MAY 1998

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

Secretary of Labor, MSHA on behalf of William Kaczmarczyk v. Reading Anthracite Company, Docket No. PENN 97-157-D. (Judge Weisberger, April 7, 1998)

Associated Electric Cooperative v. Secretary of Labor, MSHA, Docket No. CENT 97-164-R, CENT 97-165-R. (Judge Feldman, April 10, 1998)

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

Secretary of Labor, MSHA v. Peabody Coal Company, Docket No. LAKE 97-46. (Judge Weisberger, April 14, 1998)

COMMISSION DECISIONS AND ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

May 11, 1998

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	CIVIL PENALTY PROCEEDINGS
	:	Docket Nos: CENT 97-154-M
	:	CENT 97-155-M
v.	:	CENT 97-156-M
	:	CENT 97-157-M
BLUE CIRCLE, INC.	:	CENT 97-158-M
	:	

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

ORDER

BY THE COMMISSION:

This consolidated civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994). On April 16, 1998, the Secretary of Labor and Blue Circle, Inc. ("Blue Circle") filed a Joint Motion for Modification of Settlement Agreement with the Commission's Office of Administrative Law Judges. For the reasons discussed below, we reopen this proceeding, treat the motion as a late-filed petition for discretionary review, and remand the matter to the judge.

On January 15, 1998, the Secretary of Labor and Blue Circle filed with Administrative Law Judge Gary Melick a Motion to Approve Disposition/Settlement. In the motion, the parties requested approval of their agreement that Blue Circle pay $7035.00 and that the proceeding be dismissed. Mot. at 2, 12. In addition, the parties requested in the motion that the judge sever Citation No. 7855673 from the proceeding and consolidate it with Citation No. 4454558 in Docket No. CENT 97-194-M, and incorporated by reference a Motion to Sever and Consolidate, which was purportedly filed separately. *Id.* at 12. On February 10, 1998, Judge Melick issued a Decision Approving Settlement, ordering Blue Circle to pay a penalty of $7035.00. The judge did not address the parties' Motion to Sever and Consolidate.

On April 16, 1998, the Secretary and Blue Circle filed the present motion requesting that the Commission modify the penalty amount payable to the Secretary. Counsel explain that on March 18, 1998, counsel for the Secretary received a telephone call from the assessment office at the Secretary of Labor's Mine Safety and Health Administration ("MSHA") stating that the amount contained in the final settlement agreement was incorrect. Jt. Mot. at 2. Upon review, Secretary's counsel discovered that she had failed to include the settlement amount for

CENT 97-158-M in her calculations, resulting in a $1771.00 shortfall in the final settlement amount. *Id.* Accordingly, the parties request that the Commission add the penalty amount for CENT 97-158-M, so that the total penalty assessed — $8806.00 — would reflect the settlement reached by the parties. *Id.*

Our review of the record does not make certain that the penalty amount payable to the Secretary according to the settlement agreement equals the sum of $8806.00. Also, the present motion does not discuss whether Citation No. 7855673 was severed as the parties had previously requested. We have determined administratively that a separate Motion to Sever and Consolidate was never filed in these proceedings or in Docket No. CENT 97-194-M. Moreover, it appears that Citation No. 7855673 has not been severed and consolidated with Citation No. 4454558 in Docket No. CENT 97-194-M. Furthermore, on February 11, 1998, Judge Melick issued an order approving a settlement agreement in Docket No. CENT 97-194-M.

The judge's jurisdiction over this case terminated when his decision approving the settlement was issued on February 10, 1998. 29 C.F.R. § 2700.69(b). Relief from a judge's decision may be sought by filing a petition for discretionary review within 30 days of its issuance. 30 U.S.C. § 823(d)(2); 29 C.F.R. § 2700.70(a). If the Commission does not direct review within 40 days of a decision's issuance, it becomes a final decision of the Commission. 30 U.S.C. § 823(d)(1). The parties' motion was received by the Commission after the judge's decision had become a final decision of the Commission.

Relief from a final Commission judgment or order is available to a party under Fed. R. Civ. P. 60(b)(1) in circumstances such as mistake, inadvertence, or excusable neglect. Fed. R. Civ. P. 60(b)(1);[1] *see also* 29 C.F.R. § 2700.1(b) (Federal Rules of Civil Procedure apply "so far as practicable" in the absence of applicable Commission rules); *Lloyd Logging, Inc.*, 13 FMSHRC 781, 782 (May 1991). We are unable to evaluate the merits of the parties' position on the basis of the present record. In the interest of justice, we reopen the proceedings, treat the parties' motion as a late-filed petition for discretionary review requesting relief from a final Commission decision, and excuse its late filing. *See Kelley Trucking Co.*, 8 FMSHRC 1867, 1868-69 (Dec. 1986); *see also General Chem. Corp.*, 18 FMSHRC 704, 705 (May 1996).

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[1] Rule 60(b) provides in pertinent part: "On motion and upon such terms as are just, the court may relieve a party . . . from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect . . . ."

We remand the matter to the judge, who shall dispose of the parties' motion and modify his decision as appropriate. *Cf. General Chem. Corp.*, 18 FMSHRC 704, 705 (May 1996) (amending judge's dismissal order); *Martin Marietta Aggregates*, 16 FMSHRC 189, 190 (Feb. 1994) (amending judge's decision approving settlement to reflect agreement reached by parties). The judge may afford the parties an opportunity to further amend their motion.

Mary Lu Jordan, Chairman

Marc Lincoln Marks, Commissioner

James C. Riley, Commissioner

Theodore F. Verheggen, Commissioner

Robert H. Beatty, Jr., Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR

WASHINGTON, D.C. 20006

May 14, 1998

MARVIN E. CARMICHAEL	:	
	:	
v.	:	Docket No. SE 93-39-D
	:	
JIM WALTER RESOURCES, INC.	:	

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

DECISION

BY: Jordan, Chairman; Marks, Riley, and Beatty, Commissioners

In 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"), Administrative Law Judge T. Todd Hodgdon concluded that Jim Walter Resources ("JWR") did not violate section 105(c) of the Mine Act, 30 U.S.C. § 815(c),[1] when it gave employee Marvin E. Carmichael a 5-day

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[1] Section 105(c) of the Act provides, in pertinent part:

> (1) No person shall discharge or in any manner discriminate against or . . . otherwise interfere with the exercise of the statutory rights of any miner . . . in any coal or other mine subject to this [Act] because such miner . . . has filed or made a complaint under or related to this [Act], including a complaint notifying the operator or the operator's agent . . . of an alleged danger or safety or health violation in a coal or other mine, . . . or because of the exercise by such miner . . . of any statutory right afforded by this [Act].
>
> (2) Any miner . . . who believes that he has been discharged, interfered with, or otherwise discriminated against by any person in violation of this subsection may, within 60 days after such violation occurs, file a complaint with the Secretary alleging such discrimination. . . .

suspension with intent to discharge on October 10, 1991. 19 FMSHRC 770, 771, 774 (Apr. 1997) (ALJ). Pursuant to section 113(d)(2)(B) of the Mine Act, 30 U.S.C. § 823(d)(2)(B), the Commission, on its own motion, directed review on the question whether the judge's conclusion that Carmichael did not engage in activity protected under the Act is contrary to law. For the reasons that follow, we vacate and remand for further analysis consistent with this decision.

I.

Factual and Procedural Background

JWR operates the No. 7 mine in Brookwood, Alabama. JWR Br. at 2; Tr. 6. On October 10, 1991, roof bolter Marvin E. Carmichael and three fellow roof bolters were working the evening shift in the No. 6 section of the mine. 19 FMSHRC at 771. Prior to the beginning of the shift, they were informed by one of the section foremen, Mark Buzbee, that in the time before they had to begin roof bolting, and during the time throughout the shift when no bolting was required, they were going to be "task trained" on operating a scoop.[2] *Id.* While the parties agreed at hearing that the training was never completed, they presented conflicting theories and evidence as to why the training was not completed and why Carmichael was disciplined.

> (3) . . . If the Secretary, upon investigation, determines that the provisions of this subsection have not been violated, the complainant shall have the right, within 30 days of notice of the Secretary's determination, to file an action in his own behalf before the Commission, charging discrimination or interference in violation of paragraph (1).

[2] Under 30 C.F.R. § 48.7, miners are required to be trained on mobile equipment before operating such equipment. Section 48.7 provides, in pertinent part:

> (a) Miners assigned to new work tasks as mobile equipment operators . . . shall not perform new work tasks in [this category] until training prescribed in this paragraph and paragraph (b) of this section has been completed. . . . The training program shall include the following: (1) . . . instruction in the health and safety aspects and the safe operating procedures related to the assigned tasks . . . ; and (2) (i) *[s]upervised practice during non-production* . . . [or] (ii) *[s]upervised operation during production.*

30 C.F.R. § 48.7 (italics in original).

JWR's shift mine foreman, Trent Thrasher, testified that he directed the section foremen, Mark Buzbee and Kenny Looney, to task train the four roof bolters on the operation of a scoop.[3] *Id.* at 772. Thrasher testified that there were to be two components to the training. First, Buzbee was to cover what Thrasher termed "safety aspects," such as checking roof and rib conditions, bucket position, location of fire extinguishers, operating the levers, and other "standard rules." Tr. 36-37, 43-44. Following this portion of the training, Looney's role was to "put [the miner] on the scoop and watch him go back and forth . . . in a non-productive way." Tr. 37, 43.

Thrasher testified that, after the shift began, he received a call from Looney advising that the miners had refused the safety training which both Buzbee and Looney had attempted to give. Tr. 40, 44. Thrasher stated that he went into the mine and talked to the foremen for approximately 30 minutes and they told him that they had barely gotten started with the "safety aspects" of the training when "the guys told them that they weren't going to accept the training, they knew how to do the job, they didn't want to be trained, they weren't going to run the scoop[,] and they weren't going to sign forms." Tr. 42, 43-44. Thrasher also testified that the foremen told him that the roof bolters had said "they weren't going to take another man's job."[4] Tr. 42. Consequently, according to Thrasher, Looney had not been able to begin the operational phase of training. Tr. 43-44.

Thrasher further testified that, after he assured himself that the miners had been given every opportunity to accept the training, including issuing them ultimatums of discipline, the miners continued to refuse the task training. Tr. 45. Thrasher asserted that he then informed the miners that they were being given a 5-day suspension with intent to discharge for insubordination. Tr. 45, 49. Thrasher added that, as he escorted the miners out of the mine, one of them asked for a safety committeeman. Tr. 45-46. Thrasher testified that he refused this request because the suspension had already been given, and because there was no safety issue since the miners had not yet been asked to run the scoop. Tr. 46-47. Thrasher stated that when the group got to the bottom of the elevator, some of the miners said that they would have signed under protest the form stating that they had been task trained. Tr. 47. Thrasher testified that he

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[3] Neither Buzbee nor Looney testified at the hearing.

[4] Scoops are usually operated by a "bidded" operator who has been assigned the job through the bidding procedures specified in the labor contract between the company and the United Mine Workers of America ("UMWA"). JWR Br. at 2. JWR asserts that it has the right under the collective bargaining agreement to require UMWA employees to "work out of classification" or perform tasks that do not fall within the duties normally associated with their job title. *Id.* at 3. As such, it claims that it had the right to require the roof bolters to run the scoop when they had finished their normal tasks. *Id.* At the pre-shift meeting on October 10, 1991, Looney told Thrasher that the union employees were unhappy about working out of classification on the scoop job. *Id.* at 4. In fact, the UMWA had filed a grievance 3 days earlier on behalf of the miners working on the No. 6 section, "demanding [that] Management post the scoop jobs on #6 section that are being performed by other classifications." *Id.*; Resp. Ex. D.

did not respond to this comment because the miners had already had three opportunities to sign the form or take the training. Tr. 44-45, 47. Thrasher denied that either Buzbee or Looney at any point that day asked the roof bolters to sign the training form. Tr. 69-70.

Carmichael's version of the events leading up to the discipline of the roof bolters differs markedly from Thrasher's. In essence, Carmichael complained that JWR required the roof bolters to sign the training form without first giving them hands-on training as required by MSHA. In his Discrimination Report, Carmichael stated that he "was suspended with intent to discharge for refusing to sign and [f]alsify a [task training] form." Complaint to MSHA.[5] His complaint further stated that he refused to sign because he believed that his inexperience made operating the scoop dangerous to himself and the other miners in the section. Minutes from Grievance Meeting at 1.[6] Carmichael reiterated his falsification claim at the hearing, testifying that he and the other roof bolters were pressured to sign under threat of termination, despite the fact that the practical training required by section 48.7 was never mentioned, let alone administered,[7] and even though he had no prior experience operating a scoop. Tr. 9, 89.

Carmichael repeatedly testified at the hearing that the miners had not refused the oral portion of the task training. Tr. 16, 23, 89. He asserted that the roof bolters "did participate in [the oral task training] and [were] still asked to sign [the task training form] or we were terminated by Mr. Looney. There was nothing ever mentioned about Mr. Looney showing us the procedures of running the machinery on the section." Tr. 89. Carmichael also stated that the "task training [I was] given didn't make me an operator." Tr. 23. Finally, Carmichael submitted that, after he was asked to falsify the training form, he made three requests for a safety committeeman to be brought in to clarify what his rights were. Minutes from Grievance Meeting at 2-3. He maintained that each request was either refused or disregarded. *Id.* at 2-4. Likewise, Carmichael contended that his offer to sign the form under protest was refused by Thrasher. *Id.* at 3.

The parties agree that after the discipline was announced, the miners met with mine management, as provided for under the collective bargaining agreement, and the discharge was

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[5] Carmichael's Discrimination Report, on which the cited quotation appears, was submitted as part of his section 105(c) complaint to the Commission.

[6] The minutes of the grievance meeting, referred to as a "24-48 meeting," were submitted as part of Carmichael's section 105(c) complaint to the Commission. Thrasher described a 24-48 meeting as a meeting between the employee and the mine manager regarding disciplinary action taken against the employee, which must take place after 24 hours of the discipline, but within 48 hours. Tr. 48.

[7] At the hearing, when Carmichael was asked why he refused to work on the scoop, he responded: "Because we weren't put on it to run it. I didn't know how to run it or operate it. We were instructed verbally how to do it." Tr. 16.

converted to a 2-day suspension. 19 FMSHRC at 771. The miners agreed not to file a grievance seeking back pay and returned to work on October 14. *Id.* On that day, the four miners were task trained on the scoop without incident. *Id.*

On December 2, 1991, Carmichael filed a discrimination complaint with MSHA pursuant to section 105(c)(2) of the Mine Act. *Id.* at 770. On October 8, 1992, MSHA informed both JWR and the complainant of its determination that Carmichael was not discriminated against. *Id.* On October 23, 1992, Carmichael brought this proceeding under section 105(c)(3) of the Act.[8] *Id.* The matter proceeded to hearing before Judge Hodgdon on October 16, 1996. *Id.* at 771.

In dismissing Carmichael's section 105(c) claim, the judge characterized Carmichael's position at trial as follows: "Carmichael asserts that he refused to be trained to operate the scoop for safety reasons and that his suspension was, therefore, a violation of section 105(c) of the Act." *Id.* The judge further stated that "Carmichael alleges that he refused to be trained on the scoop because he was 'afraid of it.'" *Id.* at 772 (citing Tr. 9). He concluded that JWR did not violate section 105(c) by suspending Carmichael, because Carmichael failed to establish that his refusal to accept the task training was activity protected by the Act. *Id.* at 774. The judge also found that neither Carmichael nor any of the other miners advanced a basis, reasonable or otherwise, as to how the task training involved a hazard sufficient to justify a work refusal. *Id.*

II.

Disposition

JWR contends that the judge correctly concluded that Carmichael's refusal to accept task training on the scoop was not protected activity under the Mine Act. JWR Br. at 8. JWR asserts that Carmichael failed to establish either that he entertained a good faith, reasonable belief that being task trained on the scoop involved a risk to his safety, or that he communicated a safety concern to either Buzbee or Thrasher. *Id.* at 8, 10. JWR argues that, even if the Commission were to find that Carmichael engaged in protected activity, the judge's decision nonetheless should be affirmed because the sole basis for the suspension was Carmichael's insubordinate refusal to accept the task training. *Id.* at 12-13. In his pro se brief, Carmichael disagrees with the judge's decision, and asserts that his rights under the Act were violated when JWR suspended him with intent to discharge. Carmichael Br. at 1, 2, 4. Additionally, he claims that the basis for his discrimination claim was JWR's insistence that he operate the scoop, a machine on which he had not been sufficiently trained. *Id.* at 2.

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[8] Carmichael began suffering from post-traumatic stress disorder soon after he was suspended, thereby rendering him medically unable to participate in depositions or a hearing for nearly 4 years. *See id.* at 770-71; Stay Order dated June 1, 1993. The stay was lifted on September 18, 1996.

Section 105(c) of the Mine Act prohibits discrimination against miners for exercising any right protected under the Act. *See Secretary of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2799 (Oct. 1980), *rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3d Cir. 1981); *Secretary of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (Apr. 1981). After reviewing the pleadings and record, we conclude that the judge erred in characterizing Carmichael's position as a claim that his refusal to accept the task training was a protected act. Nowhere in the record does Carmichael appear to make such a claim. In fact, his original complaint to MSHA states that he was suspended with intent to discharge for refusing to falsify a task training form. Carmichael's complaint further indicates that the roof bolters' grievance following the suspension involved an allegation that JWR forced them to sign training forms before being properly trained. Carmichael's statements regarding the basis for his discrimination claim show that the activity he claims to be protected is his refusal to falsify a training form, not, as the judge found, a refusal to accept task training.[9]

In support of his determination that Carmichael's claim was that he refused training on the scoop for safety reasons, the judge stated: "Carmichael alleges that he *refused to be trained* on the scoop because he was 'afraid of it.'" 19 FMSHRC at 772 (emphasis added). The judge cited the following testimony by Carmichael as the basis of this finding:

> We were told that we were going to have to run this piece of equipment and that we were to be test [sic] trained by Mark Buzbee, and I told them that I had never run this piece of equipment.
>
> I wasn't familiar with it. I was actually afraid of that piece of equipment, to operate it. Besides that, we were told we had to sign the task training paper stating that you had been task trained on that.

Id. (citing Tr. 9). While Carmichael's testimony at the hearing was not a model of clarity, this passage does not support the judge's conclusion that Carmichael refused to be trained. The

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[9] Our dissenting colleague concedes that the judge ignored Carmichael's complaint, asserting erroneously that this was proper because the complaint was "never admitted into evidence" and therefore amounted to "unsubstantiated allegations." Slip op. at 11 n.1. The dissent misses the point. Whatever its value as evidence, the complaint to the Commission, much like a complaint in a court proceeding, is a basic pleading that serves to frame the issues to be tried. *See* Commission Procedural Rule 42, 29 C.F.R. § 2700.42. We previously have looked to the complaint for this purpose even when the complaint was not formally entered into evidence. *See Secretary of Labor on behalf of Dixon v. Pontiki Coal Corp.*, 19 FMSHRC 1009, 1015-16 (June 1997) (analyzing complaint to determine scope of issues and proper parties before Commission).

question to which Carmichael was responding was, "Can you tell the court what occurred to cause you to *not work on this machinery*." Tr. 9 (emphasis added). The question did not reference a refusal to be trained. In Carmichael's version of events, JWR gave the roof bolters only verbal training, and did not offer them the operational training required by section 48.7. Tr. 89-90. Carmichael also testified that the roof bolters were told that "any spare time that we had we would be put on this piece of machinery to do whatever was necessary." Tr. 8, 16-17. Thrasher agreed that, following training, Carmichael could be asked to perform production work with the scoop. Tr. 63. In light of this testimony, we conclude that the imminent possibility of being directed to perform productive work on the scoop, as opposed to the prospect of receiving hands-on training, was what Carmichael was referring to when he testified to his unfamiliarity with and fear of operating the scoop. 19 FMSHRC at 772.

The judge also stated that Carmichael claimed he "refused to work on the scoop '[b]ecause I didn't know how to operate it. The machine was not operating right. It was broke.'" *Id.* (citing Tr. 15). Again, in light of Carmichael's overall testimony, we find that this is a reference to Carmichael's trepidation towards the prospect of being told, in the judge's words, to "*work* on the scoop," rather than his alleged refusal to be trained. *Id.* (emphasis added). The judge's reliance on these passages to show that Carmichael was asserting a right to refuse to be trained is misplaced.

Furthermore, the judge failed to address Carmichael's testimony that, subsequent to accepting the oral portion of the training, he was terminated after refusing to falsify a training form. As mentioned above, the relevant regulation requires supervised practice or operation of mobile equipment as part of the training. However, on several occasions during the hearing, Carmichael stated or implied that he and the other roof bolters had only received the oral part of the task training given by foreman Buzbee on October 10 when asked to sign a form stating that they had received the full training.[10] Tr. 9, 29-30, 89-90. For instance, when asked whether he was given a training form to sign before training was completed, Carmichael responded: "We did participate in the training with Mr. Buzbee. . . . We did participate in that and was [sic] still asked to sign that or we were terminated by Mr. Looney."[11] Tr. 89. Also, the judge reprinted from the transcript, but declined to address, Carmichael's testimony that "we were told we had to sign the task training paper . . . ." 19 FMSHRC at 772. As Thrasher recognized at the hearing, asking Carmichael to sign a form stating that he had been fully trained, even though he only received oral training, would be improper. Tr. 68-69. The judge did not mention these statements of Carmichael, or resolve the conflict between Carmichael's version of events and Thrasher's.

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[10] We note that counsel for JWR did not cross-examine Carmichael on his explicit assertion that he participated in Buzbee's oral task training session.

[11] It was Looney who was to administer the practical training as required by section 48.7 (Tr. 60-61); as the operator concedes, Buzbee had never operated a scoop and may have been unqualified to conduct practical training on it. Tr. 10, 64.

In addition, although the judge quoted Thrasher's testimony that a safety committeeman was requested and that he denied the request, the judge failed to discuss this testimony. *See* 19 FMSHRC at 773; *see also* Tr. 9, 30. Such evidence should have been analyzed in the judge's decision.

The substantial evidence standard of review requires that a fact finder weigh all probative record evidence and that a reviewing body examine the fact finder's rationale in arriving at his decision. *See Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487-89 (1951). Commission Procedural Rule 69(a) mandates that a Commission judge's decision "include all findings of fact and conclusions of law, and the reasons or bases for them, on all the material issues of fact, law or discretion presented by the record." 29 C.F.R. § 2700.69(a). A judge must analyze and weigh all probative record evidence, make appropriate findings, and explain the reasons for his decision. *Mid-Continent Resources, Inc.*, 16 FMSHRC 1218, 1222 (June 1994); *Sunny Ridge Mining Co.*, 19 FMSHRC 254, 257 (Feb. 1997). The judge must analyze the evidence in the context of the theories advanced by the parties. Contrary to the assertion of our dissenting colleague, we are not attempting to "resuscitate Carmichael's claim of falsification" (slip op. at 13); rather, consistent with the foregoing principles, we merely direct the judge to consider the evidence adduced in support of Carmichael's claim that he was discharged for refusing to falsify a training form.[12]

Here, the judge erred by misapprehending the nature of the complainant's claim and neglecting to make credibility determinations and consider all relevant evidence. Accordingly, we vacate the judge's decision and remand with instructions to evaluate Carmichael's claim that he was suspended after accepting the oral task training and subsequently refusing to falsify a training form.[13] Further, we instruct the judge to address all record evidence relevant to

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[12] The dissent attempts to justify the judge's failure to analyze Carmichael's case on the theory that the judge made "implicit" credibility determinations. Slip op. at 11-12. However, because the judge utterly failed to address Carmichael's claim, it is impossible to discern if the judge made any credibility determinations, implicit or otherwise, that are pertinent to that claim. Indeed, absent the judge's recognition of the claim at issue, the dissent's theory that the judge made implicit credibility determinations is only speculation.

[13] Commissioner Beatty agrees with the decision of the Commission majority to vacate and remand the judge's decision based on his failure to decide the case on the issue presented by Carmichael in the complaint. Despite this error by the judge, which mandates a remand, Commissioner Beatty is also troubled about the manner in which this discrimination case developed. His reading of the trial transcript and supporting documentation convinces him that Carmichael was actually engaged in a contractual dispute with the operator over the assignment of additional work duties. In fact, a grievance was filed just 3 days prior to the incident which lead to Carmichael's filing of a section 105(c) complaint. The timing of the grievance, and the tone of the transcript testimony involving the contractual dispute, strongly suggest to Commissioner Beatty that this contractual disagreement may have been transformed into a safety

Carmichael's claim, with appropriate credibility determinations, explaining the reasons for his decision.[14] If the judge finds that JWR discriminated against Carmichael, then he shall award appropriate back pay and grant other appropriate relief under section 105(c)(3).

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dispute, thereby providing Carmichael with an additional forum in which to redress his displeasure over additional work assignments. It has been previously recognized, however, "[t]he Commission and its judges have neither the statutory charter nor the specialized expertise to sit as a super grievance or arbitration board meting out industrial equity." *Haro v. Magma Copper Co.*, 4 FMSHRC 1935, 1937 (Nov. 1982) (quoting *Secretary of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508 (Nov. 1981), *rev'd on other grounds*, 709 F.2d 86 (D.C. Cir. 1983)); *see also Local Union 5869, District 17, UMWA v. Youngstown Mines Corp.*, 1 FMSHRC 990, 995 (Aug. 1979) ("Other forums are more appropriate than the Commission for resolving issues . . . closely related to collective bargaining and union-management relations.").

Commissioner Beatty does not believe that section 105(c) of the Mine Act was promulgated by Congress to provide a vehicle for workers to litigate disputes with their employers which are not firmly grounded in the protection of their safety or the safety of co-workers. In future section 105(c) cases that appear to involve mixed motives underlying the filing of a discrimination complaint, he will be inclined to closely scrutinize the complainant's position, particularly in cases that involve less serious errors by the judge.

[14] Whether the judge finds Carmichael's version of events credible will dictate the analytical framework under which the merits of his discrimination claim should be evaluated. The judge analyzed Carmichael's claim under the Commission's work refusal doctrine. 19 FMSHRC at 774. *See generally Pasula*, 2 FMSHRC at 2789-96; *Robinette*, 3 FMSHRC at 807-12. This is not an appropriate analytical framework if Carmichael's version of events is credited; the proper framework would be that governing retaliation for engaging in protected activity for his refusal to falsify a training form. In other words, Carmichael's refusal to falsify a training form is not a "work refusal" for purposes of evaluating his discrimination complaint.

III.

Conclusion

For the foregoing reasons, we vacate the judge's conclusion that Carmichael did not engage in activity protected under the Act and remand this matter for further analysis.

Mary Lu Jordan, Chairman

Marc Lincoln Marks, Commissioner

James C. Riley, Commissioner

Robert H. Beatty, Jr., Commissioner

Commissioner Verheggen, dissenting:

My colleagues find that "the judge erred by misapprehending the nature of the complainant's claim." Slip op. at 8. Finding no such misapprehension, I respectfully dissent.

As my colleagues note, the testimony of the two principal witnesses in this case, Carmichael and Thrasher, "differs markedly." Slip op. at 4. In fact, their testimony differs to such an extent that the *only* way the judge could possibly have decided this case would be to have credited the testimony of either Thrasher or Carmichael. Thrasher testified that Carmichael was suspended for insubordination upon his refusal to accept training to operate a scoop.

Carmichael, on the other hand, offered a variety of explanations for his discrimination claim. He argued that the scoop on which he was to be trained was not operating properly (Tr. 15, 89); that Buzbee was not qualified to train him on this equipment, although Carmichael only learned of this after Buzbee was deposed (Tr. 10); that he was refused a safety committeeman when requested (Tr. 9, 11); that the task training he did receive was inadequate (Tr. 23); and that he was asked to falsify a training form (Complaint to MSHA).[1] Were the judge to have credited Carmichael's testimony on any of these points, or lent credence to the unsubstantiated claims made in Carmichael's complaint, any of these might have served as a basis for the discrimination claim. If, on the other hand, were the judge to have credited Thrasher's testimony, the *only* conclusion he could have reached was that Carmichael refused to accept training, a refusal that is not protected activity under the Mine Act. Indeed, I find that this is precisely what he did in this case: the record compels the conclusion that the judge implicitly credited Thrasher in finding the discrimination claim groundless. *See Fort Scott Fertilizer—Cullor, Inc.*, 19 FMSHRC 1511, 1516 (Sept. 1997) (recognizing implicit credibility finding of judge); *Sunny Ridge Mining Co.*, 19 FMSHRC 254, 261, 265, 267 (Feb. 1997) (same).

It is well settled that the Commission may not overturn a judge's credibility determinations except under exceptional circumstances. *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1881 n.80 (Nov. 1995), *appeal docketed*, No. 95-1619 (D.C. Cir. Dec. 28, 1995); *see also Brock v. Roadway Express, Inc.*, 481 U.S. 252, 266 (1987) ("Final assessments of the credibility of supporting witnesses are appropriately reserved for the administrative law judge, before whom an opportunity for complete cross-examination of opposing witnesses is provided."); *Metric Constructors, Inc.*, 6 FMSHRC 226, 232 (Feb. 1984)

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[1] My colleagues note that Carmichael's testimony at the hearing was not a "model of clarity." Slip op. at 6. While I agree that this is true, my colleagues further confuse matters by relying primarily on Carmichael's complaint to MSHA and so-called "minutes" from a grievance meeting in support of their assertion that falsification formed part of the basis for Carmichael's claim. *See id.* at 4 & n.6. These "minutes" are actually handwritten notes, apparently taken by Carmichael himself, that were attached to his complaint. These notes were never admitted into evidence at the hearing, and thus, were properly ignored by the judge as unsubstantiated allegations.

(when judge's finding rests on credibility determination, Commission will not substitute its judgment for that of judge absent clear indication of error), *aff'd*, 766 F.2d 469 (11th Cir. 1985). Here, I find no circumstances, extraordinary or otherwise, that would justify overturning the judge's implicit credibility determination in favor of Thrasher, and on this ground alone would affirm his decision.

But I also find that substantial evidence supports the judge's conclusion that JWR did not discriminate against Carmichael. In addition to Thrasher's implicitly credited testimony (*see* slip op. at 3-4), there is the uncontroverted fact that the UMWA had filed a grievance just 3 days before the incident at issue here protesting JWR's efforts to have employees — such as Carmichael — work outside of their job classifications to operate the scoop. Tr. 78-80; R. Ex. D. This concurrent contractual dispute is compelling corroborative evidence of Thrasher's testimony that the roof bolters involved refused training because "they weren't going to take another man's job." Tr. 42. As my colleague Commissioner Beatty notes, "[t]he timing of the grievance, and the tone of the transcript testimony . . . strongly suggest . . . that this contractual disagreement may have been transformed into a safety dispute, thereby providing Carmichael with an additional forum in which to redress his displeasure over additional work assignments." Slip op. at 8-9 n.13.

The majority decision states that "Carmichael's statements regarding the basis for his discrimination claim show that the activity he claims to be protected is his refusal to falsify a training form." Slip op. at 6. The decision concludes with a remand order directing the judge "to evaluate Carmichael's claim that he was suspended after accepting the oral task training and subsequently refusing to falsify a training form." *Id.* at 8.

I am unable to reconcile this decision with Commission precedent. Carmichael carried the burden of establishing a prima facie case of discrimination. *Secretary of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2799 (Oct. 1980), *rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3d Cir. 1981); *Secretary of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (Apr. 1981). His burden was to support the allegations made in his complaint by presenting evidence sufficient to support a conclusion that he engaged in protected activity — refusing to falsify a training form — and that his 2-day suspension was motivated in any part by any such alleged refusal. *Id.* But having made allegations in his complaint that he refused to falsify a training form, Carmichael failed to substantiate this claim at trial. Neither he nor his counsel introduced any evidence in support of such a claim. The hearing transcript contains no testimony or any argument by counsel, nor any exhibits tending to show, that Carmichael was asked to falsify a training form or that he refused to do so. In fact, neither the word "falsify" nor any derivation of the word appears

in the transcript.[2] The only evidence adduced at trial in this vein is testimony on *Carmichael's* request to sign a training form "under protest," a request JWR refused. Tr. 9, 47-48, 89-90.

The majority's decision is merely an attempt to resuscitate Carmichael's claim of falsification by treating his allegations as if they were evidence, which, by definition, is "[a]ny species of proof, or probative matter, *legally presented at the trial of an issue*, by the act of the parties and through the medium of witnesses, records, documents, exhibits, concrete objects, etc., for the purpose of inducing belief in the minds of the court . . . as to their contention." *Black's Law Dictionary* at 555 (6th ed. 1990) (emphasis added). If the judge "utterly failed" to address the falsification claim, as the majority decision suggests (slip op. at 8 n.12), it is only because Carmichael utterly failed to do anything to substantiate the claim at trial. To require the judge to revisit the issue is an exercise in futility — and to fault him for not addressing the falsification claim is at odds with Commission precedent, which, after all, requires judges only to "weigh all *probative record evidence*." *Mid-Continent Resources, Inc.*, 16 FMSHRC 1218, 1222 (June 1994) (emphasis added).

I cannot accept the majority's approach for the further reason that, using their approach, the judge's decision might just as easily be vacated and remanded on the grounds that the judge failed to consider, for example, Carmichael's testimony that the scoop on which he was to be tested was unsafe, or another of his various explanations for his claim. But that there might be evidence in the record tending to support alternative theories that could better serve as a basis for Carmichael's claim cannot serve as grounds for remanding this case. Under the substantial evidence test, the Commission may not "substitute a competing view of the facts for the view [an] ALJ reasonably reached." *Donovan ex rel. Chacon v. Phelps Dodge Corp.*, 709 F.2d 86, 92 (D.C. Cir. 1983); *see also Wellmore Coal Corp. v. FMSHRC*, No. 97-1280, 1997 WL 794132 at *3 n.13 (4th Cir. Dec. 30, 1997). Because substantial evidence supports the judge's conclusion, I would affirm his decision.

Theodore F. Verheggen

Theodore F. Verheggen, Commissioner

[2] I also find it significant that JWR's post-hearing submission makes no mention of a falsification claim. Given the gravity of such a claim, it is difficult to imagine that JWR would not have responded had the issue properly been presented to the judge.

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ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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MAY 5 1998

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 97-317-D
ON BEHALF OF	:	MSHA Case No. BARB CD 97-11
MICHAEL BROWN,	:	MSHA Case No. BARB CD 97-12
Complainant	:	
v.	:	Mine No. 1
	:	Mine ID 15-02755
BOOGAR MAN MINING, INC.,	:	
DEMA COAL COMPANY, INC.,	:	
A & J FUELS, INC., BARRY MOORE,	:	
and FREDDIE HUNTER,	:	
Respondents	:	

DECISION

Before: Judge Hodgdon

This case is before me on a Complaint of Discrimination under section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c). The complaint alleges that the Complainant, Michael Brown, was discharged by Respondent Boogar Man Mining, Inc. for complaining about being required to work under unsupported roof and that when he returned for his final paycheck, a month later, he was "threatened with bodily harm, threatened with a knife, and was intimidated and harassed by Barry Moore and Freddie Hunter [principals of Boogar Man] for filing" a discrimination complaint.[1] For the reasons set forth below, I affirm the Default Decision issued against Respondents Boogar Man Mining, Inc., Barry Moore and Freddie Hunter and I approve the settlement reached between the Complainant and Respondents Dema Coal Company, Inc. and A & J Fuels, Inc.

Procedural Background

On December 1, 1997, an Order to Show Cause was issued to the Respondents in this case, ordering them to show cause why a default decision should not be entered against them for failure to respond to any of the pleadings filed by the Complainant or orders issued in the case.

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[1] Dema Coal Company, Inc., leased Mine No. 1 to Boogar Man Mining, Inc., and then to A & J Fuels, Inc.

Respondents Dema Coal Company, Inc. and A & J Fuels Inc., responded to the order; Respondents Boogar Man Mining, Inc., Barry Moore and Freddie Hunter did not. Consequently, on January 16, 1998, a Default Decision was issued against Respondents Boogar Man, Moore and Hunter finding them jointly and severally liable for any and all damages and remedial action ordered at the conclusion of the case and individually liable for the civil penalties assessed against them by the Secretary.

Dema Coal and A & J were permitted to file an answer to the complaint and to respond to the charges of discrimination. A hearing was set for May 5, 1998.

Settlement Agreement

Respondents Dema Coal and A & J and the Secretary on behalf of the Complainant and on her own behalf, by counsel, have filed a motion to approve a settlement agreement. The agreement provides that the Complainant waives his request for permanent reinstatement; that Dema Coal and A & J will pay him back wages of $1,500.00, which represents the total of all back wages owed him by Dema Coal and A & J; and, that the civil penalty assessed against Dema Coal will be reduced from $2,500.00 to $500.00, to be paid in two equal installments. Having considered the representations and documentation submitted, I conclude that the proffered settlement is appropriate under the criteria set forth in section 110(i) of the Act, 30 U.S.C. § 820(i) and is in the public interest.

Accordingly, the motion for approval of settlement is **GRANTED**. The provisions of the agreement will be carried out in the order at the end of this decision.

Enforcement of Default Decision

The Secretary has filed a motion to enforce the default decision against Respondents Boogar Man, Barry Moore and Freddie Hunter. The motion requests the following:

> 1. A finding that Michael Brown was unlawfully discriminated against, threatened, intimidated and harassed by Respondents in violation of section 105(c) of the Act;
>
> 2. An order directing Respondents, their officers, agents, servants, employees, and "all other persons in active concert of participation with them," to cease and desist their discriminatory activities directed toward Michael Brown;
>
> 3. An order that all references to his discriminatory discharge be completely expunged from the employment record of Michael Brown.
>
> 4. An order directing Respondents to pay damages in the amount of $7,938.60, which is the amount equal to the wages which

Michael Brown lost as a result of the discrimination which occurred, including interest calculated using the short-term federal underpayment rate, all medical and hospital expenses, and any and all other damages suffered and incurred by the miner as a result of and from the date of his discriminatory discharge; and

5. An order assessing civil penalties against Boogar Man Mining in the amount of $10,000.00, Barry Moore in the amount of $2,000.00 and Freddie Hunter in the amount of $3,000.00, for their violations of section 105(c) of the Act.

Based on the January 16, 1998, Default Decision, the motion of the Secretary is **GRANTED**.

ORDER

I find that Respondents Boogar Man Mining, Inc., Barry Moore and Freddie Hunter discriminated against, threatened, intimidated and harassed Complainant Michael Brown in violation of section 105(c) of the Act. Accordingly, it is **ORDERED** that they, as well as their officers, agents servants and employees, shall **cease and desist** their discriminatory activities directed against Michael Brown; that they shall **expunge** from the employment record of Michael Brown all references to his discriminatory discharge; and that they shall, jointly and severally, **pay damages** to Michael Brown in the amount of **$7,938.60**.

Respondent Boogar Man Mining, Inc., is **ORDERED TO PAY** a penalty in the amount of **$10,000.00** within 30 days of the date of this decision. Respondent Barry Moore is **ORDERED TO PAY** a penalty of **$2,000.00** within 30 days of the date of this decision. Respondent Freddie Hunter is **ORDERED TO PAY** a penalty of **$3,000.00** within 30 days of the date of this decision.

On receipt of payment of the civil penalties by Respondents Boogar Man Mining, Inc., Barry Moore and Freddie Hunter and compliance with the requirements ordered above, the proceeding against them will be **DISMISSED.**

In accordance with the settlement agreement, Respondents Dema Coal Company, Inc., and A & J Fuels, Inc., are **ORDERED TO PAY** back wages to the Complainant in the amount of **$1,500.00**. Respondent Dema Coal Company, Inc., is **ORDERED TO PAY** a penalty of **$500.00** as follows: $250.00 within 30 days of the date of this order and $250.00 within 60 days of the date of this decision. On payment of back wages and receipt of payment of the penalty, the proceeding against them will be **DISMISSED.**

The hearing scheduled for May 5, 1998, is **CANCELED**.

T. Todd Hodgdon
Administrative Law Judge

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MAY 13 1998

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 97-82-D
on behalf of	:	MSHA Case No. MORG CD 96-03
DONALD E. ZECCO,	:	
Complainant	:	
v.	:	
	:	
CONSOLIDATION COAL COMPANY,	:	Mine ID No. 46-01318
Respondent	:	Robinson Run No. 95 Mine

DECISION

Appearances: Gretchen M. McMullen, Esq., Office of the Solicitor, U.S. Dept. of Labor, Arlington, Virginia, for the Complainant; Elizabeth S. Chamberlin, Esq., Consolidation Coal Company, Pittsburgh, Pennsylvania, for the Respondent.

Before: Judge Melick

This case is before me upon the complaint by the Secretary of Labor , on behalf of Donald Zecco, under Section 105(c)(2) of the Federal Mine Safety and Health of Act of 1977, 30 U.S.C. § 801 et seq., the "Act." The Secretary alleges that the Consolidation Coal Company (Consol) violated Section 105(c)(1) of the Act, when it transferred Mr. Zecco, a continuous miner operator, from a production section to a construction project.[1]

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[1] Section 105(c)(1) of the Act, provides as follows:

No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this Act because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine, or because such miner, representative of miners or applicant for employment is the subject of medical evaluations and potential transfer under a standard published pursuant to Section 101 or because such miner, representative of miners or applicant for employment has instituted or caused to be

The Secretary maintains that Consol transferred Zecco "in retaliation for making repeated safety complaints about conditions and for running in a safe and cautious manner during adverse conditions on the 6D Section." (Complainant's Brief p.2)[2]. The Secretary seeks a finding that Consol discriminated against Zecco and petitions for a civil penalty of $8,000.00.[3] The significant evidence in this case is largely uncontradicted. It is the inferences to be drawn from that evidence concerning which the parties disagree.

Donald Zecco had worked for Consol at the Robinson Run No. 95 Mine for 23 years and had been classified as a continuous miner operator for 15 years. In October 1995, Zecco was assigned to the 6D Section as a continuous miner operator on the midnight shift. There were adverse mining conditions in the 6D Section faced by all three shifts. There was sulfur in the coal seam, high levels of methane gas, water and bad roof. The sulfur caused sparks to fly off the barrel of the continuous mining machine and caused damage to its bits. At times, these sparks caused a ring of fire at the head of the miner. The methane level, particularly in the No. 3 entry, was purportedly so high that the 1% warning light on Zecco's continuous miner would light every time Zecco started a cut. By law, Zecco was then required to de-energize the miner and check the methane level until the level returned below 1%.

Zecco testified that the combination of sparks flying from the sulfur, float coal dust from mining activity, and methane, caused a serious hazard of an ignition or explosion. In order to correct the conditions and prevent an explosion or ignition, Zecco and his crew took extra safety measures. Zecco testified that he stopped to rock dust every 20 feet, rather than every 40 feet as required by law; he kept the continuous miner washed to suppress the float coal dust; and he checked for methane with a hand held monitor every 10 minutes, rather than every 20 minutes as required by law. Zecco maintains that he also checked the ventilation tubing more often and sometimes hung extra ventilation curtain to improve the air in the face area.

Zecco testified that these additional safety precautions, and the maintenance caused by sulfur damage to the bits, caused delays in mining the 6D Section. The monthly production

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instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding, or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by the Act.

[2] The implication in the Complaint that Mr. Zecco also suffered retaliation under a "work refusal" theory is deemed to have been withdrawn and abandoned since that theory is neither advanced nor supported by relevant law in the Complainant's post hearing brief.

[3] A monetary award was previously made to Mr. Zecco and he was assigned to a production section as a continuous miner operator as a result of his grievance filed under the National Bituminous Coal Wage Agreement of 1993, the "Contract." Accordingly, no issues concerning damages or reinstatement remain for disposition.

records for October 1995 show that the three shifts on the 6D Section produced 46.3 average feet per shift, while the 7D Section produced 72.4 and the 8D Section produced 69.4 average feet per shift. However, Zecco's crew produced 5-10 feet per shift of coal less than the day and afternoon shifts on the 6D Section. In October 1995, the midnight shift on the 6D Section produced 3.4 average feet per shift less than the day shift, and 10 average feet per shift less than the afternoon shift. (Resp.'s Exh. 4). In November and December 1995, the difference in production between the midnight and day and afternoon shifts on the 6D Section was also approximately 5 to 10 feet. (Resp.'s Exh. 4). Complainant maintains that the day and afternoon shifts, which faced similar conditions on the 6D Section , were able to maintain higher production levels, because lower barometer pressure at night caused more methane to be liberated on their shift.

In early October 1995, Zecco checked the 6D Section auxiliary fan and felt that it was not pulling enough air to the section. The fan had a 40 horsepower motor whereas the other section fans had 50 horsepower motors. Zecco claims that he reported the lower power fan to Maintenance Foreman Mike Preolitti, that Preolitti checked the fan and agreed that it had a 40 horsepower motor. Zecco claims that Preolitti also told him that all the fans in the mine were supposed to have been changed to 50 horsepower motors. Preolitti said he would see about obtaining a 50 horsepower fan motor for the 6D Section. Preolitti did not recall talking to Zecco directly about the 6D Section fan. He learned about the 40 horsepower motor from Consol Safety Inspector Phil Morgan and had Morgan check the ventilation. The ventilation was within legal parameters. Preolitti thought that all the fans had already by then been converted to 50 horsepower motors. According to Preolitti, as soon as a 50 horsepower fan became available it was installed.

Zecco maintains that in mid-October he also spoke several times to Consol Safety Inspector Phil Morgan about the inadequacies of the 6D Section fan. Morgan checked the section ventilation with a pitot tube and found it to be within legal limits. He nevertheless told Zecco he would make arrangements to obtain a 50 horsepower fan. Meanwhile he had Zecco's crew clean the dirt from the fan shroud to improve the existing ventilation.

In mid-November, Zecco spoke to Assistant Mine Superintendent Rodney Poland about the 6D Section fan and about the methane and sulfur problems. Zecco maintains that he also told Poland that he was required to shut down the miner at 1% methane, and that he would not run the miner with the warning light activated. Zecco purportedly also told Poland that in order to improve production on the 6D Section Poland needed to work with the crew and get the methane under control. Zecco also claims that he told Poland that the section ventilation fan was directly related to the methane problem and that a bigger fan would provide more air to the face. Poland recalled that Zecco reported the size of the 6D fan but he could not recall other details of the conversation. He relied on Zecco's recollection.

Zecco also claims that in early November he spoke to Mine Superintendent Walter Scheller about the 6D ventilation fan and the methane and sulfur conditions on the section. Zecco maintains that, in total, he complained to management 10 to 12 times about the section fan

and the methane and sulfur conditions. It is undisputed that the fan motor was in fact changed to 50 horsepower in January 1996, after Zecco had been transferred off the section and that 70 horsepower fans were later installed on all the sections.

Zecco testified that in mid-November, Section Foreman Titus held a meeting with the 6D crew concerning production. Titus told the crew that Poland had said that production was down and needed improvement. Titus said he had asked Poland to observe the conditions on the 6D Section for himself but he declined and said he did not want any excuses, he only wanted production to improve. Zecco felt they were trying to get the miners "to do things that we shouldn't be doing." At the same time Zecco acknowledged that he understood they were not being asked to mine unsafely. Titus testified, moreover, that he understood that Poland's criticism related to the fact that the other shifts faced the same conditions as their shift but were producing more coal.

On December 15, 1995, Zecco saw the realignment sheet posted at the mine indicating he would be transferred from the Oakdale Portal to the Robinson Run Portal to work as a continuous miner operator on a construction crew. Zecco also noted that John Belcastro was transferred from the Robinson Run Portal to a miner operator position at the Oakdale Portal. Zecco testified that he was the most senior continuous miner operator on the midnight shift, and that Belcastro was the least senior. Zecco protested his assignment to Assistant Superintendent Poland on the morning of December 16. On December 18, when Zecco learned that he was still assigned to the Robinson Run Portal, he filed a grievance claiming he was improperly realigned and had a seniority right to remain on an active production section. Zecco testified that the seal construction project at the Robinson Run Portal was a special project, and that the past practice at the mine was to "ask the oldest and force the youngest."

Zecco claimed that, according to the Contract, priority for jobs is based on seniority and that the most senior continuous miner operator has a right to work in that position. At the time of the realignment, the three most senior continuous miner operators, Zecco, Garcia, and O'Dell, were working at the Oakdale Portal on active mining sections, and the least senior continuous miner operator, Belcastro, was working on the D-haulway project at the Robinson Run Portal.

Zecco testified that even though his assigned job classification at the seal construction project remained as continuous miner operator, when he filed his grievance he did not believe he would be operating a miner at the Robinson Run Portal. Zecco never in fact did run a continuous miner from the time he was transferred on December 16, until he was transferred back to the Oakdale Portal on February 20, 1996. Rather he performed unclassified, general insider laborer duties, including digging ditches, building cribs, walking seals in low top, pumping water from seals, dragging posts in low top and setting posts, carrying old belt structure, shoveling belt spillage, and shoveling snow out of the mine entrance. According to Zecco, this work was more physically demanding and the conditions were worse than in his prior position. He had to walk long distances bent over due to the low clearances and occasionally had to wear hip waders because of water conditions.

From February 20, 1996, when he returned to the Oakdale Portal, until October 1996, when the grievance was finally settled, Zecco was assigned various duties on the production sections. He substituted for other continuous miner operators, built cribs, helped with a longwall move and operated other mining equipment. Belcastro continued to operate the continuous miner on a permanent section during this period. In October 1996, when Zecco was reassigned to a production section, Belcastro was assigned as floating continuous miner operator.

Zecco testified that at his first grievance meeting, Poland told him that he was transferred because of his low production. According to Zecco, at the next grievance meeting, Human Resource Director Mark Schiffbauer stated that he did not realize Zecco was not running a continuous miner at the Robinson Run Portal. Schiffbauer purportedly said that if Zecco was not running the miner a good part of the time, Zecco should have remained on the miner at the Oakdale Portal because he was most senior. Schiffbauer told Zecco he would speak to Poland. After several more meetings, the grievance was set for arbitration. In October 1996, the parties reached a settlement in which Zecco was assigned to a continuous miner on the 10D Section and was paid for 75 hours of overtime lost as a result of the transfer.

Respondent, Consol, maintains in essence that its transfer of Zecco to the seal construction project was strictly a business decision unrelated in any way to his request for a 50 horsepower fan for the 6D Section or to his other alleged protected activity. According to Consol, the transfer was the result of major restructuring at the mine and evaluation of the relative abilities of the miner operators. There was in fact a work force reduction and realignment at the mine on December 16, 1995. The mine work force was reduced by 75 miners and one-third of the remaining 375 miners were realigned into different job classifications, shifts and portal assignments. Miners were portaled at two locations and many miners who previously reported to the Robinson Run Portal were moved to the Oakdale Portal, while other miners were moved from the Oakdale Portal to the Robinson Run portal.

The work force reduction and realignment resulted from the completion of the D-Haulway in September 1995. This permitted the use of conveyor belt haulage for coal transportation throughout the mine and eliminated the need for rail haulage. The D-Haulway connected with the existing mine conveyor belt system at the 140 Block in September 1995, and the mine-wide conveyor belt system was operational October 1, 1995. For the next two and one-half months, the D-Haulway continuous miner production crews and the mainline motormen, who had been used previously to haul coal by rail, completed the D-Haulway work and started rehabilitation work required to seal part of the mine - - the seal construction project. The work on the seal project during this period involved the use of the D-Haulway continuous miner to cut overcasts, split coal blocks for airways and perform related rehabilitation work. According to Poland, following the work force reduction and realignment, upper mine management, excluding section foremen, pooled their collective knowledge to put together the most productive crews from the remaining available employees. Poland noted that these assignments were not based on exact science, but involved judgment and some trial and error.

By December 16, 1995, Consol management had decided to operate one longwall, and three continuous miner sections. It had also been decided, based on input from Shift Foreman Harrison, to assign a four-member crew consisting of a continuous miner operator, a shuttle car operator, a roof bolter and mechanic to work on the construction project on each shift. As a result , four continuous miner operator positions were maintained following the work force reduction and realignment on December 16.

At this time, the mine was also preparing to set up the next longwall on the 6D Section. It was necessary therefore to maximize mining progress on the 6D Section to have the next longwall panel ready to go on time. Accordingly, the best continuous miner crews were placed in the 6D Section. On the midnight shift, one particular crew, with continuous miner operator Rick Garcia, excelled and were assigned to the 6D Section. At the same time, Poland noted, based in part on a comparison of the nature and extent of production delays reported by each shift, that the midnight shift production on the 6-D Section had been significantly lower than the other two shifts. Poland believed this was the result of poor management by the section foreman and not merely because of the mining conditions.

Consol also notes that the mine was operating two types of continuous mining machines in December 1995, and this affected the assignments to the remaining miner operator positions on the midnight shift. There were 12CM miners located on the 6D Section and the seal project. A 14CM satellite miner was used on the 7D and 8D Sections. The satellite miner was significantly larger and more difficult to operate. In addition, transfer of these machines between sections was difficult and time consuming.

O'Dell, Zecco and Belcastro were the three remaining continuous miner operators. O'Dell was retained in the 7D section because he was considered the best available satellite miner operator and had been operating the 7D satellite miner satisfactorily prior to December 16. Poland wanted to improve productivity by having a better crew mix for the Oakdale Portal sections. He considered the general consensus of mine management that Zecco had struggled with the satellite miner and Belcastro had performed well on the satellite miner. Indeed, even Zecco's own witness, Albert Titus, recognized that Zecco was not as good at running the satellite miner as the other three operators. The decision was made therefore, to assign Belcastro to the remaining satellite miner in the 8D Section and to observe his performance.

The initial assignment of miners to the Robinson Run Portal midnight shift was made by Assistant Superintendent Poland because Midnight Shift Foreman Evans was on vacation when the initial posting required by the Contract was finalized. When Evans returned from vacation on December 17, 1995, he and Poland finalized the midnight shift assignments. Evans decided not to change any of the assignments.

On his first day at work on the seal project, Zecco filed a grievance pursuant under Article 23 (c) of the Contract objecting to his portal change. He alleged that "[m]anagement is in violation of the National Bituminous Coal Wage Agreement by improperly realigning me to the Robinson Run Portal." Consol disagreed with Zecco that his seniority entitled him to chose his

portal maintaining that Arbitration Decision 78-19 supported its position.[4] By the third step of the grievance process, Zecco also claimed that he was not regularly operating a continuous miner. When it was learned that Zecco was not working the same amount of overtime he had previously, arrangements were made to make overtime work available to him and he was compensated for the overtime lost to that point.

On January 11, 1996, Zecco filed the instant discrimination complaint asserting that he was removed from the 6D Section because he made complaints about methane to Mr. Poland. Poland had received reports from management and hourly employees alike regarding the methane and sulfur being encountered on the section. He recalled one occasion when Zecco told him that the 6D ventilation fan was undersized with a 40 horsepower. Poland told Zecco the fan would be checked. Safety Inspector Morgan reported back that the fan did have a 40 horsepower motor, but that it was providing adequate ventilation for mining. Morgan also reported his findings to Zecco and told Zecco that a larger horsepower motor was in the works. Poland heard nothing further from Zecco. Poland knew that all of the section ventilation fans were being upgraded to 50 horsepower, so he informed Maintenance Foreman Preolitti that the 6D fan had a 40 horsepower motor. Preolitti thought they had all been upgraded. Preolitti said he would get another motor.

The crews on the seal project worked from the Robinson Run Portal until late February 1996. The continuous miner that had been used in this area before the realignment was available for use but required some routine maintenance. However, the work being performed at the time did not require a continuous miner. The seal project crews were then told to report to the Oakdale Portal to move the longwall to 6D Section. This move took three to four weeks.

Consol maintains that in April, its management realized that the seal project would not be operating as originally planned and another realignment was proposed to eliminate skilled job classifications. Zecco's grievance was ultimately resolved when the two satellite miners were replaced with 12CM miners in November 1996, and Zecco was assigned to one of the new machines.

Evaluation of the Evidence

This Commission has long held that a miner seeking to establish a *prima facie* case of discrimination under Section 105(c) of the Act bears the burden of persuasion that he engaged in protected activity and that the adverse action complained of was motivated in any part by that activity. *Secretary on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2797-2800 (1980), rev'd on grounds, sub nom. *Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3rd Cir.

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[4] Administrative notice is taken of Arbitration Decision 78-19 a copy of which is contained in the Exhibit file. The issue of whether management has the right under the Contract to reassign miners within their classification to other locations in the mine regardless of seniority was not resolved by Zecco's grievance nor is it found necessary to resolve in this proceeding.

1981); and *Secretary on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (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 the protected activity. If an operator cannot rebut the *prima facie* case in this manner, it may nevertheless defend affirmatively by proving that it would have taken the adverse action in any event on the basis of the miner's 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 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).

There is no dispute in this case that Zecco had reported to Consol management his concerns about the methane and sulfur and about the 40-horsepower fan providing ventilation to the 6D Section in October and November 1995. Although it is undisputed that the ventilation met legal requirements and there is no evidence that any violative conditions existed, because of frequent methane and sulphur problems the 6D crews were facing during that period, it is clear that ventilation in the face area was critical to maintain a safe environment. Accordingly, Zecco's complaints in this regard constituted protected activity.

The second element of a *prima facie* case of discrimination is a showing that the adverse action was motivated in any part by the protected activity. As this Commission noted in *Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508 (1981), rev'd on other grounds sub nom. *Donovan v. Phelps Dodge Corp.*, 709 F.2d 86 (D.C. Cir. 1983), "[d]irect evidence of motivation is rarely encountered; more typically the only available evidence is indirect." The Commission considered in that case the following circumstantial indicia of discriminatory intent: knowledge of protected activity; hostility towards protected activity; coincidence of time between the protected activity and the adverse action; and disparate treatment. In examining these indicia the Commission noted that the operator's knowledge of the miner's protected activity is "probably the single most important aspect of the circumstantial case."

In this regard, it is undisputed that Zecco had requested, during the period October through November 1995, that the 40-horsepower ventilating fan on the 6D Section be replaced by a 50-horsepower fan. According to the unchallenged testimony of Zecco, these requests were made to maintenance foreman Preolitti, to Consol safety inspector, Phil Morgan and to Rodney Poland among others. There is no disagreement that Zecco also complained to management, and specifically to Poland, about the sulfur and methane on the section and that he affirmed to Poland his practice not to operate the continuous miner when the warning light indicated that he should not operate it. Consol management therefore had knowledge of Zecco's protected activity. Since Zecco was thereafter transferred in mid-December from a job on a production crew to the seal construction project, there was also a close relationship in time between his protected activity and his claim of adverse action.

I nevertheless do not find that Complainant has sustained his burden of proving that his transfer to the seal construction project was motivated in any part by his protected activity. First,

his complaints were not of such a nature as would be expected to engender disapproval let alone hostility and retaliation. Zecco's complaints, while relating to safety, were also clearly consistent with improving mine productivity. The better the ventilation of the 6D Section the less down-time the section would suffer from high levels of methane. It is undisputed, moreover, that Consol management had already planned to replace all of its 40 horsepower fans with 50 horsepower fans. It appears that only the 6D fan had not yet been replaced and, when management was apprised of this by Zecco and his crew, they were apparently surprised. In addition, efforts were immediately made to replace that fan, consistent with pre-existing plans, without any evidence of hostility. Indeed, it may be repeated, no hostility would be expected since improved ventilation with a 50 horsepower fan would reasonably be expected to improve mine productivity and fan replacements had already been planned by Consol management.

In addition, management was well aware of the sulfur and methane problems on the 6D Section causing a recognized slowdown of production. It is also noted that neither Zecco's foremen Albert Titus, who he called as his own witness, nor Zecco himself, ever testified that anyone ever suggested they mine unsafely or with the warning light activated. Indeed, Titus explained that Poland thought the midnight crew could bring its productivity up to the level of the other shifts on the 6D Section by such things as staggering lunch breaks and not permitting the crew to stay in the dinner hole too long. Zecco himself also made clear at hearings that he was not asked to mine unsafely. His witness, mechanic Michael Smith, confirms this and noted that efforts by Zecco's foreman to increase productivity took such forms as prompting the crew to get to the dinner hole earlier.

Second, the 40 horsepower fan was in fact replaced by a 50 horsepower fan in January 1997, after Zecco had already been transferred. If, indeed, management had transferred Zecco out of the 6D Section because of hostility toward his requests for a 50 horsepower fan (because, following the logic of Zecco's argument, Consol was hostile toward him because it did not really want to replace the fan), it is unlikely that Consol would have gone ahead and replaced that fan after he had already been transferred. It is also significant that Consol management, on its own volition, subsequently replaced all the 50 horsepower fans with 70 horsepower fans. It cannot reasonably be inferred within this framework that Consol would have been hostile to Zecco's earlier request for only a 50 horsepower fan. Again, it should be emphasized that improved ventilation provided by these more powerful fans is directly related to improved productivity.

Third, it is undisputed in this case that a number of other miners on all three shifts also complained about the fan in the 6D Section around the same time Zecco made his complaints and there have been neither claims, nor evidence, of retaliation against those persons. Sam Marra, a shuttle car operator on the 6D Section during relevant times, who was also a member of the UMWA safety committee, testified that he, as well as other safety committeemen, including Bob Nizely, also "complained to the point where they got tired of us complaining about the fan." Marra also personally complained to Preolitti, to Poland, and to Federal mine inspectors. Indeed, Federal inspectors thereafter came to the mine as a result of Marra's complaints and performed an inspection sometime in early November 1995. There is no evidence in this case that Zecco complained to Federal inspectors or complained any more vociferously or frequently than Marra,

Nizely or other members of any of the three shifts, yet there is no evidence of any adverse action against Marra, Nizely or any other miners.

Complainant also cites in his brief, as evidence of hostility toward his protected activity, allegations that Foreman Harrison said to him after he filed his grievance over having been denied alleged seniority rights, that he was "lucky to be working." Complainant has not, however, shown that Harrison was then even aware of Zecco's protected activity. It is also noted that there had just recently been a layoff at this mine of 75 miners.

Zecco claims that he also suffered disparate treatment because, as the most senior continuous miner operator at the mine, he was entitled under the Contract to remain as a continuous miner operator at the seals construction project to which he was reassigned.[5] The credible evidence suggests however, that Consol did in fact intend, at the time of Zecco's transfer, to have him operate a continuous miner on the seals construction project. I find the testimony of midnight shift foreman Tom Harrison particularly credible on this issue. According to Harrison, he was asked at meetings before the realignment to designate the type of work crews he would need on the seal construction project. Harrison specifically requested a number of skill positions including three continuous miner operators, one for each shift. Harrison anticipated needing continuous miner operators to cut overcasts and rock and had two continuous miners at the project needing only permissibility exams to operate. Indeed, if Consol did not intend to use three higher paid skilled crews, including continuous miners operators, on the seals construction project it would no doubt have selected lower paid general inside laborers to do the work. I cannot therefore accept Complainant's argument that he was singled out to work on this project in retaliation and to deprive him of the opportunity to operate a continuous miner. The fact that conditions and needs subsequently changed, resulting in neither Zecco nor the other miner operators operating continuous miners on the project does not support Zecco's claim. Moreover, according to the credible testimony of Harrison, it is permissible under the Contract, and not unusual, to have miners working out of classification for periods of 30 days.

In addition, even assuming, *arguendo*, that Zecco was selected in spite of his seniority to work on the seals construction project, no inference of an improper motive can be drawn because Consol had a rational, objective, non-protected business reason for Zecco's transfer out of production, i.e., his crew's lowest productivity of the three shifts on the 6-D Section as well as his reported difficulties operating the satellite miner.

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[5] It appears that the settlement of Zecco's grievance was based not necessarily on the fact of his transfer to the seal project alone but on the fact that it turned out that he was not performing in his classification as a continuous miner operator. Consol continues to maintain that it has the right under the Contract to select where its miners will work, regardless of seniority.

Even assuming, *arguendo*, that Zecco's transfer was motivated in part by his protected activity, I find that Consol would nevertheless have successfully defended affirmatively by proving that it would have transferred Zecco in any event, based on his unprotected activity (lower productivity and inadequacy in operating the satellite miner) alone. In this regard, data for October and November , for the 6D Section midnight shift crew, do in fact show lower productivity (Respondent's Exhibits No. 3 & 4). While Complainant maintains that lower productivity on the midnight shift may have been the result of lower barometric pressure there is no evidence that the actual barometric pressures were lower nor of the actual correlation between such pressure and methane emissions on the 6D Section. Poland and Titus agreed moreover, that the lower productivity of Zecco's crew was significant and cost them a lot of money. Consol could reasonably have relied upon the perceived inadequacies of Zecco as a non-protected business justification for his transfer to the seal construction project.

Under all the circumstances, I do not find that Complainant has sustained his burden of proving that his transfer was in violation of Section 105(c) of the Act.

ORDER

Discrimination Complaint Docket No. WEVA 97-82-D, is hereby DISMISSED.

Gary Melick
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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May 18, 1998

ANTHONY SAAB,	:	DISCRIMINATION PROCEEDING
Complainant	:	
	:	Docket No. WEST 97-286-DM
v.	:	
	:	Dumbarton Quarry
DUMBARTON QUARRY ASSOCIATES,	:	
Respondent	:	Mine I.D. 04-02380

DECISION

Appearances: Paul H. Melbostad, Esq., Goldstein, Gellman, Melbostad, Gibson & Harris, San Francisco, California, for Complainant;
Robert D. Peterson, Esq., Rocklin, California, for Respondent.

Before: Judge Manning

This case is before me on a complaint of discrimination brought by Anthony Saab against Dumbarton Quarry Associates under section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §815(c)(3) (the "Mine Act"). The complaint alleges that Dumbarton Quarry Associates ("Dumbarton") terminated Mr. Saab from his employment in violation of section 105(c). A hearing in this case was held in Oakland, California. For the reasons set forth below, the complaint of discrimination is dismissed.

I. SUMMARY OF THE EVIDENCE

A. Anthony Saab

Dumbarton operates a gravel pit that makes aggregate and asphalt in Fremont, California. Anthony Saab started working at the Dumbarton Quarry on June 20, 1995. He was hired from Teamsters Local 291 to drive a haul pack and a water truck. Members of the Teamsters union drive haul packs and water trucks at the quarry. Members of the Operating Engineers union operate all other equipment, including the loaders. A haul pack is a large off-road dump truck that is used to transport material from the pit to the crusher. A loader operator dumps blasted rock at the pit into the haul pack and the haul-pack operator drives the harvested rock up to the crusher. The operators of water trucks drive along the roadways at the quarry spraying water to suppress dust.

Mr. Saab testified that he made a number of safety complaints while he was employed at the quarry. He stated that he made his first complaint in the summer of 1995. (Tr. 10).[1] He complained that a loader operator was "playing around" by slamming his haul pack with the bucket of the loader. *Id.*

On or about October 22, 1996, Mr. Saab sent a letter to Clay Buckley, the production operations manager at the quarry, complaining about the attitude of one of the loader operators, Steve Hamblin. (Tr. 14; Ex. C-1). Mr. Saab stated that Mr. Hamblin would pick up his haul pack with the bucket of the loader and throw it down. The company's safety officer spoke to everyone at the pit after the letter was sent and told Mr. Saab that it would never happen again. (Tr. 14, 16). Mr. Saab testified that he was concerned about his safety because his shoulder was thrown against the door of the haul pack. He also stated that Mr. Hamblin's actions damaged the haul pack. (Tr. 15, 58).

On March 5, 1997, Mr. Saab called the Department of Labor's Mine Safety and Health Administration ("MSHA"). Mr. Saab stated that he complained about the highwalls in the pit and the berms along the roads. (Tr. 20). He stated that he was particularly concerned about the lack of berms on some of the haul roads. (Tr. 21, 58). The roads were slippery from the water truck and the brakes on his haul pack would sometimes lock up. He wanted berms to be strong enough and high enough to stop a haul pack from going over the side. (Tr. 24). He testified that because the pit was getting deeper, the highwalls were about 100 feet high and nearly vertical. He believes that he came within ten feet of this highwall when he drove a haul pack. (Tr. 23).

MSHA inspected the quarry on March 10-12, 1997, and the inspection report contains a reference to Mr. Saab's call. (Tr. 25; Ex. C-2). MSHA issued 17 citations at the quarry during this inspection. One citation concerned conditions at the highwall and one citation was issued due to the lack of berms on a particular roadway. (Ex. C-2). Mr. Saab also raised safety issues about mobile equipment at the quarry with the MSHA inspectors at the time of their inspection. (Tr. 31). Some citations were issued for conditions on this equipment, such as inoperable windshield wipers, faulty lights, and inoperable horns. Dumbarton abated the highwall citation by building berms along the highwall to keep everyone away and by having an independent contractor clean the benches on the highwall with a clam bucket crane. (Tr. 37).

On March 18, the day that the crane cleaned the highwall, Mr. Saab and Larry Meyer were laid off for the day. (Tr. 38). Mr. Saab testified that this one-day layoff was in retaliation for his call to MSHA. (Tr. 43). He bases this conclusion on the fact that no other employees were laid off on that day. (Tr. 44, II 52-53). He also testified that his hours were reduced from 10 hours a day to about 8 hours a day when he returned to the quarry. (Tr. 44-47). Mr. Meyer testified that it would have been unsafe for employees to work under that highwall on March 18

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[1] The two transcript volumes are not numbered sequentially. References to Volume I are indicated by "Tr." followed by the page number, references to Volume II are indicated by "Tr. II" followed by the page number.

because the highwall was being cleaned. (Tr. II 113). Meyer complained about his layoff because he was senior to Randy Huevel, who operated the water truck that day. (Tr. II 114-15). Buckley replied that he had the authority to determine what equipment each employee operated. Since it was only a one-day layoff, Meyer was not able to bump Huevel.

Mr. Saab alleges that on March 25, Mike Grant, an independent contractor, approached him at the end of the shift and called him a black sheep for contacting MSHA. (Tr. 47). A heated discussion followed. Saab testified that as he walked to his car to leave the quarry, a rock flew by his head. He believes that Mr. Grant threw the rock as a result of his safety complaints to MSHA. (Tr. 47-48, 51). Mr. Saab testified that, although Mr. Grant is an independent contractor who performs maintenance work on equipment at the quarry, his actions should be attributed to Dumbarton management. (Tr. 48, II 30, II 54). He stated that Mr. Grant and Mr. Buckley worked closely together and that Grant was treated as if he were an employee. *Id.* Mr. Saab immediately proceeded to Mr. Buckley's office and asked him to call the police. Buckley refused to do so, but he went outside and talked to Mr. Grant about the incident. Grant denied throwing a rock and stated that a rock must have fallen off a moving truck. (Tr. 49, II 28). Saab testified that there were no trucks around. (Tr. 49). Mr. Buckley prepared an incident report with the safety officer, Mike Oliveira. The report states that due to the lack of eyewitnesses, "the event could not be proven as stated by Saab." (Ex. C-4).

On March 26, Saab videotaped Grant at work to try to get him to admit that he threw the rock. (Tr. 60; Ex. C-5). Grant did not make any statements concerning the incident, but he told Saab the he better start looking for a job. *Id.* Mr. Saab interprets this statement to mean that Grant knew that he was going to be laid off the following week. He frequently observed Grant going into Buckley's office during this period. (Tr. 61).

The next incident involving Mr. Saab occurred on April 3, 1997. He testified that he was driving a haul pack on that day and someone in a van took pictures of him. (Tr. 53, II 32). This occurred about a week after Mr. Saab videotaped Mike Grant. *Id.* Saab testified that he had never observed anyone taking pictures of employees at the quarry before and he considered it to be harassment in retaliation for his complaints to MSHA. (Tr. 54, II 32).

On April 4, Clay Buckley told Mr. Saab that he was laid off effective that day. At that time, Mr. Saab was driving the haul pack. He was told that Randy Huevel, another Teamster at the quarry, was bumping him off the haul pack onto the water truck.[2] (Tr. 61). Huevel had more

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[2] It is Mr. Saab's position that he should have been driving the water truck at that time. He testified that on February 28, 1997, Mr. Buckley advised Saab that he was moving him from the water truck to the haul pack and Mr. Huevel from the haul pack to the water truck for a few days. (Tr. 62, II 57). Apparently, Mr. Grant needed extra help moving equipment around and Huevel was designated to provide this help because Saab had injured his back. *Id.* Although Saab believed that this switch was temporary, he was not moved back to the water truck until he was bumped by

(continued...)

seniority under the Teamsters Agreement than Saab. Saab was told that the water truck had broken down and would not be usable for a few weeks. (Tr. 63). Saab understood that once the water truck was repaired, he would be called back to work. (Tr. 64). The water truck was never repaired and Saab was not called back on a permanent basis. (Tr. 79-80). He was given the opportunity to work a few days in June, but Mr. Saab turned these offers down because he was employed elsewhere. (Tr. 77-81; Exs. C-8, C-9).

Mr. Saab believes that, although the pump on the water truck was leaking, it was still serviceable and could have been used at the mine. (Tr. 64, II 48, II 56). He believes that Dumbarton stopped using the water truck so that it could lay him off. (Tr. II 47-50). Dumbarton hired an independent contractor to water the roads starting on April 4. This contractor used his own water truck. This contractor was at the mine on April 4 watering the roadways when Saab arrived at work on April 4 and was advised that he was laid off. (Tr. 65). He was told that the quarry's water truck broke on the afternoon of April 3 and that the contractor was hired at that time.

Mr. Saab believes that Dumbarton overstated the cost of repairing the water truck. He points to the repair estimate prepared by MCG Heavy Equipment, Inc. (Tr. 66-70; Ex. C-6). MCG Heavy Equipment, Inc., is owned by Mike Grant, the independent contractor that maintains equipment at the quarry. The repair estimate states that it would cost almost $16,000 to repair the water truck. Saab believes that only two of these items relate to the water pump and the estimate for those repairs is $1,850. *Id.*

Mr. Saab also believes that the cost to the company of using an independent contractor to water the roads was greater than the cost of doing this work with a Dumbarton employee using a company truck or a rental truck. (Tr. 71-72, II 62; Ex. C-7). He testified that the company had another water truck at the quarry that he could have used. (Tr. 74-75). He stated that this truck had been at the quarry for over a year. This truck was shipped from the quarry on April 4, 1997, and taken to the Curtner Quarry. (Tr. II 47). Mr. Saab contends that although this truck leaked water and needed other repairs, he could have used it when the primary water truck broke down. *Id.* He testified that no other equipment was shipped out that day.

Mr. Saab believes that Dumbarton used a provision in the Teamsters' agreement to terminate him from his employment, but that the real reason for his termination was his protected activity. The labor agreement provides that an employer may contract out work if it does not have the equipment available to perform that work. (Tr. II 58; Ex. R-6). He contends that Dumbarton removed the spare water truck from the property and took the main water truck out of service so that it could contract out the work of watering the roadways. (Tr. II 58-59). Because

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[2] (...continued)
Mr. Huevel. Mr. Saab had the least seniority among the Teamsters at the quarry. (Tr. II 40). Mr. Saab testified that because he took better care of the water truck than Mr. Huevel, the water truck would not have broken down on April 3 if he had been driving it. (Tr. II 57).

Mr. Buckley knew that Mr. Saab had the least seniority among the Teamsters working at the quarry, Buckley also knew that Saab would no longer have a job at the quarry if it contracted out this work.

B. Dumbarton Quarry Associates

Mr. Buckley has worked at the quarry since 1982 and has been production operations manager since 1992. Mr. Buckley testified that MSHA inspected the quarry March 10-12, 1997, and that the quarry was issued a number of citations, which was unusual. (Tr. II 64-65). One of the citations required the quarry to clean off benches along the highwall. (Tr. 65-75). Since there was no direct access to the benches, a crane was brought in to clean them. A berm was installed under the highwall so that if any material fell, it would not endanger employees. He made arrangements to have a crane and a crane operator come to the quarry to clean the benches. Mr. Buckley testified that on March 18 he did not want anyone working in the pit while the crane was cleaning the highwall, so the haul pack drivers were laid off for the day and the loader operator worked at the stockpile rather than in the pit. (Tr. II 69). Only the haul pack drivers were not needed that day. The water truck and loader operators were needed, so they were not laid off. Buckley testified that he was not aware that Saab had called MSHA at the time of this layoff. (Tr. II 78).

Mr. Buckley testified that he investigated the alleged rock throwing incident described above and he did not receive any confirmation that a rock was thrown. He testified that Mr. Huevel told him that he was in the water truck at the time and saw Saab get out of the truck, shake his finger at Huevel, flip Huevel off, and get into his car. (Tr. II 77). Huevel told Buckley that he did not see Grant throw a rock. *Id.*

Mr. Buckley testified that the quarry operates under a conditional use permit issued by the City of Fremont. On April 2, 1997, Buckley received a memorandum from Dumbarton's parent company, DeSilva Gates, that contained a checklist of items that were to be completed in order to comply with the quarry's renewed conditional use permit. (Tr. II 95). One of the items in the memorandum states that all excess equipment will be removed from the site by August 1. (Tr. II 82; Ex. R-5). Buckley stated that when he received this fax, he immediately made arrangements to have the extra water truck moved to the Curtner Quarry, owned by DeSilva Gates. (Tr. II 82). The extra water truck was owned by DeSilva Gates and had originally been at the Curtner Quarry. It was shipped out on April 4. Buckley tried to ship a third water truck that had a cracked frame to the Curtner Quarry, but that quarry did not want it and so it was junked.

Mr. Buckley testified that at about noon on April 3, Huevel told him that the water truck was not operating properly and he did not know if he could use it much longer. Buckley immediately called a broker to see if he could get another water truck. At about 3:00 p.m., the water truck "just seized [up] and wouldn't operate any more." (Tr. II 85). He made arrangements with an independent contractor to provide watering services starting on April 4. He obtained the name of the contractor from DeSilva Gates, who used the same contractor. *Id.*

Mr. Buckley then asked Mr. Grant to look at the truck the next morning to see what was needed to return it to service. He also advised Mr. Huevel that there would be no work for him at the quarry at least until the water truck was repaired. *Id.* Huevel exercised his right under the Teamsters Agreement to bump Mr. Saab from a haul pack to the water truck. (Tr. II 107). Saab was not at the quarry at this time.

Mr. Grant prepared an estimate of the cost of returning the water truck to service. (Ex. C-6). Buckley testified that Grant advised him that there were a number of problems with the water truck, including a frame that was starting to crack. (Tr. II 87). During the MSHA inspection, Dumbarton was advised that cracked frames would be cited and that anything that was installed by the manufacturer of equipment had to be operational. *Id.* He testified that many items on the water truck were not operational. The estimate prepared by Mr. Grant indicated that it would cost about $16,000 to repair the truck and bring it into compliance with MSHA standards. (Tr. II 127-28; Ex. C-6). Buckley testified that he called DeSilva Gates' chief financial officer about the cost and was advised not to repair the water truck. (Tr. II 88). From that time on Dumbarton used an independent contractor to water the roads in the quarry. All of Dumbarton's sister companies were already using independent contractors to wet down roadways. (Tr. II 91, II 112).

Buckley also testified that he did not recognize the van in which Saab saw someone taking pictures of his truck at the quarry on April 3. (Tr. II 93-94). He does not know who took the pictures, but he testified that a representative of a tire manufacturing company was on the property around that time and that city and state officials often come on the property. He stated that any one of these people may have taken pictures. *Id.*

Finally, Mr. Buckley testified that Dumbarton did not take any retaliatory actions against Mr. Saab. (Tr. II 111-12). He stated that Saab was laid off because he had the least seniority. Buckley stated that if "Mr. Saab had been one step up on the seniority ladder we wouldn't be [at this hearing.]" *Id.*

II. DISCUSSION WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW

Section 105(c) of the Mine Act prohibits discrimination against miners for exercising any protected right under the Mine Act. The purpose of the protection is to encourage miners "to play an active part in the enforcement of the [Mine] Act" recognizing that, "if miners are to be encouraged to be active in matters of safety and health, they must be protected against any possible discrimination which they might suffer as a result of their participation." S. Rep. No. 181, 95th Cong., 1st Sess. 35 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2nd Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977* at 623 (1978).

A miner alleging discrimination under the Mine 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 mine 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 the protected activity. *Pasula*, 2 FMSHRC at 2799-800. If the mine operator cannot rebut the *prima facie* case in this manner, it nevertheless may defend by proving that it was also 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. Did Anthony Saab engage in protected activity?

I find that Mr. Saab engaged in activity that is protected by section 105(c) of the Mine Act when he called MSHA on March 5, 1997, and when he spoke with MSHA inspectors during their inspection. A miner has a protected right to call MSHA to report safety problems and, in general, to talk to MSHA inspectors during their inspection.

C. Did Anthony Saab present evidence that his termination was motivated in any part by the protected activity?

In determining whether a mine operator's adverse action was motivated by the miner's protected activity, the judge must bear in mind that "direct evidence of motivation is rarely encountered; more typically, the only available evidence is indirect." *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). "Intent is subjective and in many cases the discrimination can be proven only by the use of circumstantial evidence." *Id.* (citation omitted). Anthony Saab presented evidence that his termination was motivated at least in part by his protected activity.

A mine operator's knowledge of the protected activity is one factor to evaluate when determining whether an adverse action was motivated by protected activity. Mr. Saab presented evidence that employees at the mine knew that he called MSHA and precipitated the March inspection. Mr. Saab presented evidence that an inference should be drawn that Dumbarton management knew that he complained to MSHA about safety conditions at the mine and that the March inspection was a direct result of his complaints.

Another factor is the mine operator's hostility toward the protected activity, often referred to as "animus." It is clear some hostility was shown by Mr. Grant and other hourly employees. Mr. Saab did not present any direct evidence of animus by management toward employees who raise safety concerns with MSHA. Mr. Saab presented evidence that Dumbarton management took actions against him because of his discussions with management. These actions are described above in the summary of Mr. Saab's testimony. Thus, I find that Saab presented sufficient evidence of animus to warrant further analysis.

The proximity in time between the protected activity and the adverse action is another factor to be considered. There is no dispute that the termination of Mr. Saab occurred shortly after the March 1997 MSHA inspection. Accordingly, I find that Mr. Saab presented evidence that his termination was motivated at least in part by his protected activity.

D. Did Dumbarton rebut Anthony Saab's *prima facie* case? - Analysis of the issues.

As stated above, a mine 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 the protected activity. I find that Dumbarton presented sufficient evidence to rebut Mr. Saab's case. The preponderance of the evidence presented at the hearing shows that Mr. Saab engaged in protected activity but that his termination was not motivated by that activity, in any part.

First, I find that Mr. Saab's lay-off for one day on March 18 was not in retaliation for his safety complaints. I credit Mr. Buckley's testimony that he did not want anyone working in the pit that day. Since Saab was a haul-pack operator at that time, there was no work for him and he was laid off along with the other haul-pack operator. I find no connection between his complaint to MSHA and the one day layoff except that Dumbarton had to bring a crane to the quarry in order to abate a citation issued during the MSHA inspection. Mr. Saab was not chosen for layoff because he complained to MSHA but because he was a haul-pack operator. As stated above, Saab argues that he should have been the water-truck operator on March 18. (Tr. II 18). Mr. Buckley has the right to choose which employees operate particular pieces of equipment. His decision to switch Mr. Huevel to the water truck in February was unrelated to Mr. Saab's safety complaints. Saab's contention that he should have been allowed to "bump" Huevel off the water truck is without merit. Huevel had more seniority than Saab and there is no evidence that the Teamsters' Agreement grants employees that right.

The events that transpired between Messrs. Saab and Grant do not help establish that Saab's termination was the result of his protected activity. I find that although Buckley and Grant had a close working relationship, there has been no showing that they acted in collusion to harass Saab or discharge him from employment. (Tr. II 101). If Mr. Grant did throw a rock at Saab, he was not encouraged to do so by Mr. Buckley and Dumbarton did not condone such conduct. Moreover, the credible evidence casts doubt that Grant threw a rock at Saab. Saab did not see Grant throw a rock and Huevel told Buckley that he did not see Grant throw a rock. Under those circumstances, it was reasonable for Buckley to refuse to call the police or take any action against Grant.

Saab testified that he was intimidated by the fact that someone took pictures of him on April 3. I reviewed the videotape that Saab took of the incident. (Ex. C-5). I credit the testimony of Buckley that he did not know about this incident and that the pictures were probably being taken by an outsider. There has been no showing that the picture taking had anything to do with Saab's complaint to MSHA. Mr. Saab also alleged that his hours were significantly reduced

after he complained to MSHA. I find that the evidence does not substantiate this claim. (Tr. II 24-25).

The primary focus of this case concerns the layoff of Mr. Saab on April 4, 1997. Mr. Saab believes that Dumbarton orchestrated events so that he would be laid off. He contends that Dumbarton removed the spare water truck from the quarry, took the primary water truck out of service, and inflated the cost of repairing the primary water truck to justify its decision to contract out the road-watering function. Saab believes that Buckley and others at Dumbarton planned these events in retaliation for his complaints to MSHA knowing that he had the least seniority under the union contract. He also contends that if he had been allowed to drive the water truck in March and April, the truck would not have broken down because he took better care of it than Huevel did.

I find that Saab's explanation of the events is not very plausible. Saab sincerely believes that Dumbarton planned the events in order to terminate him from his employment because of his discussions with MSHA. Even if I construe all of Mr. Saab's evidence in his favor, he does not paint a very convincing picture. Such a scenario would require careful planning and coordination among a number of persons including Buckley, Grant, and Huevel. Buckley's testimony on the events of April 3 and 4 is more persuasive.

Buckley testified that Huevel was having significant problems with the water truck on April 3, he asked the mechanic to check it out, and the mechanic estimated that it would cost about $16,000 to fix the truck and bring it into compliance with MSHA standards. Buckley was aware that a number of citations had been issued during the March inspection concerning mobile equipment defects. The chief financial officer of the company did not want to authorize such a large expenditure on an old truck. The other water truck also needed significant repairs and Buckley had been given instructions to remove excess equipment from the property. Other quarries affiliated with Dumbarton were using independent contractors to water the roads. Accordingly, Buckley decided to use an independent contractor. Saab was let go, not because he called MSHA, but because he had the least seniority of the three Teamster employees at the quarry. Indeed, Buckley testified that he did not know that Mr. Saab called MSHA until Saab filed a grievance after his discharge. (Tr. II 78). Buckley testified that if Saab had been senior to any other Teamster employee, he would not have been terminated. I credit Mr. Buckley's testimony as to the events of April 3 and 4, 1997.[3]

Saab also tried to establish that Dumbarton's decision to use independent contractors to water the roads did not make any economic sense. He testified as to his rate of pay and compared it to the payments made to the contractors that were used. His testimony was not very convincing because it was rather simplistic and did not consider all of the costs borne by an employer.

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[3] I also find that Mr. Saab's complaint to Mr. Buckley about loader operator Hamblin in 1996 played no part in Mr. Saab's termination.

Based on the above, I find that the Dumbarton rebutted Mr. Saab's *prima facie* case. Although the termination occurred within a month of the MSHA inspection and at least some Dumbarton employees knew that Saab complained to MSHA, I conclude that Dumbarton terminated Saab from his employment for reasons that are unrelated to his safety complaints. Mr. Saab was not terminated for cause. He was laid off due to the lack of work. Only two of the three Teamsters were required at the quarry after Dumbarton decided to use a contractor to water the roads. The Teamsters Agreement did not prohibit Dumbarton from using an independent contractor for this function. As the employee with the least seniority, Mr. Saab was subject to layoff.

III. ORDER

For the reasons set forth above, the complaint filed by Anthony Saab against Dumbarton Quarry Associates under section 105(c) of the Mine Act is **DISMISSED**.

Richard W. Manning
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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May 20, 1998

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 97-242-M
Petitioner	:	A.C. No. 45-00020-05524
	:	
v.	:	Docket No. WEST 97-257-M
	:	A.C. No. 45-00020-05525
NORTHWEST AGGREGATES,	:	
Respondent	:	Mats Mats Quarry

DECISION

Appearances: Cathy L. Barnes, Esq., Office of the Solicitor, U.S. Department of Labor, Seattle, Washington, for Petitioner;
Charles R. Bush, Esq., Vandeberg, Johnson, and Gandara, Seattle, Washington, for Respondent.

Before: Judge Manning

These cases are before me on petitions for assessment of penalties filed by the Secretary of Labor, acting through the Mine Safety and Health Administration ("MSHA"), against Northwest Aggregates, pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820. The petitions allege ten violations of the Secretary's safety standards. A hearing was held in Seattle, Washington. The Secretary filed a post-hearing brief.

I. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Mats Mats Quarry is an aggregate mine adjacent to the Hood Canal in Jefferson County, Washington. Material is drilled and blasted at the site, sized and crushed, and shipped out on barges. MSHA Inspector Arnold Pederson inspected the quarry on Monday, March 31, 1997, and Tuesday, April 1, 1997. At the time he started his inspection, the quarry was without electricity because a thunderstorm disrupted the power in the region at about 8 p.m. on Sunday, March 30. Power was not restored to the quarry until about 8 p.m. on Monday, March 31.

It is important to keep in mind that the Commission and the courts have uniformly held that the Mine Act is a strict liability statute. *See, e.g. Asarco v. FMSHRC*, 868 F.2d 1195 (10th Cir. 1989). "[W]hen a violation of a mandatory safety standard occurs in a mine, the operator is automatically assessed a civil penalty." *Id.* at 1197. In addition, the Secretary is not required to prove that a violation creates a safety hazard, unless the safety standard so provides.

> The [Mine Act] imposes no general requirement that a violation of MSHA regulations be found to create a safety hazard in order for a valid citation to issue. If conditions existed which violated the regulations, citations [are] proper.

Allied Products Co., 666 F.2d 890, 892-93 (5th Cir. 1982)(footnote omitted). The negligence of the operator and the degree of the hazard created by the violation are taken into consideration in assessing a civil penalty under section 110(i). 30 U.S.C. § 820(i).

A. Docket No. WEST 97-242-M

1. Citation No. 7950096

On March 31, 1997, MSHA Inspector Pederson issued a section 104(a) citation alleging a violation of 30 C.F.R. § 56.20003(a). In the citation, the inspector alleged that the passageway under the roll crushers was not kept clean and orderly. The citation states that a large accumulation of dust and gear lubrication was just below the ladder. It states that the accumulation was two feet deep and that it would be difficult for an employee to enter the area to work on the discharge conveyor or to service the tail-pulley bearings. Inspector Pederson determined that the violation was not of a significant and substantial ("S&S") nature and that Northwest Aggregates' negligence was moderate. The Secretary proposes a penalty of $50 for the alleged violation. The safety standard requires that "workplaces, passageways, storerooms, and service rooms" be kept "clean and orderly."

Inspector Pederson testified that the passageway under the roll crushers was not clean or orderly. He stated that there was a large accumulation of dust and gear lubrication just below the ladder. (Tr. 11) The crushers were at ground level and a ladder led to an area below ground where the alleged violation occurred. Inspector Pederson testified that the cited area provided access to the tail pulley and to the part of the discharge conveyor that is under the roll crusher. (Tr. 13). He stated that an employee would need to enter the area if the crusher broke down or if the rollers needed to be serviced. He further stated that the accumulated material was two to three feet deep, very slippery, and presented a falling hazard. (Tr. 14, 70). The ladder provided the only access to the area. (Tr. 116).

Kenneth Johnston, the quarry superintendent, described the cited area as a pit under the roll crushers. (Tr. 158). Dust and soap grease from the crusher accumulates in the pit. The crusher is designed so that the grease flows through the bearings and out the other side. The grease accumulates in the area under the crushers. He testified that about twice a year, an

employee will descend the ladder, clean out the pit area, and service the crusher. (Tr. 160-61). He testified that no employees enter the area without first cleaning out the accumulated dust and grease.

I find that the cited area is not a workplace, passageway, or storeroom and that the Secretary did not establish a violation. I credit Mr. Johnston's description of the area as a grease pit under the crusher. Although an employee can gain access to the area by descending a ladder, it is not a passageway. Both parties agree that the cited area is very messy. It is highly unlikely that anyone would enter the area unless he were required to. Anyone entering the area would, by necessity, have to clean up the area before attempting to service or repair any equipment. I credit Mr. Johnston's testimony as to the quarry's procedures for cleaning the area when servicing the crusher. Finally, I believe that a greater hazard would be created if employees were required to enter the pit on a regular basis for the sole purpose of cleaning it out. The company's policy of cleaning the pit whenever an employee is required to enter the area to repair or service equipment creates a safer environment. Accordingly, this citation is VACATED.

2. Citation No. 7950100

On March 31, 1997, Inspector Pederson issued a section 104(a) citation alleging a violation of 30 C.F.R. § 56.20003(a). In the citation, the inspector alleged that an accumulation of spilled 4" minus rock was present in the surge tunnel creating a tripping hazard to a person needing to enter the tunnel to work on the conveyor or on the electrical circuits. He determined that the violation was S&S and that Northwest Aggregates' negligence was moderate. The Secretary proposes a penalty of $102 for the alleged violation.

The surge tunnel, which is under a surge pile, contains a conveyor system that is part of the quarry's portable crusher. Inspector Pederson testified that a walkway is present along the side of the discharge conveyor in the surge tunnel. (Tr. 17). He testified that anyone could walk into the area and stumble on the loose rock. He stated that 4" minus rock, which is rock that is 4 inches in diameter or less, was present along the width of the walkway for a distance of about 20 feet. (Tr. 19). The accumulation was two to three inches deep. (Tr. 129). He saw no evidence that anyone had started cleaning up the accumulation and believes that the rock accumulated in the area over a period of time. (Tr. 19, 77, 133). He believes that the conveyor system had been operating while the accumulation was present. (Tr. 77, 133). Inspector Pederson determined that the violation was S&S because it was reasonably likely that someone would trip and fall on the accumulation and sustain a serious injury. (Tr. 38).

Mr. Kerry Gauthier, the operator of the portable crusher, testified that he was responsible for operating, maintaining, and cleaning up around the portable crusher, including the conveyor system in the surge tunnel. (Tr. 177). He stated that he was the only person who worked on the portable crusher. He testified that, at about noon on Saturday, March 29, the portable crusher broke down. Mr. Gauthier stated that the belt in the surge tunnel started splitting and the rock cited by Inspector Pederson spilled into the surrounding area. (Tr. 181). He testified that the rock accumulated in about a half hour. (Tr. 185). Upon discovering the problem, Mr. Gauthier

shut down and locked out the portable crusher. (Tr.180, 183, 186). He then developed an informal plan to fix the crusher, to clean up accumulations, and to return the portable crusher to production. (Tr.183). He testified that he had not completed these tasks when Inspector Pederson inspected the portable crusher.

I find that the Secretary established a violation. There is no dispute that the accumulation described by the inspector was present in the walkway beside the conveyor in the surge tunnel. I find that this walkway was a "passageway," as that term is used in the safety standard. The spill occurred on Saturday at about noon. The mine did not operate on Sunday. Mr. Gauthier testified that he drove a truck on Monday. (Tr. 180). He further stated that the accumulations had to be removed by shovel. There is no indication as to why the accumulation remained along the walkway, except that Mr. Gauthier planned to take care of all the problems with the portable crusher after he was able to complete some welding on the crusher. (Tr. 190). He apparently drove a truck on Monday because the welder was in use elsewhere at the quarry on that day. The hazard presented by the accumulation was present on Saturday afternoon and on Monday. Mr. Gauthier or another employee could have tripped on the accumulation and sustained an injury. It appears that Mr. Gauthier may have walked through the accumulation on one occasion to evaluate the problems with the conveyor system.

I find that the violation was not S&S. I reach this conclusion because I find that it was not reasonably likely that the hazard contributed to by the violation would result in an injury. *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984). I credit the testimony of Northwest Aggregates' witnesses that the portable crusher was locked out and tagged out on the afternoon of March 29. The portable crusher did not operate between that time and the inspection and the accumulation would have been cleaned up before the crusher was started. Thus, there was little exposure to the accumulation. In addition, it is unlikely that any injury would have been of a reasonably serious nature. I find that the gravity of the violation was moderate and that Northwest Aggregates' negligence was also moderate. A penalty of $75 is appropriate for this violation.

3. Citation No. 7950101

On March 31, 1997, Inspector Pederson issued a section 104(a) citation alleging a violation of 30 C.F.R. § 56.14107(a). In the citation, the inspector alleged that two accessible conveyor idler rollers in the 4" minus surge tunnel were not guarded to prevent a person from contacting the pinch point between the roller and the belt. The citation states that the openings were about 36 inches wide and between 4 and 5 feet above the ground. He determined that the violation was S&S and that Northwest Aggregates' negligence was moderate. The Secretary proposes a penalty of $102 for the alleged violation. The safety standard states, in part, that moving machine parts shall be guarded to protect persons from contacting drive, head, tail, and takeup pulleys and similar moving parts that can cause injury.

Inspector Pederson testified that two idler rollers on the 4" minus surge tunnel conveyor were readily accessible because no guards were present. (Tr. 21). He was not sure whether the

guards had been removed or if guards had never been present at that location. (Tr. 82, 120). Guards were in place along the sides, but the front area was not guarded. (Tr. 118).

As stated above, Mr. Gauthier locked out and tagged out the portable crusher, including this conveyor system, when the belt began splitting on Saturday afternoon. He testified that, as part of the process of repairing and cleaning the crusher, he removed all of the guards on Saturday afternoon. (Tr.189-90). He stated that he needed to remove the guards to repair the equipment and remove any accumulations. (Tr. 184, 188). He further stated that all of the guards had been in place prior to this breakdown, including the guards cited by Inspector Pederson in this citation. (Tr. 180, 188). Mr. Gauthier further testified that he placed all of the guards outside of the tunnel so that they would not be in his way when he repaired the equipment and cleaned the accumulation. (Tr. 184). I credit the testimony of Mr. Gauthier.

I find that the Secretary did not establish a violation because there was no showing that the portable crusher was operated without the cited guards in place. The crusher was locked out on Saturday and remained locked out at the time of the MSHA inspection. Indeed, because of the thunderstorm, the leads to the primary transformer had been unhooked thereby cutting off power to the entire quarry. (Tr. 186). Mr. Gauthier had the only key to lock and unlock the power for the portable crusher. (Tr. 183-84). The guards were not removed until the portable crusher was locked out and tagged out and I credit Northwest Aggregates' evidence that the guards would have been replaced before the crusher was unlocked. The Secretary must show that the equipment was operated without guards in place to establish a violation. In this case, the mine operator established that it removed the guards to perform maintenance and to clean up accumulations while the equipment was locked out. Accordingly, this citation is VACATED.

4. Citation No. 7950102

On March 31, 1997, Inspector Pederson issued a section 104(a) citation alleging a violation of 30 C.F.R. § 56.14112(b). In the citation, the inspector alleged that the guards for the self-cleaning pulley on the discharge conveyor under the horizontal crusher were not properly secured to prevent anyone from pushing them out of the way. The citation states that the guards were also bent. He determined that the violation was not S&S and that Northwest Aggregates' negligence was low. The Secretary proposes a penalty of $50 for the alleged violation. The safety standard provides that guards shall be securely in place while machinery is being operated.

Inspector Pederson testified that the guards were between one and two feet off the ground and he surmised that the guards were pushed out by a bobcat during cleaning operations. (Tr. 26). He stated that the guards were very loose. *Id.* He was concerned that someone could push the guard out of the way while cleaning up with a shovel and become entangled in the pulley. He believed that the portable crusher had been operated while the guards were in this unsecured condition. (Tr. 85).

As discussed above, Mr. Gauthier testified that the portable crusher was locked out on Saturday, March 29, due to mechanical problems. Mr. Gauthier also testified that the guards

were not fastened at the bottom at the time of the MSHA inspection. (Tr. 186). He stated that he removed the guards when he inspected the crusher after he locked it out on Saturday. *Id.* He did not refasten the guards at that time because he had to perform some maintenance with a welder under that area. He testified that these guards were securely fastened when the crusher was operating and that he would have made sure that they were secured before unlocking the crusher to begin operations once the repairs and cleanup had been completed.

For the reasons discussed in the previous citation, I find that the Secretary did not establish a violation. There was no showing that the crusher had been operated with loose guards or that the guards would have remained unsecured once the crusher began operating again. Accordingly, this citation is VACATED.

5. Citation No. 7950103

On March 31, 1997, Inspector Pederson issued a section 104(a) citation alleging a violation of 30 C.F.R. § 56.14107(a). In the citation, the inspector alleged that a guard was not installed on the head pulley adjacent to the elevated walkway on the 4" minus stacker conveyor. The citation noted that few employees would use the walkway because a ladder had to be used to reach the walkway. He determined that the violation was not S&S and was caused by Northwest Aggregates' moderate negligence. The Secretary proposes a penalty of $50 for the alleged violation.

Inspector Pederson testified that because a ladder was not present at the time of his inspection, he did not enter the elevated walkway. (Tr. 29). He stated that he observed the violation from the ground. He believes that employees may need to get onto the walkway to perform routine maintenance.

Mr. Johnston testified that the walkway is about 7 feet above the ground at the tail pulley and 50 feet above the ground at the head pulley. (Tr. 162). He further testified that company procedures require employees to lock out and tag out the equipment before gaining access to the walkway with the ladder. The ladder is kept in a locked storage area to keep trespassers from going up on the walkway when the mine is closed. This conveyor is not part of the portable crusher that was locked out for repairs, as described above.

I find that the Secretary established a violation. The head pulley was not guarded and it was immediately adjacent to a walkway. The fact that the walkway was not frequently used is not controlling. In addition, the fact that the company requires employees to lock out and tag out the conveyor prior to entering the walkway cannot be the basis for vacating the citation. As stated above, the Mine Act is a strict liability statute. Sand and gravel operators frequently require miners to lock out and tag out equipment prior to performing any maintenance. The standard, by its own terms, only applies to "moving parts that can cause injury." The Commission held that the most logical construction of guarding standards "imports the concepts of reasonable possibility of contact and injury, including contact stemming from inadvertent stumbling or falling, momentary inattention, or ordinary human carelessness." *Thompson Bros.*

Coal Co., 6 FMSHRC 2094, 2097 (September 1984). The Commission stated that the construction of safety standards involving miners' behavior "cannot ignore the vagaries of human conduct." *Id.* (Citations omitted). In this case, it is possible that an employee would travel along the walkway to service the conveyor system without locking out the conveyor, especially if the employee believed that his work could be completed quickly. The employee may not see the need to stop production for such a simple task and may take a shortcut that could lead to a serious injury.

I find that the violation is not serious because the violative condition was in a remote location. The violation was not S&S because the possibility of an injury was slight. I also find that Northwest Aggregates' negligence is moderate to low, due to the location of the violation. A penalty of $50 is appropriate for this violation.

6. Citation No. 7950107

On April 1, 1997, Inspector Pederson issued a section 104(a) citation alleging a violation of 30 C.F.R. § 56.11012. In the citation, the inspector alleged that the barge access ramp at the loading area had two holes in the planking that forms the surface of the ramp. The citation states that the openings were about six by two feet and four by two feet. He determined that the violation was S&S and that Northwest Aggregates' negligence was moderate. The Secretary proposes a penalty of $102 for the alleged violation. The safety standard provides, as relevant here, that openings above, below, or near travelways through which persons may fall shall be protected by covers.

Inspector Pederson testified that trucks use the ramp to drive onto barges to dump the processed rock. (Tr. 34). He stated that employees also walk onto the barges and that he was concerned that an employee could fall into one of the openings and break a leg, especially if it was dark outside. (Tr. 35; Ex P-1). Employees of Northwest Aggregates showed Inspector Pederson the holes at the time of his inspection and also showed him the repairs that were being made. (Tr. 91). He testified that it was his belief that the condition had existed for at least one day. Finally, he testified that the holes should have been immediately covered, but admitted that repairs could not be made unless a barge was present. (Tr. 139-40).

Mr. Johnston testified that the holes developed in late March and that he immediately ordered planking to repair the holes. (Tr. 164, 166). He stated that as soon as a barge arrived, the holes were repaired. He described the function and design of the ramp. The ramp is hinged from the heel and supported by a head frame and counterweight system so that it can be raised and lowered. (Tr. 165). The ramp is always raised, unless a barge is present. To perform maintenance on the ramp, it must be in a horizontal position. It can only be lowered to that position when a barge is present. He testified that the holes were repaired when a barge arrived on April 1. (Tr. 167-68). The truck drivers' records indicate that a barge had also been present on either March 28 or 29. (Tr. 174, Ex. P-6).

I find that the Secretary did not establish a violation. Except at those times when the ramp was down, the ramp was not a travelway and the holes did not present a hazard. Inspector Pederson was not concerned that anyone would fall through the holes, but that someone's leg or foot could get caught in one of the holes. There is no evidence as to when the holes developed. The Secretary did not establish that the ramp was down when holes were present, except perhaps on the day that the holes first developed. The holes were caused by the truck traffic on the barge. The only time anyone walks on the ramp is when a barge first arrives because someone needs to check the depth of the water. The Hood Canal is a natural waterway that is subject to tides. The ramp was down on either March 28 or 29, and again on April 1. The holes may have developed on one of those days. Northwest Aggregates began repairing the holes as soon as the April 1 barge arrived. Indeed, the operator was repairing the holes at the time of Inspector Pederson's inspection. The evidence does not show whether there was any exposure to the hazard presented by the holes. Northwest Aggregates repaired the holes as soon as possible after they developed. Accordingly, this citation is VACATED.

7. Citation No. 7950109

On April 1, 1997, Inspector Pederson issued a section 104(a) citation alleging a violation of 30 C.F.R. § 56.11027. In the citation, the inspector alleged that the upper grizzly work deck, where the drive motor and v-belt drive are located, did not have a railing to prevent a person from falling. The citation states that the work deck was about 20 feet high and that it is the company's policy to require employees to wear a safety belt and line when working at that location. He determined that the violation was S&S and that Northwest Aggregates' negligence was low. The Secretary proposes a penalty of $119 for the alleged violation. The safety standard provides, in part, that scaffolds and working platforms shall be provided with handrails.

Inspector Pederson testified that there was no railing on the upper deck. (Tr. 40; Ex. P-2). He testified that he determined that the violation was S&S because he thought that it was reasonably likely for an accident to occur resulting in serious injuries. (Tr. 48). He stated that he believes that an accident was reasonably likely because there was no place to hook up a safety line when traveling to the work platform. (Tr. 145). He stated that the use of safety lines is not an alternative in the safety standard. (Tr. 123). He admitted that if an employee were tied off when working on the work deck, he would not fall far. (Tr. 95, 145).

Dale Inwards, a foreman for Northwest Aggregates, testified that the mine uses safety belts and lines when doing any work at the cited area. (Tr. 194). He stated that employees need to go to the area when a belt breaks. (Tr. 195).

I find that the Secretary established a violation. Although employees do not need to work on the drive motor or v-belt drive on a regular basis, I find that the deck for the motor and v-belt drive is a "working platform," as that phrase is used in the safety standard. Exhibits P-2 and P-3 show the cited working platform. I conclude that the use of safety belts and lines is not an alternative means of compliance. Section 56.15005 is an independent safety standard that requires safety belts and lines to be worn "when persons work where there is a danger of falling."

Nothing in the Secretary's safety standards suggests that safety belts and lines may be used in lieu of rails on scaffolds and working platforms.

I find that the Secretary did not establish that this violation was S&S. Inspector Pederson based his S&S finding on the fact that he was concerned that employees would not have an adequate place to attach their lanyard when traveling to the work platform. There is a place to tie off a safety line at the cited area. (Ex. P-2). Northwest Aggregates contends that the question of safe access to the work area is not an issue in this citation. I agree. The inspector's concerns about access to the work platform would remain whether or not hand rails are present. (Ex. P-2). There seems to be no dispute that employees used safety belts and lines when working in the cited area. (Tr. 48-49). I find that the Secretary did not establish that it was reasonably likely that the hazard contributed to by the violation would result in an injury, given that safety belts and lines were used in the area. I find that the gravity of the violation was moderate and that Northwest Aggregates' negligence was also moderate. I find that a penalty of $75 is appropriate for this violation.

8. Citation No. 7950111

On April 1, 1997, Inspector Pederson issued a section 104(a) citation alleging a violation of 30 C.F.R. § 56.12004. In the citation, the inspector alleged that two power cables for the grizzly drive motors had rips and cuts in their outer jackets that could easily lead to a short circuit or ground fault. The citation states that the rips and cuts could allow dirt and moisture to enter the cable and that the condition presented an electric shock hazard. Inspector Pederson determined that the violation was S&S and was caused by Northwest Aggregates' low negligence. The Secretary proposes a penalty of $119 for the alleged violation. The safety standard provides, in part, that electrical conductors exposed to mechanical damage shall be protected.

Inspector Pederson testified that both cables had rips and holes in the outer jacket. (Tr. 51; Ex. P-3). He stated that water and dust could enter the cable and deteriorate the inner insulated conductors. He further stated that rocks and dust fall from the grizzly onto the cables. Inspector Pederson believed that the condition could lead to a fatal injury. (Tr. 52). He testified that even though bare wires were not exposed, the damaged cables presented a serious electric shock hazard. (Tr. 103-04). Mr. Inwards testified that he saw that the outer jacket on at least one of the cables was damaged after Inspector Pederson inspected the grizzly. (Tr. 196). He believes that the jacket was cut from rocks falling off trucks or off the side of the grizzly.

I find that the Secretary established a violation. It is clear that the cables were subject to mechanical damage and that they were not sufficiently protected against such damage. The outer jacket on a power cable is designed to protect it from mechanical damage. The cables were subjected to such a heavy amount of damage from falling rocks that the jackets were insufficient to protect them. Additional protection was required by the standard. The fact that the inner insulation was present is not controlling. The inner insulation provides electrical separation between the phases, not mechanical protection. As Inspector Pederson stated, moisture and dirt

could enter the inner insulation and create conditions that could lead to a short circuit or ground fault.

I also find that the Secretary established that the violation was S&S. A citation is properly 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 reasonably serious nature." *National Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981). I find that it was reasonably likely that the hazard contributed to by the violation would result in an injury, assuming continued normal mining operations. The cables were damaged and were subject to continuing damage. The insulated conductors in the cable were also subject to damage from moisture and dirt. I credit the testimony of Inspector Pederson that a short circuit or ground fault was reasonably likely and that a fatal accident could result. I also accept the inspector's negligence determination. A penalty of $120 is appropriate.

B. Docket No. WEST 97-257-M

1. Citation No. 7950095

On March 31, 1997, Inspector Pederson issued a section 104(d)(1) citation alleging a violation of 30 C.F.R. § 56.14107(a). In the citation, the inspector alleged that the surge pile discharge conveyor head pulley was not guarded. The citation states that the head pulley was next to an accessible walkway at the crusher and that the guard had been removed and stored under the shaft for the rotary screen. The citation also states that the crusher operator knew that the guard had been removed. It states that the foreman and superintendent visit the crusher occasionally and should have noticed that the plainly visible head pulley was not guarded. Inspector Pederson determined that the violation was S&S and was caused by Northwest Aggregates' high negligence. The Secretary proposes a penalty of $1,000 for the alleged violation.

Inspector Pederson testified that there was a walkway beside the head pulley and "there might be an occasion for someone" to be in the area. (Tr. 54; Ex. P-4). The pulley was within a foot of this walkway. The walkway ended a few feet from the head pulley so employees would not pass through the area to go somewhere else. (Tr. 111). Employees would not be near the head pulley very often. (Tr. 127-28). He determined that the violation was serious and S&S because the area was completely exposed. (Tr. 55-56). He based his high negligence and unwarrantable failure determinations on the fact that the crusher operator was aware of the condition and the foreman and superintendent visited the crusher. He stated that the violation was obvious. Inspector Pederson testified that the crusher operator stated that he had been operating the crusher for a few days and the guard was off during that period. (Tr. 56). Inspector Pederson also relied on the fact that the condition had not been entered in the onshift examination books.

Walt Turner, a supervisory MSHA inspector at the time the citation was issued, testified that he discussed this citation with Mr. Johnston. (Tr. 150). Mr. Johnston advised him that the guard had been off for about a week, but that he was not aware that it was off. *Id.* Mr. Johnston testified that only one person is normally at the crusher and he stands at the controls near the office. (Tr. 156; Ex. R-1). He stated that it is company policy for the crusher to be locked out and tagged out before any maintenance is performed. If any maintenance or service were required at the crusher, the crusher operator would go to the electrical shed to lock out and tag out the crusher. (Tr. 156). He testified that the cited head pulley is in a remote location and there would be no reason for anyone to be there while the crusher was operating. (Tr. 156, 161).

For the reasons stated above with respect to Citation No. 7950103, the Secretary established a violation. The citation was issued at the permanent crusher, not the portable crusher that had been locked out on Saturday for maintenance. The head pulley was not guarded and it was immediately adjacent to a walkway. The citation cannot be vacated simply because the walkway is not frequently used or the company has lock-out and tag-out procedures. The safety standard applies to moving parts that "can cause injury." Given the "vagaries of human conduct" it is possible that an employee could be at the head pulley while the crusher was operating. Because the unguarded pulley was immediately adjacent to the walkway and was at about waist level, it posed a significant hazard to employees who might be in the area.

Inspector Pederson determined that it was reasonably likely that someone would be injured and that such an injury could be fatal. Based on this testimony, I find that the violation was serious. I also find that the violation was S&S. It is clear that the violation created a discrete safety hazard. I also find that it is reasonably likely that the hazard contributed to by the violation would have resulted in an injury. This element is the third part of the Commission's S&S test. *Mathies*, 6 FMSHRC at 3-4. Under this test, it is not necessary for the Secretary to establish that it was more probable than not that an injury would result from the hazard contributed to by the violation. *U.S. Steel Mining Co.*, 18 FMSHRC 862, 865 (June 1996). The test is whether an injury was reasonably likely assuming continued mining operations. In concluding that an injury was reasonably likely, I have taken into consideration the fact that the head pulley was in an area where employees do not normally travel. I also recognize that the company requires employees to lock out and tag out equipment before maintenance work is performed. Nevertheless, the pinch point was located at the walkway so that anyone walking in the area was in danger of becoming entangled. In addition, the condition had existed for about a week and, assuming continued operations, the condition presented a hazard to employees at the permanent crusher. It is foreseeable that an employee would be in the area to perform a minor task and not think it was necessary to shut down the crusher. Any injury would be serious.

I also find that the Secretary established that the violation was the result of Northwest Aggregates' unwarrantable failure. Unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2001 (December 1987). Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or "a serious lack of reasonable care." *Id.* at 2001-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (February 1991).

In analyzing the evidence in the present case using this test, I find that the violation was caused by Northwest Aggregates' aggravated conduct. The violation was not the result of intentional misconduct, indifference, or a reckless disregard of the dangers posed by unguarded pulleys. I find, however, the Northwest Aggregates' failure to meet the requirements of section 56.14107(a) was the result of a serious lack of reasonable care that constituted more than ordinary negligence.

I reach this conclusion for a number of reasons. First, the violation was readily obvious. Section 56.18002 requires each operator to conduct an examination of each working place at least once a shift for conditions that may adversely affect the safety or health of employees. A record of such examination is required to be kept. Inspector Pederson testified that the company's examination books did not show that the guard was missing. Even a cursory examination of the crusher would have revealed that the guard was not there. The violative condition was quite obvious. *See Faith Coal Co.*, 19 FMSHRC 1357, 1369 (August 1997).

Second, the condition had existed for some time while the crusher was operating. The guard had been removed sometime during the previous week and had not been replaced. The crusher continued to operate and employees were exposed to the hazard. A penalty of $800 is appropriate for this violation.

2. Order No. 7950099

On March 31, 1997, Inspector Pederson issued a section 104(d)(1) order alleging a violation of 30 C.F.R. § 56.14107(a). In the citation, the inspector alleged that both sides and the back of the self-cleaning tail pulley for the 4" minus conveyor were not guarded. The citation also states that the top guard was bent back exposing part of the pulley. It states that the violation was in plain sight of the crusher foreman and the superintendent. Inspector Pederson determined that the violation was S&S and was caused by Northwest Aggregates' high negligence. The Secretary proposes a penalty of $1,000 for the alleged violation.

This order was issued for a tail pulley on the portable crusher. As discussed above, the portable crusher was locked out on the afternoon of Saturday, March 29 due to mechanical problems. Mr. Gauthier testified that he removed guards after the crusher was locked out, but that all of the guards were present before he shut down the portable crusher. (Tr. 180, 188). He removed guards to clean and perform maintenance. He stated that the top guard was not bent back, but the guard was made of material that was not rigid so that it may have appeared to be bent. (Tr. 189). There has been no showing that the portable crusher was operated with the cited guards missing. I credit Mr. Gauthier's testimony that once the repairs were made, the guards would have been replaced before the lockout was lifted. Inspector Pederson testified that Mr. Gauthier told him that there had never been any guards at this location. (Tr. 115). I conclude that the inspector misunderstood Mr. Gauthier's comments. For the reasons discussed with respect to Citation Nos. 7950101 and 7950102, this order of withdrawal is VACATED.

II. APPROPRIATE CIVIL PENALTIES

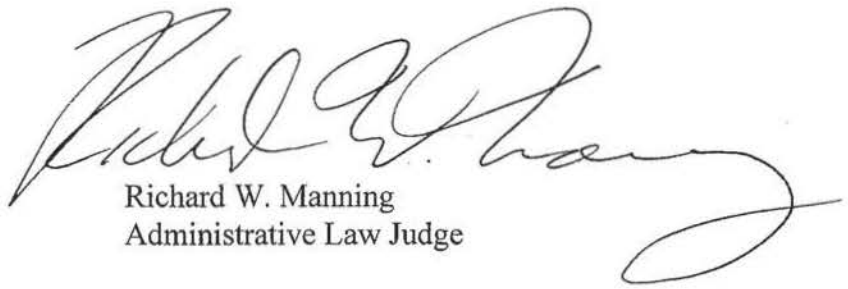
Section 110(i) of the Mine Act sets out six criteria to be considered in determining appropriate civil penalties. I find that two citations were issued at the Mats Mats Quarry between July 1995 and March 1997. (Ex. P-8). The Mats Mats Quarry is small. It appears that Northwest Aggregates is owned by Lonestar Northwest, but the Secretary did not present any evidence on this issue. (Tr. 53). Accordingly, I find that Northwest Aggregates is a small operator. The Secretary has not alleged that Northwest Aggregates failed to timely abate the citations and order. The penalties assessed in this decision will not have an effect on Northwest Aggregates' ability to continue in business. The gravity and negligence criteria are discussed separately for each violation. Based on the penalty criteria, I find that the penalties set forth below are appropriate for the violations.

III. ORDER

Based on the criteria in section 110(i) of the Mine Act, 30 U.S.C. § 820(i), I assess the following civil penalties:

Citation/Order No.	30 C.F.R. §	Penalty
WEST 97-242-M		
7950096	56.20003(a)	Vacated
7950100	56.20003(a)	75.00
7950101	56.14107(a)	Vacated
7950102	56.14112(b)	Vacated
7950103	56.14107(a)	50.00
7950107	56.11012	Vacated
7950109	56.11027	75.00
7950111	56.12004	120.00
WEST 97-257-M		
7950095	56.14107(a)	800.00
7950099	56.14107(a)	Vacated

Accordingly, the citations and order listed above are hereby **VACATED**, **AFFIRMED**, or **MODIFIED** as set forth above, and Northwest Aggregates is **ORDERED TO PAY** the Secretary of Labor the sum of $1,120.00 within 40 days of the date of this decision.



Richard W. Manning
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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MAY 28 1998

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 98-128-D
on by half of JERRY M. CAUDILL,	:	
Petitioner	:	BARB-CD 98-04
v.	:	
	:	Mine No. 68
LEECO, INC.,	:	Mine ID 15-17497
Respondent	:	

DECISION APPROVING SETTLEMENT

Before: Judge Barbour

This proceeding is brought by the Secretary of Labor on behalf of the complainant, Jerry Caudill, pursuant to section 105(c)(2) of the Federal Mine Safety and Health Act of 1977 (30 U.S.C. § 815(c)(2)). The Secretary alleges that Caudill, who was employed by Leeco as an electrician/repairman, was suspended and subsequently discharged because he was designated a miner's representative and carried out duties pursuant to that designation.

Because Caudill was reinstated temporarily as the result of a previous proceeding (see *Secretary of Labor, MSHA, On behalf of Jerry Michael Caudill* v. *Leeco, Inc.*, 19 FMSHRC 1884 (December 1997)), in the instant proceeding the Secretary seeks permanent reinstatement, as well as back wages, benefits, interest, and expenses. Also, the Secretary seeks orders directing the company to cease and desist discriminatory activities toward its employees and to expunge all references to Caudill's discharge from his personnel files. Finally, the Secretary requests a civil penalty be assessed against Leeco for its violation of section 105(c). Leeco denys it violated the Act, and asserts Caudill does not have a viable claim for relief.

After the initial pleadings were filed, the parties began discovery, and the matter was scheduled for trial. On April 8, 1998, in a telephone conference, counsels advised me the matter was settled. Counsels explained the settlement consisted of two parts. First, the Secretary and Leeco agreed to resolve the Secretary's allegation that Leeco violated the Act. As part of the agreement, Leeco committed itself to conduct classes for all employees in miners' rights under the Act and to pay a specified civil penalty.

Second, Leeco and Caudill agreed to resolve all issues raised by Caudill's assertion the company discriminated against him. Counsels stated the parties desired that part of the agreement be sealed and be subject to review only by me, the Commission, and/or a higher appellate judicial authority.

Counsels now have filed a joint motion to approved the settlement. In the motion they state the settlement between Leeco and Caudill is set forth in a separate document filed simultaneously with the motion and signed by a representative of Leeco and by Caudill. In addition, counsels for the company and Caudill have filed a motion to make confidential the agreement between Leeco and Caudill and to seal the record as it relates to the agreement.

I have reviewed the motions, as well as inspected, in camera, the agreement between Leeco and Caudill.

The agreement between Leeco and the Secretary is as follows:

1. Leeco will pay a civil penalty of $25,000 for violating section 105(c)of the Act;

2. Leeco will insure all management employees involved with working and or making personnel decisions at Mine No. 68, including section foremen, shift foremen, mine superintendents, safety personnel, and corporate officers attend a 1 hour training session on the rights of miners and their representatives under sections 105(c) and 103(f) of the Act and under 30 C.F.R. Part 40. The session will be conducted by persons mutually agreeable to Leeco and the Secretary and will be held within 60 days of the date of this Decision;

3. For actions or proceedings other than those brought under the Act, nothing in the settlement shall be deemed an admission by Leeco that it violated the Act or regulations promulgated under the Act.

In support of the agreement, the parties note that Leeco is a large operator, that in the previous 2 years, Leeco has violated section 105(c) of the Act twice, and that payment of the civil penalty, and the other damages agreed to by the parties, will not affect Leeco's ability to continue in business.

The agreement between Leeco and Caudill is comprehensive. It resolves all claims, damages, and liabilities up to the effective date of the agreement, resulting from Caudill's claim of discrimination as filed with MSHA. The agreement also resolves Caudill's status as a miners' representative and any claims he may have for wrongful discharge. The agreement contains a provision Leeco and Caudill will not commence, maintain, or continue any action or proceeding against each other based on Caudill's claims and status. The agreement also contains confidential provisions regarding releases, covenants, employment, and compensation.

Based upon my review of all submitted materials, I conclude the proposed settlement agreement is reasonable and in the public interest. **ACCORDINGLY**, the Joint Motion to Approve the Settlement in **GRANTED**, and the settlement is **APPROVED**.

I also conclude Leeco's and Caudill's request for an order of confidentiality is well advised. **ACCORDINGLY**, while the terms and conditions of the settlement as it relates to Leeco and Caudill are approved in all respects, they are **DECLARED CONFIDENTIAL**. Counsels and the signatories to the Leeco/Caudill agreement (the representative of Leeco and Caudill) are **DIRECTED** not to discuss or to otherwise communicate the terms and conditions of the agreement with anyone other than one another, and the joint motion to approve the confidential settlement agreement are **PLACED UNDER SEAL** subject to review only by the Commission or another appellate body.

ORDER

Leeco is **ORDERED** to pay to the Secretary the sum of $25,000 within 30 days of the date of this Decision. Further, Leeco and the Secretary are **ORDERED** mutually to agree upon persons to conduct the specified training. The training **WILL** be conducted within 60 days of the date of this Decision;

Leeco and Caudill are **ORDERED** to comply in full with the terms and conditions of their **CONFIDENTIAL** agreement and to do so within the time frames stated.

David F. Barbour
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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Falls Church, Virginia 22041

MAY 29 1998

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 98-1-M
Petitioner	:	A. C. No. 13-01916-05505
v.	:	
	:	Knock's Sand & Gravel
KNOCK'S BUILDING SUPPLIES,	:	
Respondent	:	

DECISION

Appearances: Edward Falkowski, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
Gary Papenheim, Esq., Parkersburg, Iowa, for Respondent.

Before: Judge Hodgdon

This case is before me on a Petition for Assessment of Civil Penalty filed by the Secretary of Labor, acting through her Mine Safety and Health Administration (MSHA), against Knock's Building Supplies, pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815. The petition alleges 15 violations of the Secretary's mandatory health and safety standards and seeks a penalty of $2,289.00. For the reasons set forth below, I affirm 12 citations, vacate three citations and assess a penalty of $3,139.00.

Background

Knock's Building Supplies operates a limestone, sand and gravel mine near Clarksville, Iowa. Sand and gravel are removed from a pit by means of a dragline[1] and hauled to the wash plant by truck. The material is then dumped onto a hopper. A feeder conveyor belt takes it out

[1] A "dragline" is a "type of excavating equipment that casts a rope-hung bucket a considerable distance; collects the dug material by pulling the bucket toward itself on the ground with a second rope; elevates the bucket; and dumps the material on a spoil bank, in a hopper, or on a pile." American Geological Institute, *Dictionary of Mining, Mineral, and Related Terms* 167 (2d ed. 1997).

of the hopper to the main screen wash plant. Oversized material goes through a crusher, inch and a quarter rock falls through a screen and onto a rock conveyor where it goes to another screen which sorts out the pea gravel onto a pea gravel conveyor. Sand falls all of the way through to a sand screw which loads the sand onto a sand stacker conveyor taking the sand to the sand stockpile.

Three employees operate the mine, a dragline operator, a truck driver and the wash plant operator. Markley Knock, the mine owner, hauls sand and gravel between the mine and the concrete ready-mix plant and lumberyard in Parkersburg, Iowa. The concrete plant is operated by Markley's sons, Kenneth and Mike. Mike also goes out to the mine periodically. In the spring of 1997, Mike's son, Jeremy, was the wash plant operator and foreman at the mine.

MSHA Inspector Clarence Theilen arrived at the mine about 1:00 p.m. on May 20, 1997, to conduct an inspection. He inspected on the afternoon of the 20th and the morning of the 21st when he left the mine site because he was feeling pressure in his chest similar to the pressure he had felt when he had a heart attack several years previously. Because of his heart problem, the inspection was completed on May 28, 1997, by Inspectors William Owen and Jimmie L. Davis. Fifteen citations were issued to Knock's as a result of the inspections.

A hearing was held on March 11 and 12, 1998, in Allison, Iowa. The citations will be discussed in the order that they were presented at the hearing.

Findings of Fact and Conclusions of Law

Citation No. 7812661

The citation alleges a violation of section 56.11001 of the Secretary's Regulations, 30 C.F.R. § 56.11001, because: "The five planks on the south side of the elevated work platform on the load out surge bins for the wash plant was [*sic*] rotted out on both ends[,] [c]reating a potential fall hazard for a miner who may step on [the] end of [the] rotted planks. [The] [w]ork platform is about 10 feet above grade. This condition does not permit safe access to all areas of [the] work platform. This area is serviced once a day on [the] west side of [the] work platform." (Govt. Ex. 21.) Section 56.11001 provides that: "Safe means of access shall be provided and maintained to all working places."

The evidence revealed that the only time anyone went onto the platform was to pull the levers to dump the surge bins. The levers are located in the center of the platform. Therefore, the working place is the center of the platform. The Commission has held, in construing an identically worded regulation, that:

> [T]he standard requires that each "means of access" to a working place be safe. This does not mean necessarily that an operator must assure that every conceivable route to a working place, no

> matter how circuitous or improbable, be safe. For example, an operator could show that a cited area is not a "means of access" within the meaning of the standard, by proving that there is no reasonable possibility that a miner would use the route as a means of reaching or leaving a workplace.

Homestake Mining Company, 4 FMSHRC 146, 151 (February 1982); *The Hanna Mining Company*, 3 FMSHRC 2045, 2046 (September 1981).

The Secretary has not shown that the area at the ends of the planks on the platform was a route to the working place. In fact, the evidence shows that to reach the levers a miner goes up a ladder and across the center of the platform. There is no reasonable possibility that a miner would go up the ladder and around the edge of the platform. Accordingly, I conclude that the Secretary has not proved that the operator violated section 56.11001 and will vacate the citation.

Citation No. 7812662

This citation alleges that: "The haul road from pit to plant was not adequately bermed in three places for a length of about 150 feet on the north side of the haul road along the pit. There is a drop off of about 15 feet into water in [the] pit. [The] haul road is approximately 25 to 30 feet wide in this area. [The] berm was less than 12 inches high in places along this area. [The] [a]xle of [the] Ford 8000 haul truck is 20 inches." (Govt. Ex. 22.) This is charged to be a violation of section 56.9300(b), 30 C.F.R. § 56.9300(b), which requires that "[b]erms or guardrails shall be at least mid-axle height of the largest self-propelled mobile equipment which usually travels the roadway."

The inspector testified that the berm along the haul road, in the area that he cited, had no berm at all in some places, and no where along that stretch was the berm higher than 12 inches. While Robert Viers, the dragline operator, quibbled about how long the area was where the inspector indicated that the berm was inadequate, he did not deny that the berm was inadequate and he did admit stopping work and building up the berm.

Based on the essentially unrebutted testimony of Inspector Theilen, I conclude that the company violated section 56.9300(b) as alleged. Consequently, I affirm the citation.

Citation No. 4421680

This citation alleges that: "Mr. Markley Knock, owner and operator of Knock's Sand and Gravel, refused to allow an authorized representative of the Secretary to continue an inspection started on 5-20-96 [*sic*], pursuant to section 103(a) of the Federal Mine Safety and Health Act of 1977 (mine act). Mr. Knock informed me at 0845 that I had 30 minutes to finish the inspection and leave mine property. Mr. Knock was informed that he was getting himself in trouble."

(Govt. Ex. 23.) The citation states that this was a violation of section 103(a) of the Act, 30 U.S.C. § 813(a).

Section 103(a) of the Act provides, as pertinent to this case, that:

> Authorized representatives of the Secretary . . . shall make frequent inspections and investigations in coal or other mines each year for the purpose of . . . (4) determining whether there is compliance with mandatory health or safety standards or with any citation, order, or decision issued under this title or other requirements of this Act. In carrying out the requirements of this subsection, no advance notice of an inspection shall be provided to any person . . . . In carrying out the requirements of clause[] . . . (4) of this subsection, the Secretary shall make inspections . . . of each surface coal or other mine in its entirety at least two times a year. The Secretary shall develop guidelines for additional inspections of mines based on criteria including, but not limited to, the hazards found in mines subject to this Act, and his experience under this Act and other health and safety laws. For the purpose of making any inspection or investigation under this Act, the Secretary . . . or any authorized representative of the Secretary . . . shall have a right of entry to, upon, or through any coal or other mine.

In *Waukesha Lime and Stone Co.*, 3 FMSHRC 1702 (July 1981), the Commission held that a refusal to permit an inspection violated section 103(a) of the Act. In *Calvin Black Enterprises*, 7 FMSHRC 1151 (August 1985), the Commission found that when inspectors were told that they were trespassing and needed written permission from the operator to inspect, they were effectively prevented from entering the mine.

In this case, Markley Knock testified that the following exchange took place:

> "What are you doing here again?" I said, "What are you looking for?" He said, "Oh, nothing. Things in general," he said. And I said, "How long you going to be here?" And he said, "Probably all day." I said, "Oh, no, you ain't." I said, "If you got something you got to look at, you go ahead and do it and I'll give you a half-hour and I want you to leave."

(Tr. 337.) Markley Knock did not testify that he did not mean what he said to the inspector, nor did he claim to be surprised when the inspector left shortly thereafter. Consequently, I conclude that, just as in the *Calvin Black* case, this was an effective refusal to permit Inspector Theilen to continue his inspection in violation of section 103(a).

Citation No. 7812663

Inspector Theilen testified that after leaving the mine, he returned to his motel and called his supervisor, Judy Peters, to tell her what had happened. Some time later, she called him back, told him to issue a citation for denial of entry and to return to the mine and continue his inspection. He returned to the mine about 2:30 p.m. and again met with Jeremy Knock. He stated that Jeremy Knock then presented him with a bill for $465.00 for "Down time 5 hrs. 3 men" and "Lost Production." (Govt. Ex. 7-A.) He further testified:

> We was [*sic*] going to go out and I was going to look through the electrical load center. And on the way out Jeremy and I were proceeding out there and Mr. [Markley] Knock pulled up in a truck and he came over and talked to me and he says, "Who is this Judy Peters? She told my wife you have the authority to shut us down." And he said, "You better not shut us down, because I got a shotgun and I know how to use it."

(Tr. 35.)

The inspector testified that after this confrontation he attempted to continue the inspection, but he started developing pressure in his chest. He stated that after leaving the mine site, he stopped by the side of the road and took a nitroglycerin pill. After that he felt all right and returned to his motel. He was instructed not to try to continue the inspection, but to return home and have his heart checked out.

As a result of this second confrontation, the inspector issued Citation No. 7812663 alleging a second violation of section 103(a) of the Act because:

> Upon return to mine for continuation of inspection after denial of entry at 08:45 [*sic*], the mine operator presented inspector with a bill for down time and lost production. He also informed inspector that if M.S.H.A. tried to shut his mine down, that he had a Shotgun and knew how to use it. The mine operator had already been informed by the District Office of section 103(a) of the mine act. The Inspector tried to finish the inspection. Due to the continued intimidation and harassment impeding the inspection, the Inspector discontinued this inspection. Inspector issued completed citations to Foreman and left site.

(Govt. Ex. 24.)

Markley Knock did not deny telling the inspector that he had a shotgun and knew how to use it. Nor did he claim that he was joking, as one witness tried to insinuate, when he said it. He did contend, however, that he made the statement at the time of the first confrontation, denying that there was a second one, and he stated that he did not have a shotgun with him and had no intention of carrying out the threat.

I find the inspector's version of the facts to be the most believable. His version is corroborated by the dates and times on the citations and by his notes made that same day. On the other hand, Markley Knock's memory was questionable. He thought that the inspection had already gone on for 4 days when the confrontation took place, although Inspector Theilen was only there a total of 2 days. In addition, Markley Knock, although admitting that he had prepared a bill for lost work and production to be given to the inspector, could not remember when he had done so and when it was given to the inspector.[2] Even more significantly, the Respondent never called Jeremy Knock as a witness, even though he was present during the confrontations. [3]

Accordingly, I conclude that these threats were part of a continuing harassment of the inspector and were in violation of section 103(a) of the Act. I will affirm the citation.

Citation No. 7812230

Inspectors Owen and Davis returned to the mine on May 27, 1997, to complete the inspection begun by Inspector Theilen. That afternoon, Inspector Owen served Citation No. 7812663 on the operator. They conducted their own inspection on May 28.

Inspector Owen issued Citation No. 7812230 for a violation of section 56.14107 of the Regulations, 30 C.F.R. § 56.14107. It alleged that: "A guard was not provided to prevent persons from contacting the rotating sheaves and pinch point hazards of the v-belt drive, on the wash screen. This hazard was accessible due to a buildup of spillage from the feed conveyor, which allowed access to the work deck along this side of the screen. Persons do not normally travel in the plant area during operations." (Govt. Ex. 25.)

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[2] In other testimony at the hearing, and in his notes, the inspector stated that Markley Knock asked who the "hell" was Judy Peters and added the words "by God" to his statement about the shotgun. Markley Knock vehemently denied that he would he would say "such stuff." However, on the very next page of the transcript he testified that "we'd try our *damndest* to correct it." (Tr. 346.) It strains credulity to believe that someone would be offended to be accused of using the words "hell" and "by God" and yet would casually use a similar word, "damndest," while testifying in a court proceeding.

[3] He was working in Waverly, Iowa, at the time of the hearing, which I judicially note was no more than 20 miles from the hearing site.

Section 56.14107 states: "(a) Moving machine parts shall be guarded to protect persons from contacting gears, sprockets, chains, drive, head, tail, and takeup pulleys, flywheels, coupling, shafts, fan blades; and similar moving parts that can cause injury. (b) Guards shall not be required where the exposed moving parts are at least seven feet away from walking or working surfaces."

The inspector testified that the only reason he believed that a violation had occurred in this case was that spillage from the feed conveyor made it possible to climb up onto the work deck. Absent the spillage, he opined that the belt drive came within section (b) of the regulation. The problem with this theory is that even with the spillage present, this was not a walking or working surface. As the inspector noted in the citation, people did not normally travel in that area during operations.

Therefore, I conclude that the spillage did not convert what was not normally a walking or working area into one. Accordingly, I conclude that section 56.14107 was not violated in this instance and will vacate the citation.

Citation No. 7812231

This citation also alleges a violation of section 56.14107 because: "Guarding was not provided to prevent persons from contacting the rotating sheaves and pinch point hazards of the v-belt drive, and the pinch point hazards of the head pulley on the raw material feed conveyor. This hazard was accessible due to a buildup of spillage from the feed conveyor, which allowed access to the work deck along this side of the screen. Persons do not normally travel in the plant area during operations." (Govt. Ex. 26.)

This citation describes another guarding violation in the same area as the previous one. For the reasons that I concluded that Citation No. 7812230 was not a violation, I conclude that this citation is not a violation. Consequently, I will vacate the citation.

Citation No. 7812232

This citation alleges a violation of section 56.14132(b)(1), 30 C.F.R. § 56.14132(b)(1), because: "An automatic reverse alarm was not provided for the Ford F-800 dump truck being utilized to haul raw material from the pit to the wash plant, and to stockpile finished material. Very little reverse travel is required in the normal traffic pattern of this truck. During normal operations all three employees are in mobile equipment, ma[]king foot traffic a limited occurrence." (Govt. Ex. 27.)

Section 56.14132(b)(1) requires that: "When the operator has an obstructed view to the rear, self-propelled mobile equipment shall have--(i) An automatic reverse-activated signal alarm; (ii) A wheel-mounted bell alarm which sounds at least once for each three feet of reverse

movement; (iii) A discriminating backup alarm that covers the area of obstructed view; or (iv) An observer to signal when it is safe to back up."

The inspector testified that the truck had an obstructed view to the rear and that it did not have a backup alarm. The company's witnesses did not dispute his testimony except to imply that he may have cited a truck that was not in operation. They did not, however, specifically state that he cited the wrong truck, and he specifically stated that he cited the truck that was in operation, not the one that was being repaired.

I conclude that the company violated section 56.14132 in this instance and will affirm the citation.

Citation No. 7812233

This citation alleges a violation of section 56.14100(a), 30 C.F.R. § 56.14100(a), because: "The operator of the Ford F-8000 dump truck did not conduct a proper pre-operational inspection of his vehicle, as indicated by the fact that no record of the lack of an operational automatic reverse alarm was available. This highway licensed vehicle was put into service to replace the regular stockpile truck which was out of service for repairs. The regular stockpile truck was provided with a back up alarm." (Govt. Ex. 28.) Section 56.14100(a) requires that: "Self-propelled mobile equipment to be used during a shift shall be inspected by the equipment operator before being placed in operation on that shift."

The inspector testified that "when I found the truck did not have an operational automatic backup alarm, I asked the driver if he checked his truck over, if he had done his preoperational check as required by MSHA. And he had no concept of what I was talking about." (Tr. 114.) When asked about the company's policy on pre-operational inspections, Mike Knock stated:

> I tell the employees, the truck drivers, that they have to grease it, grease their driveline once a day. The other stuff, the steering and stuff, has to be greased once a week. They have to check their oil every day, make sure their rear end has got grease in them and their transmission. And they do that on a weekly basis. But they more or less -- the truck driver, he drives that truck every day. Just about by driving he can tell whether there's something wrong with it or not and then he'll fix it.

(Tr. 295.)

Obviously, the truck driver was not the only employee of the operator who had no conception of the requirements of section 56.14100(a). Accordingly, I conclude that the company violated that regulation and will affirm the citation.

Citation No. 7812235

This citation alleges a violation of section 56.18006, 30 C.F.R. § 56.18006, in that: "New employees at this mine were not indoctrinated in safety rules and safe work practices. This condition was indicated by the failure to recognize hazards, such as an unsafe walking surface at bins (citation #7812661), inadequate berms on a haulage roadway (citation #7812662), failure to conduct workplace examinations (citation #7812236), by both the new foreman, and the new truck driver." (Govt. Ex. 29.) Section 56.18006 provides that "[n]ew employees shall be indoctrinated in safety rules and safe work procedures."

The evidence indicates that Jeremy Knock was a new foreman and that the truck driver was also new. Since neither of them testified, it is unrebutted that they did not have the first idea what the rules required. In response to a question about what training Mike Knock had given to his son, Jeremy, he stated:

> He was just instructed that safety came first. Always shut down the plant when they worked on it. In fact, in that little shed that sits underneath the electrical poles there's a main switch in there. Any time we work on that plant, that main switch is pulled and that door is closed so that there's no way that that plant can start up on its own, because the main power is pulled. And I always told him to make sure you do that, and they always did.

(Tr. 296-97.) Clearly, they had not been given any training in safety rules and safe work procedures. Consequently, I conclude that the operator violated section 56.18006.

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 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 mandatory safety standard; . . . (2) a discrete safety hazard--that is, a measure of danger to safety--contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in

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

See also Buck Creek Coal, Inc. v. MSHA, 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).

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

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

This evaluation 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).

The inspector testified that he found that this violation would be reasonably likely to contribute to a serious injury

> [B]ecause historically people without knowledge of basic safety work practices place themselves and others in dangerous positions and situations out of ignorance. They simply by being unaware of things end up placing themselves in places that result in serious accidents. Several of the situations which were present were likely to have resulted in fatal accidents and were so rated in their citation, so a rating of fatal and reasonably likely.

(Tr. 120.) In addition, the Secretary presented MSHA Accident Investigation Reports of fatal injuries that had occurred because employees had not been indoctrinated in safety rules and safe work procedures. (Govt. Exs. 13 & 14.)

Based on this evidence, I conclude that the violation was "significant and substantial."

Citation No. 7812236

This citation alleges a violation of section 56.18002(a), 30 C.F.R. § 56.18002(a), because: "An inspection of all working places was not conducted daily at this single shift operation, for conditions which could adversely affect the health and safety of the miners. This new foreman was not aware of this requirement. No records of examinations were available at this mine site." Section 56.18002(a) requires, in pertinent part, that: "A competent person designated by the operator shall examine each working place at least once each shift for conditions which may adversely affect safety or health."

Inspector Owen testified that he asked Jeremy Knock who was conducting the workplace inspection each day and that Jeremy indicated that he was unaware of the requirement for an inspection or what it entailed. The inspector also related that there were no records available of such inspections having been conducted. Therefore, I conclude that the operator violated section 56.18002(a) as alleged.

The inspector found this violation to be "significant and substantial." He testified that there were a multitude of items found at the mine site, which an inspection should have discovered, and which were reasonably likely to result in a serious injury. Based on this evidence, I conclude that the failure to conduct a work place inspection was "significant and substantial."

Citation No. 7816252

Inspector Jimmie Davis issued this citation alleging a violation of section 56.12028, 30 C.F.R. § 56.12028, because "[t]he mine operator could not provide an up to date and correct record of the continuity and resistance test for the mine electrical system." (Govt. Ex. 31.) Section 56.12028 provides that: "Continuity and resistance of grounding systems shall be tested immediately after installation, repair, and modification; and annually thereafter. A record of the resistance measured during the most recent tests shall be made available on a request by the Secretary or his duly authorized representative."

When the inspector asked Jeremy Knock whether such testing had been done, Jeremy did not know. Nor could he produce a record of when it had last been done. Clayton Kampman of Kampman Electric was called and came to the mine site and performed the tests while the inspector was present. No defects were found.

Mr. Kampman testified at the hearing that he had no record of when he had previously performed continuity and resistance testing for the grounding system, but believed that he usually did it at the spring start-up. The spring start-up is in March or April.

Mike Knock testified that the testing had been done in June 1996 and that the results were posted on the bulletin board. I give no weight to this testimony. If such testing had been

performed in June 1996 and it was posted on the bulletin board, then I find it hard to believe that Jeremy Knock, the inspectors and Mr. Kampman could have missed it. Further, this document, if there is such a document, was in the control of the operator and no plausible explanation was given for its not being offered at the hearing. In addition, it is at odds with Mr. Kampman's recollection of when he normally performed the tests. Certainly, it makes a lot more sense to conduct the tests at the spring start-up than 3 months after work has resumed. Finally, the regulation requires that the record be shown to the Secretary's representative on request and there is no evidence that this has ever been done.

Accordingly, I conclude that the operator violated section 56.12028 and will affirm the citation.

Citation No. 7816253

This citation alleges a violation of section 56.12004, 30 C.F.R. § 56.12004, because:

> The electrical conductors, for the three phase, 480 volt 20 H.P. crusher motor, was not of sufficient size and current carrying capacity. The conductor was an 14/4 AWG S.O. cord. This size of cord is rated for 11 amps, maximum. The 20 H.P. motor draws 29 amps according to the information plate located on the motor. Continued use of the small cord could break down the insulation and this could create a fire or shock hazard from the over heated cord. This could result into [*sic*] a fatality to employees in the area. Three employees normally work at this operation.

(Govt. Ex. 32.) Section 56.12004 requires, in pertinent part, that: "Electrical conductors shall be of a sufficient size and current-carrying capacity to ensure that a rise in temperature resulting from normal operations will not damage the insulating materials."

The Respondent does not dispute the facts of the allegation, but defends on the grounds that the cord has been on the motor ever since the operator has owned the mine, that the crusher motor normally does not run at top speed, and that the company has never been cited before for this specific violation. None of these invalidate the citation; accordingly, I will affirm it.

Citation No. 7816254

This citation alleges a violation of section 56.12004 since: "The electrical cord, on the 110 volt portable air compressor located in the shop, was found to be in an unsafe condition. The mechanical protection on the cord was cracked and this exposed the inner conductors. With the mechanical protection damaged the current carrying conductors could be damaged and this could expose employees to shock hazards which could be fatal. The air compressor is used as needed."

(Govt. Ex. 33.) Section 56.12004 requires, in pertinent part, that: "Electrical conductors exposed to mechanical damage shall be protected."

The operator does not dispute the facts of this citation, but asserts that the inner wires were still insulated and that there is no water in the shop area. While these claims may be relevant to whether the violation is S&S, which has not been alleged, they have no bearing on whether the violation occurred. Therefore, I will affirm the citation.

Citation No. 7816255

This citation alleges a violation of section 56.12025, 30 C.F.R. § 56.12025, inasmuch as: "The portable 110 volt high speed grinder, located in the shop, was not grounded. The #16 electrical cord had a two-prong male plug on it. With this type of plug the grinder could not be grounded. If used in this condition and an electrical fault occurred it would expose the employee to a shock hazard. With the case of this grinder being metal this could be fatal. The grinder is used as needed." (Govt. Ex. 34.) Section 56.12025 provides, in pertinent part, that: "All metal enclosing or encasing electrical circuits shall be grounded or provided with equivalent protection."

The company's defense to this citation is that the grinder did not work. The inspector testified that if he had been told at the time that the grinder did not work, *and that had been verified*, then he would not have issued the citation. The grinder was found on a shelf with nothing about it to indicate that it would not operate. No one told the inspector that the grinder did not work. There is no way now to verify whether it did or did not work at the time. Since nothing was said and the grinder appeared to be operable, I will affirm the citation.

Citation No. 7816256

Finally, this citation alleges a violation of section 56.14201(b), 30 C.F.R. § 56.14201(b), because:

> The feed conveyor, located under the bin, was not provided with a visible or audible warning device. The entire length of this conveyor could not be seen from the starting switch. If someone was near the conveyor, and it was started without a warning, he could be pulled into the moving conveyor, and this could result into [*sic*] an [*sic*] fatality. The plant normally operates eight hours per day five days per week with three employees.

(Govt. Ex. 35.) Section 56.14201(b) requires, in pertinent part, that: "When the entire length of the conveyor is not visible from the starting switch, a system which provides visible or audible warning shall be installed and operated to warn persons that the conveyor will be started."

The company does not dispute that the entire length of the conveyor could not be seen from the starting switch. The citation was terminated after the inspector learned that the company had a pre-startup procedure in which the plant operator visually checks to see where the other two plant employees are before starting the equipment. The company avers that since this has always been the policy, the citation should not have been issued.

This argument fails for two reasons. First, no one bothered to tell the inspector what the policy was when the citation was issued.[4] Second, the regulation does not provide for a visual check, but requires a visual or audible warning. The inspector, as he admitted at the hearing, should not have terminated the citation for the reason he did. Accordingly, I will affirm the citation.

Civil Penalty Assessment

The Secretary has proposed penalties of $2,139.00 for the 12 citations I have affirmed. However, it is the judge's 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. *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 the penalty criteria, the parties have stipulated that the proposed penalties will not affect the Respondent's ability to continue in business; that the operator demonstrated good faith in abating all of the violations, except Citation Nos. 4421680 and 7812663; that the Respondent is a very small mine operator with fewer than 5,000 hours worked during 1997; and that during the 24-months preceding the inspection, the operator had been inspected for a total of three inspection days and was not cited for any violations. (Jt. Ex. 1.) All of the citations, except Citation Nos. 4421680 and 7812663, involve technical non-serious violations of the regulations for which the level of negligence was no more than moderate. For those violations, I agree with the Secretary's proposal of minimal civil penalties.

Citation Nos. 4421680 and 7812663 are much more serious violations. The Secretary's right to inspect mines without obstruction or interference goes to the heart of the Mine Act. It is hard enough to conduct an inspection without having put up with deliberate obstruction from the operator. As the Commission stated in *Calvin Black*, at 1157, "MSHA inspectors are not required to force entry or to subject themselves to possible confrontation or physical harm in order to inspect." While I agree that a penalty of $500.00 is appropriate for the first violation, I find that $1,000.00 is too low for the second one and assess a penalty of $2,000.00.

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[4] I find that the company's failure to call Jeremy Knock as a witness in this case significantly undercuts its defenses on most of the citations because he was the only company representative present when the citations were issued. The other company witnesses can only speculate as to what happened.

Threatening an inspector with a shotgun is extremely serious. The operator's claim that he did not have a shotgun and did not intend to carry out the threat does not lessen the seriousness of the violation. The inspector did not know that the operator did not have a shotgun, in his truck or elsewhere, and he did not know that Mr. Knock did not intend to carry the threat out. Inspector Theilen took the threat seriously enough that he began having chest pains. Therefore, I find this violation, which was intentional, to be of the highest gravity. It is only the size of the company and the mine, and the fact that the Respondent has a good history of prior violations, that keep the penalty from being higher than it is.

The penalty for each citation is as follows:

Citation No.		Penalty
7812661		Vacated
7812662		$ 50.00
4421680		$ 500.00
7812663		$2,000.00
7812230		Vacated
7812231		Vacated
7812232		$ 50.00
7812233		$ 50.00
7812335		$ 111.00
7812236		$ 128.00
7816252		$ 50.00
7816253		$ 50.00
7816254		$ 50.00
7816255		$ 50.00
7816256		$ 50.00
	Total	$3,139.00

ORDER

Accordingly, Citation Nos. 7812661, 7812230 and 7812231 are **VACATED**, Citation Nos. 7812662, 4421680, 7812663, 7812232, 7812233, 7812235, 7812236, 7816256, 7816253, 7816254, 7816255 and 7816256 are **AFFIRMED** and Knock's Building Supplies is **ORDERED TO PAY** a civil penalty of **$3,139.00** within 30 days of the date of this decision. On receipt of payment, this case is **DISMISSED**.

T. Todd Hodgdon
Administrative Law Judge

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ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

MAY 8 1998

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEST 95-552 A.C. No. 42-01280-03623
v.	:	
WHITE OAK MINING AND CONSTRUCTION, INC., Respondent	:	White Oak Mine No. 2
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS Docket No. WEST 98-63 A.C. No. 42-01280-03678 A
v.	:	
VAL J. LYNCH, & SHANE HANSEN, Employed by WHITE OAK MINING AND CONSTRUCTION, INC., Respondent	:	Docket No. WEST 98-114 A.C. No. 42-01280-03680-A White Oak Mine No. 2

ORDER DENYING MOTIONS TO DISMISS

These cases are before me pursuant to sections 105(a) and 110(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815(a) and 820(c). Respondents Lynch and Hansen have moved to dismiss the cases against them on the grounds that there was an unreasonable delay between the time the underlying orders in these cases were issued to the operator and the time they were notified that the Secretary was assessing penalties against them under section 110(c). The Secretary opposes the motion. For the reasons set forth below, the motion is denied.

The following is the chronology of events in these cases:

1. March 27, 1995, Order No. 3415856 issued to White Oak.

2. March 30, 1995, Order Nos. 3415858 and 3415859 issued to White Oak.

3. March 31, 1995, Order No. 3415825 issued to White Oak.

4. June 13, 1995, a section 110(c) special investigation involving the facts in the above orders assigned to MSHA Special Investigator, Bruce Andrews.

5. June 15, 1995, Andrews receives case file.

6. August 24, 1995, Andrews begins working on investigation.

7. August 24, 1995 - July 11, 1996, Andrews conducts investigation, including interviewing 17 miners and inspectors.

a. Lynch interviewed September 19, 1995.

b. Hansen interviewed October 31, 1995.

8. March 21, 1996, initial case file received by MSHA Technical Compliance and Investigative Division (TCID) in Arlington, VA, headquarters. Respondents notified of right to request conferences on the allegations.

9. August 6, 1996, conferences held between MSHA and Respondents.

10. March 13, 1997, case file received by TCID, with additional investigative material obtained as the result of further investigation conducted, in part, because of information received at the conferences. TCID reviewed the file and then sent it with recommendations to the Office of the Solicitor for legal review.

11. August 14, 1997, TCID sent request to MSHA Office of Assessments for civil penalty assessments against individual agents.

12. November 24, 1997, proposed assessments mailed to Hansen and Lynch.

13. December 12, 1997, Lynch advises MSHA he wishes to contest the proposed assessment.

14. January 5, 1998, Hansen advises MSHA he wishes to contest the proposed assessment.

15. January 9, 1998, Petition for Assessment of Civil Penalty filed against Lynch.

16. January 19, 1998, Petition for Assessment of Civil Penalty filed against Hansen.

The Respondents base their motion on *Doyal Morgan et al*, 20 FMSHRC 38 (Chief Judge Merlin, January 1998). In that case, Judge Merlin held that: "Because the record indicates no difficulties in either investigation or evaluation and because no acceptable reason has been given to explain the delay, I find that adequate cause does not exist to justify the 22 months MSHA and the Office of the Solicitor took to complete action and issue the notices of proposed assessments." *Id.* at 42. Accordingly, he dismissed the 110(c) proceedings against the Respondents. However, this decision, while instructive, has no precedential value under the Commission's Rules, 29 C.F.R. § 2700.72, and is distinguishable from the instant cases on its facts. In these cases, the Secretary has explained the delay.

There are no Commission cases dealing with the Secretary's delay in notifying individuals of proposed penalties in 110(c) proceedings. However, in cases involving notification of the operator under section 105(a), the Commission has held that "in cases of delay in the Secretary's notification of proposed penalties, we examine the same factors that we consider in the closely related context of the Secretary's delay in filing his penalty proposal with the Commission: the reason for the delay and whether the delay prejudiced the operator." *Steel Branch Mining*, 18 FMSHRC 6, 14 (January 1996).

It is apparent in examining the chronology set out above that, while the case is far from a model of efficiency, the Secretary was proceeding with due diligence. For instance, Bruce Andrews was the only special investigator in the Price, Utah, area when he was assigned the file on June 15, 1995, and he was working on several section 105(c), 30 U.S.C. § 815(c), investigations, which because of statutory time constraints take precedence over all other special investigations. Therefore, his delay, until August 24, 1995, in beginning the investigation is understandable. In addition, this case was not the only one he was working on during the period from August 1995 to March 1997. He also worked on two other 110(c) investigations and five 105(c) investigations throughout that period.

In fact, while it is not the function of the Commission to tell the Secretary how to conduct her investigations, or to second guess the investigation every step of the way, it is apparent that the only period of time in this case where the delay might be questionable was between the conferences and the submission of the final report to TCID. Even there, the delay was not so egregious as to require the harsh remedy of dismissal. This is particularly true when the admonition of the key Senate Committee that drafted the Act that "the Committee does not expect that the failure to propose a penalty with promptness shall vitiate any proposed penalty proceeding" is kept in mind. S. Rep. No. 181, 95th Cong., 1st Sess. 34 (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 622 (1978).

Viewing the period of a time between the first citation and the proposal of penalties as a whole, I conclude that the Secretary has adequately explained the delay involved. I agree with Chief Judge Merlin, when he stated in a similar case that:

> [I]t must be borne in mind that both the investigation and the various levels of internal review were necessary for a proper evaluation of agent liability and a knowing violation. The time used to evaluate the case could reasonably be viewed as affording some assurance that resources of both the individual and the government would not be wasted by the bringing of an unworthy case.

James Lee Hancock, 17 FMSHRC 1671, 1674 (Chief Judge Merlin, September 1995).

Having found that any delay in the cases has been adequately explained, the next issue is whether the Respondents have been prejudiced. The Respondents argue that Keith W. Smith "is unable to testify due to injuries sustained in an automobile accident earlier this year." They also assert that they have been prejudiced "by the loss of potential witnesses, [their] own fading memory, the fading memories of potential witnesses and loss or destruction of evidence." I find that the Respondents have not demonstrated prejudice in these cases.

Turning first to the specific allegation of the loss of testimony of Smith, I conclude that his loss has not been shown. No offer has been provided as to what he is expected to testify. No explanation has been given as to how his injuries would prevent him from testifying. Furthermore, nothing has been presented to show how long he may be precluded, if he is precluded, from testifying. This is particularly significant in view of the fact that no hearing has yet been scheduled. Finally, the Respondents have not shown that Smith's testimony, whatever it is, is the only source of the evidence they wish to present.

The allegations that memories fade, witnesses become unavailable and evidence may be lost or destroyed do not demonstrate actual prejudice. The same allegations, which are inherently true, could be made in any case. They are not, however, a basis for dismissal unless they have actually happened and are determined to have a significant effect on the presentation of the case. The Respondents have not even alleged that any of these have occurred, let alone that they will result in an inability to defend the case.

In conclusion, I find that the Secretary, having adequately explained the delays in the case, notified the Respondents of the proposed civil penalties within a reasonable time and that the Respondents have not shown that they have incurred any actual prejudice as a result of the delays. Accordingly, the Motions to Dismiss are **DENIED**

T. Todd Hodgdon
Administrative Law Judge
(703) 756-6213

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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MAY 8 1998

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. WEST 98-64
	:	A.C. No. 42-01280-03681 A
v.	:	
	:	White Oak Mine No. 2
RANDY HOWELL, Employed by WHITE OAK MINING AND CONSTRUCTION, INC., Respondent	:	

ORDER DENYING MOTION TO DISMISS

This case is before me pursuant to sections 105(a) and 110(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815(a) and 820(c). Respondent Howell has moved to dismiss the case against him on the grounds that there was an unreasonable delay between the time the underlying orders in the case were issued to the operator and the time he was notified that the Secretary was assessing penalties against him under section 110(c). The Secretary opposes the motion. For the reasons set forth below, the motion is denied

The following is the chronology of events in this case:

1. May 23, 1995, Order Nos. 3855382 and 3855384 issued to White Oak Mining & Construction, Inc.

2. June 13, 1995, a section 110(c) special investigation involving the facts in the above orders assigned to MSHA Special Investigator, Bruce Andrews.

3. June 15, 1995, Andrews receives case file.

4. August 24, 1995, Andrews begins working on investigation.

5. August 24, 1995 - July 11, 1996, Andrews conducts investigation, including interviewing 17 miners and inspectors.

   a. Howell interviewed September 20, 1995.

6. March 21, 1996, initial case file received by MSHA Technical Compliance and Investigative Division (TCID) in Arlington, VA, headquarters. Respondents notified of right to request conferences on the allegations.

7. August 6, 1996, conference held between MSHA and Respondents.

8. March 13, 1997, case file received by TCID, with additional investigative material obtained as the result of further investigation conducted, in part, because of information received at the conference. TCID reviewed the file and then sent it with recommendations to the Office of the Solicitor for legal review.

9. August 14, 1997, TCID sent request to MSHA Office of Assessments for civil penalty assessments against individual agents.

10. November 24, 1997, proposed assessment mailed to Howell.

11. December 12, 1997, Howell advises MSHA he wishes to contest the proposed assessment.

12. January 9, 1998, Petition for Assessment of Civil Penalty filed against Howell.

The Respondent bases his motion on *Doyal Morgan et al*, 20 FMSHRC 38 (Chief Judge Merlin, January 1998). In that case, Judge Merlin held that: "Because the record indicates no difficulties in either investigation or evaluation and because no acceptable reason has been given to explain the delay, I find that adequate cause does not exist to justify the 22 months MSHA and the Office of the Solicitor took to complete action and issue the notices of proposed assessments." *Id.* at 42. Accordingly, he dismissed the 110(c) proceedings against the Respondents. However, this decision, while instructive, has no precedential value under the Commission's Rules, 29 C.F.R. § 2700.72, and is distinguishable from the instant case on its facts. In this case, the Secretary has explained the delay.

There are no Commission cases dealing with the Secretary's delay in notifying individuals of proposed penalties in 110(c) proceedings. However, in cases involving notification of the operator under section 105(a), the Commission has held that "in cases of delay in the Secretary's notification of proposed penalties, we examine the same factors that we consider in the closely related context of the Secretary's delay in filing his penalty proposal with the Commission: the reason for the delay and whether the delay prejudiced the operator." *Steel Branch Mining*, 18 FMSHRC 6, 14 (January 1996).

It is apparent in examining the chronology set out above that, while the case is far from a model of efficiency, the Secretary was proceeding with due diligence. For instance, Bruce Andrews was the only special investigator in the Price, Utah, area when he was assigned the file on June 15, 1995, and he was working on several section 105(c), 30 U.S.C. § 815(c), investigations, which because of statutory time constraints take precedence over all other special investigations. Therefore, his delay, until August 24, 1995, in beginning the investigation is understandable. In addition, this case was not the only one he was working on during the period from August 1995 to March 1997. He also worked on two other 110(c) investigations and five 105(c) investigations throughout that period.

In fact, while it is not the function of the Commission to tell the Secretary how to conduct her investigations, or to second guess the investigation every step of the way, it is apparent that the only period of time in this case where the delay might be questionable was between the conference and the submission of the final report to TCID. Even there, the delay was not so egregious as to require the harsh remedy of dismissal. This is particularly true when the admonition of the key Senate Committee that drafted the Act that "the Committee does not expect that the failure to propose a penalty with promptness shall vitiate any proposed penalty proceeding" is kept in mind. S. Rep. No. 181, 95th Cong., 1st Sess. 34 (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 622 (1978).

Viewing the period of a time between the first citation and the proposal of penalties as a whole, I conclude that the Secretary has adequately explained the delay involved. I agree with Chief Judge Merlin, when he stated in a similar case that:

> [I]t must be borne in mind that both the investigation and the various levels of internal review were necessary for a proper evaluation of agent liability and a knowing violation. The time used to evaluate the case could reasonably be viewed as affording some assurance that resources of both the individual and the government would not be wasted by the bringing of an unworthy case.

James Lee Hancock, 17 FMSHRC 1671, 1674 (Chief Judge Merlin, September 1995).

Having found that any delay in the cases has been adequately explained, the next issue is whether the Respondent has been prejudiced. The Respondent asserts that he has been prejudiced "by the loss of potential witnesses, his own fading memory, the fading memories of potential witnesses and loss or destruction of evidence" and by the fact that he is no longer employed by White Oak. I find that the Respondent has not demonstrated prejudice in this case.

The allegations that memories fade, witnesses become unavailable and evidence may be lost or destroyed do not demonstrate actual prejudice. The same allegations, which are

inherently true, could be made in any case. They are not, however, a basis for dismissal unless they have actually happened and are determined to have a significant effect on the presentation of the case. The Respondent has not even alleged that any of these have occurred, let alone that they will result in an inability to defend the case. Similarly, the Respondent has made no showing how, if at all, his no longer being employed by White Oak actually prejudices him.

In conclusion, I find that the Secretary, having adequately explained the delays in the case, notified the Respondent of the proposed civil penalty within a reasonable time and that the Respondent has not shown that he has incurred any actual prejudice as a result of the delays. Accordingly, the Motion to Dismiss are **DENIED**

T. Todd Hodgdon
Administrative Law Judge
(703) 756-6213

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