June 1981

Commission Decisions

Administrative Law Judge Decisions

Commission Decisions

JUNE

The following cases were Directed for Review during the month of June:

Delmont Resources v. Secretary of Labor, MSHA, PENN 80-268-R; (Judge Cook, April 23, 1981).

Secretary of Labor, MSHA v. Eastover Mining Company, VA 80-145; (Judge Kennedy, April 30, 1981).

Review was Denied in the following cases during the month of June:

Secretary of Labor, MSHA v. Brown Brothers Sand Company, SE 80-124-M; (Judge Koutras, May 1, 1981).

Secretary of Labor, MSHA v. Cement Division, National Gypsum Company, VINC 79-154-PM; (Judge Broderick's May 20, 1981 Order - Petition for Interlocutory Review).

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

June 11, 1981

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. HOPE 78-744-P
SEWELL COAL COMPANY	:	

DECISION

This is a civil penalty proceeding arising under section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §801 et seq. (Supp. III 1979)(the Mine Act). 1/ The issue is whether the administrative law judge erred in vacating two notices of violation on the ground that compliance was impossible because of a manpower shortage. For the reasons that follow, we reverse.

In February 1978, a federal mine inspector conducted an inspection of Sewell Coal Company's Meadow River No. 1 Mine. The mine contains six sections, and 25 miles of entries and crosscuts. The roof above the coal seam is of a glassy shale type, and is therefore fragile and subject to fracture. The mine is also very wet, accumulating about 500,000 gallons of water per day. The mine floor undulates, which creates places for water to accumulate.

As a result of the inspection, Sewell was cited for a violation of 30 CFR §75.1704. 2/ The notice alleged that Sewell failed to maintain in safe condition a designated intake escapeway to insure the passage of any person at all times, including disabled persons. The notice was issued because water accumulations, of varying depths up to 16 inches, existed for approximately 40 feet in the designated escapeway.

1/ The inspector issued the notices of violation here on February 13 and 14, 1978, under section 109(a) of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. §801 et seq. (1976)(the Coal Act). The Secretary filed his petition for assessment of civil penalty after the effective date of the Mine Act.

2/ 30 CFR §75.1704 states in part:

> [A]t least two separate and distinct travelable passageways which are maintained to insure passage at all times of any person, including disabled persons, and which are to be designated as escapeways, at least one of which is ventilated with intake air, shall be provided from each working section ... and shall be maintained in safe condition and properly marked.

Sewell also was cited for a violation of 30 CFR §75.200. 3/ The inspector testified that "there were slips and cracks in the mine roof and some of the rock had already fallen to the mine floor and other rock was ready to fall."

At the time the notices were issued, employees at the mine represented by the United Mine Workers of America had been on strike for over two months. Sewell normally employs 203 people, both union and supervisory personnel, for underground work at the mine. During the strike, however, only 33 supervisory personnel worked in the mine. Sewell's division safety director testified that 50 or 60 men would be needed to prevent any conditions which might constitute violations of the Act during an idle period. He also stated that the strike effectively prevented the hiring of any additional personnel. No coal was mined during the strike and the 33 working supervisory personnel limited their activity to correcting hazardous conditions. 4/ However, the natural deterioration of the 25 miles of mine, combined with the scarcity of workers, precluded the correction of all conditions that might constitute violations of the Act. The conditions cited in the two notices were the result of natural deterioration. Sewell conceded the existence of the cited conditions, but contended that they were impossible to prevent because of insufficient maintenance personnel.

The administrative law judge vacated both notices of violation, finding that:

> [T]he burden of establishing that compliance with the safety standards is impossible rests of course on the mine operator charged. Here, as the proponent of the rule, Respondent clearly carried its burden and established a prima facie case by its evidence [1] that the mine was idled by an economic strike, [2] that the mine deteriorates rapidly when idle due to natural forces, [3] that the two violations charged occurred as a result of such natural deterioration, [4] that the small complement of men (33 management personnel) available was insufficient to correct conditions in such a large mine (25 miles of entries and crosscuts), [5] and that the realities of labor-management relations made it impossible to hire additional personnel to keep the mine violation-free during the prolonged period of its idleness.[5/]

3/ 30 CFR §75.200 states in part:

> Each operator shall undertake to carry out on a continuing basis a program to improve the roof control system of each coal mine and the means and measures to accomplish such system. The roof and ribs of all active underground roadways, travelways, and working places shall be supported or otherwise controlled adequately to protect persons from falls of the roof or ribs.

4/ Sewell opted not to seal the mine during the strike because natural mine deterioration could have caused massive roof falls as well as flooding.

5/ The judge noted that impossibility of compliance was recognized by the Interior Department's Board of Mine Operations Appeals. Itmann Coal Co., 4 IBMA 61 (1975), and Buffalo Mining Company, 2 IBMA 226 (1973). In both cases the notices were vacated because of the unavailability of required equipment in the marketplace.

The Secretary does not contest these factual findings and the record as a whole supports them. Rather, the Secretary challenges the judge's conclusion from those facts, that compliance was impossible. The Secretary submits that the operator had discretion; it could assign its 33 management personnel to whatever tasks it deemed important. He argues that although it may have been difficult to do a complete examination of the mine so as to detect all violative conditions, such action was not impossible. To the extent violative conditions are found that cannot be corrected promptly, the operator could, argues the Secretary, danger-off and post such areas so as to prevent miner access and exposure. 6/

We agree with the Secretary that the facts relied on by the judge do not support a finding that compliance with the cited standards was impossible. In fact, the violation was abated by the operator very soon after the citations were issued. When, as here, compliance is difficult but not impossible, the appropriate consideration of such mitigating circumstances is in the assessment of the penalties.

In sum, we hold the judge erred in recognizing an affirmative defense of impossibility of compliance in this case. Accordingly, the notices of violation are reinstated and affirmed and the case is remanded for the assessment of civil penalties.

/

Richard V. Backley, Chairman

Frank F. Jestrab, Commissioner

A. E. Lawson, Commissioner

Marian Pearlman Nease, Commissioner

6/ In his brief, the Secretary contends that "the proper place for consideration of the argument raised by Sewell--that it could not comply with the Coal Act because it had limited manpower--is in assessment of the civil penalty. The fact that most employees were on strike may well mitigate the gravity and negligence associated with the violations."

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

June 23, 1981

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	
v.	:	Docket No. PENN 79-142
SOLAR FUEL COMPANY	:	

DECISION

This penalty proceeding arises under section 110 of the 1977 Mine Act, 30 U.S.C. §801 et seq. (Supp. III 1979). The administrative law judge issued a summary decision in which he concluded that Solar Fuel Company had not violated 30 CFR §75.503 1/ and vacated two section 75.503 citations against it. 2/ On August 1, 1980, the Commission directed review on its own motion. The issue before the Commission is whether electric face equipment stipulated to be in nonpermissible condition and intended for use inby the last open mine crosscut, was in violation of section 75.503 when located outby the last open crosscut.

The parties stipulated to the following facts. On May 3, 1979, an MSHA inspector issued a citation charging Solar with a violation of section 75.503. The citation stated that a continuous mining machine, located outby the last open crosscut, was not in permissible condition. The machine was not in use when cited. The following day, May 4, the inspector issued another citation again charging Solar with a violation of section 75.503. The citation stated that a roof bolting machine, located in the same working area outby the last open crosscut and also not in use at the time, was not in permissible condition. The mine section where the cited equipment was located was being prepared for mining operations scheduled to begin shortly after each citation was issued. Solar intended to use both pieces of equipment inby the last open crosscut while performing these operations. Shortly after each citation was issued, the cited defects were corrected. On both days, coal was produced in the mine section in question after each citation was issued.

1/ Section 75.503 provides:

> The operator of each coal mine shall maintain in permissible condition all electric face equipment required by §§75.500, 75.501, 75.504 to be permissible which is taken into or used inby the last open crosscut of any such mine.

Section 75.503 is based on section 305(a)(3) of the 1977 Mine Act, which reads:

> The operator of each coal mine shall maintain in permissible condition all electric face equipment required by this subsection to be permissible which is taken into or used inby the last open crosscut of any such mine.

An identical statutory provision with the same section number was contained in the 1969 Coal Act.

2/ The summary decision was issued on July 3, 1980. 2 FMSHRC 1732.

The judge emphasized that the Secretary had not alleged "that the electric face equipment involved in the ... citations was taken into or used inby the last open crosscut." 2 FMSHRC at 1737. The judge rejected the Secretary's argument that Solar's admitted intention to take the equipment inby the last open crosscut was sufficient to prove a violation. He stated that the Secretary's position "ignores the plain language of section 75.503 which requires that the equipment be electric face equipment 'which is taken into or used inby the last open crosscut.'" Id. at 1735-1736. He concluded that to prove a section 75.503 violation, the Secretary must demonstrate that an operator did not maintain in permissible condition equipment which "was 'taken into or used inby the last open crosscut'" (emphasis added). Id. at 1736. He found that the Secretary had not carried his burden because the equipment was cited outby the crosscut. 3/

We reverse. The judge's holding cannot be squared with the plain language and stated purpose of the relevant statutory and regulatory provisions.

The judge's construction renders the verbs, "is taken and [is] used," as tantamount to "has been or was taken/used." As the Secretary argues, this approach misconstrues the grammar of these provisions. The verbs in question are in the present tense of the passive voice, third person singular. Among other things, the present tense denotes continuing or habitual action as well as action which always occurs or will occur. Thus, from a grammatical standpoint, the proper meaning of these provisions is "equipment which is taken or used inby the last open crosscut," connoting past, present, and future conduct. In turn, this means that equipment habitually used or intended for use inby must be maintained in permissible condition and may be cited regardless of whether it is located inby or outby when inspected. The emphasis is not on where equipment is located at the time of inspection, but simply whether it is equipment which is taken or used inby.

3/ In reaching his conclusion, the judge relied on section 318(i) of the 1977 Mine Act, which defines "permissible" condition as regards electric face equipment. The judge stated:

> I find nothing [in] the legislative history which would support the position of [the Secretary]. On the contrary, section 318(i) of the Act provides in pertinent part: "'Permissible' as applied to electric face equipment means all electrically operated equipment taken into or used inby the last open crosscut of an entry...." In order to support [the Secretary's] position I would have to find that the language "taken into or used inby the last open crosscut" as used in this regulation is redundant. Nowhere in the Act or regulations is there a requirement that a mine operator maintain electrical face equipment in permissible condition if it is "intended" to be taken into or used inby the last open crosscut.... [2 FMSHRC at 1736.]

The judge ignored the expressly stated purpose of these provisions. While he did rely on the "permissibility" definition in section 318(i) of the 1977 Mine Act (2 FMSHRC at 1736), he did not cite the crucial explanation for requiring "permissibility" in the first instance:

> "[P]ermissible" as applied to electric face equipment means all electrically operated equipment taken into or used inby the last open crosscut of an entry or a room of any coal mine the electrical parts of which ... are designed, constructed, and installed, in accordance with the specifications of the Secretary, to assure that such equipment will not cause a mine explosion or mine fire, and the other features of which are designed and constructed, in accordance with the specifications of the Secretary, to prevent, to the greatest extent possible, other accidents in the use of such equipment.... [Emphasis added.]

Identical language is contained in 30 CFR §75.2(i). Although sections 318(i) and 75.2(i) define permissibility in terms of design, construction, and installation of electric face equipment, section 305(a)(3) of the 1977 Mine Act and section 75.503 require that the equipment be maintained in such "permissible" condition. We think that the conclusion is inescapable that the equipment be so maintained for precisely the same reason--to assure against mine accidents. The purpose of "assuring [against] mine explosion or mine fire" militates against any interpretation of "is taken into or used inby" which would lessen that assurance. Plainly, the judge's interpretation does not further the purpose of assurance.

Furthermore, the judge's interpretation would lead to unacceptable results. It would allow an operator the opportunity to operate impermissible electric face equipment inby the last open crosscut prior to a mine inspection, move it outby during the inspection, and then return it to the face once the mine inspector had left the premises. To adopt the judge's holding in light of those prospects would, we believe, derogate from Congressional intent by creating a formalistic loophole in the 1977 Mine Act and implementing regulations. Cf. Ideal Basic Industries, Cement Div., 3 FMSHRC 843, 844 (1981); Paramount Mining Co., 2 FMSHRC 2476, 2477 (1980)(rejecting similarly formalistic constructions of analogous regulations).

For the foregoing reasons, we reverse the judge's decision and interpret 30 CFR 75.503 to apply not only to equipment which has been taken inby the last open crosscut when inspected, but also to equipment which is intended to be or is habitually taken or used inby, even if it is inspected while located outby. Accordingly, this case is remanded for disposition consistent with this decision.

Richard V. Backley, Chairman

Frank F. Jestrab, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

June 24, 1981

SECRETARY OF LABOR, MINE SAFETY AHD HEALTH ADMINISTRATION (MSHA)	:	Docket Nos. DENV 79-163-PM
	:	DENV 79-240-PM
v.	:	
CAPITOL AGGREGATES, INC.	:	

DECISION

This civil penalty case involves the interpretation of 30 CFR §56.17-1, a mandatory illumination standard. In a decision issued on April 14, 1980, the administrative law judge found multiple violations of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §801 et seq. (Supp. III 1979) and assessed penalties. We vacated that decision on procedural grounds, and on remand the judge reaffirmed his prior decision. The operator, Capitol Aggregates, Inc., filed a petition for discretionary review, which we granted in part. For the following reasons, we affirm in part and reverse in part.

On May 17, 1978, an MSHA inspector issued Citation Nos. 169705 and 169706 alleging violations of 30 CFR §56.17-1 in Capitol's cement plant. The standard provides:

> Mandatory.
>
> Illumination sufficient to provide safe working conditions shall be provided in and on all surface structures, paths, walkways, stairways, switch panels, loading and dumping sites, and work areas.

The question in this case is what constitutes "[i]llumination sufficient to provide safe working conditions." Resolution requires a factual determination based on the working conditions in a cited area and the nature of illumination provided.

Citation No. 169705 alleged a violation of the standard because the lights over the coke storage bin and adjacent walkways were not operable. In concluding that the operator violated the standard, the judge was persuaded by the inspector's unrebutted testimony that the illumination was insufficient. In the absence of negligence, the judge assessed a $25 penalty. On remand, he saw "no reason to disturb [his] previous finding...." We conclude that substantial evidence supports the judge's findings.

The facts are undisputed. The only permanent lighting in a 30-40 foot area was provided by a mercury vapor light which was not operable at the time of the inspection, about 9:00 p.m. 1/ Electrical outlets, extension cords, and auxiliary lighting were available, however, and workers were equipped with flashlights. There was little reflected light in this coke area. Because the coke storage bin continuously supplied coke to the kiln, Capitol's employees might have to make repairs or do maintenance on the bin/kiln system at any time, including the evening shift. The lack of illumination created hazards, such as tripping or falling, for employees performing such work.

We reject Capitol's argument that, notwithstanding the failure of the permanent lighting, there was adequate illumination to ensure safe working conditions, because it also provided electrical outlets for portable lighting equipment and flashlights for night work. Portable lighting could satisfy the standard where such lighting is accessible, its use is feasible and safe, and it provides adequate light under the circumstances. That is not the case before us, however.

Capitol states only that it provided such lighting and outlets; it does not indicate where such lighting was stored or how easy it was to reach. Although a worker could carry a flashlight, extension cord, and auxiliary light in one hand, that practice may be neither safe nor desirable. Capitol concedes that a worker might have to climb a ladder to get to the top of the storage bin. It does not rebut the inspector's testimony that climbing a ladder and performing maintenance or repairs require the use of a worker's hands, and do not leave the hands free for carrying a flashlight or extension cord with auxiliary lights. Nor has Capitol established the adequacy of such portable lighting equipment; it does not show the amount of illumination this lighting would shed. Similarly, Capitol fails to prove that, under these facts, a flashlight provided sufficient illumination. The evidence and the case law demonstrate otherwise. The inspector testified without contradiction that a flashlight would not provide sufficient light if an employee were simultaneously holding a flashlight and working on equipment. The case law indicates that a directed beam of light such as that supplied by a cap lamp--or, by analogy, a flashlight--may not shed sufficiently diffuse light to provide a safe work area. Clinchfield Coal Co. at 3, March 1979 FMSHRC, 1 MSHC 2027 (Chief Administrative Law Judge Broderick, March 12, 1979), aff'd. sub nom., Clinchfield Coal Co. v. Secretary of Labor, No. 79-1306, 1 MSHC 2337 (4th Cir. 1980) (unpublished). (Clinchfield involved the identical coal standard at 30 CFR §77.207).

1/ This light failed because a photoelectric cell, which normally activated the lamp as the sun went down, malfunctioned. Although Capitol concedes the malfunction, it makes much of its lack of knowledge of the malfunction. Capitol's lack of knowledge relates only to its possible negligence. Because the judge found no negligence, Capitol's knowledge is not at issue here. Nor did we direct that issue for review.

In the absence of evidence to the contrary, we are persuaded that the judge properly credited the inspector's testimony that the lighting was inadequate. Clinchfield, supra; J. P. Burroughs and Son, Inc., 2 FMSHRC 3266, 3269, 1 MSHC 1165, 1166 (Chief Administrative Law Judge Broderick, 1980). We hold that, under these facts, the illumination provided by the operator did not satisfy the standard and we thus affirm the judge.

Citation No. 169706 alleged a violation of the standard because there was insufficient illumination in the area under the coke impact crusher, around the tail pulley of the C-58 conveyor belt, and by the tail section of the apron feeder under the coke hopper. The judge found that there were no lights and concluded that Capitol had violated the standard "[i]nasmuch as miners might have to travel in the area at night." In our view, his finding that miners might have to work in the cited area at night is not supported by substantial evidence. Consequently, we reverse his finding of a violation and vacate the underlying citation.

There was undisputed testimony that, when work was performed in the area during daytime, there was adequate light. The judge impliedly found that the daytime lighting was adequate, and the Secretary does not argue otherwise. Although the inspector testified to his belief that emergency nighttime repairs might be necessary, he did not observe any employees there at night, nor did he testify as to the likelihood of such nighttime repairs. By contrast, Capitol's witness testified that employees would not have to go into C-58 conveyor area at night because a bypass system provided sufficient fuel storage capacity so that the plant could run all night. Even if the bypass system failed at night, the plant had two additional days of fuel and other fuel systems available to substitute for the bypass system; hence any necessary repairs would not have to be made immediately.

Under these facts, we do not believe that substantial evidence supports the judge's finding that employees might have to work in the area at night. We hold that, because there was adequate light for safe working conditions during the day and there was no probability of work being performed at night, there was no violation of the standard. Accordingly, we reverse the judge and vacate the citation. 2/

Richard V. Backley, Chairman

Frank F. Jestrab, Commissioner

A. E. Lawson, Commissioner

Marian Pearlman Nease, Commissioner

2/ If even some sporadic nighttime work or the probability of nighttime work had been shown, the result might have been different.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
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June 29, 1981

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. PITT 78-97-P
PENN ALLEGH COAL COMPANY, INC.	:	

DECISION

On September 14, 1975, Penn Allegh Coal Company filed a petition for modification of the application of the cabs and canopies standards, 30 CFR 75.1710-1(a), to the electric face equipment at its Allegheny No. 2 mine. 1/ The petition for modification was filed under section 301(c) of the 1969 Coal Act, 30 U.S.C. §861(c)(1976), which, in relevant part, provided:

> Upon petition by the operator or the representative of miners, the Secretary may modify the application of any mandatory safety standard to a mine if the Secretary determines ... that the application of such standard to such mine will result in a diminution of safety to the miners in such mine. Upon receipt of such petition the Secretary shall publish notice thereof and give notice to the operator or the representative of miners in the affected mine, as appropriate, and shall cause such investigation to be made as he deems appropriate. Such investigation shall provide an opportunity for a public hearing, at the request of such operator or representative or other interested party, to enable

1/ The standard requires installation of protective cabs or canopies on all self-propelled electric face equipment on a staggered time schedule coordinated with descending mining heights. It states in pertinent part:

> (a) [A]ll self-propelled electric face equipment, including shuttle cars, which is employed in the active workings of each underground coal mine on and after January 1, 1973, shall, in accordance with the schedule of time specified in subparagraphs (1), (2), (3), (4), (5), and (6) of this paragraph (a), be equipped with substantially constructed canopies or cabs, located and installed in such a manner that when the operator is at the operating controls of such equipment he shall be protected from falls of roof, face, or rib, or from rib and face rolls.

> the operator and the representative of miners in such mine or other interested party to present information relating to the modification of such standard. The Secretary shall issue a decision incorporating his findings of fact therein.... Any such hearing shall be of record and shall be subject to section 554 of title 5 of the United States Code. (Emphasis added.) 2/

On January 9, 1976, while the petition for modification was pending before an administrative law judge, a notice of violation of 30 CFR 75.1710-1(a) was issued to Penn Allegh for failure to provide a canopy on a Long-Airdox electric coal drill. On June 15, 1977, the judge issued a lengthy decision in the modification case granting the modification in part and denying it in part. Both Penn Allegh and the Secretary appealed the decision to the Board of Mine Operations Appeals. On March 9, 1978, the pending appeals were transferred to the Assistant Secretary for Mine Safety and Health pursuant to the transfer provisions of the 1977 Mine Act. 30 U.S.C. §961(a). The appeals remain pending before the Assistant Secretary as of this date.

On November, 14, 1977, a petition for assessment of civil penalty for the violation alleged in the January 9, 1976, notice of violation was filed by the Secretary and the civil penalty case was assigned to the administrative law judge who had heard the modification case. 3/ On December 9, 1977, Penn Allegh requested a stay of the penalty proceeding pending the decision of the Board in the appeal of the modification case. The judge denied the stay because the petition for modification had not included the coal drill that was the subject of the notice at issue in the present penalty proceeding. 4/

On January 17, 1978, the judge issued a notice of prehearing conference and pretrial order stating that counsel for the Secretary had "indicated his unwillingness to concede that the use of a canopy on

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2/ Section 101(c) of the 1977 Mine Act, 30 U.S.C. §811(c)(Supp. III 1979), provides for the same modification procedure.

3/ Section 110(a) of the 1977 Mine Act requires that the Secretary assess an operator of a mine at which a violation occurs a civil penalty. Section 105 sets forth the procedures for that assessment and for contesting the assessment before the Commission.

4/ The petition for modification as originally filed did not specify the particular electric face equipment for which modification was requested. However, at the modification hearing the parties submitted a joint exhibit listing the electric face equipment encompassed by the petition. The judge asked counsel for Penn Allegh if the exhibit was to be deemed as amending the petition so as to apply only to those machines specified therein. Counsel responded affirmatively.

respondent's coal drill will result in a diminution of the safety of the miners and therefore [that] the canopy requirement is inapplicable." The judge requested that the parties submit proposed stipulations regarding the mining height and the height of the coal drill, and, among other things, that the Secretary furnish a scale drawing "of the canopy design MESA contends can be used safely on the coal drill in question under the mining height present." 5/ In response, the Secretary submitted a drawing of a canopy available from the manufacturer of the drill. Penn Allegh responded by asserting that the design submitted by the Secretary could not be used safely in its mine, that the judge's prior modification decision showed that a canopy could not be used safely, and that requiring a new modification petition would result in a needless multiplicity of proceedings.

On February 27, 1978, the judge issued a notice of hearing and pretrial order which stated:

> The issue in this case is whether or not the canopy design proposed by MESA could be used safely in the 4 Right section of the No. 2 mine on January 9, 1976. This issue will be determined on the basis of the scale drawing submitted by MESA and the dimensions as to mining height, machine height and roof support to which the parties have stipulated.

In response to this order the Secretary filed a prehearing statement that included a modified canopy design. This design contained structural modifications not present in the previously submitted design. The Secretary stated that he was "forced" to submit the modified design because the judge was "predisposed" to make findings, based upon the modification case, which would not permit the coal drill to operate safely when equipped with the canopy the Secretary originally proposed. Prehearing statement at 4 (March 8, 1978).

In its response to the pretrial order Penn Allegh asserted that a "canopy utilizing the design [originally] proposed by MESA for the ... drill could not on January 9, 1976 and cannot now be used safely in the 4 Right Section or any other section of Allegheny No. 2 Mine." Supplemental Prehearing Submission, ¶14, 15, (March 15, 1978). Regarding MESA's drawings of the modified canopy design Penn Allegh stated:

> [T]his proposed design is incompetent and irrelevant with respect to the subject violation. Such violation must be adjudicated on the basis of facts and conditions as they existed at the time the alleged violation occurred. Moreover, [Penn Allegh] denies that MESA's suggested modifications in the machine and canopy design will overcome the hazards created by equipping the subject machine with a canopy in 47" coal. 6/

5/ The Mining Enforcement and Safety Administration (MESA) became the Mine Safety and Health Administration (MSHA) when the 1977 Mine Act took effect.

6/ The parties had agreed that the minimum mining height at which the electric face equipment would have to operate was 47 inches.

Supplemental Prehearing Submission, at 5-6, (March 15, 1978). In a further response to MESA's modified canopy design Penn Allegh stated:

> Obviously this new design was not available on January 9, 1976 because it is strictly conceptual in nature and was prepared for the purpose of this case and hence must be deemed to be irrelevant. Moreover, the [structural modification] merely exacerbates the problems of visibility and the hazards resulting therefrom.

Response to Offer of Proof, at 3, (April 3, 1978).

The matter was heard on April 6, 1978. At the start of the hearing, the judge recited his understanding of the posture of the case:

> I understood the sole issue to be determined with respect to the fact of violation was whether the canopy design [initially] proposed by the Secretary ... could have been retrofitted to the ... face drill in use of the 4 Right Section of the No. 2 Mine without diminishing the safety of the miners.
>
> I further understood that the issue with respect to the fact of violation would be determined on the basis of the canopy design configuration found in the manufacturer's drawing ... which the operator agreed was available to it as early as April 1975, and the agreed upon dimensions as to the mining height, machine height and roof support.

Tr. 6-7.

Counsel and the judge then extensively discussed the propriety of admitting as exhibits the Secretary's modified canopy design. Counsel for Penn Allegh stated that "unless there was an actual canopy design available from the manufacturer at [the time of the alleged violation] that could have been retrofitted ... this evidence is worthless and irrelevant." Tr. 18. After further discussion, the judge stated:

> [W]hat this offer of proof if accepted amounts to is a direction that the presiding judge impose on the operator the burden of showing that two untested, unproved design concepts involving a complete overhaul of the equipment and a relocation of the operator's controls would, if accomplished, be acceptable as a safe canopy design concept.
>
> I think this is a thinly disguised attempt to shift from the Secretary the burden of showing that the manufacturer's design configuration could be used safely by requiring the operator to show that [the Secretary's] untested, unproved paper design concepts would, if implemented, diminish the safety of the miner. Even if these design concepts are, as I assume they will be, endorsed by [the Secretary's witness], they would still remain untested, unproved, paper concepts.

As I have said it is my strong recollection and I have confirmed that [when such testimony was presented before another judge he] said he could assign little weight to such conceptualization testimony. I agree and for this as well as the other reasons adverted to reject this offer of proof.

Tr. 26-27.

After further extended discussion the Secretary stated that the judge's ruling "wipe[s] out our case". Tr. 46. The judge then rendered a bench decision finding that a total mining height of 48.5 inches was necessary to allow safe operation of the drill with the canopy originally proposed by the Secretary. Because the stipulated minimum mining height was 47 inches, the judge concluded that "the canopy design configuration, proposed by the Secretary cannot be used safely in ... Respondent's No. 2 mine and could not have been used safely ... on January 9, 1976." Tr. 55-56. 7/ On April 7, 1978, the judge issued a written decision, reiterating his bench decision, and dismissed the petition for penalty assessment.

On May 5, 1978, the Secretary filed a petition for discretionary review with the Commission. The petition asserted that the judge erred in declaring the standard invalid. It also raised questions concerning the burden of proof, the admission of evidence and the taking of official notice. On January 3, 1979, the Commission granted the Secretary's petition. 8/

Although this matter poses potentially interesting questions regarding the burden of proof in an enforcement proceeding brought for a violation of a performance standard and the nature of the proof that will be

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7/ The judge also found that he had the authority to rule upon the validity of the mandatory safety standard at issue before him. Exercising this authority, he concluded that the Secretary had failed to follow the statutory scheme in promulgating 30 CFR §75.1710-1 and that the standard was therefore null, void and unenforceable. The judge reached identical conclusions in his decision in Sewell Coal Co., 1 FMSHRC 1381 (WEVA 79-31, 1979). The judge's decision in Sewell was directed for review by the Commission. For the reasons stated in our decision in Sewell, issued this date, we conclude that the judge was correct in finding he had the authority to rule on the standard's validity, but erred in finding 30 CFR §75.1710-1 to be null, void and unenforceable.

8/ At the time that the Secretary's petition for review was filed no Commissioners had yet assumed office. Therefore the 40-day review period expired without review of the judge's decision having been directed. 30 U.S.C. §823(d)(1). On June 16, 1978, the Secretary filed a petition for review of the Commission's "final order" with the U.S. Court of Appeals for the D.C. Circuit. On November 7, 1978, after Commissioners had been nominated and confirmed, the Secretary filed a motion with the Court to remand the case to the Commission to allow the Commission the opportunity to act on the Secretary's petition for review. The Secretary's motion was granted and the case was remanded "so that the Commission may dispose of the Secretary's petition."

considered to be probative and relevant in such proceedings it presents a yet more fundamental issue which commands our attention--the propriety of allowing an operator to assert as a defense in an enforcement proceeding that application of the allegedly violated safety standard will diminish the safety of miners. Our resolution of this issue makes unnecessary, indeed inappropriate, discussion of the other issues raised in this case.

Penn Allegh's consistent argument throughout this case has been that to require the installation of a canopy on its coal drill will actually diminish, rather than enhance, the safety of miners. This is so, in Penn Allegh's view, because a canopy giving sufficient clearance to the coal drill operator to allow safe and comfortable operation of the drill, necessarily will be too high to allow safe operation in the 47-inch mining height at issue. Therefore, according to Penn Allegh, to apply the standard here is to diminish the safety of miners--a result contrary to the Act's purposes. In view of this, Penn Allegh submits that the notice of violation for failure to comply with 30 CFR §75.1710 should be vacated and the petition for assessment of penalty dismissed.

Section 301(c) of the 1969 Coal Act and section 101(c) of the 1977 Mine Act expressly provide a specific mechanism for handling those situations where the application of a standard diminishes, rather than enhances, miners' safety. In such situations, the operator is required to petition the Secretary for relief from the application of the standard. Upon receipt of such a petition the Secretary gives notice, conducts an investigation, provides an opportunity for a public hearing, and issues a decision granting or denying the relief sought. The Secretary has adopted detailed regulations governing the processing of such petitions. 30 CFR Part 44. Multi-level review of a modification petition is provided; the initial decision being made by the Administrator of MSHA with the right to be heard by an administrative law judge of the Department of Labor and with an appeal to the Assistant Secretary of Labor. Only a decision of the Assistant Secretary is deemed final agency action for purposes of judicial review. 30 CFR 44.51. 9/

Thus, there is a clear distinction between modification proceedings instituted by an operator and enforcement proceedings instituted by the Secretary. The two serve related but separate ends. In one the Secretary must prove failure to comply with a standard he has adopted for application to the mining industry in general. In the other, the operator must demonstrate why compliance should be waived in view of the special facts at a particular mine.

In the present case, it is undisputed that the coal drill was not equipped with a canopy as required by the standard. It is also undisputed that Penn Allegh did not seek a modification of the cabs and canopies standard for the coal drill at issue. Penn Allegh failed to do so even in view of the fact that it had previously filed a petition for modification of the same standard as it applied to many other pieces of

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9/ Under the 1969 Coal Act modification proceedings were processed through the Department of Interior's Office of Hearings and Appeals with a right of appeal to the Board of Mine Operations Appeals. See 43 CFR §4.550 (1972)).

equipment and, therefore, was obviously aware of the procedure to be followed. Instead, with regard to the coal drill at issue here, Penn Allegh waited until it was cited for non-compliance and then raised in the enforcement proceeding the same question that could have been resolved in a modification proceeding, i.e., whether application of the standard would cause a diminution of safety at its mine.

We cannot endorse this short circuiting of the Act's modification procedures. We believe it important that questions of diminution of safety first be pursued and resolved in the context of the special procedure provided for in the Act, i.e., a modification proceeding.

A similar conclusion has been reached in an analogous situation under the Occupational Safety and Health Act of 1970, 29 U.S.C. §651 et seq. In the OSHA statutory scheme, an employer may apply to the Secretary of Labor for a variance from a standard's application. 29 U.S.C. §655(d). As with the Mine Act, the OSHAct's variance procedure is distinct from the Act's enforcement procedure. In enforcement proceedings the Occupational Safety and Health Review Commission has likewise been confronted with arguments that a violation of the Act should not be found where compliance with a standard would result in a "greater hazard" than non-compliance i.e., a diminution of safety. In establishing a narrow "greater hazard" defense, the OSHRC has set forth three elements: 1) the hazards of compliance are greater than the hazards of non-compliance; 2) alternative means of protecting employees are unavailable; and 3) a variance application would be inappropriate. (Emphasis added.) See, e.g., Russ Kaller, Inc. t/a Surfa-Shield, 4 BNA OSHC 1758 (1976).

The Third and Ninth Circuits have affirmed this forumulation of the defense. In General Electric Co. v. Secretary, 576 F.2d 558, 561 (3d Cir. 1978), the Court stated:

> Every employer has the initial obligation to make sure that his working areas comply with all applicable standards. If there is reason to believe that compliance with certain standards may jeopardize his employees, a variance should be sought. If a "greater hazard" defense is allowed at an enforcement proceeding without requiring initial resort to the variance procedures or a showing that such resort would be inappropriate, there would be little incentive for an employer to seek a variance under these circumstances.
>
> General Electric contends that an employer who correctly believes that his working conditions are safer than those prescribed in the standards should not be penalized for bypassing the variance procedures and taking his chances that he will not be cited or that he will prevail in an enforcement proceeding. The flaw in this argument is that some employers will believe incorrectly that their working conditions are safer than those prescribed in the standards. By removing this incentive to seek variances, the Commission would be allowing an employer to take chances not only with his money, but with the lives and limbs of his employees. This we cannot do. [Emphasis added.]

The Ninth Circuit endorsed the Third Circuit's reasoning in Noblecraft Industries v. Secretary, 614 F.2d 199 (1980).

We find this rationale compelling and applicable to the modification procedures of the mine safety statutes. A statutory procedure is and was available to Penn Allegh to obtain a waiver of the application of the cabs and canopies standard to the coal drill at issue. That procedure involves a forum different from this Commission, (i.e., the Department of Labor) and Penn Allegh was aware of the applicable procedures for obtaining the relief sought here. Penn Allegh did not avail itself of this opportunity. Instead, it chose to operate the drill without a canopy, an admitted violation of the standard, and waited until it was cited before making its argument regarding diminution of safety. Thus, Penn Allegh, rather than the Secretary, has determined that compliance is unnecessary. If Penn Allegh is wrong, employees have been exposed to a hazardous condition in violation of the Secretary's standard. 10/ At the present time, we cannot forecast with any certainty whether Penn Allegh could or could not have equipped its drill with a safe canopy. 11/ The responsibility for making that determination rests in a different forum and should not be determined here.

10/ We recognize that if Penn Allegh is right requiring literal compliance would mean that miners would be exposed to a hazardous condition. We view the regulatory scheme of the Act, however, as being premised upon the proposition that compliance with the safety standards adopted by the Secretary protects the nation's miners, and that the procedures permitting non-compliance, i.e., the modification provisions, must be strictly observed. We also stress, however, that the Secretary's regulations appear to provide a vehicle for insuring that the safety of miners is not compromised during the pendency of a modification petition. 30 CFR §44.16 provides for interim relief from the application of a standard pending final decision on a petition for modification. Also, 30 CFR 44.4(c) provides that "the granting of the modification ... shall be considered as a factor in the resolution of any enforcement action previously initiated for claimed violation of the subsequently modified mandatory safety standard." This case does not present a situation where an enforcement proceeding was brought by the Secretary after the operator had filed a modification petition and before that petition had been finally resolved.

11/ The fact that Penn Allegh had received a partially favorable decision from an administrative law judge in its modification case is of no importance. Although the facts forming the basis of the favorable portions of that decision possibly could be analogized to the facts of the present case, both parties appealed the judge's decision and no final decision on the petition for modification has yet been issued. Therefore, the administrative law judge's decision granting a waiver as to other items of equipment does not provide a sound basis for excusing Penn Allegh's failure to file a modification petition here.

Therefore, we hold that the defense of diminution of safety was improperly raised and accepted in this enforcement proceeding. 12/ The judge's decision is reversed and the case is remanded for further proceedings consistent with this decision.

Richard V. Backley, Chairman

Frank F. Jestrab, Commissioner

A. E. Lawson, Commissioner

Marian Pearlman Nease, Commissioner

12/ Nor in this case could Penn Allegh assert, as an alternative to its disallowed defense, that it was technologically impossible for it to comply. Such a defense would be merely an adjunct to its diminution of safety defense because it is "technologically impossible" only because it diminishes safety--not because it is impossible to fit a canopy on the coal drill.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
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June 29, 1981

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	
v.	:	Docket No. WEVA 79-31
SEWELL COAL COMPANY Respondent	:	

DECISION

This case arose when the Department of Labor's Mine Safety and Health Administration (MSHA) sought civil penalties under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (Supp. III 1979) ("the 1977 Mine Act"), for alleged violations of the cab and canopy standard for underground coal mines, 30 CFR §75.1710-1(a). 1/ The relevant facts are not disputed. Sewell Coal Company was cited by MSHA for failing to equip a roof bolter and a shuttle car with canopies. The alleged violations were abated and the Secretary filed a proposal for civil penalties. 2/

Prior to hearing the Secretary and Sewell agreed to a settlement of the matter. The Secretary filed a motion with the administrative law judge to approve the settlement. 3/ The judge denied the motion. The judge found that Sewell could not comply with the cited standard "without diminishing the safety of the miners and depriving them of the

1/ 30 CFR §75.1710-1(a) states in pertinent part:

> [A]ll self-propelled electric face equipment, including shuttle cars, which is employed in the active workings of each underground coal mine on and after January 1, 1973, shall, in accordance with the schedule of time specified in subparagraphs (1), (2), (3), (4), (5), and (6) of this paragraph (a), be equipped with substantially constructed canopies or cabs, located and installed in such a manner that when the operator is at the operating controls of such equipment he shall be protected from falls of roof, face, or rib, or from rib and face rolls.

2/ The notice of violation pertaining to the roof drill was terminated when the section in which the drill was being used was abandoned and the equipment withdrawn from use. The citation pertaining to the shuttle car was terminated when the equipment was replaced with another shuttle car that had a canopy.

3/ Section 110(k) of the 1977 Mine Act, 30 U.S.C. §820(k) states:

> No proposed penalty which has been contested before the Commission ... shall be compromised, mitigated or settled except with the approval of the Commission.

protection afforded by section 318(i) of the mandatory safety standards, 30 U.S.C. §878(i)." He further found that the Secretary's failure to comply with section 318(i) rendered the cab and canopy standard "null, void and unenforceable." He therefore dismissed the petition for assessment of penalty. In a memorandum opinion issued in conjunction with his decision dismissing the penalty petition, the judge set forth his reasons for concluding that he was empowered to pass upon the validity of the standard and for finding the standard invalid.

This case presents us with two important threshold questions: whether the judge had the authority to rule upon the validity of 30 CFR 75.1710-1(a) and, if so, whether he properly found the standard null, void and unenforceable.

I.

The standard at issue was promulgated under the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. §801 et. seq. (1976)(amended 1977) ("the 1969 Coal Act"), and was adopted on October 3, 1972. 37 Fed. Reg. 20689-90 (1972). Therefore, the question of whether the validity of the standard can be challenged in an enforcement proceeding must first be addressed in terms of the relevant procedures under the 1969 Coal Act. The 1969 Coal Act did not have a specific provision regarding the proper vehicle for challenging the validity of standards adopted by the Secretary. Furthermore, case law involving such challenges is sparse. From our review, it appears that validity challenges were left to be raised in the various types of enforcement proceedings provided for in the Coal Act. See §§106(a)(1), 109. For example, in U.S. v. Finley Coal Co., 345 F. Supp. 62 (D.ED. Ky., 1972), aff'd, 493 F.2d 285 (6th Cir. 1974), the defense of improper promulgation of standards was raised and accepted in a criminal proceeding brought under the Coal Act. In Morton v. Delta Mining, Inc., 495 F.2d 38, 43 (3d Cir. 1974), rev'd on other grounds, 423 U.S. 403 (1976), a challenge to the Secretary's penalty assessment regulations was upheld in a penalty collection proceeding. See also Association of Bituminous Contractors v. Andrus, 581 F.2d 853, 865-866 (D.C. Cir. 1978)(Leventhal, concurring), in which it is suggested that, under the Coal Act, the promulgation of a health or safety standard was appropriately challenged directly in the courts of appeals under section 106 of the Act. Apart from statutory enforcement proceedings, a further possible avenue of relief was the institution of a suit for injunctive relief against the enforcement of allegedly invalid regulations. See National Independent Coal Operator's Ass'n v. Kleppe, 423 U.S. 388 (1976).

Although challenges to the validity of standards under the 1969 Coal Act were left to be raised in enforcement proceedings, the administrative body established by the Secretary of Interior to adjudicate contested cases, the Board of Mine Operations Appeals, declined to review such challenges. The basis for the Board's conclusion was that

the delegation of authority to it by the Secretary of Interior did not encompass the authority to invalidate rules and regulations issued by the Secretary. Buffalo Mining Co., 2 IBMA 226, 242-245 (1973). Because of this perceived limitation on its authority, the Board stated: "The power to invalidate rules and regulations promulgated by the Secretary is not within the scope of authority of this Board or the Administrative Law Judge. This power resides in the U.S. District Courts and the Courts of Appeals." Peabody Coal Co., 4 IBMA 137, 138 (1975).

This basis for the Board's refusal to entertain a challenge to the validity of a standard does not apply to this Commission. The Commission is an independent adjudicative agency, entirely separate from the enforcing agency, and its authority to review Secretarial action is not subject to the same constraints as were perceived by the Board. Helen Mining Co., 1 FMSHRC 1796, 1798-1801 (1979), pet. for rev. filed, Nos. 79-2518, -2537, D.C. Cir., Dec. 19 & 21, 1979. The Commission has been given primary adjudicative jurisdiction over disputes arising under the Act and is authorized to decide independently questions of fact, law, and policy. 30 U.S.C. §823(d). See Bituminous Coal Operator's Assoc. v. Marshall, 82 F.R.D. 350 (D.D.C. 1979); Council of the Southern Mountains v. Donovan, No. 79-2982 (D.D.C., May 19, 1981). The determination of the validity of a standard obviously could be an important step in the resolution of disputes brought before the Commission and, absent some appropriate limitation on our authority to do so, we believe validity challenges should be resolved by the Commission.

The Secretary vigorously asserts, however, that section 101(d) of the 1977 Mine Act is such a limitation of our authority. This section, in pertinent part, provides:

> Any person who may be adversely affected by a mandatory health or safety standard promulgated under this section may, at any time prior to the sixtieth day after said standard is promulgated, file a petition challenging the validity of such mandatory standard with the United States Court of Appeals for the District of Columbia Circuit or the circuit wherein such person resides or has his principal place of business, for a judicial review of such standard.... The procedures of this subsection shall be the exclusive means of challenging the validity of a mandatory health or safety standard. (Emphasis added.)

This provision by its terms concerns pre-enforcement challenges to standards adopted under the 1977 Mine Act, and did not become effective until March 9, 1978. The 1977 Act is silent with respect to the review of standards previously adopted under the predecessor 1969 Coal Act. We fail to see how section 101(d) of the 1977 Mine Act can be applied retroactively to foreclose a challenge to a standard adopted under the 1969 Coal Act five and one-half years before section 101(d)'s effective date. In our view, the 1977 Mine Act leaves intact the avenues available

under the 1969 Coal Act for challenging the validity of standards adopted under that Act. 4/

Therefore, because challenges to the validity of standards adopted under the 1969 Coal Act were left to be raised in enforcement adjudications, because the Commission stands in a position fundamentally different from the Board of Mine Operations Appeals, and because section 101(d) of the 1977 Mine Act is only prospectively applicable to standards adopted under that Act, we hold that a challenge to the validity of a standard adopted under the 1969 Coal Act can be raised and decided in an adjudication before the Commission. 5/

II.

Turning to the question of the standard's validity, for the following reasons we conclude that the judge erroneously found 30 CFR §75.1710-1(a) to be null, void and unenforceable. The starting point for our analysis is to trace the development of section 318(i) of the 1969 Coal Act to determine its impact, if any, on the adoption of the improved cab and canopy standard.

The provisions of section 318(i) first appeared in Senate bill 2917, as reported, as section 206(1)(10). Legis. Hist. at 52-58. 6/ In order to fully understand the requirements of section 318(i) it is necessary to read it in the context of the subsections preceeding it (section 206(1)(1)-(9) in S. 2917 as reported, and section 305(a)(1)-(12) as passed), and the relevant legislative history behind these sections. As will be explained below, although most of the discussion in the legislative history concerning sections 305(a) and 318(i) is directed to the former, the discussion also sheds considerable light on the proper interpretation to be given section 318(i) in this case.

Section 305(a)(1)-(12) and section 318(i) were derived from section 206(1)(1)-10) in S. 2917, as reported. The Senate Committee Report accompanying S. 2917 devoted considerable attention to the need for the provisions of section 206(1)(1)-(10) as a means for controlling ignitions and explosions. Legis. Hist. at 151-161. More specifically, much debate was generated over whether to eliminate the distinction between gassy and non-gassy mines, the appropriate time periods for requiring electric face equipment in all mines to be permissible, and the attendant costs and benefits. Id. The Senate Committee resolved these questions by deciding to eliminate the gassy/non-gassy distinction, require the use of permissible equipment but provide for non-compliance permits, and establish field testing procedures and economic assistance. Id.

4/ We note that mandatory standards promulgated under the 1969 Coal Act remain in effect under the 1977 Mine Act until the Secretary of Labor issues a new or revised standard. 30 U.S.C. 961(b).

5/ Thus, the application and effect of section 101(d) of the 1977 Mine Act is left to be determined in an appropriate future case.

6/ References to "Legis. Hist." are drawn from the Senate Subcommittee on Labor, Committee on Labor and Public Welfare, 94th Cong., 1st Sess., Legislative History of the Federal Coal Mine Health and Safety Act of 1969 (Aug. 1975).

The section-by-section analysis accompanying the Committee Report further discusses the requirements of section 206(1) and, in relevant part, states:

> This section would also define the term "permissible electric face equipment" to mean electric equipment taken into or used inby the last open crosscut of the mine--that is, the working place--or parts thereof which meets the Secretary's specifications relative to preventing the emission of a spark or arc which could cause a mine fire or explosion and which includes other features to prevent, where possible, accidents in the use of equipment.
>
> The present regulations of the Bureau of Mines (Schedule 2G) would continue until changed, but the Secretary must immediately develop practical methods, such as field testing, to facilitate approval, for permissibility both under the present regulations and under revised regulations--to account for the mines required to use permissible equipment by this bill. Such methods would recognize that the primary objective is to prevent mine fires and mine explosions from this equipment. Without sacrificing safety, some types of equipment, such as "home-made" equipment in some small mines, might be made permissible for this purpose. Efforts in this direction would facilitate approvals of such equipment without the necessity for three year examinations of prototypes in the Bureau of Mines laboratory. (Emphasis added.)

Legis. Hist. at 194-195. See also Legis. Hist. at 159-160.

In a statement of the individual views of two members of the Senate Committee, two members noted their opposition to the elimination of the gassy/non-gassy distinction and the required use of permissible electric face equipment in all mines. Legis. Hist. at 227-233. On the floor of the Senate, considerable debate was focused on this aspect of the bill. The issue was addressed at length. Legis. Hist. at 224-245, 353-355, 360-390, 397-398, 603-664, 668-673, 681-703. The Senate debate was resolved in favor of eliminating the distinction between gassy/non-gassy mines concerning the use of permissible electric face equipment, but extending the effective dates for non-gassy mines and establishing a procedure for granting permits for noncomplying equipment. See Legis. Hist. at 832-839 for text of section 206(1) as passed by Senate.

Section 305 of House Bill 13950 dealt with permissible electric equipment. Legis. Hist. at 985-991. This section was similar to section 206(1) of the Senate Bill in that it eliminated the distinction between gassy/non-gassy mines and provided for noncompliance permits in non-gassy mines. See House Committee Report on section 305(a), Legis. Hist. at 1054, and section-by-section analysis at 1077-1079. See also House Floor Debate at 1171, 1203, 1307, 1340-1242, 1350-1365 and 1379. As is clear from a review of these latter cited portions of the legislative history, the focus of the debate over permissibility requirements was different in the House than in the Senate. Whereas in the Senate most of the debate focused on whether to eliminate the gassy/non-gassy distinction, in the House the debate focused on whether in mines formerly classified as non-gassy, the period provided for achieving permissibility was too long a period.

In conference, the language of the Senate bill was adopted with technical changes and with changes in the time requirements for compliance. Legis. Hist. at 1527, 1564. The language agreed to in conference was enacted as sections 305(a) and 318(i) of the 1969 Act.

With this background, we can now return to consideration of the judge's interpretation of section 318(i). As enacted section 318(i) provides:

> "permissible" as applied to electric face equipment means all electrically operated equipment taken into or used inby the last open crosscut of an entry or a room of any coal mine the electrical parts of which, including, but not limited to, associated electrical equipment, components, and accessories, are designed, constructed, and installed, in accordance with the specifications of the Secretary, to assure that such equipment will not cause a mine explosion or mine fire, and the other features of which are designed and constructed, in accordance with the specifications of the Secretary, to prevent, to the greatest extent possible, other accidents in the use of such equipment; and the regulations of the Secretary or the Director of the Bureau of Mines in effect on the operative date of this title relating to the requirements for investigation, testing, approval, certification, and acceptance of such equipment as permissible shall continue in effect until modified or superseded by the Secretary, except that the Secretary shall provide procedures, including, where feasible, testing, approval, certification, and acceptance in the field by an authorized representative of the Secretary, to facilitate compliance by an operator with the requirements of section 305(a) of this title within the periods prescribed therein; (Emphasis added).

As previously discussed, the judge apparently invalidated the standard based on his conclusion that in promulgating the cabs and canopies standard the Secretary failed to adopt specifications pertaining to the design, construction and installation of canopies and, therefore, failed to comply with the underscored provisions of this section. In doing so, we believe the judge erred.

Although section 318(i)'s definition of permissible electric face equipment includes equipment whose non-electric features "are designed and constructed, in accordance with the specifications of the Secretary, to prevent, to the greatest extent possible, other accidents in the use of such equipment", our examination of the legislative history has turned up no explanation as to the meaning or impact of that clause. Instead, as is clear from the summary set forth above, all of the discussion in the legislative history is directed at the electrical features of permissible equipment and the concern for preventing ignitions and explosions. Since nowhere in the legislative history is the meaning or purpose of the "other accidents" phrase specifically or impliedly discussed, we believe it is appropriate to view it simply as a provision that provides the Secretary with the authority to also develop permissible design and construction specifications for the non-electric features of electrical equipment. Thus, if particular specifications for cabs or canopies for electric face equipment were developed by the Secretary, he could make such specifications mandatory components of permissible equipment.

Furthermore, the legislative history makes clear that the provision in section 318(i) regarding the continuance of the Bureau of Mine regulations and the need for development of further procedures by the Secretary was directed at maintaining the permissibility requirements for electrical equipment then in effect (Bureau of Mines Schedule 2G, 30 CFR Part 18, subpart A through D), and effectuating the expressed congressional desire that further procedures be established for facilitating compliance with the permissibility requirements by small operators. The Secretary accomplished the latter by adding a new subpart E to Part 18, "Field Approval of Electrically Operated Mining Equipment". See Legis. Hist. at 195; 35 Fed. Reg. 19790; and 36 Fed. Reg. 7007.

Thus, we believe that the judge read section 318(i) too broadly in concluding that the Secretary was required to proceed under that section in promulgating a cabs and canopies standard. Section 318(i) should not be read to preclude the Secretary's use of other available statutory options for the promulgation of safety standards. In our view, the Secretary acted properly procedurally in availing himself of the option to improve the statutory cabs and canopies standard (section 317(j)) under the authority of section 101(a) of the Act. (Secretary may develop, promulgate and revise improved mandatory safety standards).

The judge's decision further suggests, however, that in promulgating the standard the Secretary violated one of the substantive mandates of the statute, i.e., section 101(b)'s mandate that no improved mandatory standard shall reduce the protection afforded miners below that provided by any mandatory health and safety standard. This conclusion of the judge appears to be premised on two interrelated bases. First, because the judge believed the Secretary was required to proceed under section 318(i) in promulgating the improved standard, in his view the Secretary's failure to set forth specifications and certification procedures for cabs and canopies necessarily diminishes the level of safety provided for in the statute. In view of our conclusion that the Secretary was not required to proceed under 318(i) in adopting an improved cabs and canopies standard, this ground for invalidating the standard must be rejected.

Second, it also appears that the judge based his finding of a reduced level of protection, at least in part, upon more specific grounds for finding that compliance with the improved standard causes a diminution of safety. In various parts of his memorandum opinion, the judge refers to cases involving petitions for modification of the application of the cabs and canopies standard, and statements by the Secretary and his agents made in extending and suspending the application of the standard in various mining heights. As discussed below, we believe each of these grounds is an inadequate basis for invalidating the standard.

The judge cites several petition for modification decisions and notes that the "[t]estimony in modification cases as to the burdens placed upon the operators and the hazards to which miners are exposed is voluminous." We conclude that there is no basis in the record for concluding that 30 CFR §75.1710-1 has reduced the protection afforded

miners. Each of the modification cases cited in the judge's decision contains findings, based upon testimony of record, that enforcement of 30 CFR 75.1710-1(a) as to certain pieces of equipment will, at various specified heights, diminish the safety of the miners to some degree. The issue in such petition for modification cases is whether the standards as applied at the mines involved would result in a diminution of safety to the miners. Section 301(c) of the 1969 Coal Act; section 101(c) of the 1977 Mine Act. This issue is far different from one requiring resolution of the broader question of whether an improved mandatory standard reduces the level of protection afforded miners generally, and in all applications, below that provided by a mandatory statutory standard. It is this more general issue that would have to be resolved before a standard could be declared invalid because it reduces protection below that provided by a mandatory standard. Because the cited modification cases do not involve or resolve the issue of the standard's general effect on existing levels of safety, they provide no support for the judge's action in striking down the standard in the present case.

Nor do we believe the judge properly relied on statements made by the Secretary and his agents in extending and suspending the standard's requirements in certain mining heights. In first extending the effective date for compliance in mining heights of less than 30 inches, the Secretary stated:

> [I]n lower mining heights, particularly those below 30 inches, certain human engineering problems have not been fully solved. While these problems vary depending upon the particular mining equipment, they include impaired operator vision, and operator cramping and fatigue. Because of these unsolved engineering problems the Secretary has determined that certain dates should be extended on and after which coal mines having specific mining heights must install canopies or cabs. This action is considered necessary in order to permit development of additional technology on canopy or cab design, in conjunction with accomplishing equipment design changes to adapt canopies or cabs.

41 Fed. Reg. 23200 (June 9, 1976).

Later, in a notice published on July 7, 1977, the Secretary reviewed the status of compliance with the standard, and concluded that

> "even though existing technology might be applicable to some equipment used in mining heights below 30 inches ..., substantial amounts of existing equipment could not be retrofitted and brought into compliance at this time.... To meet and correct this situation MESA is developing specifications for cab and canopy compartment configuration for new mining equipment pursuant to section 318(i) [of the 1969 Act]. These regulations and specifications, when completed, will be processed and promulgated in accordance with section 101 of the Act."

42 Fed. Reg. 34877. Accordingly, compliance with the cabs and canopies standard was suspended in mining heights less than 30 inches.

We believe the judge read these statements too broadly. They do not show, contrary to the judge's suggestion, that the standard has generally reduced the level of protection afforded miners. Rather, the statements made in extending and suspending the dates for compliance in certain mining heights--heights lower than those involved in the present case--evidence a recognition of certain problems in lower mining heights as well as a recognition of the documented benefits attained by the standard in mining heights above 30 inches. See 42 Fed. Reg. 34876-77. Therefore, it is our conclusion that, on the basis of the record in this case, the judge did not properly find that 30 CFR §75.1710-1(a) reduced the level of protection afforded by the statutory mandatory standard and thus was void because it contravened section 101(b).

In his decision the judge also appears to have found that the standard is invalid because of its "technology forcing" nature. The judge stated:

> ... the Federal Coal Mine Health and Safety Act of 1969 and its successor place an affirmative obligation upon the Secretary to conduct the research necessary to ensure that the standards he promulgates enhance, rather than decrease, the level of protection afforded the miners. Like the Occupational Safety and Health Act, the 1969 and 1977 Mine Safety Acts do not permit the Secretary to place an affirmative duty on each operator to research and develop new technology.... Thus, the regulation at issue which requires each operator to conduct such research and development--and thereby places miners at risk--is beyond the authority of the Secretary to promulgate and must be deemed invalid and unenforceable.

This rationale appears to be interwoven with his conclusion, rejected above, that the Secretary was required to develop specifications under section 318(i).

The record in the present case does not support the judge's suggestion that the Secretary did not properly follow the directive of section 101(c) in promulgating the cab and canopy standard. 7/ The preamble to the adoption of the standard at 37 Fed. Reg. 20689 (October 3, 1972), reflects that the statute's notice and comment rulemaking procedures were followed in promulgating the standard. A proposed rule was published (36 Fed. Reg. 5244 (March 18, 1971)), objections were filed, and an evidentiary hearing was held. On the basis of the rule-making record the Secretary concluded:

7/ Section 101(c) of the 1969 Coal Act in relevant part provided:
> [D]evelopment and revision of mandatory safety standards shall be based upon research, demonstrations, experiments, and such other information as may be appropriate. In addition to the attainment of the highest degree of safety protection for miners, other considerations shall be the latest scientific data in the field, the technical feasibility of the standards, and experience gained under this and other safety statutes.

(5) Practical technology is available to design and construct a substantial canopy or cab for installation on self-propelled electric face equipment of sufficient strength to protect the equipment operator from a non-massive roof fall.

(6) Although practical technology is available to design and construct a substantial canopy or cab for installation on self-propelled electric-face equipment of sufficient strength to protect the equipment operator from a nonmassive roof fall, it has been shown that in mining heights less than 72 inches, additional research and study is necessary to solve human engineering problems such as reduction of visibility and cramping of the equipment operator. Such research and study is currently being undertaken on behalf of the Bureau of Mines and results will be available in calendar year 1973. Depending upon the results of such research and study, as well as experience gained in the course of enforcement of the Federal Coal Mine Health and Safety Act of 1969 and other pertinent statutes, the timetables, based on mining heights, for the installation of canopies or cabs on self-propelled electric-face equipment, contained in §75.1710-1(a), (2), (3), (4), (5), and (6), may be shortened or lengthened.

(7) Observation of self-propelled electric-face equipment presently in use (including machinery presently equipped with canopies or cabs) shows that practical technology is available to retrofit existing self-propelled electric-face equipment with substantially constructed canopies or cabs.

(8) Manufacturers of new self-propelled electric-face equipment need the same amount of time to design and install substantially constructed canopies or cabs on such equipment as do coal mine operators to design and install canopies or cabs on equipment presently in use.

37 Fed. Reg. 20689

On the basis of these findings, the Secretary adopted 30 CFR §75.1710-1 requiring cabs and canopies, establishing a staggered schedule for compliance in descending mining heights, and specifying certain criteria for the construction of such cabs and canopies. In regard to the latter, the standard provides in part:

For the purposes of this section, a canopy or cab will be considered to be substantially constructed if a registered engineer certifies that such canopy or cab has the minimum structural capacity to support elastically: (1) a dead weight load of 18,000 pounds, or (2) 15 p.s.i. distributed uniformly over the plan view area of the structure, whichever is lesser.

30 CFR §75.1710-1(d).

Thus, as adopted the standard combines specification and performance criteria, i.e., it specifies the type of protection required (cabs or canopies) and specifies minimum support specifications, but it leaves to the operator or manufacturers the duty to determine precisely how such performance can be achieved on each particular type of equipment used.

Certainly, if the judge suggests that the Secretary is without authority to adopt performance standards under the Act, this suggestion must be rejected. We find no provision in the Act prohibiting the use of performance standards. Indeed, performance standards are recognized as being a valuable and legitimate means of regulation. As has been stated:

> Performance standards are generally to be preferred over those which contain specific requirements, as they give employers latitude in selecting a means of compliance which is best suited to their operation.

Diebold, Inc., 3 BNA OSHC 1897, 1900 (1976)(OSHRC), rev'd on other grounds, 585 F.2d 1327 (6th Cir. 1978). Thus, simply because the standard may leave the specific means for achieving compliance up to an operator, does not mean that the Secretary has impermissibly shifted the burden of research to an operator. To the contrary, the findings accompanying the adoption of the standard shows that sufficient practical technology existed warranting adoption of the standard.

The judge relied heavily upon American Iron and Steel Institute v. OSHA, 577 F.2d 825 (3d Cir. 1978), to support his conclusion that "the 1969 and 1977 Mine Safety Acts do not permit the Secretary to place an affirmative duty on each operator to research and develop new technology." The judge again appears to have painted with too broad a brush. The Court in American Iron and Steel was interpreting an OSHA standard that combined specification and performance elements in requiring compliance with a specified coke oven emissions exposure limit, and, if after implementation of all engineering and work practice controls compliance was not achieved, mandated that "the employer ... research, develop and implement engineering and work practice controls necessary to reduce exposure." 29 CFR §1910.1024(f)(1)(ii)(b). The Court found the statute did not allow the Secretary to place an affirmative duty upon an employer to research and develop new technology. 577 F.2d at 838. There is, however, no affirmative duty for research and development placed upon an operator in the cabs and canopies standard.

Moreover, the Court found the performance requirements of the standard there challenged to be properly promulgated, stating:

> As we have construed the statute, the Secretary can impose a standard which requires an operator to implement technology "looming on today's horizon," and is not limited to issuing a standard solely based upon technology that is fully developed today.

In the present case, the judge found that "canopy technology looms on some future horizon, not today's." This finding, however, is supported by a reference to the suspension of the canopy requirements in heights 30 inches or under, 42 Fed. Reg. 34876, and to decisions granting petitions for modification. The judge ignored the parts of the canopy suspension notice relevant to this case, i.e., the finding of existing practical technology in mining heights above 30 inches. In the notice suspending the standard under 30 inches the Secretary stated:

> The results of the compliance study indicate that considerable progress has been made in meeting the requirements of the standards, except in mining heights less than 30 inches. Of 12,910 pieces of equipment reported to be affected by the requirements in mining heights of 36 inches and above (actual height from bottom to top of 48 inches or more), 9,631 pieces of equipment (approximately 75 percent) were in compliance with the standards. In mining heights of 30 inches or more, but less than 36 inches (actual height from bottom to top of 42 inches, but less than 48 inches) 581 of 2,137 pieces of equipment required to meet the standards were reported to be in compliance (approximately 27 percent). Compliance in mines with mining heights below 30 inches (actual height from bottom to top of less than 42 inches) was negligible.
>
> This study also revealed that cabs or canopies continue to have a tremendous impact on the reduction of injuries or fatalities involving operators of self-propelled electric face equipment, including shuttle cars. Reports indicate that from 1974 through 1976 at least 111 equipment operators have been saved from certain death or serious injury because a cab or canopy protected the operator from falls of roof, face, or rib. Sixty of these "saves" occurred during 1976. Moreover, an analysis of haulage fatalities indicates that the number of equipment operators killed due to being pinned, squeezed, or crushed against the roof, rib, or other equipment, and dislodged posts have also been significantly reduced.

42 Fed. Reg. 34877. We believe this finding shows that an appropriate level of practical cab and canopy technology in fact existed. Therefore, we conclude that the record does not support the judge's finding that the general performance standard adopted by the Secretary places an illegal burden on mine operators.

Each of the grounds relied upon by the judge have failed; his conclusion that 30 CFR §75.1710-1(a) is null, void and unenforceable is reversed.

III.

Apart from his finding that the standard was invalid, the judge's dismissal of the penalty petition was also based on a finding that "on the dates the aforesaid notice and citation issued compliance with ... 30 CFR §75.1710-1(a) was impossible without diminishing the safety of miners...." The judge made this finding prior to hearing or stipulation of facts. The only relevant materials in the record when this finding was made were the notice and citation, Sewell's response denying the violations, and the Secretary's motion to approve settlement.

Regarding the notice of violation pertaining to the roof drill, the motion stated:

> At the time the Notice was issued, the technology to abate the citation was in an experimental stage. Further, in some instances the use of canopies on Galis drills had caused injuries to employees performing tramming operations. Petitioner recognized the difficulties Respondent was experiencing in attempting to abate the violation and extended the abatement period on three occasions subsequent to the Notice. Abatement finally was achieved by abandonment of the cited ... Section....
>
> Accordingly, although a violation of the cited standard existed, only a nominal penalty for the violation would be appropriate.

As to the citation concerning the shuttle car, the motion stated:

> At the time of the inspection, no cab or canopy was commercially available for Respondent's use on a shuttle car working in 43-inch high coal. Nevertheless, Respondent was able to provide a shuttle car to work in the cited area which had been specially equipped with a canopy. Respondent has a program to equip all of its underground equipment with cabs or canopies wherever it is possible to do so. In light of Respondent's good faith in attempting to comply with the cited technology forcing standard, Petitioner moves for approval of the $25.00 penalty ..., to which the parties have agreed. (Emphasis added.)

Thus, although the settlement agreement reflects that difficulties were encountered by Sewell in attempting to generally comply with 30 CFR 75.1710-1(a), the agreement falls short of stating that compliance in the specific instances at issue here was not possible without diminishing the safety of miners. In fact, with regard to the second citation the settlement agreement states that Sewell "was able to provide a shuttle car to work in the cited area which had been specially equipped with a canopy." The judge's finding that safe compliance was not possible appears to be directly contrary to this statement.

The judge's finding was based in part on a decision of the Administrator for Coal Mine Safety and Health in a petition for modification case filed by Sewell under section 301(c) of the 1969 Coal Act. Sewell Coal Co., No. M 76-131, April 27, 1979. In that proceeding, the Administrator granted in part and denied in part a petition for modification of the application of 30 CFR §75.1710-1(a) to numerous pieces of electric face equipment in several of Sewell's mines, including the mine in which the violations at issue here arose. The judge's decision provides no clear discussion of the interrelationship between the factual

matters at issue in this enforcement proceeding and those at issue in the modification case, nor is the legal effect that the grant of a modification petition has on a pending enforcement proceeding discussed. See our decision in Penn Allegh Coal Co., PITT 78-97-P, issued this date. We note that in the present case, unlike the situation before us in Penn Allegh, a petition for modification was filed prior to the issuance of the notice and citation. Id. at n.10.

In view of the fact that our decision in Penn Allegh discusses for the first time the relationship between enforcement proceedings and modification proceedings, and because the parties had no opportunity prior to the judge's order of dismissal to present arguments addressing this issue in the context of the facts of this case, a remand for further proceedings is necessary.

Accordingly, the judge's decision is reversed and the case remanded for further proceedings consistent with this opinion.

Richard V. Backley, Chairman

Frank F. Jestrab, Commissioner

A. E. Lawson, Commissioner

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June 29, 1981

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. WEVA 79-360
KING KNOB COAL COMPANY, INC.	:	

DECISION

This civil penalty case under the 1977 Mine Act, 30 U.S.C. §801 et seq. (Supp. III 1979), involves a conflict between a mandatory safety and health standard and MSHA's purported interpretation of that standard in its interim inspector's manual. For the reasons set forth below, we hold that the standard controls over the manual and affirm the administrative law judge's decision.

The essential facts are undisputed. In January 1979, a fatal accident occurred on the haulage road of a King Knob Coal Company strip mine when an employee was struck by one of King Knob's three-quarter ton pickup trucks being driven in reverse. The pickup was used in King Knob's mining operations for transportation purposes. The pickup was not equipped with a backup alarm and as a result King Knob was cited for violating 30 CFR §77.410, which provides:

> Mobile equipment; automatic warning devices.
> Mobile equipment, such as trucks, forklifts, front-end loaders, tractors and graders, shall be equipped with an adequate automatic warning device which shall give an audible alarm when such equipment is put in reverse.

The judge held that the plain language of §77.410 includes pick-ups within the class of regulated vehicles and concluded that "[s]ince King Knob concedes that the subject pickup truck did not have the specified warning device it is apparent that the violation is proven as charged." 2 FMSHRC 1679, 1680 (1980).

The judge rejected King Knob's liability defense that it was entitled to rely on an explanation of §77.410 contained in the 1978 MSHA Interim Mine Inspection Manual. The Manual is an informally promulgated handbook containing "guidelines" to aid inspectors in enforcement of the Mine Act. The guideline explaining §77.410

excepts pickups from the warning device requirement provided that their rear views are "not obstructed." 1/ The judge classified this reliance argument as "essentially one of equitable estoppel" and held that estoppel was inapplicable to the federal government in the discharge of "sovereign," as opposed to "proprietary," functions. 2 FMSHRC at 1680. He found the enforcement of mine safety standards "a unique governmental function for the benefit of the public" and concluded that equitable estoppel could not "be successfully invoked as a defense to violations of the Act and its implementing regulations." Id. However, in determining the appropriate penalty the judge considered the reliance effect of the Manual's exception. Based on his conclusion that the pickup's rear view was unobstructed, he found that "King Knob could have reasonably believed that it was in compliance with MSHA's policy excepting pickup trucks from the backup alarm standard where the operator's view to the rear is not obstructed." Id. at 1682. Therefore, he held that King Knob was not negligent in failing to have a backup alarm on the truck and assessed a nominal penalty of $10. Id.

We first consider the liability issues without reference to the Manual. King Knob contends that §77.410 refers only to heavy off-road vehicles and not to light-weight highway vehicles. King Knob argues that because "loaders," "tractors," and "graders"--other enumerated kinds of "mobile equipment"--are large vehicles, "trucks" must similarly refer to large off-road trucks commonly used for hauling heavy loads at surface mines. King Knob bolsters this argument by noting that where the term "mobile equipment" appears in other sections in the subpart containing §77.410 (Subpart E, "Safeguards for mechanical equipment"), large vehicles are contemplated.

We do not agree. "Trucks" are expressly mentioned as one kind of regulated "mobile equipment." "Truck" is a generic term and, of course, pickups are a familiar type of light truck. Since §77.410 does not

---

1/ The Manual provides:

POLICY

> Any vehicle being operated on the mine property that is capable of going in reverse shall be equipped with an automatic warning device which shall give an audible alarm when such equipment starts moving in a reverse direction, and remain in operation during the entire reverse movement.
>
> The warning device required by this section need not be provided for automobiles, jeeps, pickup trucks, and similar vehicles, where the operator's view directly behind the vehicle is not obstructed. Service vehicles making visits to surface mines or surface work areas of underground mines are not required to be equipped with such warning device. (Emphasis added).

[Interim Mine Inspection and Investigation Manual, Ch. III, p. 205 (March 1978)].

A virtually identical provision was included in a predecessor manual, MESA's 1974 Surface Coal Mine Inspection Manual.

expressly differentiate among various types of trucks subject to coverage, its plain language extends to pickups. This conclusion is reinforced by the breadth of §77.410's central term, "mobile equipment." In Lucas Coal Company v. IBMOA, 522 F.2d 581, 584-585 (3rd Cir. 1975), the court treated "mobile equipment" as an extensive term encompassing several different vehicles used in a mining operation, specifically bulldozers. We concur in the court's view that "[t]he five examples set forth in §77.410 ... preceded by the words 'such as,' are plainly not all-inclusive as to the section's coverage." 522 F.2d at 585.

Further, the obvious purpose of §77.410 is to protect miners from vehicles of various size moving in reverse. 2/ The standard is premised on the general recognition that a driver's rear view is ordinarily not as good, and hence as safe, as the forward view. Even if their role at a mine is primarily auxiliary, three-quarter ton pickups are nevertheless medium-sized vehicles whose relative speed compared with heavier vehicles constitutes a hazard in the busy mine setting. This clear danger as well as the facially broad reach of both "trucks" and "mobile equipment," lead us to conclude that recognizing the exception for which King Knob contends would constitute amendment rather than interpretation of the standard. Certainly, if the standard's drafters had intended to except light trucks from the overall class of "trucks," they could easily have written the standard to reflect the exception. The answer to King Knob's reliance on other references to mobile equipment in subpart E is that subpart E addresses diverse safety concerns. The various sections within subpart E deal with different problem areas, with each of these areas requiring varying degrees of coverage. Apart from the Manual, therefore, King Knob's three-quarter ton pickup truck used in mining operations was "mobile equipment" within the meaning of §77.410; since King Knob conceded that the pickup lacked a backup alarm, a finding of violation is dictated unless the effect of the Manual provisions compels a different result.

The MSHA Manual's pickup exception injects two issues into what would otherwise be a straightforward analysis of §77.410's coverage: whether we are required to read §77.410 as if the pickup exception were written into it and, even if we are not, whether the existence of the Manual exception estops the government from prosecuting this case.

2/ We note that the standard's mention of "forklifts," which are normally small or medium-sized, indicates that the class of covered vehicles is not exclusively limited to the very large or very heavy.

Regarding the Manual's general legal status, we have previously indicated that the Manual's "instructions are not officially promulgated and do not prescribe rules of law binding upon [this Commission]." Old Ben Coal Company, 2 FMSHRC 2806, 2809 (1980). In general, the express language of a statute or regulation "unquestionably controls" over material like a field manual. See H.B. Zachry v. OSHRC, 638 F.2d 812, 817 (5th Cir. 1981). We find the OSHRC's analogous treatment of a similar OSHA manual generally applicable: "the guidelines provided by the manual are plainly for internal application to promote efficiency and not to create an administrative straightjacket [;they] do not have the force and effect of law, nor do they accord important procedural or substantive rights to individuals." FMC Corporation, 5 OSHC 1707, 1710 (1977). This does not mean that the Manual's specific contents can never be accorded significance in appropriate situations. Cases may arise where the Manual or a similar MSHA document reflects a genuine interpretation or general statement of policy whose soundness commends deference and therefore results in our according it legal effect. 3/ This case, however, does not present that situation.

We cannot view the Manual commentary on §77.410 as a genuine interpretation or general policy statement; rather, it is clearly an attempted modification of the standard's requirements. The commentary contains an "obstructed view" and pickup exception not even remotely alluded to in the regulation's language. Indeed, as we concluded above, a pickup exception is inconsistent with the standard's broad language. Section 101(a) of the 1977 Mine Act (30 U.S.C. §811(a)) requires all rules concerning mandatory health or safety standards to be promulgated in accordance with §553 of the APA (5 U.S.C. §553). Further, §101(a)(2) requires the Secretary to publish in the Federal Register any "proposed rule promulgating, modifying, or revoking a mandatory health

3/ An agency interpretation is a statement of what the agency thinks a statute or regulation means. Chamber of Commerce of U.S. v. OSHA, 636 F.2d 464, 469 (D.C. Cir. 1980). General statements of policy are "'statements issued by an agency to advise the public of the manner in which the agency proposes to exercise a discretionary function.'" Amer. Bus Ass'n v. United States, 627 F.2d 525, 529 (D.C. Cir. 1980), quoting Attorney General's Manual on the Administrative Procedure Act, 30 n.3 (1947). Interpretations and general policy statements are distinct from ordinary "legislative" regulations, are excepted from the APA's notice and comment procedures (infra), and, in general, lack the force and effect of law. Chrysler Corp. v. Brown, 441 U.S. 281, 301-303 & n. 31 (1978). Although a reviewing body is not bound by an interpretation or general policy statement, it may choose to defer to and apply such pronouncements, thereby endowing them with a status that equals or approximates the force and effect of law. Agency expertise, the soundness of the pronouncement in question, and the formality with which the matter was promulgated are all factors which bear on deference. We note that the Manual is a relatively informal compilation not published in the Federal Register, and those factors weigh against deference.

or safety standard" and to permit public comment on the proposed regulation (emphasis added). Section 553 of the APA requires that to the extent a rule is more than an interpretation or general statement of policy, it is subject to that Act's notice and comment requirements. The Manual's attempted modification of §77.410 was not promulgated in accordance with these requirements. Therefore, the Manual's provisions on §77.410 lack the force and effect of law and §77.410 stands as written. See Chamber of Commerce of U.S. v. OSHA, 636 F.2d at 468-471; Brown Express, Inc. v. United States, 607 F.2d 695, 700-701 (5th Cir. 1979); Firestone Synthetic Rubber & Latex Co. v. Marshall, 507 F. Supp. 1330, 1334-1339 (E.D. Tex. 1981).

This holding means that we will apply §77.410 as construed above without reference to the Manual. However, this disposition does not completely resolve the liability issue in this case. Even if the Manual's pickup and obstructed view language has no legal effect, King Knob argues that the Secretary is estopped from finding a violation because King Knob was equitably entitled to rely on the "pickup exception." 4/

King Knob's argument has some force. The Manual's Introduction invites trust by stating in part that:

> The Manual is also intended to acquaint the mining industry, State inspection agencies, Federal agencies and other interested persons and organizations with the administration of the Act and Regulations. [Id. at vii.]

There is no disclaimer in the Introduction warning an operator that the Manual is not a source of law binding on the Secretary, the Commission, or courts. Nevertheless, we cannot accept King Knob's position.

The Supreme Court has held that equitable estoppel generally does not apply against the federal government. Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380, 383-386 (1947); Utah Power & Light Co. v. United States, 243 U.S. 389, 408-411 (1917). The Court has not expressly overruled these opinions, although in recent years lower federal courts have undermined the Merrill/Utah Power doctrine by permitting estoppel against the government in some circumstances. See, for example, United States v. Lazy F.C. Ranch, 481 F.2d 985, 987-990 (9th Cir. 1973); United States v. Georgia-Pacific Co., 421 F.2d 92, 95-103 (9th Cir. 1970). Absent the Supreme Court's expressed approval of that decisional trend, we think that fidelity to precedent requires us to deal conservatively with this area of the law. This restrained approach is buttressed by the consideration that approving an estoppel defense would be inconsistent

4/ In connection with the estoppel issue, we find that substantial evidence supports the judge's finding that the pickup's rear view was unobstructed. Thus, King Knob fits squarely within the Manual's purported exception. We reject the Secretary's argument on review that the pickup's tailgate constituted an obstruction. Since all pickups have tailgates, recognizing tailgates as "obstructions" would make the Manual's commentary virtually meaningless.

with the liability without fault structure of the 1977 Mine Act. See El Paso Rock Quarries, Inc., 3 FMSHRC 35, 38-39 (1981). Such a defense is really a claim that although a violation occurred, the operator was not to blame for it. Furthermore, under the 1977 Mine Act, an equitable consideration, such as the confusion engendered by conflicting MSHA pronouncements, can be appropriately weighed in determining the appropriate penalty (as the judge did here).

Even the decisional trend which recognizes an estoppel defense refuses to apply the defense "if the government's misconduct [does not] threaten to work a serious injustice and if the public's interest would ... be unduly damaged by the imposition of estoppel" (emphasis added). United States v. Lazy F.C. Ranch, 481 F.2d at 989. In view of the availability of penalty mitigation as an avenue of equitable relief, we would not be persuaded that finding King Knob liable--the Manual notwithstanding--would work such a "profound and unconscionable injury" (Lazy F.C. Ranch, 481 F.2d at 989) that estoppel should be invoked. Finally, the record is devoid of any showing that King Knob actually relied on the Manual's exception, rather then merely being "entitled" to rely on it. Courts have required that actual reliance be shown. See, for example, United States v. Georgia-Pacific Co., 421 F.2d at 96-97 n. 4.

In sum, we find the Manual commentary to be without legal effect, reject King Knob's estoppel arguments, and therefore affirm the judge's liability findings on the basis of our construction of §77.410 above. In reaching this result, we do not adopt the judge's "sovereign/proprietary" governmental function distinction, which we deem unnecessary to resolution of liability.

We agree with the judge's handling of the penalty issue. MSHA's equivocal enforcement policy made it difficult and confusing for a reasonable operator to know the true standard of care imposed by §77.410, and, hence, whether it was in a state of violation or compliance. Even though King Knob did not show actual reliance on the Manual, the proper negligence question is either what it actually knew, or what it should (or could) have known, concerning the appropriate standard of care. We think that the confusion caused by the Manual interfered with King Knob's ability to ascertain the true standard of care and therefore placed it in a position where it could have believed it was in compliance. Penalizing King Knob for confusion caused by MSHA strikes us as unfair and harsh. Under these circumstances, we agree with the judge that King Knob was not negligent. We also find support in United States v. American Greetings Corp., 168 F.2d 45, 50 (N.D. Ohio 1958), aff'd per curiam, 272 F.2d 945 (6th Cir. 1959). There, the Court imposed liability despite estoppel claims, but reduced the penalty under analogous circumstances of an agency's "misleading" a respondent.

We emphasize that our decision prospectively obviates future confusion surrounding the meaning and scope of §77.410. The decision will also alert the public to the need for using the Manual, and similar

materials, with caution. We also express the hope that this opinion will encourage MSHA to use its Manual in a responsible manner. In our view, such materials should contain, at the least, a precautionary statement warning users of their informality and non-binding nature. As this case unfortunately demonstrates, less than careful dissemination of such materials can cause enforcement and compliance confusion and, at worst, can diminish the protection of the Act and implementing regulations.

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

Richard V. Backley, Chairman

Frank F. Jestrab, Commissioner

A. E. Lawson, Commissioner

Marian Pearlman Nease, Commissioner

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JUN 1 1981

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding
	:	Docket No. WEVA 81-270
	:	A.O. No. 46-01454-03076V
v.	:	Pursglove No. 15
CONSOLIDATION COAL CO., Respondent	:	

DECISION AND ORDER

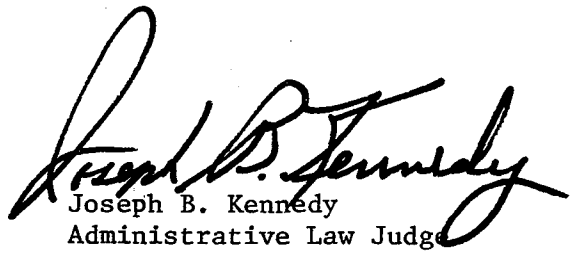
The parties move for approval of a settlement (at 90% of the amount initially assessed) of a charge that on August 14, 1980, a federal mine inspector observed an accumulation of approximately 24 tons of loose coal in the number 2 and 4 entries of the 1 Right Section of the Pursglove No. 15 Mine. Sometime prior to this the condition had been noted by the section foreman, Michael Jackson, who took no corrective action. The record does not show what action or inaction by the section foreman or his superiors resulted in this excessive and dangerous accumulation of combustibles.

What is clear is that this was a violation that resulted from a culpable indifference on the part of management to a reasonably foreseeable and objectively ascertainable risk of serious bodily harm or death. Under existing law, this disregard for the safety of the mine is automatically imputable to the operator. As this case shows, enforcement would be seriously debilitated if this rule were changed so as to immunize operators from accountability for serious violations on a showing that the condition was attributable to an act of negligent indifference by an individual rank-and-file miner or his supervisor.

Based on an independent evaluation and de novo review of the circumstances, I find the proposed settlement is marginally acceptable. Once again I must voice my concern that no disciplinary action was taken against the individual or individuals responsible because management apparently feels such action is counterproductive to other objectives.

Accordingly, it is ORDERED that the motion to approve settlement be, and hereby is, GRANTED. It is FURTHER ORDERED that the operator pay the amount of the settlement agreed upon, $900, on or before

Friday, June 19, and that subject to payment the captioned matter be DISMISSED.



Joseph B. Kennedy
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

JUN 2 1981

UNITED MINE WORKERS OF AMERICA,	:	Complaint of Discharge, Discrimination, or Interference
On behalf of:	:	
	:	Docket No. LAKE 81-55-D
NORMAN BEAVER,	:	
Complainant	:	Powhatan No. 1 Mine
v.	:	
	:	
NORTH AMERICAN COAL CORPORATION,	:	
Respondent	:	

DECISION

Appearances: Joyce A. Hanula, Legal Assistant, United Mine Workers of America, Washington, D.C., for the Complainant; Todd D. Peterson, Esq., Crowell & Moring, Washington, D.C., for the Respondent.

Before: Judge Cook

I. Procedural Background

On December 3, 1980, the United Mine Workers of America (UMWA) filed a discrimination complaint on behalf of Norman Beaver (Complainant) in the above-captioned proceeding alleging that North American Coal Corporation (Respondent) committed an act of discrimination in violation of section 105(c)(1) 1/ of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (Supp. III 1979) (1977 Mine Act). The complaint was timely

1/ Section 105(c)(1) of the 1977 Mine 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

filed with the Federal Mine Safety and Health Review Commission (Commission) pursuant to section 105(c)(3) 2/ of the 1977 Mine Act following a determination by the Department of Labor's Mine Safety and Health Administration (MSHA) that no violation of section 105(c)(1) had occurred. 3/ The complaint alleged, inter alia, (1) that the Complainant was the walkaround representative of the miners on June 11, 13, 14, and 15, 1980; (2) that the Complainant, in his capacity as walkaround representative of the miners, accompanied a Federal mine inspector during the course of four regular inspections conducted on June 11, 13, 14, and 15, 1980; (3) that the Respondent failed to comply with the requirements of section 103(f) of the 1977 Mine Act by

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fn. 1 (continued)
of miners or applicant for employment has instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding, or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this Act."

2/ Section 105(c)(3) of the 1977 Mine Act provides as follows:

"Within 90 days of the receipt of a complaint filed under paragraph (2), the Secretary shall notify, in writing, the miner, applicant for employment, or representative of miners of his determination whether a violation has occurred. If the Secretary, upon investigation, determines that the provisions of this subsection have not been violated, the complainant shall have the right, within 30 days of notice of the Secretary's determination, to file an action in his own behalf before the Commission, charging discrimination or interference in violation of paragraph (1). The Commission shall afford an opportunity for a hearing (in accordance with section 554 of title 5, United States Code, but without regard to subsection (a)(3) of such section), and thereafter shall issue an order, based upon findings of fact, dismissing or sustaining the complainant's charges and, if the charges are sustained, granting such relief as it deems appropriate, including, but not limited to, an order requiring the rehiring or reinstatement of the miner to his former position with back pay and interest or such remedy as may be appropriate. Such order shall become final 30 days after its issuance. Whenever an order is issued sustaining the complainant's charges under this subsection, a sum equal to the aggregate amount of all costs and expenses (including attorney's fees) as determined by the Commission to have been reasonably incurred by the miner, applicant for employment or representative of miners for, or in connection with, the institution and prosecution of such proceedings shall be assessed against the person committing such violation. Proceedings under this section shall be expedited by the Secretary and the Commission. Any order issued by the Commission under this paragraph shall be subject to judicial review in accordance with section 106. Violations by any person of paragraph (1) shall be subject to the provisions of sections 108 and 110(a)."

3/ On its face, the discrimination complaint states that it was filed pursuant to section 105(c)(2) of the 1977 Mine Act. The parties' March 4, 1981, filing contains a stipulation which states that the complaint was filed pursuant to section 105(c)(2) of the 1977 Mine Act.

refusing to pay the Complainant for the time spent accompanying the Federal mine inspector during the course of such regular inspections; (4) that such failure to pay the Complainant was an act of discrimination in violation of section 105(c)(1) of the 1977 Mine Act; and (5) that the Complainant suffered damages in the amount of $306.08, representing 32 hours of lost wages. 4/ The prayer for relief requested (1) the issuance of an order requiring the Respondent to pay the Complainant the sum of $306.08, with interest, and (2) such other relief as the Commission deems appropriate. The Respondent filed an answer on January 5, 1981, alleging, amongst other things, that the complaint fails to state a claim for which relief can be granted.

On January 13, 1981, a notice of hearing was issued scheduling the case for hearing on the merits on March 3, 1981, in Washington, Pennsylvania. On March 2, 1981, an order was issued granting a joint motion for continuance filed by the parties. The continuance was based on the parties' decision to waive an evidentiary hearing and to file stipulations and to submit briefs on the issue of whether an operator is required to pay a walkaround representative who accompanied a Federal mine inspector on regular inspections on days he was not scheduled to work.

The parties filed a joint stipulation of facts on March 4, 1981. Both parties filed briefs on April 10, 1981. The UMWA and the Respondent filed reply briefs on April 24, 1981, and April 27, 1981, respectively.

II. Issue

The general question presented is whether the complaint states a claim for which relief can be granted. The specific question presented is whether a mine operator is required to pay an employee who is a walkaround representative of the miners for the time spent accompanying a Federal mine inspector on a regular inspection on days when such walkaround representative is not scheduled to work, when another miner-employee who was scheduled to work at such times could have accompanied the Federal mine inspector and would have suffered no loss of pay.

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fn. 3 (continued)

A comparison of sections 105(c)(2) and 105(c)(3) of the 1977 Mine Act reveals that the UMWA could properly file this action before the Commission only pursuant to section 105(c)(3). Section 105(c)(2) filings are made by the Secretary of Labor.

The Respondent has not challenged this filing defect, and the tenor of the stipulations indicates agreement between the parties that the case is properly before the Commission. Accordingly, the defect is viewed as technical, and the complaint is deemed one properly filed under section 105(c)(3).

4/ The complaint alleges that the walkaround activities occurred in June of 1980. Thereafter, the parties stipulated that such activities occurred in June of 1979. This discrepancy is considered immaterial, and is noted solely to point out that the discrepancy exists.

III. Opinion and Findings of Fact

A. Stipulation and Findings of Fact

The parties filed the following stipulation on March 4, 1981:

1. This proceeding is governed by the Federal Mine Safety and Health Act of 1977 ("the Act") and the standards and regulations promulgated for the implementation thereof.

2. The Administrative Law Judge has jurisdiction over this proceeding.

3. Respondent is an "operator" as defined in Section 3(d) of the Act.

4. Norman Beaver was an employee and authorized UMWA walkaround representative at North American's Powhatan No. 1 mine on June 13, 14 and 15, 1979.

5. On June 13, 14 and 15, 1979, the Powhatan No. 1 mine was working on an idle day basis.

6. On June 13, 14 and 15, 1979, Norman Beaver was not scheduled to work, but accompanied a MSHA inspector on a regular inspection.

7. Prior to accompanying the inspector, Mr. Beaver was informed by North American that he would not be compensated for accompanying the inspector because he was not scheduled to work on those days.

8. Other UMWA members did work at the mine on June 13, 14, 15, 1979. These employees could have accompanied the MSHA inspector on his inspection.

9. North American did not compensate Norman Beaver for the time spent accompanying a MSHA inspector on June 13, 14 and 15, 1979. The amount of compensation due Norman Beaver, if a violation of 103(f) and 105(c) is found, is $229.56.

10. Norman Beaver filed a complaint of discrimination under Section 105(c) of the Act on July 25, 1979.

11. On November 10, 1980, Mr. Beaver received a letter from Joseph A. Lamonica, Acting Administrator for Coal Mine Safety and Health. The letter informed Mr. Beaver that MSHA had conducted an investigation of his complaint and that the Secretary had determined that a violation of Section 105(c) had not occurred.

12. On December 3, 1980, the UMWA on behalf of Norman Beaver filed a Discrimination Complaint pursuant to Section 105(c)(2) of the Act. [5/]

13. On January 7, 1981, the UMWA received North American's Answer to the Discrimination Complaint on behalf of Norman Beaver.

B. Opinion

The Complainant was an employee and authorized UMWA walkaround representative at the Respondent's Powhatan No. 1 Mine on June 13, 14, and 15, 1979. The mine was working on an idle day basis on those days. The Complainant was not scheduled to work on those 3 days, but accompanied a Federal mine inspector on a regular inspection. Prior to accompanying the inspector, the Complainant was informed by the Respondent that he would not be compensated for accompanying the inspector because he was not scheduled to work on those days. Other UMWA members did work at the mine on those 3 days, and could have accompanied the Federal mine inspector on his inspection.

The Respondent did not compensate the Complainant for the time spent accompanying the Federal mine inspector on June 13, 14, and 15, 1979. The Complainant is due compensation in the amount of $229.56, if a violation of sections 103(f) and 105(c)(1) of the 1977 Mine Act is found to have occurred.

The question presented in this case is whether a mine operator is required to pay a walkaround representative of the miners, who is also his employee, for the time spent accompanying a Federal mine inspector on a regular inspection on days when such walkaround representative is not scheduled to work, when another miner-employee who was scheduled to work at such time could have accompanied the Federal mine inspector and would have suffered no loss of pay. The UMWA maintains that the failure to pay the miners' walkaround representative in such a case is a violation of section 105(c)(1) of the 1977 Mine Act because it constitutes an interference with the statutory right to participate in mine inspections accorded the miners' walkaround representative under section 103(f) of the 1977 Mine Act. In support of its position, the UMWA maintains that the Commission's decisions in Helen Mining Company, 1 FMSHRC 1796, 1 BNA MSHC 2193, 1979 CCH OSHD par. 24,045 (1979), and Kentland-Elkhorn Coal Corporation, 1 FMSHRC 1833, 1 BNA MSHC 2230, 1979 CCH OSHD par. 24,071 (1979), stand for the proposition "that miners are entitled to compensation when they accompany a Federal inspector on regular inspections" (UMWA's Brief, p. 4). The UMWA points out that in Magma Copper Company, 1 FMSHRC 1948, 1 BNA MSHC 2227, 1979 CCH OSHD par. 24,075 (1979), the Commission stated that:

> Walkaround pay was designed to improve the thoroughness of mine inspections and the level of miner safety consciousness. The first sentence of section 103(f) expressly states

5/ See n. 3, supra.

that the purpose of the right to accompany inspectors is to aid the inspection. The Senate committee report on S. 717, 95th Cong., 1st Sess. (1977), the bill from which section 103(f) is derived, explained that the purpose of the right to accompany an inspector is to assist him in performing a "full" inspection, and "enable miners to understand the safety and health requirements of the Act and [thereby] enhance miner safety and health awareness." S. Rep. No. 95-181, 95th Cong., 1st Sess., at 28-29 (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 616-617 (1978) ["1977 Legis. Hist."]. The purpose of the right to walkaround pay granted by section 103(f) is also clear: to encourage miners to exercise their right to accompany inspectors.

It was Congress' judgment that a failure to pay miners' representatives to accompany inspectors would discourage miners from exercising their walkaround rights, and that the resulting lessening of participation would detract from the thoroughness of the inspection and impair the safety and health consciousness of miners. [Footnote omitted.]

1 FMSHRC at 1951-1952. (UMWA's Brief, pp. 5-6.)

The UMWA fashions the following arguments from these dual propositions:

The representative of the miners plays an extremely important role in the statutory scheme of the Act. He or she is the conduit between the employees at the mine and the [Secretary of Labor's] authorized representative. Such person serves as the spearhead for the employees' concerns regarding their health and safety. In Leslie Coal Mining Co. v. MSHA & UMWA, 1 FMSHRC 2022 (1979), an operator denied an authorized representative of the miners, who was not scheduled to work, the right to accompany an inspector on a regular inspection. Judge Steffey found a violation of 103(f) and stated at page 6 ". . . I believe that the company cannot interfere with the person that the miners choose to accompany the inspectors. As long as he is still an employee . . . and still one of the people who is intended to accompany the inspectors, I believe the company must let him do so . . . ." Judge Steffey was convinced of the need to maintain the integrity of the selection process for the miners' walkaround representative. The Judge also remarked on the importance of having a specific person to accompany inspectors. At page 8 of his decision, he stated:

> But there does seem to be one aspect of having the inspectors -- or rather having a

> specific person or persons designated to accomp[a]ny the inspectors; because it appears to me that the inspectors feel that if they get the same person each time -- or a limited number of persons -- to accompany them, that a process of training can be instilled in these people who go around with the inspectors, and the result is there is gradu[a]lly built up a certain amount of expertise in these representatives who accompany them.
>
> The result is they can better field complaints from the miners in general and can coordinate the various inspections by adding knowledge to what has happened in the past. And this, I think, is helpful for both the company and the inspectors.

It is obviously advantageous to both [the Respondent] and the miners to have [the Complainant] accompany the inspector rather than pull an employee out of the mine who just happened to be scheduled to work that day. Such person may not possess the expertise or experience that [the Complainant] possesses. It would be unrealistic to expect that individual to perform an effective watchdog role to insure that MSHA conducts a thorough inspection. Since the person is not the one that has been selected in advance by the miners to walkaround on the particular inspection there is no assurance that the individual would have the confidence of his fellow employees. The lack of such confidence could seriously cut down on the complaints that are brought to the Secretary's attention.

[The Respondent] was in no way prejudiced by [the Complainant] accompanying the inspector. The alternative to not paying an off-duty miner representative is to pay an on-duty miner, withdrawing him from his scheduled work site. Since the idle day work force is limited to the number of workers needed to perform certain essential tasks it would appear that taking somebody from their work site could be very disruptive. There is no logic to this approach. Moreover, it permits the operator to play a role in the selection of the miners' representative. By limiting walkaround pay to employees who the operator has scheduled to perform idle day work, the operator effectively restricts the pool of available employee walkaround representatives. [The Complainant] was the person the miners had selected to accompany the MSHA inspector on this inspection. The miners should not be deprived of their right to have the most effective representative accompany the inspector merely because that representative is not scheduled to work on a particular idle day.

> One of the surest ways to shatter confidence in the miners' representative is to allow the operator to play a role in the selection of who that representative will be. Allowing the operator to manipulate the right to walkaround pay may well result in undermining the effectiveness of the entire role of a miners' walkaround representative.

(UMWA's Brief, pp. 7-9).

The Respondent maintains that the case presents a straightforward and relatively simple issue which is answered by the explicit language of section 103(f) which states, in part, that "[s]uch representative of miners who is also an employee of the operator shall suffer no loss of pay during the period of his participation in the inspection made under this subsection." Briefly stated, the Respondent's position is that since the Complainant was not scheduled to work on the days when the regular inspection was conducted, he suffered no loss of pay for the time spent accompanying the Federal mine inspector and therefore is not entitled to compensation under the walkaround pay provision of section 103(f) of the 1977 Mine Act. The Respondent's reasoning is set forth as follows:

> [The language of the walkaround pay provision of section 103(f) of the 1977 Mine Act] indicates that Congress intended to permit employees who were regularly scheduled to work to participate in inspections without suffering any loss in pay. The section does not state that <u>any</u> miners' representative must be compensated for participating in an inspection. If Congress had intended that result, it could easily have granted that right by clear and explicit language. Instead, however, Congress chose to require only that a miners' representative must suffer no loss of pay; that is, if a miners' representative is already at the mine and scheduled to work, the operator may not deny his pay simply because he participated in an MSHA inspection.
>
> By requiring only that a miners' representative suffer no loss of pay, Congress indicated its intent that the walkaround right not be utilized to place an additional employee on the operator's payroll. The language states Congress' intent not to add another salary, but only to ensure that an employee currently receiving his salary would not be penalized for his participation in the inspection. Thus, the meaning of Section 103(f) is simply that an employee must not lose pay to which he otherwise would have been entitled simply because he chooses to participate in an MSHA inspection.
>
> When this statutory language is applied to [the Complainant's] complaint the result is readily evident. Since [the Complainant] was not scheduled to work during the week

when the inspection occurred, he suffered no loss of pay as a result of participating in the inspection. Therefore, [the Respondent's] action was fully consistent with the provisions of Section 103(f).

This conclusion is reinforced by the fact that other UMWA personnel were scheduled to work during the week of the inspection and were available to participate as the miners' representative. Since these UMWA employees were working at the mine, they would have continued to receive pay even if they had participated in the inspection as the miners' representative. Thus, there was no reason for [the Complainant] to be the miners' representative on the inspection. Other miners' representatives could have participated in the inspection without adding another individual to [the Respondent's] payroll. [Emphasis in original.]

(Respondent's Brief, pp. 4-5).

The UMWA's reply brief states, in part, that:

On its face the requirements [of the walkaround pay provision of section 103(f) of the 1977 Mine Act] are quite clear. If the representative of the miners is an employee, then the operator cannot refuse to pay him at his normal rate for the time spent participating in a regular inspection].

In the instant case, [the Complainant] walked around during what would have been his usual shift had the mine been in regular production. He was an employee of the operator and the person the miners selected to accompany the MSHA inspector on his inspection.

[The Respondent's] interference with the exercise of [the Complainant's] right to pay during a regular inspection is a violation of [sections] 105(c)(1) and 103(f) of the Act.

The Respondent sets forth the following arguments in its reply brief:

In its initial brief the UMWA ignores the explicit language of the Act, and instead focuses on imaginary problems that are not raised by the facts of this case.

1. This case does not involve the issue whether [the Respondent] may dictate who will participate as a miners' representative on MSHA inspections. [The Respondent] made no effort to dictate to the miners who could act as their representative. The miners were completely free to select whomever they wished to act as their representative during

the inspections, and [the Respondent] recognized that no such representative could suffer a loss of pay. In fact, [the Respondent] specifically permitted [the Complainant] to participate in the inspection himself. [This fact distinguishes the instant case from Leslie Coal Mining Company, 1 FMSHRC 2022 (1979), upon which the UMWA relies]. [The Respondent] simply decided that since [the Complainant] suffered no loss of pay, that it would not pay him extra compensation for participating in the inspection. This decision, which is completely consistent with the language of the Act, in no way infringed upon the miners' right to select their own representative.

2. There is no reason to stretch the language of the Act to award extra compensation to [the Complainant]. The UMWA claims, without any supporting evidence whatsoever, that it was essential for [the Complainant] to act as the miners' representative and that it was therefore necessary to provide him extra compensation in order to encourage his participation. The UMWA brief is replete with unsupported assertions that [the Complainant] is the only one who could have acted effectively as the miners' representative. These assertions are completely inconsistent with the facts as stipulated by the parties, which indicate that other qualified UMWA members were working at the mine and were available to act as miners' representatives.

In fact, it is an extraordinarily rare situation where one person acts as the miners' representative for all MSHA inspections. UMWA mine safety committees generally comprise at least three people, and frequently many UMWA members at a particular mine will participate in inspections as miners' representatives. In this case, there is no evidence that [the Complainant] was the only qualified miners' representative or that he participated in every inspection. There is no evidence that it was necessary for [the Complainant] to participate in this particular inspection. In fact, the stipulation indicates precisely the contrary: that other UMWA members were scheduled for work who could have participated as miners' representatives.

Moreover, the participation of different UMWA members as miners' representatives enhances rather than detracts from the goals of the walkaround provision and the Act. As the UMWA itself admits, one of the principal purposes of the provision is to enhance all of the miners' consciousness of the various safety and health provisions of the Act. If only one miner participated as a miners' representative, then the benefits of miner participation would be limited to that one

miner. Thus, in many instances it is both necessary and in complete accordance with the policies of the Act to have more than one person act as the miners' representative.

The choice of whom to select is of course up to the miners at a particular mine, and in this case [the Respondent] permitted the miners that choice. The only restriction is that which is contained in the Act itself, which states not that any miners' representative is entitled to be compensated for participating, but only that the representative shall suffer no loss of pay as a result of participating in the inspection.

3. The legislative history fully supports the conclusion that Congress intended merely to ensure that miners suffered no loss of pay for participating in an inspection and not that anyone who acted as a miners' representative would receive compensation. * * *

For example, the Senate Report states that the reason for requiring that a miner suffer no loss of pay was to avoid a requirement that "would unfairly penalize the miner for assisting the inspector in performing his duties." Subcommittee on Labor of the Senate Committee on Human Resources, Committee Print, Legislative History of the Federal Mine Safety and Health Act of 1977, 616-17 (1978). Thus, the Senate Report indicates that Congress was simply seeking to avoid penalizing a miner by making him lose pay that he otherwise would have received simply because he participated in an inspection during a time when he was scheduled to work. Nothing in the legislative history or in the language of the Act itself indicates that Congress intended that a person who was not working at the mine be compensated for participation in an inspection.

4. The UMWA suggests that [the Respondent] would suffer no harm if it were required to compensate miners' representatives even if they were not otherwise scheduled to work. The UMWA clearly misses the point, since requiring compensation for any miners' representative would in effect require [the Respondent] to add another employee to its payroll. It is [the Respondent's] prerogative to determine how many people it wishes to employ. Although [the Respondent] recognizes that it may not refuse to pay a member of its active work force who participates in an MSHA inspection, it is not required to put on its payroll someone who would not otherwise be receiving any pay. Congress specifically recognized this right by limiting the walkaround pay right to those who would otherwise have suffered a loss of pay, that is, those who were otherwise scheduled for work. [Footnote 2 omitted.]

For the reasons set forth below, I conclude that the Respondent's refusal to pay the Complainant for the time spent accompanying the Federal mine inspector on the June 13, 14, and 15, 1979, regular inspection was not an interference with the exercise of statutory rights accorded the Complainant under section 103(f) of the 1977 Mine Act. Accordingly, no violation of section 105(c)(1) of the 1977 Mine Act occurred as a result of such refusal. In reaching this conclusion, all arguments advanced by the parties have been considered fully, and, except to the extent that they are expressly or impliedly adopted herein, they are rejected as contrary to the facts as stipulated, contrary to the law, or immaterial to the decision in this case.

Section 105(c)(1) of the 1977 Mine Act provides, in part, that no person shall in any manner discriminate against, or cause discrimination against, or otherwise interfere with the exercise of the statutory rights of any miner or representative of miners because of the exercise by such miner or representative of miners of any statutory right afforded by the 1977 Mine Act. 6/ It is my opinion that a mine operator's refusal to provide the miners' walkaround representative, who is also an employee of such mine operator, with the pay to which he is entitled under the walkaround pay provision of section 103(f) of the 1977 Mine Act, is an act of interference in the exercise of statutory rights accorded such representative by section 103(f), and therefore actionable under section 105(c)(1). As noted in the statute's legislative history: "The Committee intends that the scope of the [activities protected by section 105(c)(1)] be broadly interpreted by the Secretary, and intends it to include * * * the participation in mine inspections under [section 103(f)]." S. Rep. No. 95-181, 95th Cong., 1st Sess. (1977), reprinted in LEGISLATIVE HISTORY OF THE FEDERAL MINE SAFETY AND HEALTH ACT OF 1977 at 623 (1978).

The question presented is whether the walkaround pay provision of section 103(f) requires the mine operator to provide the miners' walkaround representative, who is also an employee of such mine operator, with pay for the time spent accompanying Federal mine inspectors on regular inspections which are conducted on days when such walkaround representative is not scheduled to work, when another miner-employee who was scheduled to work at such times could have accompanied the Federal mine inspector and would have suffered no loss of pay. None of the Commission's decisions on the subject of walkaround pay address this issue.

The Commission has held that the right to walkaround pay accorded a miners' representative under section 103(f) of the 1977 Mine Act is limited to the time spent accompanying a Federal mine inspector during a "regular" inspection conducted pursuant to section 103(a) of the 1977 Mine Act. Helen Mining Company, 1 FMSHRC 1796,1 BNA MSHC 2193, 1979 CCH OSHD par. 24,045 (1979); Kentland-Elkhorn Coal Corporation, 1 FMSHRC 1833, 1 BNA MSHC 2230, 1979 CCH OSHD par. 24,071 (1979). The Commission has also held that when

6/ The full text of section 105(c)(1) is set forth in n. 1, supra.

an inspection of "the entire mine" conducted pursuant to section 103(a) is divided into two or more inspection parties to simultaneously inspect different parts of the mine, one miners' representative, who is also an employee of the mine operator, in each inspection party is entitled to walkaround pay under section 103(f) for the time spent accompanying a Federal mine inspector who is engaged in such inspection. Magma Copper Company, 1 FMSHRC 1948, 1 BNA MSHC 2227, 1979 CCH OSHD par. 24,075 (1979). In each of these three cases decided by the Commission, the miners' walkaround representative was scheduled to work on the days when the inspections were conducted.

Similarly, no decision by an Administrative Law Judge of this Commission has been discovered which poses the question presented herein. See, e.g., Jewell Ridge Coal Corporation, 2 FMSHRC 2578 (1980) (Steffey, J.); Secretary of Labor ex rel. Scott v. Consolidation Coal Company, 2 FMSHRC 1056 (1980) (Melick, J.); Alabama By-Products Corporation, 2 FMSHRC 467 (1980) (Laurenson, J.); Leslie Coal Mining Company, 1 FMSHRC 2022 (1979) (Steffey, J.).

The walkaround pay provision of section 103(f) requires only that the walkaround representative of the miners "who is also an employee of the operator shall suffer no loss in pay during the period of his participation in the inspection * * *." (Emphasis added.) The UMWA interprets this language as requiring the mine operator to provide compensation to its employee who is a walkaround representative of the miners whenever such representative accompanies a Federal mine inspector on an inspection of the entire mine conducted pursuant to section 103(a), regardless of whether or not such representative at that time would otherwise be performing work for the mine operator which would entitle him to a wage payment. In the UMWA's view, the only germane considerations are (1) that the individual is the person selected by the miners to act as their representative during inspections conducted pursuant to section 103(a), and (2) that the individual is an employee of the mine operator. This interpretation distorts the plain meaning of the carefully drafted language used by Congress. Congress intended only that a representative suffer no loss in pay when his activities as walkaround representative of the miners during inspections of the entire mine conducted pursuant to section 103(a) require him to be absent from those duties which he would otherwise perform for the mine operator, his employer. The plain language of the walkaround pay provision disavows any intent to create a right to compensation for a walkaround representative who is not otherwise scheduled to work. The walkaround pay provision is designed to encourage miner participation in inspections by providing an assurance that their designated representative will suffer no loss in pay as a result of participating in such inspections, i.e., that his participation in an inspection will place him in the same position with respect to his pay that he would have occupied had he not participated in the inspection. It was not intended to create a right to compensation where none otherwise existed.

The UMWA argues that denying the Complainant walkaround pay for his activities on June 13, 14, and 15, 1979, permits the mine operator to play a role in the selection of the miners' walkaround representative, and also

deprives the miners of their right to have the most effective representative accompany the Federal mine inspector merely because that representative is not scheduled to work on the day of the inspection. According to the UMWA, allowing the mine operator to play a role in the selection process will surely shatter the miners' confidence in their representative, and allowing the mine operator to manipulate the right to walkaround pay may well result in undermining the effectiveness of the miners' walkaround representative.

It is unnecessary to address these issues because they are well beyond the facts of this case. There is no indication in the record, as stipulated, that the Complainant's idle day status permitted the Respondent to directly or indirectly participate in any manner in the process of selecting a walkaround representative. Additionally, there is no indication that the Respondent manipulated the Complainant into an idle day status to discourage his participation in the inspection. The UMWA's arguments must be reserved for a case in which the facts properly raise such issues.

The facts of the instant case reveal that the Complainant was permitted to participate in the June 13, 14, and 15, 1979, inspection notwithstanding his idle day status, and that some other miner who was working at the mine could have acted as the miners' walkaround representative on those 3 days and received his full pay under section 103(f). In order to create the kind of result which the UMWA prays for in this proceeding, it would be necessary to amend section 103(f) of the 1977 Mine Act to so provide.

In view of the foregoing, I conclude that the Complainant was not entitled to walkaround pay under section 103(f) of the 1977 Mine Act for his participation as walkaround representative of the miners during the June 13, 14, and 15, 1979, regular inspection of the Respondent's Powhatan No. 1 Mine. The Respondent's refusal to pay the Complainant for the time so spent was not an interference with the exercise of rights accorded the Complainant under section 103(f) of the 1977 Mine Act, and, accordingly, is not actionable under section 105(c)(1) of the 1977 Mine Act. The discrimination complaint will be dismissed.

IV. Conclusions of Law

1. The Administrative Law Judge has jurisdiction over this proceeding.

2. The Respondent is an "operator" as defined in section 3(d) of the 1977 Mine Act.

3. The Department of Labor's Mine Safety and Health Administration conducted an investigation of the dispute which is the subject matter of this proceeding and concluded that a violation of section 105(c)(1) of the 1977 Mine Act had not occurred.

4. The Complainant received a written notification from the Department of Labor's Mine Safety and Health Administration on December 10, 1980,

informing him of that agency's determination that no violation of section 105(c)(1) had occurred; and thereafter the Complainant timely filed this action before the Federal Mine Safety and Health Review Commission.

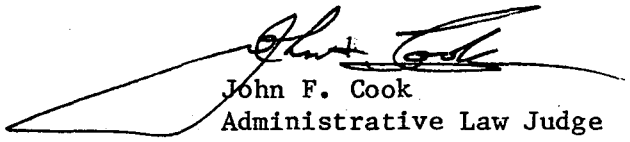
5. The Complainant was not entitled to walkaround pay under section 103(f) of the 1977 Mine Act for his participation as walkaround representative of the miners during the June 13, 14, and 15, 1979, regular inspections of the Respondent's Powhatan No. 1 Mine.

6. The Respondent's refusal to pay the Complainant for the time so spent was not a violation of section 105(c)(1) of the 1977 Mine Act.

7. All of the conclusions of law set forth in Part III, supra, are reaffirmed and incorporated herein.

ORDER

The discrimination complaint is DISMISSED.



John F. Cook
Administrative Law Judge

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Administrator for Metal and Nonmetal Mine Safety and Health, U.S. Department of Labor

Administrator for Coal Mine Safety and Health, U.S. Department of Labor

Standard Distribution

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

333 W. COLFAX AVENUE, SUITE 400
DENVER, COLORADO 80204

JUN 2 1981

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner,	CIVIL PENALTY PROCEEDING
	DOCKET NO. WEST 79-397-M
v.	A/C NO. 05-03209-05001
RALPH FOSTER AND SONS, Respondent.	MINE: ERDA C G27

DECISION AFTER REMAND

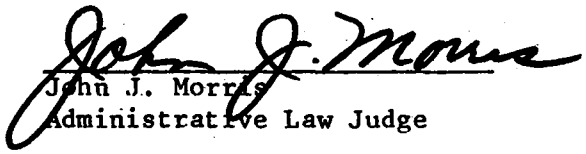
On May 12, 1981, the Federal Mine Safety and Health Review Commission remanded the above case for the assessment of a penalty.

The following is a review of the criteria required to be examined in the assessment of a penalty. 30 U.S.C. § 820(i). The parties stipulated to the fact that at the time Citation No. 326566 was issued, Ralph Foster and Sons had no history of violations of the Federal Mine Safety and Health Act, 30 U.S.C. § 801 et seq. (the Act) (Tr. 22). Respondent is a very small mine operator. (Exhibit A attached to the petition and Tr. 11).

The danger anticipated by the standard was likely to occur (Tr. 11, Commission Exhibit 1), and the resulting injury could be permanently disabling. (Comm. Ex. 1). The miners involved immediately put on their safety glasses after being informed of the violation by the inspector. (Tr. 12).

The degree of negligence attributed to respondent by the Mine Safety and Health Administration was based on an erroneous fact and should, therefore, be re-assessed. The inspector's statement indicates that the proprietor of the mine, Robert Foster, knew of the condition cited. This conclusion was based on the inspector's belief that Robert Foster was one of the miners who was not wearing the safety glasses. (Comm. Exhibit 1). However, at trial, the inspector testified that Robert Foster was not one of the miners involved, and in fact, was not in the mine at the time. (Tr. 10, 11, 21). Mr. Foster confirmed the fact that at the time of the violation he was working in another mine (Tr. 29). I find, therefore, that there was no negligence on the part of the mine operator involved in the violation of the Act.

Having given due consideration to the necessary criteria, I assess a penalty of $15.00. Respondent is directed pay this amount within 30 days of the date of this order.



John J. Morris
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

333 W. COLFAX AVENUE, SUITE 400
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JUN 2 1981

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of JOHN COCHRANE and DARYL SPRADLEY, Complainants, v. TRAIL MOUNTAIN COAL COMPANY, Respondent.	COMPLAINT OF DISCHARGE, DISCRIMINATION OR INTERFERENCE DOCKET NO. WEST 80-451-D DENV CD 80-13 MINE: Trail Mountain

DECISION AND ORDER

On May 14, 1981, the parties to this proceeding filed with the Commission a Stipulation of Settlement, Motion and Consent seeking an agreed disposition of the case.

Under the terms of the stipulation, the parties agree that respondent shall compensate John Cochrane and Daryl Spradley in the amount of $9,000.00 each in settlement of their claims against respondent resulting from their discharges; that respondent shall expunge the employment records of John Cochrane and Daryl Spradley of any adverse references relating to their discharges; and that John Cochrane and Daryl Spradley shall accept the above stipulations as full settlement of the claims giving rise to this case.

By joint motion, the parties seek an order providing: that respondent tender the agreed upon sum to John Cochrane and Daryl Spradley; that respondent expunge from their employment records any adverse references relating to their discharges; and that the above-entitled action be dismissed with prejudice and upon the merits.

Given the complainants' consent to the terms of the settlement and finding that such settlement will effectuate the purposes of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., it is

ORDERED: that the settlement agreed to by the parties is hereby APPROVED, that the joint motion is hereby GRANTED in full and, that this case is hereby DISMISSED WITH PREJUDICE.

Jon D. Boltz
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

333 W. COLFAX AVENUE, SUITE 400
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JUN 2 1981

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of JEFFREY S. HOTCHKISS, Complainant, v. CLIMAX MOLYBDENUM COMPANY, Respondent.	COMPLAINT OF DISCHARGE DISCRIMINATION OR INTERFERENCE DOCKET NO. WEST 81-130-DM MINE: Climax Mine

ORDER OF DISMISSAL

The Secretary of Labor has moved to withdraw his complaint of discrimination filed on behalf of Jeffrey S. Hotchkiss. Withdrawal is sought on the grounds that insufficient evidence exists to continue prosecution. Mr. Hotchkiss has filed a formal consent to the withdrawal of the complaint. Respondent does not oppose the motion.

The Secretary's motion is granted, and this present proceeding is dismissed with prejudice.

The Secretary's motion and the miner's accompanying consent, however, are silent as to whether the dismissal should foreclose the miner's right to prosecute his own complaint under section 105(c)(3) of the Act. The Secretary's determination to withdraw can stand no differently than an initial determination not to file a complaint; it cannot deprive the miner of his right to initiate his own complaint.[1/] Because there has been no affirmative waiver of that right, Mr. Hotchkiss is granted 30 days from his receipt of this order in which to file his own complaint with the Commission, should he wish to do so.

SO ORDERED.

John A. Carlson
Administrative Law Judge

1/ Cf. S. Rep. No. 95-181 95th Cong. 1st Sess. at 37 (1977); reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess. Legislative History of the Federal Mine Safety and Health Act of 1977 at 626 (1978).

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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JUN 3 1981

SOUTHERN OHIO COAL COMPANY, Contestant	:	Notices of Contest
v.	:	Docket Nos. LAKE 81-17-R
	:	LAKE 81-18-R
SECRETARY OF LABOR,	:	LAKE 81-19-R
MINE SAFETY AND HEALTH	:	LAKE 81-20-R
ADMINISTRATION (MSHA),	:	LAKE 81-21-R
Respondent	:	LAKE 81-22-R
	:	
	:	Meigs No. 1 Mine

DECISIONS

Appearances: David M. Cohen, Esquire, Lancaster, Ohio, for the contestant;
F. Benjamin Riek III, Trial Attorney, Office of the Solicitor, U.S. Department of Labor, Cleveland, Ohio, for the respondent.

Before: Judge Koutras

Statement of the Proceedings

This case concerns contests filed by the contestant on October 20, 1980, pursuant to section 105 of the Federal Mine Safety and Health Act of 1977 challenging the validity of the citations issued by Respondent, MSHA, for violations under 30 C.F.R. § 75.1003-2. On December 4, 1980, Respondent filed a motion to permit late filing of its attached answer and an order granting the motion was issued December 16, 1980. A hearing on the matter was scheduled for March 24, 1981, in Columbus, Ohio, but was subsequently continued to allow the parties to submit joint stipulations for the purpose of issuing a summary decision. Accordingly, briefs by both parties were filed on April 29, 1981.

Stipulations

1. The contestant operates the Meigs No. 1 Mine. This is a coal mine as defined by section 3(h) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (hereinafter the Act).

2. The contestant is an operator as defined by section 3(d) of the Act.

3. The contestant is subject to the provisions of the Act pursuant to section 4 of the Act.

4. At the beginning of the day shift on September 16, 1980, contestant's miners were transporting a part of an off-track shuttle car (which part was referred to in the subject citations as a "boom") on the east track of the Meigs No. 1 Mine.

5. Because contestant's miners did not believe that said part constituted a "unit of off-track mining equipment" or "off-track mining equipment," contestant did not believe on September 16, 1980, that 30 C.F.R. § 75.1003-2 or any of the subsections thereof were appropriate to said movement and acted accordingly.

Inspector Charles M. Fink, authorized representative of Respondent, believed that said part did constitute a "unit of off-track mining equipment" or "off-track mining equipment."

6. Citation Nos. 1010970 through 1010975 were served on contestant on September 16, 1980, between 9:37 a.m. and 9:42 a.m. The conditions or practices described in said citations are not now at issue.

7. On October 16, 1980, contestant filed a notice of contest concerning the validity of Citation Nos. 1010970 through 1010975.

8. All of the subject citations relate to section 310(d) of the Federal Mine Safety and Health Act of 1977 and allege violations of 30 C.F.R. § 75.1003-2.

9. All of the subject citations, except for Citation No. 1010972, are classified as "significant and substantial."

10. The part of an off-track shuttle car being transported on a lo-boy supply car was 5 feet 5 inches in length, 8 feet 9-1/2 inches in width, and 23 inches in height. The off-track shuttle car was 24 feet 10 inches in length, 9 feet 6 inches in width, and 34 inches in height. The lo-boy supply car was 12 feet in length, 8 feet 6 inches in width, and 8-1/2 inches in height from the rail.

11. Subsequent to the issuance of the subject citations, a notation was made in the equipment record book for the earlier September 16, 1980, midnight shift concerning the subject part. This notation was made solely to safeguard against contestant being served with an additional citation or citations and was entered even though at that time contestant believed the subject regulations did not require any such entry.

12. Southern Ohio Coal Company produced 4,437,769 tons of coal during 1979 and 5,054,776 tons of coal during 1980. The Meigs No. 1 Mine produced 918,242 tons of coal during 1979 and 1,133,645 tons of coal during 1980.

13. Respondent will submit a computer printout documenting all violations of the Act incurred and paid by contestant at the Meigs No. 1 Mine. The parties stipulate as to the admissibility of the printout.

Issues

1. Whether a boom, a component of an off-track shuttle car, constitutes a "unit of off-track mining equipment" or "off-track mining equipment" subject to the requirements of 30 C.F.R. § 75.1003-2.

2. If components such as a boom are included within the coverage of 30 C.F.R. § 75.1003-2, whether the standard is so vague as to be unenforceable or unconstitutional.

3. Whether respondent correctly charged contestant with six separate violations of 30 C.F.R. § 75.1003-2 for one occurrence.

Applicable Statutory Provisions

1. The Federal Mine Safety and Health Act of 1977, Pub. L. 95-164, effective March 9, 1978, 30 U.S.C. § 801 et seq.

2. 30 C.F.R. § 75.1003-2, which provides in pertinent part as follows:

> Requirements for movement of off-track mining equipment in areas of active workings where energized trolley wires or trolley feeder wires are present; pre-movement requirements; certified and qualified persons.
>
> (a) Prior to moving or transporting any unit of off-track mining equipment in areas of the active workings where energized trolley wires or trolley feeder wires are present:
>
> (1) The unit of equipment shall be examined by a certified person to ensure that coal dust, float coal dust, loose coal oil, grease, and other combustible materials have been cleaned up and have not been permitted to accumulate on such unit of equipment; and,
>
> (2) A qualified person, as specified in § 75.153 of this part, shall examine the trolley wires, feeder wires, and the associated automatic circuit interrupting devices provided for short circuit protection to ensure that proper short circuit protection exists.
>
> (b) A record shall be kept of the examinations required by paragraph (a) of this section, and shall be made available, upon request, to an authorized representative of the Secretary.

(c) Off-track mining equipment shall be moved or transported in areas of the active workings where energized trolley wires or trolley feeder wires are present only under the direct supervision of a certified person who shall be physically present at all times during moving or transporting operations.

(d) The frames of off-track mining equipment being moved or transported, in accordance with this section, shall be covered on the top and on the trolley wire side with fire-resistant material which has met the applicable requirements of Part 18 of Subchapter D of this Chapter (Bureau of Mines Schedule 2G).

(e) Electrical contact shall be maintained between the mine track and the frames of off-track mining equipment being moved in-track and trolley entries, except that rubber-tired equipment need not be grounded to a transporting vehicle if no metal part of such rubber-tired equipment can come into contact with the transporting vehicle.

Background of Controversy

On September 16, 1980, MSHA inspector Charles Fink conducted an inspection of Southern Ohio Coal Company's Meigs No. 1 Mine. During this inspection, Mr. Fink observed the boom of an off-track shuttle car being transported on a lo-boy. Finding 30 C.F.R. § 75.1003-2 to be applicable, the inspector issued six citations alleging violations of subsections (a)(1), (a)(2), (b), (c), (d), and (e). Contestant contends that the citations should be vacated because a boom, a component of an off-track shuttle car, is neither a unit of off-track mining equipment nor off-track mining equipment and is not subject to the provisions of 30 C.F.R. § 75.1003-2. Contestant also maintains that if the standard does apply to booms, then it is unconstitutionally vague. Further, contestant states that the inspector improperly issued six citations for one incident involving the transporting of a boom. Respondent counters each one of contestant's arguments, asserting that a boom is regulated by 30 C.F.R. § 75.1003-2 and that the standard is not vague. Further, respondent asserts that it is proper to issue separate citations for each violation of a subsection of a mandatory standard.

The six citations issued in these proceedings, resulting from the movement and transportation of the off-track shuttle car boom, are as follows:

Citation No.	Date	30 C.F.R. Section	Conditions Cited
1010970	9/16/80	75.1003-2(a)(1)	No equipment examination by a certified person.

1010971	9/16/80	75.1003-2(a)(2)	Failure to examine trolley circuit and D.C. circuit breakers prior to movement.
1010972	9/16/80	75.1003-2(b)	Failure to keep a record of the required equipment examinations.
1010973	9/16/80	75.1003-2(c)	Failure by a certified person to supervise the movement of the equipment.
1010974	9/16/80	75.1003-2(d)	Failure to cover the equipment with fire-resistant material.
1010975	9/16/80	75.1003-2(e)	Failure to maintain contact between the mine track and equipment.

Discussion

A. The Use of the Phrases "Unit of Off-track Mining Equipment" and "Off-track Mining Equipment" in 30 C.F.R. § 75.1003-2.

Respondent argues that all requirements of 30 C.F.R. § 75.1003-2 are predicated on the movement of any unit of off-track mining equipment, and maintains that a boom is such a unit of equipment. In so stating, respondent ignores the fact that of the six subsections of which contestant has been charged with violating, only (a)(1), (a)(2) and (b) refer to "units" of off-track mining equipment. Contestant's suggestion that the terms "units of off-track mining equipment" and "off-track mining equipment" refer to the same type of equipment is more acceptable in light of the rules of statutory construction.

One such rule states that "a statute should be construed so that effect is given to all provisions, so that no part will be inoperative or superfluous, void or insignificant, and so that one section will not destroy another unless the provision is the result of obvious mistake or error." C. D. Sands, 2A Sutherland, Statutory Construction, § 46.06, p. 63 (1973). Accordingly, in order for section 75.1003-2 to make sense, and since units of off-track mining equipment are not distinguished from off-track mining equipment in the safety standard, I find that they refer to the same type of equipment.

Support for this conclusion can be found in the definitions of the words "unit" and "equipment." The word "unit" as defined in Webster's New World Dictionary includes both:

1.b) a magnitude or number regarded as an undivided whole.

* * * * * * *

3.b) a single, distinct part or object, especially one used for a specific purpose [the lens unit of a camera].

The word "equipment" is aptly noted as being: "An extremely elastic term, the meaning of which depends on context." Black's Law Dictionary.

Using these definitions, a unit of off-track mining equipment might refer to either a part of a larger piece of equipment or to only the complete machine. Regardless of whether a boom is a unit of off-track mining equipment, or just off-track mining equipment as those phrases are used in section 75.1003-2, it is apparent that the definitions of "unit" and "equipment" allow the phrases to be used interchangeably. It is therefore necessary to closely examine the regulatory standard to understand the context in which these words are used.

B. Whether a Boom, a Component of Off-track Mining Equipment is Subject to the Provisions of 30 C.F.R. § 75.1003-2.

Contestant, in support of its position that a boom, as a component of off-track mining equipment, is not encompassed by the standard, thoroughly examines the textual construction and the legislative history of 30 C.F.R. § 75.1003-2. Initially, contestant observes that components are not within the Congressional purpose of section 310(d) of the Act, which authorized promulgation of section 75.1003-2. Section 310(d) provides in part that: "Trolley wires and trolley feeder wires shall be guarded adequately (1) at all points where men are required to work or pass regularly under the wires."

Contestant concludes that section 75.1003-2 should apply only to equipment which needs to be guarded from contact with trolley wires. Contestant asserts that "the precautions specified in section 75.1003-2, according to respondent's interpretation, would be required regardless of how small a component was moved and how great a vertical clearance between the component and trolley wire" (Brief, pp. 2-3). Recognizing the Congressional purpose, contestant concedes that the standard should apply to complete or reasonably complete pieces of equipment (Brief, p. 6).

Contestant examines the history of the regulation, both the events leading to the promulgation of the rule and the hearings held on the rule and finds no reference made to components of off-track mining equipment. It also notes that the MSHA Inspection Manual implies that the standard does not apply to components. Volume 2, page 456 of the manual, dated March 9, 1978, which comments on section 75.1003-2, states that: "This section refers to the moving of off-track mining equipment either under its own power or when being transported by other means." Since components rarely are capable of moving under their own power, contestant contends that the quoted language supports a conclusion that the regulation was not meant to encompass components.

Respondent's arguments apparently rely on the premise that the words "unit of off-track mining equipment" are not vague and must be given their literal interpretation. Asserting that the phrase must be examined in the context of coal mining, respondent concludes that the plain and natural meaning of the words apprise the contestant of when it must comply with the standard. It notes that the clear purpose of the standard is to permit safe movement of mining equipment over energized trolley wires. Therefore, the standard seeks to prevent any electricity-conducting equipment from coming in contact with these wires. Respondent reasons that since components are made of steel and conduct electricity, they naturally come within the scope of the standard. In view of the purpose of the standard, respondent contends that contestant should have realized that a boom was a unit of off-track mining equipment, and therefore covered by the standard.

Upon a review of the arguments of both parties and my own analysis of the standard, its language and its purpose, I conclude that section 75.1003-2 only applies to complete or reasonably complete pieces of off-track mining equipment. In interpreting this standard, I have given it the liberal construction which is necessary for remedial legislation whose primary purpose is preserving human life. See Freeman Coal Mining Company v. IBMA, 504 F.2d 741 (7th Cir. 1974). But while an agency's explication of its regulation is entitled to great weight, "such interpretations forfeit their entitlement to deference when they plainly conflict with other indicia of the proper interpretation of the statute." UMWA v. Andrus, 581 F.2d 888, 983 (D.C. Cir. 1978).

.There is nothing in section 75.1003-2 to indicate that the drafters intended to include component parts of off-track mining equipment within the coverage of the standard. Neither the word "component," nor examples of component parts, are found in any of the subsections. Respondent contends that the term "unit of off-track mining equipment" was meant to be expansive "in order to cover the myriad of possible pieces of equipment that may be transported by Contestant over energized trolley wires" (Brief, p. 9). This argument is unpersuasive since another section of Part 75 specifically refers to components, indicating that such parts are subject to the safety standard. See section 75.1103-2. The word "components" easily solves the problem of listing "the myriad of possible pieces of equipment." Therefore, it is fair to assume that the drafters would have included the word "components" within the provisions under section 75.1103-2 had they intended to include a component part such as a boom.

Subsection (d) of section 75.1103-2 refers to the "frames of off-track mining equipment." The ordinary meaning of a frame is a structure upon which a thing is built. One of the examples given in Webster's New World Dictionary is: "4. any of various machines built on or in a framework." Therefore, the most natural interpretation of the phrase "frames of off-track mining equipment" would indicate that it refers only to frames of complete machinery.

Component parts, such as a boom, do not have frames. They have enclosures or shells. Applicable words are found in 30 C.F.R. § 75.701 in its

reference to "metallic frames, casings, and other enclosures of electric equipment." (Emphasis added.) Since subsection (d) mentions only frames, it is evident that the drafters were considering only large, nearly complete, or complete pieces of machinery.

Subsection (g) provides as follows: "The provisions of paragraphs (a) through (f) of this section shall not apply to units of mining equipment that are transported in mine cars, provided that no part of the equipment extends above or over the sides of the mine car." The facts here indicate that the boom was being transported on a lo-boy supply car whose sides were only 8-1/2 inches high from the rail. Since there were virtually no sides to the supply car, anything that would be placed on it would "extend above * * * the sides of the mine car," and make the exception provided by subsection (g) inapplicable. Therefore, as contestant so aptly states, "the precautions specified in section 75.1003-2, according to respondent's interpretation, would be required regardless of how small a component was moved and how great of a vertical clearance between the component and the trolley wire" (Brief, p. 2). Such a broad interpretation of the standard goes beyond any Congressional purpose of providing a safe work environment and preventing accidents.

Respondent argues that subsection (f) sufficiently defines a "unit of off-track mining equipment" so as to include a boom within its scope. The standard requires a minimum clearance of 12 inches between the unit and the trolley wires with additional precautions for equipment which does not permit at least a 12-inch clearance. I fail to see how subsection (g) adequately defines a unit of off-track mining equipment, other than to include every size and type of equipment. According to respondent's interpretation, even a very small component would be a unit of off-track mining equipment as long as it is more than 12 inches from the trolley wires when it is being moved.

Furthermore, if section 75.1003-2 is meant to apply only to components of off-track mining equipment, then the very same or similar component parts of on-track mining equipment could be transported where energized trolley wires are present and not be subject to the safety requirements. This absurd situation could not have been anticipated or intended by the drafters.

Respondent's exploration of the legislative history further convinces me that section 75.1003-2 was not intended to cover component parts. The Federal Registers which proposed the initial rule and also reported subsequent hearings and comments, make no mention of components of off-track mining equipment. */ The drafters obviously thought the words "off-track mining equipment" were sufficiently clear without further explanation. Since no mention is made of components, or examples thereof, I conclude that they are not subject to section 75.1003-2.

*/ See 37 Fed. Reg. 26422 (December 12, 1972); 38 Fed. Reg. 7466 (March 22, 1973); 38 Fed. Reg. 16922 (June 27, 1973); 39 Fed. Reg. 29997 (October 31, 1973).

Conclusion and Order

In view of the foregoing, I find that contestant was improperly charged with six violations under 30 C.F.R. § 75.1003-2 since the boom was neither a unit of off-track mining equipment or off-track mining equipment. Accordingly, it is unnecessary to examine the issues of vagueness and multiple charges under the safety standard. The record shows that there is no genuine issue as to any material fact and that contestant is entitled to summary decision as a matter of law. Therefore, pursuant to Rule 64, 29 C.F.R. § 2700.64, the citations are VACATED and these proceedings are DISMISSED.

George A. Koutras
Administrative Law Judge

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Standard Distribution

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

333 W. COLFAX AVENUE, SUITE 400
DENVER, COLORADO 80204

JUN 4 1981

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. PHELPS DODGE CORPORATION, Respondent.	CIVIL PENALTY PROCEEDING DOCKET NO. CENT 79-370-M A/O No. 29-00159-05508 DOCKET NO. CENT 79-371-M A/O No. 29-00159-05009 DOCKET NO. CENT 79-372-M A/O No. 29-00159-05010 MINE: Tyrone Mine and Mill

DECISION

APPEARANCES:

Marigny A. Lanier, Esq.
Office of the Solicitor
United States Department of Labor
555 Griffin Square, Suite 501
Dallas, Texas 75202
for the petitioner

Stephen W. Pogson, Esq.
Evans, Kitchell & Jenckes, P.C.
363 North First Avenue
Phoenix, Arizona 85003
for the respondent

Before: Judge Jon D. Boltz

STATEMENT OF THE CASE:

Pursuant to the provisions of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the petitioner seeks an order assessing civil monetary penalties against the respondent for violations alleged in 3 citations involved in the above captioned cases. An order was issued consolidating the cases for hearing. The citations allege a violation of 30 C.F.R. § 55.3-3[1] in case CENT 79-371-M, and separate violations of

1/ Mandatory. To ensure a safe operation, the width and height of benches shall be governed by the type of equipment to be used and the operation to be performed.

30 C.F.R. § 55.3-5[2] in cases CENT 79-370-M and CENT 79-372-M. The violations allegedly took place on April 24, 1979.

The respondent admits jurisdiction of the Commission, denies all other allegations and alleges that men were not working near or under dangerous banks at its Tyrone, New Mexico mine.

FINDINGS OF FACT:

1. The alleged violations took place at respondent's open pit, multiple bench copper mine located at Tyrone, New Mexico.

2. The respondent is a large operator and the penalties proposed will not affect respondent's ability to continue in business.

3. The respondent has a history of 55 cited violations from July 20, 1978 through April 24, 1979 at its Tyrone, New Mexico mine. Of this number, there have 28 assessed violations paid.

4. In 1978 there were 723 miners employed at respondent's Tyrone Mine and 1,064,340 annual man hours were worked by those miners. (Tr. 193).

5. The violations alleged were promptly abated in good faith.

6. The mining sequence followed at the open pit mine is to drill into the material containing the ore and to set explosive charges in order to blast the material loose. The material is then scooped up and hauled away for processing.

7. As the copper ore and other material is removed, a bench slope plan is followed by the respondent. (Ex. R-6). This plan calls for the horizontal benches to be approximately 25 feet in width and the bench levels to be approximately 50 feet apart. These catch benches are separated in stair step fashion by a sloping wall.

8. The catch bench is a ledge that runs horizontally in the mine and it helps to confine or restrain loose material that may fall from higher up in the pit. (Tr. 16).

9. On April 24, 1979, at a location in the mine referred to as the Gettysburg drop cut, a decline or rim leading from one level down to another, the No. 13 electric shovel was observed by the MSHA inspector loading haul trucks with material that had been blasted previously.

2/ Mandatory. Men shall not work near or under dangerous banks. Overhanging banks shall be taken down immediately and other unsafe ground conditions shall be corrected promptly, or the areas shall be barricaded and posted.

10. The walls and benches above the area where the material was being loaded into haul trucks by the No. 13 shovel extended up approximately one hundred to one hundred fifty feet to the top or crest of the bank.

11. The maximum upper reach of the No. 13 electric shovel was approximately 50 feet.

12. On April 24, 1979, at another location in the mine the No. 3 shovel was being operated to clean up rock material at the bottom of a bank or pit wall. The bank was approximately one hundred fifty to two hundred feet high. This operation was also observed by the MSHA inspector.

DISCUSSION:

DOCKET NO. CENT 79-372-M; Citation No. 162124:

The wall of the mine that slanted away from the work area at the Gettysburg drop cut was approximately 150 feet high. Approximately 50 feet from the top of the wall was a horizontal catch bench and 50 feet below the first bench was another catch bench. According to the bench slope plan, these benches were to be approximately 25 feet wide, from the toe of the wall out to outer edge of the bench. Photographs taken of the Gettysburg drop cut by the MSHA inspector at the time of the inspection show that the catch benches had collected a considerable amount of rocks and earthen material. Men were working near the toe of the bank which was approximately 150 feet high. The MSHA inspector observed one haul truck up next to the bank being loaded by the No. 13 shovel and another truck approximately 20 feet away from the high wall. Thus, the employees were working near or under the bank and the question presented is whether the bank or wall was dangerous.

On April 24, 1979, the No. 13 shovel was at times operating within 20 feet of the toe of the bank and the pit wall which rose approximately 150 feet above. The catch benches on the banks above the operator had almost completely filled up with rock material. Rocks which might fall from the top of the wall would not have the catch bench available to stop or at least slow the fall. The cab of the shovel operator sits approximately 25 to 30 feet above the ground. If the rocks were falling from the catch bench, approximately 50 feet up the bank from where the shovel was operating, the rocks would probably not present a hazard and the bank would not be dangerous. Since the catch benches contained a large amount of rock and earth material, a rock which might fall from the top, 150 feet up, would not effectively be restrained, slowed, or stopped by the catch benches on its way down. This condition would present a hazard to the operator of the shovel as well as the haul truck drivers and persons walking on the ground near these vehicles in performance of their duties. All of these persons were observed at the site by the MSHA inspector. The operator testified that he observed rock fall from the 100 foot level above him and that he considered this condition to be hazardous. He also

testified that the rock could come through the cab of the shovel which he was operating. The operator had complained to his supervisor about the dangerous high wall and worked near the high wall for approximately two hours before he was told by his supervisor to take the shovel out of that location. However, no areas were barricaded or posted.

On the date of the inspection, the heavy equipment operator also observed that there were no catch benches on the high wall above the No. 13 shovel. He stated that the catch benches were filled up with material which made the benches slope at an angle instead of being flat and horizontal. In other places, the bench had been "dug back or had fallen off to be non-existent." (Tr. 116).

It is undisputed by the parties that catch benches are necessary and perform the function of restraining, stopping or slowing down rocks and materials which may fall down the face of the bank. Respondent concedes in its post hearing brief that there was rock on the benches. It further states that this is not very surpirsing since the purpose of the catch bench is to catch rock which may fall due to blasting or for some other reason. However, the question is what if the benches are no longer available to catch rock because they have been filled by material or are missing in some places directly above the location where the miners are working? If there are no effective catch benches above the miners, then there would be little to prevent rocks from falling unimpeded down the face of the bank.

There was testimony that the loose and unconsolidated rock material observed by the MSHA inspector and by the miners on the bank could move because of the freeze-thaw characteristics of weather, because of blasting taking place in nearby areas of the mine, because of rainfall, wind or for any other reason which might set the rock material in motion. Of particular significance is the testimony of the truck driver who was working in connection with shovel No. 13 at the Gettysburg drop cut near the time of the inspection. He testified that while he was in the cab of his empty truck waiting for another truck to finish being loaded by No. 13 shovel, part of the bank above him came down and hit the side of his truck. He looked in the rear view mirror and saw dust and some debris still falling. His truck was parked within two feet of the bank. The driver testified that he had difficulty driving away after his truck was loaded due to the rock material that had fallen under his truck from the bank.

The catch benches above the No. 13 shovel had accumulated rocks and earthen material and were no longer effective in restraining, slowing or stopping rocks from falling. This condition made the banks dangerous for the miners who were working near or under them. There was considerable risk or peril of injury to the miners if they were struck by rocks or debris falling down the side of the high bank. Thus, I find that Citation No 162124 should be affirmed.

DOCKET NO. CENT 79-371-M, Citation No. 162126:

The width of the benches above the Gettysburg drop cut was originally approximately 25 feet and the height was approximately 50 feet. There is no evidence that these specifications were not proper by engineering standards. The MSHA inspector concluded that since the benches above had effectively filled up and could no longer serve to catch falling or sliding rocks the equipment used would have to be able to clean off potentially falling rocks from the pit wall or bank above. In this case the bank was approximately 150 feet high and the shovel had a reach of 50 feet. Thus, the shovel would be unable to reach high enough to clean off the entire bank. The inspector also testified that there would have been no violation of the regulation if the catch benches had been maintained.

The 50 foot height of the original benches was proper for the equipment used because the shovel could reach up to 50 feet and thus to the edge of the bench above. Once the benches have sloughed away in places and filled up in others it would be difficult to maintain them. A geologist who testified for the respondent stated that it would present a danger to a miner to go onto benches above and clean them off. Only smaller equipment could be used for that purpose and that equipment would not be able to reach up 50 feet to clean off the bank. (Tr. 372).

The interpretation of the standard advanced by the petitioner would require the respondent to continually maintain catch benches in locations where there was no longer any mining operation going on. The standard requires the height and width of benches to accommodate the type equipment to be used and in this case no equipment was to be used on those benches. The height and width of the benches were of proper dimensions when the mining took place. The problem arose because the benches sloughed away in some places and filled up in others after they were no longer in use, thus, making them ineffective in arresting material that could fall down the bank. It was for this reason that the conclusion was reached in the previous citation that the bank was dangerous. It was up to the respondent in that instance to promptly correct such unsafe ground conditions.

A violation of 30 C.F.R. § 55.3-3 has not been proven by a preponderance of the evidence and Citation No. 162126 should be vacated.

DOCKET NO. CENT 79-370-M, Citation No. 162125:

On April 23, 1979, the No. 13 shovel was being operated to clean up material at the toe of a bank on the southside of the pit. (Tr. 126). The cab of the shovel was within approximately 20 feet of the bank and the cab was approximately 20 to 25 feet above the ground. There was also a service employee of the respondent on the ground between the shovel and the bank. The bank under which the shovel operator and the service employee were working was approximately 150 to 200 feet high. The catch benches were approximately 50 feet apart and had sloughed and filled with rock and rock material. The shovel operator testified that a rock about half of the size of a fist had come off of the bank, struck the window of his cab and shattered the glass. The operator did finish his loading duties for that day. However, he refused to go back on the shovel at that location the

next day because of the danger posed by the bank above him. He also testified that he had observed rock slides in the area where he had been working previously. (Tr. 128).

The photographs introduced, as well as the testimony of the shovel operator and other witnesses, show that the catch benches had completely sloughed away above most of the area where the No. 3 shovel was working. This allowed practically no means of arresting falling rocks potentially dangerous to any miners working below.

The respondent correctly suggests that engineering expertise is necessary in order to determine whether or not a bank is unstable. However, I also conclude that a miner does not have to be an expert in rock mechanics to determine that his safety is impaired when the window of the cab of his shovel is struck and shattered by a rock from the bank above him. By this decision I am not concluding that in every case where a rock falls from a bank and strikes equipment that the bank is dangerous. However, in this case, the operator had previously observed slides in the area and the MSHA inspector and other witnesses had observed loose and unconsolidated material on the bank 150 to 200 feet above the No. 3 shovel. That material could be set in motion for reasons already stated and catch benches which were partially filled, or had sloughed away altogether, would not be working to restrain the falling material. This condition made the bank dangerous for those miners working near or under it. Citation No. 162125 should be affirmed.

CONCLUSIONS OF LAW:

1. The undersigned Judge has jurisdiction over the parties and the subject matter in these proceedings.

2. The respondent violated 30 C.F.R. § 55.3-5 as alleged in Citation No. 162124, DOCKET No. CENT 79-372-M; and as alleged in Citation No. 162125, DOCKET NO. CENT 79-370-M.

3. The petitioner failed to prove that the respondent violated 30 C.F.R. § 55.3-5 as alleged in Citation No. 162126, DOCKET NO. CENT 79-371-M.

ORDER

Citation No. 162126 and the penalty proposed therefor are hereby vacated. Citation No. 162124 is affirmed and the penalty assessed is $1,000.00. Citation No. 162125 is affirmed and the penalty assessed is $195.00. The respondent is ordered to pay total civil penalties in the sum of $1,195.00 within 30 days from the date of this decision.

Jon D. Boltz
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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JUN 9 1981

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	Civil Penalty Proceeding
	:	Docket No. LAKE 79-215-M
Petitioner	:	A.C. No. 11-01176-05002
v.	:	
	:	Barry Plant No. 8 Dredge and Mill
MISSOURI GRAVEL COMPANY,	:	
Respondent	:	

DECISION

Appearances: Janet M. Graney, Esq., Office of the Solicitor, U.S. Department of Labor, for Petitioner; James A. Burstein, Esq., and Thomas S. Foster, Esq., for Respondent.

Before: Judge William Fauver

This proceeding was brought by the Secretary of Labor under section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., for assessment of civil penalties for an alleged violation of a mandatory safety standard. The case was heard at Springfield, Illinois. Both parties were represented by counsel, who have submitted their proposed findings, conclusions, and briefs following receipt of the transcript.

Having considered the contentions of the parties and the record as a whole, I find that the preponderance of the reliable, probative, and substantial evidence establishes the following:

FINDINGS OF FACT

1. At all pertinent times, Respondent, Missouri Gravel Company, operated a plant known as the Barry Plant No. 8 Dredge and Mill in Pike County, Illinois, which produced sand and gravel for sales in or substantially affecting interstate commerce.

2. Material was transported through the plant by a conveyor belt that was powered by a motor-driven pulley. The belt traveled about 350 feet per minute. The plant operator, Leslie Perrine, controlled the head pulley by a main switch panel at the lower level of the plant.

3. The head pulley was about 30 inches in diameter and consisted of a motor, a feed belt drive and a gear reducer. It was surrounded by a work platform and was about 30 feet above the plant's surface. A 50-foot walkway ran parallel to the belt between the tail pulley on the plant surface and the head pulley and provided the only access to the work platform. A small stairway led to the walkway at the lower end. A "no entry" sign was at the top of the stairs, on a detachable chain that went across the landing. This was put there to keep out unauthorized personnel.

4. A waist-high handrailing extended along the perimeter of the work platform and the outside of the walkway. There was no rail between the conveyor belt and the walkway or between the work platform and the pinch point, where the belt revolves around the head pulley. The walkway and work platform were constructed of metal grating and exposed to the weather.

5. Robert Rohs, the plant superintendent, traveled on the platform about twice a week for a visual inspection of the head pulley while the conveyor was running. It was his practice not to move closer than 20 to 24 inches from the pulley. If he needed to get closer, he would first notify the plant operator to shut down the conveyor. The plant operator went up on the platform about twice a week to grease the head pulley and, as needed, to perform repairs and maintenance. The evidence indicates that the operator went on the platform only when the conveyor was not running. The above two personnel were the only ones authorized to detach the chain and go onto the platform. However, in the absence of the plant superintendent, another employee would be required to inspect the head pulley.

6. On May 24, 1979, Inspector Richard J. Ogden inspected the plant including the conveyor belts, the dredge, mobile equipment and the shop and maintenance areas. He was accompanied by Mr. Rohs and Mr. Perrine.

7. The inspector observed that, at the head pulley, the pinch point between the belt and head pulley was unguarded.

8. On May 24, 1979, Inspector Ogden issued Citation No. 363006 to Respondent, reading in part: "The head pulley of the main belt conveyor was not guarded." The cited condition was abated on June 5, 1979, by installing a perforated screen as a guard.

9. At the time of the inspection, there was no emergency switch at the head pulley and no stop cord on the conveyor. It was the inspector's opinion that, without a railing between the work platform and the pinch point, an employee could be severely injured by becoming caught in the moving machinery parts.

10. He considered such an injury was unlikely because work was seldom performed in the cited area while the belt was operating. He saw no one using the walkway during the inspection.

11. Inspector Ogden also believed that Respondent could not have predicted the alleged violation. The plant had been inspected by MESA and MSHA

inspectors. Before the instant inspection, Harvey Osborne, a MESA inspector, apparently told Respondent that a "no entry" sign and chain would be adequate compliance, but cautioned that, in the future, enforcement policy would probably be changed and the chain and sign would not be allowed. However, after that there were five or six inspections before the instant one and Respondent was not told that the chain and sign were inadequate; also no violation was cited for a missing guard at the head pulley prior to the instant charge.

12. After the instant inspection, Mr. Rohs and Mr. Wolfmeyer, Respondent's general superintendent, notified Mr. Fierke of the citation. Mr. Fierke called the MSHA office and spoke with Mr. Stan Smith, who said that there was an internal memo from MSHA that provided that detachable chains and signs were no longer acceptable. MSHA had not circulated this memo to the owner-operators.

13. On May 24, 1979, Inspector Ogden issued Citation No. 363005 to Respondent, reading in part: "The return idlers on the No. 1 belt conveyor were not guarded." On December 9, 1980, the Secretary moved to dismiss the petition for assessment of civil penalty as to that citation.

DISCUSSION WITH FURTHER FINDINGS OF FACT

Based on the citation issued on May 24, 1979, the Secretary has charged Respondent with a violation of 30 C.F.R. § 56.14-1, which provides: "Mandatory. Gears; sprockets; chains; drive, head, tail, and takeup pulleys; flywheels; couplings; shafts; sawblades; fan inlets; and similar exposed moving machine parts which may be contacted by persons, and which may cause injury to persons, shall be guarded."

The Secretary contends (1) that the chain and sign across the stairs, about 50 feet from the pinch point, was not a guard within the meaning of the cited standard, and (2) that the events in prior inspections do not estop the Secretary from charging Respondent with a violation of the cited standard.

The Secretary proposes a penalty of $26.

The Respondent argues that the detachable chain and sign provided adequate protection against injury from the moving parts of the head pulley because the walkway provided the only access to the head pulley and no employees, except the plant superintendent, were authorized to remove the chain and travel on the platform while the conveyor belt was running. The operator was the only other person authorized to travel on the platform and he traveled it only when the belt was not running. Respondent contends that, when the superintendent traveled on the platform to inspect the head pulley, he would perform only a visual inspection no closer than 20 to 24 inches from the pinch point and was, therefore, in no danger of injury.

Respondent also argues that the Secretary is estopped from bringing this action because of Respondent's good-faith reliance on the representations--

express and implied--of prior inspectors who indicated that use of the chain and sign was adequate compliance.

I find that the detachable chain and "no entry" sign that limited access to Respondent's head pulley at the Barry Plant No. 8 Dredge and Mill were not an adequate guard within the meaning of the cited standard. Two employees were authorized to detach the chain and travel on the work platform. Other employees heeded the warning of the "no entry" sign; however, the two authorized employees were not protected from the dangers of becoming caught in the head pulley and severely injured. Mr. Rohs testified that he has never slipped on the surface of the work platform, even when the surface was wet. However, I find that the possibility of slipping on a wet or icy platform, or of simply stumbling, was not so remote as to excuse Respondent from providing a guard around the moving machine parts.

I also find that earlier statements made by inspectors as to what constitutes a suitable guard are not binding upon the Commission. However, Respondent's good-faith reliance on the express and implied representations of prior inspectors, and MSHA's failure to notify Respondent of a change in enforcement policy before the instant inspection, show that Respondent was not negligent.

CONCLUSIONS OF LAW

1. The undersigned Judge has jurisdiction over the parties and subject matter of the above proceeding.

2. Respondent violated 30 C.F.R. § 56.14-1 by failing to provide a guard around the head pulley at its Barry Plant No. 8 Dredge and Mill, as alleged in Citation No. 363006. Based upon the statutory criteria for assessing a civil penalty for a violation of a mandatory standard, Respondent is assessed a penalty of $1 for this violation.

3. Petitioner's motion to dismiss the petition for assessment of civil penalty as to Citation No. 363005 is GRANTED.

ORDER

WHEREFORE IT IS ORDERED that (1) Respondent shall pay the Secretary of Labor the above-assessed civil penalty, in the amount of $1, within 30 days from the date of this decision and (2) the petition for assessment of civil penalty as to Citation No. 363005 is DISMISSED.

William Fauver

WILLIAM FAUVER, JUDGE

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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JUN 10 1981

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding Docket No. LAKE 81-91 A.O. No. 11-02236-03063V
v.	:	Crown No. 2 Mine
FREEMAN UNITED COAL MINING COMPANY, a division of Material Service Corp., Respondent	:	

DECISION

Appearances: Rafael Alvarez, Esq., U.S. Department of Labor, Office of the Solicitor, Chicago, Illinois, for the Petitioner; Harry M. Coven Esq., Chicago, Illinois, for the Respondent.

Before: Judge Koutras

Statement of the Case

This proceeding concerns a proposal for assessment of civil penalty filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, charging the respondent with one alleged violation of mandatory safety standard 30 CFR 75.200. Respondent filed a timely answer contesting the citation and the matter was scheduled for hearing on May 20, 1981, in Terre Haute, Indiana, along with other cases involving these same parties. However, prior to the commencement of the hearing, the parties advised me that they had agreed to a settlement of the dispute, and they were afforded an opportunity to present their joint settlement proposal on the record for my consideration. The citation, initial assessment, and proposed settlement amount are as follows:

Citation No.	Date	Proposed Assessment	Settlement
1005827	11/10/80	$2,000	$1,500

Discussion

The citation in this case was issued after the inspector found that certain room and entry intersection diagonals and crosscuts were driven

for distances wider than those provided for by the respondent's approved roof control plan. In support of the proposed settlement, petitioner stated that the citation in question was issued approximately one month before respondent's new roof control plan was approved, and that the roof area in question was considered to be in very good condition and was fully roof-bolted. Under the new roof control plan, the area cited as being driven too wide would only have exceeded the plan requirements by approximately 18 inches, and the conditions cited did not result in any accidents or injuries (Tr. 4-9).

In view of the foregoing circumstances, and taking into account all of the statutory civil penalty criteria found in section 110(i) of the Act, the parties were in agreement that the proposed settlement is reasonable and they requested my approval.

Conclusion

After careful review and consideration of the pleadings, arguments, and information of record in support of the proposed settlement, I conclude and find that it is reasonable and in the public interest. Accordingly, pursuant to 29 C.F.R. 2700.30, the settlement is APPROVED.

Order

Respondent IS ORDERED to pay a civil penalty in the amount of $1,500, in satisfaction of the citation in question within thirty (30) days of the date of this decision and order, and upon receipt of payment by the petitioner, this proceeding is DISMISSED.

George A. Koutras
Administrative Law Judge

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JUN 10 1981

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	Complaint of Discharge, Discrimination, or Interference
	:	Docket No. SE 79-25-D
On behalf of:	:	CD 78-95
WAYNE TICE, Complainant	:	Nauvoo Strip Mine
v.	:	
RADIANT COAL COMPANY, INC., Respondent	:	

DECISION

Appearances: Inga Watkins, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Complainant;
Joseph W. McCullough, Radiant Coal Company, Inc., Birmingham, Alabama, for Respondent.

Before: Judge Stewart

The above-captioned case is a complaint of discharge, discrimination, or interference brought pursuant to section 105(c) 1/ of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (hereinafter, the Act).

1/ Section 105(c)(1) of the Act reads in pertinent part as follows:
"No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this Act because such miner, representative of miners or applicant for employment 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 * * *. "

At the hearing, the parties introduced stipulations, admissions, exhibits, 2/ and the testimony of witnesses. The Complainant called as witnesses Wayne Tice; Billy Starnes, United Mine Workers of America (UMWA) executive board member for District 20; Terry Hunter, president of UMWA Local 6855; David Lawson, UMWA safety inspector; and Lawrence Layne, Special Investigator for Coal Mine Safety and Health, U.S. Department of Labor. Joseph McCullough, president of Radiant, testified on behalf of Respondent.

Wayne Tice was employed by Radiant Coal Company (hereinafter Radiant) from October 10, 1977, until June 8, 1978, when he was discharged. The reasons given for his discharge were an incident which occurred on June 6, 1978, when Tice allowed a drill truck to roll while a person was underneath it and other alleged safety infractions for which he had been reprimanded.

Tice, a UMWA member, was idled from December 1977, to April 1978, by a strike. After he returned to work on April 10, 1978, and complained of mechanical problems he encountered while operating the drill, he was not allowed to work as many hours as the other employees.

Radiant is not in operation and is no longer active but it has not gone bankrupt nor has it been dissolved. The last coal mining at the Nauvoo Strip Mine took place in September 1978. The machinery which had been leased was returned to its owners. Radiant currently has no assets. It owes $11,000 to the Internal Revenue Service in withholding taxes. Other major obligations include amounts owed to a fuel distributor and a power company. The total liabilities amount to a minimum of $40,000.

ISSUES

I. Whether Wayne Tice is entitled to relief pursuant to the provisions of section 105(c) of the Act.

II. If Wayne Tice has been discriminated against in violation of section 105, to what relief is he entitled?

In order to establish a prima facie case of a violation of section 105(c), Tice must establish (1) that he engaged in protected activities, and (2) that the adverse action taken against him was motivated in part by the protected activities. Tice bears the ultimate burden of persuasion with regard to these issues. On the other hand, Radiant may affirmatively defend by proving by a preponderance of the evidence that, although part of its motive was unlawful, (1) it was also motivated by the miner's unprotected activities and (2) that it would have taken adverse action against the miner in any event for the unprotected activities alone. Pasula v. Consolidation Coal Company, 2 MSHC

2/ The transcript of this hearing contains references to an exhibit, M-8. This number was included as a designation of one of a group of premarked exhibits which were offered at one time. No exhibit offered actually has the designation M-8.

1001, 1010 (1980) (hereinafter, Pasula); Robinette v. United Castle Coal Company, Docket No. VA 79-141-D, 2 MSHC 1213 (1981).

STIPULATIONS AND ADMISSIONS

That the Federal Mine Safety and Health Review Commission has jurisdiction over the subject matter of this case.

That Wayne Tice, Complainant, worked for Radiant Coal Company at the Nauvoo Strip Mine between October 10th, 1977 and June 7th, 1978.

That during the working shift between April 14th and 21st, 1978, the drill steel of the 650 CP drill had to be placed back into the rack. The drill steel fell out of the rack and injured Wayne Tice's foot.

That Wayne Tice did not receive work between May 5th, 1978 and May 30th, 1978.

That on June 8th, 1978, Wayne Tice was discharged from Radiant Coal Company.

That the 650 CP drill assigned to Wayne Tice while employed at the Nauvoo Strip Mine was repaired on June 13th, 1978. The repairs included, but were not limited to, adjustment to the latches on the steel rack, welding the mast and replacing the pin on the steel rack lock.

That on May 30th of 1978, Radiant Coal Company was aware that Mr. Tice claimed that the drill jumped into reverse while being operated by him.

That on June 5th, 3/ Mr. Tice was sent home and asked to stop working at 3:45 p.m., and that all other miners working at the mine that day continued to work the remainder of the day.

DESCRIPTION AND CONDITION OF DRILL

The CP650 drill, which is truck-mounted, drills a hole 6-7/8 inches in diameter. Separate engines run the drill and the truck. When in operation, the drill stands vertically 28 feet in the air. The steels used for drilling are mounted on the drill mast and are attached to a drilling head. A rack

3/ Although Complainant's witnesses mistakenly referred to the last day on which Tice worked as June 5, 1978, the record as a whole establishes that the last day he worked was June 6, 1978.

alongside the drill carries seven spare steels to be used in drilling. The steels have an outside diameter of 5 inches and an inside diameter of 3 inches. They are 25 feet long and weigh 4,000 pounds. The spare steels are held in place in the rack by brackets and secured there by latches operated by means of rods.

When Tice returned to work after the strike on April 10, 1978, rods were missing on some latches and some of the latches were frozen. As a result, once latched, the latches could not be undone. If left undone, the steels would move around. Steels would come loose when the drill was in a vertical or horizontal position.

The rotation lever on the drill was also defective. When the lever was in the reverse position, a counterclockwise rotation unscrewed the steels from the drill operating head. A pin and part of its linkage were broken. Because of the broken pin, the drill would vibrate itself into reverse. As a result, the steel would be unscrewed from the drill head. When the carrier was to be moved, the mast would be lowered to a horizontal position. The drill motor was left running to maintain the hydraulic pressure. If the rotation lever vibrated into reverse, the steel would detach itself and then fall when the drill mast was again raised to a vertical position.

The rotation lever and a throttle lever had first become defective on December 1, 1977, just prior to the strike. The throttle lever had been repaired during the strike. Part of the problem with the rotation lever--the broken linkage--was also repaired during the strike.

The drill was a used machine which required maintenance on a regular basis. At various times, the throttle was adjusted, parts of the motor were taken off and repaired, bolts were tightened and adjusted, and welding was done on the latches. This welding on the latches was done by Radiant employees. Additional work was done on the drill on June 13, 1978, after Tice had been discharged. Repairs were made to the latches, the pin was replaced in the "steel rack lock" and welding was done to fix the latch on the mast.

During the period from December 4, 1977, until the end of March 1978, Joseph McCullough, Radiant's president, personally ran the drill on occasion. He did not have any problem with the steels dropping out. After adjusting the throttle control, he did not have any problem with it. During this time, the carrier was moved several hundred miles without the drill or the drill steels coming loose. McCullough did not operate the drill from the conclusion of the strike through June 19, 1978.

The Nauvoo Pit was inspected on May 23, 1978. Radiant's daily report for May 23 mentioned an inspection but did not contain any indication that the drill was in operation on those days and did not state whether or not the inspector examined the drill. The drill was useable but was not used in normal mining operations that day because there was no need to drill. Lawrence Layne, the MSHA special investigator who investigated Tice's discrimination complaint,

visited the Nauvoo Strip Mine on June 21, 1978. Mr. Layne had questioned Mr. Henderson, the MSHA inspector who conducted the inspection of the Nauvoo Pit in May 1978. Henderson stated that he did not inspect the drill. Edward McCullough at first believed that the drill had been run for the inspection but later admitted that he had no personal knowledge that the inspector had examined the drill, or if he did, whether it was running at the time.

The record establishes that Wayne Tice complained of conditions which he believed to be a danger to him in the operation of the 650 drill and that he did not make these claims frivolously. Because of a defective rotation lever, the drill would vibrate into reverse when being transported from place to place. The steel would become disengaged from the drill head and fall from the mast. Defects in the latches which held the steels to the mast allowed the steels to come loose. Although Joseph McCullough had no problem operating the drill during the strike, Tice experienced difficulties in the operation of the drill due to the defects after the strike.

SAFETY COMPLAINTS

Tice regularly complained of the condition of the drill to Tommy Johnson from April 10, 1978, through June 6, 1978. He estimated the total number of complaints to Tommy Johnson to have been 12 to 15 and asserted that he did so every time he encountered a problem with the steels. He specifically identified one occasion on which he complained. On April 21, 1978, Tice was slightly injured while attempting to replace a steel which had been allowed to fall from the drill. Tice warned Johnson that someone might be seriously injured if the condition were not corrected.

Tice also complained of the condition to Terry Hunter on a number of occasions and on at least one occasion to Billy Starnes. The first occasion on which Tice complained to Hunter occurred when Hunter went to the Nauvoo Pit during the third week in April, 1978, to have Radiant Coal Company sign the new contract. He observed efforts to replace two steels which had fallen from the drill. He spoke with both Tice and Tommy Johnson. It was Hunter's opinion that Johnson knew of Tice's complaint because Johnson was "standing there" and responded to Johnson's inquiry by saying "We'll try to get it fixed."

Hunter next spoke with Tice about the condition of the drill a week to a week and a half later. He again observed Radiant employees placing steels back into the drill. Chains and chain binders had been used around the steels in an attempt to keep the steels in place. Hunter again spoke with Tommy Johnson who assured him that the necessary welding would be done to repair the drill.

The third occasion on which Tice complained occurred in the last week of May, 1978. Hunter visited the Nauvoo Pit in response to a complaint made by Tice over the telephone. Hunter spoke with Tice at the mine and called Billy Starnes for him. Tice explained his complaint to Starnes and gave Tommy Johnson the phone. Johnson told Starnes that they would fix the machine

before using it again. Hunter testified that the condition of the drill was such that he would have refused to operate it; he would have called for an inspection by MSHA pursuant to section 103(g) of the Act instead.

Radiant introduced four exhibits entitled "Operator's Daily Report" completed by Tice with regard to the CP650 drill. These machine operator's reports were dated April 21, April 26, April 28, and May 30. Although space was provided for a listing of needed mechanical care or attention and Tice had noted problems with the drill in each report, he made no mention of a defective rotation lever or defective securing latches. Mr. McCullough testified that he did not see a complaint regarding the rotation lever or securing latches. Even if no such report were made in writing, the record establishes that verbal complaints were made by Tice.

PROTECTED ACTIVITY

It is established by the record that Tice engaged in activity which gave rise to the protection of section 105(c). In pertinent part, section 105(c) protects a miner who has "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."

A safety complaint is a protected activity within the meaning of section 105(c) if such complaint is made to the operator, the operator's agent or the representative of miners at the mine.

Terry Hunter and Billy Starnes were representatives of miners within the meaning of section 105(c). A "representative of miners" is defined in 30 C.F.R. § 40.1(b)(1) as a person or organization which represents two or more miners at a coal or other mine for the purposes of the Act. Each was charged by virtue of his position with responsibility for representing union members. In his capacity as president of Local 6855, Terry Hunter served as chairman of the union's safety committee. Billy Starnes was a member of the district executive board, more commonly referred to as a field representative.

Section 3(e) of the Act defines an "agent" to be any person charged with responsibility for the operation of all or part of a coal or other mine or the supervision of the miners in a coal or other mine.

Tommy Johnson was Radiant's secretary-treasurer. He had authority to sign, and actually signed, pay checks for the corporation. Tommy Johnson was also Radiant's "designated representative" for the purpose of conducting examinations and signing records of such examinations.

McCullough's position was that he, McCullough, was the only supervisor at the Nauvoo Pit. He asserted that there was no foreman at the mine. He stated that he was "out there frequently (although) not necessarily every day." McCullough spoke with Johnson every day. Johnson conveyed information

to McCullough and advised him. He would relay McCullough's orders to the other Radiant employees.

Notwithstanding the Respondent's assertion that Johnson was not a foreman, it is found that Tommy Johnson was "charged with * * * the supervision of the miners" within the meaning of the Act. Tice received his work orders from Johnson. He was told by Johnson when he was to begin and when he was to cease work. It is also clear that Johnson held himself out to non-employees as being charged with responsibility. When he was questioned about Tice's safety complaints by Terry Hunter and Billy Starnes, Johnson responded to their questions as if he had the authority to do so.

Tommy Johnson was a member of the UMWA during the times pertinent herein. His membership in the union does not preclude a finding that he was the agent of Radiant. He was also found by an arbitrator upon a grievance filed by Wayne Tice not to have been a supervisor within the meaning of the 1978 National Bituminous Coal Wage Agreement. The conclusion of the arbitrator as to Tommy Johnson's status has been thoroughly considered herein. The underlying premise of the arbitrator's opinion was that no individual should be exempted from the coverage of the contract if it was possible to avoid doing so. The arbitrator concluded that Johnson was not a supervisor because he spent much more time in production work than he actually did supervising. The arbitrator's conclusion that Tommy Johnson was not a supervisor will be given little or no weight in this decision. In view of the underlying premise employed by the arbitrator, the contractual and statutory categorizations of an individual as a supervisor turn upon different criteria.

Ultimate control over operations may not have been delegated to Johnson; however, in McCullough's absence, Radiant employees looked to Tommy Johnson for their orders. In conveying orders, he supervised the other miners and, he exercised a substantial measure of control over daily operations. It would be unrealistic to categorize Tommy Johnson as other than an agent of Radiant Coal Company within the meaning of the Act.

Wayne Tice made complaints regarding alleged safety defects to Tommy Johnson, the operator's agent, and to representatives of miners. In so doing, he engaged in activities protected by section 105(c) of the Act.

REDUCTION IN HOURS

During the period from April 10 through June 6, 1978, Tice was permitted to work fewer hours than other Radiant employees after he had made safety complaints. The record establishes that this was adverse action motivated by protected activity.

Tice had been hired on Tommy Johnson's recommendation on October 10, 1977. He was to run the drill and do any work required in the pit. Because Radiant did not yet have a drill, he ran a bulldozer, pumped water, cleaned coal, helped load coal, and did anything in the pit that needed to be done for the first 2 or 3 weeks of his employment.

Because Radiant Coal Company, Inc., was not a member of the Bituminous Coal Operators' Association, it signed an appendix to the National Bituminous Coal Wage Agreement. The contract with the UMWA provided for payment at an hourly rate. The contract also provides that, in mines producing coal for 6 days a week, each individual shall be given a fair and equal opportunity to work on each of those 6 days.

Radiant employees were paid on a salary basis. The salary exceeded what they would have gotten if paid on an hourly basis. Radiant employees were supposed to work when needed and to do whatever work was necessary. Tice was paid on a salary basis when he was hired. After the strike, Tice stated that he wanted to be paid by the hour and only wanted to operate the drill. At that time, Radiant had a quantity of coal stockpiled. The work that Radiant did amounted to selling stockpiled material. It had finished mining of the area for which it had a permit. There was, therefore, no need to use the drill until the permit was obtained for the new area to be mined on April 8, or April 9, 1978. Tice was called back on April 10 and only he ran the drill until June 6, 1978.

After Tice complained to Radiant management and the miners' representatives, the number of hours he was permitted to work were curtailed. Tice believed that this action was taken because of his safety complaints. He worked many partial days and sometimes worked only once per week. Only once did Tice work for more than 7-1/4 hours. Normally, after working a day, he would be told that he would be notified when to return to work. He worked from 7 to 21 hours per week from May 10 through June 7. Tice estimated that the other men generally worked a minimum of 60 hours per week. Because his home was about 1-1/2 miles from the mine on the road to the mine, he could observe the other Radiant employees going to and coming from work. Other employees of Radiant worked as many as 10 to 12 hours per day and on Saturdays and some Sundays.

Tice worked to this limited extent from April 10, 1978, to May 8, 1978. He was laid off from May 8 through May 30 purportedly because a dozer was broken but Radiant had a second dozer. The dozer was used to make a path for the drill and to remove rock after the shot. Leo Stubbe, who was classified as a drill helper, worked at least part of these 3 weeks. The drill was not operated during this period.

Tice first complained about the condition of the drill to Tommy Johnson, and hence to mine management, on his return to work after the strike on April 10, 1978. He continued to complain to management throughout the period in which he was employed by Radiant. Tommy Johnson responded to Tice's complaints negatively. He directed Tice to continue drilling or go home. Tice continued to complain to Johnson and to union officials. On three separate occasions, he voiced his concerns to Terry Hunter. On the last occasion, he also complained to Billy Starnes. Tommy Johnson was aware that Tice complained to the union on these occasions. Johnson was questioned by the union officials involved regarding the alleged safety problem and told the officials that the condition would be corrected.

Tice was the only individual to run the drill during the period of time from April 10, 1978, through June 6, 1978. Respondent asserted that Tice opted to only run the drill and Radiant complied with his wishes. The issue as to whether Tice had requested to operate only the drill had arisen as early as March 27, 1978, a week before Tice returned to work. Respondent introduced an unsigned copy of a letter, dated April 3, 1978, purportedly from Ed Johnson to Terry Hunter. The letter was written for the sole purpose of informing Mr. Hunter that Radiant had been advised on March 27, 1978, by "a pit committeeman" that Tice asserted he wanted to run the drill only and that "he has repeatedly said that he did not want any other." However, in his statement given to Lawrence Layne, the special investigator of Tice's discrimination claim, Terry Hunter stated that both he and Tice had informed Tommy Johnson on or about April 4, 1978, that Tice would do any type of work and that Tice did not make the statement that he wanted to operate only the drill. Tice stated that he "never refused to do anything that there ever was for me to do, when they told me to do it." As noted in the daily reports, Tice occasionally was called upon to perform tasks other than drilling.

McCullough did not speak with Tice with regard to this matter. To support Radiant's contention, he introduced a photocopy of a statement which was purported to be that of Rosemary Stubbe, wife of Leo Stubbe, in which she reported statements made to her by Wayne Tice on March 27, 1978. At the hearing, Tice denied having made the statement to Mrs. Stubbe. Mr. McCullough also testified that a number of people, including Tommy Johnson, James Connell, a policeman and the mayor also told him that Wayne Tice had told them that he wanted to run the drill only and that he would not do other work. Tice specifically denied having made such comments. The nature of the evidence introduced by Respondent is such that Tice's rebuttal testimony is more persuasive. Although Tice stated a preference to run the drill rather than do other work when he returned from the strike, he did not refuse to do other work. Even if that statement had been understood initially as a declaration that he would do no other work, Tice made it clear to mine management that such was not his intent. Tice assertion that he never refused to do any work assigned to him is borne out by frequent references in Respondent's daily reports to his performance of work other than drilling. Moreover, Tice's unrefuted testimony was that he asked "a couple of times" to do other classified work and was told that there was nothing for him to do.

Under these circumstances, the continued negative response to Tice's complaints and the disparate treatment given him after he made the complaints show that Tice's protected activity was motivation for the reduction in the number of hours he was permitted to work during the period from April 10, 1978, through June 6, 1978. The record does not establish that Radiant was motivated by unprotected activities.

REPRIMANDS

After Tice had made safety complaints about the condition of the drill, he was issued a number of reprimands for alleged safety infractions. There was no basis for some of these reprimands. The record establishes that Tice's protected activity in making the safety complaints was the motivation for the adverse action taken by Radiant in issuing the unwarranted reprimands.

Tice was issued a reprimand dated April 14, 1978, for failure to comply with company safety rules. 4/ On April 13, 1978, after a steel worked loose, Tice stopped drilling and attempted to get the steel back in its rack. He was wearing safety goggles and a respirator initially as required by the company safety rules but he removed them because they prevented him from seeing properly. He believed that the goggles and respirator had to be worn only when the drill was in operation. Alan Bradford, a part-time employee who served as Radiant's safety director, saw Tice and told him to put his glasses and respirator back on. Bradford asked, and was told, Tice's reason for having removed the protective equipment. Tice was nevertheless given a reprimand for failing to wear goggles and a respirator while running the drill.

Tice was also given a written reprimand for violation of company safety rules because he used an air hose to clean the dust from his clothing. He had been using the hose to do so since he began working at Radiant and was unaware that he violated company safety rules by doing so. Joseph McCullough testified that Tice had signed and dated a copy of the company's safety rules. Tice testified that he did not remember doing so. The signed copy of the rules was not produced. Although it has not been definitely established that Tice actually signed the rules, he was aware of other provisions in the rules and should have also known of the prohibition against using the air hose to clean his clothing.

In the first of two reprimands dated June 5, 1978, J. R. Newton, a person hired by Radiant to advise on safety matters, alleged on review of the daily reports that Tice was negligently causing the drill steels to fall because "the only way to drop these steels is to reverse the rotation of the drill on pulling the steel out of the bore hole." In the second reprimand, J. W. McCullough alleged that Tice failed to turn a fuel line valve on the drill back on. As a result, the services of a mechanic were required to get the equipment back in operation. Tice testified that he had cut off the fuel line valve to replace a filter but had been sent home by Tommy Johnson before he could replace the filter.

4/ Tice was also reprimanded in November of 1977 by Ed Johnson for sleeping on the job and not performing the work expected of him. Tice explained that he had been observed with his eyes closed but that he had closed them because sand was blown into them while he was operating a dozer in a 10-mph wind.

The record establishes that some of these reprimands issued to Tice were part of a pattern of harrassment against him. Of the four pertinent reprimands issued to Tice (not including the letter issued with regard to the June 6 incident) after his complaints to Radiant, only one appears to have been of substance. Tice admitted having dusted his clothing with an air hose on April 10, 1978, in violation of company safety rules. On the other hand, Tice was cited on April 14, 1978, for not wearing goggles and a respirator at a time when he was not operating the drill. The company safety rule required such use only when drilling. Although Tice was also reprimanded for negligently having caused steels to fall from the drill, it has been established that the drill had faults that had not been corrected. J. R. Newton had no reasonable basis for his conclusion that Tice was at fault. Finally, Tice was also given a reprimand for failing to turn the fuel line back on. In view of the fact that it is uncontradicted, Tice's explanation of the incident is accepted. Because the filter change had not been completed when Johnson directed him to quit for the day, Tice could not have turned the fuel line valve back on. The lack of a sound basis for the issuance of three of the four reprimands supports a finding that they were issued to harass Tice. The assertions of Joseph McCullough to the effect that Radiant management did not have a "program" to get rid of Tice and that the concurrence of Tice's complaints with the issuance of reprimands was coincidental are without foundation. It is clear that the unwarranted reprimands were not motivated by unprotected activity.

DISCHARGE

The record establishes that Tice's discharge on June 8, 1978, after he had made safety complaints about the condition of the drill, was adverse action motivated in part by protected activity.

The letter of termination sent to Tice on June 7, 1978, gave as the cause for the discharge "the continuing violations * * * of the Federal, State and company safety rules and especially the seriousness of the latest violation occurring on June 6, 1978." The accident which occurred on June 6, 1978, was due in part to Tice's negligence. As the arbitrator found, the role that Tice played in causing the accident was serious enough to have warranted suspension. Obviously, the violation of a Federal, state or company safety rule or regulation is not the type of activity afforded the protection of the Act, however, the record establishes disparate treatment of Tice for his part in the June 6 incident and that some of the reprimands issued for the alleged violations were part of a pattern of harassment taken against Tice in part for the safety complaints that he made.

On the last day on which Tice worked for Radiant, Tice and his helper Stubbe encountered problems getting the drill carrier started. Once they succeeded in doing so, they proceeded to the appropriate location and commenced drilling. Tice's helper informed Tommy Johnson that a problem existed starting the carrier. While Tice was still drilling and without Tice's knowledge, Tommy Johnson crawled under the vehicle. Tice was at the rear of the carrier; Tommy Johnson was in front of the carrier. Tice completed the

drilling, pulled the drill out of the ground and lowered the leveling jacks. When he did so, the vehicle began to roll and almost ran Johnson over. The helper had left the vehicle in neutral and the parking brakes were either not set or not functioning. Tice believed that the carrier had a hand-set emergency parking brake but he had never tried the lever to see if the brakes worked. He testified: "I was never in the carrier. That wasn't my job." Stubbe told Tice that the brake would not hold the carrier well enough to be relied upon, but because he had never attempted to set the brake, Tice was not sure if it was defective.

Johnson did not reprimand Tice at the time of the near accident and the day proceeded without further incident until the drill bit wore out. Tice was sent home by Johnson and told that he would be notified in the normal fashion when he was again needed to work. Tice received the letter terminating his employment with Radiant on June 8, 1978.

McCullough testified that he believed the incident which occurred on June 6 was the result of either an intentional act or one demonstrating a serious lack of common sense on the part of Tice. He testified that Tice's claim that his view was obstructed and that he did not observe Tommy Johnson or Stubbe was not plausible because Stubbe stood immediately to the side of the right front door of the truck, 10 to 14 feet from where Tice was standing, and Tommy Johnson was half under the truck. McCullough asserted that Tice should have seen the helper or Johnson.

The daily report for June 6, 1978, contained a statement to the effect that Johnson was halfway under the carrier and Stubbe was squatting beside him when Tice hoisted the jacks, letting the machine roll. McCullough was not present at the scene of the incident and Tice did not see Stubbe, so it has not been established whether Stubbe was standing or squatting. Nevertheless, Tice should have known the two were there. He should have seen Stubbe and Johnson approach the carrier. Testimony had been given at the arbitration hearing on June 19, 1978, to the effect that Stubbe and Tice started out together to get Johnson who was 200 to 300 feet away and that Tice turned around and returned to the drill while Stubbe continued on to get Johnson. Other testimony was given at the arbitration to the effect that Stubbe went to get Johnson without Tice's knowledge. In the present proceeding, the direct testimony of Tice that he did not go with Stubbe when he left to get Johnson is accepted. Nevertheless, Stubbe did go and get Johnson, and Tice should have known of their presence. Although there was negligence on the part of Tice, there is no basis for McCullough's suggestion that the incident was due to an intentional act by Tice.

The accident on June 6 occurred as a result of the concurrent fault of Tice and Johnson. There was negligence on the part of Johnson as well as Tice. Before going under the drill, Johnson should have taken steps to notify Tice and to determine that the drill would not roll. Johnson conceded at the meeting held June 9, 1978, that he had committed a safety infraction in failing to do so. On the other hand, Tice should have known that Johnson and Stubbe were in the vicinity of the carrier. He certainly should not have

lowered the carrier without ascertaining whether he could do so safely; that is, he should have checked to see where his helper was and made certain that the vehicle would not roll when lowered.

Despite the fact that both men were clearly at fault, action was taken against Tice alone. There is no indication that Johnson was given even an oral reprimand. Conceivably, Tice's earlier safety infractions might account for some difference in the severity of the discipline meted out to Tice and Johnson. It does not account for the complete absence of adverse action against Johnson.

In context, the nature of the disparate treatment of Johnson and Tice leads to the conclusion that there were reasons for the discharge other than those expressed. In view of the hostility of management towards Tice which was partially motivated by protected activities, it is found that Tice established a prima facie case that his discharge was motivated in part by his having engaged in protected activities.

The test announced in Pasula provided the employer an affirmative defense if it could be established that, "although part of his motive was unlawful, (1) he was also motivated by the miners' unprotected activities, and (2) that he would have taken adverse action against the miner in any event for the unprotected activities alone." Respondent may have been motivated in part by Tice's unprotected activities. Certainly, Tice was deserving of some form of discipline for the role he played in the June 6th accident. However, Respondent failed to show that it would have taken adverse action against Tice because of his actions on June 6th or for any other unprotected activity.

The ostensible reason for Tice's discharge was his culpability for the accident which occurred on June 6th in light of a number of earlier safety infractions. It has been found, however, that the reprimands for said earlier infractions were for the most part without substance and were part of a pattern of harrassment by mine management against Tice. It has also been found that the record contains no indication that Tommy Johnson was reprimanded or otherwise disciplined for his concurrent, and equally serious, negligent disregard of safety.

As noted in the arbitration opinion of June 30, 1978 (Exh. R-9), Tice's role in the accident may have warranted some disciplinary action. It was established that Tice acted in negligent disregard of mine safety and endangered the life of Tommy Johnson who was also negligent. Even though cause for disciplinary action may have existed, Respondent failed to establish that it would have discharged Tice for his unprotected activities, whether or not he had engaged in protected activity. The record actually supports a conclusion to the contrary. There is no evidence that Respondent made it a practice to reprimand any employee other than Tice for safety infractions. The only instance on the record of a safety infraction by an employee other than Tice was committed by Tommy Johnson when he proceeded under the carrier while it was in operation. Although his infraction was serious, no indication exists that he was disciplined. Discounting the earlier reprimands for

the reasons noted above, there is nothing on the record which would lead to the conclusion that Tice would have been treated differently than Johnson was treated had it not been for the former's participation in protected activity. That is, there is nothing which would indicate that Respondent would have discharged Tice for the safety infraction he committed on June 6, 1978.

Tice successfully established a prima facie case of unlawful discrimination. Respondent failed to counter Complainant's case directly or to establish any affirmative defense. It is found, therefore, that Tice established by a preponderance of the evidence that the discriminatory action taken against him was motivated in part by his participation in activity protected by section 105(c) of the Act, entitling him to the relief afforded by that provision.

RELIEF TO BE AFFORDED

After receiving the letter of discharge dated June 7, 1978, Tice called Starnes and told him of the letter. Tice was in turn informed that this was not the proper termination procedure to be followed by Radiant. He was also informed that the union contract called for a meeting between the employee, his representative, and a company representative within 24 to 48 hours of the firing (hereinafter, 24/48 meeting). Tice set up this meeting in a telephone conversation with either Ed or Tommy Johnson.

The 24/48 meeting was held during working hours in Radiant's Gardendale office on June 9, 1978. Tice, Starnes, Hunter, and Lawson were met by Mr. McCullough at the office. When they had been seated, approximately seven other classified Radiant employees from the pit entered the room. Three members of mine management were present: J. W. McCullough, president; Edward Johnson, vice president; and Tommy Johnson, secretary-treasurer. When an objection was raised regarding the presence of the classified employees, the explanation was given that the employees were there of their own accord.

Various threats were made in the course of the meeting. At one point, Tommy Johnson, holding his knife by the blade, shook it in Tice's face. Tommy Johnson told Tice that "if the union got Tice his job back and there was an accident within 500 feet of Tice, Tice would be held responsible and would answer to Johnson's personal satisfaction."

Tommy Johnson told Hunter that Tice was a safety hazard and was trying to kill people. Johnson said Hunter would be personally responsible if Tice was given his job back. While he spoke to Hunter, Johnson also shook his knife at him. Johnson also told Starnes and Lawson that they would be held responsible.

Some of the classified union employees said that they would not work with Tice whatever the union said because Tice was unsafe. They believed that Tice had deliberately let the drill truck roll when Tommy Johnson was underneath it. At least four or five of the employees had their knives out at the meeting pretending to be cleaning their fingernails. Tommy Johnson and Ed Johnson,

another employee listed as an officer of Radiant, were brothers. Three of the radiant employees were Ed Johnson's sons-in-law.

When Lawson told Tommy Johnson that he had violated the law first by crawling under the drill while it remained in operation, Johnson replied that Tice "should have known [he] was under there." Thereafter, the discussion became heated. During the argument, Tommy Johnson grabbed Tice by the arm and said "come on outside. We'll settle this now. I'll show you exactly what I am talking about." Starnes and Lawson attempted to stop Johnson from doing so and Tice did not go outside.

It was established that Joseph McCullough did not have a knife out at the meeting and that his demeanor was friendly. McCullough testified that he had a feeling that Tice was getting farther away from the other men who worked with him in the pit, that there was a gradual change in the men's attitudes culminating at the meeting on June 9th and that they were not happy working around him.

Tice took the matter to arbitration on June 19, 1978, 10 days after the 24/48 meeting. The arbitrator ruled that Tice could return to work but did not grant him back pay due to Tice's role in the June 6th incident. After the ruling, various threats were directed at Tice by Radiant employees. James Connell made a statement to the effect that Tice would get beaten up if he returned to work and that accidents could be programmed or set up to happen. Tice overheard one of the Johnson's agreeing with this last statement. Tice believed that Mr. McCullough had something in his pocket that looked like a gun at the arbitration meeting. McCullough testified that he has never owned a gun in his life. The record establishes that McCullough did not have a gun at the arbitration. At the conclusion of the hearing, the Johnsons "ganged up around the elevator and tried to get Tice and the union representatives to ride the elevator with them."

After the arbitrator ruled that Tice should be permitted to return to work, Tice told McCullough that he would be at work on the following morning. However, Tice did not report back for work after the arbitration; nor did he phone or write to Radiant to inform them that he would not be there. Tice stated that he did not return to work at Radiant because of the threats made against him and his family.

Despite the apparent willingness of Mr. McCullough to permit Tice to return to work, Tice will not be denied recovery herein because of his failure to do so. Among others, Ed Johnson and Tommy Johnson repeatedly threatened Tice with physical harm if he returned to work. Both Johnsons were officers of the company. It has been established that Tommy Johnson was an agent of Respondent within the meaning of the Act. Therefore, his threatening words and actions are imputed to Respondent. Tice reasonably believed that he or his family would suffer physical harm if he returned to work. Under the circumstances, he is properly compensated even though he did not return to work at the Nauvoo Pit.

Tice was unsuccessful in his subsequent efforts to obtain employment with other local mining operations. Tice stated that he went to every "strip or underground mine in Walker and Jefferson county." In the middle of July, he took employment with a construction company.

At the conclusion of the hearing, Complainant submitted the following calculations of wages and overtime lost by Tice during the period from April 10, 1978, through June 9, 1978, and to wages lost as a result of his idlement from (but not including) June 9, 1978, through July 15, 1978.

(a) $953.24: This amount represents "the difference between the hours actually worked by Complainant, Wayne Tice, (from April 10, 1978, through June 9, 1978) and the hours that were actually worked by all men, regular time, based on 7-1/4 hours being regular time," multiplied by the hourly contract rate then in effect of $8.91.

(b) $596: That amount would represent "the total hours of overtime worked by the Union employees at the mine during the period between April 10th and June 9th. The total hours overtime would be 44.60 hours based on the daily reports. The total amount of overtime hours is multiplied by the overtime rate which was according to the Contract at the mine. The UMW Contract provided for an overtime rate of $13.37 per hour * * *. [T]he total number of overtime hours was divided by eight men, including Mr. Tice, based on the new Contract which provides in Article IV that all overtime available would be equally distributed amongst all men working at the mine. The number of men working at the mine (was calculated from the daily reports)."

(c) $1,614.94: This amount was achieved by multiplying "the total number of days between June 9 and July 15 by the hours per day and the amount of wages * * * provided by the contract ($8.91)."

Counsel for Complainant offered the daily reports 5/ for the period from April 10, 1978, through June 6, 1978, in support of the estimation of damages. Mr. McCullough was offered the opportunity at the hearing to rebut the Complainant's estimation of damages. He stated that he had no statement to make regarding damages and that he would not dispute that the figures given by Complainant reflected "the amount of money he is claiming that is owed him in this discrimination case."

On November 14, 1980, an order was issued setting the date December 19, 1980, for the closing of the record. An opportunity was given therein for the parties to submit further information and/or clarification of their positions regarding compensatory damages. Neither party chose to submit additional information or clarification.

5/ These daily reports were introduced at the hearing with the acquiescence of Mr. McCullough. Petitioner retained possession of the reports until August 10, 1980, presumably to aid in further calculation of damages. The reports were filed at that time.

Complainant's unchallenged claims are accepted herein as the appropriate measure of the damages suffered by Complainant, except to the extent that the claims are directly at odds with evidence of record.

Mr. McCullough testified that Radiant Coal Company, Inc., was not in active operation from June 7, 1978, through June 19, 1978. This testimony was not rebutted by Complainant. The last daily report submitted by Complainant was dated June 6, 1978.

The inactivity of Radiant on June 19, 1978, was the result of the arbitration held that day. Because the shut down of operations on that day was directly related to the discriminatory action taken against Tice, he is properly compensated for loss of that day's wages.

The damages claimed by Complainant are accordingly reduced to account for the 8 working days in the time period between June 7 and June 18 during which no work took place at the Nauvoo Pit. Complainant's caclulation of lost wages during the period from April 10, 1978, through June 9, 1978, is reduced by 3 days' wages ($193.79). The calculation for the period from June 9, 1978, through July 15, 1978, is reduced by 5 days' wages ($324.82).

It is found that Wayne Tice suffered damages in the amount of $759 in lost wages (regular time) from April 10, 1978, through June 9, 1978; $596 in lost wages (overtime) for this same time period; and $1,290 in lost wages (regular time) from June 9, 1978, through July 15, 1978.

Complainant also requested that his employment record be expunged of any unfavorable references to alleged safety violations for which he was not at fault. This request is granted with regard to the three reprimands discussed above which were improperly issued to Tice.

There is no evidence that Radiant Coal Company has continued to harass, threaten or engage in other punitive action against Tice, his family or any other miner.

The Act and the Commission's Rules of Procedure contain statutory criteria that must be considered and require specific steps to be taken in connection with penalty assessments. Under the circumstances of this case, an assessment of a civil penalty would not be appropriate at this time because the procedural requirements have not yet been met. At the end of the discrimination case, MSHA requested leave to present evidence concerning the statutory criteria that must be considered in a penalty case. This request was denied due to unavailability of time as well as the failure to file a proper petition for assessment of civil penalty meeting the procedural requirements of the Act and the Commission's Procedural Rules.

ORDER

It is ORDERED that Respondent, Radiant Coal Company, Inc., pay the sum of $2,645 plus interest in the amount of 8 percent per annum, calculated

from the date of his discharge, to Wayne Tice within 30 days of the date of this decision.

It is further ORDERED that Respondent expunge from Wayne Tice's employment records reference to the reprimands issued (a) on April 10, 1978, for failure to wear goggles and a respirator, (b) on June 5, 1978, for failure to turn a fuel line back on, and (c) on June 5, 1978, for causing steels to fall from the drill.

Forrest E. Stewart
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

333 W. COLFAX AVENUE
DENVER, COLORADO 80204

JUN 10 1981

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. UNION CARBIDE CORPORATION, Respondent.	CIVIL PENALTY PROCEEDING DOCKET NO. WEST 80-401-M MSHA CASE NO. 42-00473-05006 H MINE: Wilson Silverbell

DECISION

APPEARANCES:

James H. Barkley, Esq. and Phyllis K. Caldwell, Esq.
Office of the Solicitor, United States Department of Labor
1585 Federal Building, 1961 Stout Street
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for the Petitioner

John W. Whittlesey, Esq.
Metals Division, Union Carbide Corporation
270 Park Avenue
New York, New York 10017,
for the Respondent

Before: Judge Jon D. Boltz

Pursuant to provisions of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (hereinafter "the Act"), the petitioner seeks an order assessing a civil monetary penalty against respondent for the violation of 30 C.F.R. § 57.6-177 as alleged in Order of Withdrawal No. 336984-1, as modified. The case was heard on April 23, 1981, in Grand Junction, Colorado.

At the conclusion of all of the evidence, the parties agreed to waive the filing of post hearing briefs and agreed to have a decision rendered from the bench after closing arguments. The bench decision follows:

BENCH DECISION

The petitioner alleges a violation of 30 C.F.R. § 57.6-177.[1/] In regard to the violation alleged, the petitioner more specifically states in Order of Withdrawal No. 336984, which was modified as 336984-1, that three misfired holes were observed on November 6, 1979, at 2:30 p.m., in the No. 292 heading, which is a location designated in the respondent's mine. The order also alleges that this condition was readily apparent and also that two employees were roof bolting within approximately 8 feet of the face. The respondent denies the allegation.

The issues in the case are whether or not there was a violation of the cited regulation and, if so, what penalty should be assessed.

I make the following findings:

1. I have jurisdiction over the parties and subject matter of these proceedings.

2. The respondent is a large operator and the proposed penalty, if assessed, would not affect the operator's ability to continue in business.

3. There is no significant history of past violations.

4. The operator demonstrated good faith in attempting to achieve rapid compliance after notification of the alleged violation.

It is undisputed that there were three misfires and that they were not reported to any supervisor until their existance was brought to the attention of the respondent by the MSHA inspector. The shot took place at the face at approximately 4:30 p.m. on November 5, 1979. After the shot, the swingshift came to work and the misfires were not discovered during that 8-hour shift. The misfires were also not discovered on the subsequent shift on November 6, 1979, until approximately 2:30 p.m. It is also undisputed that the MSHA inspector observed a fuse at the face of the number 292 heading. The fuse as described by the inspector was white and approximately 18 inches in length.

1/ 57.6-177 Mandatory. Misfires shall be reported to the proper supervisor. The blast area shall be dangered-off until misfired holes are disposed of. Where explosives other than black powder have been used, misfired holes shall be disposed of as soon as possible by one of the following methods:

(a) Washing the stemming and charge from the borehole with water;
(b) Reattempting to fire the holes if leg wires are exposed; or
(c) Inserting new primers after the stemming has been washed out.

A miner who worked with a mucking machine at the face of the ore body after the shot had taken place and before the MSHA inspector made his inspection testified that he checked the area of the blast but observed no misfires. Additionally, there were other persons who passed by the area, but did not observe any of the misfires. The fuse described by the inspector was easily observed by him even though he was there only for the purpose of checking radiation levels in the mine. The other two misfires were not easily seen since they were near the bottom and were covered up with rock. There is no evidence that the fuse observed by the inspector was not in place from the time the shot took place at approximately 4:30 p.m. on November 5, 1979, until approximately 2:30 p.m. on November 6, 1979, when it was observed by the inspector.

In my view, the cited regulation, which states that misfires shall be reported to the proper supervisor, is violated when the misfire, which in this case was readily observable, is left unattended for at least the length of time that it was in this case. It wasn't until the MSHA inspector brought the condition to the attention of the respondent that remedial action was taken as required by the regulation.

The order of withdrawal is affirmed and I conclude that a penalty should be assessed in the amount of $2,000.00.

ORDER

The foregoing bench decision is hereby affirmed and the respondent is ordered to pay a civil penalty of $2,000.00 within 30 days of the date of this decision.

Jon D. Boltz
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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JUN 11 1981

VIRGINIA POCAHONTAS COMPANY, Contestant	:	Contest of Citation
	:	Docket No. VA 79-136-R
v.	:	
	:	Citation No. 696068
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	August 17, 1979
	:	Virginia Pocahontas No. 2 Mine
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding
	:	Docket No. VA 80-112
	:	Assessment Control No. 44-01009-03035
v.	:	
	:	Virginia Pocahontas No. 2 Mine
VIRGINIA POCAHONTAS COMPANY, Respondent	:	

DECISION

Appearances: Marshall S. Peace, Esq., Lexington, Kentucky, for Virginia Pocahontas Company;
John H. O'Donnell, Esq., Office of the Solicitor, U.S. Department of Labor, for the Secretary of Labor and MSHA;
Joe Clark, Washington, D.C., for United Mine Workers of America.1/

Before: Administrative Law Judge Steffey

Pursuant to an order dated February 29, 1980, as supplemented and amended on March 11, 1980, July 8, 1980, and September 9, 1980, a hearing was held in the above-entitled proceeding on December 2, 1980, in Abingdon, Virginia, under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d).

At the conclusion of the hearing, the parties indicated that they wished to file briefs. It was agreed that initial briefs would be filed by February 2, 1981, and that answering briefs, if any, would be filed by February 16, 1981. Counsel for the Secretary of Labor and the Mine Safety and Health Administration filed his brief on January 29, 1981, UMWA's legal assistant filed her brief on February 4, 1981, and counsel for Virginia Pocahontas Company filed his brief on February 9, 1981. No party elected to file a reply brief.

1/ Although Mr. Clark represented UMWA at the hearing, Ms. Joyce A. Hanula wrote and filed UMWA's brief in this proceeding.

Issues

The issue raised by Virginia Pocahontas Company's Notice of Contest in Docket No. VA 79-136-R is whether the provisions of section 103(f) of the Act require that a representative of the miners, who accompanies an inspector on a shift other than his regularly scheduled shift, be provided with work on that shift after the period of his participation in the inspection has ended.

The issues raised by the Petition for Assessment of Civil Penalty filed in Docket No. VA 80-112 are whether Virginia Pocahontas Company violated section 103(f) of the Act and, if so, what civil penalty should be assessed, based on the six criteria set forth in section 110(i) of the Act.

Findings of Fact

My decision in this proceeding will be based on the findings of fact set forth below. All of the briefs contain either a statement of the facts or proposed findings of fact. I believe that my findings include all the essential facts which are discussed in the parties' briefs.

1. Virginia Pocahontas Company is an affiliate of Island Creek Coal Company. It was stipulated that Virginia Pocahontas is a large company and that payment of civil penalties would not affect its ability to continue in business (Tr. 6-7).

2. It was further stipulated that Virginia Pocahontas demonstrated a good-faith effort to achieve rapid compliance after the citation here involved was issued (Tr. 7).

3. The No. 2 Mine involved in this proceeding was closed on August 9, 1979, and had not been reopened at the time the hearing was held on December 2, 1980 (Tr. 7; 18). The mine was closed because it had become uneconomic to continue producing coal at that location (Tr. 168).

4. The miners at the No. 2 Mine were represented by UMWA's Local 1568 whose president in 1979 was Joe Clark. On March 9, 1978, or about the time that the 1977 Act became effective, Local 1568 had a meeting for the purpose of designating the persons who would walk around with MSHA's inspectors for the purpose of fulfilling the rights given to the miners under section 103(f) of the Act. The members of Local 1568 decided that the safety committeemen who are elected for 2-year terms should also be designated as their representatives under section 103(f) for the purpose of accompanying inspectors making mine inspections (Tr. 10; 14; 22; 38).

5. Joe Clark, in addition to being president of Local 1568, also acted as a safety committeeman, and was employed as an electrician at the No. 2 Mine (Tr. 11; 61). The union can elect as many as five committeemen, but Local 1568 concluded that three committeemen were sufficient for discharging the union's functions at the No. 2 Mine, especially since, even at the largest mines, only three committeemen are generally elected (Tr. 29).

The other two committeemen in April 1979 at the No. 2 Mine were Randy Skeens and Clarence Auville (Tr. 12-13; 61).

6. The position of safety committeeman requires the miner holding that position to be willing to spend time investigating and checking into complaints made by other miners (Tr. 14; 38). The majority of miners do not want to be safety committeemen and it was, in fact, difficult to find three miners at the No. 2 Mine who would accept the responsibilities of being safety committeemen (Tr. 10-11; 46; 96). All three of the safety committeemen (Clark, Skeens, and Auville) at the No. 2 Mine worked on the midnight-to-8 a.m. shift (Tr. 13).

7. The fact that all three safety committeemen were employed on the midnight shift resulted from the fact that most miners who were interested in serving as safety committeemen were young. Most miners prefer to work on the day shift. The result of that preference, according to Joe Clark, is that the oldest and most experienced miners are concentrated among the day-shift employees. The youngest men, therefore, are generally assigned to the midnight shift and their willingness to accept the position of safety committeeman resulted in their being selected as the miners' representatives to fulfill their right under section 103(f) to walk around with MSHA inspectors (Tr. 13; 47-48).

8. MSHA inspectors examine mines on all working shifts, but the majority of inspections occur on the day shift (Tr. 32-34; 111). Since the membership of Local 1568 had decided that safety committeemen should perform the walk-around duty of the miners' representative under section 103(f), and since all three of the safety committeemen worked on the midnight-to-8 a.m. shift, it was necessary for the safety committeemen to report for work on the day shift in order to carry out their responsibilities of walking around with inspectors. The reporting of a midnight shift employee as the miners' representative on the day shift created problems for both the miners' representatives and management. The problems created from the standpoint of the miners' representative are discussed in the next nine findings of fact.

9. The facts which brought about the legal issue raised by Virginia Pocahontas Company's Notice of Contest resulted when Clarence Auville, a miners' representative who normally worked on the midnight shift, reported for work at 7:00 a.m. on Monday, April 23, 1979, for the purpose of accompanying an MSHA inspector during a regular inspection (Tr. 65; 67). Auville asked for work before the inspector began his examination of the mine, but that request was refused (Tr. 68). Auville sat from 7 a.m. to 9 a.m. waiting for the inspector to start his examination of the mine (Tr. 69). Auville then accompanied the inspector from about 9 a.m. to 12:30 p.m. and earned 3-1/2 hours of pay, but the assistant mine foreman, Roger Hale, refused to give Auville any work to earn the remaining 4-1/2 hours required for completing an 8-hour shift (Tr. 69). Auville testified that neither Hale nor Ward, the mine superintendent, explained to him that he would not be paid at all except for the actual time he accompanied the inspector (Tr. 85).

10. Auville was told by the inspector on Monday, April 23, that the inspector would not be making an inspection on Tuesday, April 24 (Tr. 86-87). Therefore, Auville reported for work at midnight on Monday, April 23, to work his regular shift which began at 12:01 a.m. on Tuesday, April 24 (Tr. 70). Auville thereafter reported for work on the day shift on both Wednesday and Thursday, April 25 and April 26, 1979. He walked around with the inspector for 4-1/2 hours on each of those days and was given no work to complete an 8-hour shift on either day (Tr. 71-73). Auville had to report for work on Thursday, April 26, at midnight in order to obtain any pay for his fifth day for the week of April 23 through April 27 because the inspector worked for 16 consecutive hours and made two consecutive inspections covering two 8-hour shifts, namely the 7 a.m.-to-3 p.m. shift and the 4 p.m.-to-midnight shifts on April 26, 1979. A miners' representative other than Auville accompanied the inspector during his inspection conducted on the 4-to-12 shift on Thursday (Tr. 87; 111).

11. The inspector's failure to work on April 24 and the inspector's working of two consecutive shifts on April 26 caused Auville's work pattern for the week of April 23 through April 27, 1979, to be as follows:

	DAYS WORKED				
SHIFT WORKED	April 23 Monday	April 24 Tuesday	April 25 Wednesday	April 26 Thursday	April 27 Friday
12:01 a.m. to 8:00 a.m.		Regular 8 hours			Regular 8 hours
7:00 a.m. to 3:00 p.m.	103(f) 3-1/2 hrs.		103(f) 4-1/2 hrs.	103(f) 4-1/2 hrs.	
4:00 p.m. to 12:00 midnight					

The tabulation above shows that Auville had to go home about 1 or 2 p.m. on Monday, April 23, and return to work by midnight of the same day, or 10 hours later, in order to earn 8 hours of pay for Tuesday, April 24. Auville had to do the same thing on Thursday, April 26, that is, leave the mine at 1 or 2 p.m. and return at midnight, in order to earn 8 hours of pay for Friday because of the inspector's decision to work two consecutive shifts on Thursday (Tr. 86-87; 111).

12. Auville testified that he did not actually realize that management would pay him only for the time spent with the inspector on April 23, April 25, and April 26 until he received his pay check for that period and found that he had not been paid for 11-1/2 hours which was the difference between the time he had accompanied the inspector on those 3 days and the time he would have earned had he worked three 8-hour shifts (Tr. 85-86). After Auville realized that he would not receive full pay for 8 hours of work when he accompanied an inspector, he refused thereafter to accept the assignment of accompanying inspectors (Tr. 90).

13. Upon receiving the check paying him for less than 8 hours of work on 3 days, Auville went to an MSHA office and explained what had happened. MSHA considered his complaint to be a request for an inspection under section 103(g) of the Act. The result was that an inspector named Jessie D. Harrison investigated the matter and on August 17, 1979, wrote Citation No. 696068 which alleged that Virginia Pocahontas Company had violated section 103(f) of the Act by failing to pay Clarence Auville for the 11-1/2 hours that he did not spend in accompanying an inspector on the 3 different days described in Finding No. 11 above (Tr. 76; 94; Exhs. 1, 2, and 3).

14. When a miners' respresentative who normally works on the midnight shift gets paid for accompanying an inspector for only 4 or 5 hours on the day shift, the miners' representative either has to be given supplemental working opportunities to earn the remaining 3 or 4 hours of pay on the day shift, or he must report at the mine at the commencement of the midnight shift and work long enough to earn the difference between the amount he gets paid for actually accompanying the inspector and the amount he would have earned if he had not reported on the day shift for the purpose of accompanying an inspector.

15. If management declines to provide supplemental work on the day shift for the miners' representative to earn a full 8 hours of pay, the miners' representative is placed in a quandary. Since the miners' representative has to report for work at 7 a.m. for the day shift, he cannot come in late and work the last 4 hours of the preceding shift without incurring an overlap of 1 hour between the time the midnight shift ends at 8 a.m. and the time the day shift begins at 7 a.m. (Tr. 12). Of course, the miners' representative can avoid the 1-hour overlap by reporting to the mine for work at the beginning of the midnight shift. He is generally finished with his walk-around duties on the day shift at 1 or 2 p.m. because the inspectors normally work approximately 4 hours after starting an inspection about 9 a.m. (Tr. 69-72). About 2 p.m., therefore, the miners' representative has a choice of either (1) remaining at the mine for 10 hours (from 2 p.m. to midnight) or (2) driving back to his home, sleeping for a few hours, and driving back to the mine at midnight to finish out the amount of time he needs for earning the 8 hours of pay which he was not given an opportunity to earn during the day shift. Regardless of which method he elects to utilize for reporting to the midnight shift to earn the remaining 4 hours of pay, he will find himself obligated to report for work at 7 a.m. as the miners' representative on the next day shift which starts only 3 hours after he has just finished earning 8 hours of pay at 4 a.m. for the time he couldn't work on the preceding day shift.

16. Calvin Ward, who was superintendent of the No. 2 Mine in April 1979, testified that a miners' representative who normally works on the midnight shift, but who is asked to report for work on the day shift to walk around with an inspector and knows that he will be allowed to earn pay only for the time he actually spends with an inspector, can earn the time he knows he will lose on the day shift by reporting to work at 4 a.m. on his regular midnight shift and working for 4 hours on the midnight shift to compensate for the fact

that he cannot earn a full 8 hours of pay on the day shift when he walks around with an inspector (Tr. 123; 161). The superintendent believed that coming in at 4 a.m. on the midnight shift would be a desirable way for the miners' representative to earn his full 8 hours each day because he could work the last part of the midnight shift and the first part of the day shift(Tr. 162). The difficulty with Ward's suggestion is that Exhibit A in this proceeding shows that the miners' representative is paid for from 2 to 4-1/2 hours for walking around with an inspector. In order for a miners' representative to implement Ward's suggestion, he would have to know in advance the number of hours which a prospective inspection on the day shift will take. Even the inspector could hardly give an exact estimate of the amount of time he will use to make a given inspection. Moreover, the superintendent's suggestion does not take into account the overlap of 1 hour of the midnight shift and the day shift caused by the fact that the midnight shift ends at 8 a.m. and the day shift begins at 7 a.m. (Finding No. 15, supra).

17. The two miners' representatives, Clarence Auville and Joe Clark, who experienced a loss of pay as a result of walking around with an inspector because of management's refusal to assign them with work for the balance of the day shift not used in walking around with an inspector, stated that they believed that it would be hazardous for them to make up the lost time on their regular midnight shifts on a weekly basis because they would necessarily become fatigued by failure to get a proper amount of sleep with the result that they could become inattentive at a given time and cause an injury to themselves or to other miners. (Tr. 14; 16; 50-51; 75; 99). Finding Nos. 11, 15, and 16 above show that Auville and Clark correctly evaluated the fatigue factor. In addition to the fatigue factor, there are economic considerations. When a miner reports for work to earn 8 hours of pay on a single shift, he makes one round trip from his home to the mine. When a miner has to report to work twice to earn 8 hours of pay, he has to burn twice as much gas and spend twice as much time in his car commuting to and from work as he would ordinarily incur if he were able to earn 8 hours of pay on a single shift.

18. The mine superintendent testified that management is exposed to problems when an employee who normally works on the midnight shift reports for work on the day shift to walk around with an inspector. The superintendent explained that maintenance work is done on the midnight shift and that it is important that equipment be repaired, that rock dust be applied, etc., while the equipment is idle so that the mine will be in proper condition for active mining to go forward on the day shift. The superintendent said that it is difficult to find employees who are willing to work on the midnight shift. Therefore, when a miners' representative is taken from the midnight-shift to accompany an inspector, it is more difficult to find a replacement for him than it would be to find a replacement for a miners' representative who is taken from the day shift to accompany an inspector (Tr. 125-126; 130-131). Auville performed general inside work and vulcanized belts, among other things. Belt vulcanizing is a job requiring two people. When one member of the vulcanizing team is unavailable, the other member cannot vulcanize belts by himself (Tr. 79). The superintendent stated that that when work is given to a midnight-shift miners' representative on the day-shift to make up a full 8 hours of pay, it is difficult to find work

for him to do which will not become the subject of an objection by a day-shift employee who would rather do the work assigned to the midnight-shift employee than do the work the day-shift employee normally performs(Tr. 129; 160; 171).

19. The superintendent said that another problem created by the union's assignment of a midnight-shift employee to walk around on the day shift is that excessive time is lost in traveling in and out of the mine. The superintendent stated that the miners' representative reporting on the day shift at 7 a.m. must first travel to a given job in the mine so that he will have work to do until the inspector is ready to commence his inspection. When the inspector is ready to go underground, the miners' representative has to travel back out of the mine to be ready to accompany the inspector underground at about 8:30 or 9 a.m. The miners' representative then has to travel out of the mine with the inspector when the inspector has finished making his examination. After the inspector has completed writing citations or other work on the surface, the miners' representative again has to travel back underground to the place where he has been assigned work to complete the 8 hours of pay which he wants to earn (Tr. 129-130).

20. Joe Clark and Clarence Auville both doubted the validity of the superintendent's claims. Clark pointed out that the same number of trips in and out of the mine are required for a miners' representative to do his regular work and walk around with the inspector regardless of whether the miners' representative is taken from the day shift or the midnight shift (Tr. 177). Clark also disputed the superintendent's claim that management would find it any harder to replace a person who is assigned to accompany an inspector from a day shift than it is to find a replacement for a midnight-shift employee who accompanies an inspector on the day shift. Clark says his disagreement with the superintendent comes from the fact that one of management's greatest complaints about absenteeism is that when a miner, such as a shuttle-car operator, fails to report for work on a production shift, his absence requires the assignment of a "stranger" to take his place. The production crew is unused to the way the replacement shuttle car operator performs his work and that is somewhat disruptive to the smooth operation of the entire crew. Clark contended that when a midnight-shift employee reports for work on the day shift, the regular day-shift crew is not disrupted by having to be without one of its regular members while that person becomes a miners' representative to walk around with an inspector on a given day (Tr. 179-180). Auville claimed that his vulcanizing work was done on a sporadic basis so that no problems were created if vulcanizing was not done for several shifts. Moreover, Auville claimed that much of the vulcanizing work was done by employees of a firm which had contracted to do vulcanizing work for Virginia Pocahontas Company (Tr. 88-89).

21. Management claims that the union did not keep it informed as to the identity of the person who had been designated to accompany inspectors each day (Tr. 127; 132; 157; 165; 172). The result was that management sometimes found a haulage vehicle abandoned by its regular operator while that operator fulfilled his right to walk around with an inspector (Tr. 155; 165). The union claims that it began to advise management in advance as to the identity

of the person who had been assigned to be the miners' representative for the purpose of accompanying inspectors (Tr. 15-16). The union's witness, Joe Clark, claims that he thought he had an agreement with management under which the three safety committeemen, who normally worked on the midnight shift, would report to work on the day shift for a week at a time for the purpose of walking around with the inspectors. Clark said he thought management understood that the three safety committeemen, (Clark, Skeens, and Auville) would rotate on a weekly basis so that each of them would work for 1 week on the day shift. According to Clark, the union agreed to provide mine management on Friday with the name of the miners' representative who would accompany the inspector during the coming week (Tr. 31; 52).

22. Ward, the mine superintendent, claims that the union did not keep him regularly informed as to the identity of the miners' representative and that considerable confusion resulted from the union's failure to keep him regularly informed (Tr. 132). Ward introduced as Exhibit A a one-page list of data concerning regular inspections made at the No. 2 Mine for the period extending from April 3, 1979, through May 3, 1979. That list shows that regular inspections may not have occurred every day and that a miners' representative was not always available to accompany the inspector. Moreover, Exhibit A shows that during a single month, five different miners were used as miners' representatives to accompany inspectors who were making regular inspections (Tr. 133). Only one of the five different miners' representatives was a duly elected safety committeeman and he was Clarence Auville who was the miners' representative on April 23, 25, and 26, 1979, as previously described in Finding Nos. 9, 10; and 11, supra.

23. The other four miners' representatives during the period from April 3 to May 3 were Mary Griffith, Lynn Agent, Michael Lester, and Roger Elswick. Three of the aforementioned miners' representatives (Griffith, Agent, and Lester) normally worked on the day shift and one, Roger Elswick, normally worked on the night shift, or from 4 p.m. to midnight (Tr. 136; 144; 146; 175). Clark explained the union's failure to use the three aforementioned safety committeemen (Clark, Skeens, and Auville) during the period from April 3 to May 3 by stating that he and Skeens were unavailable at that time and that the other four people (Griffith, Agent, Lester, and Elswick) were appointed as members of the safety committee on a temporary basis so that they could substitute for the three safety committeemen who would normally have been expected to walk around with inspectors during that period (Tr. 25-27; 37; 55-57; 175-176). Clark explained that he has authority, as the union's president, to appoint substitute miners to fill the positions of members of the safety committee. If the temporary appointments last for more than 90 days, the union is required to hold a special meeting for the purpose of electing new members of the safety committee (Tr. 11; 29-30).

24. Clark also stated that miners' representatives are expected to be knowledgeable miners with ability to do such things as check air velocity and make methane readings so that they will know whether inspectors are correctly inspecting for such conditions. He stated that some miners who asked to be given the opportunity to walk around with inspectors could not

be allowed to continue acting as the miners' representative because they were not experienced enough to take an active part in mine examinations (Tr. 188-189).

25. There is no requirement in either the Act or the Bituminous Coal Wage Agreement that the miners' representatives for purposes of accompanying inspectors under section 103(f) of the Act must be members of the mine safety committee. Section 103(f) and the Wage Agreement do not prohibit a member of the safety committee from being a miners' representative for the purpose of walking around with inspectors (Tr. 60).

Consideration of Parties' Arguments

Discussion of Specific Issue Raised by Notice of Contest

All the issues raised in this case depend upon an interpretation of the requirements of Section 103(f) of the Act which provides as follows:

> (f) Subject to regulations issued by the Secretary, a representative of the operator and a representative authorized by his miners shall be given an opportunity to accompany the Secretary or his authorized representative during the physical inspection of any coal or other mine made pursuant to the provisions of subsection (a), for the purpose of aiding such inspection and to participate in the pre- or post-inspection conferences held at the mine. Where there is no authorized miner representative, the Secretary or his authorized representative shall consult with a reasonable number of miners concerning matters of health and safety in such mine. Such representative of miners who is also an employee of the operator shall suffer no loss of pay during the period of his participation in the inspection made under this subsection. To the extent that the Secretary or authorized representative of the Secretary determines that more than one representative from each party would further aid the inspection, he can permit each party to have an equal number of such additional representatives. However, only one such representative of miners who is an employee of the operator shall be entitled to suffer no loss of pay during the period of such participation under the provisions of this subsection. Compliance with this subsection shall not be a jurisdictional prerequisite to the enforcement of any provision of this Act.

The issue raised by contestant's Notice of Contest is whether it is obligated under section 103(f) to compensate a miners' representative for 8 hours of pay on the day shift when such representative accompanies an inspector on the day shift instead of on the midnight shift to which such representative is normally assigned. Contestant argues in its brief (pp. 5-6) that it did not violate section 103(f) when it failed to provide Clarence Auville, a miner assigned to the midnight shift, with a total of 11-1/2 hours of supplemental work on three different day shifts to make up for the fact that Auville only spent from 3-1/2 to 4-1/2 hours each day in accompanying an inspector on the day shift.

Contestant argues that the foregoing contention is clearly supported by the language of section 103(f) which provides that "Such representative of miners who is also an employee of the operator shall suffer no loss of pay during the period of his partipation in the inspection made under this subsection" [Emphasis supplied by contestant.]. Contestant argues that section 103(f) only requires that the miners' representative suffer no loss of pay for the actual time he spends accompanying the inspector. Contestant correctly states that Auville was paid for the time he actually spent with the inspector and claims that Auville, if he had chosen to do so, could have worked on his regular midnight shift to make up the difference in pay between an 8-hour shift and the amount of pay he earned while accompanying the inspector.

Contestant's brief (p. 6) stresses, in support of the foregoing argument, that it is important to recognize what section 103(f) does not provide. It is contended that the section (1) does not provide that the miners' representative be an elected member of the union safety committee, (2) does not provide that the miners' representative must receive special training to be qualified to accompany an inspector, (3) does not provide that mine management alter work schedules to accommodate a particular miners' representative who is chosen by the miners, and (4) does not provide that management provide work to a miners' representative on any shift other than his or her regularly scheduled shift.

UMWA's brief (p. 4) and the Secretary's brief (p. 15) emphasize different words in the same portion of section 103(f) cited by contestant to reach a conclusion exactly opposite from the position taken by contestant. Specifically, they read the pertinent language as follows: "Such representative of miners who is also an employee of the operator shall suffer no loss of pay during the period of his participation in the inspection made under this subsection" [Emphasis supplied by UMWA and Secretary.]. UMWA argues that it is apparent from the language of section 103(f) that the right to compensation is coextensive with the right to accompany the inspector. The Secretary points out that Congress could have written that a miners' representative would be paid for the time he or she accompanied an inspector, but instead Congress chose a much broader provision than that and stated that the miners' representative would suffer no loss of pay.

As a matter of fact, section 103(f) is silent even as to contestant's concession that management is obligated to furnish work to the miner "on any shift other than his regularly scheduled shift" (Contestant's brief, p. 6). If the pertinent language from section 103(f) is interpreted by placing emphasis on the words "during the period of his participation in the inspection made under this subsection", then that language is just as restrictive against paying the miners' representative who accompanies an inspector on the representative's regular shift as it is against paying the miners' representative who accompanies an inspector on a shift other than the representative's regular shift. It is only common sense that Congress would not have provided that the miners' representative "shall suffer no loss of pay during the period of his participation" if it had expected that the miner would not be allowed to work for the remainder of a shift so as to be paid for the balance of a given 8-hour shift not spent in walking around with an inspector.

Contestant's willingness to concede that it is obligated under section 103(f) to provide work for a miners' representative who accompanies an inspector on his or her regular shift, despite the fact that there is no express provision to that effect in section 103(f), indicates that section 103(f) should be interpreted to require contestant to provide the miners' representative with work when he or she accompanies an inspector on a shift other than his or her regular shift, unless there are compelling reasons showing that providing such work is an unreasonable requirement. Therefore, contrary to the arguments in contestant's brief (pp. 4-5) to the effect that much of the testimony in this case was irrelevant, it becomes necessary to examine the safety ramifications resulting from contestant's refusal to provide the miners' representative with work on the day shift when such representative normally works on the midnight shift.

The Miners' Representative and Membership in Union Safety Committee

While it is true, as contestant argues (brief, p. 6), that the miners' representative who accompanies an inspector is not required by the provisions of section 103(f) to be a member of the union safety committee, the evidence in this proceeding shows that the miners at contestant's mine decided that the members of the union's safety committee should be the miners' representatives for accompanying inspectors (Finding Nos. 4 and 5, supra). While it is also true, as contestant argues (brief, p. 6), that mine management is not required by the provisions of section 103(f) to alter work schedules to accommodate use of a particular miners' representative who is chosen by the miners, that was the necessary result at contestant's No. 2 Mine when it turned out that the members of the union safety committee were all miners regularly assigned to work the midnight shift at contestant's No. 2 Mine (Finding No. 6, supra). The fact that the union's safety committee members were all midnight-shift employees made it necessary for the three safety committee persons, for a week at a time on a rotation basis, to report for work on the day shift in order to accompany inspectors (Finding No. 7, supra).

Adverse Effects on Miners' Representatives of Contestant's Refusal To Provide Work on Day Shift

As indicated above, while section 103(f) does not specifically require management to alter work schedules so that midnight-shift employees may earn payment for 8 hours of work on the day shift, when such midnight-shift employees accompany inspectors on the day shift, management's refusal to alter work schedules so that those midnight-shift employees could earn compensation for 8 hours on the day shift subjected them to many adverse conditions and circumstances (Finding No. 8, supra).

Since contestant's No. 2 mine releases methane, it was a mine which was subject to daily inspections, but the miners' representative could not be certain that a given inspector would necessarily make an inspection each day. Therefore, the miners' representative frequently had to transfer back to his regular midnight shift and work from midnight to 8 a.m. after having accompanied an inspector on the day shift. That occurrence subjected the midnight-shift employee to a 10-hour interval between leaving the mine on the day shift and having to report back to the mine for the beginning of the next midnight shift (Finding Nos. 9, 10 and 11, supra).

The lack of sleep and the extra commuting time and expense associated with switching back and forth between day and midnight shifts during a given week is inherent in a midnight-shift employee's willingness to act as the miners' representative for purposes of accompanying inspectors under section 103(f) and the miners' representative in this proceeding did not object to having to switch between midnight and day shifts when he knew that the inspector would not be at the mine on a given day shift (Finding No. 11, supra).

The miners' representatives in this proceeding did take the position, however, that it would be unsafe for them to be required to work on the midnight shift and the day shift during each 24-hour period in order for them to make up on the midnight shift for the balance of time they did not spend accompanying inspectors on the day shift. The evidence showed that contestant's suggestion, that the miners' representative could work from 4 a.m. on the midnight shift to 8 a.m. so as to make up for failure to earn a full 8 hours of pay from accompanying inspectors on the day shift, was impracticable and unworkable for at least two reasons. There is an overlap of 1 hour between the time the midnight shift ends at 8 a.m. and the time the day shift begins at 7 a.m. Therefore, any miner who tried to work the end of the midnight shift and the beginning of the day shift would automatically lose an hour from one or the other of the shifts. If one assumes that the overlap could be worked out by some sort of agreement with management, one is then confronted with the fact that the midnight-shift employee would have to know in advance how much time a given inspection on the subsequent day shift would take in order to work the proper number of hours on the midnight shift to balance exactly with the number of hours the midnight-shift employee would actually spend in accompanying the inspector on the day shift (Finding Nos. 14, 15 and 16, supra).

The preceding paragraph explains why a midnight-shift employee reporting to work on the day shift to accompany an inspector cannot work on the midnight shift immediately preceding the day shift in order to make up the balance of time that his period of accompanying an inspector fails to equal a full 8-hour shift. There is one other way, of course, that the midnight-shift employee could make up for management's refusal to assign him or her work to do on the day shift before and after the inspection. That other alternative would be that the midnight-shift employee would report to work at 12:01 a.m. on the day after he or she has accompanied an inspector on the day shift. He or she would then know that on Monday, for example, he or she had spent 4 hours accompanying the inspector. By coming in at 12:01 a.m. on Tuesday, he or she could work an additional 4 hours in order to receive pay for 8 hours of work. That procedure would work for 4 days (Tuesday through Friday), but since no work is normally done on Saturday, the midnight shift employee would have to come in on Sunday night and go to work at 12:01 a.m. on Monday in order to earn the balance of the 8-hour day shift he or she was not permitted to earn on the preceding Friday. The greatest disadvantage from coming in at midnight each night to make up for work not awarded on the day shift is that the miners' representative would become completely exhausted by the end of the week because he would have to come to work twice each day to earn one day of pay and he would each day have only about 3 hours between the completion of the balance of an 8-hour shift on the midnight shift before he would be obligated to report for work at 7 a.m. on the day shift in order to be ready to accompany an inspector on the day shift.

When the above-described adverse effects of working both the midnight and day shifts on a regular basis are considered, along with the adverse economic effects of having to report to work twice each day to earn pay for a single 8-hour shift (Finding No. 17, supra), it is obvious that contestant failed to provide the miners' representative with a viable alternative for suffering no loss of pay when contestant advised the miners' representative that he could make up the balance of an 8-hour shift by working on the midnight shift long enough to earn the balance in pay which the miners' representative was not permitted to earn on the day shift.

The Miners' Representative and Special Training

Although contestant's brief (p. 6) argues that section 103(f) does not provide that the miners' representative must receive special training, I believe that contestant is in error in making that allegation. Section 103(f) states that a miners' representative is to be given an opportunity to accompany an inspector "for the purpose of aiding such inspection and to participate in pre- or post-inspection conferences held at the mine." A miners' representative who has no knowledge of proper health and safety practices would not be an "aid" to an inspector and would not be able to "participate in pre- or post-inspection conferences". The evidence in this proceeding shows that the union made an effort to select knowledgeable persons to act as miners' representatives, that the union wanted the miners' representatives to take an active role in the inspections, and that the union refused to permit some miners to continue acting as miners' representatives if their lack of experience rendered them ineffective in that role (Finding No. 24, supra).

The unavailability of some of the union safety committee persons made it necessary for the union to appoint miners as temporary members of the safety committee. Such temporary appointments may have resulted in use of some miners' representatives who lacked the training and experience which the union preferred, but was unable to require in every instance (Finding Nos. 22 and 23, supra).

Adverse Effects to Management Attributable to Use of Midnight-Shift Employees as Miners' Representatives on Day Shift

Since it was contestant's position that the equities of providing work for midnight-shift employees acting as miners' representatives on the day shift has nothing to do with interpreting section 103(f), contestant's brief does not discuss the fact that contestant's evidence showed its dislike for having to provide work on the day shift on a regular basis. Contestant's superintendent testified that he did not mind providing work for a midnight-shift employee on the day shift when a midnight-shift employee acted as a miners' representative on the day shift on an infrequent basis, but he said that he could not tolerate that practice on a consistent basis (Tr. 128; 139; 158).

The superintendent described several problems created for management by the use of a midnight-shift employee as a miners' representative on the day shift. The superintendent said that it was difficult to find employees to work on the midnight shift and that when a midnight-shift employee reported for work on the day shift, the maintenance work did not get done while the

mine was idle because of the difficulty of finding an employee to replace the midnight-shift employee who was absent because of his reporting as miners' representative on the day shift (Finding No. 18, supra). The superintendent also objected to the number of trips which the miners' representative had to make in and out of the mine to do work until the inspector was ready to commence his inspection and to return to work after the inspector had finished his inspection (Finding No. 19, supra).

The union's witnesses, however, cast doubt on the validity of management's claims by contending that there was no difference in the number of trips in and out of the mine which had to be made by the miners' representative to do normal mining work and accompany the inspector regardless of whether he was performing the assignment of a miners' representative on his regular shift or on a shift other than his regular shift. The union also claimed that management was in a better position to use a midnight-shift employee on the day shift as miners' representative than it was to use a member of a production crew because of management's dislike for having to replace a regular crew member with a "stranger" who did not normally work with a given production crew (Finding No. 20, supra).

Failure To Provide Work on the Day Shift for a Midnight-Shift Employee Who Reports for Work on the Day Shift as a Miners' Representative for Accompanying Inspectors under Section 103(f) Is a Violation of Section 103(f)

My review above of the provisions of section 103(f) leads me to conclude that contestant is obligated to provide any employee who accompanies an inspector on any shift with work on that shift so that the miners' representative may earn a full 8 hours of pay. As I have already noted, section 103(f) does not specifically require management to provide work for the balance of any shift if the miners' representative on any shift does not spend 8 hours accompanying an inspector. Contestant concedes that the provision in section 103(f) providing that the miners' representative "* * * shall suffer no loss of pay during the period of his participation in the inspection made under this subsection" should be interpreted to mean that the miners' representative must be given work to make up an 8-hour shift if the miners' representative normally works on the same shift on which the miners' representative accompanies the inspector. I conclude that contestant is required by that same provision in section 103(f) to compensate with 8 hours of pay any miners' representative who accompanies an inspector on a shift other than the shift to which he or she is normally assigned, regardless of whether the miners' representative accompanies the inspector on a shift other than his or her regular shift.

Management might be able to insist that a day-shift employee act as the miners' representative on the day shift for carrying out the purposes of section 103(f) if the union did not provide, as it has in this case, a reasonable basis for selecting a miners' representative from the midnight shift for the purpose of accompanying inspectors who are conducting inspections on the day shift. In this case, the union has given cogent reasons for being unable to provide satisfactory miners' representatives from any

shift other than the midnight shift. I have already summarized those reasons above and they need not be repeated here (Finding Nos. 4, 5, 6, and 7, supra). I have also shown from the evidence that it is unreasonable for management to expect the midnight-shift employee who acts as miners' representative on the day shift to make up the balance of an 8-hour shift not earned on the day shift while accompanying an inspector by having that miners' representative report to his regular midnight shift (Finding Nos. 14, 15, 16, and 17, supra).

Pages 15 to 22 of the brief filed by counsel for the Secretary and MSHA contains an excellent discussion of the legislative history and of the Commission's decision in The Helen Mining Co., 1 FMSHRC 1796 (1979). MSHA's brief emphasizes the fact that management should not be permitted to participate directly or indirectly in the selection by the union of the miners' representative for carrying out the provisions of section 103(f). MSHA's brief notes that contestant's refusal to provide Auville, the miners' representative in this case, with work on the day shift had a chilling effect on the willingness of miners to accept the responsibility of accompanying inspectors. In fact, Auville testified that he refused to act as miners' representative at all after management refused to pay him for a full 8-hour shift on the 3 days which he spent in accompanying inspectors on the day shift (Finding No. 12, supra).

In the Helen Mining case, supra, the Commission held that management is obligated to assign a miners' representative to accompany each inspector, or group of inspectors, who come on the same day to conduct regular inspections in different parts of the same mine. The Commission's decision was affirmed by the Ninth Circuit Court of Appeals on May 18, 1981, in Magma Copper Co. v. Secretary of Labor, ___F.2d ___(No. 79-7687). On page 2157 of the advance copy of the decision, the court stated:

> The legislative history and the statute itself could not be clearer, however, as to the purposes of the legislation in general and of the walkaround pay provision in particular. As Senator Javits explained, the walkaround pay provision seeks to assure that miners will exercise their right to participate in inspections. The right of participation, in turn, attempts to increase miners' awareness of safety problems as well as to provide inspectors with a guide familiar with working conditions in the mine. * * * The importance of miner participation in safety is repeatedly emphasized throughout the legislative history of the Act--"If our national mine safety and health program is to be truly effective, miners will have to play an active part in the enforcement of the Act." See S.Rep. No. 95-181, supra, at 35, reprinted in Legislative History at 623.
>
> The walkaround pay provisions and the participation right are both aimed at the protection of the health and safety of miners--the single overriding purpose of the legislation. * * *

It would be self-defeating for section 103(f) to be interpreted in the manner sought by contestant. If contestant were permitted to refuse work on the day shift to every midnight-shift employee who reports to the day-shift as miners' representative, that miners' representative would have to

earn a full 8 hours of pay by reporting to the midnight shift to earn the remainder of his pay. As has been shown above, the need to report to two shifts each day to earn 8 hours of pay is unfair, uneconomic, exhausting, and would inevitably result in an increase of hazards at the mine because of the liklihood of mistakes being made by an exhausted employee who is required to work on two shifts each day to earn pay for one shift.

In its decision in Magma Copper, the Commission, at page 1950, warned against reliance on the "literal language of section 103(f)" when applying its provisions to the rights granted to the miners by that section. Also in Consolidation Coal Co., 3 FMSHRC 617 (1981), the Commission stated (at p. 618).

> * * * We are not prepared to restrict the rights afforded by that section [103(f)] absent a clear indication in the statutory language or legislative history of an intent to do so, or absent an appropriate limitation imposed by Secretarial regulation.

The courts have uniformly held that the Act is a remedial statute which should be liberally construed (Freeman Coal Mining Co. v. Interior Board of Mine Operations Appeals, 504 F.2d 741 (7th Cir. 1974); Ray Marshall v. Wade Kilgore, 478 F.Supp 4 (E.D. Tenn. 1979)).

For the reasons hereinbefore given, I find that contestant violated section 103(f) by refusing to give a miners' representative work on the day shift as alleged in Citation No. 696068 dated August 17, 1979. The order accompanying this decision will affirm Citation No. 696068.

Civil Penalty Issues

Since I have found in the preceding portion of this decision that contestant violated section 103(f) of the Act, it is necessary that I assess a civil penalty pursuant to the six assessment criteria given in section 110(i) of the Act, as sought by the Petition for Assessment of Civil Penalty filed in Docket No. VA 80-112. As to the criteria of the size of respondent's business and whether the payment of civil penalties will cause Virginia Pocahontas Company to discontinue in business, it was stipulated that Virginia Pocahontas is a large company and that payment of penalties will not cause it to discontinue in business (Finding No. 1, supra). As to a third criterion of whether Virginia Pocahontas demonstrated a good-faith effort to achieve compliance, it was stipulated that the company had made a good-faith effort to achieve compliance by paying the miners' representative for the 11-1/2 hours of pay he lost by accompanying an inspector after Citation No. 696068 was written (Finding No. 2, supra). It has been my practice neither to increase nor decrease a penalty otherwise assessable under the other five criteria when it has been shown that the company achieves compliance in a normal manner. The penalty is increased under that criterion if the company fails to make a good-faith effort to achieve compliance, and the penalty is decreased if the company shows an extraordinary effort to achieve compliance by taking such action, for example, as stopping production to correct a violation alleged in a citation, as opposed to correcting a violation alleged

in an order of withdrawal which requires production to be stopped in any event. Since there was normal good-faith compliance in this instance, the penalty will not be affected by application of the criterion of good-faith compliance.

Exhibit No. 4 in this proceeding is a computer printout showing Virginia Pocahontas Company's history of previous violations. It has been my practice to increase a penalty under that criterion if the history of previous violations shows a violation of the section of the Act or regulations which is before me in a given case. Exhibit 4 shows that respondent has paid a civil penalty for one prior violation of section 103(f) of the Act. Therefore, any penalty assessed in this proceeding should be increased by $25 under the criterion of the company's history of previous violations.

The remaining criteria to be considered under section 110(i) of the Act are negligence and gravity. Only the brief filed by counsel for MSHA discusses the civil penalty issues raised by the Petition for Assessment of Civil Penalty filed in Docket No. VA 80-112. MSHA's brief (p. 23) argues that the facts in this case support a finding of gross negligence. It is said that a finding of gross negligence is warranted because the company's violation was intentional and that its intentional violation did not create a really meritorious issue of first impression which should be subject to only a nominal penalty as I held in my decision issued in Jewell Ridge Coal Corp., 2 FMSHRC 2578 (1980).

The record shows that there is considerable merit to the arguments made by MSHA's counsel. The superintendent of the No. 2 Mine at first willingly gave work on the day shift to midnight-shift employees who reported as miners' representatives on the day shift to accompany inspectors who were making examinations on the day shift (Tr. 158). The superintendent justified his change in that policy by stating that the midnight-shift employees had decided to make a job for themselves on the day shift and that he was getting complaints from the day-shift senior employees about having midnight-shift employees working regularly on the day shift (Tr. 159-160). Although the superintendent claims that he made it clear to the union that he was going to change his policy before he actually changed the policy (Tr. 139), the union's president insisted in rebuttal testimony that management had specifically agreed to allow the three safety committeemen on the midnight shift to be the miners' representatives on the day shift on a regular basis and that no advance warning of a change in policy was ever given (Tr. 175).

The superintendent himself agreed that he did not tell Auville of the change in policy until Auville reported for work on the day shift on April 23 and was told by the superintendent that he would not be given work on the day shift (Tr. 161). The mine superintendent showed considerable pride in having stopped the midnight-shift employees from reporting as miners' representative on the day shift when he was asked the following questions at transcript page 163:

Q Now, after you declined to let Mr. Auville make up his time, did everybody after that get paid?

In other words, after it happened to Mr. Auville, did you work out some kind of an arrangement whereby this matter of their not getting paid was taken care of?

A I can't recall anybody after Mr. Auville doing it. And if somebody felt, you know, that he would want to do it occasionally, I didn't complain about it.

Q So, apparently you got the practice of switching over on a regular basis stopped after April 26th [the last day Auville worked on the day shift and was not paid for it]?

A Yes, sir, I sure did.

It should be borne in mind that the union's president regularly worked on the midnight shift. Therefore, the union's president left the mine each morning at 8 a.m. Since the working hours for the day shift began at 7 a.m., there is every reason to believe that the superintendent was at the mine also by 8 a.m. each day. There is no apparent reason why the superintendent could not have worked out an agreement with the union's president to the effect that he was going to raise an issue of interpretation of section 103(f) under which he would refuse to pay a midnight-shift employee who reported as the miners' representative on the day shift.

If an advance agreement had been worked out, the midnight-shift employee could have been warned in advance of the change in policy and he could have worked as miners' representative on the day shift for 1 day and could, under protest, have worked on the next midnight shift to make up any time he was not permitted to earn on the day shift. If management had followed the aforementioned procedure, it could have raised the issue of first impression before me in this proceeding and still could have prevented the raising of the issue from having any severe effects on the miners' willingness to act as miners' representatives under section 103(f) while the legal issue was being adjudicated.

The failure of the superintendent to explain to Auville in advance, that there would be a change in providing work on the day shift for the midnight-shift employee who was reporting to work on the day shift as miners' representative, unnecessarily caused Auville to work for 3 days without getting paid when Auville's working only 1 day would have been sufficient for the purpose of raising an issue of first impression. The evidence, therefore, supports a conclusion that Virginia Pocahontas Company was unnecessarily harsh in its abrupt change of policy insofar as its treatment of Auville was concerned. In such circumstances, I agree with MSHA's counsel that there was a high degree of negligence associated with Virginia Pocahontas' violation of section 103(f).

MSHA's brief (p. 24) contends that the violation of section 103(f) was serious because Auville refused to act as the miners' representative after failing to get paid for accompanying the inspector on three different inspections. MSHA also points out that other miners were discouraged from being miners' representatives for the purpose of accompanying inspectors.

The record supports MSHA's arguments. When Auville was asked how the miners got paid for walking around with inspectors after management refused to pay him, he stated (at Tr. 90):

A I don't know how that went.

Q Did you do any more walking around?

A No, not after they refused to pay me.

Q You didn't do any more?

A No.

As to the union's ability to obtain persons to walk around with inspectors after management's refusal to pay Auville, the union's president testified as follows (Tr. 177-178):

Q Well, how did you arrange this after April 26, then, so that nobody failed to get his full eight-hour pay?

A I would have to think about that a minute. Since it's been brought up, it might have changed a little bit.
You couldn't get anybody. People would say, "If I'm not going to get paid, I'm not going to do it."
So, I would have to look around and find somebody. And most of the time, I couldn't, you know, you wouldn't find somebody who was qualified to do it. We just had to do the best we could.

Q So, what you did was find somebody on the same shift--

A Tried to, yes, sir.

Q --so you didn't have this transfer problem?

A Yes.

Q And you're not aware of any instance where the person who did the walking around either did come in early and work the previous shift or came back in to finish up on another shift?

A No, sir. At this point, I would say it didn't happen at VP-2 [that is, Virginia Pocahontas Company's No. 2 Mine].

Inasmuch as Virginia Pocahontas Company's management made no effort to avoid a serious impact on the miners' willingness to participate in inspections under section 103(f) while raising an issue of first impression under that section, I find that the violation was serious.

MSHA's brief (p. 24) recommends that a penalty of $500 be assessed for the instant violation of section 103(f) in view of the fact that the company violated the section three different times at the expense of the miners'

representative even though one violation would have been sufficient to raise the issue brought in this proceeding. I find that MSHA's recommended penalty of $500 is supported by the record and should be imposed. As I indicated above, an amount of $25 should be added to any penalty otherwise assessable under the criterion of history of previous violations because respondent has violated section 103(f) on one prior occasion.

WHEREFORE, it is ordered:

(A) The Notice of Contest filed in Docket No. VA 79-136-R is denied and Citation No. 696068 dated August 17, 1979, is affirmed.

(B) Within 30 days from the date of this decision, Virginia Pocahontas Company shall pay a civil penalty of $525.00 for the violation of section 103(f) alleged in Citation No. 696068 dated August 17, 1979.

Richard C. Steffey

Richard C. Steffey
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

JUN 11 1981

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), ON BEHALF OF OTIS G. LAWSON, Complainant	:	Complaint of Discrimination
	:	Docket No. VA 81-44-D
	:	Deep Mine No. 7
v.	:	
PARAMONT MINING CORP., Respondent	:	

DECISION AND ORDER

The Secretary moves to withdraw the captioned discrimination complaint on the ground that the complaining miner has entered into a settlement agreement with respondent. This agreement includes a release of the discrimination claim and a consent to dismissal of the captioned complaint.

Based on an independent evaluation and de novo review of the circumstances, I conclude the settlement agreement is in accord with the purposes and policy of the Act.

Accordingly, it is ORDERED that the same be, and hereby is, APPROVED. It is FURTHER ORDERED that respondent pay Mr. Lawson the amount of the settlement agreed upon, $3,500, forthwith and that subject to payment the captioned matter be DISMISSED.

Joseph B. Kennedy
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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JUN 11 1981

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of ROBERT E. STAFFORD, Complainant, v. WESTERN NUCLEAR, INC., Respondent.	COMPLAINT OF DISCHARGE, DISCRIMINATION OR INTERFERENCE DOCKET NO. WEST 80-289-DM MINE: Sherwood Project

DECISION AND ORDER

Appearances:

Mildred L. Wheeler, Esq.
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San Francisco, California 94102
For the Petitioner

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Parson, Behle & Latimer
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For The Respondent

Before: Judge Jon D. Boltz

STATEMENT OF THE THE CASE

On April 9, 1980, the Secretary of Labor, Mine Safety and Health Administration [hereinafter "the Secretary"], brought this action on behalf of Robert E. Stafford [hereinafter "Stafford"] pursuant to section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1978) [hereinafter cited as "the Act" or "the 1977 Act"]. In his complaint, the Secretary alleges that Respondent, Western Nuclear, Inc. [hereinafter Western Nuclear], unlawfully discriminated against Stafford by discharging him from his employment at Western Nuclear's Sherwood Project on September 19, 1979, in violation of the Act. The Secretary alleges that Stafford was engaged in activities relating to

health and safety protected by section 105(c) of the Act at the time of his discharge.[1/] The Secretary's complaint seeks relief on behalf of Stafford in the form of a finding of discrimination, an order directing Western Nuclear to reinstate Stafford to his former position with back pay plus interest from the time of his discharge, an order directing Western Nuclear to clear the employment record of Stafford of any unfavorable references relating to his discharge, and that an appropriate civil penalty be assessed against Western Nuclear for its alleged unlawful interference with Stafford's exercise of rights protected by section 105(c) of the Act. Western Nuclear, on May 5, 1980, filed an answer to the complaint containing a general denial of all allegations and a prayer for relief seeking recovery of costs, expenses, and attorneys fees. Pursuant to notice, the matter came on for hearing on October 8, 1980, in Spokane, Washington. Submission of post hearing briefs was completed on January 7, 1981.

FINDINGS OF FACT

1. Western Nuclear is operator of an open pit uranium mine and mill processing plant in Wellpinit, Washington, known as the Sherwood Project.

2. Robert E. Stafford was employed by Western Nuclear at its Sherwood Project from July 31, 1978, to September 19, 1979, the date of his discharge.

3. Stafford was assigned to the General Mill Maintenance Department as a general laborer where he performed various jobs, such as sandblasting, carpentry, painting and industrial coatings. For this work, he received $6.81 per hour.

1/ Section 105(c)(1) of the 1977 Act, 30 U.S.C. § 815 (c)(1), reads in pertinent part as follows:

"No person shall discharge or in any other manner discriminate against ... or otherwise interfere with the exercise of the statutory rights of any miner ... because such miner ... has filed or made a complaint under or relating to this Act, including a complaint notifying the operator or the operator's agent, or the representative of the miners ... of an alleged danger or safety or health violation ..., or because such miner ... is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101 or because such miner ... has instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding, or because of the exercise by such miner ... on behalf of himself or others of any statutory right afforded by this Act."

4. Stafford had a well-known reputation at the Sherwood Project for an interest in state unemployment compensation and in the circumstances under which one could qualify for such assistance.

5. Stafford also had a reputation for disliking the task of sandblasting. Co-workers at the Sherwood Project generally shared that opinion.

6. On September 17, 1979, Stafford was part of a work crew assigned the task of sandblasting a mill yellowcake precipitation tank in order for repairs to be made to its inside surface.

7. The work crew consisted of Stafford, Audrey Grant, Richard Miller, Allan Rebillard and Maurice Clark. Clark was lead man for the group. He was responsible for all procedural activities of the crew, although his presence at the job site was only periodic and transitory. In Clark's absence, Rebillard, as senior man, was considered by the crew to be in charge and they followed his orders. Due to his seniority and experience, Rebillard was instructed to insure safety.

8. The mill yellowcake precipitation tank is a metal vessel with a height of approximately 22 feet and a diameter of approximately 28 feet. The uppermost section of the tank is cylindrical in form. At the eight-foot mark it tapers off into a cone, down a 45 degree slope, to a small drain port at the apex. The inverted cone has a vertical height of 14 feet.

In the center of the tank is a vertical shaft which rotates a network of suspended long and short rakes. The staggered rakes agitate the yellowcake solution by passing within 1/8 inches of the internal surface of the cone. The four rakes, two long and two short, are maintained in position by a series of rake arm supports. The supports, made of 3 1/2 inch pipe, extend at right angles from the shaft out to the internal surface of the cone, where they are attached to the rake blades.

9. The procedures for sandblasting the inside of the tank were developed by Clark, as lead man, and Edward Jeffries, Mill Repair Foreman and supervisor of the work crew. The task was to be performed by crew members from a mobile, cage-like apparatus, known as a spider. The spider, supported by a cable, could be positioned at varying intervals around the tank's circumference and then operated along the tank's vertical axis. The crew members would thereby have access to all internal surfaces from the relative security provided by the spider. Procedures would be taken to insure worker safety from radiation hazards. Safety lines would be worn and tended.

10. On the morning of September 17, 1979, preparatory work for sandblasting the yellowcake precipitation tank was completed. Equipment was issued and assembled. The interior of the tank was washed down.

11. That same morning, Stafford held a conversation with Sherwood Project co-workers Craig Smith and George Hill. Segments of that conversation dealt with Stafford's opinion that sandblasting the yellowcake

precipitation tank was unsafe, that Stafford was considering quitting and that getting unemployment compensation was a concern.

12. Later that day, a bantam crane was used to position the spider apparatus inside the tank. The spider, however, was missing certain wheels used to balance the assembly. As a result, it operated in a clumsy fashion. Lead man Clark ordered that the spider be used in its present condition. Sandblasting operations commenced, with crew members taking shifts sandblasting from the spider. Wheels for the spider were subsequently located, but their installation did not perfect the stability of the mechanism. At some point in the day, an electrical short occurred in the spider assembly and it had to be taken from the tank and removed from service. The sandblasting operation was temporarily halted as a result.

13. In light of the spider malfunction, the crew looked for an alternate method to accomplish its task. Those members present, Stafford, Grant, Miller and Rebillard, considered a solution proposed by Rebillard. The suggested alternative was to use the spider as an inert basket to gain access to the tank, leave the spider, climb down onto the rake assemblies and sandblast off of them. Safety lines would be worn and tended. The crew members agreed to the proposal.

14. Rebillard then informed Clark of the crew member's concern for their safety while working from the spider and of the plan to gain access to the tank. At least some sandblasting was accomplished that day by the crew utilizing this method.

15. That afternoon, Stafford again spoke with Smith, who had examined the precipitation tank while in the area on another job. Safety, or lack thereof, was the subject of the conversation.

16. On September 18, 1979, the crew looked for a means of gaining access to those areas of the tank that had not, as yet, been sandblasted. Those members of the crew present, Stafford, Grant, Miller and Rebillard, talked the situation over and, at Rebillard's suggestion, agreed that crew members would ride the rake assemblies to get into a position to sandblast.

17. Crew members proceeded with the revised plan to complete their assigned task. Stafford, Grant and Miller took shifts of approximately 30 minutes duration, sandblasting from the rake assemblies. Each junior crew member was in the yellowcake precipitation tank three or four times per day. Rebillard positioned the crew member where sandblasting was required by activating the rake drive mechanism, transporting the individual to the desired location. Stafford was so transported.

18. Prior to crew members entering the tank, Rebillard had locked out the motor control switch for the rake drive, preventing its activation. He had also tagged the switch, stating that maintenance work was in progress. Rebillard would remove the lock just prior to activating the drive mechanism and, once the crew member was in position, would stop the rake drive and immediately replace the lock. This procedure deviated from Western Nuclear's lock and tag procedure then in effect, which required that the lock and tag should only be removed when the work was completed and the equipment was clear of personnel. The procedure employed by Rebillard likewise deviated from the electricity standard for metal and non-metallic open pit mines contained in 30 C.F.R. § 55.12-16.[2]/

19. That same day, Stafford held a conversation with co-workers Smith and Hill. Quitting for a safety concern and unemployment compensation were subjects of discussion.

20. At approximately 8:00 a.m. on September 19, 1979, Bobby Ridgeway then Radiation Safety Officer with Western Nuclear's Sherwood Project, encountered Stafford near the yellowcake precipitation tank while on a walk around inspection. During that encounter, Stafford communicated to Ridgeway his apprehension of falling off of the rake assemblies.

21. Later that morning, Stafford held several conversations with Smith and/or Hill. Quitting, being fired, refusing to work, sandblasting, yellowcake hazards, riding the rake assemblies and unemployment compensation were topics of discussion in varying degrees.

22. On September 19, 1979, the crew as a whole began the day in the general maintenance shop. Stafford, Grant, Miller and Rebillard were present. Stafford asked Miller if he would take his shifts sandblasting. Miller said that he would, but Rebillard said that to do so would be illegal as crew members should each be in the protective hood assembly for only twenty minutes at a time. At this time, Clark walked in, asked what was going on and was told of Stafford's request. Clark instructed the crew to get things ready for work on the tank, which they did. Rebillard asked Stafford to go down into the tank first. Stafford refused, stating that he felt it was unsafe. Rebillard informed Stafford that he could either go in the tank first or go see Jeffries. Stafford chose to go see Jeffries.

23. At approximately 8:45 a.m., on September 19, 1979, Stafford went to Jeffries' office and told him that he wasn't going into the tank. Jeffries asked Claude Cox, Mine Safety Supervisor, and Ridgeway, as radiation supervisor, to check the yellowcake precipitation tank for air quality and the equipment being used for safety.

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

24. After being asked by Jeffries, Cox and Ridgeway physically examined the yellowcake precipitation tank. Cox observed the area and examined the equipment for safety. He asked Stafford, Miller and Rebillard, in the presence of Jeffries, what was unsafe. The only reply he received was from Stafford, who stated that he didn't want to get on and ride the rakes. Stafford was interrupted by Jeffries, who forcefully stated, "You were told not to ride the rakes, we don't want you to ride those rakes." Cox, at this point, was unaware that people had been riding the rake assemblies. Ridgeway reported to Jeffries at the scene that the crew members were sufficiently protected from radiation hazards.

25. Jeffries then wrote out a discharge slip for Stafford based upon his refusal to perform his assigned duties.

ISSUES

By discharging him from his employment at the Sherwood Project for failure to perform his assigned duties, did Western Nuclear unlawfully discriminate against Robert E. Stafford in violation of section 105(c)(1) of the Federal Mine Safety and Health Act of 1977?

DISCUSSION

In its decision of Secretary of Labor on behalf of David Pusula v. Consolidation Coal Company, 2 FMSHRC 2786 (October 14, 1980), the Federal Mine Safety and Health Review Commission recognized the right of a miner to refuse to perform work and set forth the test to be used to determine whether or not the discharge of a miner for such refusal was discriminatory. The Commission held as follows:

> "We hold that the complainant has established a prima facie case of a violation of section 105(c)(1) if a preponderance of the evidence proves (1) that he engaged in a protected activity, and (2) that the adverse action was motivated in any part by the protected activity. On these issues, the complainant must bear the ultimate burden of persuasion. The employer may affirmatively defend, however, by proving by a preponderance of all the evidence that, although part of his motive was unlawful, (1) he was also motivated by the miner's unprotected activities, and (2) that he would have taken adverse action against the miner in any event for the unprotected activities alone. On these issues, the employer must bear the ultimate burden of persuasion. It is not sufficient for the employer to show that the miner deserved to have been fired for engaging in the unprotected activity; if the unprotected conduct did not originally concern the employer enough to have resulted in the same adverse action, we will not consider it. The employer must show that he did in

fact consider the employee deserving of discipline for engaging in the unprotected activity alone and that he would have disciplined him in any event." Id. at 2799-2800. (Emphasis in original.)

A. Protected Activity

The Review Commission further refined the right of a miner to refuse to perform work in its decision of Secretary of Labor, Mine Safety and Health Administration (MSHA), ex rel. Thomas Robinette v. United Castle Coal Company, 3 FMSHRC 803 (April 3, 1981). Robinette resolved the question of whether good faith and reasonableness are components of protected activity. The Commission adopted a rule that required a miner to have a good faith, reasonable belief in a hazardous condition for the work refusal to be considered protected activity. Id. at 812.

"Good faith belief simply means [an] honest belief that a hazard exists." Id. at 810. The Commission determined that "[g]ood faith also implies an accompanying rule requiring validation of reasonable belief." Id. at 811. Validation could be achieved by "... a simple requirement that the miner's honest perception be a reasonable one under the circumstances." Id. at 812. (Emphasis in original.)

With regard to these issues, the evidence establishes that Stafford had a preoccupation with state unemployment compensation and in the circumstances under which one could qualify for such assistance. He also was known to have a distinct dislike for the task of sandblasting. Craig Smith testified in minute detail as to various conversations he had with Stafford in the three days preceding Stafford's discharge. In the majority of these conversations, issues of safety, termination of employment and unemployment compensation were subjects of discussion. Smith had no deep regard for Stafford and was of the opinion that Stafford was trying to draw a paycheck for no work. On cross examination by counsel for the Secretary, it was revealed that Smith's recollection of other events from his past association with Stafford could not be recalled in similar exacting detail. On the other hand, Stafford either denied or could not remember conversations with Smith having taken place. After examining the testimony and demeanor of the witnesses, I find that conversations between Stafford and Smith did occur and that issues of safety, termination of employment and unemployment compensation were subjects of discussion. However, the testimony as to what was specifically said by whom and when it occurred is not entirely credible. I further find that it has been established by a preponderance of the evidence that Stafford held an honest belief that a hazard existed in riding the rake assemblies and that such belief was a reasonable one, involving substantial risk of injury through physical mutilation. There was clearly a violation of a mandatory safety standard and management was informed by Stafford of this situation, as is more fully set forth below. Under these circumstances, Stafford's refusal to perform work was a valid exercise of a statutory right afforded him by the 1977 Act and, as such, is entitled to protection.

As to other issues of protected activity raised in this case, section 105(c)(1) of the Act sets forth certain enumerated types of employee activity protected by a prohibition against discrimination or interference, 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 ... on behalf of himself or others of any statutory right afforded by this Act."

The evidence establishes that early on September 19, 1979, that Bobby Ridgeway, then Radiation Safety Officer with Western Nuclear's Sherwood Project, encountered Stafford near the yellowcake precipitation tank while on a walk around inspection. Ridgeway testified that at their meeting he greeted Stafford saying, "Good morning, Bob," and that Stafford responded with, "Well, I guess I am going to be fired." Ridgeway testified that he was concerned and wanted to know why. Stafford stated that he refused to go in the tank. When asked why, Stafford mentioned both his and his mother's concern about his exposure to high radiation. Ridgeway then proceeded to explain the relative safety of the assignment to Stafford. On cross examination by counsel for the Secretary, it was brought out that in an interview with Robert Chelini, the MSHA inspector investigating Stafford's discharge, that Ridgeway had stated that Stafford had told him that he was afraid he would fall [off of the rakes]. Ridgeway identified his voice on a tape recording of that interview. He testified that he could not remember Stafford telling him about his fear of falling, but that he could have told him. I find that Stafford did communicate his apprehension to Ridgeway and, under the broad language of section 105(c)(1), that the communication amounted to a colorable complaint of an alleged danger or safety violation.

The evidence further establishes that on September 19, 1979, after first refusing to enter the yellowcake precipitation tank, that Stafford went to see Edward Jeffries, the Mill Repair Foreman. Stafford told him that he wasn't going into the tank. Jeffries testified that he asked Stafford why and was told that Stafford had talked with his mother and that she had advised him against entering the tank because of the high radiation. Stafford testified that he complained to Jeffries about how he didn't believe that he should be riding the rakes in the manner the crew was employing because he thought that it was dangerous. Jeffries denied that Stafford mentioned this apprehension. According to Jeffries, the first indication that he received that employees were riding the rake assemblies came from Mr. Chelini, the MSHA special investigator. I find that Stafford did mention these concerns to Jeffries, providing the grounds for those concerns. These communications constituted a safety complaint and, thus, were protected activity under the Act.

To satisfy himself, Jeffries asked Claude Cox, Mine Safety Supervisor, and Ridgeway, as radiation supervisor, to check the yellowcake precipitation tank for air quality and the equipment being used for safety. Cox and Ridgeway examined the tank and Ridgeway reported to Jeffries at the scene that the crew members were adequately protected from radiation hazards. Cox testified, that while on the scene and in the presence of Jeffries, he asked Stafford, Miller and Rebillard what was unsafe. The only reply he received was from Stafford, who stated that he didn't want to get on and ride the rakes. Stafford was interrupted by Jeffries who forcefully stated, "You were told not to ride the rakes; we don't want you to ride

those rakes." Cox testified that at this point he was unaware that people had in fact been riding the rake assemblies. I find that Stafford's remarks were safety complaints and entitled to protection under the Act.

B. Motivation of Discharge

It is abundantly clear from the record that Stafford was discharged from his employment at Western Nuclear's Sherwood Project for his refusal to perform his assigned duties. That refusal has previously been determined to have been a valid exercise of Stafford's statutory rights and, hence, protected activity. Although Stafford's complaints may have played some part in his discharge, his refusal to work was ostensibly the cause. I find it has been established by a preponderance of the evidence that Stafford's discharge was motivated by this protected activity.

Although the record indicates that Stafford may have been less than a desirable employee, Western Nuclear has failed to show that it did in fact consider him deserving of discipline for engaging in any unprotected activity alone and that it would have disciplined him in any event.

CONCLUSIONS OF LAW

1. Respondent Western Nuclear is a mine subject to the provisions of the 1977 Act.

2. At all times relevant to this Decision, Complainant Robert E. Stafford was a miner as defined in the Act and entitled to the protection afforded by the Act.

3. The presiding Administrative Law Judge has jurisdiction over the parties and the subject matter in these proceedings.

4. On September 19, 1979, Complainant Stafford engaged in the following activities, which are protected by section 105(c)(1) of the Act: complaints to Radiation Safety Officer Bobby Ridgeway concerning radiation and falling hazards; complaints to Mill Repair Foreman Edward Jeffries concerning radiation and falling hazards; complaints to Mine Safety Supervisor Claude Cox concerning falling hazards; and refusal to perform assigned duties which necessitated his transportation on electrically operated mechanical equipment in a manner inconsistent with the intended use of that equipment.

5. On September 19, 1979, Respondent Western Nuclear discharged Complainant Stafford from his employment, motivated in part by the protected activity described above.

6. Respondent Western Nuclear failed to establish that it did in fact consider Complainant Stafford deserving of discipline for engaging in any unprotected activity alone and that it would have disciplined him in any event.

7. Respondent Western Nuclear's discharge of Complainant Stafford on September 19, 1979, violated section 105(c)(1) of the Federal Mine Safety and Health Act of 1977.

ORDER

Accordingly, it is ORDERED: that Respondent Western Nuclear, Inc. offer to reinstate Complainant Robert E. Stafford to his former position, at his former rate of pay, with any adjustments in position or rate of pay to which he would have been entitled had he not been discharged; that Respondent pay to Complainant Stafford back pay in the form of gross pay less amounts withheld pursuant to state and Federal law, to be calculated from the date of his discharge to the date this Decision becomes final, less actual interim earnings, plus interest at the rate of 9 percent per annum; that Respondent shall expunge from Complainant Stafford's employment record any adverse references relating to his discharge and transmit to him a copy of his employment record reflecting the deletion of any adverse references relating to his discharge; and that Respondent shall pay a civil penalty in the amount of $100.00 for its violation of the Federal Mine Safety and Health Act of 1977.

Jon D. Boltz
Administrative Law Judge

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JUN 12 1981

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding
	:	Docket No. LAKE 79-9-M
	:	A/O No. 33-01395-05002F
v.	:	
	:	Harrison Pit and Plant
AMERICAN MATERIALS CORPORATION, Respondent	:	

DECISION

Appearances: Linda L. Leasure, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Petitioner;
John W. Edwards, Esq., and David William T. Carroll, Esq., Smith & Schnacke, Columbus, Ohio, for Respondent.

Before: Judge Cook

I. Procedural Background

On June 26, 1979, the Mine Safety and Health Administration (Petitioner) filed a petition for assessment of civil penalty in the above-captioned proceeding pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (Supp. III 1979) (1977 Mine Act). The petition alleges two violations of provisions of the Code of Federal Regulations. On July 5, 1979, an answer was filed by American Materials Corporation (Respondent). Thereafter, the parties engaged in extensive discovery.

On May 21, 1980, a notice of hearing was issued scheduling the case for hearing on the merits on August 5, 1980, in Cincinnati, Ohio. The hearing convened as scheduled with representatives of both parties present and participating. At the Respondent's request, the undersigned Administrative Law Judge, accompanied by representatives of both parties, viewed the site of the accident which resulted in the issuance of the subject citations. At the close of the Petitioner's case-in-chief, the Respondent made motions to dismiss the proceeding. The motions were taken under advisement to be ruled upon at the time of the writing of the decision. Additionally, following the presentation of the evidence, a schedule was set for the filing of posthearing briefs and proposed findings of fact and conclusions of law. However, difficulties experienced by counsel necessitated a revision thereof.

On October 27, 1980, the Respondent filed a motion to dismiss. On November 10, 1980, the Petitioner filed a memorandum in opposition thereto.

The Respondent filed a posthearing memorandum on December 11, 1980, and the Petitioner filed proposed findings of fact and conclusions of law on December 12, 1980. On January 12, 1981, the Petitioner filed a letter retracting, for the present, references to certain cases cited in its post-hearing brief. The Respondent filed a reply memorandum, a supplemental memorandum regarding recent decisions, and a second supplemental memorandum regarding recent decisions on January 21, 1981, March 2, 1981, and March 16, 1981.

II. Violations Charged

Citation No.	Date	30 C.F.R. Standard
358304	4/26/78	56.12-71
360204	4/26/78	56.20-11

III. Witnesses and Exhibits

A. Witnesses

The Petitioner called Federal mine inspectors Verl C. Thomas and William D. Atwood as witnesses. Both the Petitioner and the Respondent called Mr. Charles Ballinger, the Respondent's superintendent of operations, as a witness.

B. Exhibits

1. The Petitioner introduced the following exhibits in evidence:

M-1 is a ground plan of the Respondent's Harrison Pit and Plant.

M-2 is a general ground plan of the Respondent's Harrison No. 712 Plant.

M-3 is a computer printout showing the history of previous violations for which the Respondent had paid assessments at its Harrison Pit and Plant, at its Fairfield Pit and Plant No. 711, at its North Hamilton facility No. 710, and at its Kirby Road Pit and Plant.

M-4 is an aerial photograph of the Respondent's Harrison Pit and Plant.

2. The Respondent introduced the following exhibits in evidence:

O-1 is a photograph.

O-2 is a photograph.

IV. Issues

Two basic issues are involved in this civil penalty proceeding: (1) did a violation of the subject mandatory safety standards occur, and (2) what amount should be assessed as a penalty if a violation is found to have occurred? In determining the amount of civil penalty that should be assessed for a violation, the law requires that six factors be considered: (1) history of previous violations; (2) appropriateness of the penalty to the size of the operator's business; (3) whether the operator was negligent; (4) effect of the penalty on the operator's ability to continue in business; (5) gravity of the violation; and (6) the operator's good faith in attempting rapid abatement of the violation.

V. Opinion and Findings of Fact

A. Stipulations

1. No inspections were made and no citations were issued at the Harrison Pit and Plant prior to the accident of April 25, 1978 (Tr. 8).

2. There is no dispute as to coverage and jurisdiction. The facility constitutes a "mine" within the meaning of the 1977 Mine Act (Tr. 11).

3. The size of the mine during the years 1977 and 1978 was 19,518 man-hours per year (Tr. 26-29).

B. Respondent's Motions to Dismiss at the Close of Petitioner's Case-in-Chief

The Respondent made oral motions to dismiss the proceeding at the close of the Petitioner's case-in-chief. The motions to dismiss encompass both citations. The undersigned Administrative Law Judge took the motions under advisement, and informed the parties that rulings would be made on the motions at the time of the writing of the decision based upon the record as it existed when the motions were made (Tr. 134-142).

The Respondent advanced various arguments in support of its motions to dismiss, and has reasserted those arguments in its posthearing filings. The specific legal issues raised are addressed in subsequent portions of this decision. The evidence contained in the record when the motions were made has been considered fully.

It is found later in this decision that the evidence presented by the Petitioner failed to prove that the circumstances of the accident in this case presented a situation where "equipment must be moved or operated near energized high-voltage powerlines * * * and the clearance is less than 10 feet * * *." (Emphasis added.) Therefore, a violation of 30 C.F.R. § 56.12-71 has not been proved.

However, it is found later in this decision that the evidence presented by the Petitioner established a prima facie case as to a violation of 30 C.F.R.

§ 56.20-11 in that a warning sign should have been posted as to a safety hazard which would not be immediately obvious to an employee, namely, the safety hazard created by the high-voltage powerline.

Accordingly, the Respondent's motion to dismiss at the close of the Petitioner's case-in-chief will be granted as to an allegation of a violation of 30 C.F.R. § 56.12-71 and will be denied as to an alleged violation of 30 C.F.R. § 56.20-11.

C. Occurrence of Fatal Accident

On April 25, 1978, an individual identified as Mr. Meyer sustained a fatal injury at the Respondent's Harrison Pit and Plant. The two citations which are the subject matter of this proceeding were issued during the Petitioner's April 26, 1978, fatal accident investigation.

Mr. Meyer was not an employee of the Respondent at the time of the accident, and nothing indicates that he was ever the Respondent's employee. Rather, he was either an employee of RBS Trucking Company or an owner-operator working for RBS Trucking Company. RBS Trucking Company was one of the Respondent's customers hauling sand and/or gravel from the Harrison Pit and Plant (Tr. 54, 66, 101, 126).

It appears that before April 25, 1978, the Respondent's geographical market expanded when trucks hauling coal from Kentucky to the Harrison, Ohio, area began coming to the Harrison Pit and Plant to obtain loads of sand for the return trip to Kentucky (Tr. 122-123). Some of these truck drivers cleaned coal residue from their truck beds while on the Respondent's property. This cleaning operation was accomplished by raising the truck bed. This had begun a short time before April 25, 1978 (Tr. 122-124).

It appears that the Respondent was clearly displeased with the fact that some of the truck drivers were cleaning coal residue from their truck beds while on the property, and that the Respondent was particularly upset by the fact that some of these truck drivers were cleaning their truck beds in the stockpile areas. Mr. Charles Ballinger, the Respondent's superintendent of operations, had instructed Mr. Norman Ross, the foreman, to stop the truck drivers from doing this, to get them to clean their truck beds off of the property, because coal residue was contaminating the materials that the Respondent was offering for sale. It appears that Mr. Ross implemented this directive by verbally informing those truck drivers caught in the act to make sure that they cleaned their truck beds before coming onto the property. It appears that no arrangements had been made to so instruct the truck drivers when they first entered the property (Tr. 52-53, 122-125).

RBS Trucking Company delivered coal to the power companies in the Harrison, Ohio, area, and thereafter picked up sand and/or gravel at the Harrison Pit and Plant for the return trip to Kentucky (Tr. 125-126). On April 25, 1978, Mr. Meyer drove onto the property, presumably to pick up a load of sand and/or gravel for transport into Kentucky. He turned west down

a gravel-surfaced roadway leading to one of the stockpile areas (Tr. 37-38, unnumbered stockpile on M-4). Shortly before reaching the workshop, he pulled his tractor-trailer dump truck completely off the gravel-surfaced roadway in order to dump the coal residue from the truck bed. He pulled off to the left of the gravel-surfaced roadway and parked the truck in an area characterized by unstable ground conditions. The ground was wet and muddy and there was standing water present (Tr. 35-38, 59, 86).

Parked in this position, the truck was parallel to, but not directly under, the overhead high-voltage powerlines. The truck was positioned such that the righthand, or passenger's, side of the truck was approximately 5 feet from the gravel-surfaced roadway, and that the lefthand, or driver's, side was the side nearest the powerline (Tr. 37-38, 58-59, 73, 118-119).

Mr. Meyer, apparently while still inside the tractor cab, raised the 30-foot long truck bed, or "sandbox," to its maximum vertical extension of 28-1/2 feet. Then, it appears that he got out of the cab in order to operate the tailgate release lever (Tr. 58, 61, 65, 80-83, 85, 88, 103, 115). This lever was located on the front of the trailer at the service connection of the tractor-trailer rig (Tr. 115). An individual could operate the lever either while standing on the ground or while standing on the tractor frame (Tr. 115-116). It appears that Mr. Meyer climbed onto the tractor frame in order to release the lever. He was electrocuted at approximately 1:45 p.m. when a gust of wind blew the high-voltage powerline into the raised bed of the truck. This required the gust of wind to blow the powerline a lateral distance of approximately 1 foot. The voltage passing through the powerline was rated at 4,160 volts, 1/ and the powerline was approximately 28-1/2 feet above the ground (Tr. 34-37, 61-62, 80-86, 117-118).

The subject citations were issued during the course of the Petitioner's April 26, 1978, fatal accident investigation. Citation No. 358304 was issued by Federal mine inspector William D. Atwood. The allegations contained in the citation, as incorporated into the petition for assessment of civil penalty, charge a violation of mandatory safety standard 30 C.F.R. § 56.12-71 in that "[t]he dump truck was being operated within 10 feet of the energized 4,160 volt powerline." The cited mandatory safety standard provides that "[w]hen equipment must be moved or operated near energized high-voltage powerlines (other than trolley lines) and the clearance is less than 10 feet, the lines shall be deenergized or other precautionary measures shall be taken."

1/ One of the definitions contained in 30 C.F.R. § 56.2 provides that the term "high potential" means "more than 650 volts." According to Paul W. Thrush (ed.), A Dictionary of Mining, Mineral and Related Terms (Washington, D.C.: U.S. Department of the Interior Bureau of Mines) (1968) at page 543, the term "high voltage" means: "a. A high electrical pressure or electromotive force. Grove. b. That which is greater than 650 volts. Also called high potential. ASA M2.1-1963."

Citation No. 360204 was issued by Federal mine inspector Steve Viles. The allegations contained in the citation, as incorporated into the petition for assessment of civil penalty, charge a violation of mandatory safety standard 30 C.F.R. § 56.20-11 in that "[h]azardous area [was] not adequately posted at the main haulage road along the 4,160 [volt] powerline." The cited mandatory safety standard provides that "[a]reas where health or safety hazards exist that are not immediately obvious to employees shall be barricaded, or warning signs shall be posted at all approaches. Warning signs shall be readily visible, legible, display the nature of the hazard, and any protective action required."

D. Whether the Respondent is Properly Charged with Violations of Mandatory Safety Standards

The first principal question presented is whether the Respondent is properly charged with violations of mandatory safety standards which caused or contributed to the death of an individual who was either a customer or an employee of a customer, or an independent owner-operator hired by a customer. The resolution of this question turns upon (1) whether the decedent was a "miner" within the meaning of section 3(g) of the 1977 Mine Act; and (2) whether the Respondent is charged with having committed violations of the mandatory safety standards or, alternatively, whether the Petitioner seeks to hold the Respondent responsible for violations committed by either the customer, or the customer's employee, or the independent owner-operator hired by the customer.

The 1977 Mine Act is remedial legislation intended to secure a safe and healthful work environment for "miners," as that term is defined in section 3(g) of the 1977 Mine Act. See section 2 of the 1977 Mine Act. The 1977 Mine Act imposes duties on mine operators with respect to those individuals falling within the statutory definition of a "miner." See Republic Steel Corporation, 1 FMSHRC 5, 11, 1 BNA MSHC 2002, 1979 CCH OSHD par. 23,455 (1979). Therefore, the threshold inquiry is whether the decedent was a "miner," as defined by section 3(g) of the 1977 Mine Act.

Section 3(g) of the 1977 Mine Act defines the term "miner" as "any individual working in a coal or other mine." One's status as a "miner" is not contingent upon an employment relationship with the owner or operator of a mine. El Paso Rock Quarries, Inc., 3 FMSHRC 35, 37 n. 11, 2 BNA MSHC 1132, 1981 CCH OSHD par. 25,154 (1981). The duty imposed on the mine operator to comply with the 1977 Mine Act and the mandatory safety and health standards is one that extends to all miners, irrespective of whether or not the miners affected by a given violative condition are employees of the mine operator. See Republic Steel Corporation, 1 FMSHRC 5, 11, 1 BNA MSHC 2002, 1979 CCH OSHD par. 23,455 (1979).

The evidence presented establishes that Mr. Meyer was either an employee of RBS Trucking Company or an owner-operator working for RBS Trucking Company; and that RBS Trucking Company was one of the Respondent's customers, transporting sand and/or gravel from the Harrison Pit and Plant to Kentucky. The

evidence also shows that Mr. Meyer visited the Harrison Pit and Plant on April 25, 1978, to obtain a load of sand and/or gravel. I hold that Mr. Meyer's April 25, 1978, activities at the Respondent's Harrison Pit and Plant constituted "working in a coal or other mine" and, accordingly, that Mr. Meyer fell within the definition of "miner" set forth in section 3(g) of the 1977 Mine Act. Therefore, he was entitled to the protections afforded by the 1977 Mine Act.

The second question presented is whether the Petitioner seeks to hold the Respondent responsible for violations committed by Mr. Meyer; or, alternatively, whether the Respondent is charged with having committed the violations cited in the subject citations.

The Respondent is, of course, properly charged if the citations allege that the Respondent committed the violations of the cited mandatory safety standards. It is self-evident that the Respondent is liable for its own violations.

A review of the allegations contained in the citations clearly shows that the Respondent is charged with having committed the violations of mandatory safety standards 30 C.F.R. § 56.12-71 and 30 C.F.R. § 56.20-11. The Petitioner is not attempting to hold the Respondent liable for violations committed by either RBS Trucking Company or Mr. Meyer. Accordingly, I conclude that the Respondent is properly charged in this proceeding.

These determinations dispose of some of the issues raised in Respondent's motion to dismiss filed on October 27, 1980. Others will be disposed of later in this decision.

E. Citation No. 358304, April 26, 1978, 30 C.F.R. § 56.12-71

As noted above, this citation alleges a violation of mandatory safety standard 30 C.F.R. § 56.12-71 in that "[t]he dump truck was operated within 10 feet of the energized 4,160 volt powerline." The cited mandatory safety standard requires that "[w]hen equipment must be moved or operated near energized high-voltage powerlines (other than trolley lines) and the clearance is less than 10 feet, the lines shall be deenergized or other precautionary measures shall be taken."

The evidence shows that Mr. Meyer pulled his tractor-trailer dump truck off of the gravel-surfaced roadway and parked parallel to, and not under, the powerline. He raised the truck bed to a height of 28-1/2 feet, its maximum extension, and a gust of wind blew the powerline into contact with the raised truck bed, electrocuting Mr. Meyer. This required the gust of wind to blow the powerline a lateral distance of approximately 1 foot. The evidence in the record and the inferences drawn therefrom shows that Mr. Meyer raised the truck bed in order to clean coal residue from it prior to acquiring a load of sand and/or gravel.

The controversy as to whether a violation of the regulation occurred centers around the regulation's use of the term "must." The Respondent's

position, as set forth in its motion to dismiss at the close of the Petitioner's case-in-chief, in its December 11, 1980, posthearing memorandum, and in its January 21, 1981, reply memorandum, asserts that no violation occurred because there was no requirement that the truck be moved or operated near the powerlines. According to the Respondent's posthearing memorandum:

> To the contrary, the truck was parked on ground that was wet, muddy and very unstable. The area was not suitable for pulling a truck into. There were no truck tracks in the off-road area other than the tracks made by the decedent's truck. The road did not pass under the powerlines. In order to get under the powerlines, the truck had to drive off the haul road onto the unstable area which was clearly unintended for and unsuitable for driving. No reasonable person would have driven a truck or anticipated someone else would drive a truck onto the area where the accident occurred.

(Respondent's Posthearing Memorandum, pp. 11-12; citations to record omitted.)

The Petitioner counters that the Respondent's policy prohibiting the cleaning of trailer beds in the pit areas, and its attempts to implement and enforce such policy, in effect required the drivers to perform the cleaning activities on or beside the haulage roads leading to the pits and in close proximity to high-voltage powerlines. According to the Petitioner, the fact that the Respondent did not want the truck beds cleaned on its property is not controlling because, given the circumstances, it was foreseeable that the dumping would occur on the property (Tr. 137-142, Petitioner's Posthearing Submissions, p. 8).

The regulation's use of the verb phrase "must be moved or operated" demonstrates that the regulation applies when the mine operator requires the movement or operation of equipment within 10 feet of high-voltage powerlines, or when the operator arranges the layout of its plant in such a way that equipment must be moved or operated within 10 feet of high-voltage powerlines in carrying out operations at the plant.

As stated previously, the evidence presented by the Petitioner failed to prove that the instant case presented a situation where equipment must be moved or operated within 10 feet of high-voltage powerlines.

The location of the wires in this case with respect to the subject part of the plant, including the roads, was such that it cannot be said that the mine operator created a situation where a truck such as the one involved in this case must be operated within 10 feet of the high-voltage lines.

The wires in question were not over the road in the area of the accident. The wires were well off the road. The facts show that they had to be at least about 13 feet from the road. Further, the wires were 8-1/2 feet above the standard required by the National Electric Safety Code (Tr. 99-100).

The mine operator had made it known to the truck drivers that it did not want them to dump any coal from their trucks on the property of the plant. The problem of such type of dumping of coal had begun to develop just before the day of the subject accident.

Evidence was found in the area after the accident indicating that other truck drivers had cleaned coal residue from their truck beds in the area where the accident occurred. Mr. Ballinger testified that he observed two piles of coal residue in the area immediately following the accident, the one which Mr. Meyer had dumped and one which had been dumped by another driver prior to the accident (Tr. 38-39, 53-54). The latter pile was approximately 5 to 10 feet behind, i.e., to the east of the truck and 3 or 4 feet to the north (Tr. 38-39). He testified that he did not observe piles of coal at any other point along the roadway, either to the west or to the east of the shop (Tr. 39). Federal mine inspector Verl C. Thomas, who examined the area during the April 26, 1978, fatal accident investigation, observed three piles of coal residue located approximately 5 to 8 feet, possibly 10 feet, behind the truck and 4 to 6 feet farther to the north (Tr. 59-60). He observed two additional coal residue piles located approximately 15 to 20 feet behind the truck, and somewhat closer to the gravel-surfaced roadway than the first three piles (Tr. 59-60).

However, there is no proof that any part of the management of the Respondent had any knowledge that the coal piles existed in the areas behind the subject truck off of the road area (Tr. 120-122), although the management had prior knowledge of dumping in the stockpiles. In addition, the truck driver took his truck off the road into a wet, muddy and very unstable area. It was an unsuitable area to park a truck (Tr. 37-38). In addition, the driver had gone the wrong way on a road that had been marked "one-way" the opposite direction (Tr. 49-50, 59, 73).

In addition, the inspector who issued the citation had, in a statement he issued concerning the alleged violation of 30 C.F.R. § 56.12-71, checked a box which stated that the condition or practice cited could not have been known or predicted, or occurred due to circumstances beyond the operator's control (Tr. 71). This observation by the issuing inspector bolsters the conclusion that the Respondent did not create a situation where equipment must be moved or operated within 10 feet of high-voltage powerlines.

In view of all of these factors, it is found that the Petitioner has failed to prove that the facts of this case presented a situation where equipment must be moved or operated within 10 feet of high-voltage powerlines.

It should be added that the additional evidence presented by the Respondent after the Petitioner had concluded its case would not change the result herein.

In view of the foregoing, I conclude that a violation of mandatory safety standard 30 C.F.R. § 56.12-71 has not been established.

F. Citation No. 360204, April 26, 1978, 30 C.F.R. § 56.20-11

As noted above, this citation alleges a violation of mandatory safety standard 30 C.F.R. § 56.20-11 in that a "[h]azardous area [was] not adequately posted at the main haulage road along the 4,160 [volt] powerline." The cited mandatory safety standard provides that "[a]reas where health or safety hazards exist that are not immediately obvious to employees shall be barricaded, or warning signs shall be posted at all approaches. Warning signs shall be readily visible, legible, display the nature of the hazard, and any protective action required." The evidence presented shows that the area had not been barricaded and that no warning signs had been posted (Tr. 69-70, 72, 88).

The Respondent does not contest the fact that the area where the fatal accident occurred was not barricaded and that no warning signs had been posted. Instead, the Respondent maintains that no violation occurred by interpreting the phrase "not immediately obvious to employees" as (1) limiting the regulation's protection to its own employees; and (2) requiring that the hazard not be immediately obvious to its own employees. (See Respondent's motion to dismiss at the close of the Petitioner's case-in-chief, Tr. 134-137; Respondent's Posthearing Motion to Dismiss; Respondent's Posthearing Memorandum.) 2/ The Petitioner maintains that the protection afforded by mandatory safety standard 30 C.F.R. § 56.20-11 extends to all who fall within the definition of "miner" set forth in section 3(g) of the 1977 Mine Act. Additionally, the Petitioner maintains that the hazard may not have been immediately obvious to Mr. Meyer.

I conclude that mandatory safety standard 30 C.F.R. § 56.20-11 imposes a duty upon the mine operator with respect to all who fall within the definition of the term "miner." The regulation's protection is not limited to the mine operator's employees.

Mandatory safety standard 30 C.F.R. § 56.20-11 was initially promulgated by the Secretary of the Interior pursuant to section 6 of the Federal Metal and Nonmetallic Mine Safety Act of 1966, 30 U.S.C. § 725 (1976) (1966 Metal Act). See 30 C.F.R. § 56.1. The 1966 Metal Act was remedial legislation enacted "to reduce the high accident rate and improve health and safety conditions in mining and milling operations carried on in the metal and nonmetallic mineral industries." S. Rep. No. 1296, 89th Cong., 2nd Sess., reprinted in [1966] U.S. CODE CONG. & AD. NEWS, 2846. The Federal Mine Safety and Health Amendments Act of 1977, Pub. L. No. 95-164, 91 STAT. §§ 1290-1322 (Amendments Act), amongst other things, repealed the 1966 Metal Act, see § 306(a) of the Amendments Act, and enlarged the definition of "mine" set forth in section 3(h) of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 et seq. (1970) (1969 Coal Act), to include those mines previously covered by the 1966 Metal Act. S. Rep. No. 95-181, 95th Cong., 1st. Sess. (1977), reprinted

2/ The Respondent's position that the regulation protects only its own employees is based upon the definition of "employee" set forth in 30 C.F.R. § 56.2, which defines the term as "a person who works for wages or salary in the service of an employer."

in LEGISLATIVE HISTORY OF THE FEDERAL MINE SAFETY AND HEALTH ACT OF 1977 at 647 (1978). The mandatory standards relating to mines, issued by the Secretary of the Interior under the 1966 Metal Act and in effect when the Amendments Act was enacted, remained in effect as mandatory health or safety standards applicable to metal and nonmetallic mines under the 1977 Mine Act, and continue to remain in effect until such time as the Secretary of Labor issues new or revised mandatory standards. Section 301(b)(1) of the Amendments Act. The mandatory standards in effect on the effective date of the Amendments Act "continue[d] in effect according to their terms until modified, terminated, superseded, set aside, revoked or repealed by the Secretary of Labor, the Federal Mine Safety and Health Review Commission or other authorized officials, by any court of competent jurisdiction, or by operation of law." Section 301(c)(2) of the Amendments Act.

It has been held previously in this decision that Mr. Meyer fell within the definition of the term "miner" as set forth in section 3(g) of the 1977 Mine Act. Thus, the question presented is whether 30 C.F.R. § 56.20-11, as applied under the 1977 Mine Act, accords protection to miners who are not the mine operator's employees. The problem is essentially one of interpreting the regulation in accordance with the 1977 Mine Act's remedial purpose.

As a general proposition, the rules of statutory construction can be employed in the interpretation of administrative regulations. See C. D. Sands, 1A Sutherland on Statutory Construction, § 31.06, p. 362 (1972). According to 2 Am.Jur.2d, Administrative Law, § 307 (1962), "rules made in the exercise of a power delegated by statute should be construed together with the statute to make, if possible, an effectual piece of legislation in harmony with common sense and sound reason." Remedial legislation directed toward securing safe and healthful work places must be interpreted in light of the express Congressional purpose of providing a safe and healthful work environment, and the regulations promulgated pursuant to such legislation must be construed to effectuate Congress' goal of accident prevention. Brennen v. Occupational Safety and Health Review Commission, 491 F.2d 1340 (2d Cir. 1974). "Should a conflict develop between a statutory interpretation that would promote safety and an interpretation that would serve another purpose at a possible compromise of safety, the first should be preferred." District 6, UMWA v. Department of Interior Board of Mine Operations Appeals, 562 F.2d 1260 (D.C. Cir. 1972).

The 1966 Metal Act never used the term "miner" in any of its provisions. Instead, the 1966 Metal Act used the terms "employees of the mine," "employees," "mine workers," and "workers in such mines," where the term "miner" would ordinarily be expected to appear. See sections 7(a), 8(a)(3), 8(b)(3), 10(c), and 15 of the 1966 Metal Act. But the regulation, when interpreted in conjunction with the 1977 Mine Act's remedial purpose, is clearly intended to provide those working in the mine with warning of or protection against health or safety hazards which are not immediately obvious. I therefore conclude that Congress, in adopting 30 C.F.R. § 56.20-11 as a mandatory standard under the 1977 Mine Act, intended that it afford protection to all miners, and that it imposes a duty on the mine operator with respect to all

miners working in its mine. A construction limiting its protection to employees of the mine operator would serve an objective at odds with mine safety, and is therefore not to be preferred.

The remaining question is whether the hazard was immediately obvious. The evidence clearly shows that the powerlines were readily observable (Tr. 72, 104). The evidence further shows that the powerline that achieved contact with the truck bed was approximately 28-1/2 feet above the ground, and that the truck bed, at its maximum extension, reached a height of approximately 28-1/2 feet.

The fact that the powerlines themselves were readily observable under normal conditions is not dispositive of the question presented. The powerlines were sufficiently high above the ground that the hazard posed by raising a truck bed or operating other equipment in the area was not immediately obvious. The truck operator had raised the bed of the trailer from inside the truck cab. It was raining; the winds were gusting; and the operator of the truck, upon getting out of the truck, was engaged in operating the tailgate. There is no way to know whether operators of trucks in the area would know about the high voltage of the wires in question. In view of all of these factors, I conclude that this was an area where a safety hazard existed which was not immediately obvious to a miner such as the subject truck driver and that neither barricades nor warning signs were posted at all the approaches.

Accordingly, I conclude that a violation of mandatory safety standard 30 C.F.R. § 56.20-11 has been established by a preponderance of the evidence.

G. Negligence of the Operator

It appears that the problem of dumping coal residue on the property arose only a short time prior to April 25, 1978. The Respondent undertook steps to prevent truck drivers from engaging in such activity, but as of April 25, 1978, had not found an effective means of dealing with the problem. In fact, at some undisclosed point in time after the accident, the Respondent provided a waste area in the pits where the dumping of truck beds could be accomplished (Tr. 131).

However, the fact remains that warning signs should have been posted concerning the hazard of the high-voltage powerlines. In view of all of the surrounding circumstances, including the fact that the Respondent attempted to undertake corrective action by attempting to prevent the dumping of coal residue on the property prior to April 25, 1978, I find that the Respondent demonstrated ordinary negligence in connection with the violation.

H. Gravity of the Violation

The violation contributed to the fatal accident. Accordingly, it is found that the violation was serious.

I. Good Faith in Attempting Rapid Abatement

The haulageway was immediately barricaded and posted in order to abate the violation (Tr. 72). Accordingly, I conclude that the Respondent demonstrated good faith in attempting rapid abatement of the violation.

J. Size of the Operator's Business

The Respondent is a wholly owned subsidiary of American Aggregates Corporation (Tr. 9; Respondent's Posthearing Memorandum, p. 2). The record contains no evidence as to whether American Aggregates Corporation owns or controls mining operations other than the Respondent, or, if so, the size of those mining operations.

No evidence was presented as to the aggregate size of all mining operations owned or controlled by the Respondent. The only evidence contained in the record relates to the size of the Respondent's Harrison Pit and Plant. The parties stipulated that the size of the Harrison Pit and Plant in 1977 and 1978 was rated at 19,518 man-hours per year (Tr. 26-29). The evidence presented reveals that the Harrison Pit and Plant sold approximately 350,000 to 400,000 tons of material in 1978 (Tr. 52).

K. History of Previous Violations

The parties stipulated that no inspections had been conducted at, or citations issued at, the Harrison Pit and Plant prior to the April 25, 1978, accident (Tr. 8). The record contains no other evidence as relates to the history of previous violations.

Accordingly, it is found that the Respondent has no history of previous violations cognizable in this proceeding.

L. Effect of a Civil Penalty on the Operator's Ability to Continue in Business

No evidence was presented establishing that the assessment of a civil penalty in this case will adversely affect the Respondent's ability to remain in business. In Hall Coal Company, 1 IBMA 175, 79 I.D. 668, 1971-1973 CCH OSH. par. 15,380 (1972), the Commission's predecessor, the Interior Board of Mine Operations Appeals, held that evidence relating to whether a penalty will affect the ability of the operator to remain in business is within the operator's control, and therefore, there is a presumption that the operator will not be so affected. I find, therefore, that a civil penalty otherwise properly assessed in this proceeding will not impair the Respondent's ability to continue in business.

VI. Conclusions of Law

1. The Administrative Law Judge has jurisdiction over the subject matter of, and the parties to, this proceeding.

2. American Materials Corporation and its Harrison Pit and Plant have been subject to the provisions of the 1977 Mine Act at all times relevant to this proceeding.

3. Federal mine inspectors William D. Atwood and Steve Viles were duly authorized representatives of the Secretary of Labor at all times relevant to this proceeding.

4. The Petitioner has failed to prove the alleged violation with respect to Citation No. 358304, April 26, 1978, 30 C.F.R. § 56.12-71.

5. The violation charged with respect to Citation No. 360204, April 26, 1978, 30 C.F.R. § 56.20-11 is found to have occurred as alleged.

6. All of the conclusions of law set forth in Part V, supra, are reaffirmed and incorporated herein.

VII. Proposed Findings of Fact and Conclusions of Law

The parties filed the posthearing submissions identified in Part I, supra. Such submissions, insofar as they can be considered to have contained proposed findings of fact and conclusions of law have been considered fully, and except to the extent that such findings and conclusions have been expressly or impliedly affirmed in this decision, they are rejected on the grounds that they are, in whole or in part, contrary to the facts and law or because they are immaterial to the decision in this case.

VIII. Penalty Assessed

Upon consideration of the entire record in this case and the foregoing findings of fact and conclusions of law, I find that the assessment of a penalty is warranted as follows:

Citation No.	Date	30 C.F.R. Standard	Penalty
360204	4/26/78	56.20-11	$300

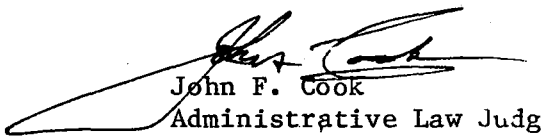
ORDER

IT IS ORDERED that the Respondent's motion to dismiss at the close of the Petitioner's case-in-chief as relates to an alleged violation of 30 C.F.R. § 56.12-71 be, and hereby is, GRANTED.

IT IS FURTHER ORDERED that the Respondent's motion to dismiss at the close of the Petitioner's case-in-chief as relates to an alleged violation of 30 C.F.R. § 56.20-11 be, and hereby is, DENIED.

IT IS FURTHER ORDERED THAT the Respondent's October 27, 1980, motion to dismiss be, and hereby is, DENIED.

IT IS FURTHER ORDERED that the Respondent pay a civil penalty in the amount of $300 within the next 30 days.



John F. Cook
Administrative Law Judge

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Administrator for Metal and Nonmetal Mine Safety and Health, U.S. Department of Labor

Administrator for Coal Mine Safety and Health, U.S. Department of Labor

Standard Distribution

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JUN 15 1981

SECRETARY OF LABOR, on behalf of GARY M. BENNETT, Complainant	:	Complaint of Discharge, Discrimination, or Interference
v.	:	Docket No. CENT 81-35-DM
KAISER ALUMINUM AND CHEMICAL CORPORATION, Respondent	:	Baton Rouge Alumina Plant

DECISION

Appearances: Marigny A. Lanier, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas, for Complainant; Stephen H. Booth, Esq., Labor Counsel, Kaiser Aluminum and Chemical Corporation, Oakland, California, for Respondent.

Before: Chief Administrative Law Judge Broderick

STATEMENT OF THE CASE

The Secretary of Labor asserts that Complainant Bennett was suspended for thirty days without pay because he refused to work under unsafe conditions. Respondent contends that Bennett was disciplined for insubordination. Respondent also contends that the complaint is barred by time limitations.

A hearing was held, pursuant to notice, on February 26, 1981 in New Orleans, Louisiana. Gary Bennett, Ferdinand Johnson, Ronnie Procell, Riley Jester, all employees of Respondent, and Otis Pilgrim and Melvin Robertson, employees of the Mine Safety and Health Administration (MSHA), testified on behalf of Complainant. Theodore Peno, Flavius Galloway, Willie Brown, Alvin Saizan and Roland Bertram, employees of Respondent, testified on Respondent's behalf.

Post-hearing briefs have been filed by both parties. Based on the evidence presented at the hearing and the contentions of the parties, I make the following decision.

FINDINGS OF FACT

1. Respondent operates an alumina plant in Baton Rouge, Louisiana, milling bauxite ore into alumina powder.

2. The plant includes sand traps located in what is called the tank farm. The sand traps are large, conically-shaped vessels that filter and cook a caustic liquid known as "liquor" which helps remove impurities from the bauxite ore.

3. The "liquor" is heated to between 200 and 300 degrees Fahrenheit. Even a small amount on a person's skin can cause a severe burn.

4. Complainant was employed as a pipefitter and as such he participated in the sandtrap "turnaround" which occurred every six months. This process involves the draining and cleaning of the vessel.

5. Complainant's duties during the turnaround included opening the manway door, removing valves for repairs and setting "blinds," which are metal discs the same diameter as the pipes and which prevent any flow of liquid into the vessel.

6. All valves are closed and tagged during a turnaround and the pump to the feedline entering the sandtrap is turned off and locked out.

7. There are two "downcomer lines" which lead from the main feedline to the sandtrap. Each of these lines contains double valves which are shut during turnaround and can only be opened by hammering them with at least an eight pound maul. Blinds are inserted in the downcomer lines as added protection for the carpenters and laborers who enter the sandtrap to remove built-up scale on the vessel.

8. After the scale is removed from the inner walls, Complainant's tasks were to "pop" scale from a side valve and reinstall the valves at the bottom of the vessel. Popping a valve consists of heating and thereby removing the scale around the valve with a torch.

9. There is a sharp conflict in the testimony on the question of whether Complainant did, or was required to, insert any part of his body into the vessel while popping the valve. I generally accept Complainant's testimony, supported by the testimony of Ferdinand Johnson and Riley Jester, on this issue, and find that Complainant did insert his arms and shoulders inside the vessel while popping the side valve.

10. On October 11, 1979 sandtrap #3 was undergoing the turnaround. By lunchtime Complainant had finished popping the side valve. He still had to reinstall the other valves and close the vessel; the carpenters and laborers had left the vessel.

11. During the lunch hour Complainant was told by some co-workers that the blinds had been removed. Complainant and Ferdinand Johnson, who worked with him, complained to their foreman, Willie Brown, that this created a safety hazard.

12. In fact, only the two blinds on the downcomer lines had been removed after the carpenters and laborers left the vessel. This was in accord with past practice in the turnaround.

13. Complainant refused to return to work after lunch until a "safety man" came to evaluate the situation.

14. Foreman Brown notified Theodore Peno, Maintenance Superintendent who came to sandtrap #3 with Maintenance Coordinator Flavius Galloway. Peno and Galloway spent nearly 40 minutes checking the vessel and the blinds and valves and determined that in their judgment all safety measures had been observed.

15. The matter was discussed with Complainant and Johnson. Peno explained that he and Galloway had checked the entire system and he offered to remain at the site. Johnson agreed to return to work but complainant refused a direct order to return.

16. On the following day, October 12, 1979, Respondent suspended complainant for 30 days without pay.

17. On February 4, 1980 Complainant filed a complaint with MSHA and on October 13, 1980, the Secretary of Labor filed this action with the Commission.

ISSUES

1. Is the complaint barred by the time limitations contained in § 105(c) of the Act?

2. Did Respondent violate § 105(c) when it suspended Complainant for 30 days without pay for refusing to perform his assigned duties on October 11, 1979?

Discussion

Complainant's original complaint was filed with MSHA nearly three months after the end of the suspension period, and the Secretary's complaint on his behalf was filed with the Commission more than eight months after that. The statute provides that a miner "may" file a complaint with MSHA within 60 days of the event complained of. § 105(c)(2). The Secretary "shall" notify the miner of his determination within 90 days of the date it was received, § 105(c)(3), and, if he finds a violation, "he shall immediately file a complaint with the Commission." § 105(c)(2).

I conclude that none of the filing deadlines are jurisdictional in nature. Rather, they are analogous to statutes of limitation, which may be waived for equitable reasons. It has already been held that the filing deadlines in discrimination cases arising under the 1969 Coal Act are not jurisdictional. Christian v. South Hopkins Coal Co., 1 FMSHRC 126, 134-36 (1979). The same result was obtained under § 111 of the present Mine Act, which directs mine operators to compensate miners while withdrawn from a mine pursuant to government order. Local 5429, United Mine Workers v. Consolidation Coal Co., 1 FMSHRC 1300 (1979).

The proper test is whether tolling the filing period is consonant with the purposes of the statute. American Pipe and Construction Co. v. Utah, 414 U.S. 538, 557-58 (1974). Congress spoke plainly on the subject

when it declared that the 60 day filing period "should not be construed strictly where the filing of a complaint is delayed under justifiable circumstances." S. Rep. No. 95-181, 95th Cong., 1st Sess. at 36, reprinted in, (1977) U.S. CODE CONG. & AD. NEWS at 3436. The deadlines imposed on the Secretary also "are not intended to be jurisdictional. The failure to meet any of them should not result in the dismissal of the discrimination proceedings." Id.

Applying these standards, I find that the delay in filing the original complaint was justifiable. Before the period expired, Complainant asked Respondent's industrial relations representative which public agencies deal with safety complaints, but received no response. Complainant also brought his complaint to the attention of an MSHA inspector less than two months after the suspension ended. The inspector mistakenly gave Complainant the wrong name and the wrong phone number for properly notifying MSHA. The delay of approximately one month was thus justifiable.

The Secretary's delay in processing the complaint cannot defeat the action, in light of the legislative history quoted above. Moreover, it is commonly held that the government is not affected by the doctrine of laches when enforcing a public right. Intermountain Electric Co., 1980 CCH OSHD Para. 24202 (10th Cir. 1980); Occidental Life Insurance Co. v. EEOC, 432 U.S. 355 (1977); Nabors v. NLRB, 323 F.2d 686, 688 (5th Cir. 1963). Respondent's plea of limitations is rejected.

Turning to the merits, the first issue is whether Complainant was engaged in activity protected under § 105(c). Secretary of Labor ex rel Pasula v. Consolidation Coal Co., 2 FMSHRC 2786 (1980). I find that Complainant in good faith believed that it was dangerous to continue working after the blinds were removed. Therefore, his complaint concerning their removal was protected under § 105(c). Complainant's foreman explained that the blinds were removed because there were no workers inside the vessel. This did not satisfy Complainant so Brown called Peno who agreed to investigate the complaint. Brown told this to Complainant but Complainant remained dissatisfied and would not return to work. Complainant then left to find the safety supervisor, which he was unable to do. The safety supervisor, as it happened, was with an MSHA inspector, who was inspecting other areas of the plant.

Complainant's refusal to work at this point was protected by § 105(c). It had not been clearly explained to him that only the two blinds on the downcomer lines had been removed. The parties agree that removal of all blinds before the turnaround is finished would be an unsafe practice. Complainant's honest belief in this condition was therefore a reasonable one under the circumstances. Secretary of Labor ex rel. Robinette v. United Castle Coal Co., 3 FMSHRC 803, 812 (1981).

After Peno was notified of the complaint, he and Galloway, who both parties trust as the expert on tank farm operations, spent nearly 40 minutes checking every aspect of the sandtrap turnaround. Peno, accompanied by Galloway, then explained their findings to Complainant and told him

that his job involved no safety hazard. Complainant still refused to return to work. Peno then offered to remain at the site and watch for trouble but Complainant persisted in his demand for a safety man. Peno then resolved to seek disciplinary action against Complainant.

I cannot conclude that Complainant's refusal to work was protected at this point. It may be that a miner is "not required to accept the foreman's evaluation of danger," Phillips v. IBMA, 500 F.2d 772, 780 (D.C. Cir. 1974), but neither may a miner insist unreasonably on a right to refuse to work. Robinette, supra. Peno diligently investigated the complaint and, after finding it baseless, thoroughly explained his position to Complainant. Complainant still honestly believed the condition to be hazardous but this belief was not a reasonable one. It is important to note that Complainant had completed the task of popping the valve which required inserting his body in the vessel. At the time he refused to continue work, there was no requirement that he get inside the vessel again to finish the turnaround. Peno and Galloway made it plain to him that the procedure used with the blinds was the same procedure he had worked under on prior turnarounds. Complainant's complaint was protected; his continued refusal to work after Respondent's investigation and explanation, I find to be unreasonable, and therefore not protected. 1/

Complainant's defiance of Brown played some role in the disciplinary action. However, Respondent has established that unprotected activity - Complainant's refusal to work after Peno's explanation to him - was an important factor in the decision to suspend. In fact, until Complainant's defiance of Peno, Peno had been making every effort to accommodate him. I therefore find that Complainant would have been suspended for this alone.

CONCLUSIONS OF LAW

1. I have jurisdiction over the subject matter and the parties to this proceeding.

2. Complainant's complaint is not barred by the time limitations provisions of the Act.

3. Respondent did not violate § 105(c) when it suspended Complainant for 30 days without pay.

1/ The actual safety of the condition has some bearing on whether Complainant's belief in an unsafe condition was a reasonable one, though it is not controlling. A few days after the incident, Respondent requested an MSHA inspector to tour the sandtrap area to see if there was merit to the complaint. The inspector, who testified at the hearing, was of the opinion that the removal of the blinds did not pose a safety hazard.

ORDER

Therefore IT IS ORDERED that the proceeding is DISMISSED.

James A. Broderick
Chief 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

JUN 15 1981

ARCH HOOVER, Complainant	:	Complaint of Discharge, Discrimination, or Interference
v.	:	Docket No. WEVA 80-580-D
ISLAND CREEK COAL COMPANY, Respondent	:	North Branch Mine

DECISION

Appearances: Charles Jr. Moats, Montrose, West Virginia, for Complainant; Wayne Bussell, Esq., Lexington, Kentucky, for Respondent.

Before: Administrative Law Judge Steffey

Pursuant to a notice of hearing issued February 23, 1981, a hearing in the above-entitled proceeding was held on April 7, 1981, in Elkins, West Virginia, under section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(3).

After the parties had completed their presentations of evidence, I rendered the bench decision which is reproduced below (Tr. 150-162):

> This proceeding involves a Complaint of Discharge, Discrimination, or Interference filed on July 30, 1980, pursuant to section 105(c)(3) of the Federal Mine Safety and Health Act of 1977 by Arch Hoover against Island Creek Coal Company. The Complaint alleges that Island Creek discriminated against complainant by refusing to allow him to hold or obtain a mechanic's job at respondent's North Branch Mine.
>
> The Complaint was filed under section 105(c)(3) of the Act because the Mine Safety and Health Administration declined to file a complaint on Mr. Hoover's behalf under section 105(c)(2) of the Act after finding, on the basis of MSHA's own investigation of the Complaint, that no violation of section 105(c)(1) of the Act had occurred.
>
> I shall make some findings of fact which will be set forth in enumerated paragraphs.
>
> 1. Mr. Arch Hoover began working at Island Creek's North Branch Mine on January 17, 1968. During most of that time he has been a helper to the operator of a continuous-mining machine or has done other work operating equipment, but he has frequently done mechanical work. On December 8, 1978, mechanic's job No. 105 was open and Mr. Hoover applied for that job, but the job was not filled on the ground that no qualified bidder had applied for it.

That particular job required that the person who held it be a certified electrician. Mr. Hoover admittedly is not a certified electrician.

Mr. Hoover filed a grievance about not being awarded the mechanic's job, but the grievance seems to have been withdrawn with the understanding that Mr. Hoover would be sent to the next class offered after that occurrence for the purpose of enabling Mr. Hoover to become trained so as to be qualified to hold a certified electrician's card issued by the West Virginia Department of Mines.

2. Before Mr. Hoover could be sent to a school to become a certified electrician, he learned that he could attend the classes only if someone, in a position to know the facts, signed a statement to the effect that Mr. Hoover had had 3 years of electrical experience. Mr. Robert Severe, a UMWA committeeman, signed a statement to the effect that Mr. Hoover had had the required 36 months of experience, but when the statement was given to Mr. James Hamlin, superintendent of the North Branch Mine, he stated that he could not agree that Mr. Hoover had accumulated 36 months of experience under the direct supervision of a certified electrician. Mr. Hamlin's refusal to confirm that Mr. Hoover possessed the requisite experience resulted in Mr. Hoover's not being sent to the classes to become a certified electrician.

3. Three witnesses testified on behalf of Mr. Hoover to the effect that at various times Mr. Hoover had acted as the sole mechanic on their section when the regular mechanic was unavailable. Those witnesses stated that Mr. Hoover performed both mechanical and electrical work as well or better than other full-time mechanics who hold certified electrician cards. The evidence shows, however, that when Mr. Hoover performed the work of a mechanic, a section foreman with a certified electrician's card was on duty on the section.

4. Mr. Hamlin explained when he testified in this case that the class to which Mr. Hoover wanted to be admitted was a special 90-hour class established with the approval of the West Virginia Department of Mines for the sole purpose of enabling some mechanics who had been working for Island Creek for a number of years in that position to become certified under the law in a way that would permit them to be considered as lawful, certified, electricians when, in fact, they would probably not have been able to pass the regular examination given to those who became certified electricians under the law as it is now administered.

Mr. Hamlin further stated that he checked with those company personnel who were in a supervisory position over electrical work and all of those individuals stated that they did not think Mr. Hoover had done the kind of electrical work which would be required for him

to have been considered to have accumulated 36 months of experience under the direct supervision of a certified electrician.

5. Mr. Hamlin and Mr. Riggleman, who is a maintenance electrical supervisor, additionally explained that the 90-hour class, which Mr. Hoover was not allowed to attend, was established for people who had held a regular mechanic's job prior to the passage of a new law pertaining to certifiecation of electricians, but who could not have become certified under the new law except for attendance at the special 90-hour course. Therefore, even if Mr. Hoover, at the time the 90-hour course was offered, had actually had 36 months of experience, he would not have been qualified for that special course set up for the benefit of those particular people who had been working as mechanics prior to the passage of the West Virginia law requiring people to become certified electricians if they were also given the title of mechanic.

6. There was introduced in evidence in this proceeding as Exhibit A a portion of the West Virginia statute which defines what a certified electrician is and that section, which is 22-1-1(d)(2), provides that a person either has to pass the examination given by the Department of Mines, or have 3 years of experience and complete a coal mine electrical training program approved by the Department of Mines. The program approved by the Department of Mines under that section is the 90-hour course which Mr. Hoover was not permitted to attend because of his failure to qualify for that special purpose. The result is that he can no longer go to any existing or prospective class because the West Virginia Department of Mines has indicated that that type of method of becoming a certified electrician is no longer available.

7. Under the existing method of becoming certified, it is necessary for a miner to become an apprentice electrician. He has to take an 80-hour course and has to follow that up with training in the mine under the direct supervision of a certified electrician for a period of time and then, eventually, he has to take another 40 hours of instruction in the classroom and, finally, he has to pass an examination given by the West Virginia Department of Mines.

8. Mr. Hamlin has indicated in his testimony that Mr. Hoover was offered the possibility of enrolling in a course which would be given during the day shift at the North Branch Mine and that course might take, together with the apprentice training, up to 18 months before one can become a certified electrician under the present requirements. Mr. Hoover does not work on the day shift, and he has indicated that he does not find it possible to take advantage of the training program offered on the day shift because it would require him to drive by himself about 85 or 90 miles to attend that type of training. Although Mr. Hoover now drives about 90 miles to work at the North Branch Mine on the 4:00 p.m.-to-12:00 midnight shift, he does so in the company of about ten other men who all ride in a van. The result is that they can pool their resources and afford

to drive that far as a group, but Mr. Hoover says he cannot afford to do it alone on the day shift as a single person. Consequently, he finds that it is economically infeasible to take advantage of the present means of becoming a certified electrician.

I believe that those are the pertinent facts that have been developed here today in the testimony of quite a few witnesses. In order for Mr. Hoover to obtain relief under section 105(c)(1) of the Federal Mine Safety and Health Act of 1977, he would have to show that respondent has violated that section. That section reads 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 miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine, or because such miner, representative of miners or applicant for employment is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101 or because such miner, representative of miners or applicant for employment has instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding, or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this Act.

As I explained in the preliminary discussion that I had before the hearing started today, I had already studied Mr. Hoover's Complaint in this case and I tried my utmost to find some way to provide for the relief which he seeks, which is to become a certified electrician, but before I can order Island Creek to send him to a class to become a certified electrician, I would have to find that Island Creek violated section 105(c)(1) and I haven't been able to find anything in that section, or in the evidence introduced in this case, which would permit me to make such a finding.

As I explained before, it looked to me as if the primary way that I might find a violation would be if the evidence showed that Mr. Hoover was asked to do the work of a mechanic, which, of course, also means that he should be a certified electrician, and he were to refuse to do that on the ground hat he was not a certified electrician, and the company were to tell him that if he didn't do it. he would be discharged. If the aforesaid things had occurred, I might then have been able to

find that there was a violation because he was objecting to doing something which is hazardous, that is, do a job for which he is not qualified by having the proper training. But, Mr. Hoover told me very clearly and without any equivocation, that nobody ever ordered him to do mechanical equipment work. He was asked to work on mechanical equipment on occasion. On other occasions, he volunteered to do mechanical work, but I haven't been shown, and nobldy has alleged, that Island Creek coerced him into doing mechanical work. So, I can't really find that the part of the Complaint which alleged that Mr. Hoover was required to do mechanical work is really supported by the evidence.

I think it was a mistake for Island Creek to have allowed Mr. Hoover to work as the only mechanic on a given section at times because there was testimony by several witnesses to the effect that there were times when Mr. Hoover was doing work which at least involved electrical connections and hooking up electrical wires, for example, in the installation of an electric motor. Mr. Hamlin pointed out, however, that as far as he was concerned, that was not the kind of electrical work that he feels is contemplated in the requirement that a person be a certified electrician.

It is a fact that when Mr. Hoover did mechanical work, there was a certified electrician present on the section. So, I can't really find that there was a violation of the Federal Mine Health and Safety Act, or the regulations promulgated under that Act, when Mr. Hoover worked as a mechanic on a section when the regular mechanic was unavailable.

As Mr. Bussell pointed out in his argument, before I could order Island Creek to do something that it hasn't already done, such as set up a special class for the benefit of Mr. Hoover, I would have to find that Mr. Hoover has been engaged in some protected activity or that Island Creek refused to let him go to one of those classes because of his having been engaged in a protected activity. I haven't been able to find any protected activity that he has been engaged in.

There have been some cases before the Commission in which the Commission has ordered a company to give an individual certain types of relief. For example, in Local Union No. 1110, UMWA, and Robert L. Carney vs. Consolidation Coal Company, 1 FMSHRC 338 (1979), Carney was given three letters of reprimand and placed on probation for 1 year because of his union activities. He had left the continuous-mining machine and had gone to complain to other union officers and MSHA because he was asked to operate the continuous-mining machine pending receipt of a known mixture of methane for checking the methane monitor. Carney was told he could only make such complaints and leave the section when management approved it. Carney continued doing union work without getting permission and that resulted in another letter of reprimand.

The Commission in that case affirmed an administrative law judge's holding that this restrictive policy was a violation of Carney's rights. The health and safety of miners made it necessary for a union committeeman to do his work even though it might interfere with Consolidation's ability to control production as it would prefer on a given occasion. The Commission held that Consolidation's policy would impede a miner's ability to contact the Secretary of Labor when safety violations or dangers arise.

I refer to the Carney case primarily to illustrate the fact that if Mr. Hoover had been engaged in some activity which showed that the company was about to do something that was hazardous or endangered someone's life or health, then he would be entitled to relief because he would have been engaged in a protected activity. The mere fact that he agreed to do mechanic's work is not a protected activity, as I understand it, which would enable me to find that a violation of section 105(c)(1) occurred.

Mr. Moats explained to me--Mr. Moats being the person who represented Mr. Hoover in this case--what the present West Virginia law is on becoming a certified electrician and, as he understood that portion of the West Virginia law, Mr. Hoover, when he worked solely as a mechanic on a section when the regular mechanic was absent, would have to be an apprentice electrician and should have a card so stating from the West Virginia Department of Mines. Mr. Moats suggested that the failure of Mr. Hoover to be given that classification while he was acting as the sole mechanic on a section may well be illegal under West Virginia law.

I am not certain that Mr. Hoover is precluded from doing mechanical work so long as a certified electrician is present, even under the present West Virginia law. As I understand that law, it simply requires that a person be an apprentice electrician under that statute if he wants to become a certified electrician. Since Mr. Hamlin has indicated that the present program is apparently going to be designed for the day shift only, it wouldn't appear that Mr. Hoover would be able to qualify for it in view of his economic problem of being unable to drive back and forth to work on the day shift. I don't know that any good will come out of this hearing, but I would hope that Island Creek would endeavor to offer the program for an apprentice electrician on its 4:00-to-12:00 shift so that Mr. Hoover could get into the program and could eventually become a certified electrician.

There was a lot of testimony in this case by Mr. Hoover's friends and I think he must be a very fine person in order for these miners to take off a day from work to come and testify in his behalf and I would hope that their efforts are not in vain and that Mr. Hoover will be given an opportunity to become a certified electrician. Everyone who has testified here today has said that Mr. Hoover is an excellent worker, that he is conscientious, that he has initiative, and I think a man like that should be allowed to become as well-trained and educated as possible and I hope the company will make a concerted effort to try

to see that Mr. Hoover gets the proper recognition and opportunity to achieve the requirements for the position that he would like to hold.

But, as I have stated, I simply cannot find any way to find that a violation of section 105(c)(1) occurred.

WHEREFORE, it is ordered:

The Complaint filed in Docket No. WEVA 80-580-D is denied for failure to prove that a violation of section 105(c)(1) of the Federal Mine Safety and Health Act of 1977 occurred.

Richard C. Steffey

Richard C. Steffey
Administrative Law Judge
(Phone: 703-756-6225)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

333 W. COLFAX AVENUE, SUITE 400
DENVER, COLORADO 80204

JUN 16 1981

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. UNITED NUCLEAR - HOMESTAKE PARTNERS, now HOMESTAKE MINING COMPANY, Respondent.	CIVIL PENALTY PROCEEDINGS DOCKET NOS. CENT 79-251-M CENT 79-252-M CENT 79-262-M MINES: Section 23 Section 25 Section 13 (Consolidated)

APPEARANCES:

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For the Petitioner

Wayne E. Bingham, Esq.
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For the Respondent

Before: Virgil E. Vail
Administrative Law Judge

DECISION

I. Statement of the Case

The above-captioned civil penalty proceedings were brought pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq.,(hereinafter referred to as "the Act"). The violations were charged in 25 citations issued to the respondent following inspections at three of its mines between the dates of February 28, 1979 and April 25, 1979.

Pursuant to notice, a hearing on the merits was held in Albuquerque, New Mexico on June 3, 1980. The parties filed post-hearing briefs.

II. Stipulations

At the outset of the hearing, the parties entered into the following stipulations:

1. The Section 23 and 25 mines are operated by United Nuclear-Homestake Partners and are subject to the Act.

2. The Administrative Law Judge has jurisdiction to hear these matters.

3. The Section 23 mine is a large uranium mine with approximately 486,000 hours worked in 1979.

4. The Section 25 mine is a medium size uranium mine with approximately 287,000 hours worked in 1979.

5. The mine inspectors who issued the citations were employees of the Mine Safety and Health Administration and authorized representatives of the Secretary of Labor.

6. Any penalties assessed in these proceedings would not affect the operator's ability to remain in business.

7. The respondent demonstrated good faith in abating all the alleged violations.

8. The Section 23 and 25 mines have a small history of previous violations.

III. Settlement Proposals

CENT 79-251-M

On May 22, 1980, petitioner filed a written motion for approval of a partial settlement agreement which had been entered into with the respondent. At the hearing, the parties moved that the agreement be approved. The agreement provides for withdrawal of Citation no. 151097 and for payment of the penalties proposed in connection with Citations numbered 151093, 151094, 151098, 151440 and 151441. At the hearing the parties stated that they had agreed to settle three more citations. Respondent agreed to pay the proposed penalty assessments in Citations numbered 151089, 151090 and 151096. Both the written and oral motions included a documented discussion of the six criteria as set forth in Section 110(i) of the Act.

Upon due consideration, I conclude that the proposed settlements should be approved. Approval of the settlement proposals are reflected below in the final order.

CENT 79-252-M

The parties entered into an agreement to settle Citation no. 151439. Respondent agreed to pay the full amount of the proposed penalty assessment. Petitioner's written motion contained a complete discussion of the elements set out in Section 110(i) of the Act and said motion is incorporated herein by reference.

The proposed settlement is hereby approved, as reflected in the final order.

At the hearing, petitioner moved that Citation no. 151606 be vacated. In support of his motion, petitioner stated that the wrong standard was set forth in the citation. Petitioner's motion is approved and Citation no. 151606 is hereby vacated.

Respondent agreed to pay the full amount of the assessed penalties in Citation nos. 150800, 151603, 151609, 151610, 151611 and 151612. The reasons, as set forth by the parties, were accepted by the undersigned and the settlements were approved at the hearing.

CENT 79-262-M

The Secretary's written motion to approve settlement is granted. Respondent agreed to pay the proposed assessment in full for Citation no. 151446.

IV. Discussion

CENT 79-251-M

Citation No. 151092

Citation no. 151092 alleges a violation of 30 C.F.R. 57.9-2, which provides that: "Equipment defects affecting safety shall be corrected before the equipment is used."

Inspector Jose Aragon issued the citation charging that, "the operating control for the service air tugger ... was defective. The tugger had to be operated with the open/close air valve on the air hose eight feet behind the tugger."

The issue is whether or not the absence of an operating control device on the tugger constituted a defect and, if so, did the defect affect the safety of the miners?

Inspector Aragon testified that the tugger was being used as a winch to hoist supplies onto supply cars. He stated that the manufacturer is supposed to install a control on the tugger, but in this instance the air pressure was being regulated by a valve eight feet behind the tugger. (Tr. 17). It was the inspector's opinion that the tugger was defective because

the handle and part of the control on the tugger were missing, causing the operator to regulate the air pressure by using an open/close air valve from a position behind the machine. (Tr. 16 and 56). This, he stated, was a safety hazard since the operator would not have complete control of the materials that were being lifted and the materials could fall or the cable could break if the load was dropped too suddenly. (Tr. 18).

Roy Souther, safety director at the mine, testified that the tugger had not been manufactured with a control device. For this reason the respondent could not have known that the condition constituted a violation. He stated that the tugger was a converted slusher and at one time there had been another control, but that was when it was being used to pull slusher buckets and not as a winch. (Tr. 146).

Mr. Souther disagreed with the inspector's view that the operator would have better control if he was operating the tugger with control on the tugger itself. He was of the opinion that air pressure is like water pressure and when the air is turned off the pressure stops immediately. This would be true from either control position. (Tr. 129). Also, he stated that the cable had a test strength greater than what the 90 pounds of air pressure could break. The cable had 17,000 pounds weight strength. (Tr. 128). The operator was operating the tugger with a back lash guard in front of the tugger so in case the cable would break the guard would prevent it from hitting the operator. (Tr. 132).

I find the testimony of the respondent's witness to be more credible than that of the petitioner's. The operator would not have any greater control if he was operating the machine from a valve on the tugger than by using the open/close air valve. The citation is therefore vacated.

Citation No. 151095

Citation no. 151095 charges a violation of standard 57.19-101 which provides that: "Positive stopblocks or a derail switch shall be installed on all tracks leading to the shaft collar or landing."

As Mr. Aragon described the condition at the shaft on the day the citation was issued, there was a supply car parked on the track approximately 30 feet from the shaft. There was no derail switch or positive stopblocks, which would prevent the car from going into the shaft. (Tr. 21-22).

Respondent claims that there was a derail switch. Roy Souther testified that there was a switch tongue, which if turned would direct a car off the main line. (Tr. 134).

I am not persuaded by the testimony presented by the respondent, that the tongue acted as a derail switch. The testimony is uncontroverted that there was a rail car sitting on the main track and if pushed the car would not have derailed, rather it would have proceeded in the direction of the shaft. (Tr. 149). Although the tongue could be used to derail a car, it was not being used as a derail switch. Therefore, I find that there was a violation and the citation is affirmed.

Penalty Assessment

The bulk of the testimony in this matter went to the issues of respondent's negligence and the gravity of the violation.

The shaft gates are kept closed except when the conveyance is at the collar and there are signs posted saying to keep the door shut. (Tr. 135). The rails are on leveled ground and it would be highly improbable that a rail car would roll into the shaft on its own. It would take two or more people or a heavy piece of equipment to push a car into the shaft. Even then, respondent offered testimony to the effect that a car could not roll through the shaft gates which are made from quarter inch steel and completely cover the shaft. (Tr. 136 and 153).

For the reasons stated above, I conclude that the possibility of an accident steeming from this violation would be remote. If an accident were to occur, however, it could be serious in nature and affect up to thirteen miners. (Tr. 24). If find that the appropriate penalty for this violation is $100.00

Citation No. 151099

Citation no. 151099 alleges a violation of a mandatory safety standard 30 C.F.R. 57.12-68, which provides that: "Transformer enclosures shall be kept locked against unauthorized entry."

The sole issue is whether the transformer enclosure was "locked" as defined by the standard.

The facts are undisputed. The transformer enclosure consisted of a chain link fence 5 to 7 feet high which was stretched and tied to the corner posts. (Tr. 27 and 141). The chain link fence was attached to the four corner posts with wire. (Tr. 34).

Mr. Aragon issued the citation based on his belief that 57.12-68 requires that there be a gate that is locked and that hooking a piece of wire to hold the chain link to the post did not meet the requirements of the standard.

I concur with the Petitioner's position, that merely wiring the chain link fence to the posts does not satisfy the requirement that the enclosure be locked.

Penalty Assessment

Respondent's negligence was slight due to the fact that respondent was in the process of completing the enclosure. A permanent gate was going to be installed and respondent had posted danger signs on the fence. (Tr. 141 and 142).

If an injury were to occur it could have been of a serious nature. However, it would be only slightly easier to gain admittance to the transformer the way the fence was constructed the day the citation was issued than if the gate had been completed and was padlocked.

For the reasons stated above, I find that a penalty of $20.00 is appropriate.

Citation No. 151601

Mine inspector, Charles Sisk, issued Citation no. 151601, alleging a violation of 57.3-22[1]/ in that "proper ground control practices were not being followed by a miner ..." Mr. Sisk testified that the miner was installing roof support starting at the face and working back toward the existing ground support. It is an improper practice to go under unsupported ground to start installing roof bolts. (Tr. 72). The inspector stated that the problem with installing roof support, the way it was being done by the miner in the instant case, is that he was 25 feet from any existing support. (Tr. 73). Although Mr. Sisk tested the ground and it appeared to be all right, he testified that the practice or how the miner was proceeding was what concerned him, rather than the condition of the ground. (Tr. 102).

Respondent argues that MSHA should not determine when ground support is required. (Respondent's brief at p. 10). This, however, is not the issue in the present case. The only determination to be made is whether proper ground control practices were being followed. Respondent contends that the ground was in good condition and did not require bolting and therefore the petitioner did not prove that proper practices were not being followed. Furthermore, respondent claims that the miner was acting on his own and the respondent cannot be held responsible for his actions.

1/ 57.3-22 Mandatory. Miners shall examine and test the back, face, and ribs of their working places at the beginning of each shift and frequently thereafter. Supervisors shall examine the ground conditions during daily visits to insure that proper testing and ground control practices are being followed. Loose ground shall be taken down or adequately supported before any other work is done. Ground conditions along haulageways and travelways shall be examined periodically and scaled or supported as necessary.

I find respondent's arguments to be unpersuasive. The miner was not acting on his own when he was installing the roof bolts. George Ruff, underground shift boss at Section 25, testified that the determination that ground support should be installed was made by Mr. Lloyd. (Tr. 175). Mr. Ruff also stated that the miner was not following good mining practices by starting from the face and bolting out. (Tr. 177). The fact that the method being used by the miner was not sanctioned by the company and was not the general practice in the mine, does not relieve the respondent of liability. Secretary of Labor v. Nacco Mining Company Docket No. VINC 76X99-P, (April 29, 1981).

I find that the citation should be affirmed. Once it was determined that ground support was going to be put in, it was the responsibility of the respondent to see that it was done in a proper and safe manner.

Penalty Assessment

Although the ground appeared to be solid, if a roof fall were to occur a fatality could result. I find that the violation was of a serious nature and that a penalty of $200.00 is appropriate.

Citation No. 151607

While inspecting the car shop, Mr. Sisk issued Citation no. 151607 based on the fact that a portable drill did not have a proper prong in the electrical plug, thereby removing the continuity of the grounding circuit. (Tr. 84).[2]/

Respondent does not refute the fact that the grounding prong in the plug was missing. Rather, respondent contends that petitioner failed in his burden of proof in not proving that the drill was not otherwise grounded or was not provided with equivalent protection.

Petitioner claims that the drill was portable and therefore the only proper grounding device would be the three prong plug. (Tr. 91). To support respondent's position, that the drill had become a fixed piece of equipment, George Ruff testified that the drill press was bolted to a bench, which was then welded to a rock bolt plate. (Tr. 170).

I agree with petitioner that it was a portable drill. There is nothing in the record that convinces me that the drill could not have been

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2/ Citation no. 151607 alleges a violation of mandatory safety standard 57.12-25 which provides that:

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

easily removed from the bench. Respondent's expert witness testimony was all based upon the assumption that the drill was a stationary or fixed piece of equipment. Therefore, his testimony is of no value in determining whether a violation occurred.

I find that a violation did occur. The record is void of any evidence that would prove that there was another method of grounding being used when the citation was issued. Petitioner established a prima facie case through the testimony of Mr. Sisk. Respondent then had the burden of proving that the drill had been grounded in a way other than by the missing prong or there was equivalent protection. This respondent failed to do.

Penalty Assessment

I find the respondent negligent in that it knew or should have known of the condition. Mr. Sisk testified that if the drill were to become energized the 120 volts could injure or even prove to be fatal. (Tr. 92). Based on his testimony, I find the violation to be of a serious nature. A penalty of $130.00 is assessed for the violation.

Citation Nos. 151604 and 151614

Citation nos. 151604[2]/ and 151614[3]/, both of which allege a violation of mandatory safety standard 57.12-10, will be discussed together. The standard allegedly violated provides that:

> 57.12-10 Mandatory Telephone and low potential signal wire shall be protected, by isolation or suitable insulation, or both, from contacting energized power conductors or any other power source.

Respondent does not contend that the phone lines were isolated from the power cables. The sole issue, therefore, is whether there was "suitable insulation."

2/ Citation 151604 reads as follows: The mine telephone line is in physical contact with 480 power cables at the 31E-8 substation (3 different cables - 480 volts) and with the 18N feeder cable at 18N-31E intersection. All of these (4) power cables were energized (480 volts).

3/ Citation 151614 reads as follows: On the 640 level from the station out to the 640 transformer station the telephone circuit is in direct physical contact with the 2300 volt primary feeder in 3 places and in contact with2 440 volt cables in 5 or 6 places and also in contact with the water line cable in 2 places. (heat tape electrical cable).

Charles Sisk, the mine inspector, who issued the citations testified that even if the phone lines and cables were insulated the respondent would not have been in compliance (Tr. 116-119). It is the Secretary's position that the word "from," as contained in 57.12-10,[4/] means that there must be insulation in addition to what insulation would already be in a power cable. In support of his position, petitioner cites a policy memorandum, dated February 21, 1975, issued by the Assistant Administrator-Metal and Non-Metal Mine Health and Safety of the Mining Enforcement and Safety Administration, the predecessor to MSHA. The memorandum interprets 30 C.F.R. § 57.12-82, which is similar to 30 C.F.R. § 57.12-10. The memorandum states that, "Jacketing as provided on a powerline by the manufacturer is not adequate for the insulating purposes of Federal mandatory standard 55, 56, 57.12-82. Additional insulation or separation must be provided ..."

Respondent contends that the company was in compliance. It is Respondents position that all the wires were adequately insulated and that the standard does not require insulation in addition to that which is already contained in the cables and wires.

Respondent's expert witness was Robert Witter, an electrical engineer. He testified that Respondent's Exhibit 18, which is a piece of cable similar to that used in the 31 East 8, is a shielded multi-conductor cable. The cable consists of three inner conductors which are surrounded by a layer of insulation. The conductors are surrounded by a filler and then covered by a concentric shield. Outside the shield there is another layer of filler and then the jacket. (Tr. 161, 188-189). Respondent's Exhibit 19, the 2300 volt cable was constructed in a similar manner (Tr. 193). The phone line, Mr. Witter stated, was a "shielded" cable. Shielded means that there is a thread of wires that encircle the insulated conductors and the wires are then covered by an outer jacket. (Tr. 187).

In his opinion there would no possibility of the phone line becoming energized if it came into contact with either of the cables because there was adequate insulation. (Tr. 191 and 193).

I find that both the phone lines and power conductors were adequately insulated within the meaning of the standard. Petitioner's argument that additional insulation is needed for compliance is unconvincing. If in fact additional insulation is required, the standard is unclear and does not give adequate notice to mine operators.

This position is further supported by Judge Edwin S. Bernstein in his interpretation of facts and standard 30 C.F.R. § 57.12-82, both of which are similar to the present case. He held that," the "insulation" installed by the manufacturer "insulated" the cables within the meaning of the standard ... if the Secretary of Labor required some special kind of insulation or some additional insulation, he should have specified that in the standard." Secretary of Labor v. Homestake Mining Company CENT 79-27, August 20, 1980, review granted.

Accordingly, both citations are vacated.

4/ 57-12-82 Mandatory. Powerlines shall be well separated or insulated from waterlines, telephone lines, and air lines.

ORDER

CENT 79-251

The proposed settlement agreement is hereby approved for the citations listed below and respondent is ordered to pay the designated amounts.

Citation	151089	$160.00
Citation	151090	$122.00
Citation	151093	$180.00
Citation	151094	$ 72.00
Citation	151096	$140.00
Citation	151098	$ 78.00
Citation	151440	$210.00
Citation	151441	$180.00

Citations 151092 and 151097 are vacated.

Citation 151095 is affirmed and Respondent is ordered to pay a $100.00 penalty.

Citation 151099 is affirmed and Respondent is ordered to a $20.00 penalty.

CENT 79-252-M

The proposed settlement agreement is hereby approved as listed below.

Citation	151439	$210.00
Citation	150800	$195.00
Citation	151603	$ 84.00
Citation	151609	$195.00
Citation	151610	$210.00
Citation	151611	$195.00
Citation	151612	$195.00

Citations 151606, 151604 and 151614 are vacated.

Citation 151601 is affirmed and respondent is ordered to pay a $200.00 penalty.

Citation 151607 is affirmed the proposed penalty of $130.00.

CENT 79-262

The proposed settlement agreement, whereby respondent agreed to pay the proposed penalty of $106.00 for Citation 151446 is approved.

Respondent is ordered to pay the sum of $2,982.00 within forty days of this decision.

Virgil E. Vail

Virgil E. Vail
Administrative Law Judge

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JUN 16 1981

OZARK-MAHONING COMPANY, Contestant	:	Contests of Citations
v.	:	Docket No. LAKE 80-253-RM
	:	Citation No. 365457; 2/14/80
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Docket No. LAKE 80-254-RM
	:	Citation No. 366115; 2/14/80
	:	Barnett Mine

DECISION

Shortly after the two cases captioned above were assigned to me, the Contestant agreed that they be consolidated with the related penalty cases when filed (see letter of May 1, 1980, from Contestant). On April 10, 1981, I was advised that the penalty cases had been filed and assigned to Judge Laurenson and had already been heard by him.

Judge Laurenson has now issued his decision in Secretary of Labor v. Ozark Mahoning Company, LAKE 80-336-M and LAKE 80-337-M (May 26, 1981).

Judge Laurenson accepted a settlement as to one of the citations involved herein and assessed a penalty as to the other citation. That decision is binding on me.

The citations under review are accordingly affirmed.

Charles C. Moore, Jr.
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
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JUN 16 1981

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), ex rel THOMAS ROBINETTE, Applicant	:	Complaint of Discharge, Discrimination, or Interference
v.	:	Docket No. VA 79-141-D
UNITED CASTLE COAL COMPANY, Respondent	:	

DECISION ON REMAND

Appearances: James H. Swain, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Applicant; Michael L. Lowry, Esq., Ford, Harrison, Sullivan, Lowry & Sykes, Atlanta, Georgia, for Respondent.

Before: Chief Administrative Law Judge Broderick

On April 3, 1981, the Commission remanded this case for a determination as to "whether [Complainant] Robinette would have been fired for his unprotected activity alone." Com. Dec. at 17-18. The parties were ordered to file briefs on the issue, and were given the opportunity to offer additional evidence. The Secretary of Labor filed a brief, but Respondent stated that it was in receivership and unable to afford the expense of filing a brief. Neither party sought to introduce additional evidence.

The evidence shows that there were a number of factors involved in Respondent's decision to discharge Robinette. He allowed his cap cord to be severed, he shut down the belt conveyor, he disconnected the mine phone, he failed to grease the feeder, he permitted a miner to run through and destroy a line curtain while working as a miner-helper, and on a number of occasions he generally neglected his duties. Of these factors, I found the shutting down of the belt conveyor to be activity protected under § 105(c). This was not cited by Respondent as a reason for discharging Robinette, but the Commission found as I did that it played a role in the discharge. Com. Dec. at 16. The Commission further found that Robinette had engaged in unprotected activities which were involved in the decision to discharge him. The Commission characterized the act of disconnecting the phone as "a flagrant disregard of mine safety." Com. Dec. at 17.

Respondent has the burden of proving by a preponderance of all the evidence that it would have fired Robinette solely because of the unprotected activities. Secretary of Labor ex rel Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2800 (1980).

> It is not sufficient for the employer to show that the miner deserved to have been fired . . . The employer must show that he did in fact consider the employee deserving of discipline for engaging in the unprotected activity alone and that he would have disciplined him in any event.

Pasula, supra. 1/ See also Wright Line, 251 N.L.R.B. 150, 105 LRRM 1169 (1980).

Percy Sturgill, section foreman, testified that on May 30 Robinette worked on the belt feeder and that part of his job was to grease the tailshaft. On May 31 the feeder tailshaft broke and Sturgill concluded that this was caused by failure to grease it the previous day. Sturgill remonstrated with Robinette about this failure. On May 31, while Robinette was working as a miner-helper, the miner ran through and destroyed a line curtain. Sturgill blamed this incident on Robinette. These incidents figured in Respondent's decision to discharge him on June 4.

At the time of the cap lamp incident, Sturgill testified that he saw Robinette disconnect the mine phone. He had a discussion with Robinette concerning the feeder being shut down, and Robinette's light being out. Although he did not discuss the phone incident until after Robinette returned from shovelling spillage on the beltline, it is clear that the phone incident was also involved in Respondent's decision to discharge Robinette.

On the present record, it is difficult to decide whether Respondent would have fired Robinette solely for the acts and omissions described in the prior two paragraphs because it obviously involves a hypothetical set of circumstances. It is clear, however, that shutting down production (which I found to be protected and the Commission affirmed) was the final act or event for which he was fired. Using a test recently employed by the NLRB,

> [I]n those instances where after all the evidence has been submitted, the employer has been unable to carry its burden, [I] will not seek to quantitatively analyse the effect of the unlawful cause once it has been found. It is enough that the employee's protected activities are causally related to the employer action which is the basis for the complaint whether that "cause" was the straw that broke the camel's back or a bullet between the eyes, if it was enough to determine events, it is enough to come within the proscription of the Act.

Wright Line, 105 LRRM at 1175 n. 14.

1/ But cf. Texas Dept. of Community Affairs v. Burdine, _____ U.S. _____, 25 FEP Cases 113 (1981), a case brought under Title VII of the Civil Rights Act.

The protected activities here were what "determined the event" - Robinette's discharge - and this is what I meant in the conclusion in my prior decision that the protected activities were the "effective cause" of the discharge.

I conclude that Respondent has not carried its burden under the Pasula standard. Sturgill did not testify that he would have fired Robinette for his unprotected activities alone. Indeed, Sturgill did not testify that he would have fired him for any activities. The decision to discharge was made by Jack Tiltson, Respondent's Vice President, who did not testify at the hearing. Tiltson was told of the protected and unprotected activities, and it would be speculative on this record to decide whether or not he would have regarded the unprotected activities as sufficient grounds for discharge. There is no evidence of disciplinary action taken by Respondent involving like conduct in the past.

It is not enough that Robinette's work performance was less than exemplary. It is not enough that he "deserved" to be discharged, not enough that his unprotected activity was "a flagrant disregard of mine safety." Since I cannot accurately assess the extent to which his unprotected activity motivated the discharge, I must conclude that Respondent's burden has not been carried.

ORDER

I conclude on the basis of the whole record that Respondent has not established by a preponderance of the evidence that Robinette would have been discharged for unprotected activities alone.

Therefore my order of March 13, 1980 IS REAFFIRMED.

James A. Broderick

James A. Broderick
Chief Administrative Law Judge

Distribution: By certified mail.

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JUN 18 1981

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding Docket No. PENN 80-267 A.O. No. 36-02347-03015
v.	:	Preparation Plant
BRADFORD COAL COMPANY, INC., FUEL FABRICATORS, INC., INDIANA STEEL AND FABRICATING CO., Respondents	:	

DECISION AND ORDER

On June 16, 1981, this matter came on for a hearing on (1) cross motions for summary decision filed by Fuel Fabricators Co., Inc., and the Secretary, (2) a motion to dismiss by Indiana Steel and Fabricating Co., and (3) a motion to implead a third party respondent. By order of June 1, 1981, Bradford Coal Co. was dismissed from the case.

The cross motions are supported by a stipulation of material facts and waiver of an evidentiary hearing. Indiana Steel moved to dismiss on the ground it paid the only penalty with which it was charged. 1/ Fuel Fabricators opposes this motion on the ground that Indiana Steel as general contractor was legally responsible for the five violations in question. Based on an independent evaluation and de novo review of the circumstances, I conclude the motion to dismiss as to Citation No. 846927 should be denied but as to the other four electrical violations it is granted. As to the four electrical violations, the Secretary's motion for summary decision against Fuel Fabricators is granted and the cross motion denied.

Findings of Fact

1. At all times pertinent, Fuel Fabricators and Indiana Steel and Fabricating Company were mine operators and statutory

1/ At the hearing, Indiana Steel declined an evidentiary hearing to dispute the facts set forth in the stipulation or to brief its claim that the Commission is without authority to determine de novo the "responsible operator" in a multi-respondent penalty proceeding.

agents within the meaning of section 3(d) and (e) of the Mine Safety Law. 30 U.S.C. § 802(d) and (e).

2. At the time the violations alleged occurred, Fuel Fabricators, the owner-operator, had overlapping control over and supervisory responsibility for compliance with the Mine Safety Law at the site of the preparation plant in question.

3. Except as indicated, at the time the violations alleged occurred, Indiana Steel, the builder-operator, had overlapping control over and supervisory responsibility for compliance with the Mine Safety Law at the site of the preparation plant in question.

4. The stipulated and undisputed 2/ facts show Fuel Fabricators and Indiana Steel were jointly and severally liable for the condition set forth in Citation No. 846927.

5. The stipulated facts show Fuel Fabricators and its electrical contractor and statutory agent, Meyer Brothers of Philipsburg, Pennsylvania, were responsible for the electrical equipment violations found in Citations Nos. 846929, 846930, 846931 and 846932.

6. The stipulated facts show Indiana Steel had no responsibility for creation or abatement of the conditions on the electrical equipment.

Conclusions of Law

1. The claim that the construction site and the construction activity at the new coal preparation plant were not subject to regulation under the Mine Safety Law is without merit. I find Congress intended to subject the construction activity involved in building the new plant to MSHA jurisdiction and regulation from the time the first miner-employees entered the site to commence work on the new plant. The fact that Fuel Fabricators failed to file an identity report within 30 days after it opened the mine site was no ground for denying MSHA jurisdiction to regulate that activity. The express terms of the Act as well as its legislative history show Congress intended coverage of the Mine Safety Law to be as broad as the constitutional power conferred by

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2/ Where the parties fail to show there is a disputed issue of fact, it is unncessary to hold an evidentiary hearing. Costle v. Pacific Legal Foundation, 445 U.S. 198 (1980).

the Commerce Clause. United States v. Dye Construction Company, 510 F.2d 78, 83 (10th Cir. 1975). The objective was to make maximum use of the commerce power to improve occupational safety and health in the Nation's mines and to avoid the disruptions to production that impede and burden commerce. Charles T. Sink, Dkt. No. HOPE 75-679 (Dept. of Int., OHA, OALJ, May 19, 1975), aff'd. 1 MSHC 1362 (1975); Secretary v. Shingara, 1 MSHC 1450 (M.D. Pa. 1976); Marshall v. Bosack, 1 MSHC 1671 (E.D. Pa. 1978); Energy Fuel Nuclear, Inc., 1 MSHC 1747 (1979); Sun Landscaping & Supply Co., 1 MSHC 2444 (1980).

Congress, has plenary power to regulate activities in and affecting interstate commerce and in this instance has specifically determined that the construction of structures and facilities including "custom coal preparation facilities" that are "to be used in" the processing of coal to be sold either locally or in interstate commerce is an activity subject to regulation. § 3(h)(1) of the Mine Safety Law. 30 U.S.C. § 802(h)(1). Cases cited, supra. See also, Texas Utilities Generating Company, 1 MSHC 2091 (1979); Heart of Atlanta Motel v. U.S., 379 U.S. 241 (1964); Katzenbach v. McClung, 379 U.S. 294 (1964); Wickard v. Filburn, 317 U.S. 111 (1942). As the stipulated facts, and the reasonable inferences to be drawn therefrom show, there was apparently a steady flow of construction materials to the mine site from the time Indiana Steel began its construction of the $17,000,000 facility. I find, therefore, there was a direct nexus between the construction activity at the mine site and the flow of goods and materials in commerce. United States v. Dye Construction Company, supra. I also find that even if all of the construction materials used in the new plant were produced and purchased wholly within the state of Pennsylvania the business of building coal preparation plants is a class of activity the cumulative effect of which clearly affects interstate commerce. Usery v. Lacy, 628 F.2d 1226 (9th Cir. 1980); Godwin v. OSHRC, 540 F.2d 1013 (9th Cir. 1976) and cases cited supra.

2. As the foregoing shows, Fuel Fabricators' suggestion that the Act does not apply until the coal preparation plant becomes operational, i.e., actually processes coal for sale in or affecting commerce is also without merit. Texas Utilities Generating Company, supra; Energy Fuel Nuclear, Inc., supra. In enacting the Act, Congress made a specific finding that "the disruption of production and the loss of income to operators and miners as a result of coal or other mine accidents or occupationally caused diseases unduly impedes and burdens commerce." 30 U.S.C. § 801(f). Thus, Congress has determined that a class of activity, unsafe mine operations,

including construction operations has a substantial economic effect on commerce. I conclude therefore that the construction activity that precedes production activity at the mine site in question is included in the class of activity that as a matter of law affects interstate commerce. This coverage I find is consistent with the congressional purpose to reach as broadly as constitutionally permissible working conditions and practices in the nation's mines, since nonuniform coverage would give unsafe employers a competitive advantage. The "substantial economic effect" test makes irrelevant any determination of what is "in" or "out" of the "current of commerce". United States v. Wrightwood Dairy Co., 315 U.S. 110, 119 (1942). An activity that takes place wholly intrastate may be subjected to congressional regulation because of the activity's impact in other states--regardless of whether the activity itself occurs before or during or after interstate movement. United States v. Rock Royal Co-operative, Inc., 307 U.S. 533, 569 (1939). Accord: Shreveport Rate Cases, 234 U.S. 342 (1914). As the Supreme Court has noted: "There is a basis in logic and experience for the conclusion that substandard labor conditions among any group of employees, whether or not they are personally engaged in commerce or production, may lead to strife disrupting an entire enterprise." Maryland v. Wirtz, 392 U.S. 183, 192 (1968). See also, Perez v. U.S. 402 U.S. 146 (1971); Marshall v. Bosach, supra; Marshall v. Kraynak, 1 MSHC 1685 (W.D. Pa. 1978); Godwin v. OSHRC, supra; Usery v. Lacy, supra; Island County Highway Dept., 2 MSHC 1174 (1980); Ogle Co. Highway Dept., 2 MSHC 1255 (1981).

3. Under the Mine Safety Law, Fuel Fabricators, the owner-operator, and its independent contractors Indiana Steel and Meyer Brothers were responsible for mine safety hazards which they either created or had responsibility for abating at the new preparation plant. Old Ben Coal Company, 1 MSHC 2177 (1979), aff'd, unpublished order, (D.C. Cir. December 9, 1980), see, 2 MSHC 1065; Republic Steel Corporation, 1 MSHC 2002 (1979); A.B.C. v. Andrus, 581 F.2d 853 (D.C. Cir. 1978); BCOA v. Secretary, 547 F.2d 240 (4th Cir. 1977); S. Rpt. 95-181, 95th Cong., 1st Sess. 14 (1977).

4. In the execution of their responsibility for enforcement of the Act, the Secretary and the Commission are authorized to assess and to apportion or allocate civil penalties between independent contractors and owner-operators. In the exercise of its adjudicatory oversight power, the Commission has the ultimate authority to determine de novo the allocation of responsibility for contested violations. BCOA v. Secretary, supra at 247; NISA v. Marshall, 1 MSHC

2033, 2040-42 (3rd Cir. 1979); Old Ben, supra; Secretary v. Morton Salt, Dkt. CENT 80-59-M, Order On Motion To Dismiss Third-Party Petition, dated April 14, 1980, review denied, 2 FMSHRC (May 1980); 45 Fed. Reg. 44,497 (General Enforcement Policy for Independent Contractors); 30 C.F.R. § 45.2(c).

5. The stipulated and undisputed facts show Fuel Fabricators and Indiana Steel shared functional control over the area involved in the violation cited in Citation No. 846927 in that the latter was responsible for placing the combustible debris within 25 feet of the flammable liquid storage tank and the former for removal of the same. I conclude that by entering into a joint arrangement and responsibility for accumulation and removal of the debris these parties shared equal responsibility for compliance and for the violation that admittedly occurred.

6. Based on an independent evaluation and de novo review of the circumstances including the gravity (low) and the negligence (slight), I find, after taking into account the other statutory criteria, that the amount of the penalty warranted is that recommended by MSHA, namely, $130, one half of which is assessed against Fuel Fabricators and the other half against Indiana Steel. 3/ The violation will be recorded as part of the prior history of both operators.

7. The stipulated facts show the four electrical violations were perpetrated as the result of actions by Fuel Fabricators and/or its electrical contractor Meyer Brothers. The undisputed facts show Indiana Steel had neither functional nor supervisory responsibility for these violations. While the owner operator is automatically responsible for violations by its independent contractors, I can find nothing in the law or its underlying policy that makes independent builder-operators vicariously liable for violations by owner-operators and other contractors working on the same site in the absence of a showing that with the exercise of due diligence the general contractor should have been aware of the violation and taken realistic action to abate the same in order to protect its own employees or subcontractors. Compare, Anning-Johnson Co. v. OSHRC, 516 F.2d 1081 (7th Cir. 1975); Grossman Steel & Aluminum Corp., 4 OSHRC, BNA, 1185 (1975) with Central of Georgia R.R. v. OSHRC 576 F.2d 620 (5th Cir. 1978).

3/ At the hearing, Indiana Steel agreed to drop any further contest of this violation and to pay a penalty of $65.00.

8. I note that the contract between Fuel Fabricators and Indiana Steel expressly limits the latter's responsibility for indemnification of Fuel Fabricators to violations committed by Indiana Steel or its subcontractors. Thus, in addition to the fact that Fuel Fabricators was not at liberty to contract out its statutory responsibility as owner-operator, so also, it may not seek to have the Commission impose a duty of contribution or indemnification where there is no basis in fact for finding the independent contractor jointly or severally liable. I realize that the right to indemnification may arise without agreement and by operation of law to prevent a result which is regarded as unfair or unjust. This remedy, however, it limited to indemnitees who are personally free from fault such as where an owner-operator is held vicarously liable for the violations of a culpable independent contractor. W. Prosser, Handbook of the Law of Torts, § 51 at 310-311 (4th ed. 1971).

9. While it might have been logical for MSHA to charge Meyer Brothers as well as Fuel Fabricators with the four electrical violations, this is no defense to Fuel Fabricators. 4/ The fact that another employer may be jointly responsible is irrelevant to a finding of violation by the employer actually cited. Central of Georgia R.R. v. OSHRC, supra, 576 F.2d 625.

10. Based on an independent evaluation and de novo review of the circumstances, I find Fuel Fabricators and not Indiana Steel was responsible for the four electrical violations. I further find that in each instance the gravity was low and the negligence ordinary and after taking into account the other statutory criteria the amount of the penalty warranted for each violation is that recommended by MSHA, namely:

Citation	Amount
846929	$122
846930	140
846931	66
846932	140

ORDER

Accordingly, it is ORDERED:

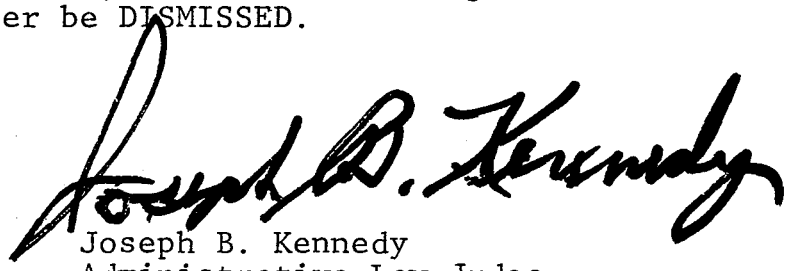
4/ Meyer Brothers was not cited because its presence at the site had long since been terminated.

1. That Fuel Fabricators' motion to implead third party respondent or for summary decision is DENIED;

2. That Indiana Steel's motion to dismiss is DENIED as to Citation 846927 and otherwise GRANTED;

3. That the Secretary's motion for summary decision against Fuel Fabricators is GRANTED IN PART and otherwise DENIED;

4. That for the five violations found, Indiana Steel pay a penalty of $65 and Fuel Fabricators a penalty of $533 on or before Wednesday, June 30, 1981 and that subject to payment the captioned matter be DISMISSED.



Joseph B. Kennedy
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

JUN 19 1981

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceedings
	:	Docket No. VINC 79-93-P
	:	A.O. No. 12-01433-03002
v.	:	
	:	Docket No. VINC 79-102-P
JOHN L. HAVILAND, ROBERT P. HAVILAND, AND CLEVE RENTSCHLER, d/b/a/ HAVILAND BROTHERS COAL COMPANY, Respondent	:	A.O. No. 12-01433-03003
	:	Haviland Strip Mine

DECISIONS

Appearances: Rafael Alvarez, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois, for the petitioner; George A. Brattain, Esq., Terre Haute, Indiana, for the respondent.

Before: Judge Koutras

Statement of the Proceedings

These proceedings concern proposals for assessment of civil penalties filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a), charging the respondent with two alleged violations of certain mandatory safety and health standards found in Part 71, Title 30, Code of Federal Regulations. Respondent filed timely answers and a hearing was convened in Terre Haute, Indiana, on July 1, 1980, and the parties appeared and participated therein. In view of a pending court action taken by the Secretary at the time the hearing was conducted, respondent's participation was limited to a jurisdictional argument asserting that respondent is not subject to the Act because it is a small, family-owned business, whose products are sold only intrastate within the State of Indiana, and to a limited cross-examination of petitioner's witnesses. Aside from its jurisdictional arguments, respondent offered no defense to the citations and presented no testimony or other evidence disputing the citations. The hearing was recessed and continued until May 19, 1981, when a second hearing was conducted for the purpose of permitting respondent to present its case. The parties appeared, but the respondent again declined to present any testimony or evidence in defense of the citations, and reasserted its previously advanced jurisdictional arguments.

Attached to, and incorporated by reference herein, is a copy of a previous order issued by me on January 22, 1981, summarizing the arguments presented by the parties at the July 1, 1980, hearing, as well as the testimony and evidence presented by the petitioner in support of its case, and certain stipulations and agreements entered into by the parties, including matters which are part of the record in the litigation pending in the district court.

Issues

In addition to the jurisdictional question, the issues presented in these proceedings are (1) whether respondent has violated the provisions of the Act and implementing regulation as alleged in the proposals for assessment of civil penalties filed in these proceedings, and, if so, (2) the appropriate civil penalties that should be assessed against the respondent for the alleged violations based upon the criteria set forth in section 110(i) of the Act. Additional issues raised by the parties are identified and disposed of in the course of these decisions.

In determining the amount of a civil penalty assessment, section 110(i) of the Act requires consideration of the following criteria: (1) the operator's history of previous violations, (2) the appropriateness of such penalty to the size of the business of the operator, (3) whether the operator was negligent, (4) the effect on the operator's ability to continue in business; (5) the gravity of the violation, and (6) the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of the violation.

Applicable Statutory and Regulatory Provisions

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

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

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

Findings and Conclusions

The thrust of respondent's defense in this case is the assertion that it operates a small family-owned mining operation as a part-time venture employing no one but the owners, and that any coal which is mined is sold strictly intrastate to local customers.

Respondent contends that its operation does not meet the definition of "interstate commerce" as provided by law, and asserts that it is not subject to the Act since its activities are conducted solely within the State of Indiana, and because its activities do not in any way affect commerce. In order to decide this question, it is necessary to examine the constitutional underpinnings of Federal jurisdiction over the mining industry.

Article I, Section 8, Clause 3, of the Constitution gave Congress the power to "regulate Commerce * * * among the several States * * *." The U.S. Supreme Court has a long history of upholding Federal regulations of ostensibly local activity on the theory that such activity may have some effect on interstate commerce.

In Wickard v. Filburn, 317 U.S. 111 (1942), the Court upheld a Federal law regulating the production of wheat which was "not intended in any part for commerce but wholly for consumption on the farm." Id. at 118. The Court stated that "even if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce, and this irrespective of whether such effect is what might at some earlier time have been defined as 'direct' or 'indirect.'" Id. at 125.

In 1975, the Court elaborated on this idea, stating that "[e]ven activity that is purely intrastate in character may be regulated by Congress, where the activity, combined with like conduct by others similarly situated, affects commerce among the States or with foreign nations." Fry v. United States, 421 U.S. 542, 547 (1975). More recently, the Seventh Circuit Court of Appeals relied upon Wickard when it said that the commerce clause "has come to mean that Congress may regulate activities which affect interstate commerce." United States v. Byrd, 609 F.2d 1204, 1209 (7th Cir. 1979) (emphasis in original).

These principles have often been relied on by the lower courts in ruling on the coverage of the present Act and its predecessor, the Federal Coal Mine Health and Safety Act of 1969. One leading case is Marshall v. Kraynak, 457 F. Supp. 907 (W.D. Pa. 1978), aff'd., 604 F.2d 231 (3d Cir. 1979), cert. denied, 444 U.S. 1014 (1980). There, the Court upheld the applicability of the 1969 Act to a small mine which was owned and operated entirely by four brothers. No other personnel had worked there for at least 7 years, and the brothers had no intention of hiring other employees in the future. The brothers contended that all of the coal which they mined was sold and consumed within the State of Pennsylvania and did not involve interstate commerce. Id. at 908. The defendants admitted, however, that more than 80 percent of their production was sold to a paper-processing corporation which was "actively engaged in interstate commerce." Id. at 909. The Court held that "the selling by the defendants of over 10,000 tons of coal annually to a paper producer whose products are nationally distributed enters and affects interstate commerce within the meaning of * * * the Act." Id. at 911.

A similar case was Secretary of the Interior v. Shingara, 418 F. Supp. 693 (M.D. Pa. 1976), involving a mine which was operated entirely by two brothers, Edward and Frederick Shingara. In the words of the Court, "Edward [went] underground, while Frederick [did] the hoisting." Id. at 694. The Court found that the fruits of their labor were sold as follows:

> The Shingara coal is sold primarily to Calbin V. Lenig of Shamokin, Pennsylvania who resells it, along with other

coal which he has gathered, to Keystone Filler and Manufacturing Co., Inc. of Muncy, Pennsylvania and Mike E. Wallace of Sunbury, Pennsylvania. Keystone Filler combines the Shingara-Lenig coal with others in order to achieve a particular ash content, dries the mixture, and grinds it into a powder which is shipped to customers outside of Pennsylvania.

And, at pages 694-695:

> Congress intended to regulate commerce to "the maximum extent feasible through legislation." S. Rep. No. 1055, 89th Cong. 2d Sess. 1 (1966) U.S. CODE CONGRESSIONAL AND ADMINISTRATIVE NEWS, 89th Cong. 2d Sess. 2072.
>
> * * * * * * *
>
> Even if it were determined that the Shingara coal does not "enter commerce" it must be concluded, under the extremely expansive intepretations given to the regulatory power of Congress, that the activity in question "affects commerce" and is thereby subject to the Act. Cf. Heart of Atlanta Motel v. U.S., 379 U.S. 241, 85 S.Ct. 348, 13 L.Ed2d 258 (1964); Katzenback v. McClung, 379 U.S. 294, 85 S.Ct. 377, 13 L.Ed.2d 290 (1964). Although the activity in question here may seem on first examination to be local, it is within the reach of Congress because of its economic effect on interstate commerce. See Beckman v. Mall, 317 U.S. 597, 63 S.Ct. 199, 87 L.ed. 488 (1942).

The Shingara Court compared the facts of the case to the facts in Wickard and concluded that "the Shingara coal mining activity, which has an even more direct impact on the coal market, also 'affects commerce' sufficiently to subject the mine from which it emanates to federal control."

In both Kraynak and Shingara, the coal in question was being sold to parties who were engaged in interstate commerce. In other mining cases, such facts were not shown, but the courts nevertheless utilized the seminal Wickard decision to find that the activities in question "affected commerce." Marshall v. Kilgore, 478 F. Supp. 4 (E.D. Tenn. 1979), involved a specific agreement between the owner of a coal mine and his buyer that the latter would sell the coal only within the state and not place any of it into interstate commerce. In holding that interstate commerce was still affected, the Court went back to the following passage from Wickard:

> It can hardly be denied that a factor of such volume and variability as home-consumed wheat would have a substantial influence on price and market conditions. This may arise because being in marketable condition such wheat overhangs the market and if induced by rising prices tends to flow into the market and check price increases. But if we assume that

it is never marketed, it supplies a need of the man who grew it which would otherwise be reflected by purchases in the open market. Home-grown wheat in this sense competes with wheat in commerce. 478 F. Supp. at 7, citing 317 U.S. at 128.

The Kilgore Court found it "inescapable that the product of the defendant's mine would have an affect (sic) on commerce. The fact that the defendant's coal is sold only intrastate does not insulate it from affecting commerce, since its mere presence in the intrastate market would effect (sic) the supply and price of coal in the interstate market." 478 F. Supp. at 7. See also Marshall v. Bosack, 463 F. Supp. 800, 801 (E.D. Pa. 1978) ("The Act does not require that the effect on interstate commerce be substantial; any effect at all will subject [the operator] to the Act's coverage").

In Kraynak, the Court rejected the argument that since there were no miners, other than the partners, the Act's provisions did not apply to the mine, and in so doing stated as follows:

> The legislative history of the Act clearly indicates that Congress did not intend to create a special class of mines exempt from its coverage. The framers were concerned specifically with the Nation's attitude permeating the coal industry that mining was a hazardous occupation. Despite the hazardous nature, the Human Resources Committee was determined that these hazards be substantially reduced or eliminated. 1977 U.S. Code, Cong. and Adm. News, Vol. 3 page 3403. To this effect, the Committee announced that it was essential that there be a common regulatory program for all operators and equal protection under the law for all miners.
>
> By requesting support for differentiation between owner-operated mines from non-owner miners where employees labor, the defendants seek to place a value on an owner-operator's life as far below that of a miner in any employer-employee setting. The fact that one is part owner of an enterprise does not, in and of itself, give a court leave to allow such an owner the right to expose himself to unnecessary harm where Congress has otherwise directed.

Marshall v. Anchorage Plastering Company and OSAHRC, (9th Cir.), No. 75-2747, February 2, 1978, 6 OSHC, held that a company that used equipment and materials from out of state and used telephone and mails was engaged in business affecting interstate commerce and is subject to the Occupational Safety and Health Act. The court stated that: "It has been clear since Wickard v. Filburn, 317 U.S. 111 (1942), that an activity which in itself has a minimal effect on commerce is still subject to regulation if similar activities, taken as a whole, might have an impact."

Godwin v. Occupational Safety and Health Review Commission, 540 F.2d 1013 (9th Cir. 1976), involved a company which was clearing land for purposes

of growing grapes. During the administrative adjudication of that case, the Review Commission held that the company was not engaging in a business affecting commerce because at the time of the citation and hearing it had not completed its plans to plant a vineyard and hence had not engaged in a business affecting commmerce. The court reversed the Commission, and, in doing so, cited the Congressional statement of findings and declaration of purpose and policy found in the Occupational Safety and Health Act of 1979, 29 U.S.C. § 651, the legislative history of the Act citing loss of life and injuries resulting from job-related hazards, and other circuit court decisions interpreting the phrase "affecting commerce" which appears in the Act, 29 U.S.C. § 652(5). The court concluded that Congress intended the coverage of the Act to be as broad as the commerce clause, and cited Fry v. United States, 421 U.S. 542 (1975), which held "even activity that is purely intrastate in character may be regulated by Congress, where the activity, combined with like conduct by others similarly situated, affects commerce."

Perez v. United States, 402 U.S. 146 (1971), held that Congress may make a finding as to what activity affects interstate commerce, and by making such a finding it obviates the necessity for demonstrating jurisdiction under the commerce clause in individual cases. Thus, it is not necessary to prove that any particular intrastate activity affects commerce, if the activity is included in a class of activities which Congress intended to regulate because it finds that the class affects commerce.

I am aware of only one case where a court held that a mine did not affect commerce within the meaning of the Act. Morton v. Bloom, 373 F. Supp. 797 (W.D. Pa. 1973), involved a one-man mine which had no employees. The coal which the defendant produced was sold "exclusively within Pennsylvania." Id. at 798. The court held that this operation was not the type which the Congress intended to cover when it enacted the statute. More significantly, the court found itself unable to conclude "that defendant's one-man mine operation will substantially interfere with the regulation of interstate commerce." Id. at 799. Even under the Wickard standard, the court stated that the mine was "one of local character in which the implementation of safety features required by the Act will not exert a substantial economic effect on interstate commerce." Id.

I have carefully reviewed the court's reasoning in Bloom, and I conclude that it should not be followed in the instant matter. First, I do not believe the court properly considered all of the possible means by which the Bloom operation could have affected interstate commerce. At one point in the opinion, the court noted that the "defendant does use some equipment in his mine which was manufactured outside of Pennsylvania * * *" 373 F. Supp. at 798. The court found that this did not bring the defendant's mine within the ambit of the commerce clause since the purchase of this equipment was "so limited that its use would be de minimis." Id. This reasoning, in my view, runs directly contrary to the Supreme Court's statement in Mabee v. White Plains Publishing Company, 327 U.S. 178, 181 (1946), that the de minimis maxim should not be applied to commerce clause cases in the absence of a

Congressional intent to make a distinction on the basis of volume of business. And, as the court noted in Bosack, the Mine Safety Act does not require that the effect on interstate commerce be substantial. See 463 F. Supp. at 801.

Secondly, and perhaps more importantly, the court in Bloom did not consider the effects which many one-man coal mining operations, taken together, might have on interstate commerce. Going back once again to the Wickard case, the Supreme Court held that even if the wheat in question was never marketed, "it supplies a need of the man who grew it which would otherwise be reflected by purchases in the open market. Home-grown wheat in this sense competes with wheat in commerce." 317 U.S. at 128. Similarly, in the instant case, the coal which the respondent supplies to its customer supplies the needs of that customer and would otherwise be reflected by purchases in the open market. I believe that such a practice in the open market would have enough of an effect, direct or indirect, on commerce to bring respondent within the purview of the commerce clause, and thus the Act. My conclusion in this regard is further supported by the following facts adduced in these proceedings.

Judge Noland's order of February 24, 1978, includes a finding that while Log Cabin Coal Company sells the coal it purchases from the respondent to the Logansport Municipal Utility Company, Logansport, Indiana, "there is no evidence concerning the area of customers serviced by the utility" (pg. 5, Judge's Order). However, a deposition by the Mayor of Logansport, taken on March 29, 1978, reflects that he also serves as the utility supervisor. He states that 30 percent of the utility coal consumption is purchased from Log Cabin, that the utility services the city of Logansport, as well as an area approximately 5 miles surrounding the city in all directions, that the utility has in excess of 12,000 meters encompassing residential, commercial, and industrial customers, excluding approximately 200 street lights. Some of its commercial customers include Alfa Industries, Electric Storage Battery, Krause Milling, Wilson and Company, the General Tire and Rubber Company, and Con-rail, formerly the Penn Central Railroad Company. The Mayor also indicated that there are approximately 18 manufacturing plants in the city, employing 9,000 to 10,000 people.

The Mayor's deposition reflects that the public utility operates under the rules of the Federal Power Commission, that it is a publicly owned electrical generating utility, and that it also purchases some of its coal from Island Creek Coal Company, located in the State of Kentucky. He also indicated that the utility has purchased coal from out of state brokers during a strike for use by the utility, as well as from the State of Indiana Public Service Commission. He had no knowledge of the respondent's coal mining operations.

Also included in the record are the March 29, 1978 depositions of Donald D. Kampenga, general manager of Essex Controls Division Electra-Mechanical Group, a subsidiary of United Technologies, a Connecticut Corporation; Edward E. Boyles, Customer Services Supervisor, General Telephone Company of Indiana; and Harry A. Bahnaman, General Manager, Wilson Produce Company, all located in Logansport, Indiana.

Mr. Kampenga testified as to the scope and extent of Essex Control's operations in Logansport, the use of power in the plant, and the fact that its products are sold to the Carrier, Whirlpool, Frigidaire, General Electric, and Westinghouse Corporations, both within and outside the State of Indiana.

Mr. Broyles testified that the General Telephone Company of Logansport supplies local and long-distance service for some 18,000 telephones in its service area, including 2,000 business phones, and that the company purchases power from the Logansport Municipal Utility to change its batteries, which in turn operates the telephone equipment.

Mr. Bahnaman testified that Wilson Product of Logansport is a hog slaughtering and food processing plant which is headquartered in Oklahoma City, Okalhoma. Ninety percent of the products produced in the Logansport plant are shipped outside the State of Indiana by truck and railroad. Power for the operation of the Logansport plant is purchased from the Logansport Utility Company and it is used to operate most of the plant equipment and machinery. The plant is one of the biggest consumers of electricity in Logansport, and it sells products in Iowa, Oklahoma, Minnesota, Kentucky, and Massachusetts. The plant is regulated by the U.S. Department of Agriculture, OSHA, and several State agencies.

The record also contains the March 28, 1978, depositions of John and Robert Haviland, and they include the following testimony.

1. The surface coal mine which is operated and mined by the respondents consists of approximately 20 acres, five of which have already been mined.

2. The equipment used by the respondents in the mining operation includes a dump truck, tractor, front-end loader, backhoe, and a drag line, all of which is operated by use of diesel full or gasoline.

3. The coal which is mined is loaded onto trucks by means of a loader for sale to the Log Cabin Coal Company.

4. The sales of coal to Log Cabin are consumated by telephone calls initiated by the respondents as well as by Log Cabin, or in person by Log Cabin, and payment is made by Log Cabin by chech which is usually delivered by Log Cabin to the respondents.

5. While no coal has been mined since January 1978, production was curtailed because of a strike and the presence of UMWA pickets at respondents mine. However, respondent intends to continue mining coal and to continue selling its coal to Log Cabin Coal Company.

In addition to the aforesaid depositions of John and Robert Haviland, the record also contains a transcript of their testimony of January 4, 1978, before District Court Judge Noland, as well as the testimony of Cleve Rentschler. That testimony includes the fact that respondents operate a surface strip mine consisting of some 20 acres of coal, that during the calendar year 1977, two acres were mined, yielding 9,000 tons, that the expenses and profits are shared by the three respondents who operate the mine, that for the preceding years of operations, the respondents received eight dollars a ton for the coal which they mined, that they employ no other employees, and that the coal is sold to the Log Cabin Coal Company located in Brazil, Indiana.

In its Memorandum of Points and Authorities in support of its motion for summary judgment filed with the Court, the Secretary makes the following arguments:

1. A search warrant is not required for an inspection conducted by MSHA pursuant to the Act.

2. The operation of a mine is a "Class of Activity" found by Congress to affect interstate commerce. In support of this argument, the Secretary traces the legislative history of the laws regulating the coal mining industry, including an assertion that Congress has rejected coverage of the law based on the number of persons working in a mine, and specifically found that mining affects interstate commerce.

3. The record in this proceeding clearly establishes that the coal mined by the respondent affects interstrate commerce in that it is consumed at Logansport, Indiana where it is converted to electrical power to supply part of the needs of the local community of Logansport through a local utility company, as well as the needs of several manufacturers whose products directly enter interstate commerce. The Secretary also notes that during a 1978 strike when respondents were not mining coal, the Logansport utility was forced to purchase coal from a supplier in the state of Kentucky at higher prices and that this establishes an effect on interstate commerce.

The Federal Coal Mine Health and Safety Act of 1969, and the 1977 Amendments are remedial legislation and should be given a liberal interpretation. This was the intent of the Congress and it has been echoed in several court decisions. See Legislative History, page 1025, "In adopting these provisions, the managers intend that the Act be construed liberally when improved health or safety to miners will result." In a case involving the 1952 Coal Mine Health and Safety Act, the predecessor of the 1969 Act, the Third Circuit Court of Appeals stated as follows in St. Mary's Sewer Pipe Co. v. Director of U.S. Bureau of Mines, 262 F.2d 378, 381 (3d Cir. 1959):

> The statute we are called upon to interpret is the out-growth of a long history of major disasters in coal mines. The death toll from mine disasters became so appalling and voluntary compliance with the safety standards set by the Bureau of Mines so haphazard that in 1952 Congress determined to make compliance with the safety standards mandatory. It is so obvious as to be beyond dispute that in construing safety or remedial legislation narrow or limited construction is to be eschewed. Rather, in this field liberal construction in light of the prime purpose of the legislation is to be employed.

The St. Mary's Sewer case was cited by the Fourth Circuit in Reliable Coal Corporation v. Morton Et Al., 478 F.2d 257, 262 (4th Cir. 1973), a case involving the 1969 Act. The court quoted the above excerpt and said "We find this observation equally appropriate to the case at hand." Other courts have echoed this liberal construction and application of the. See Freeman Coal Mining Company v. Interior Board of Mine Operations Appeals, 504 F.2d 741 (7th Cir. 1974); Old Ben Coal Corporation v. IBMA, supra; Franklin Phillips v. Interior Board of Mine Operations Appeals, 500 F.2d 772 (D.C. Cir. 1974).

The legislative history of the 1977 Act clearly contemplates that jurisdictional doubts be resolved in favor of Mine Act jurisdiction. The report of the Senate Committee on Human Resources states:

> The Committee notes that there may be a need to resolve jurisdictional conflicts, but it is the Committee's intention that what is considered to be a mine and to be regulated under this Act be given the broadest possible interpretation, and it is the intent of this Committee that doubts be resolved in favor of inclusion of a facility within the coverage of the Act.

S. Rep. 95-181, 95th Cong., 1st Sess. (May 16, 197) at 14; Legislative History of the Mine Safety and Health Act, Committee Print at 602 (hereinafter cited as Leg. Hist.).

The Federal Mine Safety and Health Act of 1977 is intended to assure safe and healthful working conditions for the American miner, and Congress clearly stated its findings and purposes in this regard in the 1969 Act as well as in the 1977 Act which extended the jurisdiction of the Coal Act to all mining activities. The Congressional findings and purposes are set forth as follows in section 2 of the 1969 Act, and is equally applicable to all mines:

> (a) the first priority and concern of all in the coal mining industry must be the health and safety of its most previous resource--the miner;

(b) deaths and serious injuries from unsafe and unhealthful conditions and practices in the coal mines cause grief and suffering to the miners and to their families;

(c) there is an urgent need to provide more effective means and measures for improving the working conditions and practices in the Nation's coal mines in order to prevent death and serious physical harm, and in order to prevent occupational diseases originating in such mines;

(d) the existence of unsafe and unhealthful conditions and practices in the Nation's coal mines is a serious impediment to the future growth of the coal mining industry and cannot be tolerated;

(e) the operators of such mines with the assistance of the miners have the primary responsibility to prevent the existence of such conditions and practices in such mines;

(f) the disruption of production and the loss of income to operators and miners as a result of coal mine accidents or occupationally caused diseases unduly impedes and burdens commerce. [Emphasis added.]

Section 3(b) defines "commerce" in part as follows: "Trade, traffic, commerce, transportation, or communications among the several states, or between a place in a state and any place outside thereof, * * *." (Emphasis in original.)

Section 3(g) defines a miner as follows: "'Miner' means any individual working in a coal or other mine."

Section 4 stated as follows with regard to what mines are subject to the Act. "Each coal or other mine, the products of which enter commerce, or the operations or products of which affect commerce, and each operator of such mine, and every miner in such mine shall be subject to the provisions of this Act." (Emphasis in original.)

The matter of determining if a mining operation affects commerce takes into consideration many variables, whereas determining if a mine product enters commerce is resolved by the single proof of its entry. In analyzing section 4 of the Act, I conclude that Congress intended the "enter commerce" and "affect commerce" clauses to be alternatives either of which subjects a mine to the provisions of the Act. However, I conclude that the intent of the 1977 statute, as well as the preceding 1969 legislation, as manifested in the legislative history, is to be broadly construed to apply to all of the nation's mines as a class of activity which affects commerce, and the cases cited above support that conclusion. Accordingly, I accept petitioner's "class of activities" jurisdictional arguments and conclude the respondent's

mining operation is covered by the 1977 Act, and its arguments to the contrary are rejected. I also find that respondent's sales of coal to Log Cabin Coal Company affect commerce within the meaning of the Act, and this also serves to bring the respondent within its reach.

In a recent case decided in the Ninth Circuit, Marshall v. Wait, 628 F.2d 1255 (1980), the Court of Appeals held that a small family-owned rock quarry had not impliedly consented to a warrantless inspection of its premises by the Secretary pursuant to the Act. The court found that while a rock quarry falls within the definition of a "mine" as that term is defined by the 1977 Act, the Secretary had not established to the Court's satisfaction that the respondent's excavation of decorative rock was a pervasively regulated activity so as to bring it within the warrantless search exceptions noted by the Supreme Court in United States v. Biswell, 406 U.S. 311 (1972), and Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970). The Court recognized that an industry's history of regulation is a relevant factor in determing the constitutionality of subjecting its operators to nonconsensual warrantless searches, cited the coal mining industry as an example of such an industry, and relying on Marshall v. Sink, 614 F.2d 37 (4th Cir. 1980), impliedly observed that small, owner-operated mines may be subjected to warrantless searches, 628 F.2d 1255.

In several other court decisions which I find relevant to the instant proceedings, the courts have recognized the right of the Secretary to inspect small, family-owned mining operations, and a discussion of these decisions follows below.

On September 15, 1978, in the case of Ray Marshall v. Jesse Kintzel, Et Al., Civil Action No. 78-13 (E.D. Pa., filed September 14, 1978), the Kintzel brothers, doing business as the Kintzel Coal Company, were permanently enjoined in part as follows:

> (1) From denying the Secretary of Labor or his authorized representative entry to, upon or through the Kintzel Coal Company, Lykens No. 6 Mine.
>
> (2) From refusing to permit the inspection of the Kintzel Coal Company, Lykens No. 6 Mine.

In Marshall v. Thomas Wolfe, d/b/a Wolfe Coal Company, Civ. No. 79-1850 (E.D. Pa.) (July 20, 1979), a Federal court enjoined the company from denying entry to MSHA inspectors for the purpose of conducting a mine inspection. The judge rejected arguments advanced by the mine operator that the Act does not apply to mines without miner-employees. See also Marshall v. Donofrio, 605 F.2d 1196 (3rd Cir. 1979), aff'g., 465 F. Supp. 838 (E.D. PA. 1978), cert. denied No. 79-848 (February 19, 1980), where the same district court judge issued an identical ruling and decision as in Wolfe Coal Company.

Kintzel and Wolfe are examples of small, family-owned mining companies, similar to the respondent's where the courts have found them subject to the

Act, and enjoined the owners from denying entry to MSHA's inspectors for the purpose of conducting inspections pursuant to the Act.

Fact of Violations

In Docket No. VINC 79-102-P, the respondent is charged with a violation of the provisions of mandatory standard 30 C.F.R. § 71.101(a) for failure to submit initial respirable dust samples to determine the amount of respirable dust to which mine employees are exposed. The initial citation, No. 256040, was issued on August 14, 1978 (Exh. P-9), and after expiration of the initial abatement time and non-compliance by the respondent, the inspector issued a withdrawal order pursuant to section 104(b) of the Act on September 15, 1978 (Exh. P-9), requiring the removal of all personnel from the mine.

In Docket No. VINC 79-93-P, the respondent is charged with a violation of the provisions of mandatory standard 30 C.F.R. § 71.302(a), for failure to conduct an initial noise survey concerning the noise levels to which miners may be exposed during the course of their work shift, and for failure to report the results of the survey to MSHA as required by the cited standard. The initial citation, No. 1 B.E.P., was issued on October 12, 1977 (Exh. P-3), but was subsequently modified on August 14, 1978, to correct an erroneous citation to the regulatory standard initially cited by the inspector and to clarify the fact that the citation was being issued under the 1977 Act (Exh. P-6). Subsequently, on August 14, 1978, the inspector issued a withdrawal order, No. 256242, after finding that the respondent had failed to abate the condition cited, and the order notes that the respondent had ordered the inspector off its mine property (Exh. P-7). It should be noted that since the issuance of the citations in question in these cases, and the subsequent court suit filed by the Secretary, MSHA has made no further attempts to inspect the mine site in question, and as far as I know the respondents are still mining coal contary to the requirements of the withdrawal orders which have been issued by MSHA.

Petitioner has presented evidence and testimony in support of the citations in question in these proceedings, and this is reflected in the attached January 22, 1981, order which I issued. However, while the respondent has had two full opportunities to present evidence and testimony in its defense, it has declined to do so on the ground that it does not recognize my authority and jurisdiction to proceed with the administrative adjudication of these dockets. Aside from its jurisdictional arguments, respondent maintains that since the Secretary has seen fit to bring an injunction action in the United States District Court, the Secretary is bound by his action and that only the District Court has jurisdiction to conduct a trial on the merits of these cases. Respondent has vehemently objected to what it believes is "forum shopping" on the part of the petitioner in these cases. In support of this argument, respondent cites the case of Bituminous Coal Operators' Association, Inc., v. Marshall, 83 F.R.D. 350 (D.DC. 1979). After review of that decision, I conclude that it does not support the position taken by the respondent. In the BCOA case, District Court Judge Gessel dismissed the suit and noted that under the Act, Congress did not intend that the District Courts review the merits of orders and citations issued against mine operators, and he

specifically stated that when an operator is adversely affected by any enforcement action taken by the Secretary, the proper procedure to follow is to allow the matter to run its course through the administrative procedures established for review through this Commission and then to an appropriate court of appeals.

While it is true that Judge Gessel noted an exception when the Secretary institutes an injunctive action against an operator pursuant to section 108 of the Act, as has been done in these cases, I take note of the fact that the District Court here has issued no further orders or dispositions staying or otherwise inhibiting the Secretary from proceeding with its case before the Commission. As a matter of fact, even though counsel for the respondent stated in a motion of April 30, 1979, for a continuance and change of hearing site that the court would issue a stay "at any time," no such order has been forthcoming and the matter has been pending with the court since 1978. Under the circumstances, I find nothing in section 108 which prohibits me from bringing these cases to finality through the issuance of my decisions in matters which are before me for adjudication. In my view, hearings before this Commission provide a more than adequate mechanism for adjudicating all of the issues which are before the District Court, including the Constitutional and jurisdictional questions raised by the respondents, Secretary of Labor v. Kenny Richardson, BARB 78-600-P, decided by the Commission on January 19, 1981.

The record adduced in this case reflects that the Secretary's court action was initially filed in the District Court on December 20, 1977, and as indicated above, while the court denied the Secretary's request for an injunction, it also denied the respondent's motion to dismiss the suit. The matter has been pending since that time, and aside from the filing of briefs, the court has made no further disposition of the matter other than to transfer it to another judge, and the Secretary has taken no further action to advance the case on the Court's docket or to otherwise initiate any action seeking to bring that suit to finality.

I take note of the fact that prior to the filing of the court action by the Secretary, MSHA had on previous occasions inspected the respondent's mining operations in 1976 or 1977, and Inspector Bailey issued several citations. Respondent's prior history of violations includes citations which were issued on April 11, October 12, and November 28, 1977. The citations which are in issue in the instant proceedings have ripened into withdrawal orders and I have no information that the respondent has ever challenged those orders apart from its defense in the court suit and in its answers to the petitions for assessment of civil penalties filed here.

In view of the foregoing, I conclude and find that the petitioner has established the fact of violations as to both citations which were issued in these proceedings and under the circumstances, both citations issued in these dockets are AFFIRMED.

Size of Business and Effect of Civil Penalties on Respondent's Ability to Continue in Business.

In its answer of January 22, 1979, to the proposal for assessment of civil penalties, respondent asserted that it had and has no employees and was self-employed. However, the record establishes that respondent's mining operation is carried on by a partnership consisting of the two Haviland brothers, and a brother-in-law, Cleve Rentschler. Respondent's counsel explained the scope and extent of respondent's mining operation for the years 1977 through 1979, and the parties agree that respondent is a small operator (Tr. 215-221; pgs. 3-4 of my previous order of January 22, 1981).

Respondent has offered nothing to suggest that the civil penalties assessed for the two citations in question will adversely affect the respondent's ability to continue in business. Accordingly, absent any evidence to the contrary, I find that they will not.

Good Faith Compliance

The record reflects that the citations issued in these cases have not been abated and that the withdrawal orders are still outstanding. Further, it seems obvious to me that the respondent's failure to comply, as well as its refusal to permit any MSHA inspectors on its property, stems from its belief that it is not subject to the law. In these circumstances, I conclude that the question of good faith compliance is inapplicable in these cases.

History of Prior Violations

Petitioner has submitted a computer print-out which indicates that for the period October 13, 1975 to August 14, 1978, respondent has been served with eight citations for various violations of mandatory safety standards. While the print-out reflects total assessments amounting to $757, it also indicates that the respondent has made no payments for any of the assessed violations. Inspector Bailey confirmed that the respondent defaulted on several of the previous citations and that petitioner referred them to the Department of Justice for collection action (Tr. 155-156).,

Two of the eight citations listed on the print-out are those which are in issue in these proceedings. The remaining six, which are unpaid, do not in my view, warrant any additional increases in the penalties which have been assessed against the respondent for the two citations which I have affirmed.

Gravity

Since the respondent has failed to submit any dust samples or to make any noise survey, I have no way of knowing whether respondent is in or out of compliance with those standards. Consequently, I am unable to determine the specific seriousness or gravity of the citations which are the subject of these proceedings.

Negligence

Inspector Bailey testified that he had previously conducted inspections at respondent's surface mining operation and had issued other citations for violations which he found. These citations were issued prior to the filing of the injunction action by the Secretary. Accordingly, I conclude that the respondent was not oblivious to the fact that it was required to comply with the provisions of the Act as well as with the mandatory safety and health standards promulgated pursuant to the law. In the circumstances I conclude and find that the respondent failed to exercise reasonable care to prevent the condition cited in these cases, and that its failure in this regard amounts to ordinary negligence.

Penalty Assessment and Order

On the basis of the foregoing findings and conclusions, and taking into account the requirements of section 110(i) of the Act, I conclude and find that the following civil penalties are reasonable and appropriate:

Docket No. VINC 79-102-P

Citation No.	Date	30 CFR Section	Assessment
256040	08/14/78	71.101(a)	$100

Docket No. VINC 79-93-P

Citation No.	Date	30 CFR Section	Assessment
1 B.E.P.	10/12/77	71.302(a)	$125

Respondent IS ORDERED to pay the civil penalties assessed, in the amounts indicated above, within thirty (30) days of the date of these decisions, and upon receipt of payment by the petitioner, these cases are dismissed.

George A. Koutras
Administrative Law Judge

Attachment

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JAN 22 1981

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceedings
	:	Docket No. VINC 79-93-P
	:	A.O. No. 12-01433-03002
v.	:	
	:	Docket No. VINC 79-102-P
JOHN L. HAVILAND, ROBERT P. HAVILAND, and CLEVE RENTSCHLER, d/b/a HAVILAND BROTHERS COAL COMPANY, Respondent	:	A.O. No. 12-01433-03003
	:	Haviland Strip Mine

ORDER TO SHOW CAUSE

Appearances: Rafael Alvarez, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois, for the petitioner; George A. Brattain, Esq., Terre Haute, Indiana, for the respondent.

Before: Judge Koutras

Statement of the Proceedings

These proceedings concern proposals for assessment of civil penalties filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a), charging the respondent with two alleged violations of certain mandatory safety and health standards found in Part 71, Title 30, Code of Federal Regulations. Respondent filed timely answers and contests denying the alleged violations, and asserting that it is not subject to the Act because the products of its mining activity do not enter or affect interstate commerce. A hearing was convened in Terre Haute, Indiana, on July 1, 1980, and the parties appeared and participated therein.

The July 1, 1980, Hearing

An informal prehearing conference was conducted prior to going on the record, and the purpose of the conference was to afford counsel an opportunity to discuss the parameters of the hearing as well as to advise me as to the status of the court action initiated by the Secretary to enjoin the respondent

from refusing entry to MSHA inspectors attempting to inspect respondent's mining operation, Ray Marshall, Secretary of Labor, U.S. Department of Labor v. John L. Haviland, et al., No. TH 77-178-C, District Court, S.D. Indiana, Terre Haute Division.

Respondent's counsel asserted that while the initial injunction action was brought by the Secretary of the Interior, the Secretary of Labor was substituted as a party plaintiff when the 1977 Act became effective, and that a motion to stay further enforcement by the Secretary is still pending before the court (Tr. 36-37). Counsel asserted that the motion was filed November 3, 1978, that it is in effect a motion to restrain the Secretary from continuing its enforcement activities at the subject mine (Tr. 38), and that the Commission is not a party to that court action (Tr. 40).

Respondent's counsel objected to the commencement of the hearing on the ground that the motion is still pending and that the question concerning the Secretary's enforcement jurisdiction over the respondent's asserted "self-employed" mining operation is still pending with the court. Counsel submitted a copy of a Memorandum Order issued by the Honorable James E. Noland, District Court Judge, on February 24, 1978, denying the Secretary's motion for a preliminary injunction to compel the respondent to permit MSHA inspections of its mine. Judge Noland reserved any ruling on the respondent's motion to dismiss the case, and as of the date of the hearing the matter was still pending before the court.

Petitioner took the position that the respondent is engaged in the business of mining coal at its strip-mining operation and that the mine is subject to the Secretary's enforcement jurisdiction even though its operations may only be intrastate. In support of its jurisdictional argument, petitioner relies on sections 3(h) and 4 of the Act. Section 3(h) defines a "coal mine," and section 4 states that "[e]ach coal mine, the products of which affect commerce, or the operations or products of which affect commerce, and each operator of such mine, and every miner in such mine shall be subject to the provisions of this Act." Citing the cases of Secretary of Labor v. Shingara, 418 F. Supp. 693 (E.D. Pa. 1976); Marshall v. Kilgore, 478 F. Supp. 4 (E.D. Tenn. 1979); Wickard v. Filburn, 317 U.S. 111 (1942); and Fry v. United States, 421 U.S. 542 (1974), petitioner asserts that since the coal mining industry is a pervasively regulated industry which affects commerce, it is clear that respondent's mining operation is subject to the Act.

Petitioner also asserted that since the court has not rendered a final decision as to the jurisdictional question, the Commission has jurisdiction to proceed with the instant civil penalty proceedings without prejudicing respondent's rights in the pending court action (Tr. 30).

With regard to the Secretary's policy concerning any further attempts to inspect respondent's mining operation subsequent to the October 18, 1977, refusal of entry to its inspectors, petitioner's counsel stated that when respondent Robert Haviland advised the inspectors not to return to the mine site without a warrant, that request was honored, and MSHA inspectors have

made no further attempts to inspect the mine (Tr. 30-31). Although counsel took the position that the Secretary has the authority to conduct warrantless inspections, no further attempts have been made to conduct such inspections at the mine in question (Tr. 32).

Petitioner's motion to amend its pleadings to name two additional parties comprising respondent's coal company, a partnership, was granted (Tr. 8-11). The record reflects that copies of petitioner's motion to amend were served on respondent's counsel of record, and counsel's objection that the individual partners were not served was rejected (Tr. 11).

In view of the fact that the Commission was not joined as a party to the case pending before the court, and considering the fact that the Commission is independent of the Department of Labor, it is my view that Judge Noland's order does not enjoin or otherwise limit the Commission's jurisdiction to continue with its administrative determination and adjudication of a case properly before it. Accordingly, counsel's objections were rejected and the hearing proceeded over his continuing objections (Tr. 45). Testimony and evidence in support of the two alleged violations were presented by MSHA during the course of the hearing, and respondent was given a full opportunity to cross-examine the inspectors and to present any testimony or evidence in defense of the citations. Aside from certain information concerning the size and scope of its mining operation, and its jurisdictional arguments, respondent declined to advance any affirmative defense to the conditions or practices cited as alleged violations of the standards in question and it called no witnesses on its own behalf (Tr. 168-169).

By agreement and stipulation, the parties agreed that the findings of fact made by Judge Noland in his February 24, 1978, Memorandum Order may be incorporated by reference and adopted by me in these proceedings (Tr. 212). However, the parties were advised that I retain continuing jurisdiction in these proceedings before the Commission and that the parties are not foreclosed from eliciting additional information at any subsequent hearing concerning any additional factual, jurisdictional, or other matters (Tr. 213).

With respect to the statutory criteria found in section 110(i) of the Act concerning the size of respondent's mining operation and the effect of any civil penalties on this operation, respondent's counsel stated that he was prepared to show that in the year 1977 respondent's annual coal production was 9,654 tons, which sold for $8 a ton to the Log Cabin Coal Company, for approximately $77,200 in gross revenues. Production in 1978 was 6,565 tons, with gross sales to Log Cabin in the amount of $65,565. For the year 1979, respondent's annual production was 6,132 tons, with gross sales to Log Cabin in the amount of $73,534, and direct local sales amounting to $250. Counsel stated that all of these revenues for the period 1977 to 1979, are gross sales and do not reflect expenses for gas, oil, or the partnership profits realized from such sales. As an example, counsel stated that net revenues to the partnership for the year 1979 amounted to $44,357, and he estimated that this reflects one of the smallest coal mining operations in the State of Indiana (Tr. 215-216).

Respondent's counsel described the mining operation carried out by the partnership as a stripping operation consisting of a 10-acre tract of "gully-scrub" land which had originally been shaft mined before the year 1920. The operation is conducted by the two Haviland brothers, one of whom is a farmer, and Mr. Cleve Rentschler, their brother-in-law and a former elementary school principal. They strip mine the Brazil Block of low sulphur coal, which is some 20 to 30 feet deep, and it is a source of extra income to the partnership. All of the coal is sold to Log Cabin Coal Company, a shale and clay mining operation located in Brazil, Indiana (Tr. 217-220). Petitioner's counsel expressed agreement with the extent and scope of the mining operation as described by respondent's counsel and agreed that it is a small operation (Tr. 221).

There is no dispute that the respondent in this case operates a surface coal mine within the State of Indiana, that it began its mining operation in 1974, that with the exception of some 250 tons of coal sold directly by the individual respondents locally in 1979, all of the coal produced during the years 1977 to 1979 was sold intrastate to Log Cabin Coal Company located in Brazil, Indiana. It also seems clear that the mining operation is conducted solely by the three named partners, John L. and Robert P. Haviland and Cleve Rentschler, doing business as the Haviland Brothers Coal Company (Tr. 88-90, 187-188).

Testimony and Evidence Adduced at the Hearing

Fact of Violations

Docket No. VINC 79-102-P

This case concerns a section 104(a) citation (No. 256040) issued by an MSHA inspector on August 14, 1978, charging the respondent with a violation of the provisions of mandatory standard 30 C.F.R. § 71.101(a). The citation states as follows: "The operator of the mine has not submitted the initial respirable dust samples to determine the amount of respirable dust in the atmosphere to which each employee is exposed."

MSHA inspector Clarence Bailey confirmed that he issued Citation No. 256040 on August 14, 1978, charging a violation of section 71.101(a) for failure by the respondent to submit initial respirable dust samples to determine the amount of atmospheric respirable dust to which mine employees are exposed. MSHA's subdistrict office advised him that the mine had submitted no samples, and as a result of this he issued the citation. Inspector Bailey explained that dust samples are taken by means of individual dust pumps which each sampled employee wears during a full 8-hour shift, the dust cassettes are then sent to MSHA's Pittsburgh laboratory for analysis, and the operator is notified of the results. If the samples show more than 1 milligram of dust, another sample is required within 6 months, and if the result is less than 1 milligram, only annual samples are required. He indicated that a mine operator may be temporarily certified to conduct dust surveys, and that dust samplers are available for purchase by an operator. The purpose of sampling

is to determine whether there are any dust exposure problems at the mine, and while 2 milligrams of dust is acceptable, anything above that is a violation (Exh. P-8, Tr. 173-180).

Inspector Bailey identified Exhibit P-9 as a copy of a withdrawal order he issued on September 15, 1978, after the expiration of the abatement period fixed for the citation, and that order affected the entire mine because each individual miner would have to be sampled. Inspector Bailey quoted from the condition or practice from the face of the order as follows (Tr. 183-184): "The operator of the mine failed to submit the initial respirable dust sample to determine the amount of respirable dust in the atmosphere, to which each employee is exposed. After the issuance of Citation No. 254040, dated August 14, 1978."

The order reflects that it was served by certified mail, and Mr. Bailey confirmed that this was the case (Tr. 184). He identified Exhibit P-10 as his "inspector's statement" concerning the order (Tr. 184). Mr. Bailey also indicated that samples were not required prior to 1978 because respondent was informed by MSHA that he need not submit samples, but Mr. Bailey could not specifically state why respondent was so informed (Tr. 197-198).

Docket No. VINC 79-93-P

This case concerns a section 104(b) notice issued under the 1969 Act, No. 1 B.E.P., on October 12, 1977, charging the respondent with a violation of 30 C.F.R. § 71.303(a), and it states as follows: "The operator has not conducted the initial survey of the noise levels to which each miner in each surface installation and at each surface worksite is exposed during his normal working shift." The notice contains a notation that it was "served to Bob Haviland by certified mail because the inspectors were ordered off the property being mined by the person served."

MSHA inspector Bryan E. Page testified as to his background and experience, and he confirmed that he attempted to conduct an inspection at the mine on October 17, 1977, for the purpose of ascertaining whether the respondent was in compliance with the noise level survey requirements of section 71.302. A letter dated July 22, 1977 (Exh. P-2) put respondent on notice as to the requirements for such a survey, and respondent was given until August 17, 1977, to comply. Robert Haviland told him that he could make no inspections unless he had a warrant and he left the mine site. While there, he observed a dragline and bulldozer doing some reclamation work, and he also observed a coal shovel which was not in operation. He also observed three people there. Subsequently, on October 18, 1977, he issued a citation charging the respondent with a violation of section 71.303(a) and served it by certified mail (Exh. P-3). The citation charged the respondent with failure to submit an initial noise reading for each employee, and while the abatement time was fixed as November 30, 1977, the citation has never been abated (Tr. 67-77). The initial citation cited the wrong standard, but it was subsequently modified to cite the correct section, 77.302(a) (Tr. 79).

Inspector Page identified Exhibit P-4 as an inspection report "cover sheet" prepared after each mine inspection. The report contains a mine identification number which is issued after an operator submits his legal identification papers upon commencing his mining operations. Mr. Page stated that respondent is a strip-mine partnership mining the Brazil Block of coal, and mined about 25 tons of coal daily on one shift from one pit, and this information was based on previous reports filed with MSHA (Tr. 81-86). He also identified Exhibit P-5 as his "inspector's statement" which he filled out when he issued the citation (Tr. 92), confirmed that he was at the mine for 5 or 10 minutes, and that he went there on instructions of his supervisor because the respondent had not submitted a noise survey (Tr. 96).

On cross-examination, Mr. Page confirmed that the persons he observed at the mine were the two Haviland brothers, and that any noise levels required to be surveyed were those levels to which they would be exposed. He confirmed that he has heard noise levels of 90 decibels and that this level does not offend his ears, although he has been exposed to noise levels requiring him to wear ear muffs (Tr. 96-8).

In response to further questions, Mr. Page indicated that noise levels are measured with a noise meter device held close to a persons's head, and it registers the noise level by means of a dial (Tr. 99). The survey would be taken on the three pieces of equipment he observed at the mine, namely, a loading shovel, dragline, and a bulldozer. The survey results are recorded on cards provided by MSHA, and the requirements and procedures for submitting them are found in section 70 of the standards (Tr. 99-104).

MSHA inspector Clarence Bailey testified as to his training and experience, and confirmed that he modified the citation issued by Mr. Page to reflect a failure to file an initial noise survey as required by section 71.302(a), and he did so on August 14, 1978 (Exh. P-6, Tr. 108).

Mr. Bailey quoted the condition he cited on his modified citation as follows (Tr. 110-112):

> The operator of the mine has not conducted the survey of the noise levels to which each miner in each surface installation and at each surface worksite is exposed during the normal work shift.
>
> The subject violation No. 1 BIP dated 10-13-77 was issued pursuant to section 104(b) of the Federal Coal Mine Safety and Health Act of 1969, which was amended by the Federal Mine Safety and Health Act of 1977. This violation is modified to section 104(a) of the Amendments Act to reflect this change. 71.303(a) corrected to 71.302(a).

Inspector Bailey identified Exhibit P-7 as a section 104(b) order of withdrawal he issued on August 14, 1978, for failure by the respondent to abate the previous citation concerning the noise level survey. Since MSHA

had no evidence that the survey had ever been submitted or received, he had no alternative but to issue the order which in effect ordered that all mining cease (Tr. 114). The order was transmitted to Robert Haviland by certified mail and the stamp date on the face of the order reflects that it was transmitted on September 1, 1978 (Tr. 115-116). He could not confirm when it was actually mailed or when the respondent received it (Tr. 117), and he personally did not mail it (Tr. 118).

On cross-examination, Mr. Bailey stated that since all such orders are mailed by certified mail, he believes that respondent received the order in question. However, he confirmed that he personally did not see the order or any cover letter actually placed in the mail (Tr. 123).

In response to further questions, Mr. Bailey stated that he had no personal knowledge that respondent continued mining subsequent to the issuance of the withdrawal order of August 14, 1978, because he never returned to the mine, nor did he attempt to go back to post an MSHA closure sign at the mine (Tr. 130). However, prior to the issuance of the citation and order, he had previously inspected the mine on a regular inspection during 1976 or 1977 and issued four citations. However, when the respondent learned that it would be subjected to civil penalties for all citations issued at the mine, it prohibited Inspector Page from coming back on the property (Tr. 132).

Regarding his prior inspections, Mr. Bailey stated that he believed he issued citations for lack of a backup alarm, a seat belt, and a fire extinguisher and that they were abated and the citations terminated (Tr. 151). Respondent's counsel stated that respondent did not remit any civil penalties for these citations because they were issued against the Haviland Coal Corporation, and they were subsequently defaulted and turned over to the Justice Department for collection (Tr. 155-156).

In view of the pending court action taken by the Secretary in this case, I issued an order on September 22, 1980, directing the parties to inform me of the status of the case pending with Judge Noland. In addition, the parties were also directed to advise me as to the necessity of any additional hearings so as to bring these cases to finality. By letter and enclosure filed October 23, 1980, petitioner's counsel filed a copy of a computer printout detailing respondent's prior history of violations, a copy of Judge Noland's Memorandum and Order of February 14, 1978, denying the Secretary's motion for a preliminary judgment, six depositions, and additional documents and information concerning the pending court litigation. That record includes the following:

1. Depositions of John Lee Haviland and Robert Paris Haviland, taken March 28, 1978.

2. Deposition of Martin Eugene Monahan, Mayor, City of Logansport, Indiana, Chairman of the Board of Works and City Council, and Supervisor of the Logansport Municipal Utility, taken March 29, 1978.

3. Deposition of Donald D. Kampenga, General Manager, Essex Controls Division, Electrica-Mechanical Group, United Technologies, Hartford, Connecticut, taken March 29, 1978.

4. Deposition of Edward E. Boyles, Customer Services Supervisor, General Telephone Company of Indiana, Logansport, Indiana, taken March 29, 1978.

5. Deposition of Harry A. Bahnaman, General Manager, Wilson Produce Company, Logansport, Indiana, taken March 29, 1978.

6. Copy of the official transcript of the hearing held before the Honorable James E. Noland, on January 4, 1978, with respect to defendants' motion to dismiss the Secretary's suit. The transcript contains the testimony of John Haviland, Robert Haviland, and Cleve Rentschler.

7. Several motions, briefs, legal memoranda, and copies of several court decisions dealing with the jurisdictional claims raised by the respondents in this proceeding, all of which have been filed in connection with the pending litigation before Judge Noland.

At the close of the hearing in these cases, the parties were informed that I intended to retain jurisdiction of this matter and that the cases would be continued and the record left open pending further disposition by Judge Noland. Since my order of September 22, 1980, no additional information has been forthcoming from the parties concerning the disposition of the matter before the court. Under the circumstances, and in order to insure timely adjudication of the cases now pending before me, the parties are advised that I intend to go forward with the adjudication of these cases so as to finally dispose of the cases. Accordingly, IT IS ORDERED that the parties SHOW CAUSE within thirty (30) days as to why these cases should not now be scheduled for an additional hearing to afford the parties a final opportunity to present any additional factual or legal evidence, testimony, or arguments as to the merits of the cases so as to enable me to issue timely decisions disposing of the dockets. The parties are also directed to advise me as to the feasibility of stipulating or agreeing as to any matters which are not in dispute, including incorporating by reference any prior testimony or information generated by the court suit as reflected in the record now pending before the court.

George A. Koutras
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

June 19, 1981

JOHNNY HOWARD, Complainant	:	COMPLAINT OF DISCHARGE, DISCRIMINATION, OR
v.	:	INTERFERENCE
	:	
MARTIN-MARIETTA CORPORATION, Respondent	:	Docket No. SE 80-24-DM
	:	
	:	MSHA Case No. MC 79-93

DECISION

Appearances: Nathan Kaminski, Jr., Esq., Schneider & O'Donnell, Georgetown, South Carolina, for Complainant;
Elliott D. Light, Esq., Assistant General Counsel, Martin-Marietta Corporation, Bethesday, Maryland, for Respondent

Before: Chief Administrative Law Judge Broderick

STATEMENT OF THE CASE

Complainant was discharged on July 31, 1979, from his job as a front-end loader operator with Respondent. Complainant contends that his discharge was the result of his refusal to work on an unsafe machine and his calling for a Federal inspection of the machine. Respondent contends that Complainant was discharged for insubordination and leaving the job site without permission.

A hearing was held, pursuant to notice, in Georgetown, South Carolina, on March 26, 1981. Lawrence Snider, Mark Martin, Evelyn Statz, Johnny Howard, and Ezra Lee Killian, a Federal Mine Inspector, testified for Complainant. Jackie Wilson, Eddie Mazyck, Buck Ridgeway, David Foy, Plant Foreman for Respondent, and David Brisley, Plant Manager, testified for Respondent. Both parties have submitted post hearing briefs. Based on the record and the contentions of the parties, I make the following decision.

FINDINGS OF FACT

1. Martin-Marietta operates a rock quarry in Jamestown, South Carolina which produces crushed stone for the construction industry. Johnny Howard was employed there from June 1977 until July 31, 1979. At various times, he operated a front-end loader, a bulldozer, and a drag line. From April 1979 to the date he was discharged, he operated a front-end loader.

2. Soon after his employment began, Howard experienced problems with the 980 front-end loader to which he was assigned. He periodically notified management that the brakes did not perform properly and management adjusted them. The adjustments would last no more than a day before the brakes became faulty again. This was a source of concern to Howard, for he believed the brakes were beyond repair.

3. The loader's faulty brakes created a safety hazard. The physical exertion required to operate the loader tended to aggravate Howard's back condition, which was known to management. The procedure required to keep the loader stable while loading trucks was so unwieldy that the operator risked dropping the load or running into the truck.

4. Howard arrived at work at about 6:00 a.m. on July 24, 1979. He loaded 3 or 4 trucks and found that the loader had no brakes. He became angry, and told his foreman, David Foy, that the loader still was not working properly and he was leaving to call the Occupational Safety and Health Administration (OSHA). Foy, aware of Howard's anger and believing he might be quitting, acquiesced in Howard's decision to leave.

5. As he was leaving the premises, Howard met Plant Manager David Brisley, who asked him where he was going. He told Brisley that he was dissatisfied with the brakes on the loader and was leaving to call OSHA. Brisley urged him to stay and help repair the loader but he refused.

6. Howard called OSHA while off the premises. OSHA referred his complaint to MSHA. He returned to work at approximately 3:00 p.m. and waited for 45 minutes outside Foy's office, intending to talk to him. Foy did not emerge and, because it was then quitting time, Howard left.

7. The next day, Howard returned to work and began to operate another front-end loader. He found its brakes too tight and decided to postpone work until Foy arrived. When Foy arrived, Howard asked him what he should do. Foy told him that he thought he had quit or had been fired, so Howard left the premises. He stopped at a nearby store. Brisley found him there and asked him to return to Brisley's office. Once there, Brisley told him that the company did not seem to be able to satisfy him, that he was making people mad at him, that he had few friends left at the company, and that he ought to seek other employment. Brisley told him to take the day off. Later, he advised him to return on July 31, 1979, when the company would decide what to do with him.

8. On July 25, 1979, MSHA inspector Ezra Lee Killian, responding to Howard's request for an inspection, issued a citation to the company for failing to tag out Howard's loader. 1/

9. Howard returned to the quarry on July 31, 1979, and was told that he was being terminated, according to Brisley, "for leaving the job and insubordination with the plant foreman." 2/

STATUTORY PROVISION

Section 105(c)(1), 30 U.S.C. § 815(c)(1), reads 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 evalua tions and potential transfer under a standard published pursuant to section 101 or because such miner, representative of miners or applicant for employment has instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding, or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this Act.

1/ The inspector did not state when he arrived at the quarry or when he issued the citation and the citation was not introduced in evidence.

2/ Martin-Marietta seems not to have reduced this termination to writing. If it did, it did not introduce it in evidence.

ISSUE

Did Martin-Marietta violate § 105(c) when it discharged Johnny Howard?

DISCUSSION

In Secretary of Labor, ex rel. Pasula v. Consolidation Coal Company, 2 FMSHRC 2786 (1980), the Commission announced a four-part test for weighing the evidence in a discrimination case. Id. at 2799-2800. To establish a prima facie case, Howard must show that he engaged in protected activity which played some role in the decision to fire him.

Howard's complaints about the brakes on his loader were certainly protected by § 105(c). The parties agree that the brakes were often faulty. The risk of harm this posed to individuals operating the loader or working near it is uncertain, but § 105(c) protects a miner when he notifies his employer of an "alleged" danger.

It is equally clear that Howard's call to OSHA was protected by § 105(c). The statutory right to request a safety inspection is the centerpiece of the Mine Act. 30 U.S.C. § 813(g). Congress believed that "[i]f our national mine safety and health program is to be truly effective, miners will have to play an active part in the enforcement of the Act." S. Rep. No. 95-181, 95th Cong., 1st Sess., at 35, reprinted in (1977) U.S. CODE CONG. & AD. NEWS at 3435. It is immaterial that Howard called OSHA rather than MSHA. A layman cannot be expected to be familiar with the jurisdictional boundaries between the two agencies.

The more difficult issue is whether Howard's absence from work on July 24, 1979, was protected by § 105(c). His absence actually resulted from two events: his refusal to work on the loader and his departure from the premises to call OSHA.

Howard's refusal to work on the loader was protected by § 105(c). A miner may refuse an assigned task if he honestly and reasonably believes that the task is hazardous to him. Secretary of Labor, ex rel. Robinette v. United Castle Coal Co., 3 FMSHRC 803 (1981). Howard's good faith and reasonableness were corroborated by witnesses for Martin-Marietta, who agreed that the brakes on the loader were faulty at the time he complained and on many previous occasions. The risk of harm posed by the faulty brakes is uncertain, but it is a fair inference that faulty brakes are a safety hazard. If it is reasonable to refuse to work on a machine that gives one a headache, Pasula, supra, at 2793, surely it is reasonable to refuse to work on a machine with faulty brakes.

Howard's departure from the premises on July 24, 1979, presents a close question. An employee has the right to remove himself from danger, but as a general rule, he is not protected when he leaves the premises, making himself unavailable for alternate work and disrupting production. However, Howard did more than simply leave the premises. Before he left, he told his foreman and the plant supervisor that he was leaving to call OSHA. He testified that he believed company policy prohibited him from using a phone on the premises for this purpose. Neither Foy nor Brisley disabused him of this belief. Had one of them informed Howard that he could call OSHA without leaving work, I might view his departure in a different light. But when a miner believes that there exists a situation requiring an immediate safety and health inspection, I hold that he has an absolute right to leave company property to call for an inspection if he believes he cannot do so on company property. Martin-Marietta made no issue of the fact that Howard did not return until late in the afternoon. Therefore, I find that his absence from work from approximately 7:00 a.m. to 3:00 p.m. on July 24, 1979, was protected by § 105(c).

It is clear that Howard's protected activity played some role in the decision to discharge him. Brisley testified that "he was terminated for leaving the job and for insubordination with the plant foreman." Tr. at 165. "Leaving the job" obviously refers to Howard's conduct on July 24, 1979.

Martin-Marietta may affirmatively defend by showing that Howard engaged in unprotected activity and that he would have been fired for that activity alone. Pasula, supra, at 2799-2800. It has pointed to a number of factors which supposedly contributed to its decision to discharge. Brisley alleges that Howard had a drinking problem. However, he was disciplined for this months before the incident in question and there was no testimony that the alleged problem recurred. Howard once left work while he was on medication for his back problem. He testified that he had his supervisor's permission, however, and none of Martin-Marietta's witnesses contradicted him. He left work one night in October of 1978 because some truck drivers were teasing him. Brisley, however, came to his house to ask him to return since he valued him as an employee. He received no discipline for the incident. [4/] He left work on July 25, 1979, soon after arriving in the morning. But he was told

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[4/] "[I]f the unprotected activity did not originally concern the employer enough to have resulted in the same adverse action, we will not consider it." Pasula, supra, at 2800.

by Foy that he had been fired or quit. When Brisley found him at the store and asked him to return, he obeyed.

The evidence simply does not support an inference that Martin-Marietta relied on any of these considerations when it fired Howard. Still, it did rely on "insubordination with the plant foreman," meaning his behavior toward Foy on the morning of July 24, 1979. Assuming that Howard was insubordinate, [5/] I cannot conclude that he would have been fired if his insubordination had not been coupled with his departure from the premises to call OSHA.

In my judgment, Howard was fired for requesting a safety inspection. I seriously doubt that there was even a "mixed motive" on the company's part, for while it has chronicled a number of unprotected activities, none of them played a role in Howard's discharge. Brisley's testimony shows that rather than invoking specific instances of misconduct, he told Howard that the company could not seem to satisfy him, that he was making people mad at him, that he was hurting feelings and losing friends. These remarks, coming so closely on the heels of Howard's announcement that he would call OSHA, lead me to believe that what upset Brisley was the fact that he had taken his complaint to "outsiders." Still, Brisley had apparently not decided what to do with Howard at the time he uttered these remarks. Only after the company had been visited and cited for a violation by an MSHA inspector did the company decide to discharge him. Under these circumstances, Respondent has a heavy burden to show that Howard would have been fired for reasons unrelated to his call for an inspection. It has failed to carry this burden.

Therefore, I find that in discharging Howard, Martin-Marietta violated § 105(c). I will retain jurisdiction of this case until the relief to be awarded is determined.

CONCLUSIONS OF LAW

1. I have jurisdiction over the subject matter and parties to this proceeding.

2. Martin-Marietta Corporation violated § 105(c) of the Mine Act when it discharged Johnny Howard on July 31, 1979.

[5/] There is room for doubt on this matter. As commonly understood, insubordination is more than simply a display of anger and frustration directed at a machine and the company in general. It would seem to require some defiance or displeasure directed at a specific superior.

ORDER

1. Martin-Marietta shall offer reinstatement to Howard in the position from which he was terminated, at the rate of pay fixed for that position on the date of reinstatement.

2. Martin-Marietta shall pay to Howard back pay covering the period from July 31, 1979, until the day he is offered reinstatement. Back pay equals the gross pay Howard would have received minus interim earnings. Martin-Marietta shall be responsible for withholding from the award the amounts required by state or Federal law and for making any additional contributions which those laws require. Interest on the net back pay award shall be computed at a rate of 6% for that portion attributable to the period July 31, 1979, through January 31, 1980, and 12% for the period thereafter.

3. Martin Marietta shall pay a reasonable attorneys' fee for services rendered by counsel for Howard.

4. Upon being notified that the decision in this case has become a final order of the Commission, the Secretary of Labor shall institute proceedings to assess a civil penalty against Martin-Marietta for the violation found herein.

5. Martin-Marietta shall cease and desist from interfering with the rights of its employees covered by the Mine Act to bring safety or health complaints to the attention of state or Federal authorities. It shall post in a conspicuous place a notice that it has committed such a violation, that it will refrain from doing so in the future and that it encourages its employees to exercise their rights under the Federal Mine Safety and Health Act. The notice shall be submitted to me for prior approval.

6. Counsel for the parties shall advise me in writing by July 10, 1981, whether they have agreed on the amounts due under paragraphs 2 and 3 of this order. If so, they shall submit those amounts to me together with the notice described in paragraph 5. Upon approval, I will issue an order which finally disposes of the present proceedings. If they are unable to agree, further post-hearing orders will be issued.

James A. Broderick
Chief Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FALLS CHURCH, VIRGINIA 22041

JUN 24 1981

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding Docket No. BARB 78-362-P A/O No. 01-01310-02005V
v.	:	Gayossa Pit
RON COAL COMPANY, Respondent	:	

DECISION

Appearances: Murray Battles, Esq., Office of the Solicitor, U.S. Department of Labor, Birmingham, Alabama, for Petitioner;
Ronald Morgan, President, Ron Coal Company, Inc., Jasper, Alabama, for Respondent.

Before: Judge Stewart

The above-captioned case is a civil penalty proceeding brought pursuant to section 109 of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 et seq. The hearing in this matter was held on May 11, 1981, in Birmingham, Alabama.

The notice of violation at issue herein, Notice No. 5-A.B.C., dated March 2, 1977, was issued pursuant to section 104(c)(1) of the Act. The inspector cited 30 C.F.R. 77.1004(b) which reads as follows:

> Overhanging highwalls and banks shall be taken down and other unsafe ground conditions shall be corrected promptly, or the area shall be posted.

The inspector described the condition or practice which led him to issue the notice of violation as follows:

> Unsafe conditions such as trees leaning over with roots pulled out of the ground were present directly over the drill operator. The area had not been posted to keep persons from entering. The highwall was approximately 40 feet high. The tree was approximately 10 inches in diameter at the bottom. The drill operator was drilling a hole approximately 3 feet from the bottom of the wall.

Notice No. 5 A.B.C. was terminated after the timely abatement of this condition.

Inspector A. B. Cates conducted an inspection of Respondent's operation at the Gayossa Pit on the morning of March 2, 1977. Ron Morgan, President of Ron's Coal Company, accompanied the inspector during his inspection. Both men testified at the hearing held in this matter.

Respondent was mining in an area that had previously been mined by another company. At the time of the inspection, Clyde Morgan, the father of Ron Morgan, was drilling a hole at the base of the highwall left by the earlier mining operation. The highwall was estimated to be between 35 and 40 feet in height. The inspector observed a tree extending over the upper edge of this highwall above the area in which Clyde Morgan was drilling. The tree was approximately 40 feet high and 10 inches wide at its base. The inspector estimated that the tree extended 10 feet beyond the edge of the highwall. If the tree fell, it would have fallen into the pit.

It is found that the overhanging tree presented a hazardous condition and that the failure to remove it or post the area was in violation of the cited standard. Ron Morgan testified that the tree had "been there" for a long time. The inspector, however, observed that one-half of the tree's roots were exposed. Furthermore, it had been raining prior to the inspection. As a consequence, the ground was "fairly wet" and the likelihood that the tree would fall was enhanced. In view of the inspector's uncontested testimony that an extensive portion of the root system of the tree was visible, Mr. Morgan's assertion that the tree was "just as solid as all the other trees in the forest" is rejected.

It is also found that Respondent demonstrated a moderate degree of negligence in failing to remove the tree or post the area. The presence of the tree was readily observable. Even though the tree had "been there" for a long time, its condition was such that its stability should not have been presumed.

It was probable that the tree would have fallen into the pit sooner or later. It was improbable, however, that it would have caused injury to any of Respondent's employees. Respondent's employees took only one cut, and spent only part of one day in the vicinity of the overhanging tree before moving to "the other side of the hill." None of Respondent's employees drilled in the area in question again.

The inspector testified that Clyde Morgan was drilling directly under the overhanging tree. Ron Morgan testified that drilling occurred 40 feet to one side of the tree. He qualified his testimony, however, by admitting that the tree could have struck the operator if it was forced in his direction. It is found that the drill operator was close enough to the tree while he was drilling to be threatened with injury if the tree had fallen. It is also noted that there was nothing to prevent any of Respondent's employees from entering the area immediately below the overhanging tree. If the tree had fallen and struck someone standing underneath it, it is probable that the injury would have been serious.

Respondent demonstrated good faith in the abatement of the condition. Clyde Morgan cut the tree down immediately. It is noted that Respondent need only have posted the area to have met the requirements of the mandatory standard.

At the time the inspection was conducted, Respondent had 2 prior paid violations. The parties stipulated that Respondent's prior history of violations was good. It was a small operation with 5 employees and a daily output of 50 to 75 tons of coal. Finally, it was the unrebutted testimony of Ron Morgan that Respondent had cash flow problems and would have to borrow money against its assets to pay a penalty.

At the conclusion of the hearing, Petitioner moved that settlement in the amount of $175 be approved for the violation at issue herein. The violation had been assessed originally at $350. As grounds for the reduction in penalty amount, counsel for Petitioner asserted that the negligence demonstrated was "simple", that the violation was slightly serious, that Respondent demonstrated good faith in the abatement of the condition and that Respondent was a small operator.

The motion for approval of settlement was granted at the conclusion of the hearing. The approval of the settlement is hereby AFFIRMED.

ORDER

IT IS ORDERED that Respondent pay the agreed upon sum of $175.00 within 30 days of the date of this decision, if payment has not already been made.

Forrest E. Stewart
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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JUN 24 1981

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), ON BEHALF OF LEONARD CUNNINGHAM, et al., Complainants	:	Complaint of Discrimination
	:	Docket No. WEVA 80-668-D
	:	Alpine Mine
v.	:	
SUBREG CORPORATION, Respondent	:	

DECISION AND ORDER

The parties move to dismiss the captioned discrimination complaint on the ground that the matter has been settled by an agreement between the complainants and the operator dated June 4, 1981.

Based on an independent evaluation and de novo review of the circumstances, I find the settlement proposed is in accord with the purposes and policy of the Act.

Accordingly, it is ORDERED that settlement be, and hereby is APPROVED. It is FURTHER ORDERED that the operator pay the amount of the back pay and employment benefits stipulated to and a penalty of $100 on or before Wednesday, July 15, 1981 and that subject to payment the captioned matter be DISMISSED.

Joseph B. Kennedy
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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JUN 24 1981

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding Docket No. YORK 80-55-M A.O. No. 27-00135-05002
v.	:	Ducharme Pit
DUCHARME SAND & GRAVEL, Respondent	:	

DECISION

Appearances: Constance B. Franklin, Esq., U.S. Department of Labor, Boston, Massachusetts, for the petitioner;
Clifford R. Kinghorn, Jr., Esq., Nashua, New Hampshire, for the respondent.

Before: Judge Koutras

Statement of the Case

This proceeding concerns a proposal for assessment of civil penalties filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, seeking civil penalty assessments for 13 alleged violations of certain mandatory safety standards set forth in Part 56, Title 30, Code of Federal Regulations. Respondent filed an answer to the proposal, and pursuant to notice, a hearing was convened on June 2, 1981, in Lowell, Massachusetts, and the parties appeared and participated therein.

Applicable Statutory and Regulatory Provisions

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

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

3. Commission Rules, 20 C.F.R. § 2700.1 et seq.

Issues

The principal issues presented in this proceeding are (1) whether respondent has violated the provisions of the Act and implementing regulations

as alleged in the proposal for assessment of civil penalty filed, and, if so, (2) the appropriate civil penalty that should be assessed against the respondent for the allged violation based upon the criteria set forth in section 110(i) of the Act. Additional issues raised by the parties are identified and disposed of where appropriate in the course of this decision.

In determining the amount of a civil penalty assessment, section 110(i) of the Act requires consideration of the following criteria: (1) the operator's history of previous violations, (2) the appropriateness of such penalty to the size of the business of the operator, (3) whether the operator was negligent, (4) the effect on the operator's ability to continue in business, (5) the gravity of the violation, and (6) the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of the violation.

Stipulations

The parties stipulated to the following:

1. Respondent is subject to the provisions of the Act and to the enforcement jurisdiction of the petitioner.

2. The citations in question were issued by an authorized representative of the Secretary of Labor and duly served on the respondent.

3. The respondent is a small family-owned sand and gravel operator employing approximately seven full-time employees.

Discussion

The respondent in this case is charged with 13 alleged violations of certain mandatory safety standards found in Part 56, Title 30, Code of Federal Regulations. The citations and conditions or practices cited are as follows:

1. 208669, 9/13/79, 30 CFR 56.9-87

   The Caterpillar 980 B S/N 89P 2580 front-end loader was not provided with an automatic reverse signal. The loader was observed operating in close proximity to two welders that were prefabricating steel on ground level.

2. 208670, 9/13/79, 30 CFR 56.9-2

   The Caterpillar 480-B 89P 2580 front-end loader was not provided with a working secondary braking system able to hold the equipment on the primary crusher hopper ramp.

3. 208671, 9/13/79, 30 CFR 56.12-32

Inspection electrical box covers were not replaced on the following areas after repairs had been made. Primary feeder vibrator, primary crusher motor, primary conduit elbow at crusher motor, and the secondary crusher.

4. 208672, 9/13/79, 30 CFR 56.14-1

The primary crusher counterweight was not provided with a guard. The work platform led an employee right up to the rotating counterweight.

5. 208673, 9/13/79, 30 CFR 56.14-1

The primary crusher flywheel and V-belt drive were not provided with a guard. The crusher work platform was so constructed that an employee could make physical contact.

6. 208674, 9/13/79, 30 CFR 56.11-1

Safe access was not provided to service the following conveyor headpulleys. The mine operator will have to survey the entire plant for other areas.

Citation 208674 was subsequently modified by the inspector on 9/17/79, as follows:

> The citation should read as follows. Safe access was not provided to service the following conveyor headpulleys. No. 1 conveyor, return conveyor, radial stacker feeder, and the radial stacker. The mine operator will have to survey the entire plant for other effected [sic] areas.

7. 208675, 9/13/79, 30 CFR 56.9-7

An automatic emergency stop device or a guard was not provided for both sides of return conveyor troughing idlers.

8. 208676, 9/13/79, 30 CFR 56.9-7

An automatic emergency stop device or a guard was not provided for the radial stacker feed conveyor troughing idlers.

9. 208677, 9/13/79, 30 CFR 56.14-1

An adequate tail pulley guard was not provided for the radial stacker feed conveyor. Back and top section missing and side sections were not covering the pinch point and tail pulley blades.

10. 208679, 9/13/79, 30 CFR 56.14-1

The Caterpillar 966-B S/N 75A 4309 front-end loader was not provided with an automatic reverse signal.

11. 208679, 9/13/79, 30 CFR 56.14-1

An adequate tail pulley guard was not provided for the return conveyor. Back and top sections were missing.

12. 208680, 9/13/79, 30 CFR 56.14-6

The front section of V-belt drive guard was not replaced on the 3 foot telsmith crusher.

13. 308681, 9/13/79, 30 CFR 56.9-22

Berms were not provided on the primary hopper dumping ramp. Both sides were elevated approximately fifteen feet.

Testimony and evidence presented by the petitioner

MSHA Inspector Donald C. Fowler confirmed that he issued Citation No. 208669, on September 13, 1979, after conducting an inspection of respondent's mining operation. He also confirmed the fact that he was accompanied on his inspection by a representative of the respondent company and he confirmed that he issued the remaining citations which are in issue in these proceedings. Mr. Fowler testified as to the conditions which he found and which prompted him to issue the citation for a lack of a reverse backup alarm on the front-end loader in question, including his opinion concerning the gravity of the conditions cited as well as the question of negligence and good faith compliance on the part of the respondent. (Tr. 27-58).

Testimony and evidence presented by the respondent

Mine Operator Walter Ducharme confirmed that he is a co-owner of the respondent mining company, and he testified concerning the circumstances surrounding the issuance of Citation No. 208669. He indicated that the front-end loader in question had a factory-installed backup alarm, but that a wire had become disconnected and rendered it inoperative when the inspector observed it in operation. He also alluded to the fact that he was requested by a local town councilman to disconnect the backup alarms because they were making too much noise and resulted in complaints from persons living in a near-by town. Mr. Ducharme disputed the inspector's contention that two welders working near the loader were placed in a hazardous position by the lack of a backup alarm and he indicated that the workers were some distance away working behind a steel structure which isolated them from any possibility of being run over by the loader in question (Tr. 61-78).

Subsequent settlement disposition of the citations

At the conclusion of the testimony and evidence concerning the first cited citation, and at the request of the parties, I rendered a tentative bench decision wherein I advised the parties that I believed the evidence established the fact of violation, that the violation resulted from ordinary negligence, that it was serious, and that the respondent exhibited rapid good faith compliance in achieving abatement of the conditions cited. I also made tentative findings concerning the size of respondent's operation, the effect of the penalties on respondent's ability to remain in business, and an initial finding that the history of prior violations would not warrant any increases in the penalties assessed in this case.

The parties were afforded an opportunity to confer with each other out of the presence of the court for the purpose of finalizing a proposed settlement, and pursuant to Commission Rule 29 CFR 2700.30, were afforded an opportunity to present their oral arguments in support of a settlement of all of the citations in issue in this case for my consideration, and these arguments were made on the record (Tr. 79-88). In addition, the parties stipulated as to the authenticity and admissibility of copies of all of the citations and abatements issued in this case, including copies of the inspector's narrative statements pertaining to each citation wherein the inspector comments on the questions of gravity, negligence, and good faith compliance as to each of the citations (exhibits G-1 through G-13).

After careful consideration of the arguments presented by the petitioner in support of the proposed settlement, including a consideration of the pleadings and exhibits, which are a part of the record in this case, I have made the following findings and conclusions concerning the statutory civil penalty assessment criteria found in section 110(i) of the Act.

Fact of violations

Respondent has conceded the fact of violation as to each of the citations issued in this case, and they are AFFIRMED.

Size of Business and Effect of Civil Penalties on Respondent's Ability to Remain in Business

The parties stipulated that the respondent is a small family-owned sand and gravel company employing seven full-time employees. Although respondent indicated that it has a "marginal" operation, no evidence was presented that the assessment of the civil penalties for the citations in question will adversely affect its ability to remain in business and I conclude that they will not.

Good faith compliance

Petitioner agreed that the conditions and practices cited by the inspector in each of the citations issued in this case were abated in good faith by the respondent prior to the time fixed by the inspector. I conclude that respondent exercised rapid good faith compliance in abating the citations issued and have considered this fact in approving the settlement disposition of the citations in question.

History of Prior Violations

Petitioner stated that the respondent had been served with two prior citations in July, 1978, for alleged violations of 30 CFR 56.9-7 and 56.14-1. However, petitioner could not confirm that civil penalties were assessed or paid for those citations, and respondent asserted that the citations were subsequently dismissed, but could not confirm that fact. Under the circumstances, since there is no evidence of any paid prior citations, I can only conclude that respondent has no prior history of violations for purposes of the penalty assessments levied for the citations in question in this proceeding. Further, assuming that the respondent had paid the two previous assessments, I cannot conclude that two prior citations would warrant any additional increases in the assessments for the citations in question here.

Negligence

I conclude and find that with the exception of Citations 208672, 208673, and 208679, the remaining citations resulted from the respondent's failure to exercise reasonable care to prevent the conditions cited and that this amounts to ordinary negligence. The three citations listed concern violations of the guarding standards found in 30 CFR 56.14-1, and petitioner asserted that respondent had been led to believe by a prior inspection that the guards which were installed on the equipment cited by the inspector on September 13, 1979, were adequate. Under the circumstances, I cannot conclude that respondent was negligent in those instances and I have considered this fact in approving the settlement dispositions for the citations in question.

Gravity

The information contained in the inspector's narrative statements for each of the cited violations reflects that all of the conditions and practices cited by the inspector were serious, and I adopt these observations by the inspector as my finding with respect to this question.

Conclusion

After careful review and consideration of the pleadings, arguments, and information of record in support of the proposed settlement, I conclude and find that it is reasonable and in the public interest. Accordingly, pursuant to 29 C.F.R. 2700.30, the settlement is APPROVED, and the citations, initial assessments, and the settlement amounts are as follows:

Citation No.	Date	30 CFR Standard	Assessment	Settlement
208669	9/13/79	56.9-87	$ 60	$ 35
208670	9/13/79	56.9-2	78	68
208671	9/13/79	56.12-32	40	30

Citation No.	Date	30 CFR Standard	Assessment	Settlement
208672	9/13/79	56.14-1	$ 36	$ 10
208673	9/13/79	56.14-1	48	10
208674	9/13/79	56.11-1	56	56
208675	9/13/79	56.9-7	56	40
208676	9/13/79	56.9-7	56	40
208677	9/13/79	56.14-1	48	10
208778	9/13/79	56.9-87	52	35
208679	9/13/79	56.14-1	56	10
208680	9/13/79	56.14-6	56	31
208681	9/13/79	56.9-22	48	40
			$ 690	$ 415

Order

Respondent IS ORDERED to pay civil penalties in the settlement amounts shown above in satisfaction of the citations in question within thirty (30) days of the date of this decision and order, and upon receipt of payment by MSHA, this proceeding is DISMISSED.

George A. Koutras
Administrative Law Judge

Distribution:

Clifford R. Kinghorn, Esq., Boyer, Kinghorn & Harkaway, 36 Chandler St., Nashua, NH 03060 (Certified Mail)

Constance B. Franklin, Esq., U.S. Department of Labor, Office of the Solicitor, JFK Bldg., Government Center, Boston, MA 02203 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JUN 25 1981

WILLIAM R. JEWETT, Complainant	:	Complaints of Discharge, Discrimination, or Interference
v.	:	Docket Nos. DENV 79-346-M and CENT 80-204-DM
MISSOURI PORTLAND CEMENT COMPANY, Respondent	:	Kansas City Mine and Plant

DECISION DISMISSING COMPLAINTS

Counsel for respondent filed on June 8, 1981, in the above-entitled proceeding a copy of a release signed by complainant. The release states that complainant has released and forever discharged respondent from all suits, actions, causes of actions, damages, claims, or demands, in law or in equity, which complainant ever had, has, or hereafter might have, from the beginning of the world to the present time, with respect to any claims, including those involved in the complaints filed in this proceeding in Docket Nos. DENV 79-346-M and CENT 80-204-DM.

Complainant's release of all claims made in this proceeding are based on a settlement agreement between him and respondent dated May 21, 1981. That settlement agreement shows that respondent agreed to pay complainant $3,873.00 and agreed to abide by certain procedural matters in connection with an age discrimination complaint filed by complainant under the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 et seq.

A hearing was scheduled to be held in this proceeding on November 14, 1979, but that hearing was indefinitely continued at complainant's request so that complainant could obtain an attorney to represent him at the hearing. After complainant had decided not to hire an attorney to represent him, the hearing was rescheduled to be held on October 15, 1980. The hearing was thereafter continued again at complainant's request because he stated that he was engaged in settlement negotiations with respondent. In the order granting the second continuance I specifically stated that complainant would be expected to file a request that his complaints be dismissed if he should reach a settlement with respondent.

On December 17, 1980, respondent's counsel submitted for my approval a draft of a proposed settlement agreement. In a letter dated December 18, 1980, I returned the draft of the settlement agreement after I had signed the draft to indicate that it would be a satisfactory method of discharging the complaints filed in this proceeding. About 5 months after I had returned the draft of the settlement agreement, I wrote a letter dated May 11, 1981, in which I requested that an executed copy of the proposed release be sent to me along with a statement by complainant that he wished to have his complaints in this proceeding dismissed on the basis of the settlement agreement.

Complainant ignored the letter of May 11, 1981, but respondent's counsel immediately replied to my letter by submitting on May 18, 1981, a copy of the

settlement agreement and a letter in which he stated that complainant had apparently not yet signed the settlement agreement or release. On June 8, 1981, counsel for respondent submitted a release signed by complainant on January 3, 1981.

Complainant has still not filed a letter requesting that his complaints in this proceeding be dismissed, but the release sent to me by respondent's counsel shows that complainant has released respondent from any claims which could possibly be raised in this proceeding. Therefore, I find that the facts hereinbefore discussed support a conclusion that the complaints filed in this proceeding should be dismissed.

WHEREFORE, for the reasons given above, it is ordered:

The complaints of discharge, discrimination, or interference filed in Docket Nos. DENV 79-346-M and CENT 80-204-DM are dismissed.

Richard C. Steffey

Richard C. Steffey
Administrative Law Judge
(Phone: 703-756-6225)

Distribution:

Mr. William R. Jewett, 4206 West 73rd Street, Prairie Village, Kansas 66208 (Certified Mail)

Lawrence E. Moncrief, Esq., Attorney for Missouri Portland Cement Company and H.K. Porter Company, Inc., Porter Building, Pittsburgh, PA 15219 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JUN 25 1981

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding	
	:	Docket Nos.	Assessment Control Nos.
	:	KENT 80-289	15-05179-03010
v.	:	KENT 80-290	15-05179-03012
	:	KENT 30-324	15-05179-03013
BIG THREE COAL COMPANY, Respondent	:	KENT 80-325	15-05179-03014
	:	KENT 80-329	15-05179-03015
	:		
	:	No. 1 Mine	

DECISION

Appearances: Darryl A. Stewart, Esq., Office of the Solicitor, U.S. Department of Labor, for Petitioner; Charles E. Lowe, Esq., Lowe, Lowe & Stamper, Pikeville, Kentucky, for Respondent.

Bafore: Administrative Law Judge Steffey

Pursuant to a notice of hearing dated November 17, 1980, as amended January 13, 1981, a hearing in the above-entitled proceeding was held in Pikeville, Kentucky, on March 5, 1981, under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d).

The issues in civil penalty cases are whether violations of the mandatory health and safety standards occurred and, if so, what civil penalties should be assessed, based on the six criteria set forth in section 110(i) of the Act.

After the hearing had been convened in this proceeding, an inspector testified in support of Citation No. 708127 which alleged that respondent had violated 30 C.F.R. § 75.301 because the volume of air in the last open crosscut was less than the minimum quantity of 9,000 cubic feet per minute required by section 75.301. The inspector stated that the air velocity was so low that it would not turn the blades on his anemometer (Tr. 10-12). The inspector testified that he had gone to respondent's No. 1 Mine to investigate a roof-fall accident. While the inspector was in the mine, he wrote Citation No. 708127, but the inspector stated that the low air velocity in the last open crosscut had no bearing on the cause of the accident and that the citation should be considered as a routine citation written as if the inspector had been conducting a "spot" inspection, that is, an inspection other than the four regular inspections required each year by section 103(a) of the Act.

The inspector did not consider the violation to be serious because no coal was being produced on the day the citation was written (Tr. 13-14).

The inspector stated that the anemometer would not turn if the air velocity was less than 50 feet per minute. He concluded that the air velocity was somewhere between 0 and 50 feet per minute. He stated that other persons involved in investigating the accident were in the last open crosscut and that no one had any difficulty in breathing (Tr. 22-23). The inspector said that the cause of the air deficiency was the fact that no curtain had been hung in the second open crosscut from the face and the lack of a curtain caused the air to be coursed from the second open crosscut to the return before being directed into the last open crosscut (Tr. 24).

The inspector first based his belief that the violation was associated with ordinary negligence by stating that the preshift examiner should have noticed the lack of air in the last open crosscut and should have reported it to mine management, but the inspector retracted that claim after he acknowledged that the mine had been closed by an order written under section 103(k) of the Act so that an investigation of the accident could be made. Since no one could have made a preshift examination while the mine was closed, the inspector was unable to say exactly how the operator could have known that a curtain had not been installed in the last open crosscut (Tr. 18). The inspector testified that the violation had been corrected in less time than he had allowed for abatement in his citation (Tr. 15).

Larry Ratliff, who is a half owner of Big Three Coal Company, claimed that the curtain in the second open crosscut could have been knocked down between the occurrence of the accident on September 18, 1979, and the time that the inspector went into the mine the next day (Tr. 32). Although the inspector testified that occurrence of the accident had no bearing on the lack of a curtain in the second open crosscut, there is no real certainty as to whether the curtain had never been erected at all, or had been installed during the previous production shift and had been torn down after the accident occurred.

The evidence supports a finding that a violation of section 75.301 occurred. As to the criteria of gravity and negligence, the evidence supports a finding that the violation was nonserious and that it was associated with a low degree of negligence in view of the fact that neither the inspector nor the owner could say for certain that the curtain had been in place during the time that coal had last been produced in the mine.

After the parties had presented evidence with respect to the first violation alleged in this proceeding, Mr. Larry Ratliff, who is half owner of Big Three Coal Company, presented some detailed testimony bearing on the criteria of the size of respondent's business and whether the payment of penalties would cause respondent to discontinue in business. Mr. Ratliff testified that respondent had opened its mine in August 1979 and had closed the mine on June 15, 1980, after occurrence of a massive roof fall which covered up respondent's continuous-mining machine, as well as a feeder and a shuttle car which respondent had been leasing from Island Creek Coal Company (Tr. 39).

Before respondent closed its mine, it had employed approximately 21 miners and had produced about 150 tons of coal per day. Respondent was under contract to produce the coal for Island Creek Coal Company. Island Creek paid respondent $19.25 per ton, less $4.80 per ton for such services as removal of impurities from the coal, and maintenance of a reclamation fund, providing electric power, and use of bathhouse facilities. Respondent also had to pay all labor costs associated with producing coal and pay for hauling the coal to Island Creek's prepearation plant (Tr. 37-39).

Mr. Ratliff, in addition to having a 50-percent interest in Big Three Coal Company, also had a half interest in Vanhoose Coal Company. The Vanhoose Company stopped mining coal on April 4, 1980, and the 265 Lee Norse continuous-mining machine being used by the Vanhoose Company was transferred to Big Three's Mine and Big Three assumed the payments on the Lee Norse which Vanhoose Company had been making prior to its discontinuance in business (Tr. 47). It was not possible to recover the continuous-mining machine after the massive roof fall occurred in respondent's mine. Respondent was also unable to recover a feeder and a shuttle car which were being leased from Island Creek. Mr. Ratliff testified that the cost of the timbers and other equipment required for recovering the equipment was estimated to be $387,000, whereas the original cost of the Lee Norse was $278,000. Respondent's insurance on the Lee Norse was sufficient to pay the remaining amount due on it as well as $49,000 in debts which respondent owed to Ingersoll Rand (Tr. 44; 46-47; 50).

When Island Creek found that Mr. Ratliff was unable to recover its feeder and shuttle car which had been covered up by the roof fall, Island Creek cancelled its contract with Big Three Coal Company and Mr. Ratliff was unable to reopen the Big Three Mine at a different location. Mr. Ratliff's counsel mailed to me on May 28, 1981, some financial data and a copy of the only income tax return which Big Three has filed. The return covers the entire period that Big Three was in business. According to the tax return, Big Three incurred a net loss of $96,016.79. Other data submitted by respondent show that it has no assets to pay existing obligations amounting to $109,931.79.

Respondent's counsel in this proceeding stated at the hearing that respondent planned to file a bankruptcy petition within a week or 10 days after the hearing was held on March 5, 1981 (Tr. 56). In a letter to me dated May 25, 1981, respondent's counsel stated that respondent still plans to file a bankruptcy petition in the near future.

Mr. Ratliff now has no interest in any active coal mine (Tr. 35). He is now running a hardware store (Tr. 30) and Mr. Ratliff does not plan to mine coal at any time in the future. His position as to the business of producing coal was given at the hearing (Tr. 52):

> I would like to state it for the record, my feelings right to this day, if there is never another lump of coal mined until I have got any part in it, they will never mine another lump.

When the evidence summarized above was obtained at the hearing, I asked Mr. Ratliff why he thought that any worthwhile good would be accomplished by having inspectors testify as to the remaining 25 violations involved in this consolidated proceeding in view of the fact that his only defense was inability to pay penalties. His reply to that question was (Tr. 53):

> Well my feeling is Big Three has no assets. We have got nothing that anybody can get. If Big Three had anything we would be more than happy to sell it and pay these debts. But we just don't have anything.

The evidence in this proceeding shows that respondent did not request a hearing because it wishes to contest whether the violations occurred, but simply wanted to present evidence to show that respondent would be unable to pay penalties even if it agreed to a settlement under which it would pay a portion of the amounts proposed by the Assessment Office. Although respondent has not yet filed a petition in bankruptcy, there is no reason to doubt its statement that it is planning to do so. If large penalties were to be assessed, the Department of Labor could collect them only by filing as a creditor in the bankruptcy proceeding because respondent's evidence indicates that it has no assets which could be seized and sold in order to collect the penalties. Even if some assets could be discovered in the bankruptcy proceeding, the collection of large civil penalties would reduce the amount which other creditors could obtain. Since Mr. Ratliff is out of the coal business and does not intend to resume the business of producing coal, assessment of large penalties would have no deterrent effect because he would not personally be paying the penalties from any assets which he has not already lost from his venture into the coal business.

I stated at the hearing that I would review the citations and order which are the subject of the five Proposals for Assessment of Civil Penalty and would reduce the penalties "by a considerable amount" in light of the fact that respondent is out of business and has no assets from which penalties can be paid (Tr. 56). If inspectors had been called to testify as to each of the 25 alleged violations as to which no testimony was taken, a period of about 2 hearing days would have been required. Even if all of the violations had been shown to have been very serious and to have been accompanied with gross negligence, I would still have felt obligated to assess relatively small penalties because a small company is involved and because it is no longer in business and has no assets from which penalties can be paid. Therefore, the remaining portion of this decision will consist of a brief review of the total violations alleged in this proceeding and a tabulation listing the alleged violations and the amount of the penalty assessed for each violation, based on the six criteria.

Docket No. KENT 80-289

The first violation alleged by the Proposal for Assessment of Civil Penalty filed in Docket No. KENT 80-289 was the violation of section 75.301 which was the subject of considerable testimony in this proceeding, as summarized in the first part of this decision. I have already found that the violation was nonserious in the circumstances and that there was a low

degree of negligence. The violation was abated in less time than the inspector provided, and after it was abated, respondent was supplying a volume of 34,000 cubic feet per minute to the last open crosscut. Those facts support a finding that respondent demonstrated better than a normal effort to achieve compliance and that the penalty otherwise assessable should be reduced by a small amount under the criterion of good-faith abatement. Respondent's witness stated that respondent had not previously been cited for a violation of section 75.301. The foregoing findings, plus additional considerations as to respondent's small size, and adverse financial condition, warrant assessment of a civil penalty of $10 for the violation of section 75.301 alleged in Citation No. 708127.

No testimony was received with respect to the remaining three violations alleged in Docket No. KENT 80-289. Citation No. 708128 alleged a violation of section 75.1702 because the intake air escapeway was not properly separated from the conveyor belt entry because of respondent's failure to erect a stopping outby the belt tailpiece. The Assessment Office considered that the violation resulted from ordinary negligence, that it was very serious, and proposed a penalty of $114. The Assessment Office did not reduce the penalty under the criterion of good-faith abatement even though the violation was abated in less time than provided for by the inspector. The Assessment Office shows assignment of no penalty points under the criterion of history of previous violations for any of the violations alleged in Docket No. KENT 80-289 because all of the violations were written in September 1979 shortly after respondent commenced producing coal.

Citation No. 707945 alleged a violation of section 75.200 because respondent failed to install reflectors at the last row of roof supports. The Assessment Office considered that the violation was the result of ordinary negligence, that it was moderately serious, and proposed a penalty of $44. The Assessment Office did not reduce the penalty under the criterion of good-faith abatement although respondent abated the violation in 15 minutes which was 10 minutes less than the time given by the inspector.

Citation No. 707946 alleged a violation of section 75.604(a) because a permanent type splice in the trailing cable to the coal drill was not mechanically strong and lacked adequate electrical conductivity and flexibility. The Assessment Office considered that the violation was the result of ordinary negligence, that it was moderately serious, and proposed a penalty of $66. Abatement was performed within the 30 minutes provided for by the inspector.

I find that the three violations, as to which no testimony was received, occurred. The penalties proposed by the Assessment Office are a litttle on the high side for failure to give respondent due credit for rapid abatement. Of course, the Assessment Office had no evidence as to respondent's financial condition. My order will hereinafter show reductions in the total penalties of $290 proposed by the Assessment Office to a total of $122, or approximately 50 percent, based on the fact that respondent is out of business and has no assets from which penalties can be collected. Of course, the penalty of $10 assessed for the violation of section 75.301 is based on evidence received at the hearing and does not have to be compared to the penalty proposed by the Assessment Office.

Docket No. KENT 80-290

The Proposal for Assessment of Civil Penalty filed in Docket No. KENT 80-290 alleged occurrence of five violations. Citation No. 725312 alleged a violation of section 77.701 because respondent had failed to provide a frame ground for a starter box. Citation No. 725313 alleged a violation of section 77.506 because respondent had used a solid wire, instead of a fuse, for the wire supplying power to the office and supply trailer. Citation No. 725314 alleged a violation of section 75.902 because a fail-safe ground check monitoring circuit had not been provided for the power circuit for the feeder on the conveyor belt. Citation No. 725315 alleged a violation of section 75.1722 because respondent had failed to provide a protective guard for the conveyor drive chain on the feeder. Citation No. 725316 alleged a violation of section 75.518 because respondent had used a solid wire, in lieu of a fuse, for the wire providing power to the control transformer. The Assessment Office found that all of the violations resulted from ordinary negligence and found that the use of solid wires, instead of fuses, was the result of a very high degree of ordinary negligence. All of the violations were properly considered to be serious. The Assessment Office appropriately reduced the penalties for the violations of sections 77.701 and 75.518 because they were abated rapidly. Finally, the Assessment Office assigned an amount of $8 to each penalty under the criterion of history of previous violations.

The Assessment Office proposed penalties of $52, $106, $56, $90, and $98, respectively, or a total of $402, for the five violations alleged in Docket No. KENT 80-290. I find that the Assessment Office proposed penalties which are well supported by the facts alleged in the citations. I find that all five violations occurred, but my order will hereinafter provide for reductions of approximately 50 percent in each of the penalties, or a total of $201, because of the fact that respondent is out of business and has no assets from which penalties can be collected.

Docket No. KENT 80-324

The Proposal for Assessment of Civil Penalty filed in Docket No. KENT 80-324 seeks assessment of civil penalties for eight alleged violations. Citation No. 709045 alleged a violation of section 75.1725 because a shuttle car lacked operable headlights and was, therefore, not maintained in a safe operating condition. Citation No. 708057 alleged that respondent had violated section 77.1107 by failing to provide a slippage switch to stop the No. 1 belt automatically in case of excessive slippage. Citation No. 708059 alleged a violation of section 75.1102 for failure to provide a slippage switch for the No. 2 belt head. Citation No. 705980 alleged a violation of section 75.316 because respondent had not erected permanent brattices as close to the working face as is required. Citation No. 707996 alleged a violation of section 75.400 because respondent had allowed loose coal, float coal dust, oil cans, and paper boxes to accumulate for a distance of about 1200 feet in the No. 4 entry and adjoining crosscuts. Citation No. 707997 alleged a violation of section 75.200 because respondent had failed to provide additional supports in an area which was 28 feet wide. Citation No. 725317 alleged a violation of section 75.1710-1 because respondent had failed to provide a

cab or canopy for a shuttle car being used in 60-inch coal. Citation No. 725318 alleged a second violation of section 75.1710-1 because respondent had failed to provide a canopy for its other shuttle car being used in 60-inch coal.

The Assessment Office considered that all of the eight violations were the result of ordinary negligence. All of the violations were considered to be serious or very serious. Respondent was given no credit for rapid abatement and the Subsequent Action sheets show that no extraordinary effort was made to abate any of the violations. Finally, the Assessment Office assigned $8 to each penalty under the criterion of history of previous violations.

I find that all eight violations occurred and that the Assessment Office proposed penalties which are supported by the conditions described in each of the citations. The penalties proposed by the Assessment Office were $78, $44, $150, $114, $225, $106, $90, and $90, respectively, or a total of $897, for the eight violations discussed above. My order will hereinafter reduce the penalties by approximately 50 percent to a total of $449 because of the fact that respondent is out of business and has no assets from which penalties can be collected.

Docket No. KENT 80-325

The Proposal for Assessment of Civil Penalty filed in Docket No. KENT 80-325 alleged occurrence of seven violations. Citation No. 708054 alleged a violation of section 75.1710-1 because a canopy had not been installed on a cutting machine being used in 60-inch coal. Citation No. 708056 alleged a violation of section 75.1710-1 because a canopy had not been installed on a shuttle car being used in 60-inch coal. Citation No. 709043 alleged a violation of section 75.313 because the methane monitor on the loading machine was not in operable condition. Citation No. 707989 alleged a violation of section 75.1725 because from 30 to 40 bottom rollers on the No. 2 conveyor belt were stuck. Citation No. 707998 alleged a violation of section 75-1710-1 because the canopy had been removed from the loading machine; the violation was abated by removal of the cutting machine from mine property. Citation No. 726231 alleged a violation of section 75.1100-1(b) because respondent had failed to provide a waterline for firefighting purposes along the conveyor belt for a distance of about 800 feet. Citation No. 726234 alleged a violation of section 75.326 because air being used to ventilate the Nos. 1 and 2 conveyor belts was traveling in reverse direction, the condition being the result of adverse roof conditions and water seepage.

The Assessment Office found that all of the violations were the result of ordinary negligence and that all of them were serious or moderately serious. The Assessment Office appropriately reduced no penalties because of respondent's having shown a rapid effort to achieve compliance. The Subsequent Action sheets show that no extraordinary effort was made to achieve compliance in any case. Finally, the Assessment Office assigned $8 to each penalty under the criterion of respondent's history of previous violations. The Assessment Office proposed penalties of $90, $90, $44, $52, $78, $72, and $150, respectively, or a total of $576, for the seven violations.

It should be noted that Citation No. 726231 incorrectly alleged a violation of section 75.1100-1(b). That subsection refers to portable water cars, whereas the condition described in the citation was that respondent had failed to provide a waterline along a conveyor belt. A waterline is required by section 75.1100-2(b). Inasmuch as the Subsequent Action sheet terminating the citation shows that respondent did provide a waterline, there is no doubt but that respondent was aware of the section of the regulations with which it was required to comply. The Commission held in Jim Walter Resources, Inc., 1 FMSHRC 1827 (1979), that a citation should not be vacated simply for failure to show the exact section of the regulations which has been violated, so long as the citation is sufficiently specific to explain to the operator the condition which is considered to be hazardous and which needs to be corrected. Therefore, my order in this proceeding will amend Citation No. 726231 to cite a violation of section 75.1100-2(b) instead of section 75.1100-1(b). My order will also amend the Proposal for Assessment of Civil Penalty so as to allege a violation of section 75.1100-2(b) and will assess a penalty for a violation of section 75.1100-2(b) instead of a penalty for a violation of section 75.1100-1(b).

I find, after making the correction discussed in the preceding paragraph, that all seven violations occurred and that the Assessment Office proposed appropriate penalties in each instance. My order will hereinafter assess total penalties of $288 which are 50 percent less than those proposed by the Assessment Office because of the fact that respondent is out of business and has no assets from which penalties can be collected.

Docket No. KENT 80-329

The Proposal for Assessment of Civil Penalty filed in Docket No. KENT 80-329 seeks assessment of civil penalties for two alleged violations of section 75.200. The first violation was alleged in Citation No. 726230 which stated that respondent had failed to follow its roof-control plan by not installing straps or crossbars for a distance of about 60 feet. The second violation of section 75.200 was cited in Order of Withdrawal No. 726235 issued under the imminent-danger provisions, or section 107(a), of the Act. The violation alleged in the order was that respondent had removed seven cuts of coal from the Nos. 4 and 5 pillar blocks and had installed only four breaker posts, whereas the roof-control plan requires installation of eight breaker posts and a row of line timbers installed on 4-foot centers.

The Assessment Office found that the first violation of section 75.200 was the result of ordinary negligence, that it was moderately serious, and proposed a penalty of §98. The Assessment Office found that the second violation of section 75.200 was the result of gross negligence, was very serious, and proposed a penalty of $445.

I find that both violations of section 75.200 occurred and that the Assessment Office appropriately evaluated the criteria in proposing the total penalties of $543 described above. My order will hereinafter reduce the proposed penalties to $272, or by about 50 perdent, because respondent is no longer in business and has no assets from which penalties can be collected.

WHEREFORE, for the reasons hereinbefore given, it is ordered:

(A) The Proposal for Assessment of Civil Penalty filed in Docket No. KENT 80-325 is amended to show that it seeks a penalty for a violation of 30 C.F.R. § 75.1100-2(b) instead of 30 C.F.R. § 75.1100-1(b) and Citation No. 726231 is amended to show that it alleges a violation of 30 C.F.R. § 75.1100-2(b) instead of 30 C.F.R. § 75.1100-1(b).

(B) Within 30 days from the date of this decision, respondent shall pay civil penalties totaling $1,332.00. The penalties assessed herein are allocated to the respective violations as follows:

Docket No. KENT 80-289

Citation No. 708127 9/19/79 § 75.301	$ 10.00
Citation No. 708128 9/19/79 § 75.1707	57.00
Citation No. 707945 9/24/79 § 75.200	22.00
Citation No. 707946 9/24/79 § 75.604(a)	33.00
Total Penalties Assessed in Docket No. KENT 80-289	$ 122.00

Docket No. KENT 80-290

Citation No. 725312 1/28/80 § 77.701	$ 26.00
Citation No. 725313 1/28/80 § 77.506	53.00
Citation No. 725314 1/29/80 § 75.902	28.00
Citation No. 725315 1/29/80 § 75.1722	45.00
Citation No. 725316 1/29/80 § 75.518	49.00
Total Penalties Assessed in Docket No. KENT 80-290	$ 201.00

Docket No. KENT 80-324

Citation No. 709045 10/12/79 § 75.1725	$ 39.00
Citation No. 708057 10/16/79 § 77.1107	22.00
Citation No. 708059 10/16/79 § 75.1102	75.00
Citation No. 705980 1/3/80 § 75.316	57.00
Citation No. 707996 1/29/80 § 75.400	113.00
Citation No. 707997 1/29/79 § 75.200	53.00
Citation No. 725317 1/29/80 § 75.1710-1	45.00
Citation No. 725318 1/29/80 § 75.1710-1	45.00
Total Penalties Assessed in Docket No. KENT 80-324	$ 449.00

Docket No. KENT 80-325

Citation No. 708054 10/12/79 § 75.1710-1	$ 45.00
Citation No. 708056 10/12/79 § 75.1710-1	45.00
Citation No. 709043 10/12/79 § 75.313	22.00
Citation No. 707989 10/17/79 § 75.1725	26.00
Citation No. 707998 1/29/80 § 75.1710-1	39.00
Citation No. 726231 5/5/80 § 75.1100-2(b)	36.00
Citation No. 726234 5/6/80 § 75.326	75.00
Total Penalties Assessed in Docket No. KENT 80-325	$ 288.00

Docket No. KENT 80-329

Citation No. 726230 5/5/80 § 75.200	$ 49.00
Order No. 726235 5/12/80 § 75.200	223.00
Total Penalties Assessed in Docket No. KENT 80-329	$ 272.00

Total Civil Penalties Assessed in This Proceeding $1,332.00

Richard C. Steffey

Richard C. Steffey
Administrative Law Judge
(Phone: 703-756-6225)

Distribution:

Darryl A. Stewart, Attorney, Office of the Solicitor, U.S. Department of Labor, Room 280, U.S. Courthouse, 801 Broadway, Nashville, TN 37203 (Certified Mail)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

JUN 25 1981

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding
	:	Docket No. KENT 81-12
	:	Assessment Control No. 15-12272-03002
v.	:	
	:	Chisholm Mine No. 2
PIKEVILLE COAL COMPANY, Respondent	:	

DECISION

Appearances: George Drumming, Jr., Esq., Office of the Solicitor, U.S. Department of Labor, for Petitioner; John M. Stephens, Esq., Stephens, Combs & Page, Pikeville, Kentucky, for Respondent.

Before: Administrative Law Judge Steffey

Pursuant to a notice of hearing issued March 12, 1981, a hearing in the above-entitled proceeding was held on May 7, 1981, in Prestonsburg, Kentucky, under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d).

After the parties had completed their presentations of evidence, I rendered the bench decision which is reproduced below (Tr. 84-95):

> This hearing involves a Proposal for Assessment of Civil Penalty filed on November 21, 1980, by the Secretary of Labor in Docket No. KENT 81-12, seeking to have a civil penalty assessed for an alleged violation of 30 C.F.R. § 75.1101 by Pikeville Coal Company.
>
> The issues in a civil penalty case are whether a violation of the mandatory safety standards or the Act occurred and, if so, what penalty should be assessed, based on the six criteria set forth in Section 110(i) of the Federal Mine Safety and Health Act of 1977. I shall first make some findings of fact.
>
> 1. On June 9, 1980, Inspector Kellis Fields made an investigation at the Chisholm No. 2 Mine of the Pikeville Coal Company. At that time, he examined the belt drive, located on the surface, for the underground belt conveyor which extended up the No. 4 entry. He observed that there was no fire suppression system on the belt drive, and he therefore issued Citation No. 722892 alleging a violation of section 75.1101. The language in that citation reads as follows: "Deluge type water sprays or foam generators were not provided for the main belt conveyor drive that is installed within 25 feet of the No. 4 portal drift opening of the south side mains." Subsequently,

on June 18, 1980, the inspector issued a modification of that citation in which he inserted the words, "intake air" between the word "portal" and "drift opening," so that the language would read that the belt drive did not have "installed within 25 feet of the No. 4 portal intake air", etc., the proper fire suppression system required by section 75.1101.

2. At the hearing, the inspector explained that the reference in his citation to the 25-foot distance from the highwall had been alleged in the citation because the inspector's manual provided some guidelines for the requirement of application of section 75.1101 to surface belt drives, and those guidelines provide that the fire suppression system is required if the belt drive is within 25 feet of the portal.

3. The inspector made it clear in his testimony that while he used the guidelines in the manual and made the measurement to show that, in his opinion, he was justified under the manual for citing a violation of section 75.1101, he believed that he was citing respondent for a violation of section 75.1101, not for a violation of a guideline in a manual. Technically, he said that he could cite respondent for a violation of section 75.1101 even if the belt drive were a thousand feet from the portal. In other words, in his opinion, the distance from the portal is not relevant for finding a violation of section 75.1101.

4. Respondent presented its safety director at the Chisholm No. 2 Mine as a witness. His name is Charles Dotson. Mr. Dotson presented as Exhibit A a diagram showing that the No. 4 entry has an apron located over it with solid walls on each side of the apron to support it, and he stated that when he measured the distance from the coal rib itself to the belt roller, that he obtained a measurement of 38 feet 7 inches. He also said that, in his opinion, the manual requires the measurement to be made to the belt roller, rather than to the motor itself, that had been used as a point of termination of measurement when the inspector obtained the distance of 25 feet from the motor on the belt conveyor drive to the highwall. Mr. Dotson's Exhibit A also shows that if the measurement had been made from the edge of the right wall facing the No. 4 entry of the apron, it would have been a distance of 18 feet 8 inches to the roller at the motor. The inspector obtained a distance of 15 feet when he made a measurement from the wall of the apron to the motor. The distance between the motor itself and the roller is two or three feet, and I think that the angle from which the two gentlemen made their measurements accounts for the remaining difference in the masurements obtained by Mr. Dotson and Inspector Fields.

5. It was the inspector's opinion that any fire that might start on the belt drive, even though it was located outside the mine could get into the No. 4 entry, which is also the belt line, and he said that despite the fact that the belt line contains what is known as a neutral split of air, it does take air into the mine from outside, and it does therefore carry whatever is in the outside air, and if there were a fire outside, it was his opinion that some smoke from the fire would be carried up the belt line, and that it would be possible for the smoke to get into the intake, and therefore, reach the working faces. He admitted that if

that were to occur, there would have to be some problem in one or more curtains being out at the end of the belt line, or between the belt line and the intake and return.

6. Mr. Dotson presented as Exhibit B a diagram of the ventilation system in the Chisholm No. 2 Mine and his diagram shows that there are -- first of all there's a check curtain just inby the No. 4 entry portal, and that is supposed to keep all but a small amount of air from going up the belt line, and, of course, some oxygen has to be in the belt line in order to supply life to the people who work along the belt line from time to time, or travel it. In addition to the check curtain at the intake or portal of the No. 4 entry, there are other check curtains arranged just inby the tailpiece of the belt line, and those check curtains prevent air from the belt line traveling to the face. Of course, there is also a check curtain just outby the belt tailpiece. All of the protective check curtains would prevent air from getting into the intake if the air should be carrying smoke from a fire from the outside. As all parties agree, there would have to be some kind of damage to the ventilation system in order for smoke from the outside to be carried to the working face up the No. 4 entry.

7. From the standpoint of gravity, not only would it be difficult for any smoke from a fire to get up the No. 4 entry, but at the time the citation was written, there was already installed in the vicinity of the head drive, about which we are talking, a large tank containing water, and that tank is equipped with pumps and water lines so that if a fire had occurred on the surface a person on the surface would have been able to combat the fire by the use of a hose attached to that water supply.

8. Mr. Dotson testified that if the inspector had not written this citation that respondent would not have installed a fire suppression system using water on this belt drive on the outside. In fact, the citation was abated by the installation of a dry chemical system because Mr. Dotson said that outside the mine the deluge water system, referred to in section 75.1101, would not have been appropriate because it would have frozen in the wintertime and would have become inoperative.

I believe that those are the principal facts that should be controlling in a decision in this case. Respondent makes two primary arguments with respect to this notice of violation. First of all, Mr. Stephens for respondent, has argued that the facility here, the belt drive, is on the surface of the mine, and that section 75.1101 clearly is a portion of the regulations which is designed to apply to underground mines, and he argues that it was improper to cite a belt drive on the surface for a violation of a safety standard which clearly applies only to underground facilities. Mr. Drumming, on behalf of the Secretary of Labor, contends with respect to that argument, that the belt conveyor involved definitely extended underground, and therefore the underground portion couldn't work if it didn't have a drive located somewhere, and even though the drive happened to be on the surface, that that drive was an integral part of

an underground belt conveyor system, and therefore was appropriately cited under a section of the regulations which is applicable to underground mines.

I am in sympathy with Mr. Stephens' position and I think there is a lot of merit to his argument here, but I have for 8 years been applying that section to underground belt drives, even though some of those belt drives have been located on the surface, and I have taken the position that Mr. Drumming takes in this case, which is that since this belt drive is an integral part of that first flight of the belt conveyor that goes underground, there is no way that we can exempt the belt drive on this portion of the conveyor belt from the underground provisions of the regulations. Therefore, I agree that it is appropriate for section 75.1101 to be cited in connection with a belt drive which is located on the surface.

We then come to Mr. Stephens' other argument, or at least one of his other arguments, and that is, he says that although he doesn't like certain portions of the manual because they also refer to application of section 75.1101 to surface facilities, he says that as a matter of fact, if you are going to follow the manual, that this particular belt drive was farther from the portal than 25 feet and, therefore, that Inspector Fields was not really following the guidelines when he cited section 75.1101.

As to whether Inspector Fields followed his guidelines depends in large part on how you look at the measurements of the two individuals who were witnesses in this case. I think we must get back to the fact that the possibility of any smoke going underground would depend on that smoke going into the No. 4 entry, and to get into the No. 4 entry, the smoke has to pass by the two supports of the apron, which are on the outside of the mine, and which really are the beginning of the No. 4 entry. So, if you considered the belt drive to be within the 25-foot distance required by the manual, then even under Mr. Dotson's measurements, the belt drive would be within 25 feet of the No. 4 portal. Consequently, I think that the manual would have been complied with in this instance, even if that were necessary.

I think, however, that I have to agree with Mr. Drumming and Inspector Fields that we're here dealing with a citation of a regulation and not with a policy in a manual. The Commission stated in Secretary of Labor v. Old Ben Coal Company, 2 FMSHRC 2806 (1980), that failure to follow a manual by itself is not a sufficient basis for vacating a notice of violation or a citation. The Commission held in that case that such instructions are not officially promulgated and do not prescribe rules of law binding upon an agency. So, I would say, if I were confronted with a choice here where the inspector is required to follow the manual down to the last inch in order for him to cite section 75.1101, I would not say that he has to follow the manual. Therefore, even if the measurements didn't come within the 25-foot provision, I would, and do, hold that it is not necessary for him to follow the manual in order to cite a violation of section 75.1101.

I believe that I have taken care of the basic legal arguments that Mr. Stephens has made, and having found that those arguments should not prevail, I find that a violation of section 75.1101 occurred.

Having found that a violation occurred, it is now necessary to assess a civil penalty based upon the six criteria. The parties have stipulated that Pikeville Coal Company is subject to the Act and that I have jurisdiction to hear and decide the case, and that respondent operates the Chisholm No. 2 Mine. It has also been stipulated that respondent is a large operator, that respondent would not be adversely affected by the assessment of a civil penalty, and that its ability to continue in business would not be adversely affected by paying a civil penalty. Those stipulations cover two of the criteria that have to be considered.

It has been stipulated as to a third criterion, that respondent demonstrated a good-faith effort to achieve rapid compliance. As to a fourth criterion, history of previous violations, it was stipulated that respondent has not previously been cited for a violation of section 75.1101.

The remaining criteria to be considered are negligence and gravity. As to negligence, Mr. Dotson stated that he thought that there was almost no possibility that smoke from any fire on the outside could get up this No. 4 entry where it would endanger anyone working underground, and he stated for that reason, the company interpreted, and he interpreted, section 75.1101 as not being applicable to this belt drive. In addition to the other reason that has already been given, namely, that the belt drive was on the surface, section 75.1101 was, in his opinion, not applicable because the belt drive was more than 25 feet from the drift opening, and was subject to freezing in winter. All these factors, in his opinion, made this belt drive exempt from having to have an automatic fire suppression system on it. Moreover, he pointed out that someone had to be stationed on the surface, in the vicinity of this belt drive, and was stationed on the surface; that all the employees in this company, both those stationed on the surface and assigned to work underground, a e trained to apply fire-fighting equipment and methods and, therefore, could have fought any fire that might have developed. They could have done so through the use of the fire hose and other facilities on the surface. Consequently, I cannot find that Respondent was negligent in having violated section 75.1101 under those conditions.

As to the criterion of gravity, I have already indicated in my findings of fact above that there was almost no probability that any smoke from a fire on the belt drive would have gone underground and would have been a hazard to anyone working underground. In view of the fact that someone was on the surface at all times, it is very likely that any fire that might have started would have been seen as soon, or about as soon, as an automatic system could have taken affect. It should be pointed out also that the company installed a dry chemical system so that it would work in any kind of weather regardless of freezing temperatures.

In addition to that, I might say that I've had several cases involving Pikeville Coal Company, and it is a very safety-oriented company. It does try to see that hazards are reduced around its mine and I think it has an excellent reputation in that regard.

Because of all the aforestated extenuating factors and circumstances, I believe that a civil penalty in this instance should be the minimum permitted by the Act. Therefore, I assess a civil penalty of $1.00.

WHEREFORE, it is ordered:

Within 30 days from the date of this decision, Pikeville Coal Company shall pay a civil penalty of $1.00 for the violation of section 75.1101 alleged in Citation No. 722892 dated June 9, 1980.

Richard C. Steffey

Richard C. Steffey
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

JUN 25 1981

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding
	:	Docket No. KENT 81-49
	:	Assessment Control No. 15-11566-3007 F
v.	:	
	:	No. 3 Mine
V AND M MINING COMPANY OF PAINTSVILLE, INC., Respondent	:	

DECISION APPROVING SETTLEMENT

Appearances: George Drumming, Jr., Esq., Office of the Solicitor, U.S. Department of Labor, for Petitioner; G. C. Perry III, Esq., Paintsville, Kentucky, for Respondent.

Before: Administrative Law Judge Steffey

Pursuant to a notice of hearing dated March 12, 1981, a hearing in the above-entitled proceeding was held in Prestonsburg, Kentucky, on May 5, 1981, under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d).

After the hearing was convened, counsel for the parties stated that they had entered into a settlement agreement under which respondent had agreed to pay a penalty of $2,000 for the single violation of 30 C.F.R. § 75.200 alleged in this proceeding, instead of the penalty of $4,000 proposed by the Assessment Office.

Section 110(i) of the Act gives six assessment criteria which are required to be used in determining the size of civil penalties. The parties had been able to stipulate as to all of the six criteria except the question of whether the operator was negligent with respect to the occcurrence of the violation. Therefore, counsel for the parties asked that they be permitted to present evidence solely on the criterion of negligence. The testimony of three different MSHA inspectors was introduced. After testimony had been received by three different inspectors, the parties reopened their settlement discussions and agreed that a settlement penalty of $2,000 was not supported by the record. Consequently, the final settlement agreement was that respondent would pay a penalty of $1,000.

The parties stipulated that respondent is subject to the provisions of the Act, that I have jurisdiction to decide the issues, that respondent is the operator of the No. 3 Mine which produces 137,000 tons of coal annually and employs about 21 miners, that a miner named Elijah Jude was fatally injured in a roof fall which occurred in respondent's No. 3 Mine on February 25, 1980, that the inspector who issued the withdrawal order and citation involved

in this case is a duly authorized representative of the Secretary of Labor, that respondent has violated section 75.200 on three prior occasions during the 24 months preceding the occurrence of the violation at issue in this proceeding, that respondent demonstrated a good-faith effort to achieve compliance after the citation and order were written, and that the violation was serious in view of the fact that it caused the death of one miner (Tr. 4-5).

Inspector John S. South wrote Citation and Order No. 707822 which is the subject of the Proposal for Assessment of Civil Penalty . He testified that he is responsible for investigating accidents and that he was asked to investigate the cause of a roof fall which occcurred at respondent's mine on February 25, 1980 (Tr. 10). The roof fall consisted of a single piece of sandstone which measured 53 feet in length, 23 feet in width, and from 15 to 20 feet in thickness (Exh. 10). The roof fell without warning while the continuous-mining machine was cutting coal. The operator of the continuous-mining machine ran in one direction and escaped the fall, but the victim ran in another direction and was caught beneath the massive rock (Exh. 10, p. 4). The rock was so heavy that it could not be moved with two 300-ton jacks and two 50-ton jacks (Tr. 32; 36). The body of the miner who was killed had to be removed by chipping away the rock and digging into the floor of the mine. A period of 15 hours was required to recover his body (Tr. 32-33). Three inspectors assisted in the removal of the miner's body and each of them testified that they had never seen a roof fall which was made up of a single rock as large as the one here encountered. .

The inspector who wrote the order stated that respondent had violated the first safety precaution in its roof-control plan which provides that if hazardous conditions are encountered, the operator is to install roof supports in addition to the standard 30-inch bolts required by the roof-control plan (Tr. 12; Exh. 9). The inspector explained that, in this instance, the additional support would normally consist of installing straps along with roof bolts. The inspector agreed, however, that even if the operator had been using straps in this instance, they would have had no effect whatsoever on holding the roof because the piece that fell was from 15 to 20 feet thick and no roof bolt would have been able to anchor above a rock that size. The inspector agreed that there is no known technology which could have prevented a roof fall of the size that occurred in respondent's mine (Tr. 14-15).

Another aspect of the roof fall which tended to exonerate respondent from any negligence was the fact that, although a hill seam existed in the huge piece of sandstone that fell, the inspector was unsure that the hill seam could have been observed on both sides of the entry prior to the fall (Tr. 17). Another inspector was positive that the hill seam could not have been detected before the roof fall occurred. He testified that if he had been mining in the same entry involved in the accident, he would have been proceeding in the same way respondent was producing coal. It was his belief that the roof fall could not have been prevented by any known technology (Tr. 25). Another factor which contributed to the roof fall was the fact that a strip mine on the surface had been shooting coal directly above respondent's mine and that work could have loosened the roof of respondent's mine (Tr. 20).

After three different inspectors had presented testimony indicating that they did not believe respondent could have foreseen the fact that the roof fall would occur and that they were unaware of any roof-control methods which could have prevented the fall, the parties agreed that the settlement penalty should be reduced from the $2,000 first discussed (Tr. 5) to the amount of $1,000 agreed upon at the end of the hearing (Tr. 37).

The preponderance of the evidence which I have discussed above shows that respondent could not have detected any hill seams prior to the accident. If so, respondent would have had no reason to install the additional support which is required by its roof-control plan when hazardous conditions are encountered. When it is considered that a small operator is involved, one may be inclined to wonder if a settlement amount of $1,000 was fair to respondent.

I believe that a penalty of $1,000 is appropriate if one considers all the implications which can be derived from the total record. Since the hearing opened with a statement by counsel that the case had been settled, I did not go into all the conditions described in Citation and Order No. 707822 which I would normally have pursued with the inspectors. For example, no testimony was received as to allegations in the citation and order to the effect that respondent had been driving some entries and crosscuts at widths greater than were permitted by the roof-control plan. Also it was alleged that respondent had performed some work 25 feet inby permanent roof support (Exh. 4). Moreover, respondent has been cited for three prior violations of its roof-control plan (Exh. 1). I am not finding that the allegations discussed in this paragraph were proven because no testimony was received with respect to them and respondent had no reason to address them since the witnesses were presented as to a single aspect of the settlement agreement. I am referring to these matters solely to show that in a fully contested proceeding, it is very likely that the evidence would have supported findings as to the six criteria which would have warranted assessment of a penalty as large as the penalty of $1,000 agreed upon by the parties.

I find that the evidence presented by the parties did fully justify a reduction of the penalty of $4,000 proposed by the Assessment Office to the settlement amount of $1,000.

WHEREFORE, it is ordered:

(A) The motion for approval of settlement is granted and the settlement agreement is approved.

(B) Pursuant to the settlement agreement, respondent shall, within 30 days from the date of this decision, pay a penalty of $1,000 for the violation of section 75.200 alleged in Citation and Order No. 707822 dated February 27, 1980.

Richard C. Steffey

Richard C. Steffey
Administrative Law Judge
(Phone: 703-756-6225)

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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JUN 25 1981

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding Docket No. VA 80-166 Assessment Control No. 44-03761-3019 V
v.	:	
	:	No. 2 Mine
ELKINS ENERGY CORPORATION, Respondent	:	

DECISION

Appearances: Leo J. McGinn, Esq., Office of the Solicitor, U.S. Department of Labor, for Petitioner; Robert T. Copeland, Esq., Copeland & Thurston, Abingdon, Virginia, for Respondent.

Before: Administrative Law Judge Steffey

Pursuant to a notice of hearing issued March 3, 1981, a hearing in the above-entitled proceeding was held on April 21, 1981, in Wise, Virginia, under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d).

After the parties had completed their presentations of evidence, I rendered the bench decision which is reproduced below (Tr. 107-118):

> This proceeding involves a Petition for Assessment of Civil Penalty filed in Docket No. VA 80-166 on October 24, 1980, by the Secretary of Labor seeking to have a civil penalty assessed for an alleged violation of 30 C.F.R. § 75.200 by Elkins Energy Corporation.
>
> I shall make some findings of fact on which my decision will be based.
>
> 1. Inspector Charles Reece went to Elkins Energy Corporation's No. 2 Mine on June 4, 1980, to make some respirable dust investigations. He traveled to the face area about 8:00 a.m. While he was in the face area, he observed that the No. 3 entry had been cut to a depth which appeared to be more than the 20 feet permitted under the roof-control plan. He talked to the roof-bolting machine's operator who advised the inspector that he had made a test hole that morning, and also that he had just finished completing the installation of a row of bolts 4 feet outby the row of bolts on which he was working at that time. The inspector made a measurement from the row of bolts which had last been installed up to the face area after the place had been completely bolted, and determined that the distance was 28 feet.

2. The inspector's measurement of 28 feet was based upon a statement made by a witness who was not available to testify in the proceeding today. The inspector, however, drew a diagram, which is Exhibit 4 in this proceeding, and that diagram shows that the inspector's own observation would permit him to testify, which he did, that the distance from the roof bolts which were being installed at the time the inspector was on the section was a distance of 24 feet. The evidence shows in this case that a 14 Joy continuous-mining machine was being used to produce coal, and that the distance from the forwardmost bit on the Joy continuous-mining machine to the controls is a distance of 21-1/2 feet. If the measurement of 24 feet is used as the distance which the machine was trammed beyond the last permanent roof support, the controls of the machine would have been out from under the supported roof a distance of only 2-1/2 feet. One of the company's witnesses testified that under that situation the hand of the operator would have been under unsupported roof but not his body.

3. The continuous-mining machine here involved was equipped with a canopy so that the controls of the miner are under the canopy, and the result is that, even if the operator's hands and arms were beyond the last permanent roof support, the operator and his hands and arms would have been under the canopy. Additionally, if the continuous-mining machine had been advanced a distance of 8 feet beyond the last row of permanent supports, the canopy would have protected the operator from a possible roof fall.

4. The roof-control plan is Exhibit 2 in this proceeding. That plan provides on page 4 that the maximum depth the continuous-mining machine may be advanced beyond the last row of permanent supports is 20 feet. Page 11 of Exhibit 2 provides in paragraph 3 that the operator of the continuous-mining machine shall not advance the controls of such equipment inby the last row of roof bolts.

5. The inspector's citation, which is Exhibit 1 in this proceeding, states that several mountain breaks existed in the face area. He testified, however, that he observed no mountain breaks in the No. 3 entry where the mining machine advanced beyond the last row of permanent supports. One of the operator's witnesses testified that he observed mountain breaks in the entry adjacent to the No. 3 entry, but that he saw none in the No. 3 entry. The main roof and immediate roof in this mine are comprised of sandstone. The inspector testified that, while he didn't think any roof was completely safe, of the various types of immediate roof that he encounters, that he considered sandstone to be the least subject to falling particles and hazardous conditions. The inspector was not aware of any roof falls which had occurred in this mine at the time he made his inspection. One of the operator's witnesses testified that no roof falls had occurred. The inspector testified that the roof-bolting machine operator and his helper had installed the proper number of safety supports prior to commencing bolting in the No. 3 entry.

6. The chief financial officer of the Elkins Energy Corporation testified in this proceeding. His name is W. Jack Davis. Mr. Davis testified that Elkins Energy has been showing a net loss for a considerable period of time. In 1977 the company had a net loss of $306,847 (Exh. D). In 1978, it showed a net loss of $2,274,925 (Exh. C). In 1979 the company went through some formal bankruptcy proceedings. At that time another company by the name of Sylvia Ann Coal Company acquired the stock of Elkins Energy and began making a joint return with Elkins Energy, and in that 1979 return, Elkins Energy itself showed a loss of $36,000 and the joint return showed a loss of $86,313 (Exh. B). Under the bankruptcy provisions, the secured creditors started receiving payments in September 1979, and those payments vary over different periods, depending upon the decisions made in the bankruptcy proceeding. The unsecured creditors, however, are to be paid off on a quarterly basis over a 4-1/2-year period. In 1980 Elkins Energy showed a net income of $200,752.24 (Exh. A). Some of that net income has been used to make payments to unsecured creditors beginning on March 13, 1980, and some more will be used to make a payment as of June 13, 1981. The company's liabilities are $4,130,140.91 in excess of its assets (Exh. E).

7. Under the bankruptcy provisions, there are four operating officers and an additional management person, namely, Mr. Davis, who received from $25,000 to $30,000 a year in salary, but the bankruptcy provisions control payments of funds out of the company's cash flow. The company has a certain amount of flexibility so that it might be able to pay a penalty of up to $500 without having to discharge payment of the penalty under the provisions of payments to unsecured creditors. Any amount over $500, and this is purely an estimate by Mr. Davis, would have to be done on a quarterly basis over a period of 4-1/2 years. Therefore, any large penalty that I might assess in this proceeding would have to be paid in the same manner, that is, on a quarterly basis.

8. Elkins Energy Corporation, at the present time, is not producing any coal because of the strike. If it were producing coal, and assuming the strike ends and production resumes, the company operates three different mines, the No. 6A Mine, the No. 10 Mine, and the No. 12 Mine. The average production from all three mines totals 35,000 tons per month, and the total employment, including managerial personnel, is 125 employees. All of the company's coal is sold under a contract with either Clinchfield Coal Company or Flat Gap Mining Company. The No. 6A Mine has an estimated life of 5 to 7 years. The No. 10 Mine has an estimated life of 6 months, and the No. 12 Mine has an estimated remaining life of from 10 to 15 years.

I believe that those are the primary findings of fact which I have gleaned from the testimony given here today. I believe that the testimony supports a finding that a violation of section 75.200 occurred because, even if we restrict the testimony to the personal observations

of the inspector, there is no doubt but that the evidence supports the fact that the continuous-mining machine controls were advanced beyond the last row of permanent supports, which would be a violation of the provisions in the roof-control plan which I mentioned in my findings above.

Having found that a violation occurred, it is necessary that I assess a penalty. The Act does not permit a judge to find that a violation occurred and waive the assessment of a penalty. The size of the company's business has been discussed in the findings of fact, and they indicate that the company is a relatively small operator. I did not include anything as to the criterion of history of previous violations in my findings above because those previous violations are set forth in Exhibit 3 in this proceeding and Exhibit 3 indicates that the company has a history of only four previous violations for the last 24 months preceding the occurrence of the violation cited in this case.

One of those was a violation of section 75.200 which was cited in February of 1980. It has been my practice over the years to increase the penalty otherwise assessable under the other five criteria if I find that an operator has violated on a prior occasion the same section of the Act or regulations which is before me in any given proceeding. Since there has been a previous violation of section 75.200, I find that whatever penalty is otherwise assessable should be increased by $25 under the criterion of history of previous violations.

I made no reference in the eight findings of fact set forth above to the criterion of whether the operator demonstrated a good-faith effort to achieve rapid compliance. The entries on Citation No. 687711 shows that it was issued at 9:45 a.m. by the inspector, and that the violation was abated by 3:15 p.m. the same day. The evidence in this case shows that the inspector waited until the No. 3 entry had been completely bolted before he measured the distance from the last row of permanent supports to the face, and he testified that he didn't even write the citation until the area had been completely bolted. Consequently, at the time the inspector wrote the citation, the roof bolting that needed to be done in this entry had already been completed.

The inspector said that roof bolting was only a portion of the abatement that he required, the other portion being that when a violation of the roof-control plan occurs, the operator is required to explain the roof-control plan to the crew so that they will know that a violation occurred and will avoid similar oversights in the future.

The company's safety director, Mr. Donnie Short, explained the roof-control plan about 3 o'clock to both the day shift, which was leaving the mine, and to the oncoming shift, which was due to begin working at 3:00 p.m. Consequently, the total abatement of the violation is based on the explanation of the roof-control plan by the operator's safety director at approximately 3:00 p.m.

It was speculated in this proceeding that the tramming of the controls of the continuous-mining machine beyond the last row of permanent supports was an act which was done by the second shift which came to work at 3:00 p.m. Consequently, the inspector appropriately waited until both shifts had had the plan explained to them before he abated the citation. I believe that those facts support a finding that the operator demonstrated a good-faith effort to achieve rapid compliance, and that the penalty should neither be increased nor decreased under the criterion of good-faith effort to achieve rapid compliance.

The last findings of fact set forth above, that is, Nos. 7 and 8 show that the operator is currently carrying on its business under provisions of the Bankruptcy Act and, consequently, can only pay penalties based on the provisions of the court's disposition of that filing in bankruptcy. Since respondent has an outstanding obligation to pay off both secured and unsecured creditors in a considerable amount, I think it would be appropriate to find that large penalties would have an adverse effect on the company's ability to continue paying off its creditors and, therefore, any penalty assessed in this proceeding should take that criterion into consideration.

The remaining two criteria are negligence and gravity. Insofar as negligence is concerned, the evidence supports a finding that there was at least ordinary negligence because the continuous-mining machine's controls were advanced farther than they should have been. Although the roof-control plan, which is Exhibit No. 2 in this proceeding, became effective only a few days before the citation was written, Mr. McGinn stated in his closing remarks that the old roof-control plan, which has a date of March 2, 1979, contained the same provisions that I used in finding that a violation of the roof-control plan occurred. Consequently, the operator was aware of the provisions of his roof-control plan, and we cannot say that the section foreman was unaware of the fact that the controls of the continuous-mining machine should not have been advanced beyond the last permanent roof supports.

As to the criterion of gravity, the evidence and the findings of fact that I have already made show that the immediate roof was sandstone which is less hazardous than some shales and other types of immediate roofs. Also, fortunately, the continuous-mining machine was equipped with a canopy which did have a safety factor built in to it, if a person does go beyond permanent roof support.

Additionally, there is no evidence in the case to show that anyone other than the operator of the continuous-mining machine went beyond permanent roof support, and the operator of the roof-bolting machine had installed the proper temporary supports before he began to install the permanent supports. Consequently, we do not have any evidence that a large number of people went beyond permanent support in this instance. Consequently, the gravity of the situation is not as great as it might have been. Of course, as the inspector pointed out, roof-control violations are the most serious ones in the coal mines because

roof falls still are a primary contributor to death and serious accidents in the mines. Therefore, none of them are to be taken lightly.

By way of summary, since we have a situation in which the company is already in bankruptcy, and one which involves a small operator, and a situation where there was ordinary negligence, and not a great degree of gravity, I believe that a penalty of $200 should be assessed, to which $25 should be added for the history of previous violations, so that a penalty of $225 will be assessed in this proceeding.

WHEREFORE, it is ordered:

Respondent, within 30 days from the date of this decision, shall pay a civil penalty of $225.00 for the violation of 30 C.F.R. § 75.200 alleged in Citation No. 687711 dated June 4, 1980.

Richard C. Steffey

Richard C. Steffey
Administrative Law Judge
(Phone: 703-756-6225)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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JUN 25 1981

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding Docket No. WEVA 80-614 A.O. No. 46-01283-03043F
v.	:	Hampton No. 3 Mine
WESTMORELAND COAL COMPANY, Respondent	:	

DECISION AND ORDER

On June 24, 1981, this matter came on for a hearing on the parties' motion to approve settlement of charges that the operator's faulty pillaring practices in the No. 9 Right Section of the Hampton No. 3 Mine resulted in the deaths of a section foreman and an assistant mine foreman. The settlement proposed is a reduction in the amount initially assessed from $13,000 to $4,000.

The parties' prehearing submissions and the information adduced at the settlement hearing showed that:

A. The charge that the operator had engaged in partial pillaring practices in violation of 30 C.F.R. 75.201-2(d) was of doubtful validity because (1) the adverse roof conditions and falls of roof in the 4th and 5th pillars in the third pillar line may have justified leaving substantial portions of the outby wings (30 C.F.R. 75.201-2(e)), and because of (2) the inconclusive nature of the testimony as to the size of the partial pillars, if any, left in the challenged pillar line.

B. The charge that the operator violated its approved roof control plan by failing to set trisets or cribs before pulling the pushout stump in the No. 5 pillar in the fourth pillar line (the scene of the accident) was clearly established as the proximate cause of the roof fall that killed the two foremen and endangered the lives of three other miners. In mitigation, the operator showed (1) a disturbing lack of clarity (now corrected) in the roof control plan, a deficiency for which MSHA shares responsibility, and (2) the institution of management controls that will effectively preclude the exercise of bad judgment that led the foremen to risk their lives and those of the contract miners.

In the light of the foregoing, the parties proposed to amend their motion so as to allocate $1,000 to the first violation and $3,000 to the second violation. Based on an independent evaluation and de novo review of the circumstances the trial judge concurred and directed that the motion to approve settlement be granted.

Accordingly, it is ORDERED that the motion to approve settlement, as amended, be and hereby is GRANTED. It is FURTHER ORDERED that the operator pay the amount of the settlement agreed upon, $4,000, on or before Wednesday, July 15, 1981 and that subject to payment the captioned matter be DISMISSED.

Joseph B. Kennedy
Administrative Law Judge

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JUN 26 1981

LESLIE COAL MINING COMPANY, Contestant	:	Contests of Citations
v.	:	Docket No. KENT 79-375-R
	:	Citation No. 713366; 8/31/79
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Docket No. KENT 79-376-R
	:	Citation No. 715998; 9/5/79
	:	Docket No. KENT 80-217-R
	:	Citation No. 729889; 3/18/80
	:	Leslie Mine
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceedings
	:	Docket No. KENT 80-259
v.	:	A/O No. 15-07082-02028S
	:	Docket No. KENT 80-314
LESLIE COAL MINING COMPANY, Respondent	:	A/O No. 15-07082-03035
	:	Leslie Mine

DECISION

Appearances: John M. Stephens, Esq., Stephens, Combs & Page, Pikeville, Kentucky, for Contestant-Respondent; Darryl A. Stewart, Esq., Office of the Solicitor, U.S. Department of Labor, for Respondent-Petitioner.

Before: Judge Charles C. Moore, Jr.

These combined civil penalty and review proceedings were heard February 24, 1981, in Prestonsburg, Kentucky. Two citations and a withdrawal order alleging violations of 30 C.F.R. §75.200 are at issue. 1/ Per stipulations introduced at the hearing, Leslie Mine is medium-sized, producing 177,818 tons of coal annually, has a moderate prior history consisting of 235 violations during two and one-half years, and imposition of the maximum civil penalty will not adversely affect Contestant-Respondent's ["Contestant's"] ability to remain in business.

1/ 30 C.F.R. §75.200 prescribes, in part, "[t]he roof and ribs of all active underground roadways, travelways, and working places shall be supported or otherwise controlled adequately to protect persons from falls of the roof or ribs."

The first citation became the basis of a withdrawal order five days later. A second citation alleging a violation of §75.200 in a different section of the mine was issued by Inspector Oney, who had issued the withdrawal order.

Inspector Smith issued citation 713366 on August 31, 1979, during an investigation of a non-fatal roof fall in the 009 working section of the Leslie Mine. The roof fall, not at issue here, had occurred in the third entry between Spads 971 and 999 (see Contestant's Exhibit ["Ex."] C-2). The fall encompassed most of the entry between the crosscuts (Tr. 43-46). The remaining portion of the entry had been timbered to prevent the fall from spreading to a power center inby Spad 999 in the third entry. 2/ A power cable had been routed around the fall into the second entry and back to the power center.

The inspector observed large cracks and cutters in the roof around the fall (Tr. 11). 3/ Water was dripping and flowing from the roof in large quantities, "like a faucet" (Tr. 14-15). This roof is composed of laminated or layered shale with additional parts of sandstone and fossilized material (Tr. 15). As such, it is structurally weak and the presence of dripping and flowing water increases the likelihood of roof falls (Tr. 16). Ten roof falls had occurred in the Leslie Mine during the five months before this citation was issued (Tr. 27, 152). Metal straps and four, five and six foot resin roof bolts supported the roof and metal plates were also put up in some areas (Tr. 16, 17, 40, 173 and Ex. C-6). It was stipulated that Contestant was following an approved roof control plan when both citations and the order were issued and that a violation of the plan is not alleged. Section 75.200 may be violated, however, if roof is inadequately supported regardless of whether a plan is being followed.

After observing these conditions, Inspector Smith issued a citation pertaining to three areas near the fall. 4/ The citation was to have been abated five days later. Inspector Oney entered the area September 5, 1979, while conducting a regular inspection and observed cracks in the roof and dripping water (Tr. 51). He saw no evidence of additional roof support and issued withdrawal order 715998 intending to cover the same area as the citation. The order differed from the citation, however, in that it failed to include an area around Spad 999 that was included in the citation, and was unclear with respect to the measurements of the

2/ "Inby" is a term of direction meaning toward the working face, and "outby" refers to the direction away from a working face. a dictionary of mining, mineral and related terms, Bureau of Mines, U.S. Department of the Interior, 1968.

3/ The inspector defined a "cutter" as a crack occurring where the roof meets the ribs, indicating stress (Tr. 13).

4/ The first area was the crosscut between Spad 971 and 997; the second was a section of roof in the second entry beginning 60 feet inby Spad 997 and extending 100 feet into the intersection; the third was a section of roof beginning at Spad 999 and extending outby 40 feet.

area cited around Spad 997. An additional ambiguity in the citation's language, carried over into the order, was not discovered until the hearing. The first inspector had intended to cite the crosscut between the second and third entries (between 997 and 971) but the citation read, "80 feet to the left of Spad 997," which could have been interpreted to mean that part of the crosscut between the first and second entries. This caused some confusion for Contestant as to the proper placement of cribs and timbers to abate the citation. A witness for Contestant testified that he first realized that some of the timbers and cribs had been misplaced while accompanying the inspector who issued the order. He requested that the compliance date be extended in order to remedy the error but the inspector refused (Tr. 181). On redirect examination, the inspector stated that he did not recall the witness making such a request (Tr. 185). The order was abated three months later after cribs and timbers had been installed to the satisfaction of the inspector.

The inspector gave several reasons for his opinion that the roof was not adequately supported. As a roof control specialist, these were the worst conditions he had ever seen (Tr. 14-15). A fall had recently occcurred in the area of the citation as had ten roof falls at this mine in the five months preceding issuance of the citation. Water flowing from the roof posed a threat of electrical shock should a piece of wet roof fall on the high voltage cable (Tr. 25). Although he admitted it was possible to have sound roof despite the presence of large quantities of water, the inspector felt that such was not the case here (Tr. 38-39).

Three witnesses for Contestant testified that the roof was adequately supported before the citation was issued, and that the timbers and cribs installed to abate the order had not taken weight since their installation (Tr. 124-125, 142, 158-159, 166, 173-174). Two of those witnesses had recently visited the area; the third had only spoken to miners who regularly worked there (Tr. 124-125). Mr. Wooten, who was Contestant's safety director when the citation was issued (Tr. 165), testified that a crack was discovered up in the roof when test holes were drilled in the area in preparation for mining (Tr. 166). Contestant then began using five and six foot bolts instead of four foot bolts, as required by the roof control plan (Tr. 166).

In view of the fact that this was admittedly bad roof, that a roof fall had just occurred and that Contestant did not prove to my satisfaction that greater roof support was used in the cited area than had been used in the fall area, I think the inspector was justified in issuing the citation. It follows that since no action was taken to abate the citation by September 5, 1979, the withdrawal order was also proper. Both the citation and the order are affirmed.

While I disagree with Contestant's evaluation of its roof condition, I find that Contestant knew of the conditions and did not consider the area dangerous. Its degree of negligence was therefore small. As to gravity it must be remembered that the inspector did not issue an imminent danger order. A penalty of $300 will be assessed.

Citation 799889 was issued when Inspector Oney was conducting a regular safety and health inspection in the 010 working section of the Leslie Mine and observed a vertical crack, one-half inch wide and 24 feet long, extending the length of the intersection between the entry and the crosscut at Spad 1608 (Ex. C-3, Tr. 69). After speaking to the roof bolting machine operator and using the "sound and vibration" method, he also found a horizontal crack 48 inches up the roof (Tr. 75-77). 5/ 6/ He saw that the cribs and timbers immediately outby the intersection had taken weight (Tr. 69), so much so in fact that the wedges installed between the timbers and the roof to insure a tight fit were "mashed almost flat," (Tr. 77). Eight foot roof bolts were being installed (Tr. 90). Four, five, six and eight foot roof bolts and metal straps supported the area (Tr. 117). Timbers and cribs had been installed in the second entry outby Spad 1608 before the citation was issued. The entry was an active coal haulage road when the citation was issued but is no longer actively used (Tr. 102, Ex. C-3).

A witness for Contestant, Mr. Vaughan, testified that he visited the area after the citation was issued and found only one crib had taken weight (Tr. 127). Two timbers were so loose that he was able to knock them out with a small mason hammer (Tr. 116).

The inspector and one witness for Contestant testified that cribs and timbers in the area have taken weight since the citation was abated (Tr. 97, 159-160). Upon returning to the area after the citation was abated, the inspector observed that more timbers had been added and that others had broken so that it was difficult to tell which timbers had been installed to abate the citation, and whether they had taken weight, in order to determine whether or not the additional support mandated in the citation was needed (Tr. 97). One witness for Contestant testified, however, that the area was timbered off pursuant to a company policy requiring escapeways to be timbered regardless of roof conditions in order to prevent falls (Tr. 127). This testimony was refuted by another witness for Contestant who testified that the cited area was not an escapeway; that the witness was "off one overcast" (Tr. 162). 7/

Although the existence of the vertical crack was well established at the hearing there was some question as to whether MSHA proved the existence of the horizontal crack. All of the Contestant's witnesses,

5/ "Sound and vibration" testing is an accepted method for detecting horizontal cracks. It consists of placing one hand on the roof then tapping the roof with a hammer. In this case the inspector found that the roof "sounded heavy" indicating weight on the roof bolts, supporting his conclusion that a horizontal crack existed (Tr. 77). Peabody Coal Company, 2 FMSHRC 987 (April 1980) and Itmann Coal Company, 1 FMSHRC 1591 (October 1979).

6/ A vertical crack is a crack in the roof visible to the naked eye. A horizontal crack is a separation of strata up in the roof not visible to the naked eye. Its existence is established by using the sound and vibration method, above, or by drilling test holes.

7/ An "overcast" is "[a]n enclosed airway to permit one air current to pass over another one without interruption." a dictionary of mining mineral and related terms, supra.

however, acknowledged that detection of a horizontal crack was the reason longer bolts were installed (Tr. 121, 122, 134, 159, 173-174). The real dispute was whether the roof was adequately supported when the citation was issued.

The inspector felt more support was needed and that the intersection would have fallen had not additional support been installed (Tr. 81). Contestant, on the other hand, was of the opinion that the area was adequately supported when the citation was issued (Tr. 159-160).

When experts disagree as to the safety of a particular situation it presents a difficult question. The Government has the burden or proof, but I believe a close question should be decided in favor of safety. I hold that on balance, the Secretary has shown that the intersection needed more roof support. I accordingly affirm the citation.

As to the penalty, I find a low degree of negligence. As to gravity, I take into consideration the fact that no imminent danger order was issued. A penalty of $100 will be assessed.

ORDER

Contestant is ordered to pay to MSHA, within 30 days, a penalty of $400.

Charles C. Moore, Jr.

Charles C. Moore, Jr.
Administrative Law Judge

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JUN 29 19

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding Docket No. CENT 81-40 A/O No. 03-01401-03008V
v.	:	Bradley Stephens #1 Mine
AEARTH DEVELOPMENT, INC., Respondent	:	

DECISION

Appearances: Eloise Vellucci, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas, on behalf of Petitioner
Michael Walker, President, Aearth Development, Inc., Little Rock, Arkansas, for Respondent.

Before: Judge Stewart

The above-captioned case is a civil penalty proceeding brought pursuant to section 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (hereinafter, the Act). The hearing in this matter was held on May 13, 1981, in Fort Smith, Arkansas.

Two orders pursuant to section 104(d)(1) of the Act were at issue in this proceeding. Both orders were issued by Inspector Lester Coleman on July 8, 1980, for alleged violations of 30 CFR 77.1710(e). Section 77.1710(e) requires that each employee working in a surface coal mine shall be required to wear suitable protective footwear. In both instances, it was established that mine management knew that these two employees were not wearing protective footwear. Michael Walker asserted at the hearing that management had informed both employees that protective footwear was required. Although the Respondent's employees were expected to pay for the shoes themselves, Respondent had arranged for credit to be extended to those employees who could not afford to pay for the shoes immediately. It is also evident that management permitted these employees to continue work even though they had not obtained safety shoes. Respondent notified its employees of the requirement that they wear protective footwear, but did not enforce the requirement. In so doing, Respondent violated Section 77.1710(e).

Respondent demonstrated a moderate degree of negligence in permitting these two employees to work without protective footwear. Management knew that the men were not wearing safety shoes but, as the result of misinformation provided by a state inspector, believed that hard-toed shoes were required by law only if the employee was working under hazardous conditions. Furthermore, both individuals had been apprised of the requirement that they wear protective footwear and provision had been made for them to procure it.

The inspector issued Order No. 793090 upon observing a laborer working in the pit while wearing only ordinary leather shoes. The laborer was cleaning coal with a shovel. The spoil bank was located immediately adjacent to the pit. The spoil was comprised of loose material and contained debris which ranged in size up to two or three feet in diameter. The inspector was concerned that material would fall from the spoil bank into the pit and strike the laborer. If a large enough piece of material struck the laborer on the foot, it could have caused bruises or broken bones.

The testimony of Michael Walker, president of Aearth, established that the height of the spoil bank above the floor of the pit was approximately 39 feet. The pit itself was estimated by the inspector to have been approximately 65 feet wide and 150 feet long. The laborer was working approximately 35 feet away from the edge of the spoil at the time he was observed by the inspector. The inspector believed that the laborer was close enough to be struck by debris falling from the spoil pile. Moreover, the laborer's responsibilities also brought him into the area of the pit immediately adjacent to the spoil bank.

The inspector issued Order No. 793091 after he observed a laborer wearing non-steel toed boots while assisting in the repair of a front-end loader. The individual involved was a trainee equipment-oiler. When observed, the laborer was helping to remove a turbocharger from the loader. The turbocharger was approximately 18 inches by 24 inches and weighed 35 to 40 pounds. Michael Walker admitted that if it had dropped on the laborer's foot, it would have caused injury. He suggested, however, that the laborer would not have lifted the turbocharger himself but would have used a boom to do so, thereby reducing the likelihood that it would have fallen onto his foot.

At the outset of the hearing, the parties stipulated that the information presented on the conference worksheet concerning Respondent's history of violations and size was accurate. The parties agreed that Respondent's history of violations was minimal and that its mine was small. Michael Walker admitted that the ability of Respondent to continue in business would not be adversely affected by any penalty assessed herein.

The parties proposed at the conclusion of the hearing to settle this case for $100 per violation. The assessment proposed for each violation had been $300. On the basis of the testimony given and evidence adduced at the hearing, the settlement was approved at that time and Respondent was ordered to pay the sum of $200 within 20 days of the hearing.

The approval of settlement is hereby AFFIRMED.

ORDER

IT IS ORDERED that, if it has not yet done so, Respondent pay the sum of $200 to Petitioner within 30 days of the date of this decision.

Forrest E. Stewart
Administrative Law Judge

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JUN 29 1981

UNITED STATES FUEL COMPANY, Applicant	:	Application for Review
v.	:	Docket No. WEST 79-81-R
	:	Citation No. 789508; 4/10/79
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	King No. 5 Mine
Respondent	:	
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	Civil Penalty Proceeding
	:	Docket No. WEST 80-62
Petitioner	:	A.O. No. 42-01389-03011 V
v.	:	
	:	King No. 5 Mine
UNITED STATES FUEL COMPANY, Respondent	:	

DECISION

Appearances: Richard H. Nebeker, Esq., Callister, Greene & Nebeker, Salt Lake City, Utah, for United States Fuel Company; Edward H. Fitch, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for the Mine Safety and Health Administration.

Before: Judge Cook

I. Procedural Background

On May 7, 1979, United States Fuel Company (U.S. Fuel) filed an application for review in Docket No. WEST 79-81-R pursuant to section 105(d) 1/ of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (Supp. III 1979) (1977 Mine Act), requesting that Citation No. 789508 be

1/ Section 105(d) provides as follows:
"If, within 30 days of receipt thereof, an operator of a coal or other mine notifies the Secretary that he intends to contest the issuance or modification of an order issued under section 104, or citation or a notification of proposed assessment of a penalty issued under subsection (a) or (b) of this section, or the reasonableness of the length of abatement time fixed

declared invalid. The citation was issued at U.S. Fuel's King No. 5 Mine on April 10, 1979, pursuant to section 104(d)(1) 2/ of the 1977 Mine Act and contains allegations (1) that a condition or practice in violation of mandatory standard 30 C.F.R. § 75.316 existed in the mine; (2) that the violation was caused by U.S. Fuel's unwarrantable failure to comply with such mandatory standard; and (3) that the violation was of such nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard. U.S. Fuel's application for review alleged, inter alia, (1) that no violation of the cited mandatory standard existed; (2) that the condition or practice set forth in the citation was not caused by U.S. Fuel's unwarrantable failure to comply with the 1977 Mine Act; and (3) that the condition or practice set forth in the citation was not of a nature which

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fn. 1 (continued)
in a citation or modification thereof issued under section 104, or any miner or representative of miners notifies the Secretary of an intention to contest the issuance, modification, or termination of any order issued under section 104, or the reasonableness of the length of time set for abatement by a citation or modification thereof issued under section 104, the Secretary shall immediately advise the Commission of such notification, and the Commission shall afford an opportunity for a hearing (in accordance with section 554 of title 5, United States Code, but without regard to subsection (a)(3) of such section), and thereafter shall issue an order, based on findings of fact, affirming, modifying, or vacating the Secretary's citation, order or proposed penalty, or directing other appropriate relief. Such order shall become final 30 days after its issuance. The rules of procedure prescribed by the Commission shall provide affected miners or representatives of affected miners an opportunity to participate as parties to hearings under this section. The Commission shall take whatever action is necessary to expedite proceedings for hearing appeals of orders issued under section 104."

2/ Section 104(d)(1) provides as follows:

"If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this Act. If, during the same inspection or any subsequent inspection of such mine within 90 days after the issuance of such citation, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsection (c) to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated."

could significantly and substantially contribute to the cause and effect of a mine safety or health hazard. An answer was filed by the Mine Safety and Health Administration (MSHA) on May 25, 1979.

Various notices of hearing were issued which ultimately scheduled the proceeding in Docket No. WEST 79-81-R for hearing on the merits on November 7, and 8, 1979, in Salt Lake City, Utah. Such hearing was held as scheduled with representatives of both parties present and participating. The parties made closing arguments following the presentation of the evidence.

On November 21, 1979, U.S. Fuel filed a motion styled "Motion to Re-open the Hearing, or in the Alternative to Have Admitted as Evidence, the Affidavits of Walter L. Wright, General Superintendent, and Bruce Sherman, the Miners' Representative, Attached Hereto." The same day, MSHA filed a statement in opposition thereto. On December 4, 1979, an order was issued granting U.S. Fuel's motion to reopen the hearing for the purpose of presenting the testimony of Messrs. Walter L. Wright and Bruce Sherman. The order contained a notice of hearing scheduling the hearing to reconvene on February 4, 1980, in Salt Lake City, Utah. Thereafter, an order was issued continuing the hearing to 2 p.m., on June 2, 1980, in Salt Lake City, Utah.

On November 26, 1979, MSHA filed a proposal for a penalty in Docket No. WEST 80-62 pursuant to section 110(a) of the 1977 Mine Act alleging one violation of 30 C.F.R. § 75.316, as set forth in 104(d)(1) Citation No. 789508, issued on April 10, 1979.

U.S. Fuel had not filed an answer to the proposal as of May 16, 1980. It should be noted that the Rules of Procedure of the Federal Mine Safety and Health Review Commission (Commission) require a party against whom a penalty is sought to file and serve an answer within 30 days after service of a copy of the proposal on the party. 29 C.F.R. § 2700.28 (1979). As a result of such failure to file an answer, Chief Administrative Law Judge James A. Broderick issued an order on May 16, 1980, requiring U.S. Fuel to show cause on or before May 30, 1980, as to (1) why it should not be deemed to have waived its right to a hearing and contest of the proposed penalty, and (2) why the proposed order of assessment should not be summarily entered as the final order of the Commission and collection procedures instituted. On May 22, 1980, the Commission's docket office received a telephone communication from counsel for U.S. Fuel pertaining to the order to show cause, and, on May 23, 1980, the case was assigned to the undersigned Administrative Law Judge.

Thereafter, a telephone conference was held during which the undersigned Administrative Law Judge and representatives of the parties participated. It was agreed that both cases would be submitted for decision based upon the record developed in Docket No. WEST 79-81-R on November 7 and 8, 1979, in Salt Lake City, Utah, and based upon a stipulation to be filed by the parties. Additionally, a schedule was set for the filing of briefs. As a result of the telephone conference, an order was issued on May 29, 1980, cancelling the June 2, 1980, hearing.

Both the stipulations and U.S. Fuel's brief were filed on June 17, 1980. U.S. Fuel filed its answer to the proposal for a penalty on June 20, 1980. MSHA filed a brief on July 9, 1980.

After the briefs were filed, it was decided to postpone the issuance of a decision in these cases until such time as the Commission issued its decision in Secretary of Labor, MSHA v. Cement Division, National Gypsum Company, Docket No. VINC 79-154-PM, addressing the issue as to when a violation is of such nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard, as that criterion is used in section 104 of the 1977 Mine Act. 3/ Chief Administrative Law Judge James A. Broderick issued his decision in the National Gypsum case on December 26, 1979, wherein he applied the rule of law announced by the Interior Board of Mine Operations Appeals in Alabama By-Products Corporation, 7 IBMA 85, 94, 83 I.D. 574, 1 BNA MSHC 1484, 1976-1977 CCH OSHD par. 21,298 (1976). See, 1 FMSHRC 2115 (1979). The Commission granted the mine operator's petition for discretionary review on January 31, 1980, and issued its decision on April 7, 1981. See, Secretary of Labor, MSHA v. Cement Divison, National Gypsum Company, 3 FMSHRC 822, 2 BNA MSHC 1201, 1981 CCH OSHD par. 25,294 (1981).

II. Violation Charged in Docket No. WEST 80-62

Citation No.	Date	30 C.F.R. Standard
789508	April 10, 1979	75.316

III. Witnesses and Exhibits

3/ An article appearing in 4 Mine Regulation & Productivity Report No. 25 (New York: McGraw-Hill, Inc.) (July 4, 1980) at pg. 2 stated, in part, as follows:

"The Mine Safety and Health Review Commission has expressed dissatisfaction with the legal precedents that federal inspectors follow to decide whether operators' violations are significant and substantial (S&S). In a public meeting, the commission voted 3 to 1 (Commissioner Al Lawson dissented) to overturn a decision of Administrative Law Judge James Broderick that upheld nine S&S findings attached to citations issued to National Gypsum (MR, 1/11).

"Broderick indicated that he was bound to follow the test for S&S violations laid out by the old Interior Board of Mine Operations Appeals (IBMA) in its 1976 Alabama By-Products decision. Operating under that test, which says that all violations could be S&S except technical ones or ones posing only a remote chance of injury, federal coal mine inspectors have found about 61% of coal violations to be S&S, while metal/nonmetal mine inspectors have found about 91% of violations to be S&S, according to figures of the Mine Safety & Health Administration.

"What will remain unanswered until the commission issues a final opinion is how far MSHRC will move in the direction of the IBMA's pre-Alabama By-Products definition of an S&S violation as one posing a risk of serious bodily harm or death."

A. Witnesses

U.S. Fuel called as its witnesses Mr. Eddie Edwards, the continuous miner operator; Mr. William Russell Allred, the miner's helper; Mr. Jose Carlos Salas, the shuttle car operator; Mr. Buddy Gines, the section foreman; Mr. Robert S. Martinez, a company safety inspector on April 10, 1979, and a section foreman at the time of the hearing; and Mr. Louis J. Mele, the director of safety and training.

Both U.S. Fuel and MSHA called Federal mine inspector Ted R. Milovich as a witness.

B. Exhibits

1. MSHA introduced the following exhibits in evidence during the hearing:

M-1 is a typed copy of Citation No. 789508, April 10, 1979, 30 C.F.R. § 75.316.

M-2 contains copies of Inspector Milovich's handwritten notes pertaining to M-1.

M-2A is a typed copy of M-2.

M-3 is a copy of the ventilation system and methane and dust control plan in effect at the King No. 5 Mine on April 10, 1979.

M-4 is a drawing prepared by Inspector Milovich.

M-5 is a copy of the inspector's statement pertaining to M-1.

2. U.S. Fuel did not introduce any exhibits in evidence during the hearing.

3. The parties filed stipulations on June 17, 1980, stipulating the admission in evidence of (a) the November 15, 1979, affidavit of Bruce Sherman; (b) an attached Exhibit "A," which is a copy of U.S. Fuel's controlling company information report; and (c) an attached Exhibit "B," which is a computer printout compiled by the Directorate of Assessments setting forth the history of previous violations at U.S. Fuel's King No. 4 and King No. 5 Mines for which assessments have been paid, beginning January 1, 1970, and ending May 29, 1980.

IV. Issues

A. The following issues are presented in the above-captioned application for review proceeding:

1. Whether the condition described in 104(d)(1) Citation No. 789508 constitutes a violation of mandatory standard 30 C.F.R. § 75.316.

2. If the condition described in 104(d)(1) Citation No. 789508 constitutes a violation of mandatory standard 30 C.F.R. § 75.316, then whether such violation was of such nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard, and whether such violation was caused by the mine operator's unwarrantable failure to comply with mandatory standard 30 C.F.R. § 75.316.

B. Two basic issues are involved in the above-captioned civil penalty proceeding: (1) did a violation of mandatory standard 30 C.F.R. § 75.316 occur, and (2) what amount should be assessed as a penalty if a violation is found to have occurred? In determining the amount of civil penalty that should be assessed for a violation, the law requires that six factors be considered: (1) history of previous violations; (2) appropriateness of the penalty to the size of the operator's business; (3) whether the operator was negligent; (4) effect of the penalty on the operator's ability to continue in business; (5) gravity of the violation; and (6) the operator's good faith in attempting rapid abatement of the violation.

V. Opinion and Findings of Fact

A. Stipulations

1. During the hearing on November 7, 1979, the parties stipulated that the King No. 5 Mine is involved in interstate commerce (Tr. 7).

2. The parties filed stipulations on June 17, 1980, stating, in part, as follows:

> [a] The above two docket numbers concern the same identical citation, Number 789508 issued on April 10, 1979, by MSHA Inspector Ted R. Milovich.
>
> [b] A hearing was held in Docket No. WEST 79-81-R in Salt Lake City, Utah, on November 7 and 8, 1979, before Administrative Law Judge John F. Cook.
>
> [c] The parties stipulate that the two cases should be consolidated and the record should be closed with the inclusion of the Affidavit of Mr. Bruce Sherman being admitted as part of the record. The Secretary specifically states that he is not opposed to the addition of Mr. Sherman's affidavit dated November 15, 1979, but further that he does not attest to the accuracy or truth of said Affidavit.

[d] The parties stipulate that the attached Exhibit "A" constitutes a copy of U.S. Fuel's Controlling Company Information Report which indicates a total production of 746,298 tons of coal was mined in 1979.

[e] The parties stipulate that the attached Exhibit "B" constitutes a printout of all paid violations by the company and may be used in determining the company's history or [sic] prior violations.

[f] The payment of any penalty in this matter will not affect U.S. Fuel Company's ability to remain in business.

[g] The violation was abated in normal good faith.

[h] The parties will file short briefs in this matter with U.S. Fuel's brief to be mailed on or by June 16, 1980, and MSHA's brief will be mailed on or by July 9, 1980.

B. Occurrence of Violation

Federal mine inspector Ted R. Milovich issued section 104(d)(1) Citation No. 789508 at U.S. Fuel's King No. 5 Mine during the course of his April 10, 1979, inspection. The citation alleges a violation of mandatory standard 30 C.F.R. § 75.316 in that "[t]he ventilation, methane and dust control plan was not being complied with in the No. 1 right entry of the first south section. The line brattice was 28 feet outby the point of deepest penetration and coal was being cut with a Joy continuous mining machine. No methane [was] detected. The plan allows 15 feet." (Exh. M-1). The applicable provision of the King No. 5 Mine's approved ventilation system and methane and dust control plan required that "[l]ine brattice or tubing will be installed at a distance no greater than 15 feet from the area of deepest penetration to which any portion of the face has been advanced in working faces from which coal is being cut, mined, or loaded." (Fourth and fifth pages of Exh. M-3, Tr. 45-46). A parenthetical statement following the requirement states that "15 feet is needed to allow proper maneuvering of the continuous miner. The King Mine has never in 70 years of mining, generated Methane of detectable quantity in any working place." (Fifth page of Exh. M-3). Mandatory standard 30 C.F.R. § 75.316 requires that:

> A ventilation system and methane and dust control plan and revisions thereof suitable to the conditions and the mining system of the coal mine and approved by the Secretary shall be adopted by the operator and set out in printed form on or before June 29, 1970. The plan shall show the type and location of mechanical ventilation equipment installed and operated in the mine, such additional or improved equipment as the Secretary may require, the quantity and velocity of air reaching each working face, and such other information as the Secretary may require. Such plan shall be reviewed by the operator and the Secretary at least every 6 months.

The applicable portion of the regulation requires the mine operator to adopt a ventilation system and methane and dust control plan approved by the Secretary. The mine operator violates 30 C.F.R. § 75.316 by failing to comply with the approved plan. Peabody Coal Company, 8 IBMA 121, 84 I.D. 469, 1 BNA MSHC 1573, 1977-1978 CCH OSHD par. 22,111 (1977); Zeigler Coal Company, 4 IBMA 30, 82 I.D. 36, 1 BNA MSHC 1256, 1974-1975 CCH OSHD par. 19,237 (1975), aff'd sub nom. Zeigler Coal Company v. Kleppe, 536 F.2d 398 (D.C. Cir. 1976).

The evidence presented by MSHA and U.S. Fuel paint starkly different pictures of the facts surrounding the issuance of the citation. In the absence of these two patently inconsistent versions of the events, the findings of material fact in these cases could be concisely stated without a prolonged discussion and analysis of the testimony of the individual witnesses. However, because the two versions are patently inconsistent, it is considered appropriate to discuss the testimony of the various witnesses in some detail.

Federal mine inspector Ted R. Milovich was accompanied on his inspection by Mr. Robert Martinez, the company safety inspector, and Mr. Bruce Sherman, a representative of the miners (Tr. 34). They entered the section and proceeded toward the face areas by walking inby through the belt entry (Tr. 34, 43). As the inspection party approached the feeder breaker, the inspector observed a shuttle car, operated by Mr. Jose Carlos Salas, dumping a load of coal (Tr. 34-36). Being a somewhat suspicious person, 4/ the inspector quickened his pace to follow the shuttle car into the working place (Tr. 34). Following the shuttle car required the inspector to make a right turn into a crosscut after passing the feeder breaker, and to thereafter make a left turn into the No. 1 right entry. This entry was adjacent to the belt entry (See, e.g., Exh. M-4). Messrs. Martinez and Sherman followed the same route as the inspector, but, because the inspector had quickened his pace, they arrived at the face area of the No. 1 right entry shortly after the inspector arrived there (See e.g., Tr. 301, 312).

Upon reaching the face area, the inspector made a series of observations which resulted in the issuance of the subject citation. A box cut on the right side of the entry was the point of deepest penetration to which the face had been advanced (Tr. 38). The evidence presented during the hearing establishes that the box cut was 5 feet deep. (See, e.g., Exh. M-4). Face ventilation was being provided through the use of line brattice which had been installed on the left side of the entry (Tr. 38). The line brattice was attached to timbers, or posts, which appear to have been installed for that purpose (See, e.g., Exh. M-4). According to the inspector, Mr. Eddie Edwards, the continuous miner operator, was cutting coal from the left side of the face

4/ Inspector Milovich testified on this point as follows:
"As he was leaving I stepped up my pace to follow this shuttle car into the working place, because I am somewhat of a suspicious person. I suspect that when a shuttle car operator observes an inspector they go up to the face and they say, 'the inspector is coming,' and things can change rapidly." (Tr. 34).

and loading it aboard Mr. Salas' shuttle car, which was positioned under the continuous miner's tail (Tr. 35-36, 96, 370, 373). The inspector testified that he observed sparks being generated from the left side of the cutting wheel when the continuous miner's ripper head made contact with the roof (Tr. 30, 346, 347, 370, 373). Visual observation enabled the inspector to determine immediately that the line brattice was not being maintained to within 15 feet of the point of deepest penetration. The inspector testified that he knew immediately that the 15 foot requirement had been violated because the continuous miner's cab was inby the end of the line brattice (Tr. 364, 369). The cab is approximately 20 feet from the cutting bits on the front of the machine (Tr. 121).

The inspector exchanged comments with members of the crew, and requested that nothing be moved or disturbed until such time as he discussed the matter with mine management (Tr. 36-37). Members of mine management were summoned to the scene and arrived shortly thereafter.

The continuous miner was backed out of the face area after management personnel were accorded the opportunity to observe the condition (Tr. 63). The inspector testified that the line brattice was attached to and terminated at the fourth post outby the face (fourth post). The third post outby the face (third post) was standing, but no line brattice was attached to it. The first post outby the face (first post) and the second post outby the face (second post) were lying on the ground on the left side of the entry. The cap pieces for the two downed posts were on the right rib siding (Exh. M-4, Tr, 57-62). The inspector's testimony reveals that the four posts and the line brattice were in that same position and condition when he first entered the face area and observed the continuous miner cutting coal from the left side of the face (Tr. 364, 373-374). His testimony further reveals that no line brattice was lying on the ground or was otherwise immediately available which could have been extended inby the fourth post (Tr. 50-51, 62, 360, 362, 367, 373, 381-382, 384-386). In fact, the inspector testified that he asked the company personnel to extend the line brattice on the fourth post to its maximum extension, and that when they did so he discovered only approximately 16 or 17 inches of line brattice which could be extended inby that post (Tr. 39-50).

A series of measurements were made using the fourth post as the point of reference. These measurements revealed that the line brattice terminated at a point approximately 28 feet outby the point of deepest penetration to which any portion of the face had been advanced, i.e., 13 feet, or almost a full cut, more than permitted by the approved ventilation system and methane and dust control plan (Tr. 37-38, 46-47, Exh. M-4). The inspector testified that none of the company personnel present expressed the view that the measurement was being made using the wrong post as the point of reference, or stated that additional line brattice was present either on the ground or under the miner which should have been accounted for in the measurement. (See e.g., Tr. 43, 362, 374-375, 379).

The inspector further testified that the citation was abated by two men who brought in additional brattice material, erected the two fallen posts and thereafter extended the line brattice (Tr. 50-51, 64, 376).

In summary, the testimony of Inspector Milovich maintains that actual mining and loading activities were being performed at the face of the No. 1 right entry at a time when the line brattice terminated at a point approximately 28 feet outby the point of deepest penetration to which any portion of that face had been advanced. His testimony further maintains that there was no additional line brattice in the area which could have been used to comply with the applicable provision of the approved ventilation system and methane and dust control plan.

U.S. Fuel maintains that Inspector Milovich's version of the events surrounding the issuance of Citation No. 789508 is patently erroneous. Briefly stated, U.S. Fuel maintains that the crew began work on the left side of the No. 1 right entry by cleaning up some sloughage along the left rib. According to U.S. Fuel, Mr. Salas had transported one shuttle car load of this material to the feeder breaker and had just returned for a second load when the inspector arrived in the face area. According to U.S. Fuel, the continuous miner was pushing sloughage into the face when Inspector Milovich arrived. U.S. Fuel maintains that the first post was knocked down by the continuous miner while maneuvering to clean up the sloughage, and that it was the only post that had been knocked down prior to the time that the inspector had the continuous miner operator back the machine out of the area along the left rib. U.S. Fuel maintains that this post was knocked down while the crew was working on the first shuttle car load of sloughage from the left side of the entry. It is U.S. Fuel's position that the second post was knocked down when the inspector had the miner operator back the machine out of the area along the left rib. Additionally, U.S. Fuel maintains that the line brattice was properly installed to within 15 feet of the point of deepest penetration at all relevant times, and that the line brattice was accidently knocked down, along with the post, while maneuvering the continuous miner to clean up the sloughage.

U.S. Fuel employed the testimony of six witnesses and the affidavit of Mr. Bruce Sherman to set forth its version of the events surrounding the issuance of Citation No. 789508. However, their evidence contains numerous inconsistencies, especially in nine key areas, which reflect adversely on their credibility. Specifically, their evidence is inconsistent insofar as: (1) when the posts were installed on the left side of the entry; (2) identifying the post to which the line brattice was attached; (3) when the two posts were knocked down; (4) what activities were occurring in the face area when the inspector arrived there; (5) the location of the line brattice after it was knocked down and what the various witnesses did or did not say to the inspector concerning the location and condition of the line brattice; (6) whether the witnesses saw measurements being made; (7) whether additional brattice material was brought in to abate the violation; (8) whether the inspector and Mr. Eddie Edwards, the continuous miner operator, engaged in a conversation at the kitchen; and (9) whether Mr. Buddy Gines, the section

foreman, was in the face area shortly prior to the inspector's arrival there. Eight of these areas are discussed in detail below. The ninth, whether Mr. Gines was in the face area shortly prior to the inspector's arrival, will be discussed in a subsequent portion of this decision.

The first area of inconsistency is of a somewhat minor nature and relates to when the line posts were installed on the left side of the entry. Mr. Edwards, the continuous miner operator, affirmatively testified that he installed those line posts (Tr. 127-128). Mr. William Russell Allred, the miner's helper, indicated that at least one of the four posts at issue was standing up from the previous shift (Tr. 160).

The second area of inconsistency relates to identifying the inby most post to which the line brattice was attached immediately prior to the time that such line brattice was supposedly knocked down by the continuous miner. Mr. Edwards testified that the line brattice was attached up to and including the first post outby the face (Tr. 116, 123, 130-131, 133-134). Mr. Allred testified that the line brattice was attached only up to and including the second post outby the face prior to Mr. Edward's beginning his activities on the left side of the entry (Tr. 162, 163, 165, 192-193). Mr. Salas, the shuttle car operator, testified that the line brattice was attached up to and including the second post outby the face, and that the brattice came off of the first post outby the face when the miner operator knocked the first timber down on his way going in (Tr. 202, 215-216). The affidavit of Mr. Sherman states, in part, that he "observed that one timber (1st outby from the face) was knocked out and the brattice was still wrapped around it." This statement indicates that Mr. Sherman maintains that he observed evidence that the line brattice had been attached up to and including the first post outby the face. The testimony of Mr. Buddy Gines, the section foreman, indicates that he maintains that the line brattice was attached up to and including the first post outby the face (Tr. 271-272).

The third area of inconsistency relates to when the first and second posts were knocked down. Messrs. Edwards and Salas maintained that the first post was toppled by the continuous miner while maneuvering to clean up the sloughage, and that the second post was knocked down when the inspector had the miner operator back the machine out of the area along the left rib (Tr. 115, 123, 202, 205, 207). However, Mr. Edwards testified at a later point that he did not know whether he toppled one post while going in and the other post while going out, or both while going in or both while going out (Tr. 129-130). Mr. Allred testified at one point in his testimony that it was necessary to topple the first post in order to clean up the material present (Tr. 162). However, he later contradicted himself by testifying that he did not remember when Mr. Edwards knocked the posts down, that he did not even remember Mr. Edwards knocking them down, and that he really did not know whether Mr. Edwards knocked them down while going in or while pulling out (Tr. 173-174). Of even greater significance on this point is the testimony of Mr. Louis J. Mele, U.S. Fuel's director of safety and training. Mr. Mele was one of the company officials summoned to the face area of the No. 1 right entry by Mr. Martinez. Mr. Mele testified that he observed the two posts

lying on the ground when he arrived in the face area. He further testified that he did not observe the two posts in their entirety because they were partially covered with coal (Tr. 397-398). His testimony that the two posts were partially covered with coal is inconsistent with the position of other witnesses for U.S. Fuel that the two posts, and particularly the second post, had just been knocked down. Mr. Mele's testimony that the two posts were partially buried is consistent only with Inspector Milovich's assertion that the two posts were down when he arrived in the face area and observed actual mining activity in progress, because some type of activity would have been required in order to partially bury the two posts.

The fourth area of inconsistency relates to what activities were occurring in the face area when Inspector Milovich arrived there. Mr. Edwards testified that he was cleaning sloughage from along the left rib, using the head of the miner to break up some large pieces that had sloughed down from the left rib, and loading the material aboard the shuttle car which was positioned under the continuous miner's tail (Tr. 114-115, 146-147, 151-152). On direct examination, he testified as follows:

> I backed the miner up, I moved over, and I was moving in, and there was sloughage from the rib that had fallen down, and I was continuing to clean that sloughage up with my machine. In order to get that sloughage cleaned up -- there is chuncks in there as big as [the bench in the courtroom where the hearing was held] and you have to start the cutter head to cut the coal to let it go up to the conveyor into the [shuttle car]. That's what I was doing. I was cutting up the sloughage; I entered the face, and then there was a big chunk right there; I started to cut it, and when I turned around to see how full the [shuttle car] was, and I seen Mr. Milovich coming down, and then I shut the machine off and I started back, and that's when he wrote up the citation.

(Tr. 114-115).

Mr. Allred's testimony on this point, although not as detailed, indicates that the crew was in the process of loading the shuttle car when the inspector arrived (Tr. 162). Mr. Salas' testimony, however, contradicts the testimony of Messrs. Edwards and Allred because he maintained that no loading was in progress. Mr. Salas testified as follows on direct examination:

> Q. Now, was your shuttle car in the position approximately that is shown on Exhibit M-4 at the time Mr. Milovich arrived?
>
> A. No. I was back a ways. I was behind the tail.
>
> Q. When you say you were behind the tail were you ready to receive coal or was there something that would still be necessary to do before the miner pumped coal into your buggy?

A. Before I go in the tail has to be up, but his tail was down at the time and he was breaking up some gob in there.

Q. So he has a rear boom which is shown as that projection from the miner over the shuttle car, and that boom had not been raised sufficiently for you to get underneath at the time that he was breaking up these lumps?

A. No, not at the time.

(Tr. 198-199).

The fifth area of inconsistency relates to the location of the line brattice after it was knocked down and what the various witnesses did or did not say to the inspector concerning the location and condition of the line brattice. Generally, the operator's witnesses and the affiant maintain that the toppled line brattice was on the floor of the entry, and that an argument ensued over the subject of mining without proper ventilation.

Mr. Sherman's affidavit maintains that the toppled line brattice was plainly visible.

Mr. Edwards testified at one point that the line brattice was on the ground underneath the continuous miner, and that that was why the inspector did not see it (Tr. 116-117). However, he later testified that the line brattice was on the ground when the measurements were made and that it was visible to anyone taking the trouble to walk around the left side of the continuous miner (Tr. 154), and that he did not know why the inspector did not see it (Tr. 143-144). As relates to any conversations with the inspector, Mr. Edwards testified that Inspector Milovich came in, stopped, shook his head and asked him "what the hell" he, Edwards, though he was doing (Tr. 124). Curiously, for a man who maintains that the line brattice had been up; Mr. Edwards never told the inspector (1) that the line brattice had been in place, (2) that it had just been knocked down by the continuous miner, or (3) that the line brattice was lying on the ground (Tr. 117, 129-130, 139-140). In fact, he testified that he did not respond to any of the inspector's direct questions concerning why the line brattice was not up (Tr. 117). At one point he testified that he did not know why he failed to mention the presence of the line brattice to the inspector upon learning that a ventilation violation had occurred (Tr. 152). He thereafter testified that he failed to mention it because he was shaken by the experience (Tr. 152-153).

It appears that Mr. Allred was suffering from a poor memory insofar as this, the most crucial aspect of U.S. Fuel's case, was concerned. He testified that he did not know where the line brattice was (Tr. 171); that he did not see the brattice cloth when the continuous miner was pulled back and the measurements were taken (Tr. 172); and that he did not recall seeing any brattice cloth tucked underneath the machine (Tr. 173). As noted previously, Mr. Allred maintained at various points in his testimony that the line brattice was attached up to and including the second post outby the face.

Yet he testified, in the following passage, that he never brought this matter to the inspector's attention simply because he never says much to Inspector Milovich:

> JUDGE COOK: If that was true, didn't you say something to the Inspector as to what you thought the situation was?
>
> THE WITNESS: Myself, no. I don't say very much to him; never did. Never did.

(Tr. 188).

Mr. Salas testified that he saw the line brattice on the ground after the inspector's arrival on the section and before the continuous miner was backed out of the face (Tr. 203-204). He further testified that the line brattice was on the ground after the continuous miner was backed out of the face, but he could not remember whether it was visible on the left side or whether it was underneath the continuous miner (Tr. 205). However, he later testified that he never saw the line brattice on the floor after the miner pulled out (Tr. 212). Additionally, Mr. Salas testified that he did not say a word to the inspector concerning the violation, and indicated that he did not look for the brattice cloth after the section was shut down or while the argument was in progress (Tr. 206, 217) even though he could have easily seen the brattice cloth from his vantage point in front of the continuous miner (Tr. 216-219). In fact, he claimed that he was unable to remember the topic of the argument (Tr. 219). The implausibility of and apparent contradictions contained in his testimony are amply illustrated by the following excerpts from his cross-examination:

> Q. Did you ever walk in front of the brattice -- I mean in front of the miner? Did you ever stand in front of the miner?
>
> A. Yes.
>
> Q. When did you ever do that?
>
> A. After everybody was there.
>
> Q. Everybody was there and you were standing in front of the miner?
>
> A. They was just arguing.
>
> Q. Everybody was arguing. Where was the brattice cloth?
>
> A. I didn't look around for it.

Q. Oh, Jesus. The brattice cloth was hanging on the second, third and fourth posts when you were coming in; it falls off the second post when Mr. Edwards moves his machine in?

A. Right.

Q. It falls off the third post and the second post falls down when he backs the machine back, and then you are standing in front of he miner, with everybody standing around arguing, and you don't know where the brattice cloth is?

A. I didn't know it was a violation before or I would have looked for it.

(Tr. 216-217).

* * * * * * *

You remember [the condition and location of the brattice prior to the time the machine was backed out of the face] but you don't remember when you were standing in front of the miner? Did it disappear?

A. I wasn't looking for it.

Q. What were they arguing about?

A. I can't remember. It was none of my business. They were the ones.

Q. But you don't remember? That's what you are telling me, you really don't remember where the brattice cloth was at the point in time that you were standing in front of the machine? Would you answer verbally for the record?

A. No.

(Tr. 219).

Mr. Buddy Gines was summoned to the face area and arrived there prior to the arrival of Mr. Mele's party. Mr. Gines testified that an argument ensued upon his arrival during which the inspector "got on me pretty bad for mining without air" (Tr. 237). Mr. Gines testified that the inspector kept saying that it was his responsibility to make sure that the crew did not cut past their ventilation; and that he got the impression that Inspector Milovich thought the crew had mined some considerable time with the posts and line brattice down (Tr. 237-238). Mr. Gines further testified that he attempted to explain to Inspector Milovich that the posts and line brattice were there, but that the inspector just kept getting on him about his responsibilities

and would not let him explain the matter (Tr. 238). This angered Mr. Gines and he therefore simply terminated the discussion with the inspector and took a seat along the right rib. He testified that he remained seated there during all subsequent activities and that he did not assist in the taking of measurements or in anything else (Tr. 237-238, 252, 256, 262).

According to Mr. Gines, the line brattice and timbers were present (Tr. 271). Yet curiously, he did not brief Mr. Mele and his party about the situation before they talked to the inspector. In fact, he did not even speak to them when they arrived (Tr. 282). Such conduct is inconsistent with Mr. Gines position that the crew had not mined past their ventilation. Logically, one would expect Mr. Gines to explain the situation to Mr. Mele's party and point out to them that the inspector's accusation was unfounded, that the inspector would not let him proffer an explanation, and that the inspector appeared unwilling to listen to reason. Instead, he said absolutely nothing to them.

Additionally, Mr. Gines did not affirmatively testify that someone told the inspector that measurements were being made in the wrong location. He testified only that he thought he heard someone tell the inspector that the measurement was being made in the wrong spot (Tr. 255).

Mr. Martinez testified that when he arrived at the face, the first post was lying on the ground and the line brattice was attached to the third post and was angling down to the second post (Tr. 302-303). Mr. Martinez testified that he assisted in making the 28 foot measurement (Tr. 304). It does not appear that Mr. Martinez had any discussion with the inspector concerning the fact that the posts had just been knocked down (Tr. 303). However, he testified on direct examination that other people made comments to the inspector as relates to the point of reference used in making the measurement:

> Q. You helped take that measurement? Did anyone from the crew or supervisory personnel state to Mr. Milovich that he was measuring from the wrong point?
>
> A. Yes, Sir.
>
> Q. Do you know who said that?
>
> A. There were several comments on the measurement. The supervisory, Andy Barnett and the crew members appeared to be -- as the brattice was angled the[y] didn't believe it was where it should be taken at. He was taking it from where it was intact all the way to the roof, the way the measurement was made.

(Tr. 304-305).

However, he appeared to become evasive when cross-examined on this point, maintaining that he did not really remember what was said:

Q. Did Mr. Mele or Mr. Barnett take the lead in advancing the company's position at the time? Was either one of them more dominant than the other in talking to Milovich?

A. Not that I recall.

Q. Both of them were talking to him at the same time?

A. People were talking.

Q. But you don't remember what was said?

A. Not really.

Q. Can you give me the flavor of what was said, what is your recollection of what was said? What were the arguments about?

A. People were arguing about the angle of the brattice after we had backed out, talking about where the measurements were taken. I really can't recall what they was talking. I was going about my job.

(Tr. 331-332).

Mr. Mele testified that the line brattice was probably on the fourth post on an angle when he arrived in the face area (Tr. 390). He testified that he saw the brattice cloth on the ground, but he had no idea as to how such observation squared with Mr. Edwards' testimony that the brattice cloth was under the continuous miner (Tr. 397).

It was apparent to Mr. Mele that Inspector Milovich had already taken some measurements, because when the two men first met the inspector stated that "the violation was 28 feet" (Tr. 390-391). Mr. Mele responded with the statement that it did not appear that far (Tr. 390-391). Thereafter, Mr. Mele assisted the inspector in making measurements. However, Mr. Mele indicated at several points in his testimony that nobody mentioned to Inspector Milovich that he was taking the measurements in the wrong location. He testified that he had no discussion with the inspector as to whether the measurement should be made from where the line brattice was actually hung on the post, or whether it should account for any of the additional brattice that was sloping down (Tr. 391). He further testified that while he was assisting in the measurement, nobody indicated that the measurement was being made in the wrong spot (Tr. 399-400). His testimony on this point flatly contradicts Mr. Martinez testimony on direct examination that he overheard supervisors or crew members tell the inspector that the measurements were being made in the wrong location.

In short, the reliable evidence shows that no statements were made to Inspector Milovich indicating either that the line brattice had just been

knocked down, or that the measurements should have been made by taking into account additional line brattice that U.S. Fuel maintains was present. The failure of U.S. Fuel's personnel to make such statements to the inspector tends to prove that Inspector Milovich gave an accurate portayal of the conditions existing at the face of the No. 1 right entry. The failure of U.S. Fuel's personnel to point out such key facts to the inspector is conduct which is inconsistent with the position advanced by U.S. Fuel's witness' and affiant. The alternative would require the acceptance of an absurd proposition in which discussions take place concerning mining without proper ventilation, and measurements are made to determine how far the line brattice terminates from the point of deepest penetration to which any portion of the face has been advanced, and yet nobody bothers to point out the crucial facts necessary to avoid the issuance of a citation. Additionally, U.S. Fuel's evidence contains numerous inconsistencies as to the position and location of the brattice cloth that it maintains had just been knocked down.

The sixth area of inconsistency concerns whether the witnesses saw measurements being made. The inconsistency in this area is confined to the testimony of Mr. Edwards.

Briefly stated, measurements were taken in the following fashion: The first measurement was made by the inspector prior to the arrival of Mr. Mele's party. He threw his tape measure, which had a nut on the end, into the face and obtained a reading of approximately 28 feet (Tr. 37-38, 390-391). Inspector Milovich informed Mr. Mele of the reading when the latter arrived. Mr. Mele responded that the distance did not appear that far (Tr. 390-391). Company personnel assisted the inspector in taking another set of measurements, with Mr. Mele holding the tape at the face. Once again, a reading of approximately 28 feet was obtained (Tr. 37-38, 304, 317, 394).

At one point during cross-examination, Mr. Edwards denied that he saw measurements being made:

> Q. Now, did you watch any of the measurements going on? Did you see the Inspector throw his tape up into the face with a nut on the end of it and read out about twenty-eight feet?
>
> A. I didn't see nothing like that. I wasn't there. I wasn't paying any attention. All I know is that he started to write out the citation.

(Tr. 122).

However, he contradicted himself at a later point in his cross-examination:

> Q. Did you see the Inspector measure the area?
>
> A. Yes, I seen him measure it.
>
> Q. Did you look at the tape at all?

A. No, I didn't.

Q. He measured it twice when you were there?

A. Yes, I know he measured it.

Q. Do you remember seeing him measure it twice?

A. Yes.

Q. You saw him throw it up once by himself and then he had somebody else walk up to the face at the roof support?

A. Yes.

Q. Who did he have walk up to the face?

A. Lou Mele.

Q. Who?

A. Lou Mele.

(Tr. 137-138). (Emphasis added).

The seventh area of inconsistency relates to whether additional brattice cloth was brought in to abate the violation. The inspector testified that the violation was abated by two men who brought in and installed additional line brattice (Tr. 50-51, 64, 376). U.S. Fuel maintains, however, that the violation was abated by reinstalling the line brattice which had fallen on the ground, and that additional brattice cloth was not brought in for this purpose. The most probative evidence adduced by U.S. Fuel in support of its position 5/ is the affidavit of Mr. Sherman which states, in part, that: "We rehung the brattice that had fallen off the timbers using the the [sic] brattice laying on the ground along the rib line and some wrapped around the

5/ The testimony of Messrs. Edwards, Gines, Martinez and Mele is less than conclusive on this point. Mr. Edwards testified that he did not see additional brattice cloth brought in to abate the citation (Tr. 125), and that nobody brought in extra brattice cloth (Tr. 141). However, the evidence presented indicates that Mr. Edwards was in no position to make a personal, firsthand observation of the abatement procedures because he was at the kitchen, and not the face, when abatement occurred. Mr. Gines testified only that he did not observe anybody bring in additional brattice cloth to abate the citation (Tr. 257). Mr. Martinez testified only that he did not know whether additional brattice cloth was brought in or, indeed, whether such action was necessary (Tr. 310). Mr. Mele testified only that to his knowledge new brattice cloth was not brought in to abate the citation (Tr. 398).

timber. There was approximately 30 feet of the line curtain laying there." However, Mr. Allred gave testimony during cross-examination which supports the testimony of Inspector Milovich. Mr. Allred's testimony on this point is as follows:

> Q. Okay. Where was the brattice cloth that was connected to the three posts that were inby point "C" [on Exhibit M-4]?
>
> A. I don't know.
>
> Q. Did you see any brattice cloth there?
>
> A. Did I see any?
>
> Q. Yes.
>
> A. After we backed up?
>
> Q. Yes.
>
> A. No, I don't recall what happened to it. Somebody else come in and fixed the place up. I don't know who did it. I don't know why they went back out to brattice. I do know the brattice was up to the farthest roofbolt post, but I am the miner helper and I did put it out there.
>
> Q. You have just told me several things: [The testimony is omitted as relates to the first two topics identified.] Three, you told me that somebody went out and got new brattice cloth and came back in. Right?
>
> A. Right.
>
> Q. Did you see that hung?
>
> A. No. If I remember right, I think we went to dinner and had somebody else do the hanging up and measuring. I can't remember for sure what happened there.
>
> Q. But you do remember somebody brought new brattice cloth in?
>
> A. No, I don't remember that. I think somebody told me somebody brought some brattice cloth in. I didn't see nobody bringing no brattice in. (Tr. 171-172).

The eighth area of inconsistency concerns whether Mr. Edwards and Inspector Milovich conversed at the kitchen. According to Inspector

Milovich, a conversation did occur there during which Mr. Edwards once again requested the inspector to overlook what he had found (Tr. 376-377). 6/ Mr. Edwards denied ever making such statements at any time (Tr. 125-126), and, in fact, maintained that he had had no conversations at all with the inspector in the kitchen area (Tr. 196). Mr. Salas, however, testified that the two men did converse in the kitchen area, but appeared to imply that they simply reminisced about "old times" (Tr. 210). He testified that he was unable to remember whether Mr. Edwards requested the inspector to overlook the violation (Tr. 211). Additionally, Mr. Allred testified that the two men engaged in a conversation in the kitchen area, but claimed that he was unable to remember whether Mr. Edwards made the request (Tr. 178-179). However, Mr. Allred's testimony does reveal that Mr. Allred discussed the violation with the inspector at that time (Tr. 187).

In summary, Mr. Edwards maintained that he had no conversation with the inspector in the kitchen area, while Messrs. Salas and Allred maintain that the two men did converse there. The two positions are inconsistent. Mr. Allred's testimony further indicates that the violation was discussed with the inspector in the kitchen area. Inspector Milovich's testimony as to the subject matter of his conversation with Mr. Edwards is considered accurate.

In view of the foregoing, I conclude that the testimony of Federal mine inspector Ted R. Milovich accurately sets forth the conditions existing in the face area of the No. 1 right entry when the citation was issued, and that U.S. Fuel has not produced credible evidence to rebut his testimony. 7/

6/ According to the inspector, the request was initially made in the face area of the No. 1 right entry moments after he caught Mr. Edwards mining without the required line brattice (Tr. 359).

7/ It appears that Messrs. Edwards, Allred, Salas and Gines may have had a motive to be less than candid in their testimony. According to Inspector Milovich, Mr. Walter Wright, the mine superintendent, arrived at the face with Mr. Mele. Inspector Milovich testified that Mr. Wright appeared particularly surprised at and quite upset with the condition, and that Mr. Wright stated that he would fire everybody on the section (Tr. 37, 51-52, 378). Mr. Edwards testified that Mr. Wright was not present (Tr. 134). Messrs. Allred, Gines and Martinez testified either that they did not remember seeing Mr. Wright or that they could not recall whether Mr. Wright was present (Tr. 185-186, 253, 265, 331). There is, however, evidence in the record which tends to corroborate the inspector's testimony that Mr. Wright was present and that he made the statement attributed to him.

Mr. Mele testified that Mr. Wright could have been present, although he was not certain (Tr. 388-389). Yet, Mr. Mele's testimony indicates that the statement is characteristic of Mr. Wright. According to Mr. Mele:

"He said that many times when we had such violations. I heard that several times, but I'm not too sure he was in there that day. I've heard him say that many times when I talked to him about violations, 'We are going to fire the boss; we are going to fire the crew.' That's just something that he -- that is one of his -- we have never done it yet." (Tr. 398-399).

Accordingly, it is found that a preponderance of the evidence establishes a violation of mandatory standard 30 C.F.R. § 75.316. Actual mining and loading operations were underway in the face area of the No. 1 right entry of the King No. 5 Mine's first south section, and the line brattice terminated at a point approximately 28 feet outby the point of deepest penetration to which any portion of the face had been advanced. This condition violated the provision of the approved ventilation system and methane and dust control plan which required the line brattice or tubing to be installed at a distance no greater than 15 feet from the area of deepest penetration to which any portion of the face has been advanced in working faces from which coal is being cut, mined, or loaded.

C. Negligence of the Operator

The facts presented in these cases reveal that as of April 10, 1979, U.S. Fuel should have been more cognizant than usual of the need to maintain good ventilation because the King No. 5 Mine had experienced a series of three frictional coal dust ignitions during the recent past. The three ignitions occurred on March 21, March 23, and April 5, 1979, in another section of the mine located approximately 2,600 or 2,700 feet from the section involved in these proceedings (Tr. 14-15, Exh. M-4). 8/ Yet, the evidence shows that the line brattice terminated at a point 28 feet outby the point of deepest penetration to which any portion of the face of the No. 1 right entry had been advanced while coal was being cut, mined or loaded, i.e., 13 feet, or almost a full cut, more than the distance permitted by the approved ventilation system and methane and dust control plan (Exh. M-3, Tr. 46-47). Under the plan, 15 feet is a full cut (Tr. 46-47, Exh. M-3). The findings of fact set forth previously in this decision show that a substantial amount of mining and loading had occurred without the required line brattice installed. The only remaining question is whether U.S. Fuel's supervisory personnel knew or should have known that the condition existed. The evidence, as set forth below, shows that the section foreman had actual knowledge of the condition and failed to take corrective action.

As noted previously, the inspector quickened his pace to follow Mr. Salas' shuttle car into the working place. As he went through the crosscut into the No. 1 right entry, he observed three miner's lights in the face

---

fn. 7 (continued)

Mr. Gines testified that he did not remember seeing Mr. Wright, and that he did not hear Mr. Wright say that the whole crew should be fired (Tr. 253). However, he testified that a union man told him later that he had heard that Mr. Wright was going to fire him.

Finally, Inspector Milovich's testimony is in accord with statements contained in his contemporaneous handwritten notes. The notes, written while underground (Tr. 95), record Mr. Wright's presence and the statement that he "would fire everyone on the section." (Exhs. M-2, M-2A).

8/ Counsel for MSHA indicated during the hearing that the three prior coal dust ignitions were flash, self-extinguishing situations, and not explosions (Tr. 106).

area (See, Exh. M-4). One of the three individuals had a lighted flame safety lamp (Tr. 34-35). Mr. Salas, the shuttle car operator, was not one of the three men observed at the face because he was still driving the shuttle car into the section when the observation was made (Tr. 44). A series of observations and conversations enabled the inspector to determine that Mr. Gines, the section foreman, was the individual in the face area with the lighted flame safety lamp.

Shortly after the inspector observed the three lights, he and Mr. Gines passed each other at a point approximately 175 feet from the face while walking down the No. 1 right entry. The inspector was walking inby and Mr. Gines was walking outby (Tr. 34-35, 71). The inspector did not actually see Mr. Gines leave the face area because it appears that the shuttle car obstructed his view at the crucial point in time (Tr. 45). However, Mr. Gines was carrying a flame safety lamp when he and the inspector passed each other (Tr. 34-36). Additionally, there were only two people present at the face, discounting Mr. Salas, when the inspector arrived there. Neither of the two men had a flame safety lamp. An unlighted flame safety lamp was inside the continuous miner (Tr. 36, 45).

It appears that Inspector Milovich wanted to confirm his belief that Mr. Gines had been in the face area, i.e., that Mr. Gines had been in a position to actually see the violation. After he stopped the mining activity, he asked Mr. Allred where Mr. Gines was (Tr. 78). Mr. Allred stated that Mr. Gines had just left (Tr. 36-37). When Mr. Gines returned to the face area, the inspector asked him whether he had just left the face area. Mr. Gines responded in the affirmative, stating that he had left "a little while ago." The inspector followed up his question by asking Mr. Gines whether he had seen how far the line brattice terminated from the point of deepest penetration. Mr. Gines answered by stating that it "didn't look that far to me" (Tr. 37, 77). The inspector thereupon reached the conclusion that Mr. Gines, a supervisory employee of U.S. Fuel, had seen the violation, and, accordingly, that the violation was caused by an unwarrantable failure to comply with mandatory standard 30 C.F.R. § 75.316 (Tr. 35, 77).

U.S. Fuel's evidence was directed toward disproving both that Mr. Gines was in the face area shortly before the inspector arrived there, and that Mr. Gines had stated that the line brattice had not appeared that far back when he was in the area a short time earlier. However, U.S. Fuel's witnesses are not considered credible on these points.

Messrs. Allred and Edwards gave testimony which, if believed, would last place Mr. Gines in the area before activities began on the left side of the No. 1 entry (Tr. 155, 162, 167-170). Their testimony is inconsistent with that of Messrs. Salas and Gines. The testimony of Messrs. Salas and Gines places Mr. Gines in the vicinity of the face moments before the inspector's arrival at the face, a much later point in time than that testified to by Messrs. Edwards and Allred. Specifically, Mr. Salas had already taken one load of material from the left side of the entry and had just returned to the face area to pick up another load when the inspector arrived there. Yet,

Mr. Salas specifically recalled seeing Mr. Gines in the No. 1 right entry while driving the shuttle car toward the face (Tr. 201). In fact, Mr. Gines admitted passing the inspector in the No. 1 right entry (Tr. 235-236). Additionally, Mr. Gines contradicted Mr. Allred's testimony on a crucial point. Mr. Gines testified that he had just finished speaking to Mr. Allred, who was straightening the cable on the continuous miner, before passing the inspector (Tr. 234-255). Mr. Allred confirmed talking to Mr. Gines while straightening the cable, but indicated that the conversation occurred before activities began on the left side of the entry (Tr. 167-170).

Furthermore, part of U.S. Fuel's evidence tends to confirm Inspector Milovich's account. Mr. Gines, by his own admission, places himself in the vicinity of the face at the relevant time. Mr. Allred confirms telling the inspector that Mr. Gines had "just left" the area (Tr. 167).

In view of these considerations, I find that Inspector Milovich correctly deduced that Mr. Gines had just left the face area of the No. 1 right entry. I further find that Mr. Gines admitted to the inspector that he had observed the violative condition, but attempted to exculpate himself by maintaining that "it didn't look that far" when he was last at the face a few minutes earlier. Additionally, the evidence shows that Mr. Gines failed to take corrective action. His knowledge and his failure to act are imputable to U.S. Fuel. See, e.g., Nacco Mining Company, 3 FMSHRC 848, 2 BNA MSHC 1272, 1981 CCH OSHD par. 25,330 (1981).

In view of the recent history of frictional coal dust ignitions at the King No. 5 Mine, U.S. Fuel was under an affirmative obligation to be even more cognizant than usual of the need to maintain proper ventilation. This obligation was clearly not met. A substantial amount of mining and loading was performed without complying with the cited provision of the approved ventilation system and methane and dust control plan. The section foreman had actual knowledge of the violative condition and failed to take corrective action. The violation was readily visible (See, Tr. 121, 364, 369). Accordingly, it is found that U.S. Fuel demonstrated gross negligence.

D. Unwarrantable Failure Criterion

The subject 104(d)(1) citation contains the allegation that the cited violation was caused by the mine operator's unwarrantable failure to comply with mandatory standard 30 C.F.R. § 75.316. A violation of a mandatory health or safety standard is caused by an unwarrantable failure to comply where "the operator involved has failed to abate the conditions or practices constituting such violation, conditions or practices the operator knew or should have known existed or which it failed to abate because of a lack of due diligence, or because of indifference or lack of reasonable care." Zeigler Coal Company, 7 IBMA 280, 295-296, 84 I.D. 127, 1 BNA MSHC 1518, 1977-1978 CCH OSHD par. 21,676 (1977).

The findings of fact and the discussion set forth in Part V(C) of this decision clearly show that U.S. Fuel failed to abate a violative condition

that it knew or should known existed because of a lack of due diligence, or because of indifference or lack of reasonable care. Accordingly, it is found that the violation was caused by U.S. Fuel's unwarrantable failure to comply with mandatory standard 30 C.F.R. § 75.316.

E. Significant and Substantial Criterion

The citation contains the allegation that the violation was of such nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard. In National Gypsum Company, 3 FMSHRC 822, 2 BNA MSHC 1201, 1981 CCH OSHD par. 25,294 (1981), the Commission held "that a violation is of such nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard if, based upon the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." 3 FMSHRC at 825. Additionally, the Commission stated that "[a]lthough the [1977 Mine Act] does not define the key terms 'hazard' or 'significantly and substantially,' in this context we understand the word 'hazard' to denote a measure of danger to safety or health, and that a violation 'significantly and substantially' contributes to the cause and effect of a hazard if the violation could be a major cause of a danger to safety or health. In other words, the contribution to cause and effect must be significant and substantial." 3 FMSHRC at 827. (Footnote omitted.) The particular facts surrounding the violation reveal the following:

As a general matter, the concentration of float coal dust in suspension is reduced if the proper amount of air and water is delivered to the face. Float coal dust is a potential fuel for an ignition or explosion. Proper ventilation reduces, but does not completely eliminate, the possibility of an ignition (Tr. 16, 18-19).

The King No. 5 Mine is a relatively new mine. It is close to the surface and has a large fan. There is adequate air in the mine, if it is properly directed (Tr. 33). The inspector found 8,500 feet of air going over the continuous miner, and the plan required only 6,000 feet of air (Tr. 22). However, the inspector was of the opinion that the violation was of such nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard because air will naturally follow the shortest, most direct route into the return. With the line brattice installed so far from the face, very little air would be ventilating the face because it would be following the shortest route out the return. Therefore, there would be a possibility that the velocity would not be as great at the face (Tr. 53).

A methane test was made and no methane was detected. Previous samples collected for analysis had indicated that the mine did not liberate methane (Tr. 54-55). However, an ignition source for float coal dust was clearly present. Rock was being cut and was generating sparks and heat (Exh. M-5,

Tr. 30, 346-347, 370, 373). The injury resulting from or contemplated by the occurrence of an ignition or explosion could reasonably be expected to be serious.

In view of the foregoing, I find that the violation could have been a major cause of a danger to safety or health. The particular facts surrounding the violation show the existence of a reasonable likelihood that the hazard contributed to would result in an injury or an illness of a reasonably serious nature. Accordingly, I conclude that the violation was of such nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard.

F. Gravity of the Violation

The findings of fact set forth in Part V(E) of this decision show that the violation was serious.

G. Good Faith in Attempting Rapid Abatement

The citation was issued at approximately 10:25 a.m., on April 10, 1979. Abatement was due by 11:05 a.m. that same day. The citation was terminated within the time set for abatement (Exh. M-1). The parties stipulated that the violation was abated in normal good faith (June 17, 1980, stipulations).

H. Size of the Operator's Business

The parties stipulated that U.S. Fuel mined 746,298 tons of coal in 1979. U.S. Fuel's controlling company information report reveals that 496,078 tons of that coal was mined at the King No. 4 Mine, and that the remaining 250,220 tons was mined at the King No. 5 Mine (June 17, 1980, stipulations).

I. History of Previous Violations

On June 17, 1980, the parties filed a computer printout prepared by the Directorate of Assessments setting forth the history of previous violations at the King No. 4 and King No. 5 Mines, beginning January 1, 1970, and ending May 29, 1980. The parties stipulated that such computer printout may be used in determining U.S. Fuel's history of previous violations.

Only those paid assessments for violations charged prior to April 10, 1979, may be properly considered in determining U.S Fuel's history of previous violations. See Peggs Run Coal Company, 5 IBMA 144, 82 I.D. 445, 1 BNA MSHC 1343, 1975-1976 CCH OSHD par. 20,001 (1975). The computer printout reveals that U.S. Fuel had paid assessments for the time period beginning January 1, 1970, and ending April 9, 1979, as follows:

Mine	All §	§ 75.316 (highest fine)
King No. 4	1277	57 ($2,500)
King No. 5	37	1 ($30)
Totals	1314	58 ($2,500)

(Note: All figures are approximations).

J. Effect of a Civil Penalty on the Operator's Ability to Remain in Business

The parties stipulated that the payment of any penalty in this matter will not affect U.S. Fuel's ability to remain in business (June 17, 1980, stipulations).

VI. Conclusions of Law

1. United States Fuel Company and its King No. 5 Mine have been subject to the provisions of the 1977 Mine Act at all times relevant to these proceedings.

2. Under the 1977 Mine Act, the Administrative Law Judge has jurisdiction over the subject matter of, and the parties to, these proceedings.

3. Federal mine inspector Ted R. Milovich was a duly authorized representative of the Secretary of Labor at all times relevant to the issuance of Citation No. 789508.

4. The violation of mandatory standard 30 C.F.R. § 75.316 charged in Citation No. 789508 is found to have occurred as alleged.

5. The subject violation of mandatory standard 30 C.F.R. § 75.316 was caused by the mine operator's unwarrantable failure to comply with such mandatory standard.

6. The subject violation of mandatory standard 30 C.F.R. § 75.316 was of such nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard.

7. Citation No. 789508 was properly issued under section 104(d)(1) of the 1977 Mine Act.

8. All of the conclusions of law set forth in Part V, supra, are reaffirmed and incorporated herein.

VII. Proposed Findings of Fact and Conclusions of Law

The parties made closing arguments at the conclusion of the hearing on November 8, 1979. U.S. Fuel and MSHA filed briefs on June 17, 1980, and July 9, 1980, respectively. Such closing arguments and briefs, insofar as they can be considered to have contained proposed findings and conclusions, have been considered fully, and except to the extent that such findings and conclusions have been expressly or impliedly affirmed in this decision, they are rejected on the grounds that they are, in whole or in part, contrary to the facts and law or because they are immaterial to the decision in these cases.

VIII. Penalty Assessed in Docket No. WEST 80-62

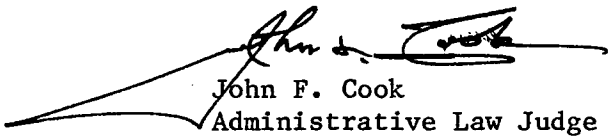
Upon consideration of the entire record in these cases and the foregoing findings of fact and conclusions of law, I find that the assessment of a penalty is warranted as follows in Docket No. WEST 80-62:

Citation No.	Date	30 C.F.R. Standard	Penalty
789508	4/10/79	75.316	$3,000

ORDER

Accordingly, IT IS ORDERED that the application for review in Docket No. WEST 79-81-R be, and hereby is, DENIED, and that Citation No. 789508 be, and hereby is, AFFIRMED.

IT IS FURTHER ORDERED that U.S. Fuel pay the civil penalty in the amount of $3,000 assessed in Docket No. WEST 80-62 within 30 days of the date of this decision.



John F. Cook
Administrative Law Judge

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JUN 30 1981

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	CIVIL PENALTY PROCEEDING
Petitioner,	DOCKET NOS. CENT 79-059-M CENT 79-211-M CENT 79-300-M CENT 79-361-M DENV 79-531-M (Consolidated)
v.	
CAPTIOL AGGREGATES, INC.,	DOCKET NOS. CENT 80-192-M CENT 80-213-M (Consolidated)
Respondent.	
	MINES: Capitol Cement Quarry & Plant and Del Rio Pit and Plant

DECISION

Appearances:

Sandra Henderson, Esq., Office of the Solicitor
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Dallas, Texas 75202
For the Petitioner,

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For the Respondent,

Richard L. Reed, Esq., JOHNSON, KROZ & VIVES, 2600 Tower Life Building, San Antonio, Texas 78205
For the Respondent.

Before: Judge Virgil E. Vail
Administrative Law Judge

The above-captioned civil penalty proceedings were brought pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., (hereinafter referred to as "the Act"). The violations were charged in 8 citations issued to the respondent following inspections at the respondent's Capitol Cement Quarry and Plant and Del Rio Pit and Plant.

Prior to the presentation of evidence in the above cases, the parties entered into a stipulation wherein specified citations would be settled subject to a ruling on the issue raised by the respondent as to whether the Federal Mine Safety and Health Administration had jurisdiction over the

respondent's two mines involved herein. The parties stipulated to certain facts, presented oral arguments and submitted briefs in support of their respective positions on the question of jurisdiction.

I. Issues

1. Whether respondent's mines involved herein are subject to the Act under 30 U.S.C. § 803 (Supp. 1977), and

2. Whether respondent violated standards of the Act.

II. Jurisdiction

The respondent argues that the products from its mines are not sold out of state and do not otherwise affect interstate commerce, and therefore its mines are not subject to regulation under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 803 (Supp. 1977).

The petitioner argues that a de minus effect or even purely intrastate activities may be found to affect interstate commerce.

The undisputed and stipulated facts show that of over 200 customers to whom respondent sells its products there is one customer, the State of Texas, to which sales are used for the purpose of highway construction, within the state of Texas. That it only sells within the feasible shipping and market area of the respondent, which is a 200 mile radius of the plant in San Antonio, Texas. Further, of the 200 customers to whom respondent sells, there are three customers who have requested that their billings be sent to an out-of-state address, but whose products are shipped within the 200 mile radius of respondent's plant and that no materials from the respondent's plants were shipped outside the state of Texas (Tr. 22-26).

Section 4 of the Act provides: "Each coal or other mine, the products of which enter Commerce, or the operations or products of which affect Commerce, and each operator of a mine, and every miner in such mine shall be subject to the provisions of the Act."

Section 3(b) of the Act defines "Commerce" as "trade, traffic, commerce, transportation, or communication among the several States, or between a place in a State and any place outside thereof, or *** between points in the same State but through a point outside thereof."

I conclude that respondent's mine operations come within the Commerce coverage of the Federal Mine Safety and Health Act of 1977. The material mined by the respondent is used for construction of highways in the State of Texas which are used in the regular stream of interstate commerce. Highway construction and maintenance have been held to be within interstate coverage of Federal statutes. See N.L.R.B. v. Custom Excavating Inc., 575 F. 2d 202 (7th Cir. 1978).

In Fry v. United States, 421 U.S. 542, 547 (1975), The Supreme Court said, "Even activity that is purely intrastate in character may be

regulated by Congress, where the activity, combined with like conduct by others similar situated, affects commerce among the States or with Foreign Nations." See Heart of Atlanta Motels, Inc. v. United States, 379 U.S. 241, (1964); Wickard v. Filburn, 317 U.S. 111, (1942). In the oft-quoted case of Wickard v. Filburn, supra, the Supreme Court held that wheat grown by an individual farmer for his own consumption is subject to federal regulations if it exerts a substantial economic effect on interstate commerce. The Court said that, even though the farmer's contribution to the demand for wheat may be trivial, that is "not enough to remove him from the scope of federal regulations where, as here, his contribution taken together with that of many others similarly situated, is far from trivial." At p. 127.

In considering the narrow set of facts submitted in this case, that is the use of materials for state highways, the use of the government postal system for transporting the billings to addresses of customers outside the State of Texas, and use of materials by over 200 customers within the State of Texas, I find that the respondent's mines' products affected commerce, and as such, are subject to the Act.

III. Settlement Proposals

CENT 79-211-M

At the hearing, the parties stated that they had agreed to settle the two Citations nos. 169799 and 169800 which involve citations issued at the Del Rio Pit and Plant and are contained in DOCKET No. CENT 79-211-M. The agreement for settlement provided that Citation no. 169799, with a proposed penalty assessment of $12.00, be reduced to $8.00 and that Citation no. 169800 with a proposed assessment of $22.00 be reduced to $17.00, subject to my ruling on the jurisdictional issue. Having ruled that the mines are covered under the Act, and having considered the proposed settlement and the six criteria as set forth in Section 110(i) of the Act, I conclude the proposed settlements should be approved.

CENT 79-59-M

The Secretary moved at the hearing to vacate Citation no. 169732. The reason given for vacating this citation was a belief that the evidence would not support the charge. Citation no. 169732 is therefore vacated.

CENT 79-361-M, CENT 80-213-M, CENT 80-192-M

At the hearing the parties agreed, subject to my ruling on the jurisdictional matter, that the Secretary would vacate Citation no. 169476 (Docket No. CENT 79-361-M) and respondent would pay the full amount of the proposed penalty assessments for Citation no. 170993 (Docket No. 80-213-M) in the amount of $36.00 and Citation no. 170913 (Docket no. 80-192-M) in the amount of $44.00. After reviewing the record, the statements of counsel, and considering the six criteria of section 110(i) of the Act, and further, based on my ruling that the mines involved herein are subject to the jurisdiction of the Act, I approve the motion vacating Citation no.

169476 and the proposed settlement of Citation no. 170993 and 170913 for $36.00 and $44.00 respectively.

CENT 79-300-M

The parties entered into a stipulation at the hearing regarding Citation no. 170405 which alleges a violation of 30 C.F.R. 56.9-22. Said standard provides that, "Berms or guards shall be provided on the outer bank of elevated roadways."

The parties agreed that there was no dispute regarding the facts surrounding the issuance of Citation no. 170405 but the respondent contested whether the standard, alleged to have been violated, applied in this instance. The parties stipulated to the facts and then argued the application of said facts to the law in their post-hearing briefs. A decision in this matter was also contingent upon my ruling on the jurisdictional issue.

Citation no. 170405 reads, in part, as follows: "The elevated ramp leading to the solid fuel loading hopper was not equipped with a berm or guard creating a hazard for the operator on the front end loader in case of running off the ramp."

The stipulated facts are as follows:

1. The length of the ramp involved was approximately thirty feet.

2. The height of the ramp at the highest point was approximately four feet.

3. The ramp was only used by a caterpillar front-end loader, or that was the only piece of equipment that used it.

4. The ramp in question was used for dumping solid fuel in the form of petroleum coke into a solid fuel loading hopper. (Tr. 8).

In the respondent's post-hearing brief, he argues that the only question presented here is whether a ramp constitutes an "elevated roadway" within the meaning of the standard cited by the Compliance Officer (p. 14). Although respondent later in his post-hearing brief raises the issue that evidence as to the lack of berms on the ramp was not included in the stipulation. I discard his argument, as the transcript of the hearings indicates the parties understood and agreed that the only issue to be decided was "(w)hether the ramp involved is an elevated roadway within the interpretation of the cited standard." (Tr. 8). This statement was made by the attorney for the respondent and he is bound by such a representation. If he wished to raise the issue of whether there were berms on the ramp the hearing would have been the proper time to do it.

The evidence as stipulated to shows the "ramp" involved herein was approximately thirty feet long, four feet high at the highest point and

used by a front-end loader to dump solid fuel into a loading hopper. (Tr. 8).

The standard, 30 C.F.R. 56.9-22, refers to "elevated roadways" requiring berms or guards. The definition of "roadways" in Webster's Third New International Dictionary is: "A strip of land through which a road is constructed and which is physically altered."

A "road" is defined as: "An open way or public passage for vehicles, persons and animals ... a private way."

In the reference to area travelled by the front end loader herein the parties, at the hearing and in their post-hearing briefs, referred to the structure as a "ramp." Webster's New Collegiate Dictionary (1979 Ed.) defines "ramp" as: "a sloping way: as a sloping low walk or roadway leading from one level to another." (emphasis added).

In view of the above and the fact that this "ramp" was used to drive a piece of machinery back and forth over the structure, I find that the so called "ramp" was a "roadway" as described in the standard.

The respondent argues that the standard requires only installation of a berm on "the outer bank of elevated roadways" (emphasis supplied). This question was considered by the Federal Mine Safety and Health Review Commission and they rejected this argument. The Review Commission stated that, "(i)f protection were extended only to those elevated roads with one open bank, while elevated roads with two open banks were not required to be bermed or guarded, miner safety would certainly be adversely affected." We agree with the Commission that the standard applies to all elevated banks. Secretary of Labor (MSHA) v. Cleveland Cliffs Iron Co., Inc. Docket nos. VINC 76-68-M and VINC 79-240-PM (February 1981).

I find from the stipulated facts that the respondent did violate the standard by failing to provide for berms on the roadway and based upon said stipulation approve a penalty of $52.00.

DENV 79-531-M

On May 16, 1978, federal mine inspector, Dan Haupt, issued Citation no. 169704, alleging a violation of mandatory safety standard 56.5-50(b).[1]/ The citation charged that, "The 988 caterpillar loader operator was exposed to 168 percent of the permissible limit for an eight hour exposure to noise. Feasible engineering or administrative controls were not being used to reduce this level in order to eliminate the need for hearing protection."

1/ 56.5-50 (b) When employees' exposure exceeds that listed in the above table, feasible administrative or engineering controls shall be utilized. If such controls fail to reduce exposure to within permissible levels, personal protection equipment shall be provided and used to reduce sound levels to within the levels of the table.

Respondent raises several legal and factual issues concerning the validity of the citation. It is not necessary to address all those arguments in order to determine whether or not the citation should be affirmed.

Mr. Haupt testified that he took a sound level reading of the loader, and since the reading was very high, he decided to sample the noise level of the operator. A DuPont D-100 dosimeter was used in conducting the eight hour test. (Tr. 34). The inspector stated that the readout was 168% of the allowable 100% level, or approximately 93.5 to 94 dBA. (Tr. 42).

On cross examination Mr. Haupt testified that he had received the dosimeter from the district office in Dallas. He was uncertain as to how long he had had it, although it had been at least one year. The dosimeter had been calibrated before it was sent to him and had not been calibrated since that time. (Tr. 50). Furthermore, he tesitifed that he did not know how long it had been since the calibration had been checked prior to the inspection. (Tr. 51). He stated, however, that the calibration was checked on a monthly basis. (Tr. 51 & 63).

In the case of Secretary of Labor v. Maudlin Construction Company CENT 80-114-M (December 18, 1980), I held that dosimeters must be calibrated immediately prior to testing, in order to assure accurate test results. The facts in that case and the one now under consideration are for all practical purposes identical. The burden of proving the accuracy of the test results is with the Petitioner. The record is void of any facts that would persuade me to depart from my previous position.

Therefore, Petitioner having failed to prove the accuracy of the test results, the citation is vacated and the case dismissed.

ORDER

CASE	CITATION NO.	FINAL DISPOSITION
CENT 79-59-M	169732	Vacated
CENT 79-211-M	169799	$ 8.00
	169800	$17.00
CENT 79-300-M	170405	$52.00
CENT 79-361-M	169476	Vacated
DENV 79-531-M	169704	Vacated
CENT 80-192-M	170913	$44.00
CENT 80-213-M	170993	$36.00

It is hereby ORDERED that Respondent pay the penalties totaling $157.00 within forty (40) days from the date of this decision.

Virgil E. Vail

Virgil E. Vail
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

333 W. COLFAX AVENUE, SUITE 400
DENVER, COLORADO 80204

JUN 30 1981

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	)	CIVIL PENALTY PROCEEDING
Petitioner,	)	DOCKET NO. WEST 79-124-M
	)	MSHA CASE NO. 05-00516-05010
	)	DOCKET NO. WEST 79-125-M
	)	MSHA CASE NO. 05-00516-05011
	)	DOCKET NO. WEST 79-126-M
	)	MSHA CASE NO. 05-00516-05012
v.	)	DOCKET NO. WEST 79-207-M
	)	MSHA CASE NO. 05-00516-05013
	)	DOCKET NO. WEST 79-310-M
	)	MSHA CASE NO. 05-00516-05014
	)	DOCKET NO. WEST 81-12-M
ASARCO, INCORPORATED,	)	MSHA CASE NO. 05-00516-05022
	)	DOCKET NO. WEST 81-13-M
Respondent.	)	MSHA CASE NO. 05-00516-05023
	)	
	)	MINE: Leadville Mine

Appearance:

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For the Respondent

Before: Judge John A. Carlson

DECISION

These cases involve the same parties and similar issues of fact and law. Accordingly, they are consolidated.

The Secretary of Labor has charged Asarco, Inc., with violations of several safety standards promulgated under the Federal Mine Safety and Health Act. 30 U.S.C. § 801 et seq. At a hearing held on May 20, 1981, the parties offered the following disposition of these cases.

WEST 79-124-M

The Secretary moved to withdraw citation nos. 333491, 333492 and 328533 and their proposed penalties. (Tr. 6). A written motion was submitted at the hearing. As reason therefor, petitioner stated that there was insufficient evidence to support these citations. (Tr. 6).

Pursuant to 29 C.F.R. 2700.11, the motion is granted. Citation nos. 333491, 333492 and 328533 and the corresponding proposed penalties are vacated.

As to the remaining citations, Asarco moved to withdraw its notice of contest. (Tr. 6). Pursuant to 29 C.F.R. 2700.11, the motion is granted. The following citations and their respective penalties are affirmed.

Citation No.	Penalty
328524	$180.00
328525	195.00
328526	275.00
328527	195.00
328530	180.00
333486	160.00
328532	345.00
328534	370.00
328536	195.00
333488	160.00
333489	225.00
333490	225.00
333493	180.00
333494	210.00
333495	210.00
	$3,305.00

WEST 79-125-M

The Secretary moved to withdraw citation nos. 333397, 333390 and their proposed penalties. (Tr. 8). A written motion was also submitted.

As reason therefor, petitioner stated that these citations had no precedential value and the Mine Safety and Health Administration (MSHA) inspector who issued them is no longer employed by the Agency. The inspector is the only individual who can testify in support of these citations (Tr. 8). In the written motion the Secretary stated that there was a lack of evidence to support these citations. Pursuant to 29 C.F.R. 2700.11, the motion is granted. Citation nos. 333397 and 333390 and their respective proposed penalty are vacated.

Respondent moved to withdraw its notice of contest to the remaining citations. Pursuant to 29 C.F.R. 2700.11, the motion is granted. (Tr. 9).

The following citations and the corresponding penalties are affirmed.

Citation No.	Penalty
333385	$ 170.00
333386	170.00
333387	122.00
333388	170.00
333389	170.00
333391	160.00
333392	160.00
333393	130.00
333394	240.00
333395	122.00
333396	150.00
333399	170.00
333400	90.00
333881	195.00
333883	90.00
333885	90.00
	$2,399.00

WEST 79-126

Asarco moved to withdraw its notice of contest to all of the citations at issue. (Tr. 10). Pursuant to 29 C.F.R. 2700.11, the motion is granted. The following citations and corresponding penalties are affirmed.

Citation No.	Penalty
333889	$ 98.00
333890	98.00
334435	150.00
334436	180.00
334438	225.00
334439	305.00
	$1,056.00

WEST 79-207

The Secretary moved to withdraw citation nos. 333882, 333884, 333887, 330411 and 334437 and their proposed penalties. (Tr. 9, 10). A written motion was also submitted.

As reason therefor, petitioner stated that as to the first three citations, the MSHA inspector who issued them is no longer employed by the Agency. The inspector is the only individual who can testify in support of these citations. (Tr. 9). The Secretary also stated at the hearing and in his motion that there is insufficient evidence to support the five citations. (Tr. 10).

Pursuant to 29 C.F.R. 2700.11, the motion is granted. Citation nos. 333882, 333884, 333887, 330411, 334437 and their respective penalty are vacated.

Asarco moved to withdraw its notice of contest to the remaining citations. (Tr. 11). Pursuant to 29 C.F.R. 2700.11, the motion is granted. The following citations and the corresponding penalties are affirmed.

Citation No.	Penalty
328535	$ 170.00
328537	130.00
333398	130.00
334440	180.00
330412	225.00
330413	210.00
330414	305.00
330416	210.00
334402	150.00
334403	210.00
	$1,920.00

WEST 79-310-M

Asarco moved to withdraw its notice of contest to citation no. 330415 which is the subject of this proceeding. (Tr. 12). Pursuant to 29 C.F.R. 2700.11, the motion is granted. Citation no. 330415 and the penalty of $180.00 are affirmed.

WEST 81-12-M

The Secretary moved to withdraw Citation nos. 566731, 566407, 566408, 567031 and 567033 (Tr. 12, 13). A written motion was also submitted.

In support thereof, the Secretary stated as to Citation no. 566731 that he had insufficient evidence. (Tr. 12). Concerning Citation nos. 566407, 566408 and 567031, the Secretary stated that Asarco had a program of regular inspections of the posts involved which may have revealed that some were loose, the condition cited by the inspector. Therefore, the circumstances may not have constituted a violation of the standard. (Tr. 13).

As to Citation no. 567033, petitioner stated that the blasting wire in question was properly supported, and therefore, no violation occurred. Respondent stated that proper shunting and equipment were used and there was no improper handling of the blasting box (Tr. 13). The Secretary agreed to these facts. (Tr. 15).

Pursuant to 29 C.F.R. 2700.11, the Secretary's motion is granted. The above citations and their respective penalties are vacated.

Asarco moved to withdraw its notice of contest to the remaining Citations. (Tr. 14). Pursuant to 29 C.F.R. 2700.11, the motion is granted. The following Citations and their respective penalties are affirmed.

Citation No.	Penalty
566404	$ 84.00
566405	60.00
566406	255.00
567026	34.00
567027	48.00
567028	78.00
567029	78.00
567030	240.00
567032	140.00
567034	180.00
566409	98.00
566410	84.00
567035	90.00
567036	60.00
567037	90.00
	44.00
	$1,663.00

WEST 81-13-M

The Secretary moved to withdraw Citation no. 566732 and the proposed penalty. (Tr. 15). A written motion was also submitted. In support thereof the Secretary stated that there was insufficient evidence to support the Citation. (Tr. 15).

Pursuant to 29 C.F.R. 2700.11, the motion is granted. Citation no. 566732 and the proposed penalty are vacated.

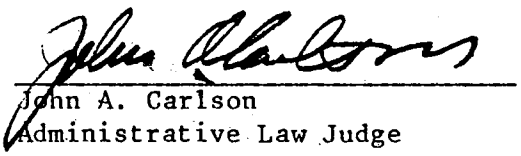
As to the remaining citations, Asarco moved to withdraw its notice of contest. (Tr. 16). Pursuant to 29 C.F.R. 2700.11, the motion is granted. The following citations and corresponding penalties are affirmed.

Citation No.	Penalty
567038	$114.00
567040	90.00
	$204.00

The Secretary stated that as to all citations he proposed to withdraw, in the above cases except those withdrawn because of the unavailability of the inspector, the petitioner and respondent reviewed all the evidence and the Secretary discussed the matters thoroughly with MSHA before submitting its motion. (Tr. 15, 16).

Respondent shall pay the penalty amount assessed for each docket number within 30 days of the date of this order.

SO ORDERED.



John A. Carlson
Administrative Law Judge

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