuit protection for trailing cables (Tr. 170). If the setting of a circuit breaker for a trailing cable is too high according to the schedule in section 75.601-1, section 75.518 is violated (Tr. 172).

Here, the dial on the circuit breaker had didgets that equaled 200 amps each. The trailing cable had an AWG (average wire gauge) of 3 (Tr. 177). Under the schedule in section 75.601-1, the cable's circuit breaker maximum allowable instantaneous setting was 600, or didget 3 on the dial (Tr. 178-179, 180). However, Clay found that the dial was set at a didget that equaled 1100 amps, almost double that allowed (Tr. 181-182).

The danger presented by having the circuit breaker set at 11 was that "[t]he cable would actually burn up" before the breaker could deenergize the electricity (Tr. 172). (The transcript frequentlty misquotes Clay and others as saying "reenergize" rather than "deenergize".) Although Clay saw one person in the vicinity of the trailing cable when he cited the condition, he noted that seven miners worked on the 005 MMU Section, and he believed that all of the miners in the vicinity of the cable would be subject to electrical burns and/or smoke and fumes if the cable caught fire (Id.). He also believed that miners working inby the cable would be endangered by smoke carried inby (Tr. 173-174).

Clay thought that in the context of continued mining operations, a fire was reasonably likely. The longer the cable was in operation, the hotter it became. In addition, there were several splices in the cable which would raise the level of heat. The cable sometimes was used constantly on two shifts and at times on a third shift as well. Thus, there was "an excessive amount of heat" generated by the cable (Tr. 173).

Clay acknowleged, however, that he did not test the cable's ground fault protection, and he agreed that if the protection was working properly, it would deenergize the cable should the cable suffer an electrical overload (Tr. 176). Nonetheless, he maintained that even if the cable was deenergized, there could still be a fire before the electricity was cut off (Tr. 183).

The cable, the circuit breaker, and the settings were required to be examined on a weekly and monthly basis. Clay maintained that the examiners "found no problem and did nothing about [the high setting]", despite the fact that the setting was visually obvious to anyone who read the dials at the circuit breaker (Tr. 174).

Normally, when the shift began, the foreman or a certified electrician put in the circuit breaker. Either person easily should have observed the dials. When Clay found the condition, the shift was 2 or 3 hours old and the foreman was on the section (Tr. 175).

The violation was abated by resetting the circuit breaker (Tr. 175).

THE VIOLATION

Section 75.518 codifies section 305(m) of the Act (30 U.S.C. § 865(m)). Section 305 contains two general provisions for all electrical equipment. First, that all electrical equipment and circuits be protected from short circuits and overloads by automatic circuit-breaking devices or fuses. Second, that three-phase motors on all electrical equipment be provided with overload protection that will deenergize all of the phases in the event any phase is overloaded.

Section 306 of the Act contains provisions specifically related to trailing cables (30 U.S.C. § 866). Section 306(b) requires short circuit protection for trailing cables to be provided by circuit breakers "of adequate current-interrupting capacity" (30 U.S.C. § 866(b)). Mandatory safety standard 30 C.F.R. § 75.601 codifies section 306(b) Act, and section 75.601-1 specifics the maximum allowble instantaneous settings for trailing cable circuit breakers.

Harlan did not dispute Clay's testimony that the circuit breaker exceeded the allowable setting, and I find this was the case (Tr. 167-168). However, Harlan maintained that it did not violate section 75.518, the standard Clay chose to cite, and I agree. The problem is that Clay did not cite Harlan for a violation of section 75.601-1. Therefore, in order to find a violation, I must accept the Secretary's argument that the facts also encompass a violation of section 75.518. They do not.

Clay cited section 75.518 because he believed that its second sentence required the trailing cable to be provided with protection that would deenergize the cable in the event of an overload (Tr. 170). The second sentence of section 75.518 pertains to "[t]hree-phase motors on all electric equipment." It was not the three-phase motor of the roof bolting machine about which Clay was concerned, but rather the trailing cable, a part of the equipment regulated by section 75.601. When trailing cables have a separate status in the Act and the regulations,

violations of the requirements relating to trailing cables should be cited under such regulations. The violations should not be subsumed under a more general provision. In other words, the phrase "three-phase motors" in section 75.518 does not include the trailing cables that provide electricity to those motors. (In this regard, I note previous decisions of the Commission's judges upholding citations of section 75.601-1 when, as here, short circuit protection has been improperly set for a trailing cable providing power to mining equipment (*Ramblin Coal Company, Inc.*, 14 FMSHRC 1025, 1026 (ALJ Fauver); *C.W. Mining Company*, 12 FMSHRC 804, 862 (April 1990) (ALJ Morris)).

For these reasons, I conclude that the evidence does not support finding a violation of section 75.518.

Citation	Date	30 C.R.F. §	Proposed Penalty
4250629	5/14/96	75.518	$252

Citation No. 4250629 states:

> Adequate overload protection was not provided for the off standard 10 SC Joy shuttle car in use and located on the 005 MMU. The trailing cable is a No. 4 AWG. The instantaneous unit in the 480 VAC three phase breaker is a 5/10. The instantaneous unit was set on 687 amps. The maximum allowable setting for a cable this size is 500 amps (Gov. Exh. LP-41).

In addition to alleging a violation of the standard, the citation includes an S&S finding.

The requirements of section 75.518 are set forth above.

On May 14, 1996, Clay inspected the short circuit and overload protection for the trailing cable of the shuttle car used on the 005 MMU Section. The trailing cable size was 4 AWG, and the maximum allowable trip setting for the circuit breaker was 500 amps. The trip setting was 687 amps, or "187 amps more than the maximum allowable amp" (Tr. 185).

THE VIOLATION

As with the previous alleged violation, I conclude the Secretary did not prove a violation of the cited standard. The circuit breaker for the shuttle car on the 005 MMU Section was set above the amperage allowed by section 75.601-1, but this did not equate to a violation of section 75.518.

Citation	Date	30 C.R.F.§	Proposed Penalty
4250631	5/16/96	75.804(b)	$252

Counsel for Harlan objected that the condition stated in the citation did not constitute a violation of section 75.804(b). In response, the Secretary moved to vacate the citation because "there [was] no violation" (Tr. 192). I granted the motion (Id.).

Citation	Date	30 C.R.F. §	Proposed Penalty
4250632	5/16/96	75.1720(a)	$267

Citation No. 4250632 states:

> Safety glasses were not being utilized in the No. 1 entry of the 005 MMU where a danger of flying particles was present. Resin type roof bolts were being installed and no eye protection was observed in use (Gov. Exh. P-44).

In addition to alleging a violation of the standard, the citation includes an S&S finding.

Section 75.1720(a) requires that miners regularly employed in the active workings of an underground coal mine wear "face-shields or goggles when welding, cutting, or working with molten metal or when other hazards to the eyes exist from flying particles."

Clay testified that on May 16, 1996, during an inspection of the 005 MMU Section, he observed a roof bolting machine operator. The operator was not wearing eye protection, (Tr. 194).

Following this testimony, there was an off the record discussion after which counsel for Harlan agreed that the company would pay the proposed penalty. I accepted the agreement (Tr. 194).

KENT 96-322

Citation	Date	30 C.R.F. §	Proposed Penalty
4250646	5/21/96	75.202(a)	$252

Citation No. 4250646 states:

> Dislodged roof supports in the form of previously installed cribs were observed in the intersection of the No. 49 cross cut of the main intake. [One] crib has been torn completely down and [four] have been damaged [and] kicked

around where they are no longer serving their purpose. Drawrock is present and the mine roof shows evidence of taking excessive weight by cutters down the rib line (Gov. Exh. P-49).

In addition to alleging a violation of the standard, the citation includes an S&S finding.

The requirements of section 75.202(a) are set forth above.

Clay testified that on May 21, 1996, he conducted an inspection of the mine. He was at the No. 49 crosscut of the mine's main intake entry when he observed several dislodged cribs. Although this area is approximately a mile and a half from active mining, Clay described the entry as "one of the ... most-traveled entries in and out of the coal mine" (Tr. 196). Clay saw people traveling through the area. The entry also was part of the mine's primary escapeway (Tr. 195-196).

Harlan's safety diretor, Sargent, did not agree that the entry was traveled frequently. He testified that at the time the condition was found by Clay, the entry was only traveled when it was examined, which was once a week. According to Sargent, miners did not enter and leave the mine through this part of the entry. Rather, there was another area of the mine where miners entered and went to the active working sections (Tr. 201).

As Clay recalled, the roof in the area showed signs that it was under pressure from excessive weight. At the intersection, where the pillar met the roof, there were cracks, or "cutters", in the roof. The cutters varied in length. One was 8 to 10 feet long (Tr. 196-197). The roof had been bolted and four cribs had been installed (Tr. 196). Generally, cribs are installed when adverse roof conditions are encounter (Tr. 199). Clay looked and saw that none of the cribs was contacting the roof. In other words, the cribs were no longer supporting the roof (Tr. 196-197).

Clay believed the cribs had been hit and knocked out of position by a large piece of mobile equipment (Tr. 197). However, he did not know when this had happened (Tr. 199-200).

Clay testified that the area had previously experienced adverse roof conditions, which was why the cribs had been installed. Moreover, the cutters indicated to Clay that the roof was under increased pressure (Tr. 197-198). Clay feared pieces of the roof would fall and injure miners and that the injuries would range from serious fractures to fatalities (Tr. 198).

Sargent testified that cribs are also installed to deter bad floor conditions, such as bottom heaving (Tr. 202). Sargent was asked whether he knew if the bottom was heaving in the area of the cribs. He did not respond directly but rather answered that the mine "ha[d] a lot of heaving bottom" (Id.). Although Sargent maintained the cribs had been in place "for a while" (Tr. 200), he did not know if they were installed to counter the roof conditions Clay observed (Tr. 200-201).

The condition was terminated when the cribs were reconstructed (Tr. 199).

THE VIOLATION

The violation existed as charged. Clay's contention that cutters ran along the rib line where the top of the rib and the roof intersected and that this indicated the roof was "taking excessive weight" (Gov. Exh. P-49) was not refuted (Tr. 196-197). Indeed, Sargent was candid in stating he did not know if the cutters were present or if the roof was under pressure (Tr. 200-201).

Although Sargent testified, and I find, that cribs can be installed both to provide additional roof support and to prevent bottom heaving, he was not resposive when asked directly if the bottom was heaving in the area cited (Tr. 202). Given the presence of the cutters, I infer the cribs were installed to provide needed additional support for the roof at the intersection of the main intake entry and the No 49 crosscut. Further, since Harlan did not dispute the fact that the cribs did not touch the roof and thus did not provide any of the necessary additional support, I conclude the roof was not supported adequately and that the failure to properly support the roof created a roof fall hazard for miners traveling in the immediate vicinity of the cribs.

It is clear that at least the weekly examiner regularly traveled through the area (Tr. 198, 201). It also is clear that Clay saw miners traveling through the area (Tr 195-196). Clay did not know when the cribs became dislodged from the roof and thus did not know how long the condition had existed (Tr. 199-200). However, the miners Clay saw traveling through the area certainly did so when the roof was inadequately supported, and I conclude they at least were subjected to hazards relating to falls of the roof and that the roof was in violation of section 75.202(a).

S&S AND GRAVITY

The violation was both S&S and very serious. I have credited Clay's testimony that the cutters indicated increased pressure on the roof (Tr. 197-198). I also credit his fear that pieces of the roof would fall and seriously injure or kill miners in the area (Tr. 198). The presence of the cribs and the cutters testified as eloquently as Clay to the instablility of the roof. The fact that pieces of the roof were not falling at the time of the inspection is not dispositive of the S&S nature of the violatoin as long as a miner could be at risk during the course of continued mining operations (see, *Halfway Incorporated*, 8 FMSHRC 8, 12 (January 1986)).

The area in which the cribs were located was examined periodically. It is reasonable to conclude that given the increased pressure on the roof, as mining continued and the examiner passed the area, pieces of the roof would have fallen. Also, it is reasonable to conclude that the exposed examiner would have sustained a serious, if not a fatal, injury.

The Commission has noted that mine roofs are inherently dangerous and that even good roof can fall without warning (*Consolidation Coal Company*) 6 FMSHRC 34, 37 (January 1984). It also has stressed the fact that roof falls remain the leading cause of death in underground mines

(*Halfway, Incorporated*, 8 FMSHRC at 13; *Roof Mining Co.*, 4 FMSHRC 1207, 1211, n.8 (July 1982)). The failure to support the roof in an area where a miner periodically traveled and where the roof was under increasing pressure, produced a situation that easily could have lead to serious injury or death and constitued a very serious violation of the cited standard.

NEGLIGENCE

Although the violation was visually obvious, the Secretary failed to show how mine managment knew or should have know of the violative conditions, and without such a showing I cannot find the company failed to exercise the care required of it. Clay did not know when the cribs ere dislodged, nor did he offer an opinion in this regard (Tr. 199-200). The testimony established the cited area was examined on a weekly basis. It also established that Clay saw two miners traveling in the cited area, from which I can infer the area was preshift examined (see 30 C.F.R. § 360). However, without more evidence on the issue I cannot assume the violation existed when these examinations were made.

Citation	Date	30 C.R.F.§	Proposed Penalty
4250649	5/21/96	75.202(a)	$252

Citation No. 4250649 states:

> The mine roof is inadequately supported at several locations thoughout the intake roadway leading to the mine fan. Several pieces of rock, some 36"x36" [and] 3 to 5 inches thick have separated from the immediate mine roof [and] were observed hanging down at various locations (Gov. Exh. P-50).

In addition to alleging a violation of the standard, the citation includes an S&S finding.

> The requirements of section 75.202(a) are set forth above.

Clay testified that on May 21, 1996, while he was inspecting the intake roadway leading to the main mine fan, he observed separated and hanging drawrock. As best Clay could recall, the rock was located approximately 1,500 to 2,000 feet from the fan (Tr. 203-204). One of the pieces of hanging rock was 36 by 36 inches square and 3 to 5 inches thick.

The roof was composed of laminated shale. The area containing the hanging rock was located outby the fan. Clay believed the velocity of the air the fan was moving along the roadway, along with periodic changes in the atmospheric pressure, caused the drawrock to separate from the roof (Tr. 204).

Clay believed miners worked and traveled through the area and therefore the roadway had been preshift examined (Tr. 204-205). He testified that there was a water hole in the roadway and that Sargent told him a miner had been in the area pumping water from the hole (Tr. 205). The area had to be preshift examined before the miner could travel to the water hole. Clay also believed that the area was examined weekly (Tr. 205).

Clay feared for the safety of miners who exmained the area and who checked the pump. They were endangered by the hanging drawrock. He noted that the entry ranged from 4 to 9 feet high, and that the greater the distance the rock fell, the more serious the injury if the rock struck someone (Tr. 204). A miner could suffer a broken neck, back, or worse, particularly if the miner was hit by the rock that measured approximately 3 feet square (Tr. 205-206).

Sargent agreed that if miners had worked in or had traveled through the area, it had to be preshift examined. However, he believed the area was not being preshift examined at the time the condition was cited. This was because to get to the water pump and to turn it on, a miner did not go into or through the cited area. The miner could turn the pump on and check on it from another entry (Tr. 208-209). For this reason, the area was not being regularly preshift examined. Rather, it was being examined weekly (Tr. 208).

According to Sargent, the cited area had been examined 3 days before Clay found the conditions, and it was not scheduled to be examined again for another 4 days (Tr. 209).

The condition was corrected when the drawrock was pulled down (Tr. 206).

THE VIOLATION

The standard requires the Secretary to prove that miners were required to work or travel in or through the cited area and that the roof was not supported adequately to protect the miners from roof fall injuries. Because the Secretary has not proved miners were exposed to the cited roof conditions, I conclude there is inadequate proof to support a violation.

Clay's belief that miners worked and traveled in the cited area was based upon his belief that the miner who attended the water pump worked and traveled there and the area had to be preshift examined (Tr. 205-206). However, Sargent maintained that miners who traveled to the pump did not have to work or travel the area but could get to the pump and attend it via another entry (Tr. 208-209). The Secretary did not dispute that this was in fact the case, and I credit Sargent's testimony. I therefore conclude the Secretary did not prove that miners who worked at the pump ever were in the the cited area. It follows from this that the Secretary also did not prove that a preshift examination was required in the cited area and therefore that preshift examiners must have traveled there.

Sargent testified without dispute that the area was examined weekly and that it was examined 3 days before Clay found the conditions (Tr. 208-209). Clay was not asked whether he believed the roof conditions he observed existed when the weekly exmainer traveled through the area and I can find a sufficient basis in the record to infer they did. The factors that caused the roof to deteriorate were not static and neither was the state of the roof.

Citation	Date	30 C.R.F. §	Proposed Penalty
4250653	5/21/96	75.202(a)	$252

Citation No. 4250653 states:

> The mine roof is not adequately supported in the return entry where the 1st right panel is located. Broken drawrock is present and 4 dislodged roof supports in the form of timbers. This area is required to be examined weekly (Gov. Exh. P-52).

In addition to alleging a violation of the standard, the citation includes an S&S finding.

The requirements of section 75.202(a) are set forth above.

Clay testified that during an inspection on May 28, 1996, he observed four dislodged and broken roof timbers in the first right panel of the immediate main return entry. The involved area measured between 20 and 30 feet (Tr. 211-212). The area was required to be examined weekly, and from the dates and initials of previous examinations, Clay believed the weekly examiner had been in the area within the preceeding week (Id.).

To Clay, the broken timbers indicated that "there [was] a problem with the ... roof" (Tr. 212). Clay also observed a cutter in the same area. It extended down the right-hand rib from where the coal pillar and the roof came together. The cutter indicated the the roof was "taking excessive weight" (Id.). (There were other cutters, as well, and although Clay did not mention any of the other cutters in the body of the citation, he testified he remembered that they were present (Tr. 215, see also Tr. 217)). Clay noted there was extensive retreat mining inby the area and that this caused excessive weight to be applied to the roof, which in turn caused the dislodging and breaking of the timbers (Tr. 213-214).

Even though the roof was bolted, Clay believed it was in a dangerous condition. He explained that timbers were set every 4 feet and the presence of four disloged timbers meant that 16 feet of roof — roof that had cutters in it — needed support. For Clay, the cutters were "pretty much an indicator of a pending roof failure" (Tr. 216).

Clay saw posted dates and initials indicating that the area was examined weekly (Tr. 213). In his view, the condition of the roof made it reasonably likely the examiner would be injured or even killed by falling roof (Tr. 213).

Because the area had been examined weekly and the conditions were visually obvious (Tr. 214), Clay believed the company was negligent in allowing the conditions to exist (Tr. 215).

Sargent agreed that the general area had been examined weekly, but he maintained that no person traveled through the particular area cited. Rather, the general area was evaluated from a different location in another entry (Tr. 218-219). He testified that the cited area was not an active part of the mine, although air coursed through the area to ventilate other parts of the mine (Tr. 119-220). Miners had no reason to be in the area. He stated, "We don't evaluate anything right there, anything whatsoever. We have no reason to be there. We've got a checkboard hung at a different location and that's where we evaluate" (Tr. 221).

The condition was corrected when a danger sign was posted and travel was prohibited in the area (Tr. 214).

THE VIOLATION

The standard is applicable only "where persons work or travel." Clay's belief that the area was traveled was based upon seeing the posted dates and initials (Tr. 211, 213). Clay did not explain exactly where the postings were located, nor did he testify regarding any other evidence leading him to believe the area was one where persons worked or traveled.

Sargent on the other hand, maintained that the cited area was not in an active part of the mine. He was adamant that miners did not work or travel in the area because miners had no reason to be there (Tr. 118-120). The dates and initials were not located in an area where the examiners would have been required to travel under the cited roof (Tr. 221). The Secretary did not discredit this part of Sargent's testimony, and, as I have noted, did not offer testimony to indicate that Clay's belief in the active nature of the entry was based on more than the dates and initials Clay observed.

Given Sargent's unrebutted testimony regarding the lack of work or travel in the cited area and the paucity of testimony from Clay on the issue, I conclude the Secretary has not established that Harlan violated section 75.202(a).

APPROVAL OF SETTLEMENTS AND CIVIL PENALTY ASSESSMENTS

DOCKET NO. KENT 96-254

SETTLEMENTS

Citation	Date	30 C.R.F. §	Proposed Penalty	Settlement
4243458	2/20/96	75.370(a)(1)	$288	$288
4243727	2/27/96	75.380(d)(1)	$288	$288
4243657	3/11/96	75.400	$309	$ 50*
4243660	3/11/96	75.202(a)	$793	$309
4243897	3/27/96	75.517	$288	$288

* The Secretary has agreed to modify the citation by deleting the S&S finding (Tr. 8).

These settlements were explained on the record, and they are **APPROVED** (Tr. 8, 69).

CONTESTED CITATION ASSESSMENTS

Citation	Date	30 C.R.F. §	Proposed Penalty	Assessment
42433726	2/27/96	75.1106-3(a)(2)	$288	$400

The violation was serious and the company was negligent. Given the company's size "at the lower end of large size companies" (Tr. 15), its "medium" history of previous violations (Tr. 225), its good faith abatement (Tr. 15), and the fact that a "reasonable" penalty will not affect its ability to continue in business (Tr. 14), I conclude that a significant penalty is appropriate.

Citation	Date	30 C.R.F.§	Proposed Penalty	Assessment
4243656	3/11/96	75.202(a)	$309	$550

The violation was very serious and the company was negligent. Given these factors and the civil penalty criteria set forth above, I conclude that a significant penalty is appropriate.

Citation	Date	30 C.R.F.§	Proposed Penalty	Assessment
4243658	3/11/96	75.380(d)(1)	$288	$250

The violation, although serious, was not as serious as the Secretary alleged. The company was negligent. Given these factors and the civil penalty criteria set forth above, I conclude that a penalty somewhat less than that proposed by the Secretary is appropriate.

Citation	Date	30 C.R.F. §	Proposed Penalty	Assessment
4243659	3/11/96	75.202(a)	$309	$550

The violation was very serious and the company was negligent. Given these facctors and the civil penalty criteria set forth above, I conclude that a significant penalty is appropriate.

Citation	Date	30 C.R.F. §	Proposed Penalty	Assessment
4243921	3/11/96	75.220	$431	$550

The violation was very serious and the company was negligent. Given this and the civil penalty criteria set forth above, I conclude that a significant penalty is appropriate.

DOCKET NO. KENT 96-320

SETTLEMENTS

Citation	Date	30 C.R.F. §	Proposed Penalty	Settlement
4244152	4/28/96	75.333(b)(3)	$252	$ 50*
4244153	4/28/96	75.333(c)(2)	$252	$ 50*
4244154	4/28/96	75.400	$252	$ 50*
4244155	4/28/96	75.333	$252	$ 0**
4244147	4/29/96	75.333(b)(3)	$252	$ 50*
4244148	4/29/96	75.333(b)(2)	$252	$ 50*
4244149	4/29/96	75.400	$252	$252
4244157	5/1/96	75.1104	$267	$ 50*
4250661	5/2/96	75.370(a)(1)	$252	$ 50*

* The Secretary has agreed to modify the citations by deleting the S&S findings (Tr. 8-10).

** The Secretary has agreed to vacate the citation on the grounds that it is duplicative of Citation No. 4244152 (Tr. 9).

These settlements were explained on the record, and they are **APPROVED** (Tr. 8-10).

CONTESTED CITATION ASSESSMENTS

Citation	Date	30 C.R.F. §	Proposed Penalty	Assessment
4244151	4/28/96	75.202(a)	$252	$550

The violation was very serious and the company was negligent. Given these factors and the civil penalty criteria set forth above, I conclude that a significant penalty is appropriate.

Citation	Date	30 C.R.F. §	Proposed Penalty	Assessment
4244150	4/29/96	75.202	$252	$550

The violation was very serious and the company was negligent. Given these factors and the civil penalty criteria set forth above, I conclude that a significant penalty is appropriate.

Citation	Date	30 C.R.F. §	Proposed Penalty	Assessment
4250669	5/8/96	75.604(b)	$252	$550

The violation was very serious and the company was negligent. Given these factors and the civil penalty criteria set forth above, I conclude that a significant penalty is appropriate.

Citation	Date	30 C.R.F.§	Proposed Penalty	Assessment
4250670	5/8/96	75.517	$252	$300

The violation was very serious, but the company was not negligent. Given these factors and the civil penalty criteria set forth above, I conclude that a civil penalty slightly more than that proposed by the Secretary is appropriate.

DOCKET NO. KENT 96-321
SETTLEMENTS

Citation	Date	30 C.R.F. §	Proposed Penalty	Settlement
4250671	5/8/96	75.514	$252	$252
4250673	5/8/96	75.340(a)	$252	$ 50*
4250674	5/8/96	75.1107-16(b)	$252	$252
4250675	5/8/96	75.1107	$252	$252
4250676	5/8/96	75.804(b)	$252	$252
4250625	5/14/96	75.514	$252	$252
4250626	5/14/96	75.400	$252	$252
4250627	5/14/96	75.503	$252	$ 50*
4250630	5/15/96	75.333(b)(5)	$252	$252

* The Secretary has agreed to modify the citations by deleting the S&S findings (Tr. 10-11).

These settlements were explained on the record, and they are **APPROVED** (Tr. 10-11).

CONTESTED CITATION ASSESSMENTS

Citation	Date	30 C.R.F. §	Proposed Penalty	Assessment
4250672	5/18/96	75.400	$252	$300

The violation was very serious, but the company was not negligent. Given these factors and the civil penalty criteria set forth above, I conclude that a civil penalty slightly more than that proposed by the Secretary is appropriate.

Citation	Date	30 C.R.F. §	Proposed Penalty	Assessment
4250623	5/13/96	75.1713-7(b)	$252	$ 50

The violation was not serious and the company was not negligent. Given these factors and the civil penalty criteria set forth above, I conclude that a minimal civil penalty is appropriate.

Citation	Date	30 C.R.F. §	Proposed Penalty	Assessment
4250624	5/14/96	75.604(b)	$252	$550

The violation was very serious and the company was negligent. Given these factors and the civil penalty criteria set forth above, I conclude that a significant penalty is appropriate.

Citation	Date	30 C.R.F. §	Proposed Penalty	Assessment
4250628	5/14/96	75.518	$252	$ 0

There was no violation of the cited standard.

Citation	Date	30 C.R.F. §	Proposed Penalty	Assessment
4250629	5/14/96	75.518	$252	$ 0

There was no violation of the cited standard.

Citation	Date	30 C.R.F. §	Proposed Penalty	Assessment
4250631	5/16/96	75.804(b)	$252	$ 0

A motion to vacate the citation was granted (Tr. 192).

Citation	Date	30 C.R.F. §	Proposed Penalty	Assessment
4250632	5/16/96	75.1720(a)	$267	$267

The company agreed to pay in full the proposed penalty (Tr. 194).

DOCKET NO. KENT 96-322
SETTLEMENTS

Citation	Date	30 C.R.F. §	Proposed Penalty	Settlement
4250633	5/16/96	75.402	$252	$ 0**
4250634	5/16/96	75.370(a)(1)	$252	$252
4250635	5/16/96	75.400	$252	$ 50*
4250650	5/16/96	75.360(a)(3)	$252	$252
4250654	5/28/96	75.370(a)(1)	$252	$ 50
4250655	5/28/96	75.370(a)(1)	$252	$ 50*
4250656	5/28/96	75.370(a)(1)	$252	$ 50*
4250657	5/28/96	75.370(a)(1)	$252	$ 50*

* The Secretary has agreed to modify the citations by deleting the S&S findings (Tr. 11-12).)

** The Secretary has agreed to vacate the citation on the grounds that the proof will not establish a violation of the standard (Tr. 11).)

These settlements were explained on the record, and they are **APPROVED** (Tr. 11, 221-222).

CONTESTED CITATION ASSESSMENTS

Citation	Date	30 C.R.F. §	Proposed Penalty	Assessment
4250646	5/21/96	75.202(a)	$252	$300

The violation was very serious, but the company was not negligent. Given this and the civil penalty criteria set forth above, I conclude that a penalty slighly more than that proposed by the Secretary is appropriate.

Citation	Date	30 C.R.F. §	Proposed Penalty	Assessment
4250649	5/21/96	75.202(a)	$252	$0

There was no violation of the cited standard.

Citation	Date	30 C.R.F. §	Proposed Penalty	Assessment
4250653	5/21/96	75.202(a)	$252	$ 0

There was no violation of the cited standard.

DOCKET NO. KENT 96-333

SETTLEMENTS

Citation	Date	30 C.R.F. §	Proposed Penalty	Settlement
4250658	5/29/96	75.1722(b)	$252	$252
4250709	6/3/96	75.1722(a)	$252	$177
4250710	6/3/96	75.202(a)	$252	$252
4250712	6/3/96	75.400	$252	$ 50*
4250713	6/3/96	75.400	$252	$252
4250715	6/4/96	75.202(a)	$252	$252
4250717	6/5/96	75.220	$252	$177
4250718	6/5/96	75.370(a)(1)	$267	$ 50*
4250719	6/5/96	75.370(a)(1)	$267	$267
4250726	6/10/96	75.1725(a)	$252	$252
4250727	6/10/96	75.1103-9(a)(1)	$252	$ 50*
4250729	6/10/96	75.364(a)(2)(iii)	$252	$ 0**
4250730	6/10/96	75.400	$252	$252
4250731	6/10/96	75.1101-1(b)	$252	$ 50*

* The Secretary has agreed to modify the citations by deleting the S&S findings (Tr. 12-13).)

** The Secretary has agreed to vacate the citation on the grounds that the proof will not establish a violation of the standard (Tr. 13).

These settlements were explained on the record, and they are **APPROVED** (Tr. 12-13, 222-224).

ORDER

It is **ORDERED** that within 30 days of the date of this decision, Harlan pay civil penalties as follows:

Docket No. KENT 96-254 — $ 3,523
Docket No. KENT 96-320 — $ 2,552
Docket No. KENT 96-321 — $ 3,031
Docket No. KENT 96-322 — $ 1,054
Docket No. KENT 96-333 — $ 2,333

Total amount due: $12,493

It is further **ORDERED** that within the same 30 days the Secretary shall modify and vacate the relevant citations as set forth above.

Upon payment of the penalties and modification and vacation of the citations, these proceedings are **DISMISSED**.

David Barbour
Administrative Law Judge
(703) 756-5232

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

MAY 30 1997

CANTERBURY COAL COMPANY, Contestant	:	CONTEST PROCEEDING
v.	:	Docket No. Penn 97-113-R
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Citation No. 4174654; 3/20/97 Dianne Mine Mine ID 36-05708

DECISION

Appearances: Joseph A. Yuhas, Esq., 1809 Chestnut Ave., Barnesboro, Pennsylvania, for Contestant;
Theresa C. Timlin, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Respondent.

Before: Judge Melick

This Contest Proceeding is before me upon the Notice of Contest filed by Canterbury Coal Company (Canterbury) under Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.*, the "Act," to challenge Citation No. 4174654, issued by the Secretary for one violation of the standard at 30 C.F.R. § 90.102(a). The citation charges as follows:

> On August 28, 1996, an employee at the subject mine exercised his rights afforded under Title 30, Code of Federal Regulations, Part 90. The employee stayed on the same shift rotation while the operator sampled him to determine compliance. When compliance could not be met, the miner was transferred to another job, which changed his shift rotation which was different before the transfer.

The cited standard, 30 C.F.R. § 90.102(a) provides in relevant part as follows:

> Whenever a Part 90 miner is transferred in order to meet the respirable dust standard in §90.100 (Respirable dust standard) . . . the operator shall transfer the miner to an existing position at the same coal mine on the same shift or shift rotation on which the miner was employed immediately before the transfer. The operator may transfer a Part 90 miner to a different coal mine, a newly-created position or a position on a different shift or shift rotation if the miner agrees in writing to the transfer.

It is undisputed that the subject miner, Russel Bollenger, was adjudged by the Secretary on August 5, 1996, to be eligible to be classified as a "Part 90" miner (Government Exhibit No. 1). As explained in a letter from the Secretary's representative, Bollenger's x-rays showed that he had "enough coal worker's pneumoconiosis ('black lung') to be eligible for the 'option to work in a low dust area' of a mine" (Government Exhibit No. 1). As the letter further explained, Bollenger had the "right to work at a job in the mine where the concentration of dust is not more than 1.0 milligram per cubic meter of air." The "Part 90" miner's rights are set forth in 30 C.F.R. §90.3(a) as follows:

> Any miner employed at an underground coal mine or at a surface work area of an underground coal mine who, in the judgment of the Secretary of Health and Human Services, has evidence of the development of pneumoconiosis based on a chest x-ray, read and classified in the manner prescribed by the Secretary of Health and Human Services, or based on other medical examinations shall be afforded the option to work in an area of mine where the average concentration of respirable dust in the mine atmosphere during each shift to which that miner is exposed is continuously maintained at or below 1.0 milligram per cubic meter of air. Each of these miners shall be notified in writing of eligibility to exercise the option.

The standard at 30 C.F.R. §90.100 sets forth the obligations of the mine operator upon notification that a Part 90 miner is employed at its mine. That standard reads as follows:

> After the twentieth calendar day following receipt of notification from MSHA that a Part 90 miner is employed at the mine, the operator shall continuously maintain the average concentration of respirable dust in the mine atmosphere during each shift to which the Part 90 miner in the active workings of the mine is exposed at or below 1.0 milligram per cubic meter of air. Concentrations shall be measured with an approved sampling device and expressed in terms of an equivalent concentration determined in accordance with §90.206(Approved sampling devices; equivalent concentrations).

The Commission, in *Jimmy R. Mullins v. Beth-Elkhorn Coal Corporation, Local 1468, District 30, United Mine Workers of America and International Union, United Mine Workers of America,* 9 FMSHRC 891, 897 (May 1987), summarized the requirements of Part 90 as follows:

> [t]he Part 90 transfer option encompasses three basic rights: (1) to be assigned work in "an area of a mine" where the required Part 90 dust concentration levels are continuously maintained . . .; (2) in "an existing position" at the same mine on the same shift or shift rotation or, if the miner agrees in writing, in "a different coal mine, a newly-created position or a position on a different shift or shift rotation" . . .; and (3) at no less than the regular rate

> of pay earned by the miner immediately before exercise of the transfer option . . . It is the duty of the operators to effectuate these rights as applicable with respect to their Part 90 miners.

Upon notification of Bollenger's status as a Part 90 miner, Canterbury made several efforts to reassign Bollenger to positions meeting the requirements of 30 C.F.R. §90.102(a). However, following respirable dust sampling, each position was found to exceed the "1.0 milligram per cubic meter of air" standard. Canterbury finally transferred Bollenger to the position of shuttle car operator on a different shift rotation. Bollenger did not consent to this transfer pursuant to 30 C.F.R. §90.102(a) and the instant citation was accordingly issued for a violation of that standard.

The provisions of 30 C.F.R. §90.102(a) are clear and unambiguous and Canterbury's transfer of Bollenger to a different shift rotation without his consent was in violation of that standard. Canterbury argues that since it did not have an "existing position" for Bollinger, in order to keep Bollenger on his same shift rotation and at the same time not exceed the 1.0 milligram per cubic meter of air dust exposure limits it would be necessary to create a new job position —— something that the law does not require. Canterbury misreads the requirements of the law. Its ultimate responsibility to a "Part 90" miner is to provide a workplace for such a miner in which the average dust exposure of 1.0 milligram per cubic meter of air is not exceeded. It can do this by reducing the level of respirable dust in the miner's existing position or in a number of other ways as set forth in the regulations. However, one thing the operator clearly cannot do is transfer a miner in Bollinger's situation to a different shift rotation without his written consent.

Under the circumstances the violation is proven as charged, Citation No. 4174654 is affirmed and this Contest Proceeding is dismissed.

Gary Melick
Administrative Law Judge
703-756-6261

Distribution:

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

Theresa C. Timlin, Esq., U.S. Dept. of Labor, Office of the Solicitor, 14480 Gateway Bldg., 3535 Market Street, Philadelphia, PA 19104
/jf

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

March 28, 1997

JAMES C. TYSAR,	:	DISCRIMINATION PROCEEDING
Complainant	:	
v.	:	Docket No. LAKE 96-146-DM
	:	NC MD 96-04
AKZO NOBEL SALT, INC.,	:	
Respondent	:	Cleveland Mine
	:	Mine ID No. 33-01994

DECISION

Appearances: James C. Tysar, Parma, Ohio, pro se, Complainant;
Mark N. Savit, Esq., and Ruth L. Ramsey, Esq.,
Patton Boggs, L.L.P., Washington, D.C., for the Respondent.

Before: Judge Koutras

Statement of the Proceeding

This proceeding concerns a discrimination complaint filed by the complainant against the respondent pursuant to section 105(c) of the Federal Mine Safety and Health Act of 1977. The complainant filed an initial complaint with the U.S. Department of Labor, Mine Safety and Health (MSHA), and after investigating the complaint, MSHA informed the complainant of its decision not to pursue the matter further. The complainant then filed his complaint pro se with the Commission.

The complainant has been employed by the respondent for over nine years, and at the time his complaint was filed he was employed as a laborer. The complainant alleges that he was discriminated against and suspended from work for three days on October 6, 1995, because of his refusal to perform a job assignment in a mine area that he believed was unsafe. The complainant seeks to recover back pay for the three-day suspension, two days of missed overtime, and expungement of the suspension action from his personnel records.

The respondent filed a timely answer to the complaint denying any discrimination and taking the position that the complainant was suspended for insubordination for refusing to carry out a work assignment and order by his supervisory foreman. A hearing was held in Cleveland, Ohio, and the parties appeared and participated fully therein. The parties filed post hearing briefs, and I have considered their arguments in the course of my adjudication of this matter.

Issue

The issue presented in this case is whether or not the respondent discriminated against the complainant by suspending him for three days after he refused to carry out a work assignment and order by his supervisor to perform a job task that the complainant believed was unsafe.

Applicable Statutory and Regulatory Provisions

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

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

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

Background

The record reflects that on October 6, 1995, Mr. Tysar and co-worker Christopher Brown were working as laborers on the midnight shift on the second floor of the mine warehouse under the supervision of Surface Shipping Production Foreman James Mook. Mr. Mook assigned them the task of cleaning (shoveling) salt off the CFC scalping screen feed conveyor belt located on the second floor. There is a dispute as to whether they were assigned to clean the entire belt line or whether their work assignment was confined to only the belt tailpiece area.

The belt in question is an elevated inclined belt approximately 20 feet long and 3 to 4 feet wide, that passes over and in front of an elevator that opens directly beneath a portion of the belt. The belt section to the left of the elevator as one is directly facing the elevator is approximately 13 feet above the floor, and the tail piece section to the right of the elevator is approximately 10 feet above the floor, and 6 to 10 feet from the elevator.

The assigned cleaning task called for Mr. Brown, the junior laborer, to shovel the belt from an elevated "man basket" secured to the end of a forklift, with Mr. Tysar operating the forklift. The belt was de-energized and locked out, and Mr. Brown would have performed the cleaning from the man basket which was equipped with hand rails and a locked gate. He was also provided with a safety belt and lanyard.

After securing the man basket to the forklift, and while preparing to move the forklift into position to begin cleaning the belt, a maintenance vehicle with two mechanics in it exited the elevator under the overhead belt line and passed by Mr. Tysar and Mr. Brown. Mr. Tysar contacted Mr. Mook and expressed his concern that he and Mr. Brown might be at risk if they were cleaning the belt area in front of the elevator doors and a vehicle exited and struck the forklift while Mr. Brown was in the raised man basket.

Mr. Mook responded to Mr. Tysar's concern, and in the course of their discussion at the job scene, Mr. Tysar informed Mr. Mook that he wanted the elevator shut down and taped off while he and Mr. Brown cleaned the belt in order to insure against another vehicle driving out of the elevator and possibly striking the forklift while Mr. Brown was suspended in the air cleaning the belt in front of the elevator doors.

Mr. Mook maintained that his belt cleaning assignment was confined to the belt tailpiece area in order to facilitate the repair and replacement of a belt wiper, and that Mr. Tysar and Mr. Brown would have no reason to be in front of the elevator doors while cleaning the tailpiece. Mr. Tysar and Mr. Brown maintained that they were assigned to clean the entire belt line, and that at some point while doing this job, the forklift would be parked in front of the elevator doors.

Mr. Tysar estimated that the belt cleaning job would take less than an hour, and Mr. Mook rejected his request that the belt he shut down and taped off while he and Mr. Brown cleaned the belt. Mr. Mook indicated that the elevator was needed to bring in parts and supplies, and he maintained that he offered Mr. Tysar two alternatives to shutting down and taping the elevator, namely, an offer to inform the other employees of the work being done by Mr. Tysar and Mr. Brown, and a suggestion that Mr. Tysar position himself next to the forklift, with the brake set, so that he could observe the elevator and warn anyone exiting that he and Mr. Brown were working in the area. Mr. Tysar denies that these offers were made, and even if they were, he indicated that he would reject them because he believed that disabling the elevator and taping off the area was the only acceptable means of insuring his safety. Mr. Mook then gave Mr. Tysar and Mr. Brown a direct order to proceed with their job assignment, and when they refused, Mr. Mook suspended them. They subsequently filed their complaints, and Mr. Brown withdrew his complaint shortly before the scheduled hearing. His case was dismissed.

Complainant's Testimony and Evidence

James C. Tysar, the complainant in this matter, testified that he is employed by the respondent as a laborer, has been employed by the company for over nine years, and serves as a safety committeeman. He stated that although he and Mr. Brown refused an order by Mr. Mook to do the assigned job, his refusal was based on a safety concern and Mr. Mook's refusal to grant his request to make his work area safe by taking the elevator out of service.

Mr. Tysar stated that he suggested to Mr. Mook that he call the plant safety director, but instead, Mr. Brian Bonjack, a maintenance foreman, appeared on the scene, and Mr. Tysar believed that Mr. Bonjack "was called as a witness because Mr. Mook intended to suspend us" (Tr. 23). Mr. Tysar stated that Mr. Bonjack had no knowledge of the events leading to his suspension, and was there to witness his confrontation with Mr. Mook. Mr. Tysar explained his work assignment and safety concerns as follows at (Tr. 49-51):

THE WITNESS: All right. My foreman, Jim Mook, gave myself and Mr. Chris Brown a job to do on the second floor of the warehouse. Our job was to - - my job was to operate a forklift with Mr. Brown in a caged-in platform which was attached to the forks of the fork lift. I was supposed to raise him up into the air to the level of the conveyor belt, which we were told to clean the decking on; Mr. Brown was told to clean the decking.

This particular conveyor belt runs on an angle, about a 45-degree angle directly above - - well, three feet out and directly above the doors of a freight elevator.

As we were getting into position to do this job, the doors of the elevator opened up and a maintenance vehicle pulled out of the elevator doors at a pretty good rate of speed.

So, I contacted Mr. Mook, and I explained to him the situation as far as our concern for our safety, being getting bumped into or knocked over while Mr. Brown was up in the air. And I requested that he tape off the elevator doors - - caution tape the elevator doors on the first floor - - so that nobody gets on the elevator and gets off on the second floor. I also suggested that he might put a "Do Not Operate" tag on the button of the elevator so that nobody pushes the buttons to operate the elevator.

Mr. Mook decided that it would be better that I put Mr. Brown up in the air on a platform, set the emergency brake and go stand by the little window in the door and look to see if the elevator is coming up.

JUDGE KOUTRAS: The door of the elevator?

THE WITNESS: Yes.

JUDGE KOUTRAS: The window in the door of the elevator is what he expected you to do?

THE WITNESS: Yes. But that scenario there would have put me directly under where Mr. Brown was working. If Mr. Brown dropped a shovel, I could get hit with a shovel.

I just thought that the best course of action to make our work area safe was to disable the elevator or to prevent people from using the elevator while we were doing this job.

Mr. Tysar further explained his safety concerns as follows at (Tr. 25):

> JUDGE KOUTRAS: How would the forklift get bumped?
>
> THE WITNESS: Because our job was to clean belt decking, which the belt decking ran over the top of the elevator doors.
>
> JUDGE KOUTRAS: You felt that that would be bumped by a piece of equipment coming out of the elevator?
>
> THE WITNESS: I felt that it could be. I'm not saying that it would be. I'm saying that there was a very good probability. The maintenance people were using the elevator at the time. The elevator is always in use. Electricians use it, mechanics use it, people come and go.

Mr. Tysar believed it would have taken Mr. Mook 10 to 15 minutes to tape off the elevator, and the belt cleaning job would not have taken more than an hour (Tr. 26). He confirmed that he told Mr. Mook that he refused to do the work out of concern for his personal safety (Tr. 34). He and Mr. Brown were then escorted off company property, and he was suspended for three days, and Mr. Brown was suspended for only one day because he had a better work record (Tr. 35). Mr. Tysar confirmed that he filed a grievance with his union regarding his suspension, but did not prevail (Tr. 42-44; 303-304).

Mr. Tysar believed that the best course of action to make his work area safe was to disable the elevator or prevent people from using it while he and Mr. Brown were working (Tr. 51). He explained that Mr. Brown was expected to clean hardened salt buildup on the belt decking in between the rollers and on the belt bottom, and they would be positioned in front of the conveyor that was ten feet off the floor on a 45-degree angle directly above the elevator door (Tr. 53).

Mr. Tysar stated that in response to his complaint, Mr. Mook suggested that he lift Mr. Brown up in the air, set the forklift park brake, and then get off the forklift and look through the window of the elevator door (Tr. 54). Mr. Tysar believed he would be at risk if the forklift tipped over, depending on the size and weight of the vehicle leaving the elevator, and Mr. Brown could have dropped a shovel or shoveled salt down on him if he were standing under the belt looking through the elevator window. He further believed that Mr. Brown would be at risk if he were knocked out of the forklift basket if the forklift tipped over (Tr. 54).

Mr. Tysar confirmed that his confrontation with Mr. Mook took place while he and Mr. Brown were preparing to clean the belt. Mr. Brown would have been on the forklift cleaning the belt decking with a shovel. The platform had rails around it, with a locked gate, and the salt would be shoveled into a dumpster below the belt (Tr. 55-56).

Mr. Tysar confirmed that that he disagreed with Mr. Mook's suggestion that he look through the elevator window and leave the forklift in a locked position while Mr. Brown was cleaning, and there was no overhead protection between the bottom of the belt and the floor level (Tr. 57). He stated that he had no idea what Mr. Mook expected of him once he looked through the elevator window (Tr. 58). He believed that Mr. Mook should have responded to his complaint in a diplomatic manner rather then punishing him for his complaint, and he stated as follows at (Tr. 59, 61-62):

> JUDGE KOUTRAS: So, that was the dispute?
>
> THE WITNESS: Yes, that was the dispute.
>
> JUDGE KOUTRAS: The foreman said, "No, we're going to do it this way," and you said, "No, we're going to do it my way." And that was the end of it.
>
> THE WITNESS: Yes, I saw it as a power struggle.
>
> * * * *
>
> THE WITNESS: In some cases when some people that are given a position with power or authority, they handle it well and some people - -
>
> JUDGE KOUTRAS: How do you think someone else would have handled that situation?
>
> THE WITNESS: Well, everybody has their own personalities and dispositions. What I'm saying is that he may have had a personal problem with me. I don't know. But I was doing my job as a union safety committeeman, and I was also taking responsibility for my own personal safety and Mr. Brown's safety, even if I wasn't a union safety committeeman.

Mr. Tysar stated that he and Mr. Brown would have been no more than four feet from the elevator doors. The doors were 10 feet wide, and the belt line was approximately 15 or 20 feet long. He stated that he and Mr. Brown were to clean the belt, starting at one end and cleaning the entire decking. At one point in time they would be directly in front of the elevator doors, and at other times "a little to the right or to the left" (Tr. 64).

Mr. Tysar believed that other pieces of equipment would have been on the elevator on the midnight shift, and maintenance personnel were working during that time. He described the area as the second floor of a warehouse with bins and mixers on that floor, and confirmed that the elevator was the only means for vehicles to reach the second floor (Tr. 67-68). He believed that

Mr. Mook did not want to inconvenience the maintenance department by shutting down the elevator (Tr. 69).

On cross-examination, Mr. Tysar stated that the elevator window is near the left edge of the door at eye level of a person of average height, and that he had difficulty seeing through the window because it is always dirty and there is an inner screen door in addition to the main door (Tr. 77-78). He further explained the operation of the doors, and stated that the maintenance vehicle that exited the elevator was backed in so that the front of the vehicle came out first when the elevator doors opened (Tr. 79-82).

Mr. Tysar stated that the belt was not running and it was locked out as required when idlers and rollers are to be cleaned (Tr. 82). He confirmed that the two individuals in the maintenance vehicle that came out of the elevator observed him as he was positioning the forklift, and they would pass him on their way back to the elevator (Tr. 85). He stated that there were "quite a few" vehicles in use on the midshift shift, as well as two mechanics and two electricians (Tr. 86). The incident in question occurred at 3:50 a.m., and the shift started at midnight (Tr. 88).

Mr. Tysar could not recall that Mr. Mook offered him any other alternative ways to make the belt cleaning job safe other than looking through the elevator window (Tr. 93). He could not remember whether Mr. Mook ever offered to notify all of the other personnel using vehicles that he was working in the area and stated, "even if he did, that's a moot point because that's still not good enough," and that "people forget" (Tr. 95-96). He believed that "the safest way to do this would have been to disable and not use the elevator or tape it off" (Tr. 96). He further stated as follows at (Tr. 96-97):

> Q. So, it's your testimony that there was no other alternative that would have been acceptable to you in any case; is that right?
>
> A. I'm willing to talk with people and compromise. That's what this whole thing is about, especially when my own safety is concerned, that particular - - even if he did or even if he did bring that possible solution up, that would have been unacceptable, yes.

And, at (Tr. 101-102):

> Q. Did you suggest anything other than taping off the elevator of de-energizing it, Mr. Tysar?
>
> A. Those are the two things that came to mind and that's normally what would be the best solution to a problem like that.
>
> Q. The question was did you suggest. I take it your answer is "no?"

A. No, because Mr. Mook was fighting me that whole time. He was arguing with me about it.

Mr. Tysar confirmed that the conveyor belt was three and a half to four feet away from the elevator, and if he were standing next to the window looking into the elevator he would have possibly been three to four feet in front of the belt area that Mr. Brown was shoveling (Tr. 105). Mr. Tysar further stated that the belt was three and a half to four feet wide and Mr. Brown was shoveling on the far side of the belt away from the elevator and Mr. Brown would have been six to eight feet behind him (Tr. 106). Mr. Brown would have been anywhere from eight to fifteen feet up in the air, depending on the part of the belt he was working on, and 15 to 20 feet where the window was located.

In response to a question as to whether or not he told Mr. Mook about his concern that Mr. Brown might drop a shovel on his head, or shoveling material down on him, while he was looking through the window, Mr.Tysar responded as follows at (Tr. 108-109):

THE WITNESS: About overhead? Yes, that was brought up; something like that, I guess.

JUDGE KOUTRAS: Specifically, did you tell Mr. Mook - -

THE WITNESS: Not about a shovel, no.

JUDGE KOUTRAS: Or material?

THE WITNESS: Material; things falling from above, yes.

JUDGE KOUTRAS: Could fall on your head?

THE WITNESS: Things falling from above, yes.

JUDGE KOUTRAS: You told Mr. Mook that?

THE WITNESS: I believe - -

JUDGE KOUTRAS: That you were concerned that material would fall on your head while you were standing at the elevator looking through the window?

THE WITNESS: I told Mr. Mook I didn't feel safe doing that; that's what I told him.

JUDGE KOUTRAS: But you didn't give him any specifics. You just used the generic word "safe." You didn't feel you were safe, right?

THE WITNESS: Basically, yes.

JUDGE KOUTRAS: But you didn't tell him why?

THE WITNESS: I don't believe I did.

Mr. Tysar stated that there is less salt buildup higher up the belt line and the "worst of it" was in front of and to the right of the elevator (as one faced it) closer to the belt tail piece which was six to ten feet away (Tr. 113-114). The forklift was four and a half to five feet wide and he did not believe he could have positioned the forklift in such a way as to clean the belt at the tail pulley area without putting it in front of the elevator. He believed that part of the forklift would still be in front of part of the door (Tr. 119).

Mr. Tysar denied that Mr. Mook worked with him to position the forklift so that it was out of the way of the elevator. He confirmed that Mr. Mook showed him how to set the parking brake, and the forklift was 15 or 20 feet away from the elevator at that time and off to the side for a distance of four feet (Tr. 120). He confirmed that the tailpiece was on the left as one exited the elevator, and that the first place a left turn can be made while exiting the elevator was 20 feet from the elevator door (Tr. 122).

Mr. Tysar confirmed that he has never heard Mr. Mook say "to hell with safety" (Tr. 122). He stated that he did not know whether Mr. Mook called Mr. Ryon, and he confirmed that in his deposition he stated that Mr. Mook did in fact call Mr. Ryon but explained that he "was confused to an extent" (Tr. 128). He then confirmed that his notes reflect that "after consulting with Tim Ryon, Mook came back and ordered us to work in this unsafe environment, and we refused on the grounds of our safety" (Tr. 129).

Mr. Tysar stated that Mr. Mook showed him where the job was to be done, and he explained as follows at (Tr. 131):

> Q. And he pointed out exactly where he wanted you to shovel and where he wanted you to put the forklift?
>
> A. You use the work "exactly." He basically went up to the second floor with us, showed us the job to be done, told us how he wanted us to do it, what to use. As far as exactly goes, those are specifics. We had a good understanding of what needed to be done and how it had to be done and what we had to use to get it done. That was clear.

Mr. Tysar stated that he raised a safety concern with Mr. Mook about securing the work basket to the forklift, and that Mr. Mook responded to his satisfaction by securing the basket to the forklift, and providing a safety belt and lanyard for Mr. Brown. Mr. Tysar commented that

"if I was going to be in the basket, I wouldn't have any problem with it" and "I would have felt safe" (Tr. 133).

Mr. Tysar stated that Mr. Mook responded to his call to come to the work area in a reasonable amount of time, and "when he got up there, then we had an argument and could not agree on a compromise" (Tr. 137). Mr. Mook then assigned him and Mr. Brown to do some shoveling while he spoke on the telephone "probably with Mr. Ryon" (Tr. 139). After finishing that call, Mr. Mook then stated "I'm giving you a direct order. I want you to do such and such a job," and then "when we refused on the grounds of safety, that's when we were suspended" (Tr. 140).

Mr. Tysar confirmed that he has been warned or written up three times for safety violations, and he explained the circumstances. He filed grievances for two of the violations, and the grievances were denied (Tr. 140-143). Mr. Tysar denied that Mr. Mook had ever previously spoken to him about safety violations or written him up for any violations (Tr. 144).

Mr. Tysar confirmed that when he and Mr. Brown were preparing to do the work and the maintenance vehicle came out of the elevator it was not "a near miss" and they were far enough away. His concern was that a vehicle exiting the elevator in the course of his assigned work would come close to where the forklift would be parked (Tr. 145). The forklift would be positioned away from the elevator, and the conveyor belt would have been between the elevator and the forklift. Assuming that he and Mr. Brown had proceeded to work on the belt, and the vehicle came out of the elevator, Mr. Tysar believed that it would have hit the forklift. He further stated at (Tr. 147-148):

> THE WITNESS: Your honor, we're really only talking about that area there, that general area where we were working is only like roughly 20 to 25 feet and directly in front of the elevator doors. There's some space off to the right and off to the left that you're not directly in front of the doors, but most of it is.
>
> JUDGE KOUTRAS: Okay.
>
> THE WITNESS: Just about anywhere you park that thing, if we were positioned directly in front of the elevator door, it would have been a direct hit. If we were off to the right a little bit, we would still have gotten hit.
>
> JUDGE KOUTRAS: Well, my question is in the course of your cleaning the belt, would you have been positioned directly in front of the elevator at any time while you were doing the work?
>
> THE WITNESS: Yes.

Christopher Brown, employed by the respondent as a laborer, confirmed that he and Mr. Tysar were assigned to do the belt cleaning job by Mr. Mook. He believed that Mr. Tysar had a legitimate safety reason for asking Mr. Mook to tape off the elevator, and he would have felt better if the elevator was tagged out (Tr. 154). Mr. Brown could not recall any alternative safety suggestions by Mr. Mook (Tr. 155).

Mr. Brown believed that his one day suspension was unfair, but confirmed that the withdrawal of his complaint "was my own idea," and that mine management never discussed the matter with him or influenced his decision. He also confirmed that respondent's counsel never harassed him, and he simply "couldn't handle" the legal proceeding (Tr. 160-161).

On cross-examination, Mr. Brown confirmed that he felt unsafe with the job assignment by Mr. Mook, and told Mr. Mook that "I feel unsafe," but said nothing specific as to why he felt unsafe. Mr. Brown stated that he offered no suggestions or ideas to Mr. Mook to correct the situation, and he could not recall any alternatives offered by Mr. Mook other then taping off or de-energizing the elevator (Tr. 163).

Mr. Brown stated that "I hardly said a word" during the conversation that took place with Mr. Mook, and he could not recall if both he and Mr. Tysar tried to reason with Mr. Mook. He further confirmed that he did not participate in the conversation between Mr. Mook and Mr. Tysar and that "all I said was I thought it was unsafe" (Tr. 166). To the best of his recollection, the vehicle in question backed out of the elevator (Tr. 167), and when asked if he could be wrong, he replied "I could be wrong, but I'm pretty sure it came out backwards" (Tr. 169).

Respondent's Testimony and Evidence

James S. Mook, respondent's Surface Shipping Production Foreman, testified that he has worked for the respondent for 19 years, and he described the second floor area around the freight elevator, and explained the diagrams (Exhibit R-2, Tr. 180-185).

Mr. Mook stated that he was informed by the maintenance department that the conveyor belt tailpiece wipers could not be changed out until all of the salt buildup at the tailpiece was cleared out. He determined that the belt tailpiece needed to be cleaned, and he assigned that job task to Mr. Tysar and Mr. Brown on the evening of October 6, 1995. The work was to begin after their lunch hour when he had time to personally take them to the area and show them what needed to be done (Tr. 186). He confirmed that he personally took them to the job area because it was a new job assignment and not a repetitious one (Tr. 187).

Mr. Mook explained what occurred at the time he assigned the job task to Mr. Tysar and Mr. Brown. He stated that he told them that "we had some belt decking to clean out and we needed a lock." The belt electrical breaker was locked out, and Mr. Brown was assigned to do the manual cleaning work from the forklift basket, and Mr. Tysar was assigned to operate the

forklift. He then told them, "we're here, set up and away you go," and since they had no questions, he left the area (Tr. 187-188).

Mr. Mook confirmed that Mr. Tysar raised a question concerning how the basket would be attached to the forklift, and he and Mr. Tysar secured it with a heavy rope and Mr. Tysar "was quite pleased with that arrangement" (Tr. 189). Mr. Mook further explained his work assignment as follows at (Tr. 189-190):

> Q. So, you locked out the belt and tied the basket there. Did you show them where you expected them to put the forklift?
>
> A. Yes, I did. It was obvious because I pointed out the tail piece area where all the salt buildup was.
>
> Q. Could you describe - - can you point on the diagram to the best of your recollection where the salt buildup was that they had to knock down?
>
> A. The forklift in the picture is positioned right where the man had to be to be able to reach right and left of that tail pulley because on a tail piece you have strip boards that contain the salt as it enters the belt; that's where the wipers were blown out and that's where the salt was packed up.
>
> As you went uphill, the salt tapered down to nothing. So, the wipers being blown out caused all this spillage right there at the tail piece area. Once we set this man up in this location, he could reach in this tail piece area and uphill and be able to accomplish all the clean up there was.
>
> Q. Did you explain that to Mr. Tysar and Mr. Brown?
>
> A. Not in detail. I told him we were going to clean the tail piece area up, and this is where I told him to set the machine and there were no questions.
>
> Q. So, you told him the tail piece area. Did you tell him the entire belt had to be cleaned?
>
> A. No, I didn't.

Mr. Mook stated that he instructed Mr. Tysar to use a scrap-salt dumpster that was nearby so that most of the salt could be shoveled from the belt decking directly into the dumpster. Mr. Tysar moved the dumpster into place with the forklift and it was placed to the right of the elevator in an inset by a walled partition (Tr. 191).

Mr. Mook stated that he returned to his office, and five to ten minutes later Mr. Tysar called on the intercom and informed him that there was "a near miss accident" and that two men on a maintenance vehicle "came screaming off the elevator" and could have hit him and caused an accident. Mr. Tysar informed him that no one was hurt "because we weren't set up yet" (Tr. 192).

Mr. Mook identified and offered a copy of a letter addressed to Mr. Tysar, dated October 6, 1995, that he was in the process of writing as a disciplinary action because of Mr. Tysar's unsatisfactory work performance (Exhibit R-7). Mr. Mook stated that the letter was never given to Mr. Tysar, or discussed with him because his work suspension that same evening occurred before he could do so. The letter was rejected (Tr. 199-202).

Mr. Mook stated that Mr. Tysar had worked for him for seven weeks prior to the suspension in question, and that he had many discussions and confrontations with him concerning his lack of work, personal safety, and unsafe work (Tr. 203-205).

Mr. Mook stated that after speaking with Mr. Tysar over the intercom, Mr. Tysar and Mr. Brown came to his office within minutes "screaming that they could not do this job at the freight elevator because it was an unsafe act and they started demanding that safety men from the company be brought in" (Tr. 208). Mr. Mook stated that he instructed Mr. Tysar and Mr. Brown to return to the second floor area and not to resume work on the belt, but to shovel salt from the floor into two dumpsters in the corner of the warehouse "until I can get this sorted out." (Tr. 208).

Mr. Mook stated that he then went to the warehouse after requesting the presence of maintenance foreman Brian Bonjack for a second opinion as to whether there were any other safety facets involved with the work assignment that he had made. Mr. Mook then called Mr. Chris Gill, the mine surface superintendent, to make him aware of his problems with Mr. Tysar, and he and Mr. Gill had an ongoing conversation about Mr. Tysar (Tr. 209-211).

Mr. Mook stated that the forklift was parked "off to the side" when he arrived at the job scene, and "it was all set up but not at the job site yet" (Tr. 211). He and Mr. Bonjack discussed the situation, confirmed with Mr. Tysar that the forklift brake had been tested and was working fine, and made sure the basket was secured and that the safety belt and lanyard were in place. The belt line was locked out, and he then ordered Mr. Tysar to move the forklift and park it to the right of the elevator as shown in the large diagram exhibit R-4.

Mr. Mook was of the opinion that the area where all of the belt work was needed to be done could have been reached with a shovel by the person in the basket where the forklift would have been parked to the right of the elevator (Tr. 213). However, this opinion was not acceptable to Mr. Tysar and he was "extremely angry" because he believed that other people could still exit the elevator and was afraid that he could get hit even with the forklift in that location (Tr. 216). Mr. Mook stated that because of the presence of other equipment on the left side of the elevator

as one exits the doors, anyone exiting the elevator on a piece of equipment would have to proceed straight ahead for a distance of 20 feet, and past the parked forklift, before he could make a left turn to reach the other warehouse areas (Tr. 215-216).

Mr. Mook stated that he offered Mr. Tysar the following alternatives other than taping off or locking out the elevator in order to assure him that the job would be safe (Tr. 218-219):

> THE WITNESS: I told him to park the machine, set the park brake, take it out of gear, get off, stand three feet, an arm's length away from the machine so he would be at the controls near enough in case Brown needed him, which would put him in a frontal view of that elevator to see anyone getting off of it.

Mr. Mook further stated that he offered to contact everyone that may have been working with vehicles that might come into the work area in question, and he denied telling Mr. Tysar to look through the elevator window (Tr. 217, 225). Mr. Mook pointed out that the dumpster was placed at the intended work location so that the salt could be shoveled in from the belt (Tr. 219). He further explained his suggested safety alternatives at (Tr. 223-224):

> A. Two fold. He would be there as the safety man for Mr. Brown, if needed. And he would be needed to move the machine, if nothing else. He was within hand's reach of the control.
>
> And, secondly, to be able to view the elevator because I stated to these gentlemen during the course of these discussions that there was a problem in the block press pump room and I needed to keep the freight elevator running if possible, so that everyone could safely use the elevator and us still get our job done at the same time. So, with Jim Tysar standing in that position, this was the alternative safety suggestion by me, he could be there for Brown as the safety man and also be able to see anyone coming off the elevator.
>
> At that point, I timed the opening on the freight elevator doors - - Brian Bonjack was present during this period, during all of these proceedings - - and it took a full six seconds for the doors to open once the open door button was pushed. So, I explained that to Mr. Tysar that he would have plenty of time to warn off anybody getting off the elevator.

Mr. Mook stated that there were three potential vehicles that could have used the elevator and he offered to warn those operators of the work taking place, but this was unacceptable to Mr. Tysar and "there was only one thought in his mind, and that was the shutting down of the elevator or nothing at all" (229-230).

Mr. Mook denied that there was any "near miss" with respect to the vehicle that drove off of the elevator, and Mr. Tysar and Mr. Brown had not yet arrived at their work area when the

machine drove past them. He stated that he spoke to the vehicle operator who informed him that there was no "near miss" and that the forklift was in the middle of the warehouse and had not moved to the corner by the elevator, and no one was in it (Tr. 235-236).

Mr. Mook stated that he and maintenance foreman Bonjack discussed the job "from beginning to end and made sure that there were no unsafe items left," and concluded that "we were well off to the side and no one could get hurt exiting the elevator" (Tr. 237). He then called superintendent Gill who informed him that "since there are no more safety items to be addressed, that this is now an act of insubordination," and Mr. Brown and Mr. Tysar were suspended and escorted off the property (Tr. 237-238). Mr. Mook stated that during his discussions with Mr. Brown and Mr. Tysar, Mr. Brown was "very quiet," and simply accompanied Mr. Tysar (Tr. 240).

During cross-examination, and in response to a bench question, Mr. Mook agreed that assuming the forklift moved along the beltline, if it was in front of the elevator doors when they opened, this would be an unsafe location (Tr. 248). However, Mr. Mook believed that the forklift would never be positioned in front of the elevator doors because the salt buildup was only at the tail piece, and the main reason for the work was to clean that area so that the wipers could be repaired (Tr. 248).

Brian T. Bonjack, respondent's Surface Maintenance General Foreman, testified that he was summoned by Mr. Mook to the scene of the incident on October 6, 1995, involving Mr. Tysar and Mr. Brown. Mr. Mook requested his presence because he wanted a second opinion about a safety matter on the second floor of the warehouse. He stated that there were discussions going on about the relevant safety of the job assignment made by Mr. Mook, and Mr. Mook wanted his opinion regarding the conditions that Mr. Tysar and Mr. Brown had been asked to work in (Tr. 256-258).

Mr. Bonjack stated that Mr. Tysar and Mr. Brown were assigned to clean the belt tailpiece, and he explained further as follows at (Tr. 258-259):

> Q. Okay, if I may, if you can look at Exhibit R-4, and if you would, Mr. Bonjack, show me on Exhibit R-4 what area of the belt Mr. Tysar and Mr. Brown had been assigned to, please?
>
> A. The tail piece is this area at the end of the conveyor, this being the tail roller which is shown at this point right here. And the chalking on this is generally directly going upstream from that, which would be in this particular area.
>
> Q. If we're facing the elevator, is it your testimony that most of the area Mr. Tysar and Mr. Brown had been assigned to clean was to the right of the elevator?

A. That's correct.

Q. Did they have to clean any of the area over here by the elevator?

A. I didn't observe any significant salt buildup in that area. There was a large accumulation in the tail piece area because there was a leaky tail piece wiper, which is what perpetrated this whole cleanup operation.

Based on his understanding that the work that Mr. Tysar and Mr. Brown were assigned to do was confined to the tailpiece area, Mr. Bonjack was of the opinion that they would not be in the pathway of any vehicles coming out of the elevator, (Tr. 259-261). He believed the forklift would not have been located directly in front of the elevator door in order to complete the cleanup job because the cleanup area was significantly offset from the elevator (Tr. 259-262).

Mr. Bonjack stated that although the cleaning of the belt was not part of his department, and he does not assign workers to do the cleaning, he believed that it is a routine assignment and the tail pieces are routinely the worst areas to clean up. He did not know if the belt in question had previously been taped off while it was cleaned (Tr. 262-263).

Mr. Bonjack stated that Mr. Mook suggested to Mr. Tysar that he position the forklift a safe distance from the elevator opening and stand next to it to assist Mr. Brown if necessary and to verbally warn anyone coming off the elevator that they were working in the area. He stated that the area was quiet and that the elevator doors can be heard when they are opening. He further stated that Mr. Mook offered to apprise or warn other plant personnel about the cleanup activity taking place and to use caution if they were in the area. However, Mr. Tysar would only be satisfied if the elevator was rendered inoperable (Tr. 263-266).

Mr. Bonjack was of the opinion that Mr. Tysar and Mr. Brown were not exposed to any imminent danger from vehicles passing by the area where they were working (Tr. 266). He stated that the mechanical work that was to be done required the elevator to be serviceable in order to bring in parts. He believed the options given to Mr. Tysar and Mr. Brown were clearly explained to them and that the response by Mr. Tysar and Mr. Brown "was an overreaction to a situation that didn't merit that type of reaction" (Tr. 268).

On cross-examination, Mr. Bonjack stated that he was not specifically summoned to the scene by Mr. Mook to be a witness but to "verify what his findings were and to see if I could see anything additional that maybe he had not seen" (Tr. 269). He confirmed that for the most part, he simply observed the verbal exchange between Mr. Mook and Mr. Tysar, and that his conversation about the safety issues was with Mr. Mook and not with Mr. Tysar and Mr. Brown (Tr. 271-273).

Mr. Bonjack stated that he was not aware that Mr. Mook's work assignment included the entire belt. He believed that the opening of the elevator doors could be heard above the noise of

the forklift motor (Tr. 277-278, 280). He agreed that someone up on a forklift cleaning the belt directly in front of the elevator would be at risk if a piece of equipment came off the elevator (Tr. 283).

In response to further questions, Mr. Bonjack stated that he was not present when Mr. Mook gave Mr. Brown and Mr. Tysar their work assignment. However, in the course of his conversation with Mr. Mook after arriving at the scene, it was his understanding that Mr. Brown and Mr. Tysar were to clean the belt tail piece (Tr. 285). He stated that the salt buildup at the belt area closer to the top "tapers off dramatically once you get away from the tail piece." In his opinion, it was not necessary to clean the belt area away from the tail piece because the entire purpose of the cleanup assignment was to ready the area for the mechanics to change the worn tail piece wipers. He stated "whether he wanted the rest of the belt cleaned or not, I wasn't a party to that and I certainly didn't see large accumulations of salt elsewhere. The tail piece was the area of concern" (Tr. 286). He conceded that assuming Mr. Brown and Mr. Tysar understood that they were to clean the entire belt, the forklift would at one point during the cleaning process be directly in front of the elevator (Tr. 288).

Russell T. Ryon, respondent's Human Resources Manager, explained how company overtime is calculated, and stated that Mr. Tysar would not have been eligible for overtime because he was suspended, and the suspension was over a weekend. He stated that he would have to review the personnel records to determine whether Mr. Tysar would have qualified for overtime had he not been suspended (Tr. 289-293).

Mr. Tysar testified in rebuttal that he and Mr. Brown were ordered to clean the entire belt line and not just the tail piece, and he stated as follows at (Tr. 306-307):

> We were told to shovel the decking on that particular belt, not the tail piece, the whole belt. We weren't even told where to start. We were just told to do the decking. That's what we were told.

With respect to any safety alternative offered by Mr. Mook, Mr. Tysar stated as follows at (Tr. 307):

> * * * * he told me to go look in the window of the elevator after I hoisted Chris Brown up in the air and set the parking brake. That's it.
>
> I don't remember anything about him telling me to put my arm out and stand an arm's length away from a forklift. He stated to me to go up to the door, and look through the window, and when the elevator comes up, to tell whoever comes out of the elevator to be careful or to stop or whatever.

Mr. Tysar denied that Mr. Mook told him he was prepared to ask the other employees and mechanics to be aware when they got off the elevator (Tr. 308).

Christopher Brown was recalled by the Court and stated that Mr. Mook instructed him and Mr. Tysar to clean off the decking, and when asked if he mentioned anything about the tail piece, Mr. Brown responded "well, that's part of it" and "he didn't tell us where to start" (Tr. 310). He could not recall that Mr. Mook indicated which part of the belt was "worse" or "best," and he believed that he and Mr. Tysar were expected to shovel off the decking of the entire belt.

In response to a question as to where he would have started the belt cleaning, Mr. Brown responded "I have no idea." When asked where he would have started if the elevator opening incident had not occurred, he responded "I don't know" (Tr. 311). When asked if he would have started at the far end or at the worst end, he responded "wherever, we really weren't in position" (Tr. 311). He explained that the belt decking is the area between the rollers and the belt frame, and it was his understanding that he and Mr. Tysar were to clean the entire length of the belt and the tail piece (Tr. 313-314).

Findings and Conclusions

Fact of Violation

In order to establish a prima facie case of discrimination under section 105(c) of the Mine Act, a complaining miner bears the burden of production and proof to establish (1) that he engaged in protected activity and (2) that the adverse action complained of was motivated in any part by that activity. Secretary on behalf of Pasula v. Consolidated Coal Company, 2 FMSHRC 2768 (1980), rev'd on other grounds sub nom. Consolidation Coal Company v. Marshall, 663 F.2d 1211 (3d Cir. 1981); Secretary on behalf of Robinette v. United Castle Coal Company, 3 FMSHRC 803 (1981); Secretary on behalf of Jenkins v. Hecla-Day Mines Corporation, 6 FMSHRC 1842 (1994); Secretary on behalf of Chacon v. Phelps Dodge Corp., 3 FMSHRC 2508, 2510-2511 (November 1981), rev'd on other grounds sub nom. Donovan v. Phelps Dodge Corp., 709 F.2d 86 (D.C. Cir. 1983). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no way motivated by protected activity. If an operator cannot rebut the prima facie case in this manner it may nevertheless affirmatively defend by proving that (1) it was also motivated by the miner's unprotected activities alone. The operator bears the burden of proof with regard to the affirmative defense. Haro v. Magma Copper Company, 4 FMSHRC 1935 (1982). The ultimate burden of persuasion does not shift from the complainant. Robinette supra. See also Boich v. FMSHRC, 719 F.2d 194 (6th Cir. 1983); and Donovan v. Stafford Construction Company, 732 F.2d 954 (6th Cir. 1983) (specifically-approving the Commission's Pasula-Robinette test). See also NLRB v. Transportation Management Corporation, 462 U.S. 393, 76 L.ed.2d 667 (1983), where the Supreme Court approved the NLRB's virtually identical analysis for discrimination cases arising under the National Labor Relations Act.

Mr. Tysar's Protected Activity

I conclude and find that Mr. Tysar had a right to complain to Mr. Mook about his concern that proceeding with the belt cleaning job assignment might place him at risk and expose him to a possible hazard if he and Mr. Brown were working with the forklift in front of the elevator doors and another vehicle exited the elevator. His complaint is a protected activity which many not be the motivation by mine management for any adverse personnel action against him. Secretary of Labor ex rel. Pasula v. Consolidation Coal Co., 2 FMSHRC 2786 (October 1980), Rev'd on other grounds, sub. nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3d Cir. 1981), and Secretary of Labor ex rel. Robinette v. United Castle Coal Co., 3 FMSHRC 803 (April 1981). Safety complaints to mine management or to a foreman constitutes protected activity, Baker v. Interior Board of Mine Operations Appeals, 595 F.2d 746 (D.C. Cir. 1978); Chacon, supra. However, the miner's safety complaint must be made with reasonable promptness and in good faith, and be communicated to mine management, MSHA ex rel. Michael J. Dunmire and James Estle v. Northern Coal Company, 4 FMSHRC 126 (February 1982); Miller v. FMSHRC, 687 F.2d 194, 195-96 (7th Cir. 1982); Sammons v. Mine Services Co., 6 FMSHRC 1391 (June 1984).

I further conclude and find that Mr. Tysar timely communicated his safety concern to Mr. Mook about the possibility that another vehicle might exit the elevator and place him at risk when he contacted him over the intercom and then went to his office with Mr. Brown to further express their safety concerns about their belt cleaning assignment. The timeliness of the complaint met the requirements enunciated by the Commission in Secretary on behalf of Dunmire and Estle v. Northern Coal Co., 4 FMSHRC 126 (February 1982); Secretary ex rel. John Cooley v. Ottowas Silica Company, 6 FMSHRC 516 (March 1984); Gilbert v. Sandy Fork Mining Company, supra; Sammons v. Mine Services Co. 6 FMSHRC 1391 (June 1984).

In the course of the hearing, Mr. Tysar, for the first time, alleged that Mr. Brown could have dropped a shovel on him if he were standing under the belt looking through the elevator window. I take note of the fact that Mr. Tysar never mentioned such a concern in his complaint statement to MSHA's special investigator on December 11, 1995. When asked in the course of the hearing whether he ever informed Mr. Mook about any safety concern that Mr. Brown might drop a shovel on him while cleaning the belt, Mr. Tysar "guessed that something like that was brought up." However, when pressed for more specifics, Mr. Tysar admitted that he did not mention any shovel to Mr. Mook. During his testimony, Mr. Mook made no mention of any shovel complaint by Mr. Tysar. Further, I find nothing in Mr. Brown's deposition and hearing testimony reflecting any safety concern that he could drop a shovel on Mr. Tysar while cleaning the belt.

I find no credible evidence that Mr. Tysar ever communicated a safety concern to Mr. Mook concerning the possibility that Mr. Brown might drop a shovel on him if he and Mr. Brown were positioned in front of the elevator cleaning the belt.

In the course of the hearing, Mr. Tysar expressed a further concern about the possibility of Mr. Brown shoveling salt materials on him if he were to stand in front of the elevator looking through the window. Although Mr. Tysar suggested the possibility of such an event in his prior statement to the MSHA investigator, his October 6, 1995, company grievance does not include safety concerns for falling shovels or materials. Further, when asked in the course of the hearing if he informed Mr. Mook about any concern for falling materials, Mr. Tysar responded "Yes," but then explained that he simply told Mr. Mook that he "didn't feel safe" looking in the elevator window and did not believe that he gave Mr. Mook any reasons for his concern (Tr. 108-109).

I find Mr. Tysar's testimony regarding his concern for falling materials to be contradictory. However, in the course of the hearing Mr. Mook testified that Mr. Tysar and Mr. Brown "blew this out of proportion" in referring to "shoveling salt down directly in front of this elevator where people coming or they themselves would be in danger" (Tr. 227). He then confirmed that falling salt "was their concern, so I was trying to address it" (Tr. 228). Under the circumstances, and not withstanding Mr. Tysar's contradictory testimony, I conclude and find that Mr. Mook must have been aware of Mr. Tysar's concern since he acknowledged as much. Accordingly, I find that Mr. Tysar timely communicated his falling materials concern to Mr. Mook.

Mr. Tysar's Work Refusal

When a miner has expressed a reasonable, good faith fear of a safety or health hazard, and has communicated this to mine management, such as a foreman, management has a duty and obligation to address the perceived hazard or safety concern in a manner sufficient to reasonably quell his fears, or to correct or eliminate the hazard. Secretary v. River Hurrican Coal Co., 5 FMSHRC 1529, 1534 (September 1983); Gilbert v. Sandy Fork Mining Company, 12 FMSHRC 177 (February 1990), on remand from Gilbert v. FMSHRC, 866 F.2d 1433 (D.C. Cir. 1989), rev'g Gilbert v. Sandy Fork Mining Co., 9 FMSHRC 1327 (1987).

The focus in work refusal cases is the complaining miner's belief that a hazard exists, and the critical issue is whether or not that belief is held in good faith and is a reasonable one. Secretary ex rel. Bush v. Union Carbide Corp., 5 FMSHRC 993, 997 (June 1983); Miller v. FMSHRC, 687 F.2d 1984 (7th Cir. 1982). In analyzing whether a miner's belief is reasonable, the hazardous condition must be viewed from the miner's perspective at the time of the work refusal, and the miner need not objectively prove that an actual hazard existed. Secretary ex rel. Bush v. Union Carbide Corp., 5 FMSHRC 993, 997-98 (June 1983); Secretary ex rel. Pratt v. River Hurricane Coal Co., 5 FMSHRC 1529 , 1533-34 (September 1983); Haro v. Magma Cooper Co., 4 FMSHRC 1935, 1944 (November 1982); Robinette, supra, 3 FMSHRC at 810. Secretary on behalf of Hogan and Ventura v. Emerald Mines Corp., 8 FMSHRC 1066 (July 1986). The Commission has also explained that "good faith" belief simply means honest belief that a hazard exists." Robinette, supra at 810,

As recently reiterated by the Commission in Billy R. McClanahan v. Wellmore Coal Corporation, 19 FMSHRC 55, 67 (January 1997), once it is determined that a miner has expressed a good faith, reasonable concern about safety, the analysis shifts to an evaluation of whether the operator addressed the miner's concern "in a way that his fears should have been reasonably quelled" Gilbert v. FMSHRC, 866 F.2d 1433, 1439 (D.C. Cir. 1989); Thurman v. Queen Anne Coal Co., 10 FMSHRC 131-135 (February 1988), Aff'd, 866 F.2d 431 (6th Cir. 1989); Secretary of Labor on behalf of Bush v. Union Carbide Corp., 5 FMSHRC 993, 997 (June 1983). A miner's continuing refusal to work may become unreasonable after an operator has taken reasonable steps to dissipate his fears or ensure the safety of the challenged task or condition, Bush, at 5 FMSHRC 998-99.

The respondent concedes that Mr. Tysar engaged in a protected activity by raising the issue of a potential danger to him and Mr. Brown if they were to proceed with their assigned job task. Indeed, foremen Mook and Bonjack both agreed that assuming the forklift moved along the beltline, if it was positioned in front of the elevator doors when they opened, it would be in an unsafe location. However, the respondent believes that the disputed issue is whether, in light of the circumstances, Mr. Tysar's belief that a hazard existed was reasonable, whether the hazard was beyond one inherent in the mining industry, and whether it was adequately addressed by Mr. Mook.

The critical disputed issue with respect to whether or not Mr. Tysar's work refusal was made in good faith and based on an honest and reasonable concern that he would be exposed to a potential hazard if he were to commence cleaning the belt while the elevator was still in operation is whether his assigned work task by foreman Mook included the cleaning of the entire beltline or was limited to the cleaning of the tailpiece.

The respondent does not dispute the fact that Mr. Tysar would have a legitimate safety concern if he and Mr. Brown were assigned to clean the entire beltline and needed to position the forklift in front of the elevator to do the job (Tr. 317-318). Mr. Mook and Mr. Bonjack agreed that if the forklift were to move along the beltline and was positioned in front of the elevator doors when the doors opened, Mr. Brown and Mr. Tysar would be in an unsafe location (Tr. 248-283).

I conclude and find that if in fact Mr. Tysar and Mr. Brown were assigned and expected to clean the entire beltline while the elevator remained in operation, they would at some point in time be positioned with the forklift in front of the elevator doors, and would be at risk if a vehicle unexpectedly exited the elevator while they were in front of it. Under this scenario, I would conclude that Mr. Tysar's concern for his safety would not be unreasonable. However, if Mr. Tysar's work assignment was confined to the belt tail piece area, I would find it reasonable to conclude that the cleaning of the belt in that location would not present a hazard to Mr. Tysar and Mr. Brown if the elevator were to continue in operation, and that Mr. Tysar's concern would not be reasonable.

Mr. Brown testified at his October 22, 1996, deposition that Mr. Mook assigned him to clean the belt decking "right above the elevator" for a distance of "about 30 feet" (Tr. 5-6). He confirmed that the elevator was 10 feet wide, and when asked about the remaining 20 feet of the beltline, he stated that "we would doing this one section" directly above the elevator (Tr. 6). He could not remember how Mr. Tysar described the area where they were supposed to be working in to Mr. Mook during their discussion (Tr. 19). When asked to describe his understanding of their exact work area on the evening in question, Mr. Brown stated as follows at (Tr. 20-22).

Q. Again, can you describe for me exactly the work area? Was it only the area immediately over the elevator?

A. Um-hum, yes.

Q. So you didn't have to clean any of the decking to the right of the elevator?

A. Yes. We had to do a section.

Q. I'm still a little confused about the section that you all had to clean off. Was it actually 30 feet of the belt that you had to clean off?

A. No. It was right where the tail piece was.

Q. And you're saying that that is directly over the elevator?

A. No. That is to the right, but it goes up, that we had to shovel.

Q. It's to the right and it goes up, so it's to the right of the elevator and it goes up?

A. Right.

Q. So in addition to the area directly over the elevator, you had to clean to the right and up?

A. Right.

* * * *

Q. But if it was to the right of the elevator, how was cleaning that section unsafe?

A. Well, we had to move up. We'd have to - - he'd have to move his forklift and then get in position to shovel the - - keep on moving up shoveling.

I find Mr. Brown's deposition testimony to be rather confusing and contradictory. On the one hand he states that the work assignment was limited to the belt area over the elevator, and on the other hand he identified and limited the work area to "a section right where the tail piece was" and not directly over the elevator, rather than the entire 30 feet of belt line. At the hearing, Mr. Brown testified that it was his understanding that he and Mr. Tysar were to clean the entire length of the belt, including the tail piece, but he had no idea where he would have started the job if the work refusal had not occurred (Tr. 311, 313-314).

Mr. Tysar testified that he and Mr. Brown were told to clean the "belt decking" between the belt rollers and the belt bottom, and that the belt traveled at a 45 degree angle above the elevator doors (Tr. 25, 49-53). He believed the belt was approximately 15 to 20 feet long, and stated that he and Mr. Brown were to clean the entire belt, starting at one end and cleaning the entire decking (Tr. 64). In response to a question as to whether Mr. Mook pointed out the exact area that he wanted cleaned, Mr. Tysar stated that he and Mr. Brown "had a good understanding of what needed to be done and how it had to be done" (Tr. 131). He later described the area where he and Mr. Brown would have been working as "roughly 20 to 25 feet and directly in front of the elevator doors" (Tr. 147-148). Still later, he testified that "we were told to shovel the whole belt" and "we weren't even told where to start" (Tr. 306-307).

Mr. Mook testified that he personally escorted Mr. Tysar and Mr. Brown to the belt area to explain their job task and that he told them "we had some belt decking to clean out" and pointed out the "obvious" tail piece area where the salt buildup was located. Mr. Mook believed that all of the salt spillage "at the tail piece area and uphill" could be reached and cleaned up at the tail piece location. He stated that he told Mr. Tysar to clean up the tail piece area and to position the forklift at that location, and Mr. Tysar and Mr. Brown had no questions. Mr. Mook denied that he told them to clean the entire beltline.

General Foreman Bonjack testified credibly that the large salt accumulation at the tail piece was the result of a leaky tail piece wiper and that the clean up operation was intended to address that problem. Mr. Bonjack observed no significant salt accumulations in the elevator area, and he was of the opinion that that there was no need to position the forklift in front of the elevator doors in order to complete the clean up job because the area that needed cleaning was away from the elevator.

Mr. Bonjack confirmed that he was not present when Mr. Mook gave Mr. Tysar and Mr. Brown their initial work assignment and he was not aware that the work assignment included the entire belt. However, after arriving at the scene of the dispute, and speaking with Mr. Mook, Mr. Bonjack learned that the work assignment was confined to the tail piece area which he believed was the area of Mr. Tysar's concern.

Mr. Tysar did not dispute or rebut Mr. Mook's credible testimony that the defective belt tail piece wipers needed to be changed out by the maintenance department and that this could not

be done until the salt accumulations at the tail piece were cleaned up. Indeed, Mr. Tysar confirmed that the "worst" salt buildup was at the tail piece, and that had the work begun, Mr. Brown would have cleaned up the salt accumulations and shoveled them into the dumpster that was placed at the tail piece for this purpose (Tr. 56). Mr. Mook testified credibly that Mr. Tysar used the forklift to move the dumpster into place in an in inset next to a wall partition so that the salt materials shoveled by Mr. Brown could fall directly into the dumpster (Tr. 191). All of this credible and unrebutted testimony by Mr. Mook lends credence to his contention that the belt cleaning assignment was limited to only the tail piece area and not the entire belt line.

In the course of his deposition, Mr. Brown stated that a foreman whose name he could not recall told him "a long time ago" that there was a "rule" that required a forklift operator to remain in the driver's seat if there was someone in the man basket (Tr. 25-27). He suggested that this rule would not allow Mr. Tysar to stand next to the forklift while he was in the basket. Upon review of the respondent's April 1, 1995, mine safety rules and policies, Mr. Brown could not find any such rule related to forklifts (Tr. 34-36). Mr. Brown did not pursue this "rule" further at the hearing, and there is no credible evidence that he or Mr. Tysar ever raised it with Mr. Mook. The only safety issue Mr. Tysar raised with respect to the forklift was the securing of the man basket, and Mr. Tysar conceded that Mr. Mook addressed his concern to his satisfaction (Tr. 133-134).

Mr. Tysar stated that even if the assigned work area was confined to the belt tail piece, there was "a very good probability" that the forklift could have been bumped by a vehicle exiting the elevator because part of the forklift would still be in front of part of the elevator doors (Tr. 119). I find this difficult to believe, particularly since Mr. Tysar himself described the width of the forklift at 4 ½ to 5 feet, and stated that the belt tail piece was 6 to 10 feet away from the elevator door (Tr. 113-114). He further stated that had he proceeded with the assigned work, "the forklift would have been positioned away from the elevator. The conveyor belt would have been in between the elevator and the forklift" (Tr. 145). Under these circumstances, and given the fact that the dumpster was located directly under the belt so that Mr. Brown could shovel in the salt materials, I find it highly unlikely that any of the materials would fall on Mr. Tysar.

Mr. Tysar further confirmed that any vehicle exiting the elevator would have to travel straight out of the elevator for at least 20 feet before it could turn left because of the presence of other equipment in the tail piece area. Under the circumstances, I find it highly unlikely that a vehicle exiting the elevator would abruptly turn sharply to the left immediately upon exiting the elevator rather than proceeding straight ahead for 20 feet where it could freely turn left without encountering any equipment obstacles, including the forklift that I find was positioned in front of the tail piece and clear of the elevator doors. Further, if the vehicle was backing out of the elevator, as Mr. Brown testified it did on the day in question, I find it unlikely that it would back out at a high rate of speed and then turn around and proceed toward the tail piece area.

After careful review and consideration of all of the testimony and evidence in this case, I credit the testimony of Mr. Mook and Mr. Bonjack and find that Mr. Mook assigned Mr. Tysar

and Mr. Brown to clean the belt tail piece area and not the entire belt. I find the testimony of Mr. Tysar and Mr. Brown regarding their work assignment to be contradictory and less than credible.

In view of my finding that Mr. Tysar's work assignment was confined to the tail piece area, and based on my foregoing findings and conclusions, I conclude and find that Mr. Tysar would not have been exposed to a hazard had he proceeded to clean the tail piece area, and that even viewed from his own perspective, I cannot conclude that his work refusal was reasonable and made in good faith. Further, even if I were to find that Mr. Tysar's work refusal was reasonable, in view of my findings and conclusions which follow below, I have concluded that Mr. Mook timely addressed Mr. Tysar's safety concerns with reasonable offers of safety alternatives, and that Mr. Tysar's rejections of these offers was unreasonable.

Foreman Mook's Response to Mr. Tysar's Safety Concerns

The evidence establishes that Mr. Tysar's confrontation with Mr. Mook took place while Mr. Tysar and Mr. Brown were preparing to position the forklift in order to commence the belt cleaning, and before any cleaning had actually been done. Mr. Tysar candidly admitted that he viewed his encounter with Mr. Mook as a "power struggle" and he believed that Mr. Mook acted less than diplomatically in responding to his concern. Having viewed Mr. Tysar in the course of the hearing, he impressed me as an articulate, but rather argumentative and strong willed individual, who at times displayed his anger and frustration in a less than diplomatic manner. Indeed, at one point in the course of the hearing I observed that Mr. Mook was so provoked by Mr. Tysar's suggestions that he had little or no concern for safety that he needed to be restrained by his counsel, and the Court ordered a brief "break" to "cool off" the parties and admonish them to maintain the proper decorum.

I find Mr. Tysar's unsupported assertion that Mr. Mook had little regard for safety to be less than credible. Mr. Tysar himself confirmed that Mr. Mook responded to his call to come to the work area in a reasonable amount of time, and assigned him and Mr. Brown to do other work while he considered the matter further (Tr. 137-138). Mr. Tysar further confirmed that Mr. Mook locked out the belt, and immediately responded to his safety concern regarding the securing of the "man basket" to the front of the forklift, and provided a safety belt and lanyard for Mr. Brown's use while cleaning the belt from inside the basket that was equipped with protective railings and a locked gate (Tr. 133).

Mr. Mook testified credibly that he thoroughly considered all of the safety aspects of his belt cleaning assignment in consultation with foreman Bonjack, and rejected as unreasonable Mr. Tysar's request to take the elevator out of service before he was expected to proceed with the belt cleaning job. Mr. Mook further testified credibly that he offered two alternative safety suggestions to Mr. Tysar namely, an offer that he (Mook) inform and alert other employees who might use the elevator that Mr. Tysar and Mr. Brown were working in the area, or that Mr. Tysar station himself next to the forklift and near the controls, with the brake engaged, so that he could

have a clear view of the elevator in order to readily alert anyone exiting the elevator that he and Mr. Brown were working in the area.

Mr. Brown testified at his deposition that Mr. Mook did not suggest any safety alternatives and never suggested that Mr. Tysar serve as "a lookout" or put the forklift in gear or in park (Tr. 9, 11, 12). However, in the course of the hearing that followed a little over a month later, Mr. Brown was less than certain that Mr. Mook never offered any alternatives to shutting down the elevator and stated that he had no recollection of any alternatives offered by Mr. Mook (Tr. 163). Mr. Brown's conflicting testimony was contradicted by Mr. Tysar who testified that Mr. Mook told him to set the forklift brake and stand by the elevator door where he could observe the arrival of the elevator by looking through the window.

Mr. Tysar initially claimed that he had no idea what Mr. Mook expected of him by looking through the elevator window (Tr. 58). However, he later testified that Mr. Mook suggested that he look through the elevator window in order to warn anyone on the elevator to be careful or to stop (Tr. 307). I find Mr. Tysar's testimony concerning Mr. Mook's alternative safety suggestion to be less than credible. Mr. Tysar claimed that he had no idea what Mr. Mook had in mind when he told him to look through the elevator window, yet he confirmed that Mr. Mook expected him to warn anyone on the elevator that he and Mr. Brown were working in the area.

I further find Mr. Tysar's testimony that he could not remember Mr. Mook offering to inform other employees that he and Mr. Brown were cleaning the belt (Tr. 95), to be contrary to his later denials that any such offer was ever made (Tr. 308).

I have considered the question of why Mr. Mook would find it necessary to offer alternative safety precautions if in fact his work assignment was limited to the tail piece area, and I find his explanation that he did so to assure Mr. Tysar that the cleaning job would be safe to be credible.

Foreman Bonjack corroborated Mr. Mook's testimony that he offered the two safety alternatives to Mr. Tysar in response to Mr. Tysar's concern that he and Mr. Brown might be at risk if a vehicle exited the elevator with the forklift positioned in front of it, but that Mr. Tysar rejected Mr. Mook's offer and insisted that the elevator be shut down. Having viewed Mr. Bonjack's demeanor in the course of the hearing, I find his testimony to be credible.

Although Mr. Tysar indicated that he was "willing to talk with people and compromise," he confirmed that he made no suggestions to Mr. Mook short of insisting that the elevator be taken out of service, and he remained steadfast in his insistence that the only safe method of cleaning the belt that he would accept was to shut down the elevator and tape it off so that it could not be used while the belt was being cleaned. Indeed, Mr. Tysar admitted that any alternatives suggested by Mr. Mook, short of taking the elevator out of service, would have been unacceptable to him and rejected out of hand.

I find Mr. Tysar's summary refusal to seriously consider Mr. Mook's alternative safety suggestions to be unreasonable and a less than good faith effort to at least attempt to resolve the dispute to their mutual satisfaction. I further discredit Mr. Tysar's assertion that Mr. Monk simply told him to go look through the elevator window, and credit Mr. Mook's testimony that he did more than that in suggesting alternative ways to address Mr. Tysar's safety concerns.

I conclude and find that foreman Mook addressed Mr. Tysar's safety concern in a reasonable way by offering the two alternatives previously discussed, and that Mr. Tysar's rejection of those suggestions and insistence that the elevator be shut down was unreasonable. Under the circumstances, I conclude and find that Mr. Tysar's work refusal was unprotected and that his suspension was not discriminatory and did not amount to a violation of section 105(c) of the Act.

ORDER

In view of the foregoing findings and conclusions, and after careful consideration of all of the credible evidence and testimony adduced in this case, I conclude and find that the complainant has failed to establish a violation of section 105(c) of the Act. Accordingly, the complaint IS DISMISSED, and the complainant's claims for relief ARE DENIED.

George A. Koutras
Administrative Law Judge

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ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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MAY 9 1997

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. PENN 94-15
Petitioner	:	A. C. No. 36-04109-03522 A
v.	:	
	:	Ambrosia Tipple Mine
WAYNE R. STEEN Employed by	:	
AMBROSIA COAL COMPANY,	:	
Respondent	:	

ORDER ON REMAND

I

This is a civil penalty proceeding under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq.

The Commission has remanded the case a second time for reassessment of a civil penalty against Wayne R. Steen.

The Commission has held in this case, and in *Sunny Ridge Mining Company, Inc.*, 19 FMSHRC 254 (1997) (decided after the judge's decision on remand in this case), that in a section 110(c) case against an individual, Commission judges must make findings on each of the six penalty criteria in section 110(i) as they apply to the individual. Since section 110(i) was drafted to apply to mine operators, rather than an individual, the Commission states that the "criteria . . . can be applied by analogy" to individuals. The Commission stated in *Sunny Ridge*:

> In making such findings, judges should thus consider such facts as the individual's income and family support obligations, the appropriateness of a penalty in light of the individual's job responsibilities, and an individual's ability to pay. Similarly, judges should make findings on an individual's history of violations and negligence, based on evidence in the record on these criteria. Findings on the gravity of a violation and whether it was abated in good faith can be made on the same record evidence that is used in assessing an operator's penalty for the violation underlying the section 110(c) liability.

Sunny Ridge, supra, 19 FMSHRC at 272.

In this case, the Commission has found that the judge's findings as to negligence, gravity, history of previous violations, and good faith abatement are sufficient as to Mr. Steen. It has remanded for findings on the criteria of the penalty's effect on the ability to continue in business and the appropriateness of the penalty to the size of the business as applied to Steen by analogy. The Commission states that "the relevant inquiry with respect to the criterion regarding the effect on the operator's abilitiy to continue in business, as applied to an individual, is whether the penalty will affect the individual's ability to meet his financial obligations" and directs the judge to "make specific findings as to the nature and extent of these obligations" and to "explain how they affect the penalty." Slip Op. p. 6. With respect to the "size" criterion, the Commission states that "the relevant inquiry is whether the penalty is appropriate in light of the individual's income and net worth" and directs the judge to make "specific findings on Steen's income and net worth" and to "explain how they affect the penalty." Id.

II

Further proceedings are necesasry to obtain evidence that will enable the judge to make necessary findings to reassess a civil penalty.

By analogy to civil penalty cases against mine operators, I hold that the Secretary has the burden of showing that a proposed penalty is appropriate to Steen's income and net worth, and that Steen has the burden of showing that the penalty will adversely affect his ability to meet his financial obligations. If the parties are unable to stipulate the information as to Steen's income, net worth, and financial obligations, Steen shall be required to produce such information. The Secretary shall have an opportunity to raise issues respecting the information submitted by Steen.

The parties are directed to confer in an effort to stipulate the following no later than **June 2, 1997**:

1. A statement of Wayne R. Steen's current income, net worth and financial obligations, with copies of his latest Federal Income Tax Return and W-2 Form, and a balance sheet.

2. A statement as to whether or not Mr. Steen has the financial ability to pay a civil penalty of $3,500 in 10 monthly installments of $350 and continue to meet other financial obligations, with the basic reasons supporting such statement. If the statement is in the negative, the parties shall endeavor to stipulate the amount of a civil penalty and monthly installments that Mr. Steen is able to pay.

If a stipulation is reached, it shall be filed with the judge by **June 10, 1997**.

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If the parties are unable to stipulate as to either item 1 or 2, above, then Mr. Steen is directed to file a statement as to such item with copies of supporting documents, no later than **June 10, 1997.** The Secretary shall have 10 days to reply to such statement or statements.

If material issues of fact are raised by the parties' separate statements, a hearing will be scheduled on the issues of fact that are relevant to the issues on remand in this case.

William Fauver
Administrative Law Judge

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