

June 1982

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JUNE

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

Secretary of Labor, MSHA v. Metric Constructors, Inc., Docket No. SE 80-31-DM.
(Judge Lasher, April 29, 1982)

Local Union 1889, District 17, UMWA v. Westmoreland Coal Company, Docket No.
WEVA 81-256-C. (Judge Steffey, Summary Decision, April 28, 1982)

Secretary of Labor, MSHA v. Consolidation Coal Company, Docket Nos. WEVA 80-116-R,
etc. (Judge Koutras, Decision on Remand, April 28, 1982)

Secretary of Labor, MSHA v. United States Steel Corporation, Docket Nos.
WEST 80-386-R, etc. (Judge Boltz, April 29, 1982)

Secretary of Labor, MSHA v. Cathedral Bluffs Shale Oil Company, Docket No.
WEST 81-186-M. (Judge Morris, May 12, 1982)

United Mine Workers of America v. Secretary of Labor, MSHA, Docket No.
LAKE 82-70-R. (Judge Merlin, Dismissal, May 21, 1982)

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

Carolina Stalite Company v. Secretary of Labor, MSHA, Docket Nos. SE 80-21-M,
etc. (Judge Lasher, May 14, 1982)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

June 1, 1982

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

v.

AMAX LEAD COMPANY OF MISSOURI

:
:
:
:
: Docket No. CENT 81-63-M
:
:

DECISION

This case is before the Commission on interlocutory review. The issue presented is whether the administrative law judge properly disapproved the parties' proposed settlement agreement on the ground that the settlement contained exculpatory language inconsistent with the general enforcement scheme of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.* (Supp. III 1979). For the reasons that follow, we hold that the judge was correct in rejecting the parties' proposed settlement.

On April 23, 1980, Amax Lead Company of Missouri was issued two citations alleging violations of 30 C.F.R. § 57.5-5, a mandatory health standard regulating miner exposure to airborne contaminants. Thereafter, on January 5, 1981, the Secretary filed a petition for assessment of a penalty with the Commission. On April 6, 1981, the Secretary and Amax filed with the judge a joint motion to approve settlement. 29 C.F.R. § 2700.30(a). 1/ In an order issued on April 9, 1981, the judge rejected the proposed settlement agreement because of language contained in the following paragraph:

The parties further agree that the elements of this settlement agreement apply only to the particular citations herein and do not prejudice the Secretary in making any future determinations with respect to [Amax'] operations. [Amax'] consent to enter into this settlement agreement does not constitute an admission of any violation of the Act or the regulations or standards promulgated thereunder. The parties further agree that any factual admissions made by [Amax] in this settlement agreement are for the purposes of settlement only and shall not be deemed to be an admission by [Amax] for the purposes of any subsequent proceeding brought in any judicial or administrative forum by the United States Government or by any other party.

1/ 29 C.F.R. § 2700.30(a) is based upon 30 U.S.C. § 820(k) (text quoted *infra*). Commission Rule 30(a) provides:

General. No proposed penalty that has been contested before the Commission shall be compromised, mitigated, or settled except with the approval of the Commission after agreement by all parties to the proceeding.

The judge found this paragraph objectionable because the exculpatory language made "uncertain the existence of the alleged violations." In his order denying approval of the settlement, the judge concluded that the exculpatory language impeded the Commission's ability to determine the operator's history of violations for purposes of assessing future penalties. 30 U.S.C. § 820(i). The judge also concluded that the exculpatory language could possibly preclude the Secretary in future enforcement actions from using the violations alleged here to establish a pattern of violations under sections 104(e) and 108(a)(2) of the Mine Act. The judge stated, however, that he would approve a settlement containing the following or similar exculpatory language:

Nothing contained herein shall be deemed an admission by [Amax] of the violation of the Federal Mine Safety and Health Act or any regulation or standard issued pursuant thereto in any action other than an action or proceeding under the Federal Mine Safety and Health Act.

Following the judge's rejection of the parties' proposed settlement, Amax submitted amendatory settlement language to the Secretary for approval. That proposed amendatory language changed the paragraph of the settlement agreement objected to by the judge to read as follows:

The parties further agree that the elements of this settlement agreement apply only to the particular citations herein and do not prejudice the Secretary in making any future determinations with respect to [Amax'] operations. [Amax'] consent to enter into this settlement agreement does not constitute an admission of any violation of the Act or the regulations or standards promulgated thereunder. Nothing contained herein shall be deemed an admission by [Amax] of a violation of the Federal Mine Safety and Health Act or any regulation or standard issued pursuant thereto, in any judicial or administrative forum, by the U.S. Government or by any other party, other than in an action or proceeding brought by the U.S. Government under the Federal Mine Safety and Health Act.

(Amendatory language emphasized.)

The Secretary rejected the proposed amendment.

Amax then submitted a second revised amendment to the Secretary for approval. As further amended, the paragraph of the settlement agreement objected to by the judge read:

The parties further agree that the elements of this settlement agreement apply only to the particular citations herein and do not prejudice the Secretary in making any future determinations with respect to [Amax'] operations. [Amax'] consent to enter into this settlement agreement does not constitute an admission of any violation of the Act or the regulations or standards promulgated thereunder. The parties

agree that these two citations cannot be used against [Amax] in any judicial or administrative forum, by the U.S. Government or by any other party, other than in an action or proceeding brought by the U.S. Government under the Federal Mine Safety and Health Act.

(Amendatory language emphasized.)

The Secretary rejected this proposed amendatory language also.

Thereafter, Amax filed a motion with the judge seeking the judge's reconsideration of his order disapproving the parties' original proposed settlement. Amax also alternatively sought either the judge's approval of the amendatory language that the Secretary had rejected and an order enforcing the settlement as amended, or the judge's certification to the Commission of his order denying the requested relief. Amax' motion was opposed by the Secretary. 2/ 2

The judge issued an order denying the motion insofar as it sought reconsideration of his order disapproving the settlement and an order enforcing the settlement in the proposed amended form. The judge, however, granted the motion in part and certified to the Commission for review his interlocutory order denying the relief requested by Amax. We subsequently granted the judge's certification of his interlocutory ruling, as well as a petition for interlocutory review filed by Amax. 29 C.F.R. § 2700.74(a).

Preliminary to our discussion of the judge's ruling, we emphasize the Commission's authority to review settlements entered into between the parties in contested penalty proceedings. The source of our authority is section 110(k) of the Mine Act. 30 U.S.C. § 820(k). Section 110(k) in part provides, "No proposed penalty which has been contested before the Commission under section 105(a) shall be compromised, mitigated or settled except with the approval of the Commission." Accordingly, it is clear that section 110(k) confers upon the Commission the statutory authority either to approve or to reject settlements in contested penalty proceedings. As we observed in Co-op Mining Company, 2 FMSHRC 3475, 3475-3476 (1980), "[S]ection 110(k) of the Mine Act places an affirmative duty upon us to oversee settlements."

With respect to the facts of this case, we conclude that the judge was correct in disapproving the parties' joint proposed settlement. We hold that parties are free to admit or to deny the fact of a violation in settlement agreements. Inherent in the concept of settlement is that the parties find and agree upon a mutually acceptable

2/ The Secretary altered his initial position and submitted, as he does on review, that the judge correctly rejected the parties' proposed settlement. The Secretary also submitted that he was not bound to the amendatory settlement language proposed by Amax because he did not agree to the changes.

position that resolves the dispute and that obviates the need for further proceedings. Whether that mutual position involves an admission or denial of a violation under the Mine Act will normally be left to the parties. The Commission's only task in the event of a proposed settlement is to determine whether approval of the parties' agreement is in the public interest. Here, however, the joint settlement of the parties contained exculpatory language that was inconsistent with the enforcement scheme of the Act.

The language proposed by the Secretary and Amax could have prevented any consideration of the alleged violations involved here in future proceedings arising under the Mine Act. Amax conceivably could attempt to use the settlement as a shield in future litigation to avoid certain key enforcement provisions contained in the Act. For example, if such language were approved, settled violations could not then serve to establish the operator's history of previous violations as contemplated by section 110(i) or as a basis for a pattern of violations under section 104(e) or 108(a)(2) of the Mine Act. ^{3/} Such exculpatory language as originally proposed by these parties could prevent some of the Mine Act's strongest compliance incentives from coming into operation. The result could well be a considerable weakening of the agency's enforcement capabilities and, as a result, could jeopardize the health and safety of miners. Although the effect of the parties' settlement could be determined in a future case in which that settlement is relied upon, we do not find that persuasive or a reason for approving the settlement at this time. To do so could allow the Secretary to disregard concessions he had previously agreed to which the Commission had approved. For these reasons, we affirm the judge's order rejecting the settlement submitted to him by the parties. ^{4/}

Amax additionally requests approval of one of the amended settlements proposed by the operator. We disagree with the judge's statement, in his order denying enforcement of the amended settlement, that "the retention of the sentence preceding the exculpatory phrase is inconsistent with the amendatory language" and that the phrase creates an ambiguity as to the validity of the involved citations. We do not see such an ambiguity. Although Amax refused to admit that a violation occurred, it has quite clearly conceded that, for purposes of any

^{3/} Also, were this a case in which the involved violations were the result of the operator's unwarrantable failure to comply with the cited standard, approval of the exculpatory language could prevent the settled violations from being used to establish an unwarrantable failure chain of violations under sections 104(d)(1) and 104(d)(2) of the Act.

^{4/} As did the judge, we find no difficulty with the exculpatory language as it relates to proceedings arising outside the scope of the Mine Act's coverage. In our view, the effect of such exculpatory language is properly left to the appropriate forum.

proceedings under the Mine Act, the violations were to be treated as if established. 5/ There is no ambiguity as to the future effect under the Mine Act to be given to the violations. The violations could serve as a basis for implementing the entire enforcement and compliance scheme of the Act noted above. Therefore, we believe that the proposed amendatory language is consistent with the enforcement scheme of the Mine Act. 6/

However, we cannot approve such an "amended settlement" because the parties have reached no mutual agreement concerning it. Because the Secretary did not agree to the amendatory language, he cannot be bound to the terms of the settlement as unilaterally amended by Amax. Thus, the only settlement agreement that was before the judge, and that is now before us on review, is the settlement submitted to the judge for approval on the parties' joint motion.

Finally, we note that approval of the amendatory settlement language is consistent with our decision in Co-op Mining Company, supra. There, in reversing a judge's order approving settlement on the ground that the parties' stipulation showed that the alleged violation did not occur, we stated:

5/ Amax' first proposed amendment in part read:

Nothing contained herein shall be deemed an admission by [Amax] of a violation of the Federal Mine Safety and Health Act or any regulation or standard issued pursuant thereto, in any judicial or administrative forum, by the U.S. Government or by any other party, other than in an action or proceeding brought by the U.S. Government under the Federal Mine Safety and Health Act.

(Emphasis added.)

Amax' second proposed amendment similarly in part read:

The parties agree that these two citations cannot be used against [Amax] in any judicial or administrative forum, by the U.S. Government or by any other party, other than in an action or proceeding brought by the U.S. Government under the Federal Mine Safety and Health Act.

(Emphasis added.)

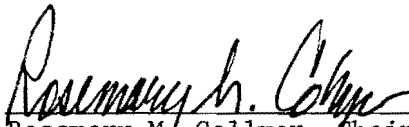
6/ The proposed amendatory language is also consistent with our authority under section 110(i) of the Mine Act "to assess all civil penalties" provided for in the Act. In that regard, section 110(a) of the Mine Act in part provides that "[t]he operator of a coal or other mine in which a violation occurs of a mandatory health or safety standard or who violates any other provision of this Act, shall be assessed a civil penalty by the Secretary." Because Amax would have been admitting a violation for purposes of Mine Act proceedings, had the amendatory settlement language been agreed to by both parties and approved by the judge, the assessment of a penalty would have been within the scope of our statutory authority despite Amax' general denial of a violation.

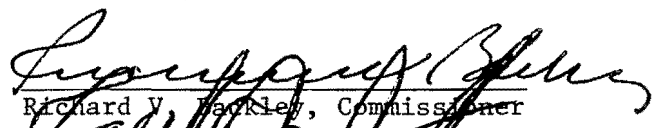
The legislative history of the [Mine Act] states, 'The purpose of a civil penalty is to induce those officials responsible for the operation of a mine to comply with the Act and its standards.' [Fn. omitted.] To assure this purpose is served section 110(k) of the Mine Act places an affirmative duty upon us to oversee settlements. Compliance with the Act and its standards is not fostered by payment of a civil penalty where the stipulated facts establish that no violation occurred.

2 FMSHRC at 3475-76.

As the above passage indicates, our holding in Co-op Mining Company was based upon our concern with promoting operator compliance with the Mine Act. Because the settlement agreement in that case established that the alleged violation did not take place, approving the settlement would not have promoted the operator's future compliance with the Act. In this case, however, with respect to the amendatory language under discussion we are not presented with a settlement that establishes that no violation occurred. Rather, a violation is established even though the operator makes no "admission" to that effect.

Accordingly, the judge's order denying approval of the settlement agreement proposed by both parties is affirmed and the case is remanded for further proceedings including, of course, the opportunity for both parties to proceed with an appropriate settlement in light of this decision.

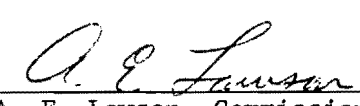

Rosemary M. Collyer, Chairman


Richard V. Backley, Commissioner


Frank E. Westra, Commissioner

Commissioner Lawson, concurring in part and dissenting in part:

Contrary to the majority, I agree with the judge and the Secretary that the amendatory language creates an ambiguity as to the validity of the involved citations. One cannot deny the existence of a violation and at the same time agree to the payment of a civil penalty therefor, since all penalties must be predicated upon the existence of a violation. Section 110(a); Co-op Mining Company, *supra*. However, since any further settlement which is proposed containing exculpatory language must be agreed to by all parties to the proceeding, the Secretary has the power to reject any such language which he believes to be contrary to the Act or the public interest.


A. E. Lawson, Commissioner

Distribution

Gerald T. Carmody, Esq.
Bryan, Cave, McPheeters & McRoberts
500 North Broadway
St. Louis, Missouri 63102

Debra Feuer, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd.
Arlington, Virginia 22203

Administrative Law Judge John Morris
FMSHRC
333 West Colfax Ave.
Denver, Colorado 80204

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

June 4, 1982

FREDERICK G. BRADLEY :
 :
v. : Docket No. WEVA 80-708-D
 :
BELVA COAL COMPANY :

DECISION

This discrimination case arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (Supp. III 1979). We are asked to decide whether a decision by a state agency denying a miner's claim of discrimination under a state mine safety law precludes litigation of his discrimination claim under the Mine Act, or of issues arising under the Mine Act claim. On the basis of the record in this case, we affirm the judge's determination that the state action did not preclude the miner's separate action under the Mine Act. We also affirm the judge's conclusion that the miner had been discriminatorily discharged in violation of the Mine Act, but remand for recomputation of the back pay award.

I.

Frederick Bradley was employed as a section foreman at Belva Coal Company's No. 5-B underground coal mine in Logan County, West Virginia. His duties included coal production and supervising the abatement of safety violations. He had a reputation for being a productive and safety-conscious miner. On a number of occasions prior to his discharge in June 1980, he complained about safety hazards in his section. Bradley made some of his complaints to his immediate supervisor, Mine Foreman Larry Davis.

On June 10, 1980, an MSHA inspector inspecting the 5-B mine issued three withdrawal orders and nine or ten citations for violations of mandatory safety standards. The cited conditions included excessive accumulations of combustible materials in the haulageways, inadequate short-circuit protection, incorrectly hung curtains, and damage to a trailing cable that had been driven over by mobile equipment. Bradley's crew spent a portion of its shift correcting the violations. The withdrawal orders were terminated the same day and most of the violations were abated.

On June 11, 1980, the following day, the same inspector returned to the mine and observed conditions similar to those that had led to the citations and orders on June 10. He issued more citations and three more withdrawal orders, one of which covered a continuous miner trailing cable that had been run over and damaged by mobile equipment. The cable was not energized at the time the order was issued, but was still connected to the continuous miner and to a power source. The inspector agreed that the damaged part of the cable could be replaced by a permanent splice. The cable was "red tagged" to indicate that it was not to be used, but was not "locked out"--that is, locks were not applied to the electrical equipment to prevent energization.

The miners immediately began abatement work. Mine Foreman Davis instructed Bradley to have cribs brought up for roof support in the face area, where the inspector had found inadequate support. Bradley directed Thomas Minton, the scoop operator, to take the scoop and get a load of cribs. Bradley and another miner began hanging the continuous miner's damaged trailing cable so that the scoop could pass. Foreman Davis told Bradley not to bother hanging the cable and directed him to let the scoop run over it. Davis testified that he perceived no danger in having the scoop run over the cable because the cable was not energized and its damaged section was to be cut away and replaced. Bradley refused to comply with Davis' order, and hung the cable while Minton drove by in the scoop. Bradley and Davis exchanged some words during this incident.

Shortly after the cable incident, Davis told Bradley to bring a tape measure up to the face where the cribs were being installed. Davis needed to measure a place in the work area that the inspector had indicated was too wide. Bradley was engaged in other compliance work and either directly or indirectly refused, complaining about being asked to do a number of tasks at the same time. In the words of the judge (3 FMSHRC at 437), "heated words were exchanged" between the two, and Davis informed Bradley that he was fired. Bradley testified that Davis told him the firing was for Bradley's "attitude." Tr. 35-6. Bradley left the mine, and later Davis filled out a personnel form indicating that he had fired Bradley for "unsatisfactory work," "disobedience," and "insubordination." 1/

On June 27, 1980, Bradley filed a complaint of unlawful discrimination with the West Virginia Coal Mine Safety Board of Appeals and alleged a

1/ At one point on June 11 after Bradley had arrived on the surface, Davis telephoned from below and offered to let Bradley return to work. Bradley responded that he had been fired, and would discuss the matter with Belva management. Tr. 39-40, 175. (Davis testified that he offered the job back solely out of sympathetic concern over the economic effects on Bradley of a termination. Tr. 175.) Bradley discussed his situation with Belva management officials, Conally Carleton and James Miller. Miller told Bradley to "leave the mountain." Tr. 40. Miller had been below with Davis earlier, and had apparently overheard the last argument between Davis and Bradley. Tr. 39. Neither Carlton nor Miller testified at the hearing.

violation of that State's Coal Mine Safety Law (W. Va. Code § 22-1-21). ^{2/} The state action was heard by a three-member Board on August 26, 1980. At the state hearing, Bradley was represented by counsel and had the opportunity to present witnesses and evidence and to cross-examine Belva's witnesses. A transcript of the testimony was prepared by a court reporter. On December 12, 1980, the State Board issued the following decision:

2/ W. Va. Code § 22-1-21 provides:

(a) No person shall discharge or in any other way discriminate against or cause to be discharged or discriminated against any miner or any authorized representative of miners by reason of the fact that he believes or knows that such miner or representative (1) has notified the director, his authorized representative, or an operator, directly or indirectly, of any alleged violation or danger, (2) has filed, instituted or caused to be filed or instituted any proceeding under this law, (3) has testified or is about to testify in any proceeding resulting from the administration or enforcement of the provisions of this law. No miner or representative shall be discharged or in any other way discriminated against or caused to be discriminated against because a miner or representative has done (1), (2) or (3) above.

(b) Any miner or a representative of miners who believes that he has been discharged or otherwise discriminated against, or any miner who has not been compensated by an operator for lost time due to the posting of a withdrawal order, may, within thirty days after such violation occurs, apply to the appeals board for a review of such alleged discharge, discrimination, or failure to compensate. A copy of the application shall be sent to such person who shall be the respondent. Upon receipt of such application, the appeals board shall cause such investigation to be made as it deems appropriate. Such investigation shall provide an opportunity for a public hearing at the request of any party to enable the parties to present information relating to such violation. The parties shall be given written notice of the time and place of the hearing at least five days prior to the hearing. Mailing of the notice of hearing to the charged party at his last address of record as reflected in the records of the department of mines shall be deemed adequate notice to the charged party. Such notice shall be by certified mail, return receipt requested. Any such hearing shall be of record. Upon receiving the report of such investigation, the board shall make findings of fact. If it finds that such violation did occur, it shall issue a decision within forty-five days, incorporating an order therein, requiring the person committing such violation to take such affirmative action to abate the violation as the board deems appropriate, including, but not limited to, the rehiring or reinstatement of the miner or representative of miners to his former position with back pay, and also compensation for the idle time as a result of a withdrawal order. If it finds that there was no such violation, it shall issue an order denying the application. Such order shall incorporate the board's findings therein. If the proceedings under this section relative to discharge are not completed within forty-five days of the date of discharge due to delay caused by the operator, the

(footnote continued)

A majority of the Board finds that the dispute between Mr. Bradley and his superior did not involve safety matters and at no time did the matter of the individual safety of the miner arise. In the opinion of a majority of the Board, Mr. Bradley was terminated for insubordination. The complaint of Frederick G. Bradley is, therefore, dismissed.

Pursuant to state law, Bradley filed an appeal of the Board's decision in the Circuit Court of Kanawha County, West Virginia, on January 15, 1981. The record does not reflect that a judicial decision has yet issued.

While the state action was pending before the State Board, Bradley filed a complaint of unlawful discrimination with the Commission on **September 23, 1980.** ^{3/} Shortly after issuance of the State Board decision, Belva filed with the Commission a "Motion to Dismiss or in the Alternative ... to Defer Proceedings." Belva contended that the State Board decision precluded litigation of Bradley's federal claim pursuant to section 105(c) of the Mine Act under the "doctrine of res judicata and collateral estoppel." Belva also argued that "principles of comity" required dismissal of the federal proceeding. In the alternative, Belva sought deferral of the federal proceedings until Bradley had exhausted state appeal procedures. In an unpublished order dated January 12, 1981 ("Unpub. Order"), the Commission's administrative law judge denied Belva's motion. The administrative law judge held the hearing January 28, 1981, and issued a decision on February 11, 1981, concluding that Bradley had suffered unlawful discrimination and ordering Belva to reinstate him with back pay. 3 FMSHRC 433 (1981). In a supplemental decision on April 10, 1981, the judge refined his initial analysis to reflect the Commission's discrimination tests in Pasula v. Consolidated Coal Co., 2 FMSHRC 2786 (1980), rev'd on evidentiary grounds, 663 F.2d 1211 (3d Cir. 1981), and in Robinette v. United Castle Coal Co., 3 FMSHRC 803 (1981), and awarded Bradley back pay. 3 FMSHRC 921 (1981).

footnote 2/ cont'd.

miner shall be automatically reinstated until the final determination. If such proceedings are not completed within forty-five days of the date of discharge due to delay caused by the board, then the board may, at its option, reinstate the miner until the final determination. If such proceedings are not completed within forty-five days of the date of discharge due to delay caused by the miner the board shall not reinstate the miner until the final determination.

(c) Whenever an order is issued under this section, at the request of the applicant, a sum equal to the aggregate amount of all costs and expenses including the attorney's fees as determined by the board to have been reasonably incurred by the applicant for, or in connection with, the institution and prosecution of such proceedings, shall be assessed against the person committing such violation.

^{3/} Bradley brought his discrimination complaint pursuant to section 105(c)(3) of the Mine Act because the Secretary had determined after investigation that a violation of section 105(c) had not occurred.

II.

We analyze first the question of whether the West Virginia Board decision precludes litigation of Bradley's Mine Act discrimination claim or of issues arising under that claim. Preclusion is an affirmative defense, and the party asserting it must prove all the elements necessary to establish it. For the reasons explained below, we conclude that preclusion is inapplicable because Belva has not shown the necessary identity either of claims or of issues.

As a general proposition, we recognize that preclusive effect as to either claims or issues may attach in appropriate cases to the decision of an administrative agency acting in a judicial capacity. See United States v. Utah Construction & Mining Co., 384 U.S. 394, 421-22 (1966). There are exceptions to the applicability of preclusion, as, for example, where "there is reason to doubt the quality, extensiveness, or fairness of procedures followed in prior litigation." Montana v. United States, 440 U.S. 147, 164 n. 11 (1979). Additionally, in cases of overlapping federal and state regulation, federal supremacy may, in effect, bar proceedings under a state law that conflicts with a federal statute. See, for example, Ray v. Atlantic Richfield Co., 435 U.S. 151, 157-58 (1978). As relevant here, however, unless the party asserting a preclusion defense can satisfy the "technical" requirements for raising it, we need not resolve such questions as the quality or fairness of procedures followed in the state litigation or whether the state law conflicts with the Mine Act. ^{4/} Belva has not made the necessary "technical" showing with regard to either type of preclusion. We turn initially to res judicata, or claim preclusion.

Res Judicata

We agree with the judge (Unpub. Order at 3) that since this case arises under a federal statute, the federal law of preclusion, rather than state law, must provide the criteria for analysis. See Maher v. City of New Orleans, 516 F.2d 1051, 1056 (5th Cir. 1975), cert. denied, 426 U.S. 905 (1976). Under the federal doctrine of res judicata, a judgment by a court of competent jurisdiction on the merits in a prior

^{4/} The Mine Act does not totally pre-empt state regulation of mine safety and health, but does "supersede" any conflicting state law. Thus, section 506(a) of the Mine Act provides:

No State law in effect on the date of enactment of this Act or which may become effective thereafter shall be superseded by any provision of this Act or order issued or any mandatory health or safety standard, except insofar as such State law is in conflict with this Act or with any order issued or any mandatory health or safety standard.

Without reaching the possible conflict issue, we note in passing that the provisions of West Virginia Code § 22-1-21 are not identical to the discrimination provisions of section 105(c) of the Mine Act (n. 6 below). We also note that Bradley argues that the West Virginia proceedings were unfair, a contention not necessary to resolve in view of our disposition of this case.

suit bars a second suit involving the same parties or their privies based on the same claim. Lawlor v. National Screen Service Corp., 349 U.S. 322, 326 (1955); Commissioner v. Sunnen, 333 U.S. 591, 597 (1948). Res judicata also forecloses litigation in a second action of grounds for, or defenses to, the first claim that were legally available to the parties, even if they were not actually litigated in the first action. Brown v. Felsen, 442 U.S. 127, 131 (1978). As indicated above, res judicata may be applied to the decisions of administrative agencies acting in a judicial capacity. In this case, the crucial res judicata question is whether Bradley's state and federal claims action are identical; of course, if they are not, res judicata is inapplicable. See Newport News Shipbuilding & Dry Dock v. Director, 583 F.2d 1273, 1278 (4th Cir. 1978), cert denied, 440 U.S. 915 (1979). 5/

The judge did not make an unequivocal finding on whether Bradley's state and federal claims are identical. He defined claim as the "operative facts out of which a grievance [arises]" (Unpub. Order at 2), and concluded that "the set of facts" in Bradley's complaint "amount[s] to a cause of action" under both West Virginia law and the Mine Act. Id. at 3. On the other hand, he also emphasized that "Bradley never had an opportunity to have his § 105(c) [Mine Act] claim litigated expressly" before the West Virginia Board. Id. In any event, the judge rejected Belva's preclusion defense largely on the statutory grounds that the Mine Act creates a wholly independent federal claim in discrimination cases. On appeal, Belva focuses on this latter aspect of the judge's decision; however, it must still demonstrate that it meets the technical requirements for asserting res judicata. In attempting to do that, Belva contends that Bradley's state and federal claims are the same. Petition for Discretionary Review at 9.

We first define a claim. The term has been variously described in the res judicata context, and the judge's focus on a common nucleus of operative fact is a formulation that has received judicial approval. We are not inclined, however, to examine claims in a legal vacuum. A suit is founded on a source of law protecting against a wrong, as well as on the events complained of. Distinct sources of law may create different rights, impose different duties, and interdict different wrongs, yet may all apply to the same set of facts. See, for example, Tipler v. E.I. duPont deNemours & Co., 443 F.2d 125, 126-130 (6th Cir. 1971) (an administrative decision resolving a complaint arising under the National Labor

5/ While this decision was being prepared, the Supreme Court held in Kremer v. Chemical Constr. Corp., ___ U.S. ___, No. 80-6045, May 17, 1982, that a federal district court handling a plaintiff's employment discrimination claim under Title VII of the Civil Rights Act of 1964 must give preclusive effect to a prior state court decision upholding a state's administrative agency's rejection of the plaintiff's same state employment discrimination claim. The Court overturned a line of cases which had held that preclusion did not apply on the theory that Title VII provided for an independent and cumulative federal remedy regardless of state proceedings. Without engaging in detailed analysis, the Court concluded in Kremer that the plaintiff's state and federal claims, or at least the key issues common to both suits, were identical. The Court did not modify the settled requirement that there must be an identity of claims or issues in order for preclusion to apply. Our decision in the present case rests on the conclusion that Belva has failed to show the kind of identity of claims or issues which the Court found present in Kremer.

Relations Act does not necessarily preclude a suit arising under Title VII even though the same basic facts were involved in both actions). Therefore, we favor and adopt the approach to defining claim for res judicata purposes that looks not only to the operative facts, but also to "the primary right and duty, and the delict or wrong ... in each action." Maier v. City of New Orleans, 516 F.2d at 1057, quoting Seaboard Coast Line R. Co. v. Gulf Oil Corp., 409 F.2d 879, 881 (5th Cir. 1969). See also Baltimore S.S. Co. v. Phillips, 274 U.S. 316, 321 (1927). This test is well suited to employment discrimination cases, which typically involve a complex mix of fact and law. In short, when comparing a discrimination action brought under another statute to one arising under the Mine Act, we will examine both the facts and the substantive legal protection afforded the miner under both statutes.

Applying the foregoing analysis, we conclude that the gravamen of Bradley's federal Mine Act claim is that he was discriminated against for engaging in a protected work refusal--namely, for refusing to obey an order that he reasonably believed would have created a safety hazard if obeyed. From all that appears on the record, the gravamen of his state claim is that he was discriminated against for making safety complaints. Furthermore, his federal claim necessarily includes the burdens of proof and discrimination analysis we announced in Pasula, 2 FMSHRC at 2796-2800, and Robinette, 3 FMSHRC at 817-18 & n. 20. There is nothing in the record showing any corresponding elements under West Virginia law. While Bradley's two claims are similar, we cannot conclude on this record either that they are the same or that Bradley could have brought an action under West Virginia law that would have been identical to his federal claim.

Turning to Bradley's federal claim, we have previously concluded that section 105(c)(1) of the Mine Act 6/ grants miners the general right to refuse work if the refusal is based on a good faith, reasonable belief that a hazardous condition exists. Pasula, 2 FMSHRC at 2789-94; Robinette, 3 FMSHRC at 807-17. Although section 105(c) does not expressly

6/ Section 105(c)(1) provides:

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

provide for the right to refuse work, the legislative history unambiguously shows that Congress intended section 105 to embrace this right. See Pasula, 2 FMSHRC at 2791-93. The judge's decision--when read in light of our views on the meaning of a claim--makes clear that the essence of Bradley's federal claim is that he was fired for refusing the order to allow the scoop to run over the damaged trailing cable. 3 FMSHRC at 922. The judge also analyzed Bradley's claim solely under the Pasula-Robinette tests for examining an alleged discriminatory action. Id.

In contrast, section 22-1-21(a) of the West Virginia Code (n. 2 above), under which Bradley brought his state action, provides in relevant part that "No person shall discharge ... any miner ... by reason of the fact that he believes or knows that such miner ... has notified ... an operator, directly or indirectly, of any alleged violations or danger" It is not clear from the face of this provision whether the state law would treat Bradley's refusal to obey an order as a protected "notification to an operator of a danger." Belva has not demonstrated in any event that West Virginia law confers a general right to refuse work. (Belva has presented us with no other substantive provisions of the state law.) Other than the West Virginia decision in issue, Belva has presented no West Virginia Board decisions (which, from all that appears, are not officially published) nor any other court decision interpreting the West Virginia act. Nor has Belva presented any legislative history to explain the meaning of section 22-1-21(a). Similarly, Belva has not shown that West Virginia law affords a miner in a discrimination case the burden of proof structure and analytical framework used to resolve a Mine Act discrimination case.

Nor does the State Board decision in Bradley's case shed any light on the foregoing matters. The decision is extremely brief and conclusory. The decision contains no findings of fact, credibility resolutions, or explanations for the conclusions reached. No mention is made that the matter of a right to refuse work was litigated or considered by the Board, or that such a right in general exists under state law. ^{7/} The decision is also silent on the burdens of proof and discrimination analysis employed to reach the result obtained.

^{7/} At the West Virginia state hearing, Bradley's counsel seem to have argued that Bradley was fired because of prior safety complaints or because he was being held responsible for the mine section being shut down by the MSHA inspector. Transcript of West Virginia hearing, at 83, 87. We note in passing that the transcript of the state proceeding is frequently garbled and does not provide significant assistance in determining the basis of Bradley's state claim.

While we agree with the judge that the facts involved in Bradley's two actions are substantially the same, we cannot find on this record that the two claims are identical. Of course, we are not attempting to essay any kind of a conclusive construction on the meaning of West Virginia law. We have addressed only the facial, apparent meaning of section 22-1-21(a), and we have a record virtually devoid of proof on identity of claims. Our holding therefore means only that Belva has failed to show that Bradley's state "safety complaint" claim involved, or could have involved, the same kind of work refusal claim litigated before us. Cf. Tipler v. E.I. duPont deNemours & Co., 443 F.2d at 126-130. ^{8/} We would, of course, take steps to prevent any duplicating recoveries under state law and this Act, and, as we hold below, we will also allow the decisions of state tribunals to be admitted into evidence in our proceedings. This latter device may supply in appropriate cases approximately the same relief the preclusion doctrines are designed to afford.

Collateral Estoppel

Our conclusion on res judicata does not dictate a particular conclusion with regard to collateral estoppel, or issue preclusion. Unlike res judicata, the doctrine of collateral estoppel applies where the second suit is based upon a different claim. Under collateral estoppel, the judgment in the earlier suit precludes re-litigation of issues actually litigated and necessary to the outcome of the earlier suit. See, for example, Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326 & n. 5 (1979). We need not decide whether collateral estoppel applies to our proceedings because Belva has not satisfied the requirements for raising this defense.

Indeed, Belva has not advanced any separate collateral estoppel arguments, but instead has vaguely lumped this doctrine with its discussion of res judicata. The basic premise for applying collateral estoppel is a showing that the precise issues involved in the second action were actually and necessarily decided in the first. Belva has not made this showing. The West Virginia Board decision is so brief and conclusory that we can not use it as a basis for collateral estoppel. In the third section of this decision, we discuss the issues relevant to this federal action, and nothing in this very limited record persuades us that they were considered or decided in the West Virginia proceeding.

^{8/} At oral argument before us, reference was made to section 22-2-26(g) of the West Virginia Act, which provides for a limited right to refuse work under unsupported roof, and we agree with the position taken by Belva's counsel that that section appears to have no relevance to the facts of this case.

In addition to its preclusion arguments, Belva also raises a comity argument, which appears to be based on the Supreme Court's discussion of "Our Federalism" in Younger v. Harris, 401 U.S. 37 (1971). The analogy to Younger is strained. In that case, the only issue was the proper policy to be followed by a federal court when requested to enjoin on constitutional grounds a criminal prosecution pending in a state court. Even if this comity notion possessed some analogous appeal, which we do not decide, it should not apply where, as here, a miner is pursuing different claims.

We conclude our preclusion discussion by addressing the judge's admission into evidence of the state decision, a procedural action to which Belva does not object. Allowing the introduction of such decisions may satisfy many of the goals that the preclusion and comity doctrines were created to serve: lessening the burdens of multiple litigation, fostering harmonious federal-state development of similar bodies of law, and avoiding unnecessary relitigation of points already thoroughly tried and analyzed by a competent body. We approve the introduction of such decisions into evidence, but also agree with the judge that no weight should have been accorded to this particular decision. 3 FMSHRC at 921. As we have already indicated, the state opinion is on its face devoid of any meaningful analysis. We therefore concur with the judge that "[w]ithout knowing how the Board evaluated the testimony or applied the law, ... any deference to its opinion would be unjustifiable." Id.

We now turn to the discrimination issues.

III.

We first analyze whether Bradley established a prima facie case under our Pasula/Robinette tests, and then examine the question of whether Belva nevertheless successfully defended against it.

The standards by which we analyze a section 105 prima facie case were set out in Pasula and Robinette. In Pasula, we developed a two-part test:

... 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.

Pasula, 2 FMSHRC at 2799. As we have already indicated, these two decisions also recognize a right to refuse work so long as the refusal is predicated on a good faith, reasonable belief in a hazardous condition.

The judge appropriately applied the Robinette test to Bradley's refusal to let the scoop run over the cable (see discussion of facts above). Although Belva disagrees with the specific manner in which the Robinette test was applied to the facts in this case, it does not argue that the wrong test was applied. Belva contends that Bradley did not have a reasonable belief that the cable was hazardous. Belva relies on "objective" evidence and points to testimony that the cable was severed and de-energized.

In Robinette, however, we adopted a test less rigid than "objective proof":

Miners should be able to respond quickly to reasonably perceived threats, and mining conditions may not permit painstaking validation of what appears to be a danger. For all these reasons, a "reasonable belief" rule is preferable to an "objective proof" approach under the Act.

Robinette, 3 FMSHRC at 812. Here, the judge had before him ample evidence that Bradley may have had a reasonable fear of shock or electrocution. The miners in Bradley's crew testified that they did not know the cable had been de-energized--the cable was still hooked up to the continuous miner, it had not been locked out, and the opposite end of the cable was located three breaks away. Tr. 89. Moreover, Bradley testified that only a week before the argument he had been badly shocked by a cable under similar conditions. Tr. 235. Belva also points to testimony that electricians had already cut the cable for splicing. Tr. 221-22. However, this testimony does not make clear whether the cutting occurred before or after the scoop incident, and there is no evidence Bradley knew or was told of the cutting when he refused to let the scoop run over the damaged cable. Under these circumstances, we affirm the judge's conclusion that Bradley's refusal to allow the scoop to drive over the cable was a protected refusal to perform work that the miner reasonably regarded as dangerous. The next question is whether Bradley's discharge was motivated "in any part" by this protected work refusal.

The judge inferred improper motivation largely because of the operator's knowledge of Bradley's protected activity and the timing of the protected activity and the sanction. In Chacon v. Phelps Dodge Corp., 3 FMSHRC 2508 (1981), pet. for rev. filed, No. 81-2300, D.C. Cir., December 11, 1981, the majority and the dissent agreed that circumstantial evidence of this type and reasonable inferences drawn therefrom may be used to sustain a prima facie case of discrimination. 3 FMSHRC at 2510-12.

It is undisputed that Bradley had made a number of safety complaints to the operator, and had made some to his supervisor, Mine Foreman Davis. Davis was the supervisor who fired Bradley and whose order Bradley refused to obey. Thus, Davis was well aware of Bradley's protected activity in general and his work refusal in particular. With respect to coincidental timing, the judge found that "[s]ince the discharge followed so closely on [Bradley's] refusal to allow the scoop to run over the cable, such refusal unquestionably figured in the decision to discharge." 3 FMSHRC at 922. We agree.

The evidence of knowledge and timing present in this case constitutes substantial evidence that Bradley's discharge was at least partially motivated by his protected refusal to work. The more difficult issue is whether Belva successfully defended against Bradley's prima facie case. In Pasula, we spelled out the availability of defense to a successfully established prima facie case:

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. ... 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.

2 FMSHRC at 2799-800. (Emphasis in original.)

Belva's final defense is that, even assuming a prima facie case was established, Bradley was also fired for his insubordinate refusal to get a tape measure (see discussion of facts above) and that he would have been fired anyway for that act alone.

Since it was the refusal to get the tape measure that immediately preceded Davis' decision to fire, we agree with the judge's apparent finding that this act also figured into the discharge. 3 FMSHRC at 922. Thus, this is a "mixed motivation" discrimination case and the ultimate issue is whether Belva would have fired Bradley for the tape incident alone. The judge found that Belva would not have discharged him over that matter and, while Belva poses some reasonable arguments, the judge's rejection of them is supported by substantial evidence. We do not, however, approve of some of his reasoning.

As we emphasized in Pasula, and recently re-emphasized in Chacon, the operator must prove that it would have disciplined the miner anyway for the unprotected activity alone. Ordinarily, an operator can attempt to demonstrate this by showing, for example, past discipline consistent with that meted out to the alleged discriminatee, the miner's unsatisfactory past work record, prior warnings to the miner, or personnel rules or practices forbidding the conduct in question. Our function is not to pass on the wisdom or fairness of such asserted business justifications, but rather only to determine whether they are credible and, if so, whether they would have motivated the particular operator as claimed.

Here, Belva points only to Davis' testimony that the tape line argument was the "only reason" for Bradley's discharge. Tr. 173-4. Belva did not attempt to show that Bradley was an unsatisfactory miner or had engaged in insubordinate acts previously. Neither did Belva attempt to show that it had rules or practices dealing with this kind of problem, or had previously fired anyone for similar incidents. We also note that Davis' testimony appears somewhat less than forthright. He did not initially mention the cable incident, and conceded that he had argued with Bradley over that point only upon questioning by the judge. Tr. 189.

Under the foregoing circumstances, we agree with the judge that Belva's defense is not persuasive. Since the incidents involving the cable and tape line happened virtually on top of one another, the judge's inference that Bradley would not have been discharged over the tape measure dispute alone is supportable. At the same time, we are troubled by some of the language used by the judge. He suggests, for example, that discharge over such an incident would be a "totally disproportionate sanction." 3 FMSHRC at 922. Such personal views are irrelevant; the proper point is that Belva failed to show that it would have fired him over that incident alone. In a different case, an operator might be able to show that such an incident alone supported termination and a judge's and our views on the wisdom or justice of such an action would be beside the point.

In sum, we affirm the judge's discrimination findings on the bases discussed above.

IV.

In his supplemental decision, the judge awarded Bradley \$22,249.76 in back pay with interest, as well as costs and attorney's fees. 3 FMSHRC at 923. 9/ Because it appears that the judge erred in computing the back pay due, we remand this aspect of the judge's decision for expeditious recomputation of back pay.

In Northern Coal Co., 4 FMSHRC 126, 144 (1982), we followed precedent established under the National Labor Relations Act and defined back pay as the sum equal to the gross pay the miner would have earned but for the discrimination, less his "actual net interim earnings." "Net interim earnings" is an accepted term of art which does not refer to net earnings in the usual sense (gross pay minus various withholdings). Rather, the term describes the employee's gross interim earnings less those expenses, if any, incurred in seeking and holding the interim employment--expenses that the employee would not have incurred had he not suffered the discrimination. 10/ To remove any possible confusion, we will henceforth

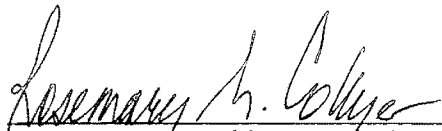
9/ While this case was pending before us, Belva agreed to pay the sums owed into an escrow account.

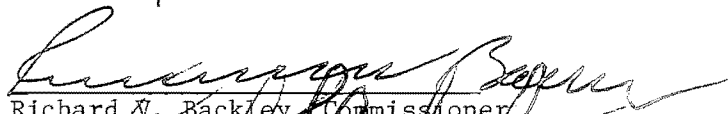
10/ Under the National Labor Relations Act, such deductible expenses include transportation costs incurred in finding and maintaining interim employment; employment agency fees; room and board where the employee works away from home; moving expenses, etc.

refer to the term as "actual interim earnings." See OCAW v. NLRB, 547 F.2d 598, 602 (D.C. Cir. 1976), cert. denied, 429 U.S. 1078 (1977).

The judge subtracted Bradley's net earnings (that is, take home pay) from the gross pay he would have earned from Belva. We remand so that the judge can deduct the actual interim earnings as described above. We note that in the proceedings before the judge, Bradley asserted he had not actually received a portion of the sum owed him by one interim employer. The judge should ascertain on remand whether any more of this sum has been recovered by Bradley since the judge's initial decision. The judge may take such additional evidence and argument as necessary. 11/

For the foregoing reasons, we remand for expeditious recalculation of back pay, and affirm the rest of the judge's decision on the bases discussed above.


Rosemary M. Collyer, Chairman


Richard V. Backley, Commissioner


Frank V. Jestrab, Commissioner


A. E. Lawson, Commissioner

11/ We also affirm the judge's handling of Belva's allegations of unemployment compensation "fraud" by Bradley. Whatever the truth may be regarding these allegations, the matter is before the state, not the Commission.

Distribution

Daniel F. Hedges, Esq.
Appalachian Research & Defense Fund, Inc.
1116-B Kanawha Blvd., East
Charleston, West Virginia 25301

Ricklin Brown, Esq.
Bowles, McDavid, Graff & Love
1200 Commerce Square
P.O. Box 1386
Charleston, West Virginia 25325

Linda Leasure, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd.
Arlington, Virginia 22203

Administrative Law Judge James A. Broderick
FMSHRC
5203 Leesburg Pike, 10th Floor
Falls Church, Virginia 22041

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

June 21, 1982

SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA) :
 : Docket No. SE 81-25-M
v. :
 :
 :
PUERTO RICAN CEMENT COMPANY, INC. :

DECISION

This penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (Supp. III 1979), and involves the interpretation of 30 C.F.R. § 56.4-27. That regulation states:

Mandatory. Whenever self-propelled mobile equipment is used, such equipment shall be provided with a suitable fire extinguisher readily accessible to the equipment operator.

For the reasons that follow, we affirm the judge's conclusion that Puerto Rican Cement Company violated this standard.

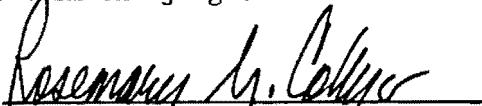
The relevant facts were stipulated by the parties. The company was cited for failing to have a fire extinguisher attached to a forklift at its Ponce cement plant. The forklift was consistently used in the same manner. At the beginning of the shift it was taken from its storage location in the machine shop building and was driven about 780 feet to the cement warehouse, where it was operated for the remainder of the shift. At the end of the shift, it was driven back along the same route to the machine shop building. Inside the warehouse, four fire extinguishers were located at intervals of approximately 100 feet. Outside the warehouse and along the 780 foot route traveled by the forklift, six fire extinguishers were attached to the outside of buildings at intervals of approximately 130 feet. Despite the presence of the extinguishers in the building where the forklift was used and along the route it traveled, the judge upheld the citation. He construed the standard to require a fire extinguisher to be affixed to the mobile equipment itself when the equipment is in use. We agree.

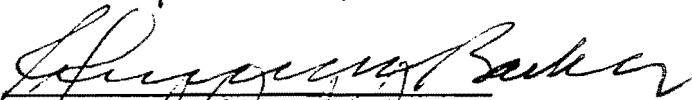
In concluding that the judge properly interpreted the standard, we have looked at the words of the standard, reviewed its purpose, and finally we have noted the practical problems inherent in the interpretations advocated by the parties.

We first consider the language and syntax of the standard. The words of a standard when not technical in nature are to be given their commonly understood meaning. 1/ The standard requires that mobile equipment "shall be provided with a suitable fire extinguisher." The generally understood relevant meaning of "provided" is to be furnished or equipped with. 2/ In the standard, the term "mobile equipment" takes the action of the verb "provided." Thus, the plain meaning of the regulation is that the machinery itself be equipped with an extinguisher. 3/

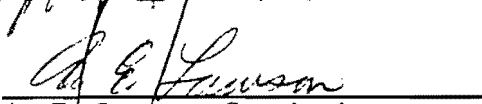
Furthermore, it seems self evident that requiring extinguishers to be affixed to self-propelled mobile equipment will augment the safety of the equipment operator. In the event of a fire, the time required to activate an extinguisher attached to the equipment would be significantly less than if the extinguisher were located elsewhere. Inordinate delay could result in determining which extinguisher location were nearest to the equipment and securing the extinguisher. Moreover, extinguishers might not readily or otherwise be accessible if the mobile equipment left the area where the extinguishers were located.

For the foregoing reasons, we affirm the judge.


Rosemary M. Collyer, Chairman


Richard V. Backley, Commissioner


Frank R. Jestrab, Commissioner


A. E. Lawson, Commissioner

1/ See 2A Sutherland, Statutes and Statutory Construction § 47.28 at 141 (4th ed. 1973). Sutherland further notes that "dictionary definitions ... report common usage...." Id. § 46.02 at 52.

2/ Webster's Third New International Dictionary (1971) p. 1827.

3/ The company's argument that an extinguisher need not be attached to the forklift so long as there are fire extinguishers readily accessible to the equipment operator is obviously at odds with the syntax of the standard.

Distribution

Enrique Bray, Esq.
Lafitte & Dominguez
P.O. Box 1732
Hato Rey, Puerto Rico 00919

Michael McCord, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd.
Arlington, Virginia 22203

Chief Administrative Law Judge Paul Merlin
Fed. Mine Safety & Health Rev. Commission
1730 K Street, N.W.
Washington, D.C. 20006

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

v.

CENTRAL OHIO COAL COMPANY

June 21, 1982

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Docket No. LAKE 81-78

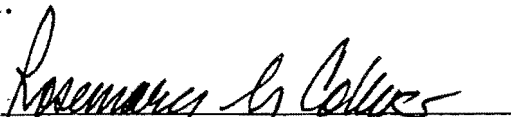
DECISION

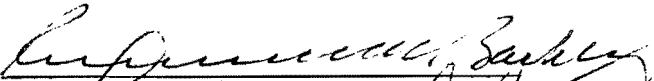
This case arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (Supp. III 1979). Pursuant to 30 U.S.C. § 823(d)(2)(B) the Commission sua sponte directed review of the following issue:


Did the judge err in approving this settlement agreement containing an exculpatory clause stating "nothing contained herein shall be deemed an admission by Respondent of a violation of the Federal Mine Safety and Health [Act] of 1977 or any regulation or standard issued thereto."

In our recent decision in Amax Lead Company of Missouri, 4 FMSHRC ____ (Docket No. CENT 81-63-M, June 1, 1982), we held that "parties are free to admit or deny the fact of violation in settlement agreements." Slip op. at 3. This holding controls the present case. We emphasize that, in light of the voluntary nature of the settlement process, settlements cannot be conditioned upon an admission of violation.

Accordingly, the decision of the administrative law judge approving the settlement at issue is affirmed.


Rosemary M. Collyer, Chairman

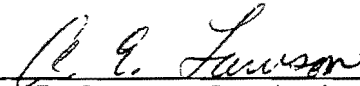

Richard V. Backley, Commissioner


Frank F. Gestrah, Commissioner

A. E. Lawson, Commissioner, dissenting:

Commissioner Lawson, dissenting:

As stated in my dissent in Amax Lead Company of Missouri, supra, one cannot deny the existence of a violation and at the same time agree to the payment of a civil penalty therefor, since all penalties must be predicated upon the existence of a violation. Section 110(a); Co-op Mining Company, 2 FMSHRC 3475 (1980). Accordingly, I would reverse the decision of the administrative law judge approving the settlement in this matter.



A. E. Lawson, Commissioner

Distribution

Debra L. Feuer, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd.
Arlington, Virginia 22203

David M. Cohen, Esq.
American Electric Power Service Corporation
P.O. Box 700
Lancaster, Ohio 43130

Administrative Law Judge Decisions

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JUN 3 - 1982

COWIN AND COMPANY, INC.,	:	Contest of Citation
Contestant	:	
	:	Docket No. CENT 81-250-RM
v.	:	Citation No. 173604; 6/8/81
	:	
SECRETARY OF LABOR,	:	Shafter Mine
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	
Respondent	:	

DECISION

Appearances: W. S. Pritchard, Jr., Attorney, Birmingham, Alabama for the contestant; George D. Palmer, Associate Regional Solicitor, U.S. Department of Labor, Birmingham, Alabama, for the respondent.

Before: Judge Koutras

Statement of the Case

This proceeding concerns a contest filed by the contestant Cowin and Company (hereinafter Cowin) contesting the legality and propriety of a citation issued by an MSHA Inspector pursuant to section 104(d)(1) of the Federal Mine Safety and Health Act of 1977, of June 8, 1981. At the time the citation was issued, Cowin was an independent contractor doing mine development work for Gold Fields (a corporation) at the Shafter Silver Mine located near Shafter, Persidio County, Texas. The work being performed by Cowin was a mucking operation at the bottom of a drilled shaft that was drilled to a seven foot diameter and to a depth of approximately 938 feet below the surface. The citation cites an alleged violation of mandatory safety standard 30 CFR 57.19-71, and it was alleged that during the mucking operation employees of Cowin were required to stand in a bucket of loose, slippery, muddy "muck" while being hauled approximately seventy feet up the shaft in question.

This case was originally assigned to former Commission Judge Forrest E. Stewart, and upon his subsequent transfer from employment with the Commission, the case was reassigned to me for further adjudication. It should be noted that subsequent to the docketing of this contest with the Commission, both Cowin and MSHA filed a number of motions, responses, and further pleadings dealing with certain procedural matters concerning

the timely filing of the contest, and a subsequent civil penalty assessment for the violation. Included in these filings are motions to dismiss, amended motions, and responses filed by the parties. A summary of these procedural motions, including my rulings, are set out in a three page order issued by me on January 28, 1982. The Order is a matter of record and its contents need not be repeated herein.

The parties were served with a notice of hearing issued by me on February 26, 1982, advising them that a hearing would be conducted on the contest on May 5, 1982, in Birmingham, Alabama, the hearing location requested by the contestant. A subsequent amended notice of hearing which I issued on April 13, 1982, advised the parties of the specific hearing location in Birmingham for the scheduled hearing.

At the hearing, the parties tendered a motion for approval of a proposed settlement agreement for the citation in question. The proposal includes an agreement by the contestant for a payment of a \$210 civil penalty for the citation, a reduction of \$90 from the initial assessment of \$300. The proposed reduction was based on the assertion that the gravity of the conditions cited was substantially less than initially assigned in the initial assessment made by MSHA's Office of Assessments.

Discussion

The section 104(d)(1) citation issued in this case, No. 173604, cites a violation of mandatory safety standard 30 CFR 57.19-71, and the conditions or practices cited by the inspector states as follows:

Employees were required to stand on loose muddy muck and ride the muck bucket approximately 70 ft. to a landing. The muck being muddy caused the footing to be unstable. This company had previously been cited for men riding in the muck bucket with materials and the supervision was told along with employees that they were not to ride the buckets with materials or muck. Safety belts were used by the employees, attached to the rope hook.


The proposed settlement motion was rejected and denied. The parties were reminded of my previous rulings in this matter, and in particular the notice of hearing issued on February 26, 1982, stating that the issues to be tried in this contest were the fact of violation, whether it was "unwarrantable", and whether the conditions cited constituted a "significant and substantial" violation of the cited mandatory safety standard.

The parties were also reminded of my previous ruling of January 28, 1982, that since no civil penalty proceeding was filed by the Secretary in this matter, the normal civil penalty matters set out in section 110(i) of the Act are not in issue in these proceedings. Further, since the Secretary filed no proposal for assessment of a civil penalty in this

case, it seems clear to me that I have no jurisdiction to consider the proposed settlement proposal tendered by the parties with respect to MSHA's initial penalty assessment. Accordingly, the proposed settlement for the penalty assessment, which apparently has never been contested by Cowin and for which no penalty proposal has been filed with the Commission, was rejected and denied. In view of my ruling in this regard, Contestant Cowin renewed its motion to withdraw its contest in this case and it was granted from the bench.

ORDER

Contestant's motion to withdraw its notice of contest filed in this case is GRANTED, and this case is DISMISSED.


George A. Koutras
Administrative Law Judge

Distribution:

George D. Palmer, Associate Regional Solicitor, U.S. Department of Labor,
Office of the Solicitor, 1929 South Ninth Ave., Birmingham, AL 35256
(Certified Mail)

W. S. Pritchard, Jr., Esq., Pritchard, McCall, Jones, Spencer & O'Kelly,
901 Brown-Marx Bldg., 2000 First Avenue North, Birmingham, AL 35203
(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 3 - 1982

SECRETARY OF LABOR,	:	Civil Penalty Proceedings
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. SE 82-12
Petitioner	:	A.O. No. 01-00758-03104 V
	:	
v.	:	Mine No. 3
	:	
JIM WALTER RESOURCES, INC.,	:	Docket No. SE 82-13
Respondent	:	A.O. No. 01-01247-03081 V
	:	
	:	Mine No. 4

DECISIONS

Appearances: George D. Palmer, Associate Regional Solicitor, U.S. Department of Labor, Birmingham, Alabama, for the petitioner; Robert W. Pollard, Attorney, Birmingham, Alabama, and Gerald Reynolds, Attorney, Tampa, Florida, for the respondent.

Before: Judge Koutras

Statement of the Case

These proceedings concern proposals for assessment of civil penalties filed by the petitioner against the respondent on November 27, 1981, pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a), proposing civil penalty assessments for two alleged violations of mandatory safety standards 30 CFR 75.316 and 75.1704.

Respondent filed timely answers to the petitioner's proposals, denied that the alleged violations occurred, interposed several legal and factual defenses, and requested a hearing. Subsequently, by notice of hearing issued by me on February 26, 1982, the parties were advised that both cases would be heard in Birmingham, Alabama, on May 4, 1982. By an amended notice issued on April 13, 1982, the parties were informed of the specific hearing location in Birmingham.

Although all of the notices of hearings issued in these proceedings directed the parties to inform me of any proposed settlements arrived at by the parties in writing no later than ten calendar days in advance of the commencement of the hearings, petitioner's counsel, the Associate Regional Solicitor, telephoned my office on Friday, April 29, 1982, to advise me that the parties had reached a settlement in both dockets.

I directed both parties by telephone calls placed on the afternoon of April 29, 1982, to appear at the hearings as previously noted. I further advised them that since the initial notices of hearings were served on the parties more than sixty (60) days in advance of the scheduled hearing date, petitioner's "last-minute" telephone call was totally unacceptable, untimely, and contrary to the specific prehearing notice requirement that settlement proposals be communicated to me in writing no more than 10 days in advance of the scheduled hearings.

Issues

The principal issues presented in this proceeding are (1) whether respondent has violated the provisions of the Act and implementing regulation as alleged in the proposal for assessment of a civil penalty filed in this proceeding, and, if so, (2) the appropriate civil penalty that should be assessed against the respondent for the alleged 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 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.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, P.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, 20 CFR 27001.1 et seq.

Discussion

Docket No. SE 82-12

The hearing in this case was convened pursuant to notice and the parties appeared. Petitioner's counsel presented a motion for approval of a proposed settlement for the citation in question. In addition to the matters presented in the written motion, the parties were afforded a full opportunity to present oral arguments in support of the proposed settlement disposition of the case. In addition, statements were presented by MSHA Inspector L. G. Ingram who issued citation, as well as by the representative of miners (Bobby Johnson) who acted as the union walkaround representative at the time of the issuance of the citation.

The 104(d)(1) Citation No. 0756313, June 19, 1981, cites 30 CFR 75.316, and states as follows:

The ventilation plan was not being followed in 2 entry on section 10 in that the roof bolting was being performed with out the temporary wing curtain for blowing was not installed and the curtain line was approximately 17 feet from the deepest penetration. Wing curtain is required when bolting.

Fact of violation

The respondent does not dispute the fact that the conditions or practices cited by the inspector constituted a violation of cited mandatory safety standard 30 CFR 75.316. The failure to insure the installation of the missing temporary wing ventilation curtain was a violation of the operator's approved ventilation plan, and the respondent conceded that this was in fact the case. The citation is AFFIRMED.

Good faith compliance

The record reflects that the cited condition was immediately abated within minutes after the missing wing curtain was installed, and the inspector confirmed this fact.

Size of business and effect of civil penalty on respondent's ability to remain in business.

The parties were in agreement that the No. 3 mine employed approximately 679 miners at the time the citation issued, and that the mine's annual coal production was approximately 500,000 to 800,000 tons. Respondent does not contend that the penalty assessed in this case will adversely affect its ability to remain in business.

History of prior of violations

Petitioner asserted that the respondent has a moderate history of prior assessed violations, but failed to produce a computer print-out detailing this history. However, the inspector stated that while he had cited previous ventilation violations at the mine, he could not recall any prior citations for failure to install temporary ventilation wing curtains.

Gravity

The information presented during the hearing reflects that the No. 3 mine is a gassy mine and that methane is ever-present and liberally emitted. In addition, the inspector indicated that methane ignitions

had occurred in the mine, particularly during the mining cycle. In this case, the citation issued during the roof bolting operation, and the parties agreed that methane ignitions during roof bolting were very rare.

Although the inspector did not know how long the missing curtain condition existed, he agreed that he observed the condition at the beginning of the shift and that it was not likely that it existed for any long duration. Since the missing curtain affected the ventilation system, the inspector believed that the condition cited was serious, and the parties agreed that this was the case.

Negligence

In its motion in support of a reduction of the proposed civil penalty assessment of \$2,750, petitioner stated that the initial assessment made by MSHA's Office of Assessments was \$750, and the rationale for this assessment amount is detailed in the "Narrative Findings for a Special Assessment", which is a part of the record in this case. Subsequently, when the respondent requested a conference, MSHA's assessment representative at that conference increased the penalty assessment to \$2,750 and he did so on the basis of information that two higher level mine management personnel were at the location of the missing ventilation curtain and had been there for several minutes before the mine foreman and inspector arrived on the scene. The conference officer obviously concluded that the condition cited was known by top-level management for an extended period of time, and their failure to correct the condition before the inspector arrived at the scene resulted in a drastic increase in the original assessment.

Petitioner asserted that the mine foreman arrived at the scene a minute or so in advance of the inspector but that the other top-level management personnel were directing their attention to an operating problem and were not aware of the wing curtain violation. Thus, petitioner maintained that the possible actual knowledge of the missing wing curtain by respondent's management was not present for more than about a minute before the inspector arrived and required correction.

Respondent's counsel agreed with the arguments advanced by the petitioner with regard to the circumstances noted and insisted that such management knowledge, if any, was at most momentary and was not sufficient for the foreman to react before the inspector arrived on the scene. Given the full facts and circumstances now known to the parties, respondent maintained the increased assessment was totally arbitrary.

In view of the foregoing arguments, the parties proposed a civil penalty assessment in the amount of \$350 as an agreed upon settlement disposition for the citation.

Conclusion

After careful consideration of the arguments and information presented by the parties in support of their proposed settlement disposition of this matter, and particularly with regard to the question of negligence, I agree that a reduction in the increased assessment is justified. However, in view of the seriousness of the citation, the proposed penalty of \$350 is rejected. Further, taking into account the almost instant abatement of the condition, the parties were advised that I would approve a civil penalty assessment of \$500 for the citation, and they agreed. Accordingly, pursuant to Commission Rule 30, 29 CFR 2700.30, I conclude and find a settlement in the amount of \$500 is reasonable and in the public interest, and the motion is GRANTED, and the settlement is APPROVED.

ORDER

Respondent IS ORDERED to pay a civil penalty assessment in the amount of \$500 in satisfaction of Citation No. 0756313, June 19, 1981, 30 CFR 75.316, within thirty (30) days of the date of this decision and order, and upon receipt of payment by the petitioner, this matter is DISMISSED.

Docket No. SE 82-13

The 104(d)(1) Citation No. 0752151, July 28, 1981, cites 30 CFR 75.1704, and states as follows:

The operator did not maintain the designated 10-men service cage in the prod. shaft properly -- in that such device (Nord Berg Hoist/Lakeshore Designed) would not run. Further, the approved back-up North coal skip did not have the embark-debark means available for persons. The main service hoisting facility (Nord-berg/Lakeshore cage) was unavailable as material (flat car on trip) had cage tied up.

In this case the parties proposed a settlement in the amount of \$295 for the citation in question. The initial "special assessment" made in this case was in the amount of \$2,000. The assessment was further reduced to \$1250 at the assessment conference stage, and this is the amount which was proposed by the petitioner at the time that it filed its civil penalty proposal on November 27, 1981.

In support of the proposed settlement reduction for the citation in question the petitioner asserted that the facts as now known to him justifies a reduction. Counsel stated that the citation was issued after the inspector found that the 10-man service cage located in the production shaft would not operate on a manual mode, but could be used automatically. Since this equipment was a designated main escapeway, the inspector was not concerned that it was not totally operable, but that two additional hoists designated as back-ups could not be used.


In preparation for the hearing, petitioner's counsel asserted that additional facts were brought to his attention concerning the two back-up escape hoists. The service hoist had a piece of equipment stored on it which could have been easily removed to facilitate the transportation of men in an emergency. The second hoist referred to by the inspector in his citation could have been used since a portable walk board for use by the men to enter the hoist was located some distance from this hoist. Thus, petitioner argues that the original assessment was made on the assumption that the two additional hoists were totally unserviceable for use in an emergency, which was in fact not the case.

In addition to the foregoing arguments, petitioner's counsel stated that he has consulted with the assessment officer who "specially assessed" the citation in question and that he was now in agreement that the regular civil penalty process is appropriate in this case. As a matter of fact, counsel asserted that the agreed upon proposed settlement amount of \$295 was computed by the same MSHA assessment officer after all of the facts were disclosed and brought to his attention. Counsel also brought to my attention that he discussed the proposed settlement with the inspector who issued the citation, and that the inspector was unavailable for the hearing because he was on sick leave and has filed for disability retirement.

Petitioner's motion also includes information concerning the other statutory criteria found in section 110(i) of the Act. Coupled with the facts and circumstances surrounding the issuance of the citation, the subsequent assessments, and the arguments presented in support of the proposed settlement, I conclude and find that the settlement proposal is reasonable and in the public interest. Accordingly, pursuant to 29 CFR 2700.30, the motion to approve settlement is GRANTED, and the settlement is APPROVED.

ORDER

Respondent IS ORDERED to pay a civil penalty assessment in the amount of \$295 in satisfaction of Citation No. 0752151, July 28, 1981, 30 CFR 75.1704, within thirty (30) days of the date of this decision and order, and upon receipt of payment by the petitioner, this matter is DISMISSED.



George A. Koutras
Administrative Law Judge

Distribution:

George D. Palmer, Esq., U.S. Department of Labor, Office of the Solicitor,
1929 South Ninth Ave., Birmingham, AL 35256 (Certified Mail)

Robert W. Pollard, Esq., Jim Walter Resources, Inc., Box C-79, Birmingham,
AL 35283 (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 3 - 1982

SECRETARY OF LABOR,	:	Complaint of Discrimination
MINE SAFETY AND HEALTH	:	and Discharge
ADMINISTRATION (MSHA),	:	
ON BEHALF OF JOHN COOLEY,	:	Docket No. LAKE 81-163-DM
Complainant	:	
	:	Michigan Division Quarry
v.	:	
	:	
OTTAWA SILICA COMPANY,	:	
Respondent	:	

DECISION

Appearances: David F. Wightman, Attorney, U.S. Department of Labor,
Detroit, Michigan, for the complainant; Frank X. Fortescue,
Esquire, Southfield, Michigan, for the respondent.

Before: Judge Koutras

Statement of the Proceedings

This is a discrimination proceeding filed by complainant MSHA on June 19, 1981, pursuant to section 105(c) of the Federal Mine Safety and Health Act of 1977, on behalf of complainant John Cooley for an alleged act of discrimination which purportedly occurred on May 6, 1980, */ when Mr. Cooley was discharged from his employment with the respondent for refusing to follow an order from his supervisor to perform a work task which Mr. Cooley contends was unsafe. Mr. Cooley alleged that he had previously been suspended on May 2, 1980, for refusing to follow the same order, and he contends that the discharge which followed violated certain rights protected under the Act.

Respondent filed a timely response to the complaint, and pursuant to notice served on the parties a hearing was held in Detroit, Michigan, during the term December 15-16, 1981, and the parties appeared and participated fully therein. Post-hearing arguments and proposed findings and conclusions were filed by the parties, and they have been considered by me in the course of this decision.

*/ MSHA's assertion in its original complaint that Mr. Cooley was discharged in 1981 appears to be a typographical error. The record in this case reflects 1980 as the correct year.

Issues presented

The principal issue presented for adjudication in this case is whether Mr. Cooley's suspension and subsequent discharge from his employment with the respondent was in fact prompted by protected activity under the Act. Specifically, the crux of the case is whether Mr. Cooley's refusal to perform or carry out an order by his supervisor which he (Cooley) believed constituted an unsafe work assignment insulated him from suspension or discharge, and whether his abusive language warranted his discharge.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 301 et seq.
2. Sections 105(c)(1), (2) and (3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815(c)(1), (2) and (3).
3. Commission Rules, 29 CFR 2700.1, et seq.

Stipulations

The parties stipulated that respondent operates a mine within the meaning of the Act, that the Secretary has jurisdiction to initiate the complaint, and that I have jurisdiction to hear and decide the matter (Tr. 8-9).

Testimony and evidence adduced by the complainant

John W. Cooley, testified that he is married, completed his education through the ninth grade, and was employed by the respondent for 18 months prior to his discharge on May 6, 1980. He described his job classification as "laborer" and stated that this included such "typical" duties as draining out elevator pits, shoveling and loading sand, hosing down the floor, driving "bobcats", and other general cleaning duties. He confirmed that prior to May 1980, he had been disciplined to carry out orders from his supervisor and received a penalty of a week off without pay and placed on probation for 12 months. He had two weeks left on his probation time at the time of his discharge (Tr. 10-12).

Mr. Cooley confirmed that David Chalmers was his supervisory foreman for at least six months prior to his discharge in May 1980, and he believed Mr. Chalmers had a great disregard for his own safety and cited several examples of this (Tr. 13). Mr. Cooley confirmed that he bid on a dryer operator's job in April 1980, and prior to this time he worked on the No. 6 Dryer as a laborer, and his duties included lighting the dryer pilot light with a cigarette lighter or a burning piece of paper. He stated that he performed these duties for some eight months prior to his discharge and that he lit the pilot in the fashion described at least thirty times, and "sometimes two three times a day" depending on when it would go out (Tr. 14-15).

Mr. Cooley identified exhibit G-9 as a sketch or drawing of the No. 6 Dryer which he made and he explained the location of the parts and described how he would light the dryer pilot light. He stated that the dryer was located on a second floor landing some eight feet off the ground, and he described where he would stand to light the pilot. He indicated that he would have to stand on his toes and lean over a railing to reach the pilot light location, and this position would expose him to a possible fall head first over the railing and through an opening to the steel floor below on the next landing. He also expressed concern over a "flash flame" from the pilot and indicated that "this is where I singed hair right off my knuckle" (Tr. 16-19). He also alluded to the fact that the floor where he had to stand to light the pilot was often slippery due to the presence of a thin coating of silica dust (Tr. 20).

Mr. Cooley stated that he was instructed in the method for lighting the dryer pilot with a burning piece of paper or cigarette lighter by Mr. Chalmers and by Bill Nivitt, who was his supervisor prior to Mr. Chalmers. He had observed Mr. Chalmers lighting the dryer with a piece of burning paper and when he advised Mr. Chalmers that he believed it was unsafe to light it in that fashion Mr. Chalmers inserted a wad of paper towels in the pilot and lit it. However, the paper did not catch fire and Mr. Chalmers tried it a second time, and after a while it caught and ignited the pilot (Tr. 21-22). Mr. Cooley expressed his concern over the lighting of the dryer pilot with a burning piece of paper as follows (Tr. 23-24):

Q. Okay. What was your opinion of lighting the No. 6 pilot with a burning piece of paper?

A. Dangerous, stupid.

Q. Why do you say that?

A. I respect things. I just, I have great respect for things that are supposed to be. They got the correct way to do it. I will put it like that. They got a correct way to do it. If they don't do it that way, don't do it.

Q. What was the correct way to do it?

A. That panel board. Like I say, you got three lights on there. This is time. You got your cleaning to make sure you clear it. All right. When that light goes off, the other one comes on and you push that, sending -- that sends the gas.

When that light goes off, the other one comes on, you ignite it. That is the correct procedure.

Q. That wasn't working?

A. No. And this made me believe that if this wasn't working, it is sheer madness not to think that these others could malfunction. And what if they would? You would get a double dose of gas in there. Well, hey, you know.

Q. What were you afraid of?

A. Getting burned up or blowed up or great danger. That is what I was afraid of.

Q. Were you afraid of falling?

A. I stated before, I was. Falling through this opening hole in the floor, yes.

Q. You stated before that you bid on the drier operator job, why did you bid on the drier operator job if you thought it was unsafe?

A. Well, to get out of lighting the pilot.

Q. And?

A. It is much -- how should I say? -- strenuous, and it is a little more pay. But the main reason was to get out of lighting the pilot.

Q. Why did you think you would get out of lighting the pilot with a burning piece of paper if you bid on the drier operator job?

A. That was before when I was on labor. Marvin Phelps and Smock, they would call Chalmers and he would order me to go back there and light that while they worked the control panel.

Q. So the drier operator didn't usually have to hold the burning piece of paper?

A. No, no. I seen the times, one time during that week, me and Marv, I beat him to the control panel and he didn't say nothing but he looked like he was kind of disappointed about it, you know, about lighting, reaching over.

Mr. Cooley stated that after he received his bid as a dryer operator he received five days of training from Marvin Phelps, an experienced dryer operator who lit the No. 6 dryer with a piece of paper. During his training, Mr. Cooley stated that he lit it in that fashion on two occasions, but that he complained to Mr. Phelps as well as Mr. Chalmers that this was unsafe. He stated that he had also complained to Ken Smock and Sam Watson, two other dryer operators about lighting the pilot with burning paper (Tr. 27).

Mr. Cooley testified that when he went to work on Friday, May 2, 1980, the last day of his training week, the dryer was down due to a problem so he proceeded to the lunch room. His foreman told him to get to work so he proceeded to the dryer area where he performed some clean up work and lubricated the trunion. Foreman Chalmers then called Mr. Phelps with instructions to "fire up" the dryer and when he (Cooley) leaned over the railing to light it the hair was singed off the knuckles of his right hand and that point he decided that he would never again light the dryer with burning paper. After making his mind up to voluntarily withdraw his bid as a dryer operator and informed Mr. Chalmers that he was "pulling his bid" as a dryer operator and informed him that he wanted to go back to his laborer's job, and Mr. Chalmers said "ok". Later that day Mr. Chalmers called him and ordered him to light the No. 6 pilot, and Mr. Cooley refused. Mr. Chalmers reminded him that he was on probation, Mr. Cooley cussed and stated to Mr. Chalmers that he would not light it and Mr. Chalmers asked him to come to his office. When he arrived at the office, a union steward and safety man was present and Mr. Chalmers indicated that he wanted Mr. Cooley "off the property". Mr. Cooley thereupon was sent home, indicated to his union steward that he wished to file a grievance and left (Tr. 27-32). He has not been employed since that time (Tr. 32).

On cross-examination, Mr. Cooley testified that he has worked in other plant open areas other than the No. 6 Dryer, some of which he considered to be unsafe. He indicated that he did complain about one of these areas, but claimed that he was "in the dark" about any company safety meetings (Tr. 35). He believed the entire plant was unsafe and stated that he had called unsafe conditions to the attention of his supervisors in the past (Tr. 37-39). Mr. Cooley conceded that he complained to Mr. Chalmers about "doing laborer's work", such as cleaning around the dryer, when he was in fact a dryer operator trainee. He explained that he did not like working around a steel floor which had water on it and which was near the electrical dryer control panel. After he burned his knuckles, he decided he had had enough and he withdrew his bid, and he conceded that the pilot incident wasn't the controlling factor (Tr. 45-46). He also stated that he knew he was on probation and felt that management wanted to get rid of him. He also conceded cursing and using profane language when speaking with Mr. Chalmers, but insisted that he was not cussing "toward him" but was upset over the fact that he had withdrawn his bid (Tr. 46). He also conceded that rather than going to Mr. Chalmers' office he told him that he would meet him in the lunch room, and when he finally met him there Mr. Chalmers told him he wanted him off the property and that he was fired for refusing a direct order (Tr. 47-48). The following Monday, he met with Mr. Bentgen and his union stewards, and he confirmed that he filed a grievance and identified a copy of the grievance which a union steward prepared for him (Exhibit R-1; Tr. 47-53).

Mr. Cooley confirmed his prior probation before his discharge on May 2, 1980, and he also confirmed that he had other differences with company management while on probation and that he was suspended for a week (Tr. 57-48). He explained that he was suspended for not following a supervisor's order and that he realizes that he could have been fired for that incident (Tr. 60).

Mr. Cooley testified that prior to May 2, 1980, he complained several times about the burner problem, and these complaints included complaints to his supervisors as well as to other dryer operators and a union safety man (Tr. 61-62). In response to further questions, he confirmed that he singed his knuckles on May 2, 1980, when he attempted to light the pilot with burning paper, and that coupled with the other problems he decided to bid off the job as dryer operator (Tr. 64). He stated that while he can read pretty well, he has difficulty in writing and has difficulty in expressing himself in writing (Tr. 65).

Hilliard W. Bentgen testified that he has worked at the quarry in question since February 1980, and is now the Industrial Relations Safety Director. He has served in this position since June 1980, and prior to that time was the Industrial Relations Supervisor. In 1980 the quarry had 90 employees and comprised 650 acres. The quarry mines and processes silica sand. He stated that in 1980 dryer operators were required to make written inspection reports, and he identified exhibit G-8 as the reports for March and April 1980 (Tr. 82-85).

Mr. Bentgen explained the procedures for terminating employees and he indicated that Mr. Cooley's probationary period was fixed by an Industrial Board decision. He identified exhibit G-1 as a letter sent to Mr. Cooley terminating his employment, and he confirmed that the letter stated that he was discharged for (1) refusal to follow the instructions of his foreman; (2) use of foul and abusive language in dealing with his foreman; and (3) his prior disciplinary record with the company. He also explained that the failure by Mr. Cooley to follow his foreman's orders was in connection with his refusal to assist in the lighting of the No. 6 dryer, and the charge of using foul and abusive language resulted from foreman Chalmers telling him (Bentgen) that Mr. Cooley used "violent profanity" against him over the telephone. Mr. Bentgen related the circumstances surrounding the discharge as follows (Tr. 88-89):

Q. What was the subject of the conversation in which John Cooley used this profanity?

A. Mr. Chalmers related to me that he had instructed Mr. Cooley to go assist in lighting the drier and this resulted in the profanity from Mr. Cooley.

Q. How was he instructed to do it?

A. I couldn't give his exact words. Mr. Chalmers informed me that he had merely instructed John Cooley to assist in lighting the drier.

Q. How was he supposed to assist?

A. I assume he was going to hold the burning piece of paper or whatever, to light the drier.

Q. All right; thank you.

To your knowledge has anyone ever been fired for using profanity by Ottawa Silica Company?

A. Not to my knowledge, no.

Q. Had John Cooley used foul and abusive language without refusing to help Marvin Phelps light the No. 6 drier, with a burning piece of paper, would you have fired him?

A. In view of Mr. Cooley's prior record, yes, I would have.

Q. In view of his prior disciplinary record?

A. Yes, for insubordination. We tend to review the job refusal and insubordination, both as insubordination acts.

Q. You mean both the job refusal and the profanity?

A. Yes. It could be a job refusal one time, the profanity the next time.

Q. This was the same conversation, wasn't it?

A. I am talking about his prior instances.

Q. Prior instances?

A. Yes.

Mr. Bentgen testified that he investigated the circumstances surrounding the discharge of Mr. Cooley and that this consisted of conversations with the foreman and Mr. Cooley in the presence of union stewards. Based on the information which came out he made the decision to discharge Mr. Cooley. He believed that he asked Mr. Chalmers whether he told Mr. Cooley to light the pilot with a burning piece of paper, but could not recall what Mr. Chalmers' response was. He confirmed that Mr. Chalmers did not deny that he asked Mr. Cooley to light the pilot in that fashion and assumes that he did instruct him to do it in that fashion (Tr. 90). Later, during Mr. Cooley's grievance, Mr. Chalmers stated to him that Mr. Cooley had never informed him about any problems with the No. 6 dryer (Tr. 90). Mr. Bentgen confirmed that his investigation revealed that foremen had instructed people to assist the dryer operator in lighting the dryer with a burning piece of paper, and that the foremen themselves had done it this way. This occurred on five or six occasions during a two or three month period prior to Mr. Cooley's discharge. After MSHA's investigation of Mr. Cooley's complaint, he issued a memorandum instructing personnel not to light the dryer with a burning piece of paper and he did so because "it was unclear in my mind whether it was unsafe or not. I did not have the information or know-how" (Tr. 92). Mr. Bentgen conceded that he had his doubts and questioned the method of lighting the dryer with a burning piece of paper, and he was aware that employees were lighting it in that fashion (Tr. 92-92).

Mr. Bentgen admitted stating to MSHA investigator Russell Spencer that the lighting of the No. 6 dryer pilot with a burning piece of paper was an "unaccepted practice". He did not mean this to be interpreted as "unsafe", but rather, meant that there is a "preferable practice" or "better way" (Tr. 94). He explained his answer further as follows (Tr. 95-96):

Q. You said it was an unaccepted practice by the management of Ottawa Silica? It was an unaccepted practice?

A. Yes, for several reasons, not necessarily the safety factor. One, it took two men to light a drier that should have only taken one.

Q. Right.

A. I think in my mind at the time that that figured in there as important as any other reason.

Q. That's right, because that might show it wasn't designed that way; it might be unsafe. Is that correct?

A. That wasn't in my mind at the time.

Q. That's right. You were saying it was an unaccepted practice, is that right?

A. It is unacceptable.

Q. Why wouldn't you accept it?

A. For the reasons that I have stated.

Q. That it would take two people to do the job of one, it wasn't designed that way?

A. No, it wasn't.

JUDGE KOUTRAS: The other answer is: after Mr. Anderson from MSHA called him, he got the word MSHA didn't look too kindly with lighting the paper, he is liable to get a citation so he issued a memorandum setting the company policy; isn't that possible?

THE WITNESS: Yes.

JUDGE KOUTRAS: Isn't that right?

THE WITNESS: Like I say, I didn't know whether it was safe or not. I wasn't worried about the citation.

Mr. Bentgen stated that he was familiar with the burner on the No. 6 dryer and that the pilot is designed to be lit by one employee standing at a control panel about ten feet away, and he identified exhibit G-2 as a

copy of the drier start-up procedures which were a part of the dryer operator's job description and they were in effect in May 1980 (Tr. 97). He confirmed that the procedures do not reflect that more than one person is required to light the dryer, and he also confirmed that the company did not contact the dryer manufacturer before ordering employees to ignite it by means other than the automatic controls (Tr. 98). He confirmed that the dryer procedures contain a notation indicating that the dryer purge was "jumped out", and he has not been able to contact any knowledgeable electricians or maintenance people to confirm that the purge was in fact bypassed as noted on the instructions (Tr. 99). He explained that the notation was typed on the exhibit in May 1978 by an individual who is no longer with the company, and Mr. Bentgen believed that the No. 6 purge had been repaired, and he could find "nothing to make me believe otherwise" (Tr. 99-100).

Mr. Bentgen identified a copy of a portion of the manufacturer's booklet concerning a flame scan burner dealing with the operation of the dryer burner, and he explained the purge system (Tr. 102-104). With regard to any purge bypass, Mr. Bentgen stated that his repair records do not reflect when the purge was repaired (Tr. 106), and he confirmed that Mr. Chalmers was fired by plant manager Terry Fester for poor work performance as a supervisor and for reporting to work on two occasions while intoxicated (Tr. 107). Mr. Bentgen identified exhibit G-4 as the labor-management agreement in effect between the union and the company in May 1980. The agreement became effective November 10, 1979, and it expires November 12, 1982 (Tr. 111).

On cross-examination, Mr. Bentgen stated that the No. 6 dryer had problems in that a deflector which was installed to concentrate the gas flame toward the igniter spark plug was removed, and fabricated replacements were constantly being removed by persons unknown (Tr. 115). To his knowledge, there have been no accidents connected with the No. 6 Dryer (Tr. 116). Mr. Bentgen stated that when he met with Mr. Cooley on Monday, May 5, 1980, Mr. Cooley said he refused to do the job for safety reasons and denied using foul and abusive language against Mr. Chalmers. He also stated that Mr. Cooley had never spoken to him about safety complaints, and that Mr. Chalmers had no authority to fire Mr. Cooley. He also indicated that when Mr. Cooley returned to the plant on Monday, May 5, he came in late in the afternoon as if he were going to work (Tr. 118), and he made the decision to fire him for the reasons stated earlier (Tr. 119). He explained the grievance procedures and detailed the three-steps involved in Mr. Cooley's grievance, and confirmed that it was rejected and his discharge was sustained (Tr. 119-124).

In response to bench questions, Mr. Bentgen stated that as of 1978, the notation on the dryer procedures reflecting that the purge was "jumped out" would indicate to him that this was probably true (Tr. 127), and that for the period 1978 and 1979 it was probably "jumped out". However, he indicated that an electrician who had been at the plant for three years had no knowledge that the purge was "jumped out" (Tr. 128). With regard to the meeting with Mr. Cooley and the union stewards, Mr. Bentgen stated that the chief steward told him he would not want to light the dryer with burning paper because he was not a dryer operator and knew nothing about it. Mr. Bentgen stated "I was of the same opinion at the time because

I didn't know anything about it", but he went on to state that he relied on the foreman's statement that he believed it was safe and "he was the expert at the time I consulted with him" (Tr. 135-136).

Responding to a question as to whether he believed the lighting of the dryer with a burning piece of paper was safe, Mr. Bentgen replied as follows (Tr. 136-137):

Q. Do you still feel that the lighting of this burner by manual means is safe?

A. There is a preferable method. I don't think it is unsafe. I have done it myself and I would do it again.

Mr. Fortescue mentioned the fact that applying the flame to the gas, if there is a drier operator there and I am holding the burning piece of paper, he turns on the gas, there is a flame about that long comes out of the pipe, directed in that direction and I am standing here holding the paper with the flame; unless he were to turn the gas on, and holding it there for some period of time, which you cannot do, because there is a safety device for that, if there is no flame in the gas to the pilot. If this were to happen and then I were to light the flame, then there might be an explosion. But I can't imagine the safety devices that are put in there, the scanning devices on the pilot would cut the light off to the pilot, if there is no flame. The fact that the operator is standing there to turn the gas on while I have the flame to the pilot, I can't imagine any unsafety.

Q. What if the purge is inoperative, if the purge is not operating?

A. If the purge is not operating, I don't think there would be any chance of explosion from the pilot light. There may be a chance of explosion after the main burner is kicked on, if I were to walk away from the pilot. But I don't think I am qualified to answer that.

With regard to the company's motivation in discharging Mr. Cooley, Mr. Bentgen indicated as follows (Tr. 141-142):

Q. Of course. This whole case is what the state of mind of Mr. Cooley was at the time of his alleged refusal to perform the task of lighting that pilot light by whatever means. You seem to take, some people seem to take the position here it was an act of insubordination, compounded by the fact that he had similar problems of an insubordinate nature in the past.

A. We believed at the time of discharge, and we still have the belief, that Mr. Cooley's job refusal was not, in fact, based upon a safety allegation, due to the fact that he did not mention anything about safety to the supervisor until after he was being sent home. That was our case through the Industrial Board; that was our belief at the time and still is.

Q. But you heard his testimony that he had complained to two or three drier operators before. In fact, he complained to Mr. Chalmers.

A. Mr. Chalmer denies that he ever made those complaints.

Q. I understand. So your position in this, as a result of conversations the following Monday, it would be the company's position rather, that Mr. Cooley brought in the question of not being safe as an afterthought?

A. That was the position. We always took the hypothetical position that, say the job was unsafe, would Mr. Cooley have been fired anyway because of the way he reacted? We decided that based upon his record of similar instances that he acted in the same way he had acted in all the other ways, and that was improper.

Q. Would you classify him as a hot head?

A. Yes. I think Mr. Cooley has a temper. Like I said, he has to work on it.

Q. You heard his testimony that his obscenities and his cursing, et cetera, were not directed at the individual but directed at the principle of his being forced to light this burner on several occasions?

A. The foreman does say he felt obscenities were directed at him rather than varied in nature.

Q. What is the company's present position again with respect to the refusal by an employee to light this burner manually? You say it is not an accepted practice and it would be subject to discipline?

A. That policy was issued when I had the doubt, prompted by Tom Anderson. I haven't retracted that policy. But that has never been a question, because the cowell has never been removed.

Mr. Bentgen detailed the prior disciplinary problems concerning Mr. Cooley which included suspensions and probation for insubordination, job refusal, and absenteeism, but he indicated that known of these

incidents were related to any safety complaints made by Mr. Cooley. He also indicated that during his tenure as the industrial relations officer he received no safety complaints from Mr. Cooley, nor was he ever advised that any such complaints were ever filed (Tr. 145).

Kenneth R. Smock testified that he is employed by the respondent as a dryer operator, and has served in that capacity "off and on about two years". Mr. Smock stated that during one of his breaks on Friday, May 2, 1980, he encountered Mr. Cooley, and was advised by Mr. Cooley that he had withdrawn his bid for dryer operator and "was back on labor". Since the dryer operator's job paid more money, he asked Mr. Cooley for an explanation as to why he had withdrawn his bid, and before he could answer he was summoned to the phone to answer a call from Dave Chalmers. Mr. Smock overheard part of what Mr. Cooley said, and it included some cussing by Mr. Cooley. Mr. Cooley hung the phone up, but Mr. Smock could not recall exactly what Mr. Cooley told him with regard to why he bid off the dryer operator's job (Tr. 149-150).

Mr. Smock stated that while Mr. Cooley was employed as a laborer had assisted him in lighting the dryer, as did another laborer. Although Mr. Smock knew that Mr. Cooley did not like lighting the dryer pilot with a burning piece of paper, he could not recall him specifically stating that he believed it was unsafe and Mr. Smock did not inquire as to the reasons why he did not like lighting it in that fashion (Tr. 150). Mr. Smock identified exhibit G-10 as certain dryer operator reports which he filled out during the period February through April 1980, and they were submitted to Mr. Chalmers (Tr. 151). Mr. Smock also stated that he had observed Mr. Chalmers light the dryers with a piece of burning paper and that this was before Mr. Cooley was fired (Tr. 151).

On cross-examination, Mr. Smock testified that he was assigned to the dryer a week or so before Mr. Cooley was fired, and at that time he was aware of the fact that the purge cycle had been "jumped out". He explained that the dryer would not light and that the wire had been burned off due to people putting paper in. The paper would ignite the wire, but if "someone stretched it out and ran it around the spark plug and it would work. It worked occasionally" (Tr. 152). He reported the matter by indicating that "pilot needs to be fixed" on his reports. He stated that the purge cycle was the "yellow light on the console" and when that indicator light would come on, this would indicate that the purge was completed (Tr. 153). He had reason to believe that the purge was not working because the pilot button would not light when it was depressed, and the burnt wire, coupled with sand and water which would get into the pilot, caused the problem. He also stated that the pilot deflector was missing, but he saw no one remove it, nor could he state why anyone would want to remove it (Tr. 154).

In response to bench questions, Mr. Smock stated that the telephone conversation between Mr. Cooley and Mr. Chalmers lasted a few minutes and he only overheard Mr. Cooley speaking, and the explained what he heard as well as what followed later in the day (Tr. 156-157):

Q. Do you recall what the subject of the conversation was when he was cursing?

A. Yes. It was to light the pilot.

Q. Was it over the pilot light being difficult to light?

A. As near as I can remember, John didn't want to light it. I don't know what the reason was. I didn't hear it stated.

It could have been because he thought it was unsafe. But then again, it could have been that is the way John does things. He fails to get some things out. Maybe that was it. I don't know.

Q. Did Mr. Cooley say anything to you that day about his difficulty with the pilot light and the burner and that sort of thing?

A. Later on in the day, yes.

Q. But not prior to the conversation?

A. No, no, he didn't.

Q. What did he tell you later in the day?

A. He felt that it was unsafe. I had to leave. I had to go relieve the drier. I couldn't stick around, you know, to talk to him.

Q. Were you aware of the fact that he, or had he ever told you that he was burned or received some injury from trying to light the pilot before?

A. Yes. It does sort of ring a bell. It seems to me that he did tell me that but I don't know if it was after the phone call or a long time before, or what. I don't know. It has been so long.

Mr. Smock detailed the procedures he and Mr. Cooley followed while attempting to light the dryer pilot, and he indicated that 90% of the time it did not light. If Mr. Smock had no paper or matches, he would ask any laborer who happened by to assist him. Someone had to be at the control panel while the other person was at the pilot light location. He later developed his own system for lighting it by himself. He would insert a piece of paper into the pilot hole, light it, and he would then run over to the control panel while the paper was burning. He believed this practice was safe, and replied as follows as to how others may have felt (Tr. 159-160):

Q. Doesn't it strike you as unusual that Mr. Cooley is the only one that feels that this is unsafe to light it that way?

A. No, I have heard other people say they thought it was unsafe, but I never -- Put it this way: they haven't been around it as much as I have. I have been around it quite a bit more. I was on production relief, which I have to know how to operate the driers in case one of the operators don't show up, I have to take his place.

Q. How long was Mr. Cooley around at the time, prior to the time this happened?

A. Well, I really -- Well, he didn't know that much about it.

Q. You don't consider him to be as experienced as you?

A. No.

Q. In that situation do you find it unusual that he was reluctant, assuming that there were experienced persons to light it?

A. Not really.

James Marvin Phelps, testified that he has been employed with the respondent for two years and nine months. During the period April 1978 to May 2, 1980, he worked as a dryer operator and he was assigned the task of training Mr. Cooley as a dryer operator during the week when he was discharged. Mr. Bentgen assigned him the job of training Mr. Cooley and Mr. Phelps stated that the automatic lighting system for the No. 6 dryer was not working during the week in question and that it had not been working for two or three months prior to Mr. Cooley's discharge.

Mr. Phelps identified exhibit G-11 as copies of 10 reports he filed with the respondent with respect to his daily inspection of the No. 6 dryer, as well as other equipment for which he is responsible. The reports reflect dryer conditions which required maintenance and attention, and the reports are routinely made by him when he finds equipment in need of maintenance or repair.

Mr. Phelps stated that prior to his bidding on the dryer operator's job Mr. Cooley helped him light the No. 6 drier. Two people were required to light the dryer because the automatic lighting system was not working properly. One man was required to be at the control panel to activate certain buttons, and a second man was required to be at the dryer burner location in order to manually light the pilot light. Mr. Phelps would position himself at the control panel, and Mr. Cooley would light the pilot light by means of burning paper over the pilot light.

Mr. Phelps confirmed the fact that foreman Chalmers was aware of the fact that the automatic dryer lighting mechanism was not working and Mr. Phelps stated that he advised Mr. Chalmers of this fact. Mr. Phelps also confirmed that Mr. Cooley complained to him that lighting the dryer with paper was unsafe, but he did not know whether Mr. Cooley communicated this fact to Mr. Chalmers (Tr. 166-170).

On cross-examination, Mr. Phelps asserted that the problem with the automatic lighting mechanism for the No. 6 dryer was an "on and off" situation. He explained that the problems were intermittent and resulted from the fact that the metal covering over the pilot light area was being "ripped off". He reiterated the fact that Mr. Cooley complained about the unsafe practice of lighting the No. 6 dryer manually by use of a piece of paper.

Mr. Phelps stated that on May 2, 1980, when he came to work the dryers were out and no production was in progress. There was a problem with a crane and the dryers were not on. He received a call from Mr. Chalmers at approximately 5:30 p.m., and Mr. Chalmers instructed him to light the No. 6 dryer. He believes that Mr. Cooley assisted him in lighting the dryer at that time by means of a piece of paper. The pilot light subsequently went out and Mr. Chalmers called him a second time and instructed him to light the dryer. Mr. Cooley refused to help him and stated that it was unsafe. Mr. Phelps reported this to Mr. Chalmers and asked him to send someone to help him light it. Mr. Chalmers came and lit it himself and Mr. Cooley left the area and went to the cafeteria after advising Mr. Phelps that he was withdrawing his bid for the dryer operator's job.

Mr. Phelps stated that he was not present during the phone conversation between Mr. Cooley and Mr. Chalmers and he could not testify as to that conversation (Tr. 170-178).

In response to further bench questions, Mr. Phelps stated that he never attended any company safety meetings, and he believed the purpose of the dryer purge system "was to clean out, if there was any gases left in the line it would blow them out so there wouldn't be any built-up gas in there" (Tr. 181). As for any complaints made by others with regard to the dryer, and Mr. Cooley's reluctance to light it, he stated as follows (Tr. 179, 182):

Q. Do you find it unreasonable -- This may be a difficult question for you to answer, but I still ask it anyway. Do you find it unreasonable for Mr. Cooley, under the circumstances to refuse to light it?

A. If he thought it was unsafe, he thought it unsafe, you know. That's all.

* * * * *

Q. Have you ever heard of any other employees at this facility, at this organization, complain about the method in which the pilot light was being lit on this burner or any other burner, for that matter?

A. None of the drier operators complained about it, you know. That wasn't the right way to do it; but we all do it. We didn't feel it was unsafe. Some of the other employees, you know, told us it wasn't safe, we shouldn't be doing it that way.

Q. Who were some of these other employees?

A. I can't really remember. Just people talking.

Q. Just general conversation and chit chat?

A. Right.

Q. Why would they talk to you about it?

A. I don't know. It would just come up, I guess.

And, at pages 183-184:

Q. I have a little difficulty in listening to the the testimony of witnesses today. Everybody seems to be talking to each other about the manner in which this thing is lit. Some people think it is safe; others don't.

A. That is not the right way to do it. It is not the safe way to do it, but I didn't feel I was in any danger.

Q. No. What I am saying: if employees, if this were a topic of conversation one would think at least some safety people would be involved or someone at least would mention it to somebody.

A. Well, they did, they did. The office knew about it, you know.

Q. Which office?

A. The management, I guess. The foreman knew about it, you know.

Q. Knew about what? Knew about the way it was being lit?

A. Yes, they knew the way it was being lit. They did do it; Chalmers did it.

* * * * *

Q. Did someone make a decision -- Did someone come in and look at these two driers, mangement came to the conclusion that it was safe. From that point it would be standard operating procedure to light it with a newspaper?

A. No.

Q. It was just what? It was an accepted practice?

A. I can't say what they were thinking. I don't know. I don't know why they didn't fix it sooner. They knew about it beforehand.

Q. Now, when this system is operating perfectly, with the use of the button, I assume there is no need to use a newspaper, right?

A. Right.

Q. It is all done automatically?

A. Right.

Q. Is that the better way?

A. It is the right way; it is a better way. It is easier.

Mr. Phelps stated that during the entire week that he trained Mr. Cooley on the No. 6 dryer, the pilot had to be lit by means of paper and that it would not light automatically (Tr. 198). He also indicated that the No. 5 dryer, which had the same ignition system as the No. 6 dryer, worked well and would light automatically (Tr. 201-202).

Kenneth Stumpmier testified that he has been employed by the respondent for over nine years, and approximately six years ago he worked as a dryer operator for about a year. He stated that he has observed David Chalmers' work habits and Mr. Chalmers "didn't have much regard for safety" (Tr. 203). He explained that Mr. Chalmers would do things that other employees would not do because of safety reasons. Mr. Stumpmier stated that he was a union steward in May of 1980 and on Friday, May 2nd of that year he spoke with Mr. Cooley in the lunch room and Mr. Cooley told him that Mr. Chalmers was sending him home because he would not light the No. 6 dryer with a piece of paper. After Mr. Cooley told him that he would not light it in that manner because it was unsafe, Mr. Stumpmier attempted to speak with Mr. Chalmers about the matter but he refused to speak with him (Tr. 203-205).

Mr. Stumpmier testified that he was at the meeting with Mr. Cooley and Mr. Bentgen on Monday, May 5, 1980, and he told Mr. Bentgen that he too would not light the No. 6 dryer with a burning piece of paper because he believed it was unsafe to light it in that fashion. A month later, Mr. Bentgen issued a memorandum stating that anyone found lighting the dryer with a burning piece of paper would be subject to disciplinary action, including discharge (Tr. 206).

On cross-examination, Mr. Stumpmier confirmed that Mr. Chalmers is no longer employed with Ottawa Silica and he believed he was in Utah. In the past he never heard Mr. Chalmers order anyone to do anything unsafe

and when he was a dryer operator he experienced no problems in lighting the No. 6 dryer automatically. Mr. Cooley had not previously complained to him about any unsafe working conditions connected with the dryer. Although Mr. Cooley was "kind of mad" when he spoke with him on May 2, he could not recall his using any profanity (Tr. 208). He assisted Mr. Cooley in preparing his grievance a few days after his discharge, and he believed that Mr. Chalmers "had bad feelings toward John" (Tr. 213). However, he stated that this was only his opinion and he based it on the fact that Mr. Cooley and Mr. Chalmers did not "joke around together" as other workers and foremen do (Tr. 217).

MSHA Inspector Russel L. Spencer testified that he was employed as a special investigator and confirmed that he conducted an investigation in August, 1980, in connection with the discrimination complaint filed by Mr. Cooley. Mr. Spencer stated that he had never been to the quarry in question previously and that he observed the No. 6 dryer on two occasions during his investigation, once on August 20, and again on August 21, 1980. He described the area around the No. 6 dryer, and stated that he measured the distance from the railing position where one would stand to light the burner pilot light to the pilot light, and determined that it was 54 inches. The dryer is located on the second floor which is approximately eight feet about ground level, and adjacent to the railing is an opening or hole which measured 24 inches by sixty inches, and which is between the railing and the pilot light location. The floor was wet and sandy and he observed no deflector shield over the pilot light. Mr. Willard Stubblebine, an electrician, was with him at the time and he hung over the floor hole demonstrating how he would light the pilot light (Tr. 230-235).

Mr. Spencer testified as to his mining background and experience which began in 1951, and he stated that he has been a Federal mine inspector since 1970. His experience also includes employment as a state safety inspector with the Michigan Department of Labor (Tr. 242). Mr. Spencer stated that he did not believe it was safe to light the No. 6 dryer pilot with a burning piece of paper because the automatic ignition controls which were installed for the dryer were installed for that purpose. He also indicated that the dryer was not intended to be ignited manually, and that when he recently visited the dryer site on Monday, December 14, he attempted to reach the spark plug igniter from the position where persons using burning paper were standing, and he had difficulty doing it. He also believed that the area where he stood presented slip and fall hazards due to the wet floor and the proximity to the floor hole (Tr. 243-245).

On cross-examination, Mr. Spencer stated that he was not personally aware that the dryer had been substantially modified since he first observed it in August 1980, but that Mr. Bentgen informed him that this was the case. He also stated that he had not attempted to reach the pilot light in August 1980, when he was there, and that the floor hole conditions were based on his 1980 observations (Tr. 246-247).

In response to bench questions, Mr. Spencer stated that he observed no substantial changes in the dryer that may have taken place since August 1980, and that the operator controls have not been changed, and the location of the railing around the dryer has not changed within an inch or so. He also confirmed that he never inspected the plant in question other than to investigate Mr. Cooley's discrimination complaint (Tr. 249).

Mr. Spencer stated that he has inspected numerous sand and gravel and crushed stone mining operations covered by the Part 56 safety standards, and that those standards would apply to a silica sand operation such as those conducted by the Ottawa Silica company. He conceded that he is not familiar with the dryer in question, is not an expert, and he has never worked on such a dryer (Tr. 251). He was not aware of any mandatory safety standard which would apply to the dryer in question, and he indicated that the question of whether lighting it with a piece of paper was an unsafe act which would depend on such circumstances as to whether the floor was wet or slippery, whether the person extended himself over the railing, and whether safe access was provided. Also, consideration must be given to whether the dryer was intended to be ignited by paper, or whether the dryer could be considered as "defective equipment" under section 56.14-25 or 26. Other considerations would be whether the dryer purge cycle was burned out and the possibility of pre-ignition (Tr. 252-256).

Respondent's Testimony and Evidence

Willard Stubblebine, testified that he has been an electrician for 23 years, and has worked in that capacity for the respondent since January 2, 1979. He is responsible for the electrical performance of all of the equipment in the plant, including the dryers. Prior to May 1980, the No. 6 dryer had problems in that sand was getting into the burner, preventing the pilot light from lighting. If it does not light within 30 seconds, it shuts down. He fabricated a shield to hold back a pocket of gas which would facilitate lighting the pilot. The shields kept getting lost, so the men used paper to ignite the pilot. The purpose of the shield or deflector was to keep the sand out of the burner, and it was first installed on the dryer in early 1979. The dryer was not equipped with a shield when he first began working on it, and he fabricated them out of tin hose clamp, and he replaced it eight or ten times during the first half of 1980 (Tr. 261-264).

With regard to any complaints regarding the lighting of the pilot by means of burning paper, Mr. Stubblebine testified as follows (Tr. 265-266):

Q. How would you find out that it had to be replaced?

A. Normally the operators would complain about lighting it with the paper.

Q. How would you find out about it?

A. I shouldn't say "operators complain;" they didn't complain to me. If they were complaining to the boss, I don't know. I would find out a lot of times by walking back. A kid that used to be on the third shift, Marshall, would tell me. He wasn't complaining. He used to like lighting it with a paper. He had his own little thing worked out. He didn't step over the railing like you, he draped a paper towel out of the burner or wired it up and the pilot would catch on fire and the burner would light.

I can't really remember operators complaining to me. I remember them telling me it wasn't working, but as far as reaching a real and heavy complaint, I don't know. Now, how often, you know, if they ever complained to the foreman, I don't know. A lot of time I think Russ Heyman may have mentioned it to me. Offhand I can't remember anybody coming over to the shop saying it is not working.

Q. Did anybody ever complain to you that they felt it was unsafe to light it by paper?

A. I can't say for sure because I hear so much junk in the lunchroom that don't mean nothing. I can't say.

Q. Did John Cooley ever complain to you?

A. No. John Cooley, I never talked to.

Regarding the lighting of the burner with a piece of paper or cigarette lighter, Mr. Stubblebine stated as follows (Tr. 266-267):

Q. Do you have an opinion as to whether or not it is safe to light the burner with a burning piece of paper or cigarette lighter?

A. Well, my opinion, you know, I don't think it is. What you are lighting is just the pilot. There is so much safety involved, to get the main gas open, you know, and I guess in extreme cases -- I don't know what the percentage would be -- the main burner may open sometimes, but I don't know.

I tried to light the main burner already without the pilot. I couldn't get it lit. You've got to get the pilot lit. You have to have your roof blower on. You have to have your combustion blower on. You have a high and low gas limit. You have an air limit from the combustion blower just to ignite your pilot. When you push the button to get your beep you have a Honeywell control unit and you have 30 seconds to light it. If it don't light it shuts down and starts pumping again. Okay?

Now, once you get the pilot, I think within 15 seconds you got to have an established pilot within 15 seconds for the main gas to open, which is a motorized safety shut-off valve for the gas. Once you establish pilot, that opens. Now, I never seen one open without establishing a pilot, although I think, like I said, it is probably possible. I never saw it.

Q. Do you believe it is safe or unsafe to to light it that way?

A. I think it is safe.

Mr. Stubblebine testified that at the present time the No. 6 dryer purge cycle is working, but that in the past there was a problem with an electrical alloy which would affect the purge cycle. However, since 1979 he has never known the purge cycle on the No. 6 dryer to be "jumped out" (Tr. 268). Since May 1980, a new conveyor was installed alongside the dryer and the railing was moved back somewhat and made higher. Although the water and sand problems around the dryer were "bad" in 1979, it is now under control (Tr. 269-270).

On cross-examination, Mr. Stubblebine stated that while sand and water was present in the dryer area in May 1980, he observed no "build-up" of such materials. He indicated that it was a common practice to climb over the railing and stand on an adjacent I-beam next to the cover to light it. He also observed a foreman light the pilot with material wrapped around a hangar wire and he considered that to be the "worst way" to light it (Tr. 270-274).

Mr. Stubblebine stated he had heard talk among some employees that lighting the dryer pilot with paper was unsafe, but he believed the majority of talk is not by the dryer operators but by others. He also indicated that the dryer operators are normally responsible for lighting the dryers and that laborers would be expected to do this if they were assigned the job. He could not explain the notation on the dryer instructions (exhibit G-2) that the purged had been "jumped out". Even if it were jumped out, he would still not be reluctant to light it with a piece of paper. However, he has known of instances where the purge was "jumped" or "shorted" to save the three to five minutes waiting time for the purge cycle to start again.

Mr. Stubblebine explained the operation of the dryer purge system, and stated that if the pilot does not light the first time, another three or four minutes will pass before an attempt to again initiate pilot can be made. He indicated that "you just keep going until you get it lit", and "that is where you can run into a problem" (Tr. 279). He explained that he did not know what could occur with the dryer, but with a blast furnace, repeated attempts to initiate pilot could cause a gas build-up "inside the blast furnace that would blow". He believed any such gas build-up in the dryer would disperse into the air because it is so open (Tr. 279).

When asked whether he knew what the instant case was all about, Mr. Stubblebine replied "I think it is something about John Cooley's discrimination", and he further stated as follows (Tr. 280-281):

Q. Let me tell you what it is about so I can ask you this question. Put yourself in John Cooley's shoes and he is asked to light that pilot with a piece of paper and he refuses to do it because he thinks it is unsafe; not because you think it is unsafe. He thinks it is unsafe. And they tell John Cooley, you know, "Mr. Cooley, your job here is to follow instructions and when you are told to light the system, light the drier, you light the drier. If you don't that is insubordination, et cetera, and therefore you are subject to discharge for failing to follow orders." Leaving aside some other facts in this case that I haven't given you, putting yourself in Mr. Cooley's shoes, what would be your reaction to that situation?

A. I would have to respect his opinion. If I thought it was unsafe to light it then I would have to have a case up myself, I guess, because I wouldn't light it if I felt it was unsafe.

Q. But you personally don't think it was unsafe in this case?

A. No.

Q. I think that you have lit it, you have put the fire to the pilot many times?

A. Not many times.

Q. You have done it on occasion?

A. Yes.

Discussion

In Secretary of Labor on behalf of David Pasula v. Consolidation Coal Company, 2 FMSHRC 2786 (October 14, 1980) (hereinafter Pasula), the Commission analyzed section 105(c) of the Act, the legislative history of that section, and similar anti-retaliation issues arising under other Federal statutes. 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 provides (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.

Although upholding the Administrative Law Judge's decision that Pasula has a "right to walk off the job" for safety reasons, the Commission acknowledged that such a right is not explicitly covered by the plain language of the Act. However, relying on the legislative history, the Commission stated as follows:

We must look to the entire statute, being mindful that the 1977 Mine Act is remedial legislation, and is therefore to be liberally construed. . . . In determining whether section 105(c)(1) protects Pasula's refusal to work, we consider it important that the 1977 Mine Act was drafted to encourage miners to assist in and participate in its enforcement The successful enforcement of the 1977 Mine Act is therefore particularly dependent upon the voluntary efforts of miners to notify either MSHA officials or the operator of conditions or practices that require correction. The right to do so would be hollow indeed, however, if before the regular statutory enforcement mechanisms could at least be brought to bear, the condition complained of caused the very injury that the Act was intended to prevent. A holding that miners have some right to refuse work under the 1977 Mine Act therefore appears necessary to fully effectuate the congressional purpose.

Pasula was appealed to the United States Court of Appeals for the Fourth Circuit, and in an opinion filed October 31, 1981, 663 F.2d 1211, the Court reversed the Commission's decision after finding that Pasula's discharge was premised not on his walking off the job but on his closing down of a continuous mining machine. The Court observed that "Pasula was not disciplined because he refused to work but rather because he exceeded the scope of his right to walk off the job under the Mine Act."

In considering the effect of a previous arbitration decision which had denied Pasula's claims of discrimination, the Court made the following observations at 663 F.2d 1219:

In this case, the considerations underlying the standards of gravity of injury in the Wage Agreement and in the statute are different. The Wage Agreement requires the arbitrator to determine whether the hazard was abnormal and whether there was imminent danger likely to cause death or serious physical harm. The underlying concern of the Mine Act, however, is not only the question of how dangerous the condition is, but also the general policy of anti-retaliation (against the employee by the employer). Because this is a major concern of the Mine Act, it requires proof merely that the miner reasonably believed that he confronted a threat to his safety or health. Those who honestly believe that they are encountering a danger to their health are thereby assured protection from retaliation by the employer even if the evidence ultimately shows that the conditions were not as serious or as hazardous as believed. Questions of imminence and degree of injury bear more directly on the sincerity and reasonableness of the miner's belief. (emphasis added)

In a detailed footnote at 663 F.2d 1216-1217, the Pasula Court discussed the right of a miner to refuse work, and although the Court did not state any specifics, it did agree that there was such a right in general when it stated:

Thus, although we need not address the extent of such a right, the statutory scheme, in conjunction with the legislative history of the 1977 Mine Act, supports a right to refuse work in the event that the miner possesses a reasonable, good faith belief that specific working conditions or practices threaten his safety or health.

Id. at 1217 n. 6.

In Pasula the Commission established in general terms the right of a miner to refuse work under the Act, but it did not attempt to define the specific contours of the right. In several decisions following Pasula, the Commission discussed, refined, and gave further consideration to questions concerning the burdens of proof in discrimination cases, "mixed-motivation discharges", and "work refusal" by a miner based on an asserted safety hazard. See: MSHA, ex rel. Thomas Robinette v. United Castle Coal Company, VA 79-141-D, April 3, 1981, MSHA ex rel. Johnny N. Chacon v. Phelps Dodge Corporation, WEST 79-349-DM, November 13, 1981.

In Robinette, the Commission held that a miner may refuse and cease work if he acted in good faith and reasonably believed that the performance of the work would expose him to a hazard. The Commission also held that the right to refuse work may extend to shutting off or adjusting equipment in order to eliminate or protect against a perceived hazard. The facts presented in the instant case are similar to those presented in Robinette. Robinette complained about being taken off a job as a miner's helper and being reassigned as a conveyor belt feeder operator. Robinette ceased to operate and shut down the belt after his cap lamp cord was rendered inoperative and he could not see. Robinette and his section foreman exchanged heated words over the incident and Robinette uttered several cuss words. Robinette's prior work record included prior warnings for unsatisfactory job performance and insubordination, and his section foreman was not too enchanted with his work. The section foreman testified that "anytime Robinette had to do something he did not like, he usually messed it up".

The Judge who heard the Robinette case treated it as a "mixed motivation" discharge case. Although finding that Robinette's work was "less than satisfactory" and that he was "obviously belligerent and uncooperative" with his section foreman as a result of his change in job classification, Judge Broderick concluded that the "effective" cause of Robinette's discharge was his protected work refusal, and he rejected the operator's contentions that the primary motives for the discharge were insubordination and inferior work.

In Robinette, the Commission ruled that any work refusal by an employee on safety grounds must be bona fide and made in good faith. "Good faith" is interpreted as an "honest belief that a hazard exists", and acts of deception, fraud, lying, and deliberately causing a hazard are outside the "good faith" definition enunciated by the Commission. In addition, the Commission held that "good faith" also implies an accompanying rule requiring validation of reasonable belief", but that "unreasonable, irrational or completely unfounded work refusals do not commend themselves as candidates for statutory protection".

In fashioning a test for application of a "good faith" work refusal, the Commission rejected the "objective, ascertainable evidence" test laid down in Gateway Coal Co. v. Mine Workers, 414 U.S. 368 (1973), and instead adopted a "reasonable belief" rule, which is explained as follows at 3 FMSHRC 812, April 3, 1981:

More consistent with the Mine Act's purposes and legislative history is a simple requirement that the miner's honest perception be a reasonable one under the circumstances. Reasonableness can be established at the minimum through the miner's own testimony as to the conditions responded to. That testimony can be evaluated for its detail, inherent logic, and overall credibility. Nothing in this approach precludes the Secretary or miner from introducing corroborative physical, testimonial, or expert evidence. The operator may respond in

kind. The judge's decision will be made on the basis of all the evidence. This standard does not require complicated rules of evidence in its application. We are confident that such an approach will encourage miners to act reasonably without unnecessarily inhibiting exercise of the right itself.

* * * * *

In sum, we adopt a good faith and reasonableness rule that can be simply stated and applied: the miner must have a good faith, reasonable belief in a hazardous condition, and if the work refusal extends to affirmative self-help, the miner's reaction must be reasonable as well.

In MSHA ex rel. Michael J. Dunmire and James Estle v. Northern Coal Company, WEST 80-313-D and WEST 80-367-D, February 5, 1982, the Commission defined further the scope of the right to refuse work under the Act by adding a requirement that a statement of a health or safety complaint must be made by the complaining miner, and adopted the following requirement:

Where reasonably possible, a miner refusing work should ordinarily communicate, or at least attempt to communicate, to some representative of the operator his belief in the safety or health hazard at issue. "Reasonable possibility" may be lacking where, for example, a representative of the operator is not present, or exigent circumstances require swift reaction. We also have used the work, "ordinarily" in our formulation to indicate that even where such communication is reasonably possible, unusual circumstances --such as futility--may excuse a failure to communicate. If possible, the communication should ordinarily be made before the work refusal, but, depending on circumstances, may also be made reasonably soon after the refusal. (Emphasis added).

Respondent's arguments

In its posthearing brief, respondent argues that Mr. Cooley was discharged on May 2, 1980, because his conduct and language was so reprehensible that it could no longer be tolerated in the work place. Citing prior occasions of "foul temper" which caused disciplinary action to be taken against him, respondent points to the fact that Mr. Cooley was on probation at the time he "made such a spectacle" on May 2, 1980, that mine management could no longer countenance his presence.

Respondent maintains that there was absolutely no evidence produced at the hearing to indicate that the manner of lighting the No. 6 dryer was in fact unsafe, and that Mr. Cooley's co-workers Kenneth Smock, James Phelps, and Willard Stubblebine attested to the safety of the procedure used for

lighting the dryer with a burning piece of paper. Respondent asserts that Mr. Cooley concocted the alleged incident of the singed knuckles, and that his excuse concerning the unsafe method of lighting the dryer was an afterthought also concocted after conferring with his union representative.

Respondent asserts that other than Mr. Cooley's self-serving assertion, there is no evidence that he ever complained to anyone about the alleged safety hazard involved in lighting the dryer, that Mr. Cooley had often lit the dryer by means of burning paper in the past without incident, and that his refusal to perform the task assigned to him on May 2, 1980, for alleged reasons of safety was unreasonable and has no basis in fact. Respondent concludes that Mr. Cooley's lack of good faith concerning his purported fear of lighting the dryer with a burning piece of paper is demonstrated "by the vile manner in which he treated his supervisor and co-workers at the time of his discharge."

MSHA's arguments

In its posthearing brief filed in this case, MSHA argues that the right of a miner to refuse work under conditions which he reasonably and in good faith believes are hazardous has been affirmed and refined by the recent Commission decision in Michael J. Dunmire and James Estle v. Northern Coal Company, Docket No. WEST 80-313, 367-D (February 8, 1982) which interprets Pasula v. Consolidated Coal Co., 2 FMSHRC 2786 (1980) rev'd on other grounds sub nom. Consolidated Coal Co. v. Marshall, 663 F.2d 1211 (3rd Cir. 1981). MSHA asserts that under the Dunmire holding, refusal to work is in good faith when the miner has attempted to communicate his reasons for refusing to work to some representative of the mine at or near the time of his refusal. Further, MSHA argues that a miner's belief in the existence of a dangerous condition is reasonable if it is a belief that a reasonable man confronted with those conditions could draw; however, it need not be the only belief that a reasonable man could draw from those conditions. Moreover, MSHA states that Dunmire reaffirms the Commission's earlier determination in Robinette v. United Castle Coal Co., 3 FMSHRC 803, 809 (1981) that:

Because this (the general policy of anti-retaliation) is a major concern of the Mine Act, it requires proof merely that the miner reasonably believed that he confronted a threat to his safety or health. Those who honestly believe that they are encountering a danger to their health are thereby assured protection from retaliation by the employer even if the evidence ultimately shows that the conditions were not as hazardous as believed.

MSHA argues that it is not essential that the condition which the miner fears be actually hazardous, but only that his belief in the existence

of a hazard be reasonable. After detailing the facts and circumstances concerning the manner in which Mr. Cooley was required and directed to light the dryer in question, MSHA concludes that Mr. Cooley's refusal to perform this task was based on his reasonable and good faith belief that it was unsafe.

In response to respondent's assertion that even though Mr. Cooley may have refused to light the dryer pilot for safety reasons, he would have been fired anyway because of his past disciplinary record and his abusive language to his supervisor Dave Chalmers, MSHA states that the respondent must establish this affirmative defense. In this regard, MSHA argues that the respondent has the burden of proving first, that John Cooley's use of profanity in his work refusal is not protected activity under the Act, and second, that had John Cooley never refused to light the dryer pilot with a hand held flame, Ottawa Silica would still have fired him for his use of profanity alone. Pasula v. Consolidated Coal Co., 2 FMSHRC 2786, 2800 (1980) rev'd on other grounds sub nom. Consolidated Coal Co. v. Marshall, 663 F.2d 1211 (4th Cir. 1981). MSHA maintains that the respondent has failed to carry its burden on either of these points.

MSHA maintains that Mr. Cooley's profanity in communicating his refusal to work is protected activity under the Act. In support of this conclusion MSHA argues that Mr. Cooley is a poorly educated and unskilled miner and that he became upset after repeatedly being ordered to perform an unsafe act. Taken in this context, MSHA asserts that in as much as the profane language was used to communicate the refusal to work, it is part of the protected refusal to work itself. Further, MSHA maintains that the respondent has not met its burden of proving that it would have terminated Mr. Cooley for using abusive language alone, and points to the fact that the respondent could not identify any prior incident where it terminated an employee for using profanity. MSHA also argues that Mr. Cooley and Mr. Smock both testified that the profanity was directed at the unsafe act rather than at foreman Chalmers personally. As for Mr. Chalmers, MSHA makes reference to the record which reflects that Mr. Chalmers lacked sensitivity to safety hazards, that he performed several dangerous acts on the job, and that he was discharged by the respondent for reporting to work twice while intoxicated.

Findings and Conclusions

As indicated earlier, the critical issue in this case is whether Mr. Cooley's refusal to perform a job task which he believed to be unsafe, and which led to his discharge, was protected activity under the Act. Mr. Cooley claims he was ordered off the mine property by his supervisor after he refused to assist in the lighting of the No. 6 Dryer with a burning piece of paper and that he was subsequently discharged because of this incident. On the other hand, respondent maintains that Mr. Cooley was discharged because he failed to carry out a work assignment and used "foul and abusive" language when speaking with his supervisor about the incident. According to the testimony of Mr. Bentgen, the man who discharged

Mr. Cooley, mine management viewed the work refusal and the use of foul and abusive language as acts of insubordination. In addition, management also took into consideration the fact that Mr. Cooley had previously been disciplined for insubordination and work refusals (apparently unrelated to safety), and that he was on probation at the time of the work refusal which prompted his discharge. Under the circumstances, and in light of the precedent discrimination cases discussed above, it is necessary to explore the following issues raised in these proceedings:

1. Whether the lighting of the dryer in question with a burning piece of paper was an unsafe practice.
2. Whether Mr. Cooley made any statements to management concerning a safety complaint connected with the lighting of the dryer with a burning piece of paper.
3. Whether Mr. Cooley's safety concern connected with the lighting of the dryer with a burning piece of paper was made in good faith.
4. Whether Mr. Cooley's refusal to light the dryer with a burning piece of paper was reasonable, and if so, whether the work refusal is protected activity under the act.
5. Whether respondent has carried its burden of showing that Mr. Cooley's discharge was motivated by unprotected activities and that he would have been discharged for those activities alone.

Lighting the No. 6 Dryer with a burning piece of paper.

One critical issue presented in this case is whether or not the practice of lighting the dryer pilot light in question with a burning piece of paper was an unsafe practice. The record in this case reflects that there is a "right" and "wrong" way to initiate pilot for the dryer in question. The "right" way is by means of pushing certain buttons on a control panel which is located some fifteen or so feet from the area where the dryer pilot light is located. The testimony and evidence adduced in this case amply supports a conclusion that the "right" way to light the pilot in question is by the mechanical means of buttons located at the control panel, and that the lighting of the pilot by means of burning pieces of paper either stuffed into the pilot location or attached to an end of a wire and then inserted into the pilot light area is the "wrong" way to light it.

Although neither party called any expert witnesses to testify as to the engineering and mechanical operational parameters of the dryer in question, I conclude and find that the testimony and evidence adduced in this case supports the conclusion that the pilot light was never intended to be initiated or lit by means of a burning piece of paper,

and that this practice was unsafe. Aside from Mr. Cooley's opinion that the lighting of the dryer pilot with a burning piece of paper is "dangerous and stupid", dryer operator James Phelps testified that the use of burning paper was not the "right" or "safe" method for lighting the dryer, and former dryer operator Kenneth Stumpmier testified that it was unsafe to light it in that manner.

Company Safety Director Hilliard Bentgen conceded that the "preferable" method for lighting the dryer is by means of the control panel and not a burning piece of paper. Although he testified that he did not personally believe it was unsafe to light the dryer by means of burning paper, the fact is that after MSHA's investigation of Mr. Cooley's discharge Mr. Bentgen issued a memorandum prohibiting such a practice. Although Mr. Bentgen indicated that he was not an expert and was unclear as to whether such practices of lighting the dryer with burning paper was unsafe, he candidly conceded that he had his doubts and was aware of the fact that employees were in fact lighting it with burning paper. It seems to me that as safety director, Mr. Bentgen should have sought expert advice to resolve the question as to whether the lighting of the dryer with burning paper was safe or unsafe. A telephone call to the Manufacturer or references to the dryer operational manual would probably have answered this question. I simply cannot accept self-serving assurances that it was safe, nor can I accept the excuse or inference that persons unknown were removing a shield that had been fabricated to prevent the pilot flame from going out, particularly where the record shows that an identical No. 5 Dryer was experiencing no such difficulties.

Although company electrician Willard Stubblebine testified that he would not be reluctant to light the dryer with a burning piece of paper, he candidly conceded that he would have to respect Mr. Cooley's refusal to light it in that fashion if he thought it were unsafe. Mr. Stubblebine also candidly admitted that it was common practice for a person to climb over a protective railing adjacent to the dryer and stand on an I-beam so as to be closer to the pilot light area while attempting to light it. He also described an eyewitness account of a foreman's attempt to light the dryer with material wrapped around a wire hangar as the "worst way" to light it.

In addition to the testimony of the witnesses as to whether they believed the lighting of the dryer with a burning piece of paper was safe or unsafe, there are other factors present in this case which support the conclusion that it was unsafe. First there is the question of the so called "purge cycle". Although there is conflicting evidence and uncertainty as to whether the dryer purge cycle was in fact "jumped" or "shorted" out, I believe it is clear from the record that the purge cycle is a mechanical safety measure engineered into the dryer lighting sequence to prevent against the build-up of gasses. Although Mr. Bentgen conceded that he was no expert, he alluded to the fact that an inoperative purge could cause problems and present possible explosion hazards (Tr. 136-137), and he conceded that the notation which appears on the dryer operator's job description (Exhibit G-2) that the "Purge is jumped out on No. 6, will be repaired" would lead one to believe that the purge cycle was inoperative.

Mr. Stubblebine indicated that problems can be encountered when an inoperative purge cycle causes repeated efforts to initiate pilot. Although he was not certain as to the dryer, he did state that repeated unsuccessful attempts to initiate the pilot light of a blast furnace could cause explosive build-ups of gas that would probably be dispersed near the dryer because it is an open area (Tr. 279). Dryer operator Kenneth Smock testified that he was aware the purge cycle was "jumped out", and that a burned out wire caused by paper being inserted near the pilot light ignition point, coupled with sand and water, made it difficult to light the pilot, and that he had reported the condition on his daily inspection report.

Although Mr. Cooley also indicated that he believed the manual lighting of the dryer also exposed him to a hazard of possibly slipping or falling on the floor or over a protective railing which was adjacent to and near the location of the pilot light because of the presence of water and sand which made the area slippery, I am convinced that his principal concern centers over the fact that he was directed and required to use a burning piece of paper in attempting to light the dryer pilot light and my decision regarding his complaint is based on this fact. Having visited the plant site in the company of counsel for both parties during the course of the trial in this case, it would appear to me that the nature of respondent's silica sand drying operation is such that water, moisture, sand and dampness is an ever present fact of life, and absent any evidence that respondent violated any mandatory safety standard dealing with the clean-up or control of such materials I have no basis for finding that the mere presence of such materials presented a hazard.

As for the positioning of the guardrail in question, since the time of Mr. Cooley's discharge modifications have been made to the positioning of that guardrail, and aside from any evidence of anyone climbing over it to reach the pilot, I cannot specifically conclude that the guardrail is all that critical to my decision. However, it seems clear to me that at the time of Mr. Cooley's discharge, requiring an employee to manually light the dryer by means other than the automatic control system and panel procedures could have possibly exposed an employee to any number of situations which may or may not have been hazardous, and I am convinced that the company's policy prohibiting the manual lighting of the dryer reflects in part some of these concerns.

Statement of a safety complaint

Respondent argues that only after Mr. Cooley was ordered off the property on Friday, May 2, 1980, by Mr. Chalmers did he assert that his work refusal was based on a perceived safety hazard. However, the record adduced in this case reflects that Mr. Cooley had previously complained about the hazards of lighting the dryer with burning paper. As a matter of fact, the record supports a conclusion that the practice of lighting the dryer with a burning piece of paper was well known to everyone at the plant, including mine management.

Mr. Cooley testified that he had previously complained that the lighting of the dryer with burning paper was unsafe and that he complained to Mr. Chalmers, Mr. Phelps, Mr. Smock, and to another dryer operator by the name of Sam Watson. Mr. Smock confirmed that Mr. Cooley had often expressed his displeasure over lighting the dryer with burning paper, but he could not recall Mr. Cooley specifically stating that he was concerned about the safety of that procedure and he did not inquire further as to Mr. Cooley's reluctance to perform that task. However, he confirmed that when he overheard Mr. Cooley speaking with Mr. Chalmers over the telephone on Friday, May 2, 1980, his refusal to light the dryer "could have been because he thought it was unsafe", and that later that day Mr. Cooley did tell him that he felt it was unsafe.

Dryer Operator Phelps, the man assigned to train Mr. Cooley during his last week of employment, testified that Mr. Cooley complained to him during that time that lighting the dryer manually with burning paper was unsafe. Mr. Phelps also confirmed that the automatic mechanism for lighting the dryer was inoperative during the week of Mr. Cooley's training, and as a result, it took two men to light it. One man would stand at the control panel and the other would stand at the pilot light location with a burning piece of paper. He also confirmed that he had reported the inoperative automatic lighting mechanism to Mr. Chalmers, noted the conditions in his inspection reports, and that the lighting of the dryer with burning paper was the subject of general conversation among the employees and that company foremen and management knew about it.

Electrician Stubblebine confirmed that operators would complain about lighting the dryer with burning paper, and while they did not complain directly to him, it came to his attention more or less through lunchroom conversations. However, since he did not speak to Mr. Cooley, Mr. Cooley never complained to him.

There is nothing in the record to suggest that Mr. Cooley had ever complained to MSHA about the practice of lighting the dryer with burning paper, and Inspector Spencer testified that absent a finding that the dryer was "defective equipment" there is no specific safety standard covering this practice. Mr. Bentgen testified that Mr. Cooley had never previously complained to him about his being required to light the dryer with burning paper, and Mr. Bentgen stated further that during Mr. Cooley's subsequent grievance Mr. Chalmers informed him that Mr. Cooley has never complained to him that lighting the dryer with burning paper was unsafe. However, Mr. Bentgen confirmed that when he met with Mr. Cooley and his safety representative on Monday, May 5, 1980, Mr. Cooley informed him at that time that his work refusal was based on his safety concerns and it seems clear to me that Mr. Bentgen knew this before he made the decision to fire Mr. Cooley that same afternoon.

In view of the foregoing, I conclude and find that the record supports a conclusion that Mr. Cooley communicated his belief about the safety hazard presented to his supervisor Phelps during the week of his training prior to his discharge, and that he also communicated it to safety director

Bentgen prior to his decision to discharge Mr. Cooley. Coupled with the fact that the practice of lighting the dryer with burning paper appears to have been general knowledge among the dryer operators and dryer laborers, there is a strong inference that Mr. Cooley also communicated his safety concerns directly to Mr. Chalmers, and that Mr. Chalmers chose to ignore them. In short, I conclude and find that the communications made by Mr. Cooley regarding his safety concern falls within the test enunciated by the Commission in the Dunmire and Estle case discussed above.

The reasonableness of Mr. Cooley's work refusal

Having concluded that the practice of lighting the dryer pilot light in question with a burning piece of paper was an unsafe practice, the next question presented is whether Mr. Cooley's belief that it was unsafe was reasonable, and whether his reluctance or refusal to follow this practice was made in good faith.

Mr. Cooley has a limited education, and after viewing him on the stand during the course of the hearing he impressed me as being candid and straightforward. Although his prior work record and differences with his supervisors, as reflected by the record and the testimony of several witnesses, lead me to conclude that he may be short tempered and lacking in self-restraint when dealing with co-workers and supervisors, he nonetheless impressed me as being sincere when he testified that he was frightened by the prospect of being required to light the dryer pilot light with burning paper and that his fears were heightened even more when he singed the hair of his fingers as the result of a "flash-back" from an unsuccessful attempt to initiate pilot with a burning piece of paper.

In addition to Mr. Cooley's testimony, electrician Stubblebine, who testified that he had no dealings with him, nonetheless respected his right to refuse to light the pilot with burning paper if he believed it was unsafe. As a matter of fact, Mr. Stubblebine commented that if he thought it was unsafe he too would refuse to light it in that fashion and that if the company disciplined him for this he would file a complaint as did Mr. Cooley.

Although dryer operator Smock expressed no fear at lighting the dryer with burning paper and fashioned his own "one-man operation" procedure for doing this, he confirmed that Mr. Cooley did not know much about the dryer operation and was not as experienced as he was. Given these circumstances, Mr. Smock did not find Mr. Cooley's reluctance to light the dryer with burning paper to be unusual. Dryer operator Phelps gave similar testimony, and former operator Stumpmier testified that he too would refuse to light the dryer with burning paper because he believed it was an unsafe practice and so informed safety director Bentgen. He also confirmed the fact that approximately a month after Mr. Cooley's discharge Mr. Bentgen issued a memorandum stating that anyone caught lighting the dryer with a burning piece of paper would be subject to company disciplinary action, including discharge, and the record reflects that this policy is still in effect.

Finally, although Mr. Cooley's former supervisor and foreman David Chalmers did not testify in this case, the record presented raises a strong inference that he was lacking somewhat in his appreciation for safe work practices. Mr. Cooley referred to several instances where Mr. Chalmers would perform dangerous acts, Mr. Smock confirmed that he personally observed Mr. Chalmers light the dryer with a burning piece of paper, and Mr. Stumpmier testified that Mr. Chalmers had little regard for safety and that when he attempted to discuss Mr. Cooley's refusal to light the dryer after he was ordered off the property, Mr. Chalmers would not speak with him.

Although Mr. Chalmers had ordered Mr. Cooley off the property after his refusal to light the dryer, Mr. Bentgen confirmed that Mr. Chalmers had no authority to discharge Mr. Cooley and that Mr. Bentgen discharged him after speaking with Mr. Chalmers. Mr. Bentgen also stated that his investigation confirmed that foremen made it a practice to instruct employees to assist in the lighting of the dryer with burning paper, that they themselves had engaged in this practice, and that Mr. Chalmers told him that he had instructed Mr. Cooley to assist in the lighting of the dryer and assumed that he would do so by holding the burning piece of paper. Mr. Bentgen also confirmed that Mr. Chalmers was subsequently fired for poor work performance and for reporting to work on two occasions while intoxicated.

Given all of the aforementioned circumstances, I conclude and find that Mr. Cooley had a good faith reasonable belief that the lighting of the dryer in question by means of a burning piece of paper presented a dangerous safety hazard which may have exposed him to injury, and that his good faith belief in this regard falls squarely within the test laid down by the Commission in MSHA ex rel Michael Dunmire and James Estle v. Northern Coal Company, WEST 80-313-D and WEST 80-367-D, decided February 5, 1982. By refusing to light the dryer as directed by his supervisor, Mr. Cooley eliminated any hazard to which he may have been exposed had he carried out the order, and, as stated by the Commission in Dunmire and Estle, supra, "avoidance of injury is the very reason the right to refuse work exists".

Whether respondent would have fired Mr. Cooley anyway for use of profanity.

Respondent maintains that Mr. Cooley was discharged because of his "bizarre" behavior and the use of "reprehensible and vile" language towards his supervisor Dave Chalmers. In addition, respondent asserts that Mr. Cooley treated his supervisor and co-workers in a "vile manner" at the time of his discharge, and that the record offers ample evidence that this behavior warranted his discharge.

The only specific conduct of record in this case deals with a telephone conversation which Mr. Cooley had with his supervisor David Chalmers. During that conversation, Mr. Cooley purportedly used profanity and made certain utterances which obviously prompted his being initially sent home by Mr. Chalmers and then being discharged by Mr. Bentgen the following week.

However, there is nothing of record here that suggests that Mr. Cooley directed his remarks to his "co-workers". Further, the only witness to the one-sided telephone conversation was Mr. Smock. He testified that the telephone conversation lasted only a few minutes, and that the use of profanity by Mr. Cooley stemmed from his reluctance to light the dryer pilot light. Since Mr. Chalmers did not testify, and since no one but Mr. Cooley knows what Mr. Chalmers may have told him during that phone conversation, I have no way of knowing whether Mr. Chalmers' may have also said something to further provoke Mr. Cooley.

Respondent's conclusions that Mr. Cooley used "vile", "foul", and "abusive" language obviously is based on what Mr. Chalmers may have told Mr. Bentgen. There is no evidence or testimony that Mr. Cooley used this sort of language towards Mr. Bentgen or any other company official, and Mr. Cooley, as well as Mr. Smock, indicated that the cursing was directed at the method of lighting the dryer rather than at Mr. Chalmers personally. Considering the circumstances under which Mr. Chalmers left his employment with the respondent, and absent his testimony, there is a strong inference that Mr. Chalmers may not have been too enchanted with Mr. Cooley as an employee and may have said something to provoke Mr. Cooley's outburst.

After careful consideration of the record adduced here, I conclude and find that the use of profanity by Mr. Cooley during the telephone conversation in question was the direct result of his being required to light the dryer with a burning piece of paper, an act which I have found Mr. Cooley reasonably believed was unsafe. In these circumstances, I agree with MSHA's assertion that the use of profanity by Mr. Cooley was part of the protected work refusal itself, and I conclude and find that this was the case at the times the words were spoken on May 2, 1980.

While it may be true that Mr. Cooley may have bid off the job of dryer operator and decided not to pursue that job at the conclusion of his week of training, the fact is that what prompted his discharge was his refusal to assist in the lighting of the dryer with a burning piece of paper, a task that had been assigned to him on May 2, 1980, by his foreman. The purported basis for Mr. Cooley's discharge was his refusal to follow his supervisor's order to light the dryer with a burning piece of paper, the use of foul language towards this same supervisor over this work refusal, and Mr. Cooley's past disciplinary record with the respondent. Mr. Bentgen testified that he considered the use of foul language and the refusal to perform the assigned task to be acts of insubordination and that Mr. Cooley would have been fired anyway even if he had carried out the instructions to light the dryer. Mr. Bentgen reasoned that since Mr. Cooley had a prior record of work refusal and insubordination, and since he was on probation for these prior offenses at the time of the dryer incident, his discharge was justified. However, since I have concluded that the refusal to perform the assigned job task and the use of profanity were protected activities, they do not constitute acts of insubordination warranting a discharge under the Act. This being the case, Mr. Cooley's prior work record is not controlling.

Respondent has not established that Mr. Cooley had ever been disciplined for using profanity, nor has it established that it has ever disciplined other employees for using profanity on the job. Since Mr. Bentgen had the final authority to discharge or otherwise discipline Mr. Cooley for the May 2, 1980 incident concerning the dryer, he had the opportunity to consider Mr. Cooley's reasons for refusing to light the dryer before making the decision to discharge him. Mr. Bentgen candidly conceded that prior to the decision to discharge Mr. Cooley he was made aware of the method of lighting the dryer by means of burning paper, yet he opted to discharge him for insubordination and his past record. Further, while it may be true that Mr. Cooley's grievance and arbitration (exhibit R-4) was denied and his discharge sustained, that decision is not binding on me, and since the arbitration decision contains no rationale or reasons explaining it, I have given it no weight. The critical question is whether the preponderance of the evidence adduced in the instant proceeding supports a conclusion that the respondent would have discharged Mr. Cooley in any event by reason of any unprotected activities alone. After careful review of the record, I conclude and find that the testimony and evidence adduced in this case does not support a conclusion that the respondent would have fired Mr. Cooley for the manner in which he communicated his work refusal to his supervisor. This is not to say that as a general rule an employer may never fire a miner for abusive language and conduct towards a supervisor. By the same token, a miner may not insulate himself against such conduct by hiding behind the Act. However, on the facts of this case, where there is a direct nexus between the conduct and a right protected under the Act, I simply cannot conclude that the discharge was justified.

Conclusion

On the basis of the foregoing findings and conclusions, including a preponderance of all of the credible evidence and testimony of record in this proceeding, I conclude and find that complainant John Cooley was unlawfully discriminated against and discharged by the respondent for engaging in activity protected under section 105(c) of the Act, and the complaint of discrimination IS SUSTAINED.

Remedies

In an Order I issued on February 26, 1982, extending the time for the filing of posthearing briefs and proposed findings and conclusions, I requested that the parties include as part of their posthearing briefs arguments concerning the remedies to be afforded Mr. Cooley in the event he prevailed in this matter. MSHA has included such proposed remedies as part of its posthearing submissions, but the respondent has not. Since the record reflects that MSHA filed its brief with me a month or so prior to the respondent, and served a copy on the respondent, I assume that respondent's counsel had an opportunity to review the proposed remedies. Since respondent has not commented on it, I assume further that it does not disagree with

the monetary information concerning back-pay, fringe benefits, etc., which MSHA has included as part of its argument. Further, I take note of the fact that Industrial Relations Director Bentgen testified as to the contractual pay and fringe benefit matters found in the wage agreement during the hearing and indicated that the contract is effective through November 12, 1982 (Tr. 111-112).

MSHA seeks Mr. Cooley's reinstatement to the position of dryer operator with seniority and all the prerequisites of seniority, back to the day of discharge, as well as back pay from the date of discharge, May 5, 1980, until reinstatement. MSHA asserts that Mr. Cooley's back pay can be calculated from the contract between the Ottawa Silica Company and the Teamster's Union (Exhibit G-4). Moreover, MSHA relies on the testimony at trial that the monetary value of the fringe benefit package under the contract is considered to be 52% of the base wage (Tr. 112), and includes the amount of back wages and fringe benefits which have accrued through March 30, 1982 as part of the requested remedy in this case. The requested remedies, up to the dates shown, are as follows:

<u>Time Period</u>	<u>Rate of Pay</u>	<u>Hours/Wk</u>	<u>Basic Wage</u>	<u>52% of Basic Wage</u>	<u>Total</u>
5/5/80-11/9/80	\$ 7.26 hr.	40	\$ 8,421.60	\$ 4,374.23	\$12,800.83
11/10/80-11/9/81	\$ 7.96 hr.	40	\$16,556.80	\$ 8,604.53	\$25,166.33
11/10/81-3/30/82	\$ 8.66 hr.	40	\$ 6,928.00	\$ 3,602.56	\$10,530.56
		<u>Totals</u>	\$31,906.40	\$16,591.32	\$48,497.72

Civil penalty assessment question

The parties were permitted to make a record concerning those statutory factors found in section 110(i) of the Act dealing with the assessment of civil penalties for violations of the Act and the mandatory health and safety standards promulgated therein (Tr. 8-9), and MSHA's solicitor has included some arguments in support of its request for an assessment of civil penalties against the respondent for discriminating against Mr. Cooley. However, included in those arguments are new matters dealing with an alleged "knowing violation" by respondent's foreman, arguments concerning respondent's prior assessments history for certain violations of mandatory safety or health standards, and arguments concerning the effect of any civil penalty on respondent's ability to remain in business.

While it is true that I invited the parties to make such a record in this case, on reflection, and in light of the new matters pleaded, I decline to assess any civil penalty against the respondent at this time.

However, MSHA is free to proceed in a separate civil penalty proceeding if it believes that this is appropriate. Since the Act, as well as the Commission's rules, provide specific steps to be taken in regard to civil penalty proceedings, I believe that it should proceed in a separate proceeding if it desires to seek a civil penalty for respondent's act of discrimination. MSHA's request for an assessment of a civil penalty in this case is DENIED, without prejudice to its filing a separate proceeding.


ORDER

1. Respondent IS ORDERED to reinstate Mr. Cooley to his former or equivalent position at the mine in question, with all of his seniority rights intact back to the date of his discharge, at the current prevailing wage and fringes pursuant to the contract between the respondent and the union (exhibit G-4).

2. Respondent IS ORDERED to pay to Mr. Cooley all back pay, including fringe benefits, from the date of his discharge to and including the time periods and in the amounts shown on MSHA's schedule of remedies (\$48,497.72)

3. In addition to the back pay and fringe benefits shown in MSHA's schedule of remedies, respondent IS ORDERED to pay Mr. Cooley back pay and fringe benefits from March 30, 1982, up to and including the day he is reinstated to his job in compliance with this Order. In this regard, MSHA's counsel is directed to confer with respondent's counsel for the purpose of calculating the amounts due Mr. Cooley and to insure compliance with this additional back-pay and fringe benefits payment requirement.

Full compliance with this Order is to be made within thirty (30) days of the date of this decision.


George A. Koutras
Administrative Law Judge

Distribution:

David F. Wightman, Esq., U.S. Department of Labor, Office of the Solicitor,
231 W. Lafayette St., Rm. 657, Detroit, MI 48226 (Certified Mail)

Frank X. Fortescue, Esq., Welday, Klyman, Fortescue, Burau & McGlynn,
200 Northland Towers East, Southfield, MI 48075 (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 3 - 1982

SECRETARY OF LABOR,	:	Civil Penalty Proceeding
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. SE 81-21
Petitioner	:	A.O. No. 40-01148-03009 F
	:	
v.	:	No. 1 Tennessee Strip
	:	
S.A.M. COAL CO. INC.,	:	
Respondent	:	

DECISION

Appearances: Thomas A. Grooms, Attorney, U.S. Department of Labor,
Nashville, Tennessee, for the petitioner; Daniel J. Tribell,
Esquire, Middlesboro, Kentucky, for the respondent.

Before: Judge Koutras

Statement of the Case

This proceeding concerns proposals for assessment of civil penalties filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a), charging the respondent with two alleged violations of certain mandatory safety standards found in Part 77, Title 30, Code of Federal Regulations. Respondent filed a timely answer and notice of contest and a hearing was convened at Knoxville, Tennessee on February 2, 1982.

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 penalties filed in this proceeding, and, if so, (2) the appropriate civil penalty 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 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.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, P.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 CFR 2700.1 et seq.

Discussion

The conditions or practices allegedly constituting violations of the mandatory safety standards cited by the inspector in this case are set out in the following citations (Exhibits P-2 and P-3):

Section 107(a) citation 0736755, August 6, 1980, cites a violation of 30 CFR 77.1001, and the condition or practice is described as follows:

Loose unconsolidated material (rock) is present along the highwall. The wall is approximately 250 feet long and 50 feet high. Observed in the No. 1 pit during a fatal accident investigation.

Section 104(a) citation 0736757, August 6, 1980, cites a violation of 30 CFR 77.1713, and the condition or practice is described as follows:

Evidence indicated that inadequate onshift examinations were being made. The highwall on each end of the accident scene was obviously hazardous and the conditions were not recorded in the record book.

The inspector modified the citation on August 12, 1980, to include the following condition:

The person making the on-shift examination and filling out the record book was not certified in the State of Tennessee.

Stipulations

The parties stipulated that respondent is subject to the Act, that any penalty assessed will not adversely affect its ability to remain in business, and that respondent's prior history of violations consists of five citations as listed in an MSHA computer print-out (Exhibit P-1; Tr. 4).

Testimony and evidence adduced by the petitioner

MSHA Inspector Lawrence Spurlock testified that he has some 26 years experience in the coal mining industry and has served as an MSHA inspector for eleven years. His experience includes the inspection of surface mines and the investigation of accidents involving high walls. He confirmed that he conducted an accident investigation at the subject mine in August 1980, and did so after the respondent advised MSHA that a fatal accident had occurred at the mine. He also confirmed that as a result of that investigation he issued the two citations which are the subject of this proceeding. He issued the section 107(a) withdrawal order because loose unconsolidated material was still present after the accident occurred (exhibit P-2; Tr. 7-12). He also prepared an accident report and a copy was served on the respondent (exhibit P-4). He indicated that the accident occurred on August 5, 1980, and he identified several photographs which were taken at the time (exhibits P-5 through P-21; Tr. 12-31).

Mr. Spurlock testified that the accident victim was killed when part of the high wall collapsed on him and his drill rig while he was working under it drilling boreholes into the ground to facilitate the construction of a drainage ditch, and he identified the scene of the accident as depicted in photographic exhibits P-6 through P-10, and he estimated the width of the part of the wall which collapsed as 25 to 30 feet wide, and that the weight of the rock material which fell as approximately 100 tons (Tr. 18). With regard to the loose material which he cited in his order, Mr. Spurlock referred to photographic exhibit P-7 and drew a red circle around the area in the photograph where he believed the loose material was present. He also identified similar areas of loose unconsolidated materials as well as areas described as "cracks" in exhibits P-9 and P-10 (Tr. 19-20), as well as in exhibit P-11 (Tr. 21-22). Exhibit P-14 depicts the area from which the rock fell and it also shows "over-hanging material created after the wall collapsed" (Tr. 25).

Mr. Spurlock testified as to several cracks which he observed along the top of the high wall, but he did not know what caused them. However, he stated that they were present in the part of the wall which was left standing after the collapse, and the cracks may have been caused by drilling or blasting (Tr. 28). He believed that the accident may have been caused by the vibration of the drill in the pit near the high wall, and he believed that the mine operator should have removed loose material from the wall as the pit was being developed (Tr. 35). Proper procedures call for removal of loose materials so that the wall is sloped "back toward the hill in at a proper angle of repose order to keep it from over-turning on a person" (Tr. 35-36). Mr. Spurlock believed the wall was "pretty straight" at a 90 to 95 degree angle, and he identified a copy of the respondent's "ground control plans" as submitted to MSHA (Exhibit P-18, Tr. 40). The plan contains the operator's procedures for scaling high walls and contains a requirement that the angle of repose for the high wall be 85 degrees or less (Tr. 41). Mr. Spurlock did not believe that the wall in question had been properly scaled because "there was too much loose, unconsolidated material still present on the wall" (Tr. 41).

Mr. Spurlock stated that the respondent advised him during his investigation that the wall in question had been scaled by means of a power shovel. However, he determined that the shovel had not been used on the day of the accident and that it was parked on the spoil bank some 3/4 of a mile from the accident scene undergoing repairs (Tr. 42). Further, the respondent advised him that the shovel had not been used for some three or four days prior to the collapse of the wall (Tr. 42).

Mr. Spurlock testified as to the second citation which he issued for a violation of section 77.1713, and confirmed that he did so after checking the mine record books for August 5, 1980, and failing to find an entry for loose unconsolidated materials. Since he found such material present on August 6, 1980, which he believed constituted an obvious violation of section 77.1001, he also believed that a competent on-shift examiner would have discovered those conditions (exhibit P-3; Tr. 45-46). He explained that part of the mine is located in the State of Tennessee and part in Kentucky, and that the portion of the mine which he cited is located in Tennessee and the on-shift examiner was not certified in that state, but was certified in Kentucky (Tr. 46).

On cross-examination, Mr. Spurlock testified as to certain drill holes found at the top of the high wall, but he did not know when they were drilled, nor did he know the condition of the area when they were drilled. The order which he issued was terminated by another inspector, possibly the day after it was issued, and he was not present when it was terminated. In addition, he was not in the pit, nor did he inspect it, prior to the day of the accident (Tr. 49). He was acquainted with "hill seams", which he described as separations which are dry and sometimes wet, and he conceded that it was possible that some were present in the area where the rock materials fell out from the wall. He also conceded that the "cracks" he observed were "natural" cracks (Tr. 51).

Mr. Spurlock conceded that the loose materials which he cited the day after the accident were conditions that existed after the rock fall in question, and that the overhanging area was what was left after the wall fell (Tr. 55). He also described in an area of unconsolidated material which he identified in photographic exhibits P-10, as unconsolidated material that had nothing to do with the collapse of the wall and was away from the fall area (Tr. 55-56). He had no idea as to the angle of repose of the area from where the rock fell prior to the fall (Tr. 57), but did observe "teeth" marks present on the high wall from the shovel (Tr. 57). As for the second violation concerning the record book entry, he conceded that he did not observe the area in question on the day of the accident, August 5, and did not know what the foreman may have observed at that time (Tr. 58).

Mr. Spurlock testified that the conditions were abated by blasting down the remaining highwall area where the fall occurred (Tr. 69), and he reiterated that he had never observed the high wall area in question prior

to the day of the accident. He also indicated that the respondent had never previously been cited for any similar violations, and to his knowledge had no problems with controlling the high walls prior to the accident in question (Tr. 72). His rationale for issuing the second violation is stated as follows (Tr. 76):

JUDGE KOUTRAS: But there is no question in your mind that Mr. Spurlock issued the second citation because of what I have just recited, that he believed that the accident resulted from an obvious hazardous condition on the high wall which should have been detected by the on-shift Examiner.

MR. GROOMS: I believe that that is correct, is it, Mr. Spurlock?

JUDGE KOUTRAS: Is that right?

THE WITNESS: Yes.

Harold C. Copeland testified that he is employed by the State of Tennessee as a mine inspector and that is presently engaged in duties connected with the training of state mine inspectors. He also owned a strip coal mine for about a year and is familiar with high walls. He confirmed that he was called to the mine in question the day after the accident and coordinated his inspection with MSHA's inspection of the accident scene. He identified exhibits P-4 and P-5 as photographs of the scene of the accident, and also identified photographs which he took during the inspection (Exhibits P-14 through P-17, P-21; Tr. 77-80).

Mr. Copeland testified that the conditions depicted in exhibit P-15 show loose overhanging rock and major vertical cracks. The loose rock on top of the highwall area depicted in the photograph are hazardous, but he did not know about the cracks shown because "there is no way to tell what those cracks lead to" (Tr. 81). When asked what should have been done about the wall, he replied "if it was this way before there was men working under, it should have been scaled down and cleaned up. The loose rock should have been taken off of it" (Tr. 81). Referring to the cracks which appear in exhibit P-21, he indicated that they may have been caused by prior blasting, but that there was no way to know for sure (Tr. 82). The present cracks however, would present a danger of the rock falling, but he did not know if they were from the area where the original fall had taken place (Tr. 83).

Mr. Copeland expressed an opinion that the fatality was caused by falling rock, and he conceded that the loose rock which he observed was present after the accident occurred. However, from his experience, he did not believe that the high wall which he observed the day after the accident would have looked any different the day before (Tr. 90).

On cross-examination, Mr. Copeland confirmed that he did not see the accident area prior to the fall and had no way of knowing whether the cracks he described were present at that time (Tr. 95). He also indicated that certain drilled holes which were located 50 or 75 feet away from the immediate fall area and were not charged may have been due to faults in the rock, but he did not know when the holes were drilled (Tr. 97-98).

Wayne Farmer testified that he is a field representative for the State of Tennessee Labor Department, but has worked in underground and surface strip mining since 1944. He was part of the investigation of the accident in question, and identified the loose unconsolidated materials shown in exhibits P-5, P-6, and P-14 and P-15 (Tr. 107). While he did not know why the wall in question fell, since it did fall, he believed that it was due to unconsolidated rock (Tr. 108). He agreed with Mr. Copeland's conclusions as to why the wall fell (Tr. 109).

On cross-examination, Mr. Farmer conceded that he saw none of the rock prior to the fall, did not know when any of the holes in question were drilled, and did not know how much of the rock fall may have changed the adjacent area after the fall because "I wasn't there" (Tr. 109). He also conceded that it was possible for the mine foreman to inspect the wall immediately before the fall and come to the conclusion that it appeared all right to him, but not to him (Farmer) when he looked at it (Tr. 117).

Testimony and evidence adduced by the respondent

Charles Woodall testified that he has been employed by the respondent for about a year and half, and has worked around strip mines for about 34 years. He stated that he is a shovel operator and on the day of the accident was working in the pit during the second shift from 3:00 to 11:00 p.m. He described the procedure for stripping the pit and stated that he scaled the high wall in question by taking "everything down that is loose that you can pull down as you go" (Tr. 128). All loose materials are taken down with the shovel and in all the years he has served as a shovel operator stripping pits and walls he has never had an accident and has "never had a machine tore up" (Tr. 129). He indicated that he scaled the high wall in question during his shift and thought it was safe enough to work in the pit. He would not have continued to work in the pit if he did not believe it was safe, and company policy dictates that no one is required to work in unsafe areas. He has always been instructed to inform his supervisor or foreman if he believes an area is unsafe and he has no fear of any reprimand for leaving an unsafe work area (Tr. 130). Mr. Woodall stated that the 2400 Lima Shovel which he operated was the only one used in the pit in question and it was not out of service on the day of the accident but it was taken out for repairs after the pit was cleaned up (Tr. 131).

On cross-examination, Mr. Woodall stated that the shovel may have been taken out of the pit the day after the accident, but that he did not drive it out. After examining photographic exhibits P-9 and P-10,

Mr. Woodall stated that the wall did not look the way the pictures show it on the day of the accident since it did not appear in that condition when he left the pit area (Tr. 131-133). He indicated that all loose material is scaled with the shovel and any material that cannot be taken down by the shovel is not "loose material". He also indicated that it was possible that from the time he completed scaling the wall until the fall the rock could have been "working", but in the 34 years he has worked in the pits prior to the accident he has never known of anyone being struck by a rock falling off a high wall (Tr. 135).

In response to bench questions, Mr. Woodall stated that he could not recall when he last scaled the high wall which fell prior to the accident, but his guess was that it would have been two days before. The wall is scaled with the bucket attached to the boom of the shovel, and it will extend some 30 to 35 feet. The walls are scaled as the pit is opened up and as the shovel moves in and out of the lifts (Tr. 135-139). He indicated that he did not observe the high wall in question after the accident, and that he was working in another area when the accident occurred. He did not return to the area where the accident occurred until a week or two later (Tr. 141).

Jack Miracle testified that he is employed as a strip mine foreman and while he is not presently employed by the respondent was employed as a shovel operator during August 1980, and he operated a shovel for five or six years prior to that time. He stated that he and Mr. Woodall operated the shovel in the pit where the accident occurred. He worked the day shift and stated that the high walls were scaled and cleaned as the pit was being stripped. He described the procedures he followed for scaling and stripping, and indicated that the entire high wall was scaled during the time he was stripping the pit. He also indicated that he took the shovel out of the pit during the last shift the evening before the accident and parked it some 500 feet away, and it was his understanding that it would be overhauled. In his opinion, nothing was left to be done in the pit when he removed the shovel and he observed no unsafe conditions in and about the high wall at the time the shovel was brought out. However, he did not return to the accident area after the fatality occurred (Tr. 141-145).

Mr. Miracle stated that based on his 18 years' experience in and around strip mine pits, he observed nothing about the highwall in question at the time he last observed it when he moved the shovel out which would lead him to conclude that it was not safe. He had worked with the accident victim for some six years and considered him to be a safe worker, and Mr. Miracle indicated that he would not hesitate to leave a pit area if he believed it were unsafe. He was close to the scene of the accident after the wall fell and observed rock from the fall laying in the pit and that any overhanging rock which may have been present "wasn't hanging there before the fall" (Tr. 147). The pit was completely finished when he moved the shovel out and no additional scaling is done before the coal is actually hauled out (Tr. 148).

On cross-examination, Mr. Miracle stated that the area depicted in photographic exhibit P-9 away from the rock fall itself resembles the condition of the wall when he left it. However, he believed the areas circled in red on the photograph which have been characterized as "cracks" are in fact "offsets" in the wall. He confirmed that he was at home when the accident occurred and that he performed no work with the shovel on the day of the accident. He believed that the last time he took the shovel out was on the Monday evening prior to the accident, but was not absolutely sure. He also confirmed that no scaling was done after the shovel was taken out of the pit (Tr. 152).

In response to bench questions, Mr. Miracle viewed photographic exhibits P-7, P-10, and P-15, and stated that what appears to be overhanging rock is shown in exhibit P-15, but that "it may be laying back on the wall 15 to 20 feet" (Tr. 154). If it were small rock, the shovel boom could reach it since it is 67 feet high, and when extended to its full length it could reach a distance of 75 feet. Although he could not describe the highwall as shown in the pictures, he stated that he would not want to work under it after the accident occurred because "the fall must have disturbed it when it fell out" (Tr. 156).

J. B. Huddleston, mine superintendent, testified that he has 17 years of strip mining experience and has operated shovels and other related equipment during this time. He was the superintendent on August 5, 1980, when the accident occurred and was a personal friend of the accident victim David Crawford. Mr. Woodall, and Mr. Miracle were good shovel operators, and Mr. Crawford had always been a competent and safe worker.

Mr. Huddleston stated that he worked in the pit in question on the Saturday before the accident and the shovel was not there. He believed the shovel may have been moved out of the pit the previous Thursday or Friday. He also indicated that once the tripping is completed with the shovel, trucks and loaders are brought in to haul out the coal and the coal cleaning machine comes in and cleans up the coal. The pit and wall looked good to him when he worked it on Saturday and "everything looked solid" (Tr. 160). At the time of the accident, Mr. Crawford was drilling in the pit near the base of the highwall, and he did not believe that Mr. Crawford would have exposed himself to any hazard had there been any observable dangerous conditions present. Prior to the accident, no one had ever been injured from any dangerous highwall situation and he believed the accident occurred when a hill seam in the wall slipped and fell off (Tr. 165-166).

Mr. Huddleston testified that drilling and blasting near and at the top of the high wall had taken place prior to the accident and he described the procedures followed during this process. Loading operations ceased after the accident, but the holes which had been drilled and charged were shot the next day (Tr. 169).

On cross-examination, Mr. Huddleston confirmed that the order was abated and terminated after the highwall in question was blasted down (Tr. 171). Referring to exhibit P-9, Mr. Huddleston stated that the wall

after the accident did not look the way it did the previous Saturday. The exposed "jagged-like" rock and signs of hill seams shown in the photograph were not present prior to the accident and the wall appeared smooth and "there was nothing loose that you could see on it" (Tr. 175). Referring to exhibit P-21, he could not tell whether there were "cracks" in the wall area shown because he did not go to that area and what appears to be cracks may be an open place in the ground (Tr. 179).

In response to a question concerning the condition of the highwall as stated by the inspector in his citation, and as depicted in exhibits P-7, P-10, and P-15, Mr. Huddleston stated as follows (Tr. 181-182):

A. Yes, he was correct that there had been loose stuff on the wall because it was there.

Q. You could see that, is that what you are saying to me now in those pictures, that you can see loose unconsolidated rock?

A. Yes.

Q. Along that high wall?

A. Yes, it looks to be.

* * * * *

Q. (By Mr. Tribell) Between the time this rock fell out, whatever the condition was created, if any, at that time and the next day when the Inspector came out there, there was nothing done, we pulled out after we got Mr. Crawford out; was any work performed in there?

A. None at all.

Q. Was the area barricaded and guarded?

A. Barricaded and locked so that nobody wouldn't go in.

Q. In other words, if there had been any condition created by this happening, we would not have attempted to correct it before the inspector came on the job?

A. No, not at all. What was there was there, and it it was to be faced, and even if there had of been, I wouldn't have had anything to do about it because it was there and everybody could see it, you know, whatever is done is done in my opinion. I didn't "straighten it out" or nothing, I wouldn't have had it done.

Mr. Huddleston indicated that the length of the entire highwall was approximately 500 feet but only the part immediately above the fall which had been drilled was blasted down to abate the citation. The entire wall was eventually taken down months later (Tr. 185-186).

Dallas Shackelford testified that he is the former owner of the S.A.M. Coal Company, and since August 1980, has served as general manager in charge of all coal production. He was at the mine when the accident occurred, and he viewed the pit and highwall the previous Thursday and Friday and it looked safe to him. He also observed the high wall while in the pit loading coal on the morning of the accident and observed no cracks or other dangerous conditions (Tr. 187-189). Three or four men and equipment were working under the highwall at any given time and he observed nothing that would lead him to believe they were in danger. The shovel was taken out of the pit for repairs, and a week before the accident he had discussed the need to repair the motor with the mine superintendent (Tr. 190).

Mr. Shackelford testified that he arrived at the scene of the accident five or ten minutes after the wall fell, and after taking some measurements concluded that the drill rig and accident victim were approximately 40 feet from the base of the wall when it fell on them. He indicated that the portion of the wall which fell "tumbled" and "pitched" out approximately 50 feet. He was personally acquainted with the accident victim and considered him to be one of the safest employees. The company has had a good safety record, and no prior accidents have ever occurred in connection with the highwalls. All employees are directed not to work in unsafe areas and to consult with their boss if they encounter dangerous conditions (Tr. 193).

Eddie Haley testified that he has been employed by the respondent as a drill foreman for about three years. He confirmed that he had drilled the holes depicted in the top of the highwall in question and stated that they were drilled before the highwall was created. He has never drilled such holes from a distance of 30 inches from the edge of any highwall, and while he observed the highwall from the top, he had never gone down into the pit. While at the top of the wall he never observed any loose or unconsolidated material, nor has he ever observed any unsafe conditions there. He was acquainted with the accident victim and knew him to be a safe worker who would never have been in the pit if he thought it was dangerous (Tr. 198-201).

Joe Wyatt testified that he is employed by the respondent as a drilling and blasting foreman, was so employed at the time of the accident, and he discovered the victim after the section of the highwall fell. Mr. Wyatt indicated that he had been in and around the pit area before the accident and the walls "looked good to me from the top side and the bottom down in the pit when we scuttled it with the shovel" (Tr. 202). The only difference he observed in the wall after the accident was in the area where the rock fell out. The shovels were operating in the pit and the walls were stripped and scaled. He explained that some of the drill holes were loaded, but the shot was delayed a day because of the accident (Tr. 203).

Mr. Wyatt testified that when the accident occurred all of the men left the mine site, and he disagreed that loose and unconsolidated material was on the highwall in question (Tr. 204).

Robert Marcum testified that he has worked around strip mines for 18 years and is employed by the respondent as a foreman. On the day of the accident he was the second shift foreman. He and the first shift foreman, David Ellison consulted with each other during the shift change and together they checked out all of the work areas. This is the normal practice during the shift change. They checked the pit and highwall area where the accident occurred and they left it ten minutes before the accident. They observed no conditions which they thought was dangerous, and he had been in the pit previous to the accident supervising the loading and cleaning of coal. In his opinion, the rock fall in question was caused by a hill seam and that loose, unconsolidated rock did not cause the rock fall of such magnitude. He had observed the shovel operator stripping and scaling the highwalls and believes that it was a good job (Tr. 209).

On cross-examination, Mr. Marcum confirmed that he had previously executed an affidavit for respondent's counsel which indicated that he had observed a hill seam in the wall with dirt and mud between sections of rock, and that this is what caused the rock to separate and the wall to fall (Tr. 211-212). He confirmed that he observed this condition on the day of the accident, and he also confirmed that Mr. Ellison kept his own shift examination books and that he (Marcum) kept his own. He did not know whether Mr. Ellison was making his on-shift examination at the time he accompanied him, nor did he know about any entries that Mr. Ellison may have made in his book (Tr. 215).

Mr. Marcum stated that he was in the pit about five minutes making his inspection of the highwall and that it does not take long to drive in and out of the pit. He did not go to the top of the highwall because his men were not expected to work in that area for weeks after the accident, and he had no way of knowing whether Mr. Ellison would be making his own on-shift examination at that time (Tr. 216). Mr. Marcum stated further that he was in Mr. Ellison's truck when he went to the pit to see how the accident victim was doing and they were there about four or five minutes, and neither he nor Mr. Ellison went to the top. He does not know whether this was Mr. Ellison's on-shift examination and he does not know why Mr. Ellison was not certified in Tennessee as a mine foreman, but that he (Marcum) is certified in both places (Tr. 220).

Referring to exhibit P-9, Mr. Marcum identified an area along the highwall which appears to contain loose, unconsolidated material, but he could not state whether the fall caused that condition. He also confirmed that he observed the dirt and mud in the hill seam when he returned to the pit after the accident, and that he saw "the dirty streak right where the hill seam was" (Tr. 222-223).

Findings and Conclusions

Fact of Violations

Citation No. 0736755, August 6, 1980, 30 CFR 77.1001

30 CFR 77.1001 provides as follows:

Loose hazardous material shall be stripped for a safe distance from the top of pit or highwalls, and the loose unconsolidated material shall be sloped to the angle of repose, or barriers, baffle boards, screens, or other devices be provided that afford equivalent protection.

Section 77.1000, requires a mine operator to establish and follow a ground control plan for the safe control of all highwalls and pits, and section 77.1000-1, requires the filing of a copy of the plan with MSHA. The respondent's plan which was in effect at the time of the accident in question was filed with MSHA on October 16, 1979, (exhibit P-18), and the equipment used for the scaling of the highwall, as well as the means for doing this is stated as follows in the plan:

Highwall will be brought down by the dozers and high lifts and scaling needing to be done will be done by 2400 Lima Shovel.

In addition, the plan reflects the anticipated height of the highwall to be 60 feet, the maximum height as 80 feet, and the proposed angle of the highwall is shown as 85 degrees or less. Further, I take note of the fact that the respondent is not charged with a violation of its ground control plan. Inspector Spurlock includes no such "finding" in his accident report (exhibit P-4), and petitioner does not assert any violation of section 77.1000.

During the course of the hearing, respondent's counsel argued that there is no evidence presented that loose, unconsolidated rock or material was present along the entire 250 feet of the highwall. Conceding the existence of loose and overhanging rock after the fall, counsel asserts that these conditions were the obvious result of the fall. Further, since the inspector only required the highwall area which remained in the immediate vicinity of the fall to be blasted down to abate the citation, respondent's counsel further suggests that even if loose rock was present prior to the fall, it obviously was confined to that area and not to the other areas testified to by the inspector during the hearing well after the fact. Counsel also suggests that there is a strong inference that the only reason the citation issued was because a fatality had occurred, and he emphasizes the point that the testimony and evidence presented by his witnesses reflects that the highwall in question was scaled of all loose unconsolidated rock prior to the fall and that inspections of the highwall revealed no obvious hazardous conditions (Tr. 233-235).

Petitioner's counsel argued that the evidence he presented clearly established that after the fall loose unconsolidated rock material was left on the highwall, and that these conditions constitute a violation of the cited safety standard. As to the condition of the highwall prior to the fall, counsel concedes that there is no direct evidence that loose unconsolidated materials were present on the highwall. However, counsel asserts that there is circumstantial evidence that loose unconsolidated materials were present and that these conditions caused the rock fall in question. Counsel asserts further that it is not credible that only the portion of the wall which fell out was loose and unconsolidated and that the remaining portion away from the wall was in any better condition. Counsel stated that "it is only reasonable to assume that this entire distance here was in poor shape, and that that was the cause of the wall to fall out" (Tr. 237). When asked whether he meant the entire 250 feet of highwall, counsel responded "at least portions along that way, as you get closer to the rock fall, obviously you get into the question of what came first" (Tr. 237).

With regard to the proposed \$10,000 assessment for an alleged failure to scale the wall, counsel conceded that the fact that a fatality occurred prompted that initial assessment amount by MSHA (Tr. 237). Conceding that the highwall area was isolated after the fall and that no one was working in that area at the time the citation issued, counsel nonetheless supported the proposed assessment as follows (Tr. 238).

MR. GROOMS: In some sense, you could argue that this was an assessment, that is, in the sense that assessment took these circumstances; but based on the Inspector saying in his Inspector's Statement that there was a fatality associated or related to this violation, now clearly then the Inspector believed, and it is our position, that the circumstances, the state of that wall circumstantially supports the theory that the fatality was caused by the poor condition of that wall.

The parties do not dispute the fact that the rock which fell from the highwall and caused the fatality constituted a "massive" fall (Tr. 225). This conclusion is supported by the testimony of witnesses which described the extent of the fall as encompassing a total volume of approximately 100 tons of rock which fell from an area of the wall which was approximately 25 to 30 feet wide and approximately 50 feet high, and from the photographic exhibits taken shortly after the accident showing the rock mass which covered the drill as well as the victim. Inspector Spurlock's accident investigation report contains a finding that "loose overhanging material was present for a distance approximately 250 feet" (pg. 3, exhibit P-4). The citation (exhibit P-2), described the highwall as being 250 feet long, but the loose unconsolidated material is described as being "present along the highwall". In his narrative statement describing the gravity of the violation, Mr. Spurlock states that the accident occurred "due to the walls not being evaluated properly".

When read together, the highwall conditions described by the inspector in the citation, accident report, and narrative statement are lacking somewhat in clarity. It is difficult to determine from these documents precisely what the inspector had in mind when describing the parameters of the loose rock and materials which may have been present on the highwall in question. A reading of those documents suggests that loose unconsolidated rock materials were present on the highwall when the inspector viewed the pit and wall area after the accident, but it is far from clear to me whether his concern was with the entire 250 feet along the top of the highwall, or simply that 25 to 30 foot area from where the rock fell, including the immediate edges on both sides of the wall. In addition, it is not clear to me whether the inspector intended to cite the respondent for conditions which may have existed before the highwall collapsed, or whether his intent was to cite a violation for the conditions of the highwall which existed at the time he viewed the area after the fall.

On the basis of the facts presented in this case, separation of those conditions which may have caused the highwall to collapse, and those conditions which the inspector believed constituted a violation at the time he issued the citation is no easy task. Significantly, since none of the inspectors who testified observed the condition of the highwall prior to the fall, petitioner's case concerning hazardous conditions rests on speculation and inferences based on what they observed after the event. On the other hand, respondent's defense that the highwall which fell had been scaled and contained no readily observable hazardous conditions is supported by the testimony of several witnesses who were in the pit and highwall area immediately prior to the fall.

The citation issued on August 6, 1980, was issued the day after the fatal fall of rock material from the pit highwall. The inspector had been summoned to the scene, and during his investigation of the accident issued the citation which states on its face that "loose unconsolidated material (rock) is present along the highwall". The inspector described the wall in the citation as being approximately 250 feet long and 50 feet high, and he states that he observed the conditions during his fatal accident investigation. Although no other conditions are described on the face of the citation issued at the time of the event, at the hearing held on February 2, 1982, the inspector identified several photographs taken during his investigation and he described several areas along the highwall as "cracks" and "overhanging materials" as well as loose unconsolidated materials. However, he also testified that the cracks were present in the highwall area which remained after the fall, and that the overhanging material was created after the wall collapsed.

With regard to the assertion that the respondent failed to properly scale the highwall, the inspector testified that he reached this conclusion after observing loose unconsolidated rock still present on the highwall after the fall. He also identified other areas along the highwall containing unconsolidated material, but conceded that these areas were away from the fall area and had nothing to do with the rock which fell. He also conceded that he did not view the highwall in question prior to the fall, had no

knowledge as to the condition of the wall prior to the fall, had no idea as to the angle of repose of the highwall prior to the fall, and was not present when the conditions he cited were abated. Although he indicated that he observed "teeth" marks made by the shovel in the highwall, his conclusion that the wall was not scaled was based on the fact that the shovel was not in the pit area on the day of the accident and he determined during his investigation that the shovel had not been used in the pit for the three or four days prior to the accident.

With regard to the existence of "hill seams" in the highwall, the inspector conceded that it was possible that some were present in the highwall area which had fallen, and he also conceded that some of the cracks which he described may have been "natural". He reiterated that the fact that the loose unconsolidated materials which existed, and which he observed after the fall, constituted an obvious violation of section 77.1001.

State mine inspector Copeland, who accompanied the MSHA inspector during the accident investigation did not view the wall prior to the fall and had no knowledge of its condition. His testimony regarding the existence of loose rock on the wall is based on observations made after the fall and while he expressed an opinion that the wall would not have looked any different before the fall, he had no basis for making that judgment other than his "experience". In these circumstances, since I believe that the massive fall of rock which occurred was a rather unusual event, particularly in light of the extent of the fall, I reject the notion that anyone may rely on "past experience" to support a conclusion that the highwall area which fell probably looked the same way the day before the fall. As for the cracks which he observed, Mr. Copeland conceded that he had no way of knowing what caused them, and he candidly conceded that he could not state whether the cracks presented a hazard because there was no way to tell where they led to.

As for the testimony of state mine inspector Farmer, he too conceded that he had no knowledge of the condition of the wall prior to the fall, and while he agreed with Mr. Copeland's conclusion that loose unconsolidated material caused the fall, his conclusion in this regard, as well as that of Mr. Copeland is simply based on the fact that "it did fall".

Petitioner's arguments

In addition to the arguments presented during the course of the hearing, in its posthearing brief petitioner argues that the fatal accident was caused by the respondent allowing the highwall in question to deteriorate over a period of several days, during which time its scaling and stripping shovel was absent from the pit. Petitioner maintains that the inspector issued the section 107(a) withdrawal order the day after the fatal rock fall when he observed loose and unconsolidated material along the entire length of the highwall during the course of his accident investigation, and in support of this contention, petitioner has cited certain testimony by the inspector, as well as several photographs of the highwall taken at the time of the investigation. Further, petitioner

asserts that the inspector cited a violation of section 77.1001, because the highwall had not been sufficiently scaled or sloped to the required 85 degree angle of repose. Petitioner cites the inspector's testimony that the wall was vertical and overhanging, and at an angle of from 90 to 95 degrees, and that the wall which fell and crushed the victim was identical to a column which bulged out from the highwall is shown in photographic exhibit P-8.

Petitioner also relies on the testimony of mine superintendent Huddleston that the shovel used for scaling was moved out of the pit on the previous Thursday or Friday prior to the accident which occurred on Tuesday, August 5, 1980, as well as the testimony of the inspector that the wall was probably "working" two or three days before the fall, and the testimony of the shovel operator Woodall that the wall could have been working during the time the shovel was removed, to support a theory that the removal of coal requiring heavy front end loaders and trucks to pass near and under the wall, as well as vibration from the victim's drill, during this time caused the deteriorating wall to collapse.

Finally, petitioner cites the testimony of respondent's witnesses who expressed concern about the conditions of the wall as depicted in MSHA's photographs, and asserts that respondent's suggestion that the collapse of the wall was caused by undetectable "hill-seams" should be rejected as sheer speculation based on no credible evidence or testimony.

Respondent's arguments

In addition to oral argument made at the hearing, respondent argues in its brief that the inspector's decision to issue the citations in this case was dictated by the fact that a fatality occurred. Conceding that a dangerous condition existed prior to the accident, respondent maintains that such a condition was not apparent to the accident victim, the mine foremen, or any other employees in the area in question.

With regard to the photographs introduced by MSHA during the hearing, respondent maintains that they contribute nothing constructive to this case since they can be, and in this case are, deceptive, especially as to depth, the lay of land, etc., and simply do not give an accurate idea of the way the area looked, even at the time they were taken.

With regard to Inspector Spurlock's "evaluations" as reported in his accident investigation report, respondent makes the following comments:

1. Respondent concedes that foreman David Ellison directed the accident victim to drill a series of holes in the bottom of the pit near the highwall.

2. Regarding the conditions of the highwall as reported by the inspector in his report, respondent maintains that the highwall had, in fact, been scaled properly as testified to by the operators, foreman, and other mine employees. As for the alleged cracks in the wall, respondent asserts that they resulted from the fall and that the respondent had no control over this condition.
3. With regard to the existence of certain drill holes at the top of the highwall and the inspector's belief that the weight of the drill may have weakened the highwall, respondent points out that this assumption was proved to be completely erroneous because the holes were drilled before the highwall was even created and that it is impossible to operate a drill within 3 to 5 feet of the highwall due to the way a drill must be set up and braced for drilling.
4. Concerning the purported statement by foreman Ellison that the shovel normally used for scaling the highwall had been out of service for repairs for five days, respondent states that the evidence proved that the shovel had not been taken out of service until it had completely stripped the pit, scaled the highwall, and completed its job in that area. It then left the pit under its own power, in an operating condition, and the shovel operators described how they scaled the highwall as the pit was stripped down.
5. Respondent agrees with the statement that foreman Ellison and second shift foreman Robert Marcum observed the drilling operation approximately five minutes before the accident and that both men stated that they observed no hazardous conditions at that time.

I am convinced from all of the evidence and testimony adduced in this case that Inspector Spurlock was primarily concerned about the loose, unconsolidated and overhanging rock which was present at the highwall area after the collapse of the wall. I am further convinced that he issued the imminent danger withdrawal order because of his concern that the condition of the highwall after the fall posed an imminent danger in the event mining were permitted to continue before the conditions which remained were corrected. However, the critical issue presented in this case is not so much the condition of the highwall after the fall, but rather, the conditions which existed prior to the fall and whether proper scaling and removal of rock had been accomplished in accordance with the requirements of the cited safety standard. The fact that an imminent danger may have existed at the time the inspector viewed the

scene of the accident the day after the wall collapsed during his investigation does not establish that the condition of the wall sometime prior to that event was such as to constitute a violation. After careful consideration of all of the evidence and testimony adduced in this case, I conclude and find that the petitioner has failed to establish by a preponderance of any credible evidence that loose, hazardous, and unconsolidated materials were present along the entire highwall in question prior to the fall, or that respondent had failed to comply with section 77.1001 by failing to strip or scale the entire highwall wall in question.

Inspector Spurlock's conclusion that the entire highwall had not ~~been~~ properly scaled was based in part on his assertion that loose, unconsolidated material was still present on the wall after the massive rock fall. However, he conceded that the loose materials he cited, as well as the overhanging areas, were at the location or in close proximity to that part of the wall which collapsed. In short, it seems obvious to me that his observations concerning the unconsolidated materials still present when he conducted his investigation on August 5th, were in fact observations of loose and overhanging materials which were the direct result of the fall which had occurred the day before, and which were present at or near that location.

A second reason for Inspector Spurlock concluding that the entire highwall was not properly scaled was his determination made during his investigation of the accident that the shovel normally used to scale the highwall had been out of service for repairs for five days prior to the highwall collapse, and that no other equipment capable of scaling the wall was present in the pit when Mr. Spurlock was there. The information concerning the absence of the shovel from the pit area was apparently given to Mr. Spurlock by former pit foreman David Ellison. Mr. Ellison did not testify at the hearing and petitioner did not take his deposition. Since none of the witnesses presented by the petitioner viewed the highwall conditions prior to the fall, petitioner's assertions that the highwall was not properly scaled in based on speculation and assumptions that no scaling of the highwall took place prior to the massive fall which occurred on August 5th. Although state mine inspector Copeland stated that the wall should have scaled, he prefaced his testimony with the remark "if it was this way before". Since he candidly admitted he had never observed the wall prior to the fall, and since it seems obvious to me that his testimony regarding the condition of the wall focused on how it appeared to him after the fall, his testimony as to whether it was in fact scaled is of little or no value. As for state inspector Farmer's testimony, I have given no weight to his inference that since the wall fell it obviously needed scaling.

Respondent's witnesses testified as to the scaling which had been on the highwall prior to the fall. Shovel operator Woodall, a man with 34 years of experience in the pits, testified as to the procedures he follows

in stripping and scaling a highwall. Although his testimony regarding the work that he performed in the pit indicates that it was done on the shift following the accident, he "guessed" that the last time he scaled the highwall in question was one or two days prior to the fall, and he indicated that the 2400 shovel was the one used to scale the wall and that it was not out of service on that day.

Former shovel operator Jack Miracle testified that he and Mr. Woodall operated the Lima 2400 shovel in the pit area where the fall occurred. Mr. Miracle testified that while he performed no work in the pit the day of the accident, he did work on Monday, the day before the accident, and that he took the shovel out of the pit after the last shift that evening and parked it some 500 feet away for overhaul. He also testified that nothing was left to be done in the pit when he took the shovel out, and he observed no unsafe conditions on the highwall.

Mine Superintendent Huddleston, a personal friend of the accident victim, testified that he was supervising the pit operations on the day of the accident and that he also worked in the pit the previous Saturday and observed nothing which would cause him concern for the integrity of the highwall. Mr. Huddleston did not see the shovel in the pit on Saturday, and he believed that it may have been moved out of the pit the previous Thursday or Friday. Thus, his testimony contradicts the testimony of Mr. Woodall and Mr. Miracle as to when the shovel may have actually been taken out of the pit area.

Drilling and blasting foreman Wyatt and shift foreman Marcum testified that they were both in the pit area in question on the day of the accident, that the highwall appeared to be safe, and they observed no dangerous or hazardous conditions. General Manager Shackelford testified that he observed the highwall the previous Thursday and Friday and it appeared safe. He also stated that he was in the pit on the morning of the accident, observed no cracks or dangerous conditions, observed men and equipment working under the highwall, and observed nothing which would lead him to believe they were in danger.

With regard to the existence of any loose, unconsolidated or overhanging rocks, it should be noted at the outset that the citation issued by the inspector states that such materials is present, and that it was observed during his accident investigation. Although the inspector's accident investigation report contains a finding that the loose materials was present for a distance of 250 feet, the citation simply states that the highwall was that long, but it does not state that the loose materials were present for that entire distance. Further, during his testimony at the hearing, the inspector made frequent references to certain photographs which were taken after the fall at the scene of the accident (exhibits P-5 through P-15), and he relied on those photographs to support his contention that loose materials were present along the highwall. However, a close examination of his testimony, as well as the photographs, leads me to conclude that Mr. Spurlock's concern with the conditions of the highwall

focused on what remained of the wall after it fell and not with the conditions of the entire 250 length and breadth of the wall. For example, the inspector identified exhibit P-7 and drew a circle around an area of overhanging loose materials. One of the circles is directly over the fall area, and the other area circled appears to be in close proximity to the fall area.

The inspector also identified several cracks in the highwall, and circled several areas which he believed contained loose, unconsolidated rock, as well as overhangs of rocks and loose materials, as depicted in photographic exhibits P-9 through P-11, and P-14. However, he candidly admitted that some of the cracks along the top of the highwall, as well as the overhanging rocks and loose materials, were present in that part of the highwall which was left standing after the fall had occurred, and the enlarged photographs which he relied on substantiate the fact that the conditions referred to were at or closely adjacent to the area of the wall collapse. He also described some of the "cracks" as natural rock formations, and while state inspector Copeland also alluded to the presence of "cracks", he could not tell what caused them or where they led to and his description of overhanging rock as shown in photographic exhibit P-15 is clearly in reference to a condition left after the rock fall in question.

None of the witnesses who testified for the petitioner in this case had viewed the highwall in question prior to the fall, and it seems clear to me that they had no way of knowing the condition of that wall prior to the massive fall of rock which occurred on August 6, 1980. On the other hand, practically all of the witnesses who testified for the respondent had viewed the conditions of the highwall both before and after the fall, had worked in and around the pit area where the fall occurred, and their consistent testimony is that the highwall at the immediate location of the fall, as well as in the adjacent areas, as depicted in the photographs, simply did not look the same the day before and after the fall. Having viewed these witnesses on the stand during the course of the hearing, I find their testimony to be credible.

Petitioner's reliance on Inspector Spurlock's testimony that the highwall conditions he observed during his accident investigation on August 6th, a day after the fall, were not significantly different from those which prevailed on August 5th, the day before the fall, is rejected. The testimony in this case is that over 100 tons of rock materials fell from a 25 to 30 foot wide section of the highwall which was some fifty feet high and that several locations at the edges of the fall were left with loose, overhanging materials. However, it seems obvious to me that these conditions were the direct result of the fall, and I fail to comprehend how the petitioner can argue that the highwall conditions on both days were the same. Further, the testimony in this case is that the cited conditions were abated after "the loose unconsolidated material (rock) had been shot off, and the hazardous condition no longer exists" (exhibit P-2).

The record here confirms the fact the Inspector Spurlock did not issue the abatement or termination, but he did confirm that the citation was terminated after the highwall where the fall occurred was blasted down. Mine Superintendent Huddleston also confirmed that the citation was abated by blasting down the area immediately above the fall, and that the entire wall was eventually taken down months later. These facts support the conclusion that the gravamen of the charge against the respondent is that loose, unconsolidated materials were present along the highwall on August 6, 1980, the day that the inspector conducted his accident investigation, and that he was concerned about those conditions and that they were subsequently abated to MSHA's satisfaction by blasting down that portion of the wall which was left standing after the fall and which contained loose, overhanging rock materials.

In view of the foregoing, I conclude and find that the evidence and testimony adduced in this case does not support a finding that loose, hazardous materials were present on the highwall prior to the fall and that the respondent failed to strip or scale any such materials from the wall. Although the testimony regarding precisely when the shovel used for scaling was taken out of the pit area is conflicting, respondent presented credible testimony that scaling and stripping had been accomplished in the pit area in question prior to the massive rock fall and that the condition of the highwall immediately prior to the fall appeared to be free of any readily observable or detectable hazards to those men and supervisors who were in the area. As for the existence of the loose, unconsolidated and overhanging rock materials which were left after the fall, I cannot conclude that these conditions constituted a violation of the cited standard. Those conditions were the direct result of the fall and the area had been secured, miners were withdrawn, and barricades erected to facilitate MSHA's accident investigation. Given these circumstances, I do not believe that the respondent should be charged with a violation. As indicated earlier, the fact that the remaining conditions may have presented an imminently dangerous condition does not necessarily support a conclusion that a violation of any mandatory safety existed. Under the circumstances, Citation No. 0736755, issued on August 6, 1980, citing a violation of 30 CFR 77.1001, IS VACATED.

Citation No. 0736757, August 6, 1980, 30 CFR 77.1713

30 CFR 77.1713(a) provides as follows:

At least once during each working shift, or more often if necessary for safety, each active working area and each active surface installation shall be examined by a certified person designated by the operator to conduct such examinations for hazardous conditions and any such hazardous conditions noted during such examinations shall be reported to the operator and shall be corrected by the operator.

Subsection (c) of section 77.1713 requires the certified person making the examination required by subsection (a) to record the conditions of the mine areas that he examined in an approved book maintained at a designated mine area. The certified person is also required to report any hazardous conditions discovered during his examination so that appropriate corrective action may be taken.

Subsection (c) of section 77.1713 requires the certified person making the examination required by subsection (a) to record the conditions of the mine areas that he examined in an approved book maintained at a designated mine area. The certified person is also required to report any hazardous conditions discovered during his examination so that appropriate corrective action may be taken.

The citation charges the respondent with failing to make an adequate onshift examination, and the reasons given for this conclusion on the face of the citation is that "the highwall on each end of the accident scene was obviously hazardous and the conditions were not recorded in the record book". The citation was subsequently modified to include a second charge that "the person making the on-shift examination and filling out the record book was not certified in the State of Tennessee". The term "certified" is defined in pertinent part by section 77.2(m) as "a person certified or registered by the State in which the coal mine is located to perform the duties prescribed by this Part 77".

Petitioner's arguments

Petitioner argues that Inspector Spurlock cited a violation of section 77.1713, because the on-shift examination book for August 5, 1980, showed that the highwall was "okay". Due to "the obvious nature of the bad highwall", petitioner asserts that the inspector concluded that the required inspection was not done, or was incompetently done, and points to the inspector's testimony that in his judgment the wall as he saw it on August 6, 1980, would not have significantly changed so that what he observed on August 6, 1980, should have been apparent to the on-shift examiner on August 5, 1980.

Petitioner argues that Inspector Spurlock cited a violation of section 77.1713 because he interpreted that section as requiring not only an examination of active working areas and active surface installations, at least once on every shift, but also that this examination must be competent, in that it must detect hazardous conditions which then must be reported and corrected, as required by the standard.

Petitioner submits that the inspector's interpretation of section 77.1713 is correct and that it requires the certified person to do more than simply "view" the highwall. Since the standard requires that such areas be examined, petitioner asserts that the Dictionary definition of that word, which states in part "to inspect or test for evidence of disease or abnormality" is applicable in this case. In addition, petitioner

relies on the requirement of section 77.1713(c) that the certified person must make a report of the nature and location of any hazardous condition found to be present at the mine in further support of its interpretation of the standard, and cites Judge Stewart's decision in Secretary of Labor v. Bill's Coal Company, Inc., 1 FMSHRC 167 (1979) (Judge Stewart interpreting 77.1713(c)), wherein he stated that:

The operator's failure to record the existing hazards was negligent in that the conditions were visually apparent.

Petitioner submits that Judge Stewart's interpretation of section 77.1713(c) in Bill's Coal Company, Inc. and the interpretation which gives substance to this standard, in general, compels an interpretation consistent with that of Inspector Spurlock's, that the section is violated not only by the complete failure to examine working areas at least once per shift, but also by the failure to carry out these examinations in a competent manner by failing to discover the hazardous conditions that are present.

Petitioner argues further that section 77.1713(a) was also violated when foremen Marcum and Ellison went into the pit to make an examination a few minutes before the accident and failed by their cursory inspection to discover not only the apparent hazards but also the imminent hazard of the rock fall which took place within a few short minutes after this "inspection". In support of this conclusion, the petitioner cites the Commission's decision in Peabody Coal Company v. Secretary of Labor, 1 FMSHRC 1494 (1979), where the Commission stated:

The regulation is broadly worded and requires, among other things, that a designated certified person examine working areas for hazardous conditions as often as is necessary for safety and that any conditions noted be corrected by the operator.

In conclusion, petitioner maintains that section 77.1713(a) was violated when the respondent failed to competently examine the work areas and thus failed to identify the hazardous conditions present there. This occurred, states the petitioner, not only when the first shift foreman Ellison conducted his regular on-shift examination (if it was earlier than the examination conducted with second shift foreman Marcum) but also when Ellison and Marcum again entered the pit shortly before the accident to carry out another examination and failed again to detect the hazards.

Failure to perform adequate inspection and to record hazardous conditions.

The inspector testified that he cited this condition because of his assumption that the accident was caused by a hazard (loose unconsolidated rock) which he believed should have been detected and recorded by shift foreman David Ellison. The citation which he issued states that "inadequate"

on-shift examinations were made because the highwall "on each end of the accident scene was obviously hazardous and the conditions were not recorded in the record book". In support of this specification petitioner relies on the testimony of the inspector as well as the notation made on his "narrative statement" recorded at the time that he issued the citation (exhibit P-3), indicating that "The on shift record books showed o.k. in all highwalls, and at the scene of the accident and at another pit loose material was present". The book was not produced at the hearing, nor were any entries for the previous days mentioned.

Mr. Ellison is no longer employed by the respondent and neither party apparently made any attempts to take his deposition. However, second shift foreman Marcum testified that when he and Mr. Ellison were in the pit some ten minutes prior to the rock fall they observed no hazardous conditions. Although Mr. Marcum did not know whether the brief visit to the pit constituted Mr. Ellison's onshift examination, general manager Shackelford and superintendent Huddleston testified that they too were in the pit the morning of the accident, visually observed the highwall, and saw no hazardous conditions present.

Respondent does not argue or assert that the rather cursory view of the highwall by Mr. Ellison and Mr. Marcum while driving by the pit area in a truck during the end of the first shift and immediately before the wall collapsed constituted the inspection required by section 77.1713. Inspector Spurlock's accident investigation report (pg. 2) indicates that the accident victim reported for work at the pit in question at 7:00 a.m. on the day of the accident, and the pit was under foreman Ellison's supervision. The report also reflects that Mr. Ellison made an examination of the working areas of the pit and then assigned the workmen to their normal duties. Mr. Ellison entered the pit again at approximately 3:00 p.m. with second shift foreman Marcum, observed the work that had been performed by the accident victim at the base of the highwall, and left the area. Shortly thereafter another individual discovered that a portion of the highwall had fallen on the cab of the drill and that the accident victim had been crushed by the falling material.

Inspector Spurlock conceded that he did not know what foreman Ellison may have observed during his shift, and as previously noted, Mr. Ellison did not testify, and petitioner did not take his deposition. Since Inspector Spurlock had absolutely no way of knowing what Mr. Ellison may have observed when he noted the highwall conditions as "okay", I cannot conclude that Mr. Spurlock is in any better position to conclude that the conditions were in fact hazardous and that Mr. Ellison's failure to observe and record these purported hazardous conditions constituted a violation of section 77.1713. It seems to me before anyone can conclude that the respondent failed to accomplish its required on-shift examination in a "competent" manner because of some failure on its part to discover and record any asserted "hazardous conditions" which may be present it must first be established through competent credible evidence that such hazardous conditions existed and were readily obvious to the certified person making the examination.

While I agree with the petitioner's interpretation of what constitutes an examination pursuant to section 77.1713, the evidence and testimony adduced by the petitioner in this case in support of the citation simply does not establish a violation. It seems clear to me that the petitioner's position is that since there was a massive fall of rock from the highwall, the on-shift examiner was somehow derelict in his duty by not recording the hazardous conditions which led to that fall when he conducted his required inspection the day before the fall. However, as previously noted, I have concluded and found that the petitioner did not establish that such hazardous conditions existed and I have rejected petitioner's assertion that the highwall conditions observed by Inspector Spurlock during his accident investigation were not significantly different from those which probably prevailed the day before. Further, as previously noted, the evidence in this case clearly established that some 100 tons of rock fell from a 25 to 30 foot wide section of the highwall, and that the remaining portion of the highwall at or directly adjacent to that fall contained loose overhanging rock materials. It seems obvious to me that these conditions were the direct result of the fall and I fail to comprehend how the petitioner can now argue that the conditions on both days were the same and that they were somehow readily observable and should have been apparent to the on-shift examiner.

In view of the foregoing, I conclude and find that petitioner has presented no credible evidence to support its contention that loose hazardous materials were in fact present on the highwall area which fell or that the person conducting the on-shift examination observed such conditions and failed to record and report them. While it is true that loose unconsolidated rock materials remained on the highwall after the fall and that an overhang was present immediately above the wall area which had fallen out, I am convinced that these conditions were the direct result of the fall. This is also true for the areas described by the inspector as being "on each end of the accident scene". The fact that respondent was only required to blast down that portion of the wall in the immediate vicinity of the fall to abate the citation strongly suggests that this was the area which really concerned the inspector. Since the withdrawal order issued after the accident occurred and the area was barricaded off and no one was working there, the failure to record those remaining conditions does not in my view give rise to any violation of section 77.1713. The purpose of this standard is to alert a mine operator of obvious detectable hazards so that corrective action may be taken, and if necessary, to facilitate the withdrawal of mines from the zone of danger. Accordingly, that portion of the citation which charges a failure to conduct an adequate inspection and record obvious hazardous conditions is VACATED.

Lack of state certification on the part of the on-shift examiner.

The facts in this case reflect that part of the respondent's mining operation is located in the State of Tennessee and part in the State of Kentucky. The site of the accident took place in that portion of the

mine which has a Mine "ID" number indicating that it is in the State of Tennessee. Mr. Marcum testified and confirmed that shift foreman Ellison was not certified in the State of Tennessee, but he did not know why. Mr. Marcum is certified in both states, and Inspector Spurlock confirmed that Mr. Ellison was certified by the State of Kentucky. No evidence was forthcoming as to the requirements for certification in these states, and there is nothing in the record to indicate the relative mine expertise required by those jurisdictions before one is "certified". In any event, I believe it is clear from the evidence presented that Mr. Ellison was not certified by the State of Tennessee and since he was required to perform duties at the mine in that state, his lack of proper certification has been established by the petitioner and this specification of the modified citation is AFFIRMED.

History of Prior Violations

Respondent's history of prior violations for the period August 6, 1978 through August 5, 1980, as reflected in the computer print-out (exhibit P-1), shows that the respondent has paid assessments in the amount of \$414 for five citations issued during this 24-month period, none of which are for violations of sections 77.1001 or 77.1713.

On the basis of the record presented in this case I conclude and find that the respondent has a good safety record and that its history of prior violations does not warrant any additional increases in the civil penalties imposed by me on the basis of this criterion. Further, I have considered the fact that the accident which occurred in this case was the first of its kind at the mine and that respondent had not previously been charged with violations connected with pits and highwalls. In addition, the record reflects that prior to the accident in question the respondent had no problems with the highwall in question, and except for the accident, petitioner presented no evidence to reflect that respondent has previously failed to maintain its highwalls and pits free from hazardous materials.

Size of Business and Effect of Civil Penalties Respondent's Ability to Continue in Business.

The record reflects that the respondent employs approximately 140 persons and its annual coal production is approximately 280,000 tons. Its strip mining operation extends into Kentucky and Tennessee, and the mine in question is located in Tennessee and employed approximately 29 persons at the time of the citation (Tr. 223-224). I conclude and find that respondent is a small-to-medium sized mine operator and this is reflected in the penalty assessed by me in this case. Further, the parties have stipulated that any penalty assessment in this matter will not adversely affect respondent's ability to continue in business and I adopt this as my finding.

Gravity

On the facts presented here, I cannot conclude that the failure by the foreman making the examination in question to be certified by the State

of Tennessee constituted a serious violation. The record reflects that foreman Ellison was certified by the State of Kentucky, and since the mine property crossed both jurisdictions, I assume that a foreman certified by one state is just as competent as one certified by another. Further, absent any evidence by MSHA that the lack of certification was serious per se, I cannot conclude that it was.

Negligence

A mine operator is presumed to know the law. In this case I find that the violation which I have affirmed resulted from the failure by the respondent to exercise reasonable care, and that this constitutes ordinary negligence.

Penalty Assessment

On the basis of the foregoing findings and conclusions, and taking into account the requirements of section 110(i) of the Act, I conclude that a civil penalty of \$75 is appropriate for the citation which has been affirmed.

Order

Respondent IS ORDERED to pay a civil penalty in the amount of \$75 within thirty (30) days for a violation of 30 CFR 77.1713(a) as detailed in the section 104(a) Citation No. 0736757, as modified on August 12, 1980. Upon receipt of payment by the petitioner, this case is dismissed.


George A. Koutras
Administrative Law Judge

Distribution:

Daniel J. Tribell, Esq., S.A.M. Coal Corp., Box 188, Middlesboro, KY
40965 (Certified Mail)

Thomas A. Grooms, Esq., U.S. Department of Labor, Office of the Solicitor,
280 U.S. Courthouse, 801 Broadway, Nashville, TN 37203 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

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

JUN 4 - 1982

SECRETARY OF LABOR, MINE SAFETY AND
HEALTH ADMINISTRATION (MSHA),

Petitioner,

v.

PHELPS DODGE CORPORATION,

Respondent.

CIVIL PENALTY PROCEEDING

DOCKET NO. CENT 80-349-M

A/C No. 29-00159-05012

MINE: Tyrone Mine & Mill

Appearances:

Linda Bytof, Esq., Office of the Solicitor
United States Department of Labor
11071 Federal Building, Box 36017, 450 Golden Gate Avenue
San Francisco, California 94102
Appearing on behalf of the Petitioner

James Speer, Esq., and Stephen Pogson, Esq.
Evans, Kitchel & Jencks
363 North 1st Avenue, Phoenix, Arizona 85003
Appearing on behalf of the Respondent

Before: Judge John J. Morris

DECISION

The Secretary of Labor, on behalf of the Federal Mine Safety and Health Administration, (MSHA), charges respondent Phelps Dodge Corporation (Phelps Dodge) with violating the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq.

After notice to the parties a hearing on the merits was held on March 25, 1982 in Phoenix, Arizona. At the conclusion of the evidence the parties waived their right to file post trial briefs and they further requested a bench decision.

Based on the evidence I issued the following bench decision:

JURISDICTION

The parties in the pleadings filed in this case admit that the Federal Mine Safety and Health Review Commission has jurisdiction over the parties.

SETTLED CITATIONS

Petitioner has moved to vacate citations 162308, 162309, 162310 and to vacate all penalties in connection with those citations. The motion to vacate is granted. The citations and penalties should be vacated.

Respondent has also moved to withdraw its notice of contest to Citation 162205 and pay the proposed penalty. That motion is granted. Citation 162205 the proposed penalty is \$72.00 should be affirmed.

CITATION 162203

The petitioner in this citation alleges a violation of Title 30, Code of Federal Regulations, Section 55.9-11 which provides as follows:

Mandatory. Cab windows shall be of safety glass or equivalent, in good condition and shall be kept clean.

ISSUES

The issues are whether respondent violated the regulation and, if a violation occurred, what penalty is appropriate.

FINDINGS OF FACT

Furloughed MSHA Inspector Bill Novinger testified for the petitioner. On March 11, 1980, inspector Novinger was at the Phelps Dodge mine arriving there about 7:30 a.m. At that time he saw a Caterpillar loader in the respondent's crushing area next to the primary crusher. It was parked 35 to 50 yards from the primary crusher. The Caterpillar is a large rubber tired vehicle with a cab that can be entered seven feet above the ground. Access to the cab is provided by a ladder.

Inspector Novinger observed that the upper glass of the cab window was shattered on the left side and short pieces of glass were protruding. The window itself measures 20 inches wide and 30 inches high. The entire upper window was broken into four or five pieces. The lower window was missing altogether.

The inspector and a company representative had the pieces of glass removed with the worker holding a cloth to protect his hand. The hazard here was that the glass could fall out and strike a worker either inside or outside the cab. Vibration could also cause the glass to jiggle out and

strike the driver. The citation was abated the following day. The inspector extensively reviewed the company records and reached a conclusion that some of the shop people were not aware of some of the defects in the equipment.

DISCUSSION

Witnesses Terrazas and Shupe offered by the respondent, in my view, do not establish a defense for this violation. Witness Terrazas reviewed the company records and they indicated that two days before this citation was issued the loader was in the repair shop for some welding work. Ordinary procedure would require somebody in the welding shop to have repaired the broken window. This was apparently not done and there was no record from the shop of it having been done.

Respondent's code of safety practices and the operator's checklist (R1 and R2) merely establishes that the company has an internal procedure to be followed if defective equipment enters the repair shop. However, there is no evidence indicating that the window was repaired when the loader was in the shop for other repair work.

The most devastating evidence offered by the government in this particular citation is that this equipment was in close proximity to the workers and sitting on the ready line where any worker could use it. In this condition, there was no reason it couldn't have been seen by a supervisor and ordered removed from service. I further note that when the MSHA representative and the company official called for a worker to start the equipment, he was able to do so. The equipment, at that time, was obviously not locked out, nor had it been removed from service.

The law is clear in these circumstances that where defective equipment is available for use, the mine operator must be held in violation of the mandatory standard.

CIVIL PENALTY

The criteria for establishing a penalty and for assessing such a penalty is contained in 30 U.S.C. 820(i). Considering that statutory criteria, I deem that the proposed civil penalty of \$48 for the violation of citation 162203 is appropriate and should be affirmed.

CITATION 162312

Petitioner in this citation alleges that respondent violated Title 30, Code of Federal regulations, Section 55.9-2 which provides as follows:

Mandatory. Equipment defects affecting safety shall be corrected before the equipment is used.

FINDINGS OF FACT

MSHA representative Charles Price inspected the Phelps Dodge work site in March 1980. The inspector observed an "electra-haul" vehicle which has a hauling capacity of 170 tons. The vehicle has six large tires each with a diameter of ten feet, six inches. A strip of rubber (two inches deep by two and a half to three feet long) was missing on the outside portion of the rear tire. "Electra-Haul" vehicles move at 5 to 30 miles per hour in a pit area which has a number of grades in it.

On the same day of the inspection, witness Jack M. Alexander was present. Mr. Alexander has attended a number of training schools on the functions and hazards of tires and their rim components. He has studied the company literature on the matter and has extensive work dealing with Goodyear tires in his last 30 years in that particular field.

The particular tire on this truck was manufactured by the Goodyear Company. The tires are made from a radial base ply and there are six steel breakers above the body ply. The tread is 2-1/4 inches deep when the tires are new. The purpose of the rubber tread is for traction and the steel breakers are made of steel. The missing portion of the tire tread had come off near the shoulder of the tire. It was possible to see the top breakers. The strength of this tire was as good as the one next to it. There were 3,000 to 5,000 miles of safe operation left in this particular tire. The missing tire tread was not in contact with the pavement. A blowout would not occur unless at least three to four metal breakers are disrupted. The metal in this tire was in good condition.

DISCUSSION

The regulation at Part 55.9-2 has two facets. The first portion concerns whether there is an "equipment defect."

Petitioner can establish a prima facie showing of a defect by proving that the equipment was being used in a different condition from that in which it was received from the manufacturer. Obviously, Goodyear Tire does not supply tires with portions of the tread missing. Accordingly, I conclude that an "equipment defect" existed. 1/

The second requirement of the standard is whether the equipment defect "affected safety". In this regard, I find the witness, Jack M. Alexander, to be credible as he has broad experience in tires of this type. On the other hand, petitioner's witness, MSHA inspector Price, disavows any claim of expertise as to tires. Inasmuch as I find witness Alexander to be credible, I believe his testimony that the equipment defect involved here did not affect safety. For that reason, I conclude that citation 162312 should be vacated.

1/ In Allied Chemical Corporation, WEST 79-165-M (March 1982) (pending on review) a violation of this standard was ruled to have occurred when the mine operator used equipment that did not contain an integral part (a chock) originally provided by the manufacturer.

Petitioner's counsel argues in her closing argument that the term "affecting safety" should be broadly construed. I agree. The regulation is a broad umbrella inasmuch as the purpose of the Federal Mine Safety and Health Act of 1977 and its predecessors is to promote the safety of miners. I also have no quarrel with the cases she cites that safety had been affected in situations involving loose lug nuts, a rusted out brake, and inoperative rear signals. However, dealing with the evidence in this case, I do not find that the defect on this tire was one that "affected safety."

Counsel for the petitioner also argues that there was a lack of balance in the defective tire. This condition could put more pressure on one tire than the other. That may be, but the evidence fails to establish that such a lack of balance was one that would affect safety.

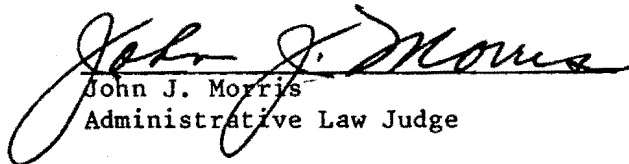
Based on the foregoing findings of fact, the conclusions of law, I enter the following order:

ORDER

1. Citation No. 162203 and the proposed penalty of \$48 are affirmed.
2. Citation No. 162308 and all penalties therefor are vacated.
3. Citation No. 162309 and all penalties therefor are vacated.
4. Citation No. 162205 and the proposed civil penalty of \$72 is affirmed.
5. Citation No. 162310 and all penalties therefor are vacated.
6. Citation No. 162312 and all proposed civil penalties are vacated.

POST TRIAL ORDER

The foregoing bench decision is affirmed.


John J. Morris
Administrative Law Judge

Distribution:

Linda Bytof, Esq.
Office of the Solicitor
United States Department of Labor
11071 Federal Building, Box 36017
450 Golden Gate Avenue
San Francisco, California 94102

James Speer, Esq.
Stephen Pogson, Esq.
Evans, Kitchel & Jencks
363 North 1st Avenue
Phoenix, Arizona 85003

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

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

JUN 7 - 1982

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	)	CIVIL PENALTY PROCEEDINGS
)	
Petitioner,	)	DOCKET NO. WEST 81-17-M
	)	A.C. No. 42-00712-05015
v.	)	MINE: Arthur Concentrator
)	
KENNECOTT COPPER CORPORATION,	)	DOCKET NO. WEST 80-474-M
	)	A.C. No. 42-00149-05013 I
Respondent.	)	DOCKET NO. WEST 80-360-M
	)	A.C. No. 42-00149-05011 H
)	
	)	MINE: Bingham Canyon

Appearances:

James R. Cato, Esq., Office of the Solicitor
United States Department of Labor
911 Walnut Street, Suite 2106
Kansas City, Missouri 64106,
for the Petitioner.

Kent W. Winterholler, Esq. and John B. Wilson, Esq.
Parsons, Behle & Latimer
79 South State Street
Salt Lake City, Utah 84147,
for the Respondent.

Before: Judge Virgil E. Vail

DECISION

STATEMENT OF THE CASE

The above three cases, which were consolidated for hearing, involve alleged violations of Section 110(a) of the Federal Mine Safety and Health Act of 1977 (hereinafter the Act), 30 U.S.C. 820(a) (Supp. III, 1979).

A hearing on the merits was held in Salt Lake City, Utah on April 27, 1982, where the parties were represented by counsel. Post hearing briefs were waived.

STIPULATIONS

At the outset of the hearing, the parties stipulated as follows:

1. The Bingham Canyon Mine and Arthur Concentrator of Kennecott Minerals Company are subject to the Federal Mine Safety and Health Act and the jurisdiction of the Federal Mine Safety and Health Review Commission.
2. The past record of citations against the Bingham Canyon Mine and Arthur Concentrator are such that it would neither warrant an increase or decrease in the amount of a penalty, if the Court should decide that a penalty was warranted in either one of the three cases.
3. The Bingham Canyon Mine and Arthur Concentrator of Kennecott Minerals Company are considered large in their relationship to other operations of this type.
4. The two individuals who issued the citations involved in this case are duly authorized representatives of the Secretary.

ISSUES

Whether the respondent violated the Act or regulations as charged by the Secretary and, if so, the amount of the civil penalties which should be issued.

DECISION

At the hearing, documentary exhibits were received and witnesses testified on behalf of the operator and MSHA. At the conclusion of the taking of evidence, the parties waived the filing of written briefs, proposed findings of fact and conclusions of law. Instead, they agreed to make oral argument and have a decision rendered from the bench. That decision which appears below with only nonsubstantive corrections is affirmed as my final decision at this time. 1/

DOCKET NO. WEST 81-17-M

This involves Citation No. 577414 issued on June 4, 1980, and involves a 104(a) violation of mandatory safety standard § 55.12-19 which states as follows:

Where access is necessary, suitable clearance shall be provided at stationery electrical equipment or switch gear.

1/ Tr. 225-235.

The citation No. 577414 reads as follows:

Suitable clearance and/or adequate access was not observed to the six electrical disconnect switches/starters/circuit breakers at the east end of the tripper floor. Access clearance was blocked and made difficult by the following materials stacked in and around the electrical switches: (1) Numerous grease/ oil-soaked cardboard boxes partially filled with oily rags; (2) two dollies; (3) one empty large cardboard box; (4) one 18" x 18" (approx.) piece of heavy metal; (5) one 24" x 30" piece of thick rubber-like material; (6) several long pieces of wood. Employees are in this area daily. 2/

The issue in this case is whether or not suitable clearance was provided in the area near and around the switch boxes, described as the east end of the tripper floor? Petitioner argues that there was not suitable clearance or what I interpret to mean access for personnel to the particular switch boxes located in the tripper area. Respondent argues that it was not necessary for there to be access to these switches, as there were other places where the equipment that was hooked up to the electrical boxes could be disconnected or the electricity turned off. Respondent further argues that if quick access was required to the particular disconnect switches to the machinery in the area cited herein due to an emergency, there were other ways to deal with this and it would not be necessary to use the switches at the east end of the tripper floor.

I find a preponderance of the evidence shows that in the area cited under Citation No. 577414, particularly the pictures, demonstrate graphically there was considerable debris, clutter, and material which prevented quick access to these particular electrical boxes. Evidence shows that those electrical boxes would be of considerable help in case there was an emergency where it would be necessary to have a quick disconnect of electricity to machinery in the area. Depending upon where the person who was to be responsible for turning the equipment off was located, he would have a difficult time getting through the debris that existed in this area. Exhibits P-3, P-4 and R-1 shows the various items of debris that the MSHA inspector observed at the location covered under the citation. There appears, from looking at Exhibit R-1, to be space to the right side of the debris where a person could walk through. However, a broken 2 x 4 on the floor, as well as the other debris, I feel constitutes a violation of 55.12-19.

I find the proposed assessment amount of \$195.00 is reasonable in view of the fact that this is an area where the respondent's employees would go

2/ Exhibit P-1.

regularly to use products from a grease cabinet located in the area and would be aware of the conditions that existed there.

DOCKET NO. WEST 80-360-M

Docket No. WEST 80-360-M involves a 107(a) order of withdrawal and a 104(a) citation for a violation of mandatory safety standard § 55.12-14 which states in part as follows:

Power cables energized to potentials in excess of 150 volts phase-to-ground shall not be moved with equipment unless sleds or slings, insulated from such equipment are used. When such energized cables are moved manually, insulated hooks, tongs, ropes or slings shall be used unless suitable protection for persons is provided by other means... .

Citation No. 576222 issued in this case states as follows:

The Michigan front-end rubber tire dozer was moving the energized 5000 volt power cable to the No. 45 shovel on the 6440 level with the dozer blade causing a potential shock hazard. The slings on either side of the protective insulated mats were not being used. The employee on the ground near the front end dozer was using tongs to help move the cable. 3/

The issue is whether the power cable was being moved in such a manner as to jeopardize the employees health and safety?

Petitioner alleges that the testimony of the inspector should be believed in that he observed this activity of the dozer moving the sled upon which the cable was located and in so observing saw the cable come in contact with the blade of the dozer. He also testified he saw an employee in contact with the equipment.

Respondent argues that they were not in violation of § 55.12-14 for the reason that they were using a sled and that the cable did not come in contact with the equipment nor did the employee come in contact with either the cable or the end loader.

I find the most credible evidence in this case is that of the operator of the end loader and respondent's employee who testified that he assisted

3/ Exhibit P-9.

in moving the cable with a hook. Testimony in the case was that the cable lay in a trough through a mat of rubberized material (sled) covered with another strip of material on top of the cable. In the process of moving the sled the strip of material covering the cable came loose and that this is probably what the inspector saw and thought was the cable coming in contact with the blade. The fact that the inspector was not at the area where this was taking place, but observed it from afar (estimated to be 150 yards) makes the credibility of the two other witnesses more believable, and based upon that evidence I am going to vacate Citation No. 576222.

DOCKET WEST NO. 80-474-M

Docket No. WEST 80-474-M involves a 104(a) violation of mandatory safety standard 55.9-22 which provides as follows:

Berms or guards shall be provided on the outer bank of elevated roadways.

Citation No. 576220 which states as follows:

12 feet of the outer bank on the 6040 level haul road was not provided with a berm to prevent the electrical preventive maintenance truck No. 803 from going over the elevated bank, injuring two employees. The distance from the 6040 level to the 5990 level is approximately 50 feet.

Both parties stated that there were no witnesses to what happened and a decision as to what occurred must be based upon a careful review of all of the evidence. The evidence that was admitted in the manner of exhibits and testimony does not clearly point to what actually occurred. I see the issue, having heard all of the evidence and observed all of the exhibits that were submitted, is, whether the area where the truck went over the bank had fallen prior to its arrival there eliminating the berm or collapsed from the truck backing up to near the edge causing the bank to fall?

Respondent argues, based on the testimony of the driver, that he backed up to approximately 8 to 10 feet from the edge of the bank and stopped preparing to go ahead when the truck went over the embankment. Further, that members of respondent's safety investigative team were of the opinion that material at the bottom of the embankment resulted from the sloughing ^{4/} when the truck backed up to this point and went over the bank. Respondent further argued that Kennecott management has a good berm policy and they inspect for berms all the time which makes it unlikely that there was not a berm at this particular location.

^{4/} Sloughing is defined in Websters New Collegiate Dictionary as: "to crumble slowly and fall away."

Petitioner argues that based on the testimony of the inspector who arrived at the scene shortly after the accident and the pictures and other documents submitted in the way of evidence, that the material at the bottom of the area that apparently sloughed off does not indicate that it happened at the time the truck went over the bank and, therefore, there wasn't a berm at the top. Petitioner maintains this particular area had sloughed prior to the time the truck backed up there.

It is not a question so much as to whether or not at one time there had been a berm at this location, because the evidence shows a berm on both sides of the area where the truck went over which appears to have been adequate when it was installed. The question here is whether the embankment fell at sometime eliminating the berm prior to the electrical maintenance truck backing up here, or did the truck's presence and weight cause the bank to collapse thus eliminating the berm at that time?

Delbert S. Tapp, driver of respondent's truck involved in this accident, was asked on direct examination whether or not there was a berm where the accident occurred and he stated: "No, I didn't notice" (Tr. 170). On cross examination, Mr. Tapp was again asked if he saw a berm at this location and answered: "Not necessarily, I can't say as I did or didn't, because I wasn't paying attention" (Tr. 177-178). The witness was vague about this. I realize he was called by the petitioner to testify and I had the impression he was uncomfortable. I was surprised that it was his and everyone else's observation of the facts that Tapp stopped at the distance that he said he did from the edge of the bank (8 to 15 feet) and did not observe a berm, if one existed. I further find that the photographic evidence, and particularly Exhibits P-15 and P-16 show a large indentation and gapping hole on the top of the embankment, and Exhibit P-19 shows a large sloughed area, yet there is not a great amount of loose material shown at the bottom of the embankment as might be expected if the area caved when the truck backed onto the top area. I also note in Exhibit P-10 that there is little evidence of material around the truck where it ended up on its side after going over the bank. There is some material near the truck shown on the photos but with the size of the area that was supposedly sloughed off, I would expect a larger amount of material at the bottom and some on top of the truck which I don't see in the pictures.

I find that the most credible evidence is that the driver of the truck backed up and over the edge of the embankment causing the truck to fall to the bottom. I'm convinced that there was not a berm at this particular location and that it was eradicated when the area sloughed off at an earlier time. I further find that respondent had a policy of inspecting the respondent's mine for berms and repairing them when they needed repairing but they failed to see the need for repair in the area involved in this accident. Respondent should have observed this condition if their policy was working but apparently it is not infallible.

As to the amount of the penalty to be assessed in this case, I find that this area was not an area that was in regular use. The history of respondent's prior violations is such that the penalty should be neither increased or decreased, but that they had a prior berm violation which was not refuted. The gravity of the violation is serious as shown by the fact that the two employees in the truck were injured with one sustaining a broken arm. Based upon the six criteria, four of which were stipulated to, I find a penalty of \$750.00 is appropriate.

ORDER

It is ORDERED that the bench decision rendered in Docket Nos. WEST 81-17-M, WEST 80-474-M and WEST 80-360-M is hereby affirmed.

It is ORDERED that the Citation No. 576222 issued in Docket No. WEST 80-360-M is hereby vacated.

It is ORDERED that respondent pay the penalty in the amount of \$195.00 for Citation No. 577414 and the penalty in the amount of \$750.00 for Citation No. 576220 totaling \$945.00 within thirty (30) days of the date of this decision.



Virgil E. Vail
Administrative Law Judge

Distribution:

James R. Cato, Esq.
Office of the Solicitor
United States Department of Labor
911 Walnut Street, Room 2106
Kansas City, Missouri 64106

Kent W. Winterholler, Esq.
John B. Wilson, Esq.
Parsons, Behle & Latimer
79 South State Street
P.O. Box 11898
Salt Lake City, Utah 84147

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JUN 7 - 1982

SECRETARY OF LABOR,	:	Civil Penalty Proceedings
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No: WEST 81-219-M
Petitioner	:	A.O. No: 48-00154-05001 H
	:	
v.	:	Docket No: WEST 81-232-M
	:	A.O. No: 48-00154-05002 S68
MOUNTAIN WEST CONSTRUCTION, INC.,	:	
Respondent	:	Big Island Mine

DECISION

Appearances: Stephen P. Kramer, Esq., Office of the Solicitor,
U.S. Department of Labor, for Petitioner
Dean W. Clark, Esq., for Respondent

Before: Judge Moore

The above docket numbers were consolidated for trial and involve two citations. Citation No. 337616 issued on October 15, 1980, alleges a violation of 30 C.F.R. 57.4-33 in that "there was a welding truck parked between the buildings at the No. 1 crusher with nobody in attendance and the oxygen and acetylene cylinders were not shut off." Citation No. 337799 was issued on July 10, 1980 (there was no explanation of the numbering sequence) and alleges a violation of 30 C.F.R. 57.15-5 in that "two employees working for Mountain West Construction were observed 75 to 100 feet in the air not using their safety belt and line. The men were putting bolts and nuts in the steel beams. The two beams had already been connected.

Very little may be said as to Citation No. 337616. The inspector saw the welding cart with the oxygen and acetylene lines running into the fourth or fifth floor of the building. An employee of the mine operator, (Mountain West was not the operator but an independent contractor) went in the building came out again and shut off the oxygen and acetylene cylinders and the inspector assumed that there was nobody in the building and that the torch was not in use. Later testimony developed the fact that the torch was in use on an intermittent basis and that it was attended at all times. The workmen were putting pipe through the building and using the torch to cut pipe and cut the metal supports. They would turn the torch off when they were not using it, but would not go four or five flights down the steps to shut off the gas at the cylinder. In my opinion the standard does not require that they go back to the cylinders every time they decide not to use the torch for a short period of time. This citation is vacated.

Citation No. 337799 presents a different problem. The standard, 30 C.F.R. 57.15-5 states:

"safety belts and lines shall be worn when men work where there is danger of falling: a second person shall tend the lifeline when bins, tanks, or other dangerous areas are entered."

The standard clearly states that if there is a danger of falling, belts and lines shall be worn. MSHA does not so interpret it, however, so far as high steelwork is concerned.

While I am not sure it is a universal practice throughout MSHA, here in southern Wyoming, which is notorious for its high winds, it is considered hazardous to have a high ironworker tied with a safety line while the crane is hoisting beams to be attached to others, than to have him free to move in case the beams should be blown toward him. The MSHA position is that the workman does not have to use his safety line until the new beam is in place and one or two bolts have been fitted to hold the beam in place. When the bolts are being tightened, however, and perhaps torqued, the workman is supposed to have his line attached.

In the instant case the inspector saw two men, 75 to 100 feet in the air, sitting on an "I" beam without their lines attached. Someone in the area told the inspector that the men had finished connecting the iron together and were now tightening the bolts. He issued the citation and imminent danger order at the time. The inspector does not remember who he talked to, but it was a supervisor for Mountain West. The company witnesses said that they classified their high iron workers in two distinct groups. One group would go up and connect the steel beams with two bolts at each end. The bolts were not tightened so as to leave the structure with sufficient flexibility so that more beams could be attached. When the connectors are finished, they leave the structure and different workers climb up to tighten the bolts with impact wrenches. This second group of workers use safety belts, whereas the first group does not. The evidence indicates that at the time of the citation, the workers observed by the inspector were connectors rather than bolters. Under the MSHA policy, they were not required to have safety lines attached and if the unknown Mountain West employee had told the inspector that they were connecting rather than bolting the inspector would not have issued the citation.

While it bothers me that MSHA has in effect, modified a safety standard by interpretation, I do not view my role in these proceedings as one of a prosecutor charged with strict enforcement of the Act. The Congress gave that job to the Secretary of Labor, and if he chooses to apparently relax a standard in the interest of safety, I will not second guess him. Under the Secretary's policy, however, no violation occurred in the instant case and the citation and order are accordingly vacated.

The above proceedings are dismissed.

Charles C. Moore, Jr.
Charles C. Moore, Jr.
Administrative Law Judge

Distribution: By Certified Mail

Stephen P. Kramer, Esq., Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Boulevard, Arlington, VA 22203

Dean W. Clark, Esq., 145 North 1st East Street, Green River, WY 82935

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JUN 8 - 1982

SECRETARY OF LABOR,	:	APPLICATION FOR TEMPORARY
MINE SAFETY AND HEALTH	:	REINSTATEMENT
ADMINISTRATION (MSHA),	:	
on behalf of GEORGE D. JUSTICE:	:	Docket No. KENT 82-111-D
Applicant	:	
v.	:	Case No. PIKE CD 82-10
	:	
CANADA COAL COMPANY, INC.,	:	
Respondent	:	No. 2 Mine

DECISION AND ORDER DENYING APPLICATION FOR TEMPORARY REINSTATEMENT

On January 22, 1982, Mr. George D. Justice, purportedly a miner, filed a complaint of discharge with the Secretary of Labor, alleging that his discharge was in violation of section 105(c)(1) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et. seq., the "Act". More than four months later, on June 3, 1982, the Secretary filed an Application for Temporary Reinstatement on behalf of Mr. Justice under the provisions of section 105(c)(2) of the Act and Commission Rule 44(a), 29 C.F.R. § 2700.44(a) (as amended).

Under amended Commission Rule 44(a), an application for temporary reinstatement must state the Secretary's finding that the miner's complaint of discrimination, discharge, or interference was not frivolously brought and must be accompanied by a copy of the miner's complaint, an affidavit setting forth the Secretary's reasons for his finding and proof of service upon the operator.

The application herein contains a finding by the Secretary that the miner's complaint was not frivolously brought, and is accompanied by proof of service upon the operator and a copy of what purports to be the miner's complaint. While the application is also accompanied by the affidavit of Michael Yanak, Jr., an employee of the Secretary (Mine Safety and Health Administration), that affidavit does not set forth the Secretary's "reasons" for his finding that the miner's complaint was not frivolously brought, as required by Commission Rule 44(a). A copy of the affidavit is attached hereto as Exhibit "A".

"Reasons" are essentially statements made to explain or justify an action or decision and which provide a rational and sufficient basis for such action or decision. See

The American Heritage Dictionary of the English Language,
Houghton Mifflin Co., 1976. The affidavit here at issue
essentially sets forth only vague conflicting uncorroborated
allegations. Considered as a whole, it cannot be said that
the affidavit sets forth sufficient grounds to explain,
justify, or provide a rational and sufficient basis for the
Secretary's finding that the miners complaint was not frivo-
lously brought.

Accordingly, the Application for Temporary Reinstatement
must be denied.



Gary Mellick
Assistant Chief Administrative Law Judge

Distribution: By certified mail.

Jack T. Page, Esq., Drawer 31, Pikeville, KY 41501

George D. Justice, Box 25, Phyllis, KY 41554

Thomas P. Piliero, Esq., Office of the Solicitor, U.S.
Department of Labor, 4015 Wilson Boulevard, Arlington, VA
22203

EXHIBIT "A"

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES

IN THE MATTER OF:	)	Application for Temporary
	)	Reinstatement
SECRETARY OF LABOR,)	
on behalf of)	
)	
GEORGE D. JUSTICE,)	
)	
Applicants)	
)	
v.	)	Case No. PIKE CD 82-10
)	
CANADA COAL COMPANY, INC.,)	
No. 2 Mine,)	
)	
Respondent	)	Docket No. <u>KENT 82-111-D</u>

A F F I D A V I T

Commonwealth of Virginia)
County of Arlington)

Michael Yanak, Jr., being first duly sworn, deposes and states:

1. I am a Mine Safety and Health Specialist on the staff of the Office of Technical Compliance and Special Investigation, Mine Safety and Health Administration, located at 4015 Wilson Boulevard, Arlington, Virginia 22203.
2. As a Mine Safety and Health Specialist, I had the responsibility of initially reviewing the report of investigation of the above-captioned matter.
3. My review of the report of investigation disclosed the following:

(a) At all relevant times herein mentioned, Respondent Canada Coal Company, Inc., did business and operated the No. 2 Mine in the production of coal and therefore is an "operator" as defined in Section 3(d) of the Federal Mine Safety and Health Act of 1977 (Act).

(b) At all relevant times herein mentioned, Applicant George D. Justice, was employed by respondent as a mechanic, assigned to work at the subject No. 2 Mine and was a "miner" as defined in Section 3(g) of the Act.

(c) The subject No. 2 Mine located in or near Kimper, Pike County, Kentucky, is a "mine" as defined in Section 3(h) (1) of the Act, the products of which enter or affect commerce.

(d) Mr. Justice was hired by respondent in August 1981, and continued to work in respondent's employ until he was discharged on or about January 21, 1982.

(e) On or about January 21, 1982, Mr. Justice was working in the No. 2 section of the subject mine during the third shift. During the course of that shift, Mr. Justice required the need for a sanitary toilet.

(f) Mr. Justice alleges that he made a diligent search but was unable to locate a sanitary toilet on the No. 2 section of the subject mine. He therefore advised his immediate supervisor of that circumstance and requested transportation to the surface for the purpose of using the surface toilet facilities. His request was refused. Mr. Justice then repeated his request for transportation to the Company Safety Inspector. His request

was refused. Mr. Justice then repeated his request for transportation to the Third Shift Mine Foreman. The Third Shift Mine Foreman arranged transportation to the surface for Mr. Justice.

(g) Once on the surface Mr. Justice was advised to remain there in order to await the General Superintendent. Thereafter, the General Superintendent discharged Mr. Justice, alleging that a sanitary toilet was available on the No. 2 section.

(h) On January 22, 1982, Mr. Justice timely filed a complaint of discharge with the Mine Safety and Health Administration alleging that his discharge was in violation of Section 105(c) of the Federal Mine Safety and Health Act of 1977.

5. Based upon the foregoing information the Secretary of Labor, through his authorized designees, determined that the complaint of discharge filed by George D. Justice was not frivolously brought.


Michael Yanak, Jr.

Taken, subscribed and sworn before me this 2nd day
of June, 1982.


Catherine L. Falatko
Notary Public

My commission expires: Dec. 5, 1983

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JUN 8 - 1982

SECRETARY OF LABOR,	:	Civil Penalty Proceeding
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 80-11-M
Petitioner	:	A.C. No. 11-02360-05002
v.	:	
	:	Macon County Material, Inc.
MACON COUNTY MATERIAL, INC.,	:	(Dredge and Mill)
Respondent	:	

DECISION

Appearances: Leonard A. Grossman, Esq., Office of the Solicitor,
U.S. Department of Labor, for Petitioner;
Charles C. Hughes, Esq., for Respondent.

Before: Administrative Law 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 alleged violations of mandatory safety standards. The case was heard at St. Louis, Missouri. 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, Macon County Material, Inc., operated a sand and gravel pit and plant known as the Macon County, Inc., Dredge and Mill, in Macon County, Illinois, which produced sand and gravel for sales in or substantially affecting interstate commerce.
2. Respondent extracted material from its pit by a dragline and stockpiled the material at various places in its plant. Front-end loaders then carried the material to conveyor belts for processing through a series of screens, washers, and classifiers before the material was stockpiled for sale and shipment to customers.

3. The pit and plant were about three-quarters of a mile apart. Respondent employed about 15 people with experience ranging from 2 years to 30 years. The pit and plant operated three overlapping shifts per day. The first shift was 4:30 a.m. to 1:30 p.m., the second 1 p.m. to 10:30 p.m., and the third 7 a.m. to 5 p.m. The draglines, loaders, trucks, mechanics, and electricians operated only during the third shift.

4. On July 17, 1979, a foreman, Mike Hamrich, removed a guard from the 5/8 belt conveyor tail pulley and a guard from the Mason sand tail pulley in order to run the belts under load to see where the belts might need adjustment. In violation of company safety policy, Mr. Hamrich failed to replace the guards after this test.

5. Also on July 17, the front-end loader operator, Les Patrick, disconnected the backup alarm on his equipment. This action was in violation of company safety policy.

6. Also that morning, Respondent's electrician, Mark Sadorous, unlocked the gate to No. 3 7,200-volt transformer station to work on the transformer. When he left the station he failed to lock the gate to keep out unauthorized personnel. This action violated company safety policy.

7. Later in the day, on July 17, 1979, Federal Inspector Bill Henson inspected Respondent's pit and plant.

8. The inspector observed that the 5/8 belt conveyor tail pulley was operating without a guard. He observed one person cleaning in the area. The tail pulley was about 5 feet above the surface. Inspector Henson charged Respondent with a violation of 30 C.F.R. § 56.14-6 (failure to install guards on moving machinery parts). Citation No. 362872 reads in part: "The tail pulley guard on the 5/8 belt conveyor was not in place." The cited condition was abated promptly by placing a guard on the tail pulley.

9. The inspector also observed that the guard was missing from the Mason sand belt conveyor tail pulley, which was in operation. He observed no one in the area during the inspection, but it was likely that miners would pass through it. The tail pulley was about 5 feet above the surface. Inspector Henson charged Respondent with a violation of 30 C.F.R. § 56.14-6 (failure to install guards on moving machinery parts). Citation No. 362873 reads in part: "The tail pulley guard on the mason sand belt conveyor was not in place." The cited condition was abated promptly by installing a guard on the tail pulley.

10. The inspector next observed the 980 Caterpillar front-end loader being operated in reverse without an automatic reverse signal. He observed that the back-up alarm on the loader was disconnected. There was an obstructed view to the rear of the loader and an observer was not present to signal the operator when it was safe to travel in reverse. Inspector Henson charged Respondent with a violation of 30 C.F.R. § 56.9-2 (failure

to correct equipment defects). Citation No. 362874 reads in part: "The automatic reverse signal alarm on the 980 Cat. End loader was not operable." The cited condition was abated immediately by reconnecting the alarm.

11. Finally, the inspector observed that the gate to the No. 3, 7,200-volt transformer station was unlocked. The transformer was energized. Inspector Henson charged Respondent with a violation of 30 C.F.R. § 56.12-68 (failure to keep transformer enclosures locked). Citation No. 362875 reads in part: "The No. 3 transformer station was not locked to prevent unauthorized entry." The cited condition was abated promptly by locking the gate.

12. Respondent has received safety awards from MSHA and the National Sand and Gravel Association in 10 of the 11 years of operation. There has been only one injury resulting in lost work time. Respondent had received only one citation before the instant inspection and has never received an employee safety complaint.

DISCUSSION WITH FURTHER FINDINGS

Based on citations issued on July 17, 1979, the Secretary has charged Respondent with two violations of 30 C.F.R. § 56.14-6, which provides: "Except when testing the machinery, guards shall be securely in place while machinery is being operated."

The Secretary argues that the guards for the tail pulleys on the 5/8 conveyor and the Mason sand belt were not in place while the equipment was in operation, and that there was no evidence that the equipment was being tested at the time of the inspection.

The Secretary proposes a penalty of \$36 for each of these violations.

Based on a citation issued on July 17, 1979, the Secretary has charged Respondent with a violation of 30 C.F.R. § 56.9-2, which provides: "Equipment defects affecting safety shall be corrected before the equipment is used."

The Secretary argues that the 980 CAT front-end loader was operating in reverse without an operable automatic warning device and the operator had an obstructed view to the rear with no observer to signal the operator when it was safe to back up.

The Secretary proposes a penalty of \$28 for this violation.

Based on a citation issued on July 17, 1979, the Secretary has charged Respondent with a violation of 30 C.F.R. § 56.12-68, which provides: "Transformer enclosures shall be kept locked against unauthorized entry."

The Secretary argues that, at the time of the inspection, the gate to the No. 3 7,200-volt transformer station was unlocked and seeks a penalty of \$40 for this violation.

Respondent has admitted to the facts alleged in each citation, but argues that it should be relieved of liability because each of the violations was committed by an experienced employee who acted contrary to company safety policy and that the company had no knowledge of or reason to know of the violations.

The Federal Mine Safety and Health Act of 1977 has been construed to be a strict liability statute (Warner Company, 1 MSHC 2446 (June 9, 1980)), so that an operator's liability is not conditioned upon fault (Ace Drilling Coal Company, 1 MSHC 2357 (April 24, 1980); United States Steel Corp., 1 MSHC 2151 (September 17, 1979); and Peabody Coal Co., 1 MSHC 2215 (October 31, 1979)). As stated in Ace Drilling, *supra*, the actions of an employee are deemed to be the operator's actions for purposes of determining liability for conduct regulated by the Act (at 2358). While an employee's negligence may be considered in assessing penalties, it has no bearing on the fact of violation (El Paso Rock Quarries, 2 MSHC 1132, and 1135 (January 29, 1981)).

Each of the violations here constituted a serious hazard and could significantly contribute to a mine accident causing death or serious bodily injury.

Before the inspection, Respondent had an excellent safety record insofar as reported accidents and conditions disclosed by inspections. However, to the extent of the violations revealed by the inspection on July 17, 1979, the company's safety rules, policies, training, and supervision had not been effective and can be improved.

Considering the statutory criteria for assessing penalties, and giving weight to the company's excellent prior history and its good faith efforts to abate the conditions cited, it is determined that nominal penalties are justified in this case. These may serve as a record and formal reminder to the company that steps are needed to achieve more effective compliance with the safety standards promulgated under the Act.

CONCLUSIONS OF LAW

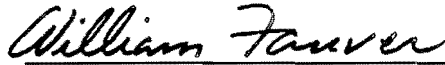
1. The undersigned judge has jurisdiction of the parties and subject matter of this proceeding.

2. On July 17, 1979, Respondent violated 30 C.F.R. § 56.14-6 as alleged in Citation No. 362872; violated 30 C.F.R. § 56.14-6 as alleged in Citation No. 362873; violated 30 C.F.R. § 56.9-2 as alleged in Citation No. 362874; and violated 30 C.F.R. § 56.12-68 as alleged in Citation No. 362875.

3. Based upon the statutory criteria for assessing a civil penalty for a violation of a mandatory safety standard, Respondent is assessed a penalty of \$25 for each of the above four violations.

ORDER

WHEREFORE IT IS ORDERED that Respondent, Macon County Material, Inc., shall pay the Secretary of Labor the above-assessed civil penalties, in the total amount of \$100.00, within 30 days from the date of this decision.



WILLIAM FAUVER, JUDGE

Distribution:

Charles C. Hughes, Esq., Welsh, Kehart & Shafter, P.C., P.O. Box 871,
457 Citizens Building, Decatur, Illinois 62525

William C. Posternack, Esq., US Department of Labor, Office of the
Solicitor, 230 S. Dearborn St., Chicago, IL 60604

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JUN 8 - 1982

SECRETARY OF LABOR,	:	Civil Penalty Proceeding
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 82-35-M
Petitioner	:	A.O. No. 12-00820-05031
v.	:	
	:	Minntac Mine
UNITED STATES STEEL CORPORATION,	:	
Respondent	:	
	:	
UNITED STATES STEEL CORPORATION,	:	Contest of Order
Contestant	:	
v.	:	Docket no. LAKE 82-6-RM
	:	Order No. 486720; 9/10/81
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Minntac Mine
ADMINISTRATION (MSHA),	:	
Respondent	:	
	:	
LOCAL UNION NO. 1938, DISTRICT 33,	:	
UNITED STEELWORKERS OF AMERICA,	:	
Representative of the Miners	:	

DECISION

Appearances: Robert A. Cohen, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, on behalf of the Secretary of Labor;
Louise Q. Symons, Esq., Pittsburgh, Pennsylvania, on behalf of United States Steel Corporation;
Clifford Kasenan, Safety Chairman, Local Union 1938, United Steelworkers of America, Virginia, Minnesota, on behalf of the Representative of the Miners.

Before: Administrative Law Judge Broderick

STATEMENT OF THE CASE

The two cases have been consolidated since they both involve the same order of withdrawal. The notice of contest filed by U.S. Steel

challenges the validity of the order and the civil penalty proceeding seeks a penalty for the violation charged in the order. Pursuant to notice, a hearing was held on the consolidated cases in Duluth, Minnesota on March 24, 1982. Federal mine inspector Thomas Wasley and Terry Martinson testified on behalf of the Secretary. Nick Brascugli, Herbert Brandstrom, Randall Pond and Phillip Anderson testified on behalf of U.S. Steel. No witnesses were called by the Representative of the Miners. The Secretary and U.S. Steel have filed posthearing briefs. Based on the entire record and considering the contentions of the parties, I make the following decision.

FINDINGS OF FACT

1. At all times pertinent to this proceeding, U.S. Steel was the operator of the Minntac Plant, a mine as defined in the Federal Mine Safety and Health Act of 1977. The subject plant produces goods which enter interstate commerce.
2. U.S. Steel is a large operator, and the assessment of a penalty will not affect its ability to continue in business.
3. A total of 180 violations were assessed against the subject mine within the 24 months prior to the violation involved herein, of which 170 have been paid.
4. Respondent demonstrated good faith in abating the condition after the issuance of the order involved in this proceeding.
5. An order of withdrawal had been issued under section 104(d)(1) of the Act on March 31, 1981, for an alleged violation of 30 C.F.R. § 55.15-5.
6. The order of withdrawal referred to in Finding 5 was issued during a regular mine inspection which was completed prior to the issuance of the order involved in this proceeding.
7. The Inspector was regularly in the subject facility between March and September, 1981. However, he did not carry out a complete inspection of the facility between March 31, 1981 and September 10, 1981.
8. The subject plant contains an agglomerator in which iron ore concentrates are formed into pellets, fired at high temperatures, cooled, and shipped out to steel mills.
9. Cooling of the pellets takes place in a large structure called a cooler where outside air is drawn in through large fans to cool the bed of pellets.

10. The cooler is a vessel with a donut-like shape. The heated pellets are dumped into the cooler on to castings or pallets, which rotate slowly around the cooler, following which the pallets are tipped to a vertical position and the taconite pellets are dumped into a bin below the cooler.

11. There is a door to the cooler through which maintenance personnel go in to inspect or make repairs on the inside of the vessel.

12. On June 10, 1981, a maintenance crew entered the cooler to patch a burned-out area on the load wall of the cooler.

13. Before any of the men went into the cooler they dropped plywood boards to cover the openings which resulted from one of the pallets being locked in the vertical position. A form was erected in the shop, placed in the cooler and the patch was made on the wall. The entire operation took about three hours and a half. The crew was in the cooler about 45 minutes.

14. The crew left the cooler, after which the foreman inspected the job and handed out the plywood sheets. After handing out the last sheet of plywood he pulled himself from the cooler. He was not wearing a safety belt at the time.

15. When the plywood was removed there were two openings resulting from the pallet being in the vertical position: one was 51 inches by 44 inches by 8 feet; the other was 11-1/2 inches by 6 inches by 3 feet. The openings go to the dump zone, more than 18 feet below.

16. On September 10, 1981, Inspector Wasley issued a withdrawal order under section 104(a)(2) of the Act charging an unwarrantable failure to comply with 30 C.F.R. § 55.15-5.

17. The condition was abated and the order terminated on September 15, 1981, when U.S. Steel instructed employees entering the cooler to use a safety belt when a danger of falling into the cooler exists.

18. At the time the order was issued, U.S. Steel had a company safety rule requiring the use of a safety belt where there is danger of falling 5 feet or more.

REGULATION

30 C.F.R. § 55.15-5 provides as follows: "Safety belts and lines shall be worn when men work where there is danger of falling; a second person shall tend the lifeline when bins, tanks or other dangerous areas are entered."

ISSUES

1. Did the Secretary establish the prerequisites for a 104(d)(2) order, i.e., was there an intervening "clean inspection" between the 104(d)(1) order and the 104(d)(2) order?
2. Is 30 C.F.R. § 55.15-5 impermissibly vague?
3. If it is not, did the evidence establish a violation of 30 C.F.R. § 55.15-5?
4. If a violation was established, was it caused by the operator's unwarrantable failure to comply with the standard in question?
5. If a violation was established, what is the appropriate penalty therefor?

CONCLUSIONS OF LAW

1. The U.S. Steel Corporation is subject to the provisions of the Federal Mine Safety and Health Act of 1977, in the operation of the Minntac Plant.
2. The undersigned Administrative Law Judge has jurisdiction over the parties and subject matter of this proceeding.
3. The Secretary established prima facie that there was no clean inspection of the facility intervening between the 104(d)(1) and the 104(d)(2) orders.

DISCUSSION

Although U.S. Steel did not specifically raise the issue in its pleadings, the question whether there was an intervening clean inspection between the prior 104(d)(1) order and the 104(d)(2) order involved herein is properly before me. It is MSHA's obligation to establish prima facie the absence of an intervening clean inspection in order to sustain the order being challenged. Secretary v. CF & I Steel Corporation, 2 FMSHRC 3459. Unfortunately, the evidence bearing on this issue is skimpy, and possibly conflicting. The Inspector testified:

Q. Now, when you decided to issue the - the 104(d)(2) order, did you know whether there was a prior intervening clean inspection that had taken place since your issuance of the 104(d)(1) order?

A. There was not no clean inspection, no.

Q. And how do you know that?

A. Cuz I was the inspector. I issued the last one.
(Tr. 28).

* * * * *

Q. Okay. Now did you inspect Minntac operations between March 3rd, 1981 -- March 31, 1981 and September 10th, 1981?

A. Oh, sure.

Q. Were you there every day?

A. No, not every day.

Q. Were you there regularly?

A. Just about.

Q. And did you cover the entire facility?

A. Um, I have covered the entire facility, yes.

* * * * *

Q. So between March 3rd, 1981 -- March 31, 1981, and September 10, 1981, you had been entirely through the Minntac Plant?

A. Are you talking about a complete thorough inspection?

Q. I'm asking you if you went to every area in the Minntac Plant between March 31st, 1981, and September 10th, 1981.

A. This was a different inspection on -- in March. That one was completed.

Q. Between --

A. Then we started another inspection.

Q. But between March 31st, 1981, and September 10th, 1981, you had gone through the entire Minntac plant?

A. Well, that's possible I went through there.

(Tr. 54).

I conclude, based on the above testimony, that MSHA established prima facie that there was not an intervening clean inspection between the (d)(1) and the (d)(2) orders. U.S. Steel did not offer any evidence to rebut the prima facie showing.

4. The mandatory standard in 30 C.F.R § 55.15-5 is not impermissibly vague.

DISCUSSION

The standard in question has been construed by the Commission in at least one case. Secretary v. Kerr McGee Corporation, 3 FMSHRC 2496 (1981). Although the issue of vagueness was apparently not raised, the Commission did refer to the general language of the regulation: "As contrasted with more detailed regulations, it is the kind made simple and brief in order to be broadly adaptable to myriad circumstances. From an operator's standpoint, one benefit of this flexible regulatory approach is that it affords considerable leeway in adapting safety requirements to the variable and unique conditions encountered in different mines." Id., at 2497.

U.S. Steel argues that the regulation is deficient because (1) it does not specify any distance or depth for the possible fall and (2) no standards are set for the probability of a fall. I conclude that the words "danger of falling" (1) eliminate the de minimus situation, i.e., a fall of a few inches or feet and (2) are sufficiently specific to apprise reasonably prudent operators when safety belts are required. I also conclude that the standard requires safety belts to be worn during the entire time when a danger of falling exists. Thus, one exiting a vessel must wear his belt until he has reached a point in his exit where the danger is passed.

5. A violation of 30 C.F.R. § 55.15-5 was established by the evidence in this case.

DISCUSSION

Once the plywood flooring was removed, a workman in the cooler could fall a distance of more than 18 feet through the larger opening created by the pallet being in a vertical position. It is true that the foreman in this instance stated that he positioned himself in such a way when exiting the cooler that he would fall back on the pallet

rather than toward the large opening. It is also true that the foreman had crawled out of similar coolers for years without injury, that he had worked on construction jobs up to 180 feet in the air without a safety belt, and that it was his opinion that a safety belt was not needed in the circumstances of this case. Whether a danger of falling exists must be determined with reference to the ordinary working person. Considering the foreman's testimony describing how he climbed out of the cooler (Tr. 115, 119-121), it seems evident to me that an ordinary working person could have slipped and fallen through the large opening. There was (and is) a danger of falling in exiting the cooler in question. Failure to wear a safety belt is a violation of the standard.

6. The violation was caused by the unwarrantable failure of the operator to comply with the standard.

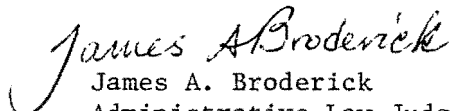
DISCUSSION

The violation was committed by a foreman, a representative of management. He should have known of the hazard and should have taken steps to avoid it. Zeigler Coal Company, 7 IBMA 280 (1970); Cleveland Cliffs Iron Co. v. Secretary, 4 FMSHRC 171 (1982).

7. I conclude that the violation was serious, since a serious injury could have resulted. The violation was the result of the operator's negligence. I conclude that an appropriate penalty for the violation is \$1,250.

ORDER

On the basis of the above findings of fact and conclusions of law, IT IS ORDERED that Order No. 486720 issued September 10, 1981, is AFFIRMED. IT IS FURTHER ORDERED that U.S. Steel Corporation, within 30 days of the date of this decision, pay the sum of \$1,250 as a civil penalty for the violation of 30 C.F.R. § 55.15-5 charged in the order.


James A. Broderick
Administrative Law Judge

Distribution: By certified mail

Robert A. Cohen, Esq., Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Blvd., Arlington, VA 22203

Louise Q. Symons, Esq., Attorney for United States Steel Corporation, 600 Grant Street, Room 1580, Pittsburgh, PA 15230

Clifford Kasenan, Safety Chairman, Local Union 1938, United Steelworkers of America, 307 First Street North, Virginia, MN 55702

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JUN 8 - 1982

MATHIES COAL COMPANY,	:	Contest of Citation
	:	
Contestant	:	
	:	
v.	:	Docket No. PENN 82-3-R
	:	Citation No. 1142334; 9/22/81
	:	
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Mathies Mine
ADMINISTRATION (MSHA),	:	
	:	
and	:	
	:	
UNITED MINE WORKERS OF AMERICA,	:	
	:	
Respondents	:	
	:	
	:	
SECRETARY OF LABOR,	:	Civil Penalty Proceeding
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	
	:	Docket No. PENN 82-15
Petitioner	:	A.C. No. 36-00963-03181
	:	
v.	:	
	:	Mathies Mine
	:	
MATHIES COAL COMPANY,	:	
	:	
Respondent	:	

DECISION

Appearances: David T. Bush, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for the Secretary of Labor;
H. Juanita M. Littlejohn, Esq., Pittsburgh, Pennsylvania, for Mathies Coal Company.

Before: Judge Lasher

A hearing on the merits of this consolidated proceeding was held in New Kensington, Pennsylvania, on April 8, 1982, at which both parties were represented by counsel. On April 8, 1982, after consideration of the evidence submitted by both parties and proposed findings of fact and conclusions of law proffered by counsel during closing argument, a decision was entered on the record. This bench decision appears below as it appears in the official transcript aside from minor corrections.

This matter is comprised of a contest proceeding filed by Mathies Coal Company, herein Mathies, on October 9, 1981, under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., herein the Act, and a civil penalty proceeding initiated by the Secretary of Labor by a filing on December 7, 1981, under section 110 of the Act.

The citation involved in both proceedings which were consolidated for hearing and decision by my order dated April 1, 1982, is numbered 1142334 and was issued by MSHA Inspector Francis E. Wehr on September 22, 1981. The allegedly violative condition described in the citation is that: "One of the four sanding devices provided for the No. 4 self propelled personnel carrier (mantrip) was inoperative which was going to transport personnel from Gamble No. 1 to 4 face, 24 butt parallel section ID054. The sander was empty due to valve that was stuck open. Foreman in charge Ron Pietroboni. Notice to provide safeguard 10WC 12-01-72." The citation also alleged, in addition to the purported violation of 30 C.F.R. § 75.1403, that said violation was of such a nature that it could significantly and substantially contribute to the cause and effect of a mine safety or health hazard. This latter allegation was accomplished on the face of the citation by the placement of an X in an appropriate box. The notice to provide safeguard referred to on the face of the citation is dated December 1, 1972, (Exhibit 1b) and it provides: "Sanding devices were not sufficient to supply sand to all wheels in both directions of travel on Lee-Norse Nos. 1, 2, 3 and 4 and Galis Nos. 5, 6, 7, 8 and 9 self propelled mantrip cars." This obviously has reference to a specific situation existent at Mathies on December 1, 1972. Subsequently, this safeguard notice was amended to provide more reasonable guidance and by citation issued August 12, 1980, the original safeguard notice was modified to provide as follows: "This is to modify safeguard number 1 JWC dated 12/01/72 to include that all mantrips at this mine will be provided with properly maintained sanding devices sufficient to sand all wheels in both directions of travel."

If not specifically established in the record, I find from the pleadings herein that on or about 8:20 a.m., on September 22, 1981, approximately five minutes after the citation was issued that Inspector Wehr issued a termination of the citation which indicated: "Adjustment [sic] were made on the valve and sander fill with sand returning the sander to a operative condition."

The general issues involved are whether a violation of section 75.1403 of 30 C.F.R. occurred as alleged by Inspector

Wehr and if so whether such violation was 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 again, if such violation occurred, the amount of civil penalty which should be assessed in consideration of the six standard statutory penalty assessment factors provided in the Act.

Section 75.1403, a general statutory requirement repeated in the codified mandatory standards contained in CFR, provides: "Other safeguards adequate, in the judgment of an authorized representative of the Secretary, to minimize hazards with respect to transportation of men and materials shall be provided." Authority for the issuance of the aforesaid safeguard notice is contained in section 75.1403-1 and the specific requirement relating to sanding devices on self propelled personnel carriers is provided for in section 1403-6(b)(3).

At the commencement of the hearing the parties provided general stipulations with respect to the ownership of the Mathies Mine wherein the alleged violation occurred and jurisdictional agreements. They further stipulated with respect to four of the six penalty assessment criteria. Two witnesses testified for the Secretary of Labor, Coal Mine Inspector Francis E. Wehr and MSHA Supervisor William A Dupree. Malcolm Dunbar, Safety Supervisor at Mathies Mine, testified for Mathies.

Inspector Wehr testified that on the morning of September 22, 1981, at approximately eight-fifteen a.m. he was standing on the clearance side of the mantrip in question, which I find based on other testimony in the record to be a Lee-Norse self propelled mantrip car, and observed the operator of this mantrip car who, based upon subsequent testimony in the record, I find to be one Steve Nick perform a safety inspection after which Mr. Nick engaged the trolley pole thereon. According to Inspector Wehr management personnel had previously left the area when this event occurred. After asking Mr. Nick if he was ready to go and receiving Mr. Nick's answer that he was ready to go but was waiting for the foreman to return, Inspector Wehr conducted his own inspection of the mantrip and determined that one of the four sanders thereon was malfunctioning. The foreman who had left the area had gone to find another person to ride with him on the mantrip. The mantrip was loaded with seven or eight miners at the time Inspector Wehr discovered the inoperative sander and was scheduled to travel from the area where it was observed by Inspector Wehr (called "the bottom") some sixty-five hundred feet to the section. (The bottom is marked point "A" on Joint Exhibit No. 1, a mine map, and the section is marked point "B" thereon).

Inspector Wehr concluded that Mr. Nick, the operator, had performed his inspection of the mantrip based on his observation that Nick had pulled the levers controlling the sanders and had turned around and looked at various points on the mantrip, for example, the fire extinguisher. When Inspector Wehr checked the malfunctioning sander in question he determined that because a valve was stuck the sand contained in the container constituting part of the sander had been emptied. In other words there was no sand in the sander to be released in the event such might become necessary during the trip to the section.

I footnote at this point that the record indicates that approximately one half a gallon of sand is contained in the sander and that there are sanders above each of the four wheels on the mantrip. The record also indicates that the sand is released on the tracks for the purpose of increasing friction when the brakes of the mantrip are applied thereby increasing the stopping power of the mantrip brakes.

Inspector Wehr indicated that the sander would have been used in the course of going to the section because the mantrip would have had to change directions. Evidence in the record in further explanation of this testimony is to the effect that the mantrip uses only two sanders at any one time determined by the direction of travel of the mantrip. Thus if one sander is inoperable, fifty percent of the sanding capacity of the mantrip is withdrawn insofar as the same relates to its effect on stopping power. Wehr said Mr. Nick, the mantrip operator, did not indicate to him that there was a problem.

Inspector Wehr determined that a violation occurred because the plunger (valve) was open and there was no sand in the sander. Thus, no sand could be applied to the rails. He indicated that he considered the violation to have resulted from the negligence of the mine operator because the condition of the sander should have been known and that as the operator checked it the violative condition should have been discovered. The Inspector indicated that he considered the violation to have been of the "significant and substantial" variety because of various factors which he mentioned were prevalent in the haulageway. He testified that in addition to the sander not working there were hills and grades the mantrip would have to pass over to get to the working section and that the Mathies Mine is a "wet" mine which has pumps all along it's haulageways. Specifically, he indicated that point "D" on Joint Exhibit No. 1 gets water in it and that also point "G" gets water in it. I footnote at this point that Mathies' witness Malcolm Dunbar indicated that there is at least one location along the haulageway where water had been observed on the

track. Mr. Dunbar did not recall the conditions on the track on September 22, 1981, and to the extent there is any substantial conflict between the testimony of Inspector Wehr and Mr. Dunbar on this particular point the more specific testimony of the Inspector is credited.

The Inspector indicated that from point "A" to point "C" on the mine map there is a small down grade and at point "D" there is a dip. According to Mr. Dunbar, between point "D" and "E" there is a 3.4 percent downgrade, from point "E" to point "F" the haulageway is fairly level and from point "F" to point "G" there is an S turn. With respect to visibility the record, in this case the testimony of Mr. Dunbar, indicates that the mantrip (sometimes called portabus) has headlights and that while there is some low top the bus has windows at each end.

The hazard envisioned by Inspector Wehr resulting from the impairment of the sander was a sliding derailment or "slamming" into some object on the tracks. The injuries expected by the Inspector would be broken bones resulting from crushing blows to people who were thrown around or thrown out of the mantrip. In Exhibit M-4, the gravity sheet which Inspector Wehr completed, Inspector Wehr indicated that the injury contemplated by the occurrence of the event in question could reasonably be expected to be "fatal." Although Mathies in taking his deposition as well as at hearing has challenged Inspector Wehr's conclusion as to projected injuries from the occurrence of the anticipated hazard (Exhibit C-6), I conclude that Inspector Wehr's testimony is reasonable, logical and credible under all the circumstances. His testimony in this connection was reinforced by the testimony of Mr. Dupree who indicated his awareness of fatalities which had occurred in Utah and Kentucky resulting from sander insufficiency. The Inspector also indicated his awareness of an accident where a miner sustained a back injury after being thrown from a mantrip. I therefore find that with respect to the injury aspect that it is established on this record that upon the occurrence of the hazard contemplated there exists a reasonable likelihood that a resultant injury would be of a reasonably serious nature.

The Respondent, Mathies, contends that no violation occurred in the first place because at the time the Inspector observed the malfunctioning sander the mantrip operator had not completed his process of making safety checks. Significantly, Mathies did not call Mr. Nick as a witness. Mr. Nick would be the best witness in view of his exclusive knowledge with respect to the defense raised by Mathies. Mr. Dunbar testified that after the citation had been issued

by Inspector Wehr he spoke to Mr. Nick and that Mr. Nick told him that he had completed all safety checks except for his check of the sanders. I conclude that the direct knowledge of the Inspector on this vital conflict must be found to overpower the less probative testimony of Mr. Dunbar. As pointed out by the Secretary on cross examination and readily admitted by Mr. Dunbar, Mr. Nick's disavowal to him with respect to not having completed his safety examination of the mantrip might have been with a view toward avoidance of disciplinary action. Secondly, Mathies' position on this point is damaged by virtue of its own system establishing responsibility for making these important safety checks. Mathies has a written policy placing the responsibility for such checks on the section foreman, in this case on Ron Pietroboni, who likewise did not testify. In any event, like Mr. Dunbar, Mr. Pietroboni was not in the area at the time the defective sander was initially discovered by Inspector Wehr, when Inspector Wehr observed Mr. Nick making the safety check, when Inspector Wehr asked Mr. Nick as to the readiness of the mantrip, and when Inspector Wehr made his decision to issue the citation.

Accordingly to Mr. Dunbar, the foreman's responsibility for making safety checks can be delegated to others in the foreman's discretion. Although Mr. Dunbar testified that on September 22 he did not know who had the responsibility to make the safety check or who Mr. Pietroboni had delegated such responsibility to, nevertheless it was Mr. Nick who Mr. Dunbar conversed with to determine if the mantrip had been safety checked. I therefore conclude that Mr. Nick was the responsible person to make the safety checks on behalf of Mathies on the day in question, that he was observed by Inspector Wehr to make those checks, that he did advise Inspector Wehr that the mantrip was ready and that for some unspecified reason the safety check (1) was either not made as it should have been or (2) was negligently performed so as not to have revealed the malfunctioning sander. Although I found Mr. Dunbar to be a sincere and knowledgeable witness his position from which to observe the critical event here was not as close as that of Inspector Wehr whose account of events I find no basis in the record to discount. I therefore conclude that the violation occurred as charged in the citation. The mere occurrence of the defective sander under mine safety law constitutes a violation since liability is imposed on a mine operator without regard to fault. ElPaso Rock Quarries, 3 FMSHRC 35, 38-39 (1981).

Based upon Inspector Wehr's account, I find that Mathies was negligent necessarily in one of three possible regards raised by the circumstances: (1) in failing to specifically

delegate the responsibility to make a safety check of the mantrip in question on September 22, 1981; or (2) in negligently conducting the safety check on the mantrip at that time; or (3) in the failure of the person to whom such responsibility had been delegated to inspect the sanders in question. Because the persons having the responsibility or who may have had the delegated responsibility did not testify, it is impossible to more specifically determine the person who was culpable in this instance.

Although Respondent challenged the Inspector's testimony in various respects on the basis that it was inconsistent with testimony he gave in a prior deposition on October 21, 1981, I find that the discrepancies are not sufficient to result in a repudiation of the quality thereof. Briefly, Respondent during the hearing made a point with respect to the Inspector's testimony that he had not asked if a safety inspection had been performed on the mantrip. It does appear that the Inspector was asked this question on page seventy-six (76) of the deposition (Exhibit C-5). Inspector Wehr answered the question by indicating that, "The individual (Mr. Nick) running it said it was okay." Subsequently, on the same page, the Inspector was asked why he didn't ask Mr. Nick if the safety inspection had been done. I construe his answer-which is not an articulation of precise thinking-to be that by asking Mr. Nick if the bus was ready to go the same subject matter was being solicited from Mr. Nick. Interplay between highly intelligent, articulate attorneys and sometimes less sophisticated witnesses frequently will result in ambiguities and surfaces inconsistencies. I find no basis, on the attempts made by Mathies in this case, to blur the otherwise credible testimony of the Inspector.

We turn now specifically to the question whether or not the violation was of such a nature as can significantly and substantially contribute to the cause and effect of a mine safety or health hazard. In Secretary of Labor v. Cement Division, National Gypsum Company, 3 FMSHRC 822, 825 (April, 1981), the Commission defined the phrase "significant and substantial violation" as being one, "if based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." I previously found that the actual occurrence of the event or the hazard contemplated would likely result in an injury or illness of a reasonably serious nature. The question I see remaining under the National Gypsum test is whether or not the violation here contributed to the cause and effect of a mine safety hazard. The Commission in National Gypsum noted that the Act does not define the key

terms "hazard" or "significantly and substantially." It was determined that the word hazard denotes 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. The Commission also noted that the inspector's "independent judgment is an important element in making 'significant and substantial' findings, which should not be circumvented." The effect of the National Gypsum decision constituted a retreat from the view urged by the Secretary that a violation is of a significant and substantial nature so long as it poses more than a remote or speculative chance that an injury will result, no matter how slight that injury might be. Prior to National Gypsum most violations were treated as "significant and substantial." The National Gypsum case elevated significant and substantial violations to a middle ground between the technical non-serious category of violations and "imminent danger" violations. I footnote here that my own view prior to passage of the 1977 Act was that the phrase "as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard" was a phrase of art which had specific meaning under the 1952 Act which had been picked up in its entirety under the 1969 Act and under normal rules of statutory construction, absent input by interested legislators on both sides of the aisle, would have transferred a meaning carrying a greater degree of seriousness than the intermediate ground chosen by the Commission after the passage of the 1977 Act. In fleshing out its holding in National Gypsum the Commission did indicate that "something more than the violation of a standard itself is required."

In view of the National Gypsum decision I conclude that the Secretary in this case has carried its burden of proof with respect to its "substantial and significant" allegation by showing the wetness, albeit occasional, of the haulageway, the curves and down grades in the mine and the intrinsic danger of haulage travel itself. A violation which affects the braking capacity of a vehicle which carries human beings under the circumstances described in this case is a relatively serious violation by its very nature.

I will comment on the failure that I believe occurred in the record of this proceeding at this point. There was no showing that the Mathies Mine had an unusual number of sanding violations or of braking accidents. There was no expert testimony with respect to the stopping distance loss which would occur by the loss of one sander or two. There is no indication of the speed which mantrips ordinarily travel. The mechanics of how the violation would contribute to the cause

and effect of a violation or accident was not developed. Those deficiencies, however, are not found to totally offset the prima facie case which I conclude the Secretary established primarily through Inspector Wehr's testimony.

Based upon the stipulation of the parties, I find that (a) this is a large coal mine operator which (b) proceeded in good faith to achieve rapid abatement of the violative condition after notification thereof and which (c) will not be adversely affected by the payment of penalty in terms of its ability to continue in business. Mathies, which has a total complement of five hundred and sixty-eight (568) miners working three (3) shifts, has a record of one thousand fifty-nine (1,059) previous violations for the twenty-four (24) month period preceding the commission of the violation in question. I've found that the coal mine operator was negligent in the commission of the violation. I do not find gross negligence or willfulness of any degree in the occurrence of the violation. I find that this was a moderately serious violation under all the circumstances and, as previously noted, have found that it contributed to the cause and effect of a safety hazard as charged by the Secretary. The Secretary, both in its administrative process and the penalty aspect of this case and in this hearing, has sought a penalty of a hundred and thirty (\$130.00) dollars. I find no reason on the basis of this record to reduce or increase that amount. Accordingly, a penalty of one hundred and thirty (\$130.00) dollars is assessed and Mathies is ordered to pay the same to the Secretary within thirty (30) days from the date of the written decision which I will subsequently enter incorporating this bench decision.

CONCLUSION OF LAW

A violation which adversely affects the braking capacity of a personnel-carrying vehicle (mantrip) could significantly and substantially contribute to both the cause and effect of a mine safety hazard where such vehicle is expected to encounter wet conditions and to negotiate curves and downgrades while transporting miners along a mine haulageway.

ORDER

(1) Mathies Coal Company's Notice of Contest is found to be without merit, and Docket No. PENN 82-3-R is dismissed.

(2) Mathies Coal Company, in Docket No. PENN 82-15 is ordered to pay the Secretary of Labor a civil penalty of \$130 within 30 days from the date hereof.

(3) All proposed findings of fact and conclusions of law not expressly incorporated in this decision are rejected.

Michael A. Lasher, Jr.

Michael A. Lasher, Jr., Judge

Distribution:

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

H. Juanita M. Littlejohn, Esq., and Jerry F. Palmer, Esq., Consolidation
Coal Company, 1800 Washington Road, Pittsburgh, PA 15241
(Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
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JUN 8 - 1982

SECRETARY OF LABOR,	:	Civil Penalty Proceeding
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. PENN 82-5
Petitioner-Respondent	:	A.O. No. 36-00963-03171
	:	
v.	:	Contest of Citation
	:	
MATHIES COAL COMPANY,	:	Docket No. PENN 81-230-R
Contestant-Respondent	:	Citation No. 1050403; 7/30/81
	:	
	:	Mathies Mine

DECISIONS

Appearances: Covette Rooney, Attorney, U.S. Department of Labor,
Philadelphia, Pennsylvania, for the petitioner-respondent;
H. Juanita M. Littlejohn, Esquire, Pittsburgh, Pennsylvania,
for the contestant-respondent.

Before: Judge Koutras

Statement of the Proceedings

These consolidated cases concern a contest filed by Contestant-Respondent Mathies Coal Company challenging the legality of one citation issued by an MSHA inspector on July 30, 1981, pursuant to section 104(a) of the Federal Mine Safety and Health Act of 1977. In addition, Petitioner-Respondent MSHA seeks a civil penalty pursuant to section 110(a) of the Act for the alleged violation stated in the citation. A hearing was conducted in Pittsburgh, Pennsylvania on March 18, 1982, and the parties appeared and participated therein. The parties waived the filing of posthearing arguments.

Issues

The issues presented in this proceeding include the question as to whether contestant-respondent violated the provisions of the mandatory safety standard cited by the inspector in the citation, whether the violation was "significant and substantial", and the appropriate civil penalty which should be assessed for the alleged violation.

Applicable Statutory Provisions

1. The Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., particularly sections 104(a) and 104(d)(1).

2. Section 110(i) of the 1977 Act, 30 U.S.C. § 820(i), which requires consideration of the following criteria before a civil penalty may be assessed for a proven violation: (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.

3. Commission Rules, 20 C.F.R. § 2700.1 et seq.

Discussion

The section 104(a) citation no. 1050403, was issued on July 30, 1981, by MSHA Inspector Joseph J. Baniak, and the condition or practice cited is described on the face of the citation as follows:

Evidence observed and measured showed that workers were 7-1/2 feet in by roof supports and a danger board while installing line brattice in the unsupported face area of No. 2 entry 26 Butt section ID 056. This was left from the mid-night shift. NOTE: This condition was corrected; however, the citation shall not be terminated until the approved roof control plan is reviewed with the mid-night shift crew members who left this condition. (No. signs were evident in the soft muddy bottom that any type of support was installed.

Inspector Baniak charged a violation of mandatory safety standard 30 CFR 75.200, and also included a finding in the citation that the cited condition or practice constituted a "significant and substantial" violation of section 75.200. The abatement time was fixed as 8:30 a.m., July 31, 1981.

Inspector Baniak terminated the citation on July 31, 1981, at 8:00 a.m., and the action taken by the operator to abate the conditions cited is described on the face of the abatement notice as follows:

The approved roof control plan was reviewed with the mid-night shift crew members that worked in the 26 Butt Section I.D. 506.

Stipulations

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

1. The Mathies Mine is owned and operated by the respondent, Mathies Coal Company.
2. The Mathies Mine is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977.

3. The Administrative Law Judge has jurisdiction over these proceedings.
4. The subject citations were properly served by a duly authorized representative of the Secretary of Labor at the dates, times and places stated therein, and may be admitted into evidence for the purpose of establishing their issuance and for the truthfulness or relevancy of any statement asserted therein.
5. The assessment of a civil penalty in this proceeding will not affect respondent's ability to continue in business.
6. The appropriateness of the penalty, if any, to the size of the coal operator's business, should be based upon the fact that the respondent's Company and Mine's annual production tonnage is one million, four hundred, fifty four thousand, three hundred forty nine.
7. The respondent demonstrated ordinary good faith in it's handling of compliance after the issuance of the citation.
8. The Mathies Mine was assessed a total of one thousand, one hundred, ninety one violations during the twenty-four month period preceding the issuance of the instant citation. Two hundred five of these violations were issued for violation of 30 CFR 75.200.
9. The parties stipulate to the authenticity of their exhibits, but not to their relevance or for the truth of the matters asserted therein.

Testimony and evidence adduced by the petitioner

MSHA Inspector Joseph T. Baniak, testified as to his background and experience, and indicated that he has been a mine inspector for some eleven years. He confirmed that he inspected the mine on July 30, 1981, as part of an MSHA "ventilation saturation inspection", and confirmed that he issued the citation in question (exhibit P-1). The citation was abated by another inspector and Mr. Baniak identified a copy of the termination notice (exhibit P-2). Mr. Baniak stated that he rode the mantrip into the section with inspector escort Tom Rigotti and section foreman Allan Tedeschi and they proceeded to the working places through the number three entry to the number two entry. Mr. Baniak stated that he wanted to inspect the area to determine how it was left by the previous midnight shift.

Mr. Baniak testified that upon inspection of the number 2 entry he observed that part of the line brattice was hung 7-1/2 feet in by temporary roof supports in the last place which had been mined. He measured the

distance with a rule, observed three temporary jacks which had been installed, two of which were visible, and the other one was behind the curtain. He issued the citation because he observed the brattice line attached to the roof and the area was not supported. The mine bottom was muddy and he observed nothing to indicate that temporary roof support jacks had been installed five feet from the permanently supported roof in the entry crosscut as required by the approved roof control plan. He also observed foot prints in the area where the line curtain was installed and he assumed that someone from the previous shift had walked beyond permanent roof supports to install the line curtain without installing temporary roof jacks for support. The three temporary jacks which he observed were installed directly under the roof bolted area in the crosscut and the roof area there was completely bolted in accordance with the roof control plan (Tr. 9-14).

Mr. Baniak identified a sketch which he prepared for the hearing and he testified as to the location of the temporary jacks and line curtain as shown on the sketch (exhibit P-3). He indicated that mine management agreed with his citation and were in complete agreement with the conditions which he noted on the citation. He stated that the three temporary jacks he observed were 4 or 5 feet apart, that the cut of coal was completed, and that the entry is approximately 11 feet wide. He is familiar with the mining method used in the section and indicated that 20 feet deep cuts are taken in the entry, and ventilation tubing is installed, and the entry is then cleaned (Tr. 14-19).

Mr. Baniak testified that the line curtain in question would have been hung at the end of the midnight shift. He indicated that the curtain is used when the auxiliary fan is down and that based on the position in which he found the curtain the fan could not have been down because the width of the mining machine would have torn it down. He described the clean-up procedures and indicated that once the first cut or lift is taken, the machine makes a clean-up pass and ventilation is then provided to a depth of ten feet. A second pass is made and the clean-up repeats. During this process, the temporary jack nearest the fan need not be removed to make a clean-up pass.

Mr. Baniak identified a copy of the applicable roof control plan for the mine (exhibit P-4) and stated that the conditions he cited were in violation of mandatory safety standard 75.200 as well as safety precautions 3-C and 4 found on page 6 of the plan. He indicated that a small warning danger sign was posted on one of the temporary roof jacks which were installed. He also identified a copy of his notes which he made at the time the citation was issued, as well as a sketch of the scene which are part of his notes (exhibit P-5), (Tr. 20-21). He believed that the roof control plan was violated for the following reasons (Tr. 22):

There was no evidence of a temporary support installed in or near where the spad was driven supporting the check curtain that was left in number two entry. However, there were many visible signs of footprints because of the soft muddy bottom. The area was thoroughly examined prior to issuance of the citation, and it was agreed upon by management personnel.

Mr. Baniak believed that the violation was "significant and substantial" because anytime anyone is under unsupported roof doing work serious injuries could result (Tr. 27). He also indicated that there have been 36 fatal accidents in his district and 24 of them were the result of men working inby permanent roof support. He believed that the respondent was aware of the conditions because the section foreman and crew members are required to know about the roof control plan provisions. If a roof fall had occurred, one or more people would have been directly affected (Tr. 27).

On cross-examination, Mr. Baniak confirmed that he saw no one walk under unsupported roof and that his conclusion that they did are based on the foot prints, the position of the brattice line in an area 7-1/2 feet inby permanent supports, and no signs in the mud that any temporary supports had been installed where the curtain was attached to the roof (Tr. 32, 34). He also stated that Mr. Ricotti asked him to make the citation out to him because he was "partly responsible" for the roof support material (Tr. 35, 37-38).

Mr. Baniak conceded that the sketch he drew in his notes at pg. 4 is different from exhibit P-3, and he explained that his notes were intended as a "reference" to the area where the violations were cited (Tr. 40, 44). He confirmed that at the time he issued the citation he did not speak with anyone on the previous midnight shift and did not know for a fact that anyone walked out under unsupported roof to install the line curtain (Tr. 47). He stated that the line curtain is hung after the cut of coal is completed and the machine is moved out. Clean-up could not have been accomplished with the line curtain installed in the center of the entry because the machine could not get into the area (Tr. 48). Had the line curtain been adjacent to the rib, there would be no need to remove the temporary jacks to clean up. The section was using an auxiliary fan and tubing for ventilation and this system does not require temporary support to provide face ventilation (Tr. 50).

Alan Tedeschi testified that he is currently employed by the Jones and Laughlin Coal Company in a management position and that he previously worked for the respondent as a section foreman. He confirmed that he was discharged by the respondent on August 17, 1981, for refusal to work a scheduled shift. His refusal to work was based on the fact that he had worked two straight 8-hour shifts and would not work a third one because he didn't believe he could perform his duties safely. He also confirmed a prior disciplinary action against him for missing a day of work, but he denied harboring a grudge against the respondent (Tr. 86-91).

Mr. Tedeschi stated that he was the section foreman on the day shift at the time the citation issued and that he accompanied Mr. Baniak on his inspection. The violation was issued on his shift, but the conditions cited by Mr. Baniak concern the prior midnight shift. Mr. Tedeschi confirmed that a cut of coal had been taken out and three temporary jacks were installed. He observed two of the roof jacks on the right side of the line curtain and confirmed that part of curtain was in by these supports. The curtain was 4 or 5 feet from the left hand rib. He reviewed the sketch prepared by Mr. Baniak and agreed that it generally depicted the area in question. He also confirmed the fact that he voiced no objections at the time the citation was issued (Tr. 92-94).

Mr. Tedeschi then described the mining procedures which he followed in cutting the coal, installing roof support jacks, and the clean-up process. He saw no foot prints in the area described by Mr. Baniak because he was not looking for any and he indicated that anyone working at the face should be aware of the roof control plan. He stated that roof jacks were to be installed along the left rib line, but the clean-up should take place before the jacks are set. Further, after the second cycle of coal is taken out the jacks are not supposed to be removed (Tr. 97-98).

On cross-examination, Mr. Tedeschi reiterated the circumstances surrounding his termination from the respondent's employ and stated that he was fired for not showing up for work, and denied that he was discharged by the mine superintendent for lying to him about his failure to report to work as scheduled (Tr. 99-103). He confirmed that he did have a grudge against the respondent at the time he was fired because he had lost his job, and confirmed that he told the superintendent that "he couldn't get away with this" and that he was "going to get Consol" for firing him (Tr. 105). He also confirmed that he spoke with Inspector Baniak two weeks before he was subpoenaed and that Mr. Baniak asked him whether he recalled the incident connected with the issuance of the citation, but denied that he was pressured by Mr. Baniak and that his testimony is from his independent memory of the circumstances (Tr. 109-110).

Mr. Tedeschi stated that he heard no arguments between Mr. Rigotti and Mr. Baniak over the citation (Tr. 113), and conceded that the condition cited by Mr. Baniak "was there", and he agreed that the roof control plan prohibited anyone going in by the last row of permanent supports (Tr. 115), but he did not know how the line curtain in question was attached to the roof because he was not there and made no further inquiries in this regard. Abatement was achieved by supporting the area with three roof jacks and he assumed that the condition was left by the preceding crew (Tr. 117).

Respondent's testimony and evidence

Thomas Rigotti testified that he is employed by the respondent as a mine environmental technician and that part of his duties are acting as an escort for MSHA inspectors. He confirmed that he escorted Mr. Baniak

into the number 2 entry on the 26 Butt Section on July 30, 1981, and that Mr. Baniak served the citation on him. He indicated that the citation was issued after Mr. Baniak advised him that he saw evidence that men had worked under unsupported roof. Mr. Baniak assumed that someone worked under unsupported roof after observing that part of the line curtain was hung in an area where he believed no temporary roof supports had been installed. Mr. Rigotti observed no foot prints in the area and he did not discuss the citation with Mr. Baniak at that time, but did so later. He denied that he agreed with Mr. Baniak's action in issuing the citation but he did discuss the fact that Mr. Baniak saw no evidence that roof jacks had been installed. In addition, Mr. Rigotti indicated that he wanted to review the roof control plan first to determine whether proper procedures were followed in advancing the line curtain and installing the roof jacks (Tr. 126-127).

Mr. Rigotti stated that company policy prohibits employees from proceeding or working inby unsupported roof and that employees are disciplined if they are in violation of this policy (Tr. 128). Mr. Rigotti reviewed Mr. Baniak's sketch (exhibit P-3) and disagreed that three temporary jacks were installed in the place shown. He stated that he observed two roof jacks set further into the entry and marked the exhibit accordingly. He also disagreed with the position of the line curtain as shown on the sketch and stated that it was further inby the entry along the left rib and marked the sketch accordingly and stated that the curtain was 8 to 10 feet from the face (Tr. 130-132).

Mr. Rigotti stated that he left Mr. Baniak on two occasions to check on other mine areas and to use the mine phone. He described the mine bottom in the number two entry as wet and indicated that it had been cleaned. He stated that the entry was 16 feet wide, that the floor is cleaned with the miner pan, and that the miner passing through the area during the clean-up process would have destroyed any evidence of jacks being installed. He also indicated that jacks would have been set along the left hand rib line (Tr. 134).

On cross-examination, Mr. Rigotti stated that he could not recall who went into the mine with him and Mr. Baniak because a "blitz" inspection was taking place and there was a lot of confusion. He confirmed that he did not argue with Mr. Baniak about the citation, and agreed that there was no evidence that temporary jacks had been set. He also confirmed that he has never observed employees going under unsupported roof (Tr. 138).

Mr. Rigotti stated that after the citation was issued he made an inquiry as to whether anyone had worked under the unsupported roof. He learned that section Foreman Frank Coccagna had installed jacks and advanced them as the cuts of coal were taken out. Mr. Rigotti did not know whether anyone was in the area between the time the midnight shift ended and the time he and Mr. Baniak arrived on the scene. He did not lift the curtain to see whether another jack was behind it and he indicated that line curtain and tubing are used for ventilation when coal is being mined. When line curtain is used, the auxiliary fan is normally used and both are operating at the same time (Tr. 139-146).

In response to bench questions, Mr. Rigotti stated that pg. 6, item 4, of the approved roof control plan permits the installation of a minimum of two temporary jacks or posts on five foot centers after one half a cut of coal is taken, the advancement of canvas or tubing, and the performance of work as long as men stay under the roof support. The temporary supports can then be removed remotely by use of a jack handle, and then the other side of the cut can be mined (Tr. 148). He also indicated that Inspector Baniak should not have assumed that anyone was inby roof support without investigating the matter further (Tr. 150).

Mr. Rigotti stated that he observed no equipment in the working place in question when he and Mr. Baniak arrived on the section, that the area was completely mined out, and immediately outby the curtain there was a warning device there to keep people from entering the area. The line curtain was beyond the warning place and no roof supports were there and he believed someone pulled them out remotely in accordance with the roof plan. However, they could have been left in, but this is discretionary (Tr. 151-152).

Frank A. Coccagna, section foreman, testified that he holds a degree in economics and political science from the University of Pittsburgh and a two-year degree in mining technology from Penn State University. He stated that he was familiar with the roof control plan in effect on July 30, 1981, as well as company policy which prohibits anyone from going inby unsupported roof for any reason except to install roof support jacks (Tr. 166-168).

Mr. Coccagna identified a sketch of the scene of the citation as he recalled it on July 30, 1981, and he described the work performed in the area during his midnight shift (Ex. C-1; Tr. 168-170). He stated that the line curtain was hung up on the last roof jack which was installed next to the ventilation tubing and the curtain was no more than a foot from the jack where a person could reach it (Tr. 170). The jacks were about five feet from the rib, and after the curtain was hung the first line jack was removed by means of reaching in with a jack handle. He removed the jack in order to use it across the face of the cut to facilitate the hanging of a danger board to alert miners on the next shift not to walk inby unsupported roof (Tr. 171-172).

Mr. Coccagna stated that after the jacks were taken out and the line curtain hung, they proceeded to mine the second half of the lift, backed the miner up and cleaned up along the curtain in such a manner as to not disturb the curtain. The section was dry with a little water from the sprays. Since the jacks were installed two feet from the line curtain, the clean-up would have destroyed any visible evidence that the jacks had been set. There would not have been a third jack behind the line curtain, and during the entire mining process the roof control plan was complied with at all times. At no time was work performed under unsupported roof, and he was on the section during the entire shift supervising the operation. He has gone out under unsupported roof, but only to support it, and he does not condone his men going under unsupported roof, nor has he ever ordered them to do so (Tr. 173-176).

Mr. Coccagna stated that he first learned about the citation at noon the day it was issued. Mine superintendent Karazsia telephoned him at home and asked him how the line curtain came to be located in by unsupported roof. He explained the mining procedures which were followed on his shift and Mr. Karazsia responded "fine" (Tr. 177).

Mr. Coccagna testified that three or four weeks prior to the hearing Inspector Baniak was in the mine and engaged him in a conversation concerning the citation in question and told him "You were wrong, you were wrong", and that this went on for two and half hours while he was escorting Mr. Baniak on his inspection rounds (Tr. 178).

On cross-examination, Mr. Coccagna stated that at the time the cut was being mined and the area cleaned up, they were following roof control plan "drawing number 1-B" and safety precaution number 4, found on page six of the plan (Tr. 180). He described the clean-up process, including the operation of the continuous miner cutting heads during the clean-up cycle (Tr. 180-186).

Mr. Coccagna stated that when the curtain was hung, a foot of left over material was tucked behind it. One of his crew members inserted a spad into the roof with a spad gun and he connected the curtain to the spad. The ventilation tubing was left a little behind the roof bolts so that it could be pulled out. Permanent roof supports were present in the entry when the auxiliary fan tubing was pulled out. The curtain was hung while under temporary support (Tr. 186-190).

In response to bench questions, Mr. Coccagna stated that Mr. Baniak's "rough sketch" of the scene as depicted in his notes resembled the area at the time the citation issued, except that the line curtain was closer to the rib and did not "curve out" (Tr. 199). He also indicated that Mr. Baniak's "hearing sketch" was not accurate in that the curtain was not in the middle of the entry as shown and the first cut of coal had been taken out a week earlier (Tr. 200).

George Karazsia, mine superintendent, Gamble Portal, Mathies Mine, testified that when he learned that the citation had been issued by Mr. Baniak he telephoned section foreman Frank Coccagna to inquire about the allegation that men worked under unsupported roof on his shift. Mr. Coccagna explained the procedures which were followed in installing the line curtain and assured him that it was done in full compliance with the roof control plan and that no one on his crew worked under unsupported roof. After speaking with Mr. Coccagna he called Mr. Baniak to discuss the matter but Mr. Baniak refused to discuss the citation with him. Since that time Mr. Baniak visited the mine three times to discuss the citation with mine employees and with him. Mr. Karazsia stated that he advised Mr. Baniak that since the matter was being litigated and was in court he did not believe he should discuss the matter with him or his men (Tr. 204-208).

On cross-examination, Mr. Karazsia confirmed that he instructed Mr. Baniak not to speak with or discuss his citation with his salaried personnel because the matter was in litigation and the men felt that Mr. Baniak was harrassing them because of his attempts to discuss the citation with them during his mine visits after the citation was issued and before the present hearing was convened (Tr. 208-210).

George Puskarich, retired shuttle car operator, testified that he was so employed on the section midnight shift in question on July 30, 1981. He stated that he observed the curtain in question during the end of the shift and he observed that two jacks were set and the curtain was then hung. The jacks were then moved back and Mr. Coccagna put a danger board across them. Mr. Puskarich observed no one under unsupported top during the shift and if they do "they are crazy" (Tr. 216-217). Referring to the sketch (Ex. C-1), Mr. Puskarich described how the entry was mined, cleaned, and how the jacks and curtain were installed during the shift (Tr. 219-220).

Inspector Baniak was recalled by me and testified as follows (Tr. 229-231):

Q. Leave the practicalities out of it. I want to know what happened that night. He claimed they were using tubing and curtain?

A. Both.

Q. Both.

A. Okay.

Q. All I'm asking you is, can you confirm that? Were they in fact using tubing and curtain to ventilate?

A. Well, your Honor, I based the condition I cited by the fan being in that position and the check curtain, mostly was in the center of the place. Whether it be fifteen feet inby, whether it be twenty feet outby from the permanent support, it was seven and a half feet inby, and hung approximately center of the entry.

Q. Yes, but my question is, if they followed the procedure that Mr. Coccagna testified to as to how they installed that line curtain inby with the permanent supports, would that still be a violation?

A. Yes, from what I saw I'd still have go [sic], yes. If this was hung at the completion of the cut, why would, whether it be one or two temporary supports, why would they have to possibly be removed? And this is the condition that I made.

Why would they be moved? If there was one they were still inby. If there were two or if there was one at the canvas, they're too far. And I was just basing mine on the check curtain.

In fact I think I measured that the check curtain was seven and a half feet inby. And this was my whole case. And the position of the curtain.

Q. Had Mr. Coccogna been right there on the scene and explained to you how that check curtain came to be installed in the manner in which you found it, had he explained to you that he set two temporary jacks on the side along the rib line, installed the check curtain and then removed the jacks with a thirty foot bar and hung a danger board up there and left the area, would that have been a violation?

Just a hypothetical?

A. Okay. From the position I saw the check curtain, this is what I'm basing it on. Probably the way he had explained it using that, it's a possibility that it could be done.

But the way I saw it when I was in the section and the curtain being in such, in the center of the face, there would be no need to remove any temporary supports.

* * * * *

Q. But you heard him testify that he did in fact, remove the two that were along the line curtain.

A. To place here.

Q. Yes, and put them back where he claims they were.

A. Um-hum, okay, well there's a possibility.

Mr. Baniak also confirmed that the citation was abated by another inspector and that he was not present when the inspector met with the midnight crew to discuss his citation and the approved roof control plan (Tr. 238).

Findings and Conclusions

Fact of Violation

The critical question in this case is whether MSHA has established a violation by a preponderance of the credible evidence and testimony adduced in this case. MSHA has the burden of proving that miners were inby roof supports and the posted danger board at the time the line brattice in question was installed. Since no one observed anyone inby these areas, MSHA's case rests essentially on the testimony of Inspector Baniak. In issuing the citation in question, Mr. Baniak arrived at certain conclusions based on assumptions and speculations with respect to the approved roof control plan, the method of mining and clean-up being utilized by the midnight shift immediately prior to the time he observed the conditions cited, and certain foot prints which he states he observed at the scene. The crux of MSHA's case lies in the inspector's belief that someone was under unsupported roof and they attached one end of the ventilation line curtain to a roof spad which extended some 7 1/2 feet inby the last row of roof supports. In short, the Inspector saw some foot prints, saw no evidence that temporary jacks had been installed at or near where the curtain was attached to the roof, and came to the conclusion that someone had installed the curtain while under unsupported roof (Tr. 52-54). MSHA also presented the testimony of the former day shift foreman, Alan Tedeschi, who confirmed what the inspector observed at the time the cited conditions were found.

The crux of the defense to the citation is the assertion by the respondent that the line curtain was installed in full compliance with the approved roof control plan. In support of this defense, respondent presented the testimony of the section foreman who was responsible for the work performed on the shift immediately preceding the one on which the conditions were found. Mr. Coccagna testified that he supervised the work which had taken place at the location of the line curtain in question, and he described in detail the procedures followed in supporting the roof and hanging the curtain in question. He also stated that the installation of temporary supports, their subsequent removal after the curtain was installed, and the installation of the curtain itself, were all accomplished in full compliance with the approved roof control plan (exhibit P-4, Safety Precaution No. 4, pg. 6, and Drawing 1(b)). Mr. Coccagna's testimony was corroborated by former shuttle car operator George Puskarich, and mine superintendent George Karazsia confirmed that Mr. Coccagna explained the procedure he followed in hanging the curtain in question when he questioned him shortly after the citation was issued.

The record establishes that the roof in the entry crosscut in the immediate vicinity of the curtain was fully supported and bolted in accordance with the roof control plan. In addition, petitioner's counsel conceded that there is no evidence that anyone was under unsupported roof while the auxiliary ventilation tubing was installed in the area in question, and that had any other hazards or violations been observed by the inspector, he would have issued additional citations (Tr. 190). Given these circumstances,

I find it unlikely that the section foreman on the midnight shift would expose himself to a citation by such a foolhardy act as leaving a curtain installed in full view of an inspector if he (the foreman) did not believe what he had done was in full compliance with his roof control plan.

Both Mr. Coccagna and Mr. Puskarich impressed me as straightforward credible witnesses. Mr. Coccagna is a college graduate, with two years of post-graduate study in mining technology. He impressed me as being most knowledgeable with respect to the detailed provisions of the roof control plan, and I accept his explanation as to how the line curtain in question was installed. Mr. Puskarich was retired at the time he testified and was no longer employed by the respondent, and I see no reason why he would not tell the truth. Further, all of the respondent's witnesses were sequestered during the hearing, and having viewed them on the stand, I find their testimony to be credible. In addition, Inspector Baniak conceded that it was possible that the curtain in question was installed, and the temporary jacks removed, as explained by Mr. Coccagna (Tr. 230-231).

Although there is no dispute as to what Inspector Baniak observed at the time the citation issued, I cannot conclude that MSHA has established a violation. In short, MSHA's "circumstantial case" that someone had been under unsupported roof at the time one end of the line curtain in question was fastened to the roof spad has been rebutted by the testimony and evidence presented by the respondent in this case. Under the circumstances, Citation No. 1050403, July 30, 1981, citing a "significant and substantial" violation of mandatory safety standard 30 CFR 75.200, IS VACATED.

ORDER

In view of the foregoing findings and conclusions, the civil penalty proceeding, Docket No. PENN 82-5, IS DISMISSED. Contestant's contest of the vacated citation, Docket No. PENN 81-230-R, IS SUSTAINED.


George A. Koutras
Administrative Law Judge

Distribution:

Covette Rooney, Esq., U.S. Department of Labor, Office of the Solicitor,
3535 Market St., Philadelphia, PA 19104 (Certified Mail)

H. Juanita M. Littlejohn, Esq., Consolidation Coal Co., Consol Plaza,
Pittsburgh, PA 15241 (Certified Mail)

Harrison Combs, Esq., UMWA, 900 15th St., NW, Washington, DC 20005
(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 8 - 1982

SECRETARY OF LABOR,	:	Civil Penalty Proceeding
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No: WEST 81-243-M
Petitioner	:	A.O. No: 48-00155-05070
	:	
v.	:	Alchem Trona Mine
	:	
ALLIED CHEMICAL CORPORATION,	:	
Respondent	:	

DECISION

Appearances: Stephen P. Kramer, Esq., Office of the Solicitor,
U.S. Department of Labor, for Petitioner
John A. Snow, Esq., for Respondent

Before: Judge Moore

The above case originally involved 6 citations, 5 of which involved the dust standard. At the trial, government counsel moved to dismiss the 5 dust violations because the testing criteria had been changed since the issuance of the citations, the chain of possession criteria had been changed, and counsel did not believe that he could prevail in view of the current rules. I granted the motion and all citations except citation 577319 issued on December 17, 1980 alleging a violation of 30 C.F.R. 57.3-22 were vacated.


Citation No. 577319 alleges a violation of 30 C.F.R. 57.3-22 in that "there was loose ground on the back and rib in 5 room between 18 and 19 crosscut in B-92 panel. The panel is down at the time of inspection. The pieces of loose measured approximately 12" by 18" times by 12" thick. A piece from the rib measured approximately 20" by 18" by 34" thick." There was considerable dispute as to where the loose roof and rib were located in the mine, but there is no question but that the condition existed and that the two pieces of trona were barred down by an employee of the company. No management personnel were in the immediate vicinity with the two inspectors when they observed the condition, however.

The inspector stated that even though this was an idle shift, a workman was observed in the vicinity of an electrical power station 200 feet away from the loose pieces of trona. The loose material was in an entry or room and the power station was in a crosscut. Thus the 200 foot distance would include a ninety degree turn. The company records show that even though this was an idle shift, the required roof and rib

inspection had been made, but it showed no bad roof or rib conditions. The inspector stated that in retreat mining, and that is what was being done in this panel, trona can become cracked and loose in a matter of ten minutes.

The standard requires that miners examine and test the back, face and rib of their working places at the beginning of each shift, and frequently thereafter and it also requires that supervisors examine the ground conditions during daily visits. Inasmuch as there is no evidence that the supervisors did not make the necessary examination, MSHA's case depends upon whether the miner that was working in the vicinity of the electrical distribution center was required to examine the area of the loose pieces before working at the distribution center. The standard says that miners shall examine "their working places." 30 C.F.R. 57.2 defines a working place as "any place in or about the mine where work is being performed." Except for the inspection party, there were at most two people working in the panel at the time of the citation. Only one of the two people was observed but it was assumed that he was accompanied by someone else. I cannot construe the standard to require a worker to go 200 feet in by his working station to examine for loose roof and ribs. He must make the examination in his immediate working area and there is no evidence that the workman observed by the inspector did not act in accordance with the standard.

The citation is vacated and the case is dismissed.


Charles C. Moore, Jr.,
Administrative Law Judge

Distribution: By Certified Mail

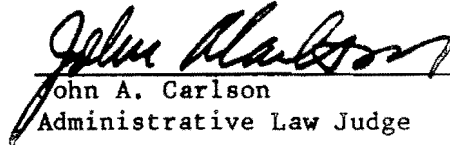
Stephen P. Kramer, Esq., Office of the Solicitor, U.S. Department
of Labor, 4015 Wilson Boulevard, Arlington, Virginia 22203

John A. Snow, Esq., Van Cott, Bagley, Cornwall and McCarthy, Suite 1600,
50 South Main Street, Salt Lake City, UT 84144

14 JUN 1982

Accordingly, AMS is substituted as respondent in the place and stead of the original respondent, Phillips; this proceeding is in all respects dismissed as to Phillips; and the \$48 proposed civil penalty previously paid by AMS is affirmed and assessed against AMS.

SO ORDERED.


John A. Carlson
Administrative Law Judge

Distribution:

James G. Williams, Esq.
Phillips Petroleum Company
Minerals Group
P.O. Box 3209
Englewood, Colorado 80155

George W. Terry, Jr., Esq.
Malcolm L. Shannon, Jr., Esq.
Phillips Uranium Corporation
P.O. Box 26236
4501 Indian School Road, N.E.
Albuquerque, New Mexico 87125

Nancy S. Hyde, Esq.
Office of the Solicitor
United States Department of Labor
4015 Wilson Boulevard
Arlington, Virginia 22203

A.J. McDougall, President
American Mine Services, Inc.
4705 Paris Street
Denver, Colorado 80239

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JUN 21 1982

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding
	:	<u>Docket Nos.</u> <u>Assessment Control Nos.</u>
v.	:	KENT 81-77 15-07295-03019 KENT 81-78 15-07295-03020
MARTIKI COAL CORPORATION, Respondent	:	Martiki Surface Mine

DECISION

Appearances: George Drumming, Jr., Esq., Office of the Solicitor, U. S.
Department of Labor, for Petitioner;
William G. Francis, Esq., Francis, Kazee and Francis,
Prestonsburg, Kentucky, for Respondent.

Before: Administrative Law Judge Steffey

Pursuant to a notice of hearing issued March 16, 1982, a hearing in the above-entitled proceeding was held on April 20 and 21, 1982, 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 each day, I rendered the bench decisions which are reproduced below (Tr. 218-245 in Docket No. KENT 81-77 and Tr. 227-242 in Docket No. KENT 81-78):

DOCKET NO. KENT 81-77

The proposal for assessment of civil penalty filed on March 16, 1981, in Docket No. KENT 81-77 seeks assessment of civil penalties for five alleged violations of the mandatory health and safety standards. The parties succeeded in reaching a settlement agreement as to three of the violations and the other two have been the subject of a hearing at which both MSHA and respondent have presented witnesses.

Since there are both contested and noncontested violations involved in this proceeding, I shall first consider the contested violations. The remaining part of my decision in Docket No. KENT 81-77 will consist of a discussion of the settlement agreement and indicate whether the settlement agreement should be accepted.

Contested Violations

Citation No. 731280 (Exhibit 2), October 6, 1980, § 77.1605(a)

The information given below constitutes findings of fact with respect to the alleged violation of Section 77.1605(a) in Citation No. 731280.

1. The parties have stipulated in Exhibit 9 that respondent operates the Martiki Surface Mine and that it is a large operator. Respondent demonstrated good faith in achieving rapid compliance with respect to the violations which were settled, as well as the ones which are contested. The parties further stipulated that any penalty which may be assessed in this proceeding will not adversely affect respondent's ability to continue in business.

2. On October 6, 1980, Inspector Andrew Reed, Jr., made an examination of the Martiki Surface Mine. At that time, he wrote Citation No. 731280 alleging a violation of section 77.1605(a), which provides, "cab windows shall be of safety glass or equivalent, in good condition and shall be kept clean."

3. The condition given in the inspector's Citation No. 731280 was that the cab windshield in Caterpillar Loader 992C (Company No. 309) is not in good condition. The windshield contained a shattered place in the upper left side with approximately 14 cracks extending from the shattered place. Three of the cracks extended all the way across the window and about five cracks were observed in the area traversed by the windshield wiper blade.

4. The operator of the No. 309 end loader was Raymond Maynard and it was his opinion that the cracks were not bad enough to obstruct his vision. He indicated that there was, in his opinion, only a small place, which he described as a crack, where a rock had hit the windshield and that some small lines extended out from the initial point of impact. He didn't think there were as many cracks or lines as the inspector thought existed in the windshield. Maynard reported to his supervisor, Bill Houser, that there was a cracked place in the windshield and the report to that effect was given to Houser orally by means of a short wave radio, which was in one of the trucks which Maynard was loading. Maynard testified that it is a company practice to have anything that's wrong with a vehicle reported in writing on a card, but he could not recall whether there was a card available on the morning that this windshield was cracked. Therefore, he did not write on a card the fact that the windshield was cracked.

5. The lead supervisor on the midnight-to-8:00 a.m. shift, which was the shift on which the citation was written, was Bill Houser. He testified that he had received a call from Maynard about the existence of a cracked windshield in loader No. 309, but

since Maynard did not feel that the cracks were bad enough to keep him from operating the vehicle, he did not have the equipment taken out of service. Consequently, the equipment was used on the first part of the shift and Maynard was still in the end loader at the time it was examined by the inspector in the neighborhood of 4:00 a.m. The citation, itself, was written at 6:55 a.m. but the cracked windshield had been observed prior to that time. Houser testified that if the operator of a piece of equipment thinks that a given defect is sufficiently bad to interfere with the operation of the equipment that he generally leaves that up to the judgment of the operator of the equipment. If the defect, or problem that's reported to him is anything that Houser considers to be of a serious nature, such as the brakes giving a problem, he personally goes to the equipment and checks it to be certain that there is no endangering hazard associated with the problem, if the piece of equipment is continued in service for the remainder of the shift.

Those are the primary facts that were given by the witnesses in this case as to Citation No. 731280. A great deal of testimony was given by the three witnesses, Reed, Maynard, and Houser, but most statements are sufficiently diverse in nature to make it necessary to discuss them in deciding whether a violation occurred and, if so, whether the penalty should be of a moderate nature or perhaps a fairly large penalty.

There was a motion made by counsel for respondent after all the testimony was given, urging that Citation No. 731280 be dismissed because the inspector's testimony had failed to show that the windshield was in other than good condition. As I have indicated previously, the violation involves section 77.1605(a) which provides that "[c]ab windows shall be of safety glass, or equivalent, in good condition and shall be kept clean." Respondent's counsel has emphasized that there's no dispute but that the windshield was made of safety glass, or equivalent and that the glass was clean. The only question is whether the windshield with 14 cracks in it was in good condition. It is the position of respondent's counsel that although there were some cracks in the windshield, I should give considerable weight to the testimony of the operator of the equipment, who was of the opinion that the cracks, although admittedly present, were not sufficiently bad to cause him any problem in operating the equipment. So, the issue before me, really, is whether, or at what point, cracks in a windshield become severe enough to be considered not in good condition, as was alleged by the inspector.

It is human nature for a person to see events which will ultimately be used to make conclusions which are consistent with that person's position in life. The inspector wanted to show that the cracks constituted a violation of section 77.1605(a) and there-

fore he very meticulously counted the number of cracks in the windshield. Since his manual apparently indicates that cracks in the area which is traversed by the wiper blades are especially likely to be where a person's vision would be affected, he counted the number of cracks in the area where the windshield wiper traversed the windshield. He also noted that three of the cracks were long enough to go clear across the windshield.

In opposition to the inspector's observations of the windshield, we have the loader operator's testimony. He said that the cracks were perhaps long enough to extend 6 inches, that they didn't traverse the area where the windshield wipers passed across the windshield, and that his vision was not blocked in any way.

We have to keep in mind, of course, that these cracks were observed by both the inspector and the loader operator about 4:00 a.m., when darkness prevailed and during foggy weather conditions. Consequently, I can certainly believe that Maynard would have been less inclined to see the cracks than the inspector because Maynard didn't set out to establish any specific type of condition. It is significant, though, that Maynard thought that these cracks were sufficiently noticeable for him to take the time to report them to his supervisor, Houser.

Both of the operators of end loaders who testified in this proceeding indicated that the Company wants any kind of defects in its equipment reported. Both witnesses gave respondent a high grade for the effective and conscientious maintenance that's done on the equipment. Consequently, this is not a case in which we have a respondent which is dilatory about fixing equipment or a case in which equipment operators are encouraged not to report defects in equipment. Nevertheless, I think that the testimony, when viewed from the standpoint of the position of each person who has testified, would have to support a finding that the cracks were of sufficient nature to keep the windshield from being in good condition. For that reason, I find that there was a violation of section 77.1605(a) and that respondent's motion to dismiss should be denied.

Having found that a violation occurred, a civil penalty must be assessed, based on the six criteria for assessing penalties as those criteria are given in section 110(i) of the Federal Mine Safety and Health Act of 1977. As Finding No. 1 above shows, the parties have already stipulated as to three of the six criteria, in that, they have agreed that respondent is a large operator, that respondent's ability to continue in business will not be affected by the payment of penalties, and that all of the violations were abated rapidly.

In my past decisions, and in the assessment formula described in 30 C.F.R. § 100.3, the criterion of good-faith abatement has been used in the following manner: if a violation is found to have been abated in a normal fashion, that is, within the time given by an inspector for abatement, the penalty is neither increased nor decreased under the good-faith abatement criterion. If the violation is not abated within the time given by the inspector, then up to 10 penalty points are added to the penalty, otherwise assessable under the other criteria, and the penalty is therefore increased. On the other hand, if an operator abates a violation in less time than was given by the inspector, then it's considered rapid abatement and up to 10 penalty points are subtracted from the penalty which would otherwise be assessable and the penalty is therefore decreased.

It is not often that I find parties stipulating that a respondent has demonstrated good faith in achieving rapid compliance. With respect to each of the violations involved in this case, the inspector's statement, which is Exhibit 3, in one instance, and Exhibit 5 in the other instance, the inspector states that the operator abated the violation in about one-eighth of the time that he had set. Therefore, whatever penalty is assessed in this case should be reduced considerably because of the rapid abatement. I have discussed the rapid abatement criterion first because it happens to be among those matters which were stipulated by the parties, but it can't be applied until some determination has been made with respect to the other criteria. In other words, you have to determine an amount before you can deduct anything from it.

Exhibit 1 shows that the number of previous violations of section 77.1605(a) amounts to one in the 24-month period preceding the occurrence of the violation alleged in this case. Exhibit 1 shows in the second portion on the right side that there've been three violations alleged but only one of them has been paid, and the other two, I'm told by counsel, are the ones involved in this proceeding. It's been my practice over the years to add some amount to a penalty when I find that there has been a previous violation of the same section which is before me in a given case. In this instance there is the minimum that can exist, which is one, and that one occurred over a period of 24 months. Consequently, I do not feel that a very large amount needs to be assessed for a single violation in a 24-month period. Therefore, whatever penalty is assessed, \$20 will be assessed under the criterion of history of previous violations.

The next criterion which has to be considered is negligence. The evidence shows that there was a very low degree of negligence because, first of all, the crack in this particular windshield had not been in existence long enough for it to have been reported prior to the shift on which it was reported by Maynard, the operator of the end loader. Since Maynard did report the cracked windshield at

the beginning of his shift to the supervisor, and since it cannot be determined for certain whether that would have been sufficient to have brought about the replacement of the windshield during the day shift, I can hardly find on the evidence that respondent was negligent in not having replaced the windshield before it was cited by the inspector.

The reason for the foregoing conclusion is that the citation was issued on a midnight-to-8:00 a.m. shift and the Company relies on an independent contractor to replace windshields. As it turned out, the windshield, in this instance, was replaced within 3 or 4 hours after it was cited by the inspector. There's no evidence in the record to show, for a certainty, that it might not have been replaced even if the inspector had not written a citation about it. In any event, there was a very low degree of negligence so that I think the most that I should assess under that criterion would be \$10.

The sixth criterion is gravity, or seriousness. As to that criterion, there is little persuasive evidence because most of the testimony as to gravity is based on speculation. The inspector did get into the cab of the end loader and did look through the place where the windshield wiper traverses the windshield. It was the inspector's opinion that his vision was slightly reduced by the five cracks across the windshield, but the inspector said that there was no discoloration around the cracks, there was no accumulation of dirt in the cracks, and his most adverse statement about the cracks was that there might have been some refraction of light from the cracks at certain times of the day or night. Therefore, the evidence as to impairment of one's ability to see through the windshield ranges from the inspector's belief that his vision would have been slightly reduced by the cracks to the equipment operator's belief that his vision was not affected at all by the cracks.

In evaluating the gravity of the cracked windshield, there is a second factor to be considered, namely, the inspector's belief that the cracks in the windshield weakened the windshield structurally so that an additional rock or other object that might have flown against the windshield at a subsequent time would necessarily have exposed the operator to an additional hazard because some flying glass might come off a windshield which had already been weakened by cracks as compared to a new windshield, or a windshield which has no cracks in it. On structural weakening, I think that the inspector's conclusion is supported by the record because his testimony shows that there were 14 cracks in the windshield, some of which extended all the way across the windshield, and there were five in the area where the windshield wiper traversed the windshield. So, there would have to have been a weakening of a windshield which

has that many cracks in it. Consequently, I find that the violation was moderately serious and that a penalty of \$30 should be assessed under the criterion of gravity.

On the basis of the foregoing discussion, \$20 should be attributed to history of previous violations, \$10 should be assessed under negligence, and \$30 should be assigned under gravity, for a total of \$60. As I indicated previously, since there was very rapid abatement of the violation in this instance with the windshield being replaced so quickly that the day shift could go ahead and use the end loader on the next shift, I believe that the penalty already assessed should be reduced by half. Therefore, the penalty should be \$30.00 in this instance for the violation of section 77.1605(a) alleged in Citation No. 731280.

Citation No. 951482 (Exhibit 4), October 6, 1980, § 77.1605(a)

The findings of fact with respect to Citation No. 951482 alleging a violation of section 77.1605(a) are given below.

1. During the same inspection on which the inspector wrote the citation considered above, the inspector also examined another Caterpillar 992C loader, having Company No. 313, and the inspector also cited that Caterpillar loader for a violation of section 77.1605(a). His citation, in this instance, states that the cab's windshield was not in good condition because approximately seven cracks were present in the windshield.

2. When the inspector started testifying in detail about the seven cracks in the windshield of loader No. 313, he was unable to be nearly as explicit as he had been when he described the cracks in the windshield of loader No. 309. He was sure only of the fact that he had counted seven cracks in the windshield. He thought that the cracks were caused by an object falling off the bucket of the end loader and hitting the right side of the windshield, thereby causing seven cracks in the windshield. The inspector was not sure whether those seven cracks were in the area traversed by the windshield wiper blades, although he concluded that if one looked through the windshield, those seven cracks would be in his line of vision, or at least some of them would be. He emphasized, in connection with the seven cracks, the fact that end loader No. 313 was being used in an area where there were several lights which were strong and which, upon hitting the windshield at various angles, might cause light refractions which could distort vision through the windshield. But even as to that allegation or conclusion the inspector was not sure what hazard the seven cracks would cause, because he only looked through the windshield while the end loader was stationary. In that single position, no light refractions showed on the windshield.

3. The operator of loader No. 313 was Chester Lacey. Lacey had worked for Martiki for about 5-1/2 years, but he'd been operating heavy equipment for many years longer than that. It was his opinion that the crack in the windshield did not cause any problem in his being able to see through the windshield. His description of the crack was completely different from that of the inspector. He testified that the only crack in the windshield was a half moon crack about 10 inches long in the lower left corner of the windshield. It was his testimony that the half moon crack did not extend up from the windshield's bottom for more than 4 inches. As he described the area traversed by the windshield wiper blades the windshield wiper would not have come closer to the top of the windshield than 6 inches or closer to the bottom of the windshield than 6 inches. Since the crack extended up from the bottom 4 inches, the crack did not come within the area traversed by the windshield wiper blades.

4. Lacey emphasized that the crack was so low in the windshield that he would not normally look through that portion of the windshield to do anything, because if he were loading the bucket he would look, approximately, through the center of the windshield. When he loaded a truck, or dumped materials out of the bucket into a truck, which are very large trucks, he would be looking only through the top of the windshield. Lacey also testified that although he had seen the crack in the windshield at the time he began his shift, that he is a type of operator who is known as a general mine utility person, who can operate practically any equipment at the mine, except the drag line. Therefore, he said that he had only about 10 minutes to inspect this piece of equipment. By the time he had finished inspecting it, the lead supervisor, Bill Houser, had already left. The only way he then had for reporting the crack to Houser would have been to have had a truck driver report it over the truck's radio. Since Lacey wanted to get busy operating the end loader, he did not orally report this particular crack in the windshield because his supervisor had already left and because he didn't think it was very serious, and he was confident it would not obstruct his vision.

5. Insofar as the crack in the windshield of loader No. 313 is concerned, Houser testified that he hadn't received any report about the windshield in this instance, but that when the inspector cited the violation he, of course, had the windshield replaced. The significant part of Houser's testimony was that if he personally had seen a half moon crack in the bottom of the windshield, 10 inches long, he would have had the windshield replaced. It was also his testimony that the Company does have a practice of checking windshields on its own initiative and when it does find one that's excessively scratched, or in need of replacement, the Company does so on a regular and routine basis.

Those are the findings of fact which are significant with respect to the windshield cracks in end loader No. 313.

Respondent's counsel also made a motion to dismiss, with respect to Citation No. 951482. He stressed the same factors in his motion with respect to the instant citation as he did with respect to Citation No. 731280, except that he emphasized that there was even less reason to find that this windshield was not in good condition than there was with respect to the preceding alleged violation. He emphasized, correctly, that when Lacey was testifying about the cracked windshield in loader No. 313, he stated that he had the citation read to him, or showed to him by the Company's safety supervisor the next day or so after it had occurred. Lacey said that when he read the inspector's description of the windshield on his loader No. 313, he thought the inspector had made a mistake and had described the wrong windshield for his loader No. 313 because the inspector's description of seven cracks in the windshield did not coincide or track with his recollection of the crack in any way at all. Therefore, respondent's counsel emphasizes that there was not enough wrong with this particular windshield to justify a conclusion that the windshield was in other than the good condition required by section 77.1605(a).

Counsel for the Secretary of Labor and MSHA opposes the motion to dismiss and he emphasized that Lacey, the operator of the end loader, did acknowledge and did know that there was a crack in the windshield that was 10 inches long and that a crack in a windshield is sufficient to show a lack of the required good condition.

This particular citation has given me a great deal of concern because I am somewhat in agreement with respondent's counsel that there must be some minor thing that can be wrong with a windshield and still be considered in good condition. I believe it was the operator of the previous vehicle, No. 309, who stated that if a windshield didn't have anything at all wrong with it, he'd consider it to be in excellent condition, and if it had a few cracks in it, he'd still consider it to be in good condition. I think that that's pretty much what respondent's counsel feels about the meaning of the phrase "good condition".

I'm inclined to want to agree with him, except that I cannot get it out of my mind that if a crack in a windshield is not reported and the windshield is not replaced at the time the crack is first observed, I don't know whether it would get replaced at all until it really does become a serious hazard. At the time the windshield was cited, the question of safety was not as pronounced a consideration as it would have been, for example, if the inspector had alleged that a violation of section 77.1606(a) had occurred. In that section, there's a reference to equipment defects affecting safety which should be reported to the mine operator. I would assume

that if the crack in the windshield had been very severe that the inspector might have gone so far as to cite it as a defect affecting safety, but he didn't go that far. Instead, he said that the windshield was not in good condition.

I believe that the phrase "good condition" will have to be rather liberally construed in order to do what the Act was intended to do, that is, make certain that a piece of equipment is safe and that there won't be anything about the equipment that will result in a possible injury just because a given operator doesn't see very well in a moment of using the equipment in a certain position. For example, even though Lacey, the operator of end loader No. 313, stated that the crack didn't cause him any problem at night, and that he didn't think there was enough reflection of artificial light to cause a problem, he felt that in the daytime you might get a rainbow effect, as he called it, which might cause an obstruction in vision, or a probability that you would not see as well through the windshield as you would like to see.

Since Houser, the supervisor, indicated that he would have had the windshield replaced if he had seen the same crack on his own, it looks to me as if I shall have to find, on the evidence as a whole, that even if I ignore the inspector's testimony that there were seven cracks in the windshield and I accept only Lacey's testimony that there was one half-moon crack, 10 inches long, that I would still have to find that this was a windshield that was not in good condition. Houser's testimony shows that he would have replaced this particular windshield if he had seen it. I think that also shows that he would find it not to be in good condition or he would not replace it.

I recognize that on redirect examination, counsel for respondent asked Houser if he would rely on the equipment operator's opinion if the equipment operator thought that a windshield was in good condition. Houser said he would have, and that he thought Lacey's opinion was based on sound experience and discretion. The fact remains that Houser had already given his opinion that a windshield with a 10-inch crack should be replaced before he was asked that question. Since the testimony as a whole supports a finding that the windshield was not in good condition, I find that there was a violation of section 77.1605(a) with respect to end loader No. 313.

Having found a violation, it's necessary for me to assess a penalty. Some of the six criteria have already been considered above and it is unnecessary for me to repeat those details, other than to observe that it has already been found that respondent is a large operator, that payment of penalties will not cause it to discontinue in business, and that the violation was rapidly abated.

I have already found that there has been one prior violation of section 77.1605(a). It is true that the violation I am now considering is a third violation and one could find that there are two previous violations, but I believe that the Act means what it says when it refers to "previous" violations. I don't think that two violations found by the inspector within a few minutes of each other can be considered a "history" because the operator has no opportunity to benefit from having been told twice within a 30-minute period that a certain condition constitutes a violation of a mandatory health or safety standard. There was simply not enough time between the citations for management to take any action that would keep the second violation from happening, based on the fact that a previous one had been cited a few minutes prior to that. Therefore, I shall make the same conclusion here with respect to history of previous violations that I did before, namely, that \$20 should be assessed under the criterion of history of previous violations.

In this instance, there probably is a slightly higher degree of negligence because the operator of loader No. 313 was not as careful and prudent in reporting this particular crack as the operator of loader No. 309 had been. Of course, one must take into consideration that the crack in the windshield in loader No. 313 was less noticeable than the crack in the windshield in No. 309. The inspector had more difficulty in describing the extent of the crack in No. 313 and the operator of No. 313 found the crack to be so insignificant that it almost merited no reporting of it at all. Still the operator said he would have reported it if he'd had a radio in the vehicle to use for that purpose. The fact that the operator did not report it has to be considered slightly more negligent than the other one which was reported. Consequently, I think that a penalty of \$30.00 should be assessed under the criterion of negligence in this instance.

As to the criterion of gravity, this violation of section 77.1605(a) was not as serious as the previous one because the inspector agreed that these cracks were much less significant. He saw no light refractions when he looked through the windshield, and since he was in some doubt about the exact location of the cracks, I can hardly find from his testimony that a person's vision would have been distorted by the cracks. While the inspector felt that the windshield had been weakened by the cracks, the fact remains that seven cracks would have weakened this windshield less than 14 cracks weakened the other windshield. The foregoing conclusions assume that an ordinary layman can make such conclusions based on the evidence that I have. Of course, the testimony of the operator of loader No. 313 is that there was only one small crack at the lower corner of the windshield. Consequently, I can only find that this violation was less serious than the other one, bordering on a finding that it was nonserious. Based on the discussion above, I find that a penalty of \$10 should be assessed under the criterion of gravity.

Since the windshield here involved was replaced with the same promptness that characterized replacement of the other one, I find that the criterion of rapid abatement should be given a great deal of weight. Therefore, the penalty of \$60 which would otherwise be assessed under the criteria of history of previous violations, negligence, and gravity will be reduced by 50 percent to \$30.00.

Settlement Agreement

As explained in the introductory part of this decision, the parties agreed to a settlement with respect to the other three violations alleged in Docket No. KENT 81-77. The findings with respect to the contested violations are also applicable to the settlement agreement insofar as three of the six criteria are concerned. It has already been stipulated that the operator is a large operator, that payment of penalties will not cause it to discontinue in business, and that the violations were rapidly abated.

Counsel for the Secretary placed into the record this morning the basis for the settlement insofar as the remaining three criteria are concerned. The first violation was alleged in Citation No. 950537 stating that a white Chevrolet explosives truck loaded with various explosive materials was not securely blocked or braked so as to prevent the truck from rolling, as required by section 77.1302(j). It is said that the violation was accompanied by ordinary negligence because the foreman knew about the truck's condition and had not taken steps to secure it thoroughly. It is also said that the violation is accompanied by moderate seriousness because there was a possibility that the truck could have rolled away from its parking place and might have caused a hazard to anyone who might have been in the area.

The Assessment Office evaluated the criteria of negligence and gravity in about the same way that it was described on the record by the Secretary's counsel. Exhibit 1 in this proceeding doesn't show that there's been a previous violation of section 77.1302(j). Consequently, I find that the penalty of \$130 proposed by the Assessment Office was derived under the six criteria in an acceptable manner and that respondent's agreement to pay the proposed penalty in full should be approved.

The next citation involved in the settlement agreement is No. 950538, which alleges a violation of section 77.1302(f) because the explosives truck, the same one that was involved in the previous alleged violation, was found loaded with explosives, detonators, and detonating cord which had been left on the truck during a previous working shift. The inspector concluded that the materials were left in the truck by personnel working on the previous shift because the types of detonators and explosives left on the truck were the types used on the previous shift, but were not the kinds used on the shift during which he made his inspection which

was the midnight-to-8:00-a.m. shift. The inspector considered that the violation was associated with ordinary negligence because the supervisor knew about the explosives on the truck.

The violation was moderately serious because the truck was being used for transportation of personnel. Consequently, the Assessment Office found that the violation was moderately serious and proposed a penalty of \$122. I find that to be an appropriate penalty and that the settlement agreement should be approved with respect to the alleged violation of section 77.1302(f). I should emphasize that all of the violations in this proceeding were rapidly abated so that the penalties otherwise assessable under the six criteria have been appropriately reduced to a lower amount than they would have been if the operator had not shown rapid abatement.

Finally, the settlement agreement deals with a Citation No. 951485 which alleged that a violation of section 77.1110 had occurred, in that the fire extinguisher on Caterpillar Dozer No. 429 had been discharged and had not been recharged with the appropriate chemicals and, therefore, was not in an operable condition. Counsel for the Secretary stated that there was ordinary negligence involved in this violation because an examination of the fire extinguisher would have disclosed that it had been discharged and wouldn't operate. He indicated that the violation was only slightly serious because the dozer was located in an area which is above ground where the possibility of fire is not associated with the hazards which exist in an underground mine where coal dust or methane can be ignited by any fire that does start.

The Assessment Office took into consideration that this violation was not as serious as the other ones mentioned above and proposed a penalty of \$78. In view of the operator's rapid abatement, I believe that that penalty was also appropriately derived by the Assessment Office. Therefore, the motion for approval of settlement will be granted and the settlement agreement will be approved.

DOCKET NO. KENT 81-78

Citation No. 951770 (Exhibit 6), October 7, 1980, § 77.1005(a)

When Inspector R. C. Hatter was at Martiki Coal Corporation's surface mine on October 7, 1980, he wrote a citation alleging a violation of section 77.1005(a). The findings of fact, which should be made in connection with whether a violation was shown to exist, will be set forth below in enumerated paragraphs.

1. The conditions which the inspector described in connection with Citation No. 951770 began with an observation that the lowest bench on a highwall was about 40 feet high. The inspector believed that there were loose materials along the top of the bench in the

form of sandstone and rocks, ranging in size from a fist to a hard hat. The inspector first noticed what he thought were hazardous conditions when he was looking at the bench from the pit area beneath it. In order to get a better view of the materials, the inspector went to the top of the bench and walked along the top of the bench. The area traversed by the inspector is shown in three different pictures, which have been identified and admitted in evidence as Exhibits A, B, and C. In each of those pictures, a hump is shown in the top of the bench, about halfway across the bench, and approximately midway in each of the pictures. The inspector walked all the way across the top of the highwall to the hump, and then stood on the hump and looked at the remaining part of the top of the bench. At one place, about a quarter of the way across the bench, the inspector lowered himself to the ground and, using his foot, eased off of the highwall one sandstone about the size of a hard hat. He examined the place where the stone landed in the pit area beneath the bench, and found that that place was about 10 or 12 feet from the base of the bench, and that the rock had broken up somewhat, but not completely.

2. The inspector decided that there had been a violation of section 77.1005(a) which provides as follows: "[h]azardous areas shall be scaled before any other work is performed in the hazardous area. When scaling of highwalls is necessary to correct conditions that are hazardous to persons in the area, a safe means shall be provided for performing such work."

3. The inspector was advised that work had been done in the pit area for about 2 days, and he felt that the failure to scale the materials along the edge of the top of the bench was an obvious condition that was hazardous and should have been scaled further, before work was done in the pit area. Therefore, he initially wrote Citation No. 951770 as an unwarrantable-failure citation.

4. The Company's Safety Director, Donald McConnell, was of the opinion that no violation had occurred and that it was certainly improper for the citation to have been written as an unwarrantable-failure citation. McConnell asked Inspector Hatter's supervisors to come to the mine and make an inspection of the area described in Citation No. 951770. In response to that request, the Sub-District Manager, Bill Coleman, and a Surface Supervisor named Webb, came to the mine and made an examination of the top of the bench involved. It was their opinion that Inspector Hatter should not have written the citation as an unwarrantable-failure citation. The inspector thereafter modified the citation to show that it had been issued under section 104(a). Therefore, we are here concerned with a citation written under section 104(a), rather than 104(d)(1).

5. Inspector Hatter was of the opinion that the highwall in general, which was about 200 feet high, and which had four or five benches above the lowest one here involved, had been well constructed and did not have hazardous materials on them. But he still felt that the lowest one, shown in Exhibits A, B, and C, was a hazardous condition, at the time he observed it.

6. The inspector was of the opinion that the additional loose material that he was concerned about could have been removed by use of a cherry picker or by using a crane of some sort to drag a piece of dozer track along the top of the bench. Apparently, the Company did not agree that that was a safe way to deal with the situation and, therefore, the inspector and the Company compromised on abatement, whereby a berm was constructed at the base of the highwall, at a distance of about 20 feet from the highwall, and for the entire length of the bench, so that equipment could not get any closer to the bench than about 15 or 20 feet.

7. The Company abated the condition very rapidly, succeeding in putting the berm entirely across the base of the bench by the end of the shift on which the citation was written.

8. Four witnesses appeared in this proceeding on behalf of respondent. The first one was James David Lewis, who was the lead foreman during the production phase. He agreed that there were some rocks along the feathered edge, but he did not get up on top of the bench to check whether there were any fissures or cracks in the top of the bench. He also agreed that the materials at the top of the bench were composed of sandstone and slate, and that slate deteriorates more rapidly than sandstone. But it was his opinion that the materials at the top of the bench did not constitute a hazardous area. He emphasized that the end loaders, which worked at the bottom of the pit, in loading coal and cleaning off the coal, were equipped with heavy tops which were adequate for not only roll-over protection, but also to protect the operator from any falling materials.

9. The next witness who testified on behalf of the Company was Ralph Hodson, who was also a lead supervisor. He had made an inspection of the bench before work was begun on October 7. It was his opinion that no hazardous conditions existed along the top of the highwall. He was familiar with the fact that there was loose material on the feathered edge, but he believed that the top of the bench had been constructed in a safe way, by having a bulldozer scrape it first, and following up with a shovel. He had been a shovel operator prior to becoming a lead supervisor, and he believed that the few rocks and loose materials that were left were not hazardous. He believed that proper techniques had been used to construct the bench. He emphasized that the bench, at its top, was not wide enough, after the shovel operation, to permit a dozer to go back and clean it again. In other words, it would have been unsafe to have done so.

10. The third witness who testified on behalf of respondent was Robert Dixon, who was Assistant Safety Director at the time the citation involved was written. He had been with Inspector Hatter when the inspection first began. He had been down in the pit area when the inspector advised Dixon that the inspector believed that the top of the bench was hazardous. While Dixon did not agree with the inspector, it was his duty to stay with the inspector and, therefore, he accompanied the inspector to the top of the bench, and he walked part of the way across the top of the bench with the inspector. He saw the inspector push the hard-hat-sized rock off the top, and noted that it landed about, in his opinion, 8 feet out from the bottom of the bench. He saw only one crack in the top of the bench, which he said was parallel with the bench above the lowest one which is involved in this case. Dixon had also made an inspection of the bench area before the inspector made his examination, and he, like the other two witnesses, whose testimony has been described above, felt that there was nothing hazardous about the bench which is under consideration here.

11. The fourth witness who appeared on behalf of respondent was Donald McConnell who, on October 7, 1980, was the Director of Health and Safety, but who no longer works for the Company, having left on January 28, 1982. It was his testimony that he also inspected the bench on October 7, 1980. He, like the three witnesses whose testimony have been described above, agreed with them that there were no hazardous conditions existing on October 7. McConnell was called back to the pit area when Dixon advised him that the inspector was of the opinion that a citation should be written about the bench.

12. McConnell had participated in the construction of the entire 200-foot highwall and he was particularly concerned about the construction of a highwall and benches which would be free of any kind of hazards. It was his opinion that no hazardous conditions existed. He believed that the feathered edge was a necessary aspect of the lowest bench, because he knew that the top of the bench consisted of slate and materials that would have a tendency to be loose. He believed that by using the dozer in advance of the shovel to feather the edge, any loose material would remain at the top of the bench and, if they did fall, they would fall directly below, without any hazard to people below, because of the small consistency of the materials. He also believed that the equipment that the Company used was sufficiently protective in the way it was designed to prevent any injuries to anyone who might be working in the pit at the time any loose material might come down.

I believe those are the primary findings that should be made in this proceeding with respect to the alleged violation of section 77.1005(a).

Respondent's counsel has stressed the fact that, while there may have been some loose material at the top of the bench, that the construction of the bench was of such a nature that it could not be considered to constitute a hazardous condition.

The Secretary's counsel has emphasized that respondent has placed undue emphasis on the type of equipment used by the Company, in that the Company seems to be of the opinion that its equipment is so well made and so adapted to the kind of operation involved, that no hazard exists when work is being done below the bench here involved.

The crucial aspect of proof of the violation lies in the first sentence of section 77.1005(a), and that is that I must first start off with a finding that a hazardous area existed, because the sentence reads "[h]azardous areas shall be scaled before any other work is performed in the hazardous area." The question of whether there was a hazardous area is an extremely difficult determination to make, based on the evidence that exists in this case. It is particularly difficult, because I have the testimony of four witnesses working for the Company, and I only have the testimony of one inspector. It is his position that it was a hazardous area and it is their position that it was not a hazardous area.

If the inspector had simply cited the operator for having loose material along the top of the bench, I suppose even the Company's witnesses would have to concede that that was true, because all of the witnesses agreed that there was some loose material at the top of the bench. The difference in interpretation is whether that loose material would fall and, if it did, whether the danger is so obvious and so great that I should label the bench area as hazardous.

I don't really have a difference in facts here. I have four Company witnesses and one inspector, all of whom agree that there was a feathered edge at the top of the lowest bench, and they all agree that there was some loose material in that feathered edge. The difference in interpretation is the question which is before me for decision.

The inspector examined the same physical features of the bench which were scrutinized by the Company's four witnesses and he concluded that the area was hazardous, while the other four men looked at the same conditions and concluded that the area was not hazardous. To the inspector's credit, of course, must be noted the fact that he is the only one of the witnesses who walked along the top of the bench over to the hump in the middle of the bench as shown in Exhibits A, B, and C. Dixon is the only witness who was on top of the bench with the inspector and Dixon is the only Company witness who was in a position to say whether there were or were not cracks or fissures in the top of the bench. Dixon agreed that there

was one crack in the top of the bench in the distance that he walked, which was anywhere from a quarter of the way to the hump, to half of the way. The inspector said there were other fissures in the top of the bench, between the place where Dixon stopped walking and the hump where the inspector stopped walking.

I would be inclined to agree with the four men, who reached the conclusion that the loose material at the top of the bench was not a hazardous condition, if it were not for the fact that I've read several Commission decisions in which people have been killed from having been at the bottom of a highwall when there were materials that fell off the highwall. In one of those cases, Consolidation Coal Company, 2 FMSHRC 3 (1980), an assistant superintendent and a foreman-trainee were working at the bottom of a highwall when a landslide occurred and killed the foreman-trainee.

I believe that I should interpret the mandatory safety standards in the fashion which will bring about maximum safety for the miners. I find that the preponderance of the evidence in this case shows that there were loose materials at the top of the bench and that there was a possibility that these materials could fall below. The fact that those materials existed for 400 feet along the top of the highwall supports a finding that there was a hazardous area here.

The cracked windshield in the end loaders involved in the violations previously considered in this decision were in the same type of end loader which was being operated below the bench involved in this case, that is, Caterpillar 992C end loaders. In each of the prior cases, the windshields had been cracked by the fall of a piece of material from the bucket down to the windshield, which would only have been a distance of from 15 to 20 feet. Now, if a rock falling off a bucket can crack a windshield, then it seems to me that a rock falling from the top of a bench, a distance of 40 feet, is certainly capable of going clear through a windshield and causing an injury to the person operating an end loader.

So, even though respondent does have instructions to its employees not to get out of equipment near a highwall, and if they do get out of it, to exit on the outby side of the equipment, so that they'll be protected from any falls from the highwall by the equipment itself, the fact remains that there is a possibility of injury from anything falling off of the highwall. I cannot find that the inspector was incorrect in concluding that a hazardous area existed. Therefore, I find that a violation of section 77.1005 (a) was proven.

Having found a violation, it's necessary that a civil penalty be assessed. The Secretary's counsel, in his concluding argument, asked that a large penalty be assessed if I affirmed the citation.

The reason that he made that request is that I had pointed out, in some questions of McConnell, that people who work with a given condition, such as the construction of the highwall, might get complacent, or so used to seeing a certain condition, that they might fail to recognize its possible hazards. The purpose of civil penalties, of course, is to deter operators from violating a given section of the regulations. A large civil penalty, theoretically, has a better chance of keeping a person from forgetting that a violation occurred than a small penalty would. A large civil penalty, however, should be assessed only when a large penalty has been shown to be required after proper consideration of the six criteria set forth in section 110(i) of the Act.

As I pointed out in the previous portion of this decision in Docket No. KENT 81-77, some of the six criteria have already been the subject of a stipulation which is applicable to all the alleged violations. It has already been stipulated that the Company is a large operator, and that payment of penalties would not cause it to discontinue in business.

Exhibit 1 deals with the criterion of history of previous violations. And that exhibit shows that there's been one previous violation of section 77.1005(a) in the last 24-month period. I believe that that is about as minimal a history of previous violations as a company could have. Consequently, I shall assess a penalty of \$20 under the criterion of history of previous violations.

The remaining three criteria are a good-faith effort to achieve compliance, negligence, and gravity. As to the negligence involved, I can find only a low degree of negligence, because all four supervisors involved in this case had inspected the highwall, or lower bench, before work was done that day, and all of them appear to be sincere and credible witnesses who did not feel that the material at the top of the bench constituted a hazardous area. Since I have had a lot of problems with being certain that it was a hazardous area, I certainly cannot fault them for having some doubts about it. Therefore, I shall only assess a penalty of \$10 under negligence, because I feel there is a very low degree of negligence.

Insofar as gravity is concerned, there doesn't seem to be any doubt but that there was a possibility of a serious accident if some of this material at the top of the bench should have fallen and gone through a windshield or a side glass and hit an operator of an end loader. The inspector testified, and it was generally agreed, that an end loader, at the time the inspector first examined the bench, was working within a few feet of the bench, and the operator of the equipment would have been, according to all the witnesses, within 12 to 15 feet of the bench. That would have been within the range of a rock that might have fallen from the bench. So I would have to find that it was a serious violation. At the same time, as I've

pointed out above, there does not seem to have been a strong likelihood that an injury would have occurred even if a berm had not been constructed for abatement of the citation. Consequently, under the criterion of gravity, I believe that a penalty of \$100 is warranted.

It has been stipulated that the Company made a rapid good-faith effort to achieve compliance. The stipulation is supported by the testimony because the Company immediately started constructing the required 400-foot berm and had it completed before the inspector left the premises, or so nearly completed, that the inspector terminated the citation. As I have already pointed out in the preceding part of this decision, the criterion of rapid abatement has been used by the Assessment Office and by me as a reason for reducing a penalty reached under the other five criteria. In the discussion of the other criteria above, I have derived a penalty of \$130 under the other criteria. I believe, as I indicated in assessing penalties for the violations of section 77.1605(a), that the amount of the penalty should be reduced by 50 percent under the criterion of rapid abatement. Therefore, a penalty of \$65 will be assessed for the violation of section 77.1005(a) alleged in Citation No. 951770.

WHEREFORE, it is ordered:

(A) The motion for approval of settlement with respect to three of the violations alleged in Docket No. KENT 81-77 is granted and the settlement agreement is approved.

(B) Pursuant to the settlement agreement, Martiki Coal Corporation shall, within 30 days from the date of this decision, pay penalties totaling \$330.00 which are allocated to the respective violations as follows:

Docket No. KENT 81-77

Citation No. 950537 10/6/80 § 77.1302(j)	\$ 130.00
Citation No. 950538 10/6/80 § 77.1302(f)	122.00
Citation No. 951485 10/6/80 § 77.1110	<u>78.00</u>

Total Settlement Penalties in This Proceeding \$ 330.00

(C) Within 30 days from the date of this decision, Martiki Coal Corporation shall pay civil penalties totaling \$125.00 with respect to the violations which were contested. Those civil penalties are allocated to the respective violations as follows:

Docket No. KENT 81-77

Citation No. 731280 10/6/80 § 77.1605(a)	\$ 30.00
Citation No. 751482 10/6/80 § 77.1605(a)	<u>30.00</u>

Total Contested Penalties in Docket No. KENT 81-77 \$ 60.00

Docket No. KENT 81-78

Citation No. 951770 10/7/80 § 77.1005(a) \$ 65.00
Total Penalties Assessed in Docket No. KENT 81-78 \$ 65.00
Total Contested Penalties Assessed in This Proceeding \$ 125.00
Total Settled and Contested Penalties in This Proceeding.. \$ 455.00

Richard C. Steffey
Richard C. Steffey
Administrative Law Judge
(Phone: 703-756-6225)

Distribution:

George Drumming, Jr., Esq., Office of the Solicitor, U. S. Department
of Labor, Room 280, U.S. Courthouse, 801 Broadway, Nashville, TN
37203 (Certified Mail)

William G. Francis, Esq., Attorney for Martiki Coal Corp., Francis,
Kazee and Francis, 111 East Court Street, P. O. Box 110, Prestonsburg,
KY 41653 (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 21 1982

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding
	:	Docket No. KENT 82-10
v.	:	A. C. No. 15-10559-03002
ADAMS COAL ENTERPRISES, INC., Respondent	:	No. 1 Preparation Plant

DEFAULT DECISION

Appearances: George Drumming, Jr., Esq., Office of the Solicitor, U. S.
Department of Labor, for Petitioner;
No one appeared at the hearing on behalf of Respondent.

Before: Administrative Law Judge Steffey

When the hearing in the above-entitled proceeding was convened in Prestonsburg, Kentucky, on April 23, 1982, pursuant to written notice of hearing dated March 16, 1982, and received by respondent on March 19, 1982, counsel for the Secretary of Labor entered his appearance, but no one appeared at the hearing to represent respondent.

Under the provisions of 29 C.F.R. § 2700.63(a), when a party fails to comply with an order of a judge, an order to show cause shall be directed to the party before the entry of any order of default. An order to show cause was sent to respondent on April 26, 1982, pursuant to section 2700.63(a), requiring respondent to show cause why it should not be found to be in default for failure to appear at the hearing convened on April 23, 1982. A return receipt in the official file shows that respondent received the show-cause order on May 3, 1982. The time within which a reply to the show-cause order should have been received has passed and no reply has been submitted.

Inasmuch as no reply to the show-cause order was submitted, I find respondent to be in default for failure to appear at the hearing convened on April 23, 1982. Section 2700.63(b) of the Commission's rules provides that "[w]hen the Judge finds the respondent in default in a civil penalty proceeding, the Judge shall also enter a summary order assessing the proposed penalties as final, and directing that such penalties be paid."

I have examined the Proposed Assessment sheet in the official file and I find that the Assessment Office has proposed a penalty for the single violation of 30 C.F.R. § 71.802 involved in this proceeding after considering the six assessment criteria set forth in section 110(i) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(i), in accordance with the assessment formula described in 30 C.F.R. § 100.3. Since section 2700.63(b)

provides for the proposed assessment to be entered as a matter of course in a default proceeding, it is unnecessary for me to discuss the six criteria in detail. I have discussed the proposed assessment solely to have it reflected in my decision that the Assessment Office derived the proposed penalty of \$28.00 in a proper manner. The small penalty is appropriate in this instance because respondent is a small operator, has no history of previous violations, and the violation appears to have been nonserious.

WHEREFORE, it is ordered:

Adams Coal Enterprises, Inc., having been found to be in default, is ordered, within 30 days from the date of this decision, to pay a civil penalty of \$28.00 for the violation of section 71.802 alleged in Citation No. 983263 dated June 1, 1981.

Richard C. Steffey

Richard C. Steffey
Administrative Law Judge
(Phone: 703-756-6225)

Distribution:

George Drumming, Jr., Esq., Office of the Solicitor, U. S. Department of Labor, Room 280, U. S. Courthouse, 801 Broadway, Nashville, TN 37203 (Certified Mail)

David H. Adams, Esq., Adams Corporation, P. O. Box 2320, Pikeville, KY 41501 (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 24 1982

AMAX CHEMICAL CORPORATION,	:	Contest of Citations		
Contestant	:	<u>Docket Nos.</u>	<u>Citation Nos.</u>	<u>Dates</u>
v.	:			
	:	CENT 82-93-RM	517729	2/2/82
	:	CENT 82-94-RM	517732	2/4/82
SECRETARY OF LABOR,	:	CENT 82-95-RM	517734	2/9/82
MINE SAFETY AND HEALTH	:	CENT 82-96-RM	517738	2/11/82
ADMINISTRATION (MSHA),	:	CENT 82-97-RM	517739	2/11/82
Respondent	:	CENT 82-98-RM	517740	2/17/82
	:	CENT 82-99-RM	518049	2/10/82
	:	CENT 82-100-RM	518060	2/18/82
	:	Amax Mine and Refinery		

DECISION AND ORDER OF DISMISSAL

Counsel for contestant filed on June 7, 1982, in the above-entitled proceeding a notice of contest seeking review of the validity of the eight citations listed in the caption of this decision. A separate docket number has been assigned to each of the citations, but review of all citations is sought in a single notice of contest, a copy of which has been placed in each of the folders made for the separately docketed cases. All of the cases involve the same operator and raise common questions of law and fact. Therefore, the cases are consolidated for purposes of hearing and decision.

Counsel for the Secretary of Labor filed on June 16, 1982, a timely answer to the notice of contest. The answer alleges that the citations were properly issued under section 104(a) of the Federal Mine Safety and Health Act of 1977, that the citations properly allege violations of the mandatory standards, that contestant's mine produces products which affect interstate commerce, that the time for abatement given in the citations was reasonable, and denies all other allegations made by the notice of contest. The Secretary's answer, however, does not raise any issue about whether the notice of contest was timely filed.

The notice of contest states that it is contesting the eight citations listed in the caption of this decision "in accordance" with section 105(d) of the Act and 29 C.F.R. § 2700.20. Section 105(d) reads, in pertinent part, as follows:

(d) 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 in 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 * * * 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. * * * [Emphasis supplied.]

Section 105(d) requires that an operator file its notice of contest with the Secretary of Labor within 30 days after the citation or order is issued and the Secretary is required to notify the Commission "immediately" that such a notice of contest has been filed. The question of whether a notice of contest has been filed within the time limitation of section 105(d) depends upon how one interprets the word "immediately" in section 105(d). I issued a decision on January 30, 1979, in Island Creek Coal Co. v. Secretary of Labor (MSHA) and United Mine Workers of America, Docket No. PIKE 79-18, in which I treated the provision in section 105(d) that the Secretary notify the Commission "immediately" of the filing of a notice of contest as the equivalent of a requirement that the operator notify the Commission simultaneously with notification of the Secretary. In that decision, I dismissed the operator's pleading because it had not been filed with the Commission within the 30-day time period. The Commission affirmed the dismissal in Island Creek Coal Co., 1 FMSHRC 989 (1979).

Section 2700.20(b) of the Commission's rules provides that an operator may file a copy of its notice of contest "* * * with the Commission at or following the timely filing of his notice of contest with the Secretary". [Emphasis supplied.] There is no way for me to establish from the notice of contest filed in this proceeding exactly when it was timely filed with the Secretary, but it certainly cannot be considered as a timely filing because it was filed 125 days after the first citation (No. 517729) was issued on February 2, 1982, and was filed 109 days after the last citation (No. 518060) was issued on February 18, 1982.

Contestant states in paragraph 10 of its notice of contest that "[t]he issues and costs involved with these Citations are such that a hearing should not be deferred until penalties are assessed". In Energy Fuels Corp., 1 FMSHRC 299, 308 (1979), the Commission held that an operator may obtain immediate review of a citation, but the Commission indicated that it would normally be possible to postpone the hearing on the notice of contest until such time as the Secretary had proposed penalties so that the civil penalty issues could be considered in a consolidated proceeding. The Commission noted further that "[i]f the operator has an urgent need for a hearing, the Secretary could make it more likely that the two contests would be tried together by quickly proposing a penalty" (1 FMSHRC at 308-309).

Contestant has not specifically shown in its notice of contest why it believes there is an urgent need for a hearing and contestant has not explained how its need for an immediate hearing can be reconciled with its failure to file its notice of contest for from 125 to 109 days after the citations to which it objects were issued. Section 2700.22 provides that an operator's failure to file a notice of contest "* * * shall not preclude

the operator from challenging the citation in a penalty proceeding." Therefore, dismissal of the notice of contest for untimely filing will not prevent contestant from raising in the civil penalty proceedings the same defenses which it seeks to raise in its untimely filed notice of contest.

I am aware of the fact that the Commission has referred to the legislative history and has emphasized the need to give liberal interpretation to the time limitations in the Act in such decisions as Victor McCoy, 2 FMSHRC 1202 (1980), and Salt Lake County Road Department, 3 FMSHRC 1714 (1981), but the McCoy case dealt with a miner who had filed a discrimination complaint and Congress has indicated that the time limitations are not to be treated as jurisdictional in such cases. In the Salt Lake case, the Commission was dealing with the Secretary's obligation to notify the Commission of the filing by an operator of a notice of contest which an operator, if it objects to a proposed penalty, is required to file within 30 days after receiving the Secretary's proposal of a penalty pursuant to section 105(a) of the Act. In the Salt Lake case, the Commission declined to dismiss a civil penalty proceeding because of the Secretary's failure to notify the Commission within 45 days after the operator had filed its notice of contest. That decision did not change the operator's responsibility under section 105(a) to notify the Secretary of its objections to a penalty proposal within 30 days.

The contestant in this proceeding is seeking to obtain an expedited hearing on citations before penalties have been proposed. In such circumstances, contestant should not be permitted to obtain an expedited review of the citations unless it files its notice of contest within the 30-day time limit. Having failed to meet the 30-day time limitation for obtaining expedited review of the citations, the operator must now wait until the Secretary has proposed penalties under section 105(a) of the Act. At that time, the operator may challenge the citations in a civil penalty proceeding in accordance with the provisions of section 2700.22.

WHEREFORE, for the reasons hereinbefore given, it is ordered:

The notice of contest filed June 7, 1982, in Docket Nos. CENT 82-93-RM, et al., is dismissed without prejudice to contestant's right to raise in the civil penalty proceedings the same issues which are given in its notice of contest.

Richard C. Steffey
Richard C. Steffey
Administrative Law Judge
(Phone: 703-756-6225)

Distribution:

C. A. Feezer, Esq., Dow & Feezer, P.A., P. O. Box 128, Carlsbad, NM 88220 (Certified Mail)

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

D. R. Lambert, President, Local 181, USWA, 311 South Guadalupe Street, Carlsbad, NM 88220 (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 1982

SANDRA CANTRELL, : Complaint of Discharge,
Complainant : Discrimination or Interference
v. :
GILBERT INDUSTRIAL, : Docket No. WEST 82-23-DM
Respondent :

DECISION

Appearances: Sandra Cantrell, Bellevue, Idaho pro se;
Ronald F. Sysak, Esq., Prince, Yeates & Geldzahler,
Salt Lake City, Utah, for Respondent.

Before: Administrative Law Judge Broderick

STATEMENT OF THE CASE

Complainant filed this proceeding under section 105(c) of the Federal Mine Safety and Health Act of 1977, claiming that she was discharged by Respondent because of safety related activity protected under the Act. A hearing was held in Boise, Idaho, on May 25, 1982. Sandra Cantrell testified on her own behalf. Charles Hames, James Vegh, William Coffey and Ernest Kihs testified on behalf of Respondent. Both parties waived their rights to file written proposed findings of fact and conclusions of law, and stated their contentions orally at the conclusion of the hearing. Based on the evidence presented at the hearing and considering the contentions of the parties, I make the following decision.

FINDINGS OF FACT

1. Complainant was employed by Respondent beginning on March 19, 1981, as a dump person, where her basic duty was to flag and direct dump trucks. Her rate of pay was \$8.25 per hour.

2. After approximately 2 or 3 weeks as a dump person she was promoted to the position of dozer operator and her wage was increased (after 1 week) to \$9.25 per hour. Her basic duty was to clear dirt and debris from areas previously blasted and push it over into a waste pile. She worked an average of 50 hours per week.

3. On April 14, 1981, while she was operating her dozer, the ripper accidentally touched off a cap and primer which had been left in the area after blasting.

4. The explosion shook up and frightened Complainant. It caused a ringing in her ears and a headache. She worked about 2-1/2 hours after the incident. She also worked the next day and part of the day following. She then went to a doctor for the headaches which had persisted since the accident.

5. She attempted to return to work on April 23, but was unable to work. She returned on about May 4 although she continued to be troubled by headaches and back aches. Her physician recommended that she limit herself to light work. She worked for 3 days as a flag person at a pay rate of \$7.00 per hour.

6. On about April 27, 1981, Complainant called the MSHA office in Boise and told MSHA about the incident of April 14 and her injury.

7. An MSHA inspector inspected Respondent's facility on April 29, 1981, and issued a citation for failure to notify MSHA of the occurrence of an accident as required by 30 C.F.R. § 50.10.

8. On May 6, 1981, Complainant was laid off, and was told that her position (as a flag person) was terminated because a flag person was no longer needed on her shift and no other light duty was available. The foreman who laid her off was unaware of her complaint to MSHA or the subsequent MSHA inspection.

9. Complainant filed a claim for worker's compensation for the period she was unable to work following her injury. She also filed a claim for unemployment compensation.

10. Respondent needed additional flag people on approximately May 10, 1981. Respondent's Personnel Director pulled out Complainant's folder, but was unable to contact Complainant since she had no telephone. Other people were hired.

11. At the time Complainant was laid off there were other dozer operators who continued working although they had been hired subsequent to Complainant. Respondent states that it is "a merit shop company," by which it means that it does not follow seniority, nor does it have to answer to any employee or employee representative in determining lay off policies. The employees were not represented by a union.

12. Respondent was a joint venture, the purpose of which was to prepare a site for the Cypress Hill Mines. It was formed in November, 1980, and completed its work at the site in approximately October, 1981.

13. Following her lay off, Complainant did not go back to work until January, 1982, when she went to work at a night club. She earns approximately \$140 to \$160 per week including tips.

CONCLUSIONS OF LAW

1. Respondent at all times pertinent to this case was the operator of a mine and subject to the provisions of the Federal Mine Safety and Health Act of 1977.

2. I have jurisdiction over the parties and subject matter of this proceeding.

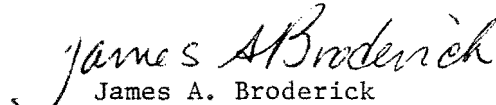
3. Complainant failed to show by a preponderance of the evidence that she was laid off because of any activity protected under the Act.

DISCUSSION

Complainant alleges in part that she was shabbily treated in her workmen's compensation case, that she was discriminated against because she was a woman, that when she returned to light duty following her injury, her pay should not have been cut, that she should have been laid off in accordance with seniority principles. None of these allegations would, if proven, establish a claim under section 105(c) of the Mine Safety Act. Although Complainant did report her injury to MSHA, and Respondent was cited for a violation of a mandatory standard, the evidence does not show that she was discriminated against because of the report. She was returned to work at light duty subsequent to the report and inspection. I accept the evidence that the persons responsible for her layoff on May 6, 1981, were unaware of the report to MSHA, the inspection, and the subsequent citation. There is no evidence linking any adverse action against Complainant to her call to MSHA officials. Thus, Complainant has failed to establish the basic requirement for liability under 105(c): a nexus between the adverse action and protected activity under the Mine Act. Secretary/Pasula v. Consolidation Coal Company, 2 FMSHRC 2786 (1980), rev'd on other grounds sub nom Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3rd Cir. 1981). Therefore, Complainant's case must be dismissed.

ORDER

Based upon the above findings of fact and conclusions of law, IT IS ORDERED that this proceeding is DISMISSED.


James A. Broderick
Administrative Law Judge

Distribution: By certified mail

Sandra J. Cantrell, P.O. Box 574, Bellevue, ID 83313

Ronald F. Sysak, Esq., Prince, Yeates & Geldzahler, Third Floor Mony Plaza, 424 East Fifth South, Salt Lake City, UT 84111

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 1982

SECRETARY OF LABOR,	:	Civil Penalty Proceedings
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket Nos. WEVA 80-565
Petitioner	:	WEVA 81-106
	:	WEVA 81-249
v.	:	WEVA 81-377
	:	WEVA 81-429
DAVIS COAL COMPANY,	:	WEVA 81-449
Respondent	:	WEVA 81-457
	:	WEVA 81-458
	:	WEVA 81-459
	:	WEVA 81-460
	:	WEVA 81-461
	:	WEVA 81-462
	:	WEVA 81-504
	:	WEVA 81-505
	:	WEVA 81-506
	:	WEVA 81-600
	:	WEVA 81-601
	:	WEVA 82-25
	:	WEVA 82-24
	:	
	:	Marie No. 1 Mine

DECISIONS

Appearances: Covette Rooney, Attorney, U.S. Department of Labor,
Philadelphia, Pennsylvania, for the petitioner; Paul E. Pinson,
Esquire, Williamson, West Virginia, for the respondent.

Before: Judge Koutras

Statement of the Proceedings

These consolidated dockets concern petitions for assessment of civil penalties filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a), seeking penalty assessments for a total of 176 alleged violations of certain mandatory safety and health standards promulgated pursuant to the Act.

Respondent filed answers and contests to the civil penalty proposals, and pursuant to an agreement by the parties, all of the dockets were consolidated for hearing in Charleston, West Virginia, during the term

May 18-19, 1982. The parties were afforded a full opportunity to present oral arguments concerning their respective positions, and they waived the filing of any posthearing briefs and/or proposed findings and conclusions.

Issues

The issues presented in these proceedings are (1) whether respondent has violated the provisions of the Act and implementing regulations as alleged in the proposals for assessment of civil penalty filed, and, if so, (2) the appropriate civil penalty that should be assessed against the respondent for each alleged violation based upon the criteria set forth in section 110(i) of the Act. In these proceedings, the crucial question presented is whether or not the assessment of civil penalties against the respondent for the violations in question will have an adverse impact on its ability to remain in business.

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.

Stipulations

The parties stipulated to the following:

1. The respondent is the owner and operator of the Marie No. 1 Mine and both are subject to the provisions of the Act.
2. The Administrative Law Judge has jurisdiction to hear and decide these dockets pursuant to the Act.
3. All of the citations issued to the respondent in these consolidated dockets, including any terminations, abatements, or modifications, were properly served on the respondent by duly authorized representatives of the petitioner, and all copies of the citations in question in these proceedings which are attached to and made a part of the proposals for assessment of civil penalties are authentic copies of the original citations duly served on the respondent or its agents.

4. The respondent is a small coal mine operator producing 87,251 production tons of coal annually, when the Marie No. 1 Mine is operating.

5. The Marie No. 1 Mine is not currently producing coal.

Except for three dockets in which testimony was taken concerning the fact of violations, the parties stipulated as to the fact of violations in the remaining cases. They also stipulated as to the civil penalty criteria found in section 110(i) of the Act as to each of the violations, and these stipulations are discussed at the appropriate places indicated in these decisions. In addition, the parties are in agreement that none of the citations which were issued in these proceedings concern fatalities, injuries, or accidents involving miners or equipment.

Findings and Conclusions

Docket No. WEVA 80-565

Fact of Violations

This docket concerns 14 violations served on the respondent in December 1979, and March 1980. Two were issued for failure to properly insulate power cables; two for failure to guard a belt conveyor; four for failure to record results of weekly electrical examinations; and the remaining ones for miscellaneous infractions concerning ventilation, an inoperative methane monitor, and failure to designate stationary equipment on a mine map. The parties stipulated that all of the violations occurred, and they are all AFFIRMED. .

Gravity

The record establishes that the gravity and probability of harm occurring as a result of all of the citations, with the exception of Citations 677862, 677863, 673591, 673592, ranged from low to moderate. As for the four citations noted, the parties stipulated that they were all serious infractions.

Negligence

The record reflects that all of the citations, except for 677861, resulted from the respondent's failure to exercise reasonable care, and that all of these violations constitute ordinary negligence. With regard to Citation No. 677861, the parties have stipulated that the negligence was low because previous inspections had not revealed any problems with the inoperative methane monitor which was cited.

Good faith compliance

The record reflects that the respondent demonstrated extraordinary good faith compliance concerning Citations 677798, 677799, 677861, 677862, and 677863 in that correction and abatement of the cited conditions was

achieved immediately. As for the remaining citations, the respondent achieved compliance by abating the conditions within the time fixed by the inspectors.

History of prior violations

For purposes of this docket, the parties stipulated that respondent has no history of prior violations of section 75.313, 75.300-4(a), 77.508, or 77.502-2. One prior violation of sections 75.517, 75.703, and 77.800-2 are noted; as well as five prior citations of 75.1722, eight for violations of 75.1722, four for violations of section 75.200, and two for section 75.512.

Docket No. WEVA 81-106

Fact of Violations

This docket concerns 16 citations served on the respondent during April and May 1980. Three were issued for failure to keep records of examinations made in the mine; two were for improper fittings on power cables; three concerned permissibility violations on mining equipment; two were guarding violations for failure to guard machine parts; two were for failure to provide adequate fire suppression devices on a shuttle car and roof bolter; and the remaining ones were for miscellaneous electrical violations. The parties stipulated that the violations occurred, and all of the citations are AFFIRMED.

Gravity

None of the violations were deemed to be serious. The gravity and probability of harm occurring with respect to all of the citations ranged from medium to low, and citations 910981, 910982, and 910983 were deemed to be technical recordkeeping infractions.

Negligence

All of the citations with the exception of six, resulted from the respondent's failure to exercise reasonable care. Citations 910981, 910984, 910986, 910990, 910992, and 910994 all constituted low degrees of negligence in that some of the cited conditions were not readily apparent or occurred through inadvertence. In any event, all of the citations in question resulted from ordinary negligence by the respondent.

Good faith compliance

With regard to Citations 910989, 910990, 910992, the record establishes that respondent exhibited extraordinary compliance in that the cited conditions were immediately corrected and abated. As for the remaining citations, respondent exhibited good faith compliance by promptly correcting the conditions.

History of prior violations

For purposes of this docket, the parties stipulated that the respondent had no prior violations of section 75.305, 75.1722(a), and 75.605; 11 prior citations of section 75.400; six for section 75.303; five for section 75.515; three for section 75.701; seven for section 75.503; four for section 75.604; and one citation of 75.1107.

Docket No. WEVA 81-249

Fact of violations

Two of the citations were issued for accumulations of coal dust and small amounts of oil on equipment, one was for failure to follow the ventilation plan in that 8 permanent stoppings needed repairs, one for failure to guard a belt drive, one for an inadequate methane monitor on a continuous mining machine, and one for failure to adequately rock dust the roof. The citations are all AFFIRMED.

Gravity

The gravity and the probability of harm occurring as a result of all of the citations ranged from very low to moderate. The repairs needed for the stoppings were minor, the mining machine was permissible, was not overheated, and was equipped with operative fire fighting equipment, the mine floor was rock dusted, no methane was detected in the mine, and no ignition sources were present in the areas where the accumulations were observed.

Negligence

Citations 910319, 911658, 911659, and 911660 all resulted from a low degree of negligence on the part of the respondent in that the conditions cited were either beyond the control of the respondent or were not readily detectable. The remaining citations resulted from ordinary negligence.

Good faith compliance

Respondent demonstrated extraordinary good faith in abating the accumulations citation by immediately stopping production until the condition was corrected, and immediately repairing the continuous mining machine methane monitor. The remaining citations were abated within the time fixed by the inspector.

History of prior violations

Respondent has a history of eight prior violations of sections 75.316, and 75.400, and no history of prior citation of the other sections cited in this docket.

Docket No. WEVA 81-377

Fact of Violations

All four of these citations resulted from the failure by the respondent to submit required respirable dust samples for certain areas of the mine. They are all AFFIRMED.

Gravity

The gravity and probability of harm occurring as a result of all of the violations described in the Citations were low in that failure to submit the samples of the areas for the bi-monthly periods, would not per se be likely to lead to harm to an employee.

Negligence

All of the citations constituted ordinary negligence in that the respondent failed to exercise reasonable care in insuring that the required samples were submitted.

Good faith compliance

The respondent was unable to abate the violations since the bi-monthly sampling period had passed. Accordingly, no abatement was required.

History of prior violations

The respondent has a history of one violation for 30 C.F.R. 70.207(a).

Docket No. WEVA 81-429

Fact of Violation

The violation issued after the inspector observed scaling of the roof in a portion of the track area of the mine. The citation is AFFIRMED.

Gravity

The gravity and the probability of any harm resulting from the cited condition were moderate.

Negligence

The violation resulted from a low degree of negligence in that the deterioration observed by the inspector cannot be controlled by the operator.

Good faith compliance

The respondent demonstrated ordinary good faith compliance by correcting the condition within the time specified by the inspector.

History of prior violations

Respondent has no history of prior violations of section 75.205.

Docket No. WEVA 81-449

Fact of Violations

One citation concerns the failure by the respondent to maintain a roof bolter in permissible condition. The remaining four were issued because the respondent failed to submit respirable dust samples for certain designated sampling cycles. They are all AFFIRMED.

Gravity

The gravity concerning the roof bolter citation was minimal since no methane was present in the area and the probability of harm was remote since only one bolt was missing on the machine. The gravity connected with the sampling citations was low since it was improbable that any exposure to dust during the sampling cycle could result in any harm.

Good faith compliance and negligence.

The respondent demonstrated extraordinary good faith abatement to achieve compliance regarding the permissibility citation in that power was immediately removed from the machine and it was repaired. With regard to the sampling citations, no abatement was required since the sampling period had passed. All of the citations resulted from ordinary negligence.

History of prior violations

For purposes of this docket, the parties stipulated that the respondent has a history of five prior violations of section 75.503; one prior violation of section 70.207(a); and three prior violations of section 208(a).

Docket No. WEVA 81-457

Fact of Violations

This docket concerns 20 citations issued to the respondent during November and December 1980. Five were issued for inoperative fire sensor alarms on the conveyor belt line; two were for inoperative water deluge systems; four were for the failure to record the results of certain preshift and on-shift examinations; three for failure to remove combustibles (grass, weeds, and oil cans) found near certain equipment; four were electrical violations for improper fittings and bushings on cables; and two were roof control violations for improper roof bolts and failure to provide an approved torque wrench. The parties stipulation that all of the violations occurred, and the citations are all AFFIRMED.

Gravity

The gravity and probability of harm occurring as to all of the citations ranged from low to moderate.

Negligence

None of the violations in question resulted from gross negligence by the respondent, and all of the conditions or practices cited were the result of low or ordinary negligence.

Good faith compliance

With regard to 11 of the citations, respondent demonstrated extraordinary good faith compliance by immediately correcting the conditions and abating the violations.* As for the others, abatement was achieved through prompt corrections of the conditions within the time fixed by the inspectors.

History of prior violations

For purposes of this docket, the record reflects that the respondent has no prior citations for violations of sections 75.323 75.1103-8(b), 75.305, 75.901(a), and 75.1101-3. Two prior citations are reflected for section 75.512, four for sections 75.515 and 75.200, one each for 77.504 and 75.1103, and eight prior violations of section 75.400.

Docket No. WEVA 81-458

Fact of violations

This docket concerns twenty citations served on the respondent during December 1980, and January and February 1981. The citations were issued for a variety of infractions dealing with accumulations of combustible materials, violations of the mine ventilation plan, improper fittings on power cables, failure to have an up-to-date mine map, the existence of stumbling hazards in a surface shop, an unsafe roof bolter, storage of compressed gas cylinders in an outside shop area without proper valve covers, lack of insulation and proper bushings on certain power cables, failure to record examination results in an approved book, failure to lock a gate on a power substation, and the accumulations of combustibles on certain mine equipment. All of the conditions or practices cited are a matter of record, and the parties stipulated that the violations did in fact occur. Accordingly, all of the citations are AFFIRMED.

Gravity

The parties stipulated that Citations 918006, 918008, 918009, 876570, and 910293 were all serious violations. They also stipulated that that the gravity connected with the remaining citations were in four cases minimal, and as to the others the gravity was low or null, and that these were all nonserious infractions.

*/ Citations 916581, 916582, 916583, 916585, 916586, 916588, 916589, 916592, 916594, 916596, and 916648.

Negligence

The parties agreed that Citations No. 912395 and 912396 were the result of no negligence on the part of the respondent. They also agreed that Citations 918322 and 918324 through 918328 resulted from a low degree of negligence on the part of the respondent, and that the remaining citations resulted from ordinary negligence. I conclude and find that except for the citations indicating no negligence, the remaining violations demonstrated a lack of reasonable care and therefore constitute ordinary negligence.

Good faith compliance

The parties stipulated that the respondent demonstrated extraordinary good faith compliance by immediately correcting the conditions cited in Citations 918008 and 918328. As for the remaining citations, they agreed that the respondent promptly corrected the conditions and achieved abatement within the time frames specified by the inspectors.

History of prior violations

For the purposes of this docket, the parties stipulated that the respondent has a history of 14 prior violations of section 75.400; two for section 75.1104; three for section 75.1101-3; four for section 75.1725; five for section 75.701; 13 for section 75.316; six for section 77.505; three for section 75.1200; five for section 75.504; six for section 75.212; three for section 77.502; and no prior citations of sections 75.1725(2), 75.1400-4, 77.205(b), 77.509(c), and 77.208(e).

Docket No. WEVA 81-459

Fact of Violations

This docket concerns 20 citations issued to the respondent on February 17 and 24, 1981. Two citations concern an inoperative methane monitor on a continuous mining machine; four are permissibility violations concerning loose bolts in a roof bolter panel, a loose light, and improper openings in a panel box; three are for accumulations of combustible materials on a bolter and in the roadway; three concern improper bushings on a cable and broken conduit; two are for improper identification for a belt head and a miner power connector; one was issued for a disconnected fire suppression system on a scoop; one for an inoperative deenergizing device on a scoop; and two were issued because of a missing wheel cover and a bolt on a scoop. The parties stipulated to the fact of violations, and all of the citations are AFFIRMED.

Gravity

The parties stipulated that two of the citations (917629, 917636), were serious. Eight of the remaining citations were nonserious, with a low degree of gravity in that it was improbable that any injuries would result, and the remaining citations were of a minimal degree of gravity.

Negligence

The parties stipulated that Citations 917622, 918337, 918338, 918339, 918340, and 917627 were the result on no negligence on the part of the respondent. They agreed that Citation No. 917630, concerning accumulations along the entire mantrip roadway for a distance of 8,650 feet resulted from respondent's "extreme negligence" but that no ignition sources were present. Further, they stipulated that the remaining citations were the result of respondent's failure to exercise reasonable care, and that this constitutes ordinary negligence.

Good faith compliance

The record reflects that the respondent demonstrated normal good faith compliance in promptly correcting the cited conditions within the time fixed by the inspectors in all but one citation. That citation, No. 917631, was abated through rapid compliance by the respondent.

History of prior violations

For purposes of this docket, the parties stipulated that the respondent has no prior citations for violations of sections 75.1107-16(b) or 75.523-2(c); 17 prior citations of section 75.400; two citations of sections 75.313 and 75.904; three citations of section 75.515; and one citation of section 75.1725(a).

Docket No. 81-460

Fact of violations

I take note of the fact that Citation No. 917642, February 24, 1981, was assessed at "zero" by MSHA's assessment office, and a notation on the pleadings filed by the petitioner reflects that the citation was subsequently vacated. Under the circumstances, this citation is dismissed.

With regard to the remaining 19 citations issued in this docket, the record reflects that three were guarding citations for failure to provide adequate guards for equipment; ten concerned miscellaneous citations for failure to properly insulate power cables, improper cable bushings, and failure to install power cables on proper insulators; two were for failure to provide fire extinguishers; two were for improper electrical guarding devices; and one for failure to vent a battery charging station. The parties stipulated that all of the violations occurred, and the citations are all AFFIRMED.

Gravity

The record reflects that the gravity and probability of harm occurring as a result of all of the citations which have been affirmed in this docket ranged from low to moderate.

Negligence

With the exception of Citation No. 917651, the record establishes that all of the remaining citations constituted ordinary negligence and resulted from the respondent's failure to exercise reasonable care. With regard to citation 917651, the record reflects that the negligence was low inasmuch as the cited loose cable bushing resulted from inadvertent machine vibration.

Good faith compliance

With regard to Citation No. 917639, respondent demonstrated extraordinary good faith compliance by immediately removing power from the equipment and repairing the cable insulation. The same applies for Citations 917640 and 917643, where the respondent immediately removed the equipment from service and installed a guard on the feeder coupler, and immediately placed an identification tag on the cat head. As for the remaining citations, the record establishes that the respondent demonstrated good faith compliance by correcting all of the cited conditions and practices within the times specified by the inspectors.

History of prior violations

For purposes of this docket, the parties stipulated that respondent has four prior violations of section 75.515, one prior citation of section 75.807, and no prior citations for the remaining cited mandatory standards.

Docket No. WEVA 81-461

Fact of Violations

Citation No. 917753, March 6, 1981, citing 30 CFR 75.515, was vacated by MSHA on June 1, 1981, after completion of a further investigation.

With regard to the remaining 19 violations, four were issued for inadequate guards on belt conveyor pulleys; eleven were for improper motor cable bushings, lack of insulators on cables, and failure to guard power cables; two were for missing bolts on a motor and a scoop; one for failure to provide a good fire extinguisher on a belt conveyor; and one roof control violation for loose roof bolts. The parties stipulated that all of the violations occurred, and all of the citations are AFFIRMED.

Gravity

Except for citations 917750, 917751, 917755, and 917761, which the parties agreed were serious, the gravity regarding 15 of the remaining citations was low, and one involved moderate gravity. All of these concerned improbable nonserious hazards.

Negligence

All of the citations were the result of respondent's failure to exercise reasonable care, and they all constitute ordinary negligence.

Good faith compliance

Respondent corrected all of the cited conditions within the time fixed for abatement, and demonstrated ordinary good faith compliance as to all of the violations.

History of prior violations

The record reflects six prior citations of section 75.1725(a); 10 prior violations of section 75.515; four citations for section 75.1722(a); six for section 75.506; seven for section 75.517; five for section 75.807; 16 for section 75.200; and no prior citations for violations of sections 75.516.2(c) or 75.1100.2(e)(1).

Docket No. WEVA 81-462

Fact of violations

Two of the citations were issued for coal dust accumulations along the belt head, one for failure to provide a proper bushing for a switch power cable, one for failure to guard a tail piece roller, one for failure to adequately support the roof along the track slope, and one for failure to provide a bumper block at the raw coal dump. All of the citations are AFFIRMED.

Gravity

The gravity and the probability of harm occurring a result of five of the citations ranged from low to moderate. No methane was detected in the areas of the coal accumulations, but the presence of an ignition source could have resulted in a fire. The roof support violation was serious in that the existing roof bolts were not providing adequate roof support and someone could have been seriously injured had a roof fall occurred.

Negligence

All of the citations resulted from ordinary negligence on the part of the respondent.

Good faith compliance

Respondent demonstrated good faith compliance as to four of the citations by abating the conditions within the time fixed by the inspector. Regarding the bumper block citation, respondent demonstrated extraordinary efforts to comply by immediately installing a bumper at the raw coal dump.

History of prior violations

Respondent has a history of 18 prior violations of section 75.400, 10 prior violations of section 75.515, four violations of section 75.1722(a), 16 violations of section 75.200, and one prior violation of section 77.1605(1).

Docket No. WEVA 81-506

Fact of violations

One of the citations was issued for failure to provide fuse protection on a piston pump at the slope bottom, and a second one was issued for failure to provide a fire extinguisher in the maintenance shop. These are both AFFIRMED.

Gravity

The degree of gravity with regard to both citations was moderate.

Negligence

Both citations resulted from the respondent's failure to exercise reasonable care, and this constitutes ordinary negligence.

Good faith compliance

Respondent demonstrated extraordinary compliance by immediately providing a fire extinguisher for the shop, and by promptly providing fuse protection for the pump in question.

History of prior violations

Respondent has a history of two prior violations of section 77.506, and one prior violation of section 77.1109(a).

Docket No WEVA 81-601

Fact of violation

This docket concerns Citation No. 911888, issued on June 2, 1981 for a violation of 30 CFR 75.316, for failure by the respondent to submit an annual review of a ventilation plan to MSHA. The parties agreed that a violation occurred, and the citation is therefore AFFIRMED.

Gravity

The parties stipulated that inasmuch as the respondent did in fact have an effective ventilation plan at the time the citation issued, the fact that it failed to submit a copy to MSHA had a minimal gravity level, and the violation was not significant or substantial.

Negligence

The parties are in agreement that the violation resulted from ordinary negligence on the part of the respondent.

Good faith compliance

The plan was subsequently submitted to MSHA for review within the time allotted by the inspector. Therefore, the respondent demonstrated good faith compliance.

History of prior violations

The parties stipulated that the respondent has a history of eight prior violations of section 75.316.

Docket No. WEVA 82-25

Fact of violations

This docket concerns eight citations served on the respondent during the period May through August 1981. Three citations were issued for failure by the respondent to submit respirable dust samples for certain sampling periods; one was issued for inadequate rock dusting; one for permitting combustible materials to accumulate; one for failure to install a power cable on insulators; one for having shields off a battery car and the batteries were cracked; and one for failing to maintain a second floor travelway safe in that a floor board was missing, thereby exposing a hole. The parties stipulated that all of the violations occurred, and therefore, the citations are AFFIRMED.

Gravity

The parties agreed that none of the citations were significant or substantial, and that the gravity or probability of harm occurring as a result of the violations was minimal or moderate.

Negligence

The record establishes that all of the citations resulted from the respondent's failure to take ordinary care, and that this amounts to ordinary negligence.

Good faith compliance

With regard to the respirable dust citations, the parties stipulated that abatement could not be achieved since the sampling cycle had passed at the time the citations issued. As for the remaining citations, the parties stipulated that respondent demonstrated ordinary good faith compliance by correcting all of the conditions cited by the inspectors within the time fixed for abatement.

History of prior violations

For purposes of this docket, the parties stipulated that the respondent has a history of 18 prior violations of section 75.400; seven prior violations of section 75.750 and 75.1725(a); one prior violation of section 77.205(a); and six prior violations of section 70.208(a).

Docket No. WEVA 82-24

Fact of violations

This docket concerns four citations issued to the respondent in December 1980, for (1) failure to submit an escape and evacuation plan to MSHA, (2) failure to submit a plan for emergency medical assistance, (3) failure to provide a deenergization device on a machine, and (4) failure to provide adequate illumination in locations of the preparation plant. The parties stipulated that the violations occurred, and therefore all of the citations are AFFIRMED.

Gravity

The parties stipulated that Citation No. 918012 was serious, but that the probability of harm occurring as a result of the remaining three citations was minimal or moderate.

Negligence

All of the citations resulted from the respondent's failure to exercise reasonable care, and this amounts to ordinary negligence.

History of prior violations

The parties agreed that for purposes of this docket, respondent has a history of no prior citations of sections 75.1101-23(a), 75.1713, or 77.207, and three prior violations of section 75.523.

Docket No. WEVA 81-504

This docket concerns a section 107(a) imminent danger order issued by MSHA Inspector Edward M. Toler, on December 9, 1980, charging the respondent with an alleged violation of mandatory safety standard 30 CFR 77.701, for failure to properly ground a water pump (Ex. P-1). In support of the violation, MSHA presented the testimony of Inspector Toler. He confirmed that he inspected the mine on the day in question and that he issued the citation after determining that the frame ground wire on the pump was not connected to a ground. The condition was detected after he observed slate picker Fred Brewer being shocked from contacting the pump. Mr. Brewer stated that he had received a shock from the pump when he attempted to prime it, and the pump was being used to pump water to the tipple. A company electrician accompanying him on the inspection confirmed the violation and discovered that the ground was not connected. The electrician advised him that he was not

aware of the condition, and Mr. Toler stated that he could find no evidence that the monthly electrical examinations had been made, but he conceded that mine operator Davis was not at the mine. The inspector conceded that such examinations are generally conducted by visual examinations rather than the dismantling of the equipment. The inspector confirmed that abatement was achieved within 45 minutes or an hour of the issuance of the order (Tr. 8-24).

Mine owner and operator Winford Davis testified in defense of the citation. He testified that the problem with the pump was not with the grounding unit, but rather, with the power cable coming to the pump ground. He was unaware of the fact that the ground wire had come loose, but conceded that the slate picker advised him of a "slight shock" when he touched the pump. The condition was abated in a matter of minutes, and he has qualified electricians on the site to take care of such problems. He had no knowledge of the condition because it could not be detected by visual examination, but he acknowledged that monthly checks were required, and he surmized that this was being done. Mr. Davis also alluded to some problems with the local power company's power system (Tr. 24-37).

Fact of violation

Upon consideration of the testimony concerning this violation, I conclude and find that MSHA has established a violation of the cited mandatory safety standard. Section 77.701, requires the grounding of metallic frames, casings, and other enclosures of electric equipment. I conclude that the testimony of the inspector established that the water pump in question was not properly grounded, and that this constitutes a violation of the cited standard. Accordingly, Citation No. 918017 is AFFIRMED.

Gravity

I conclude and find that this citation was extremely dangerous. The slate picker in question was observed receiving a shock from the water pump which was not properly grounded. Mine operator Davis confirmed that the slate picker had advised him that he was "slightly shocked" when he touched the pump. However, what may be a "slight shock" one day may well be a fatal one the next.

Negligence

I conclude and find that the conditions cited as a violation should have been detected by the mine through the required electrical inspections. While it may be true that the condition was caused by a loose ground wire which was not readily observable, testing of the equipment during the required examinations would probably have revealed the cited condition. Under the circumstances, I conclude that the respondent failed to exercise reasonable care and was negligent.

Good faith abatement

The condition was corrected in some 45 minutes after the issuance of the withdrawal order, and compliance was achieved by reconnecting the loose ground wire.

History of prior violations

The solicitor stated that for the 24 month period prior to the issuance of the instant citation on December 9, 1980, respondent had been assessed for three prior violations of section 77.701 (Tr. 135).

Docket No. WEVA 81-505

This docket concerns eight citations served on the respondent during November and December 1980, charging the respondent with five violations of mandatory safety 30 CFR 77.506, and one violation of sections 75.302-1, 75.301, and 77.701. One citation was issued pursuant to section 104(d)(1) of the Act, and seven were section 104(d)(1) "significant and substantial unwarrantable failure withdrawal orders.

Inspector Toler confirmed that he inspected the mine on November 18, 1980, and issued section 104(d)(1) Citation No. 916590, citing a violation of section 75.302-1, because a ventilation line curtain where mining was taking place was not installed for a distance of at least 10 feet from the face (Ex. P-2). He measured the distance in question and found that the curtain was approximately 35 feet from the face. The mining machine was in operation and mine management should have been aware of the condition (Tr. 38-42).

Mr. Toler believed that the conditions were hazardous because the whether was cold, the mine was extremely dusty, and it has a history of methane. There was a likelihood of an explosion, and seven people working at the face would have been affected by the hazard (Tr. 42).

On cross examination, Mr. Toler conceded that there had never been a fire or explosion at the mine, but that the presence of methane has been confirmed by test analysis of air samples taken in the mine. He also confirmed that there was an excessive amount of dust suspended in the atmosphere on the day in question, and that the ventilation requirements of the approved plan were violated. The purpose of maintaining the curtain 10 feet from the face is to sweep away noxious gases and dust from the face area (Tr. 43-49). Abatement was achieved within 15 minutes and the curtain was extended to the required distance toward the face (Tr. 50).

Inspector Toler confirmed that he also issued withdrawal order 916591 on November 18, 1980, citing a violation of section 75.301 (Ex. P-3). He did so after determining that the face ventilation in the No. 1 room, 014 No.1 section where a continuous miner was operating

and mining coal was inadequate. The ventilation was measured with an anemometer and smoke tube and no measurement could be made as there was no movement of the smoke, and .2 percent methane was present at the last roof bolt from the working face. Section 75.301 requires 3,000 cubic feet of air a minute at the end of the ventilation curtain (Tr. 50-52).

Mr. Toler stated that Don Davis was operating the mining machine, and since he was part of mine management, he should have been aware of the ventilation plan requirements. Lack of ventilation presented a hazard of methane, and with the dust in suspension, and an explosion was likely (Tr. 53). Seven men would have been affected, and the violation occurred in the same area as Citation No. 916590 (Tr. 54).

On cross-examination, Mr. Toler confirmed that the order issued after the curtain was extended the required distance to abate the previous citation be issued, but the required amount of ventilation could not be induced. He explained that the curtain was not wide enough and he described it as "a piece of junk". Although he noticed the condition of the curtain as it was being installed, he said nothing about it and then issued the order (Tr. 56). However, at the time, it was his understanding that the curtain in question was the same one installed to terminate the previous citation (Tr. 57).

Mr. Toler stated that abatement was achieved after additional line curtain was brought into the mine, and repairs were made to insure that it extended far enough (Tr. 59).

Mr. Toler confirmed that he issued section 104(d)(1) closure order No. 918015 on December 9, 1980, citing a violation of section 77.701, after observing that electrical equipment in the mine preparation plant was not provided with frame grounding for the metal frames and enclosures (Ex. P-4). He closed down all of the preparation plant electrical equipment. He detected the violation after discovering that a 440 A.C. electric motor, with three phases and a ground did not have the required four wires, with one connected to the ground lug. He also determined that none of the plant motors were grounded because the grounding wire from the tipple to the transformer station was not connected, and therefore, no grounding could be maintained within the plant (Tr. 61-62).

Mr. Toler believed that the conditions cited should have been detected through the monthly electrical inspections. The conditions constituted a shock hazard, and it was likely that two men would have been exposed to this hazard. The plant is exposed, and the rain and snow contributed to the hazard (Tr. 64).

Mine operator Winford Davis testified that he believed the grounding system for the plant in December 1980 was adequate to preclude any shock hazards. He attributed the violation to a loose neutral wire behind the switch box panelling which was not visible. The wire was actually

cut, but all of the equipment was grounded through the plant neutral grounding system. In order to abate the citation, individual wires had to be installed from each piece of equipment directly to the transformer. The tipple was 40 years old, and it had to be completely rewired. He had not been previously advised by the plant electrician that the grounding was faulty (Tr. 67-71).

On cross-examination, Mr. Davis conceded that he was aware that monthly electrical examinations must be made and that the equipment must be tested. However, he is not an electrician (Tr. 72).

MSHA Inspector Harold E. Newcomb confirmed that he issued order of withdrawal number 0640145 pursuant to section 104(d)(1) of the Act on December 10, 1980 (Ex. P-5). He cited a violation of section 77.506 when he found that proper overload and short circuit protection was not provided for the No. 12 conductor cable supplying power to the 480 volt A.C. clean coal elevator located on the third floor of the plant. The fuses protecting the circuit were "bridged out" with stranded wire. Mr. Newcomb stated he has a B.S. degree in electrical engineering and confirmed that he conducts MSHA electrical inspections and assists in "electrical problems". He testified that a 25-amp fuse should have been protecting the circuit, rather than the No. 8 stranded wire, which probably provided 45 or 50 amps. The original fuse had at some prior time blown out and someone replaced it with the stranded wire which is not an approved fuse device. A proper fuse would have deenergized the circuit in the event of an overload, but the wire would not and the circuit could have overheated and melted the wire (Tr. 74-77).

Mr. Newcomb stated that the monthly electrical examination should have revealed the fuse condition, and he believed the hazard in question presented a fire or electrical shock hazard to at least one employee, and the prior citation concerning lack of proper grounding contributed to the gravity. The condition was abated after a proper sized fuse was purchased for the circuit in question (Tr. 78). He also confirmed that Mr. Davis conceded to him that the plant was "electrically run down", but Mr. Davis made no statement that he was aware of the fuse condition in question. A qualified electrician, however, should know that a fuse should not be replaced with a piece of wire (Tr. 82), but anyone could have replaced the fuse with a piece of wire (Tr. 83).

Mr. Newcomb confirmed that he also issued section 104(d)(1) orders of withdrawal Nos. 0649146, 0640147, and 0640148 on December 10, 1980, citing violations of section 77.506. The first citation was issued because overload and short circuit protection was not provided for the No. 12-4 conductor cable extending from the main plant switch box to the 480 volt water pump and coal belt located on the third floor. The circuit was protected with a 200-amp fuse, which is not the proper size in that it was too large. The second citation issued after he found the fuses on the power cable supplying 480 volts a.c. to the 10 horsepower vibrator had been bridged out with a piece of wire. A 20 amp fuse should have been used. The third citation also involved a fuse which had been bridged

out with a piece of wire on the circuit for the No. 10-4 conductor cables supplying power to the 15 H.P. circulating pump. The proper fuse was one of 45 amp capacity, and the stranded wire did not provide this. All of the citations were issued for failure to provide proper overload and short circuit protection (Exhs. P-6 through P-8; Tr. 86-95). Mr. Newcomb stated that the cited conditions concerning the fuses should have been discovered by mine management through the required monthly electrical examinations. He also believed that the conditions cited presented shock and fire hazards.

MSHA Inspector Michael L. Deweese confirmed that he is an electrical inspector and that he issued section 104(d)(1) withdrawal order 876569 on December 10, 1980, at the preparation plant (Exh. P-9). He cited a violation of section 77.506 after finding that overload and short circuit protection was not provided for the No. 12 wire supplying 220 volts to the "gas pump" located on the second floor. Three 200 amp fuses were being used to protect the circuit, and 20 amps is the proper size. The condition was hazardous in that in time, the circuit could have become overloaded and the resulting short circuit caused by the failure of the fuses to function properly could cause a fire or shock hazard to one person. The operator's monthly electrical examinations should have detected the condition (Tr. 98-101).

On cross-examination, Mr. Deweese stated that Mr. Davis conceded that the plant was in a run-down electrical condition, but he did not state that he knew the cited condition existed. Mr. Deweese had no idea how long the over-sized fuse had been in the equipment, and indicated that it would take about a minute to change it (Tr. 105).

Mine Operator Winford Davis testified in regard to the aforementioned five electrical citations concerning improper overload and short circuit protection. He stated that the company regularly purchases proper sized fuses for use by its employees, and they are kept in the supply house. Fuses are supposed to be stocked for emergencies, and employees are instructed to stop by the supply house and obtain them if they are needed. They were also authorized to purchase them at a local hardware store. Mr. Davis stated further that the tipple in question was originally constructed in 1941 and 1942, and at the time of the MSHA inspection the plant still had the original wiring. Practically all of the electrical equipment in the plant had to be replaced and money was in short supply at the time. Fuses were not expensive, but switch boxes and line starters were. All of the cited conditions were eventually abated (Tr. 106-109). He had no idea that improper fuses were being used and they too were replaced with proper fuses (Tr. 110).

Fact of violations

I conclude and find that MSHA has established by a preponderance of the evidence that each of the violations cited in this docket occurred as charged in the citation and orders issued by the inspectors. The testimony and evidence adduced by MSHA supports each of the citations and orders issued, and they are all AFFIRMED.

Gravity

I conclude and find that all of the citations in question in this case were serious violations. The electrical citations presented possible shock and fire hazards, and the others presented mine ventilation hazards as well as possible methane and coal dust explosions or fires.

Negligence

I conclude and find that the respondent was negligent in failing to discover the cited conditions which resulted in the issuance of the citation and orders in this case. Properly conducted pre-shift and on-shift examinations of the mine, the plant, and the electrical equipment in question would have detected the cited conditions.

Good faith compliance

Although it is true that the respondent corrected and abated all of the conditions and practices cited in this case, several of them almost immediately, the fact is that they were abated as a result of withdrawal orders issued by the inspectors. In any event, there is no evidence of any lack of good faith compliance on the part of the respondent.

History of prior violations

The solicitor stated that for the 24-month period prior to the issuance of the citations in question in this case, the respondent had one prior assessed violation of section 75.302-1, two for violations of section 75.301, three for violations of section 77.701, and five for violations of section 77.506.

Docket No. WEVA 81-600

MSHA Inspector Thomas B. Marcum testified that he issued section 104(d)(2) withdrawal orders 917653 and 917657, on March 2 and 4, 1981, during a regular inspection of the mine (Ex. P-10 and P-12). The first order cited a violation of section 75.807, after he found that an 800 foot long voltage cable from the No. 6 belt head to the section was not hung or placed properly so as to protect it from damage. The cable was a 4,160 volt cable, and it was lying on the mine floor alongside the section mantrip roadway, and it had been run over by the man trip in several areas, and he observed the tracks where it had been run over. The roadway was used daily by the three shifts coming and going. He believed that the cable had been on the roadway for some time, and the operator should have been aware of its location because the roadway is traveled everyday, and it should have been detected during any pre-shift examination. The cable should have been hung on J-hooks, and the failure to do so presented a shock hazard in the event the cable became damaged (Tr. 118-122).

On cross-examination, Mr. Marcum confirmed that most of the cable in question was properly hung on J-hooks, but that the cited 800 foot portion was not. The man-trip vehicle is a rubber tired vehicle, and

the cable is insulated with armored-shell steel which provides high protection. He has never seen this type of cable being penetrated by running over it with rubber tired equipment, and the cable was the main power source coming from the outside underground. He saw no J-hooks installed along the places where the cable was lying, and no one explained to him why it was not hung properly (Tr. 123-127).

With regard to the second order, Mr. Marcum stated that he cited a violation of section 75.518 after discovering that the S & S scoop charger for the 014 Section was not provided with fuse protection in that a fuse had been bridged out with a wire (Tr. 127). The wire was installed alongside a fuse but he did not know whether the fuse was blown out or not. Even if the fuse were working, the presence of the wire next to it was not proper because this would permit more current to flow through the cable. He believed the condition constituted a shock or burn hazard, and in the event of a fire or smoke, the men on the section would be exposed to a hazard (Tr. 130-131). Mr. Marcum stated that the fuse was located inside the scoop battery charger, and he discovered the condition when he found that the charger lid only had one bolt in it when it should have had three. He opened the lid and found the condition in question. He conceded that he had sometimes bridged fuses in the same manner when he worked as a miner, but that a new fuse was promptly installed to replace the defective one (Tr. 132).

Gravity

I conclude and find that both of the citations which have been affirmed were serious violations. While it is true that the cable in question was constructed of very durable material and showed no visible signs of damage, it was nonetheless lying on a main travelway where men and equipment passed by on a daily basis coming and going from the mine. Further, the inspector saw evidence that the cable had been run over by the mantrip, and even though it was rubber-tired and not likely to penetrate the cable, such a practice is serious. As for the bridged fuse on the scoop charger, this presented a possible shock and fire hazard because the circuit it served was improperly protected.

Negligence

Both citations resulted from the respondent's failure to take reasonable care. The cable was in full view of personnel coming and going from the section, and the fuse condition should have been detected during the required examinations, particularly since the missing lid bolts which led to the discovery of the condition by the inspector were plainly visible.

Good faith compliance

The cited conditions were abated after the issuance of the orders, and the respondent demonstrated good faith in achieving compliance.

History of prior violations

The solicitor indicated that the respondent had three prior assessed violations of section 75.807, and no prior violations of section 75.518.

Size of Business and Effect of Civil Penalties on the Respondent's Ability to Remain in Business. (Applicable to all Dockets).

The parties have stipulated that the respondent is a small mine operator, and that its annual coal production has been approximately 87,000 tons. With regard to the question of respondent's current financial condition, including the effect of any civil penalties on its ability to remain in business, respondent presented the testimony of its owner, and his testimony follows below.

Mine Operator Winford Davis testified that he began mining in 1964, that the Marie No. 1 Mine was initially started in 1971, and since that time this has been his only active mining operation. However, the mine ceased to operate on December 29, 1981, and it has not been an actively producing mine since that time. He testified that during the years prior to 1974, the mine was profitable, and he conceded that his "before taxes" profits in 1975 was "a little over \$1 million", but that since that time the mine has lost money. The profits from his operation in 1974 was used to purchase new equipment and to go expand the mine. Income for the mine, in terms of profit, for the years 1975 and 1976, was approximately \$300,000, before taxes, but the mine lost \$11,000 in 1977.

Mr. Davis testified that during the period April through September 1977, the mine was flooded, and no coal was produced. A UMWA strike in November 1977, also affected coal production, and the strike lasted for about 90 days, or until February of 1978. Although flood insurance covered the larger portion of flood damage, he still lost approximately \$1.8 million in equipment, and had to borrow money to replace it. The mine was also flooded on three occasions during 1978 and 1979, and that curtailed coal production even further. In addition, while his mine is not a union mine, organizing efforts to unionize the mine during November 1980, resulted in vandalism and other trouble which also cut into his production. He absorbed the flood losses for 1979 because he was afraid to file further flood claims for fear that his insurance would be cancelled, and the mine was down for three months while the water was pumped out. As a result of all of these events, his losses for each of the years 1978 and 1979 was a half-a-million dollars per year. Similar losses were encountered in 1980 because of labor problems.

Mr. Davis identified his accounting firm and stated that he has retained them since 1974 to keep his books. Work is being performed on the report ending April 30, 1981, but he indicated that he has been unable to pay the firm for their accounting work since prior to April 1981, and the firm has filed for an extension for him to pay his taxes for the year 1981. Since he has been unable to pay his accountant, he felt that

he could not call upon him to testify in these proceedings. Mr. Davis indicated that he presently owes money to a great number of creditors, and some of these debts are as old as 1978. Since he has been in business for some 22 years, his creditors are being patient with him, but some have been creditors since 1974. He produced a copy of his accountant's report, dated April 30, 1981, and it is a part of the record.

Referring to his latest accountant's report, Mr. Davis testified that the net loss for the Davis Coal Company for the first four months of 1981 was \$191,443.47, and while he has not been provided with additional accountant's reports for the subsequent periods, he estimated his company's losses as \$500,000 for the calendar year 1981, and he lost approximately the same amount for each of the years during 1978 through 1980. Current indebtedness for the company is between \$2.3 and \$2.5 million, and the largest creditor is the Pikeville National Bank and Trust Company, which holds a note for an original amount of \$750,000, for a loan made in 1979. The balance due is now \$700,000, and it was reduced by \$50,000 through the sale by the bank of a continuous mining machine which it had repossessed. The proceeds from the sale of this machine were applied by the bank to reduce his current note liability. In addition, he testified that within the last year additional equipment had been removed from the mine and sold to settle company debts. The Ingersoll-Rand Company repossessed two mining machines, three shuttle cars, a scoop, and a feeder, all of which they intend to sell at public auction to settle a debt of \$360,000 which his company owes to that company. All of this equipment is located at Ingersoll-Rand's storage area in Charleston, and he no longer has it. In addition, the Long-Airdox Company met with him two weeks ago in an attempt to work out an agreement for payment of several roof bolters.

Mr. Davis stated that the mine ceased operation in December 1981 because he ran out of money, and he had no funds to pay his miners. Since that time the company has generated no income, and the only bank account it has is a checking account with the Pikeville Trust Company, and it has a deficit balance. During the year 1981, and part of 1982, he has put over \$100,000 of his own personal money into the company in an attempt to keep the company going. Neither he nor his family have received any income from the company during 1982, but he still works for the company in an attempt to settle his debts or negotiate additional capital to begin mining again.

Referring to his personal income tax statements which he had with him, Mr. Davis testified that for the year 1980 he and his wife had a joint gross income of \$79,632, and for the year 1981 their joint gross income was \$51,373. He still pays the phone bill from his own funds for the phone at the mine office, and other than two night watchmen which he personally pays to protect the equipment still in the mine, the company has no other employees. He pays the watchmen a combined salary of \$250 a week from his own personal funds, and while he wishes to get back into

the mining business, he indicated that he cannot do this until he receives additional capital and pays off his debts. As an example, he indicated that he would need an immediate \$15,000 just to have the power turned on at the mine by the local utility company. He still owes the company \$5,000 for past utility bills, and they require an additional \$10,000 as a deposit before the power is turned on again. In addition, he would also have to pay back taxes amounting to \$18,000, and royalties, which are in arrears, before he can think about resuming mining.

Mr. Davis stated that while he has contemplated filing for bankruptcy, he has tried to avoid it up to this time, and that he requires approximately \$100,000 to start up mining again. He also alluded to the fact that he could not make anymore monthly payments of \$4000 to \$5000 which he had been making to MSHA to satisfy past assessed violations, and that as a result, the solicitor's Arlington, Virginia, office instituted collection proceedings against him within the past year and attached coal shipments he had made to the United Coal Company to collect \$8500.

Conceding that the total amount of civil penalties initially assessed by MSHA in the instant dockets amounts to approximately \$32,773, Mr. Davis stated that he recognizes his obligation to pay the penalties. However, he indicated that he has no assets or cash to pay these penalties, and if he were forced to pay, it would certainly have an adverse affect on his ability to stay in business. As for any suggestion that he sell some of his equipment to pay these assessments, he indicated that the liens held by the bank, as well as his state tax liabilities and debts, would absorb any revenue resulting from the sale of his equipment. Mr. Davis stated that when the mine was producing, they worked five days a week on two production shifts and one maintenance shift, and that he normally employed 50 miners. However, they are no longer working at the mine (Tr. 164-195).

On cross-examination, Mr. David confirmed that there are still several closure orders outstanding on the mine. He estimated the current value of the equipment still at the mine as \$500,000, and indicated that he has no interests in any other coal companies. Although Davis Coal Company owns the stock of a tipple facility (Burning Springs Collieries) where he used to load his coal, it is no longer operating and it is in fact the tipple plant immediately connected to the Marie No. 1 Mine. It is the same tipple plant where some of the citations in these proceedings were served. Mr. Davis confirmed that he has been attempting to negotiate with a bank for loans to resume active mining. He has no other employments, but may consider going into the building contracting business, but he does not contemplate going back into the coal mining business unless he can raise the necessary capital.

Discussion

I agree with the holding of the former Interior Board of Mine Operations in the case of Robert G. Lawson Coal Company, 1 IBMA 115, 117-118 (1972), a case decided under the 1969 Coal Act, where it was held that:

We view the provisions of section 109(a)(1) as manifesting an intent by Congress to require a balancing process in arriving at an appropriate penalty to be assessed in any given case. Application of the criteria of section 109(a)(1) requires weighing the importance of imposing pecuniary penalties, as a measure of deterring insufficient concern for the health and safety of miners, against other deterrents specified in the act, such as closure orders. The amount of a monetary penalty imposed should be sufficiently high to deter any laxity of vigilance on the part of an operator to keep his mine in compliance with the Act. In our view, however, the imposition of a penalty which would cripple an operator's ability to continue his production of coal without a counterbalancing benefit to the safety of miners would not be appropriate.

* * * * *

We do not view the civil penalty assessment procedure as a tool to force closure of mines; we look upon it as an auxiliary tool to bring about compliance.

* * * * *

We believe Congress intended a balanced consideration of all statutory factors, including the size of mine and the ability to remain in business, to permit assessments which would be equitable and just in all situations but which would not have the effect of drastically curtailing coal production or employment of miners to the ultimate detriment of the public interest.

* * * * *

Where numerous violations are found and cited during a tour of inspection, the aggregate amount of the proposed assessments, even though each separate violation may be assessed at a nominal value, may be an amount beyond the operator's ability to pay, and thus, for no other reason than this, may be unreasonable. In such cases it is incumbent upon an Examiner and this Board to look at the total amount and impact of the monetary penalty in arriving at a fair assessment.

The former Board followed its Lawson Coal reasoning with respect to the question of the effect of civil penalties on small operators in two subsequent decisions, Newsome Brothers, Inc., 1 IBMA 190 (1972), and Hall Coal Company, 1 IBMA 175 (1972). I have applied this rationale on several occasions in deciding cases under the 1977 Mine Act, and these

decisions have since become finalized as Commission decisions. See: MSHA v. Fire Creek Coal Company, Docket BARB 79-3-P, etc., April 5, 1979; MSHA v. G & M Coal Company, Dockets SE 79-128 and Dockets SE 81-12, etc., November 19, 1980 and April 7, 1981.

It is no secret to anyone that the Davis Coal Company has been the subject of several prior civil penalty proceedings before this Commission and its Administrative Law Judges. In MSHA v. Davis Coal Company, Docket Nos. 78-627-P, etc., March 7, 1980, the Commission, on its own motion, directed review of ten cases in which the judge had approved settlements pursuant to Rule 2700.30(c). Upon review of the record in those cases, the Commission, over the vigorous dissent of Commissioner Lawson, found no basis to conclude that the judges erred in approving the settlements, and their decisions were all affirmed.

Commissioner Lawson's displeasure with the affirmance of the settlements in question was based on his belief that the approval of a 90% reduction from the original civil penalties was unsupported by any credible evidence that Davis Coal Company was in such "dire" financial condition as to justify such drastic penalty reductions. Commissioner Lawson observed that the company was not required to come forward with any current financial information to determine what, if any, effect the payment of the initially proposed civil penalties would have had on Davis' ability to continue in business. Scrutinizing Davis' business operations for a time span covering 1976 to 1979, Commissioner Lawson took particular note of the fact that Davis was not required to file audited financial statements or tax returns to establish any business losses supporting a finding that the company could not afford to pay the full assessment amounts. He was also disturbed with the asserted lack of consideration given to Davis' history of prior violations and the lack of any discussion dealing with the deterrent effect of those violations.

I am not unmindful of Commissioner Lawson's concerns with respect to the issues raised in his dissent in the previous Davis cases. However, as the presiding Judge in the cases before me for decision, I am constrained to apply the facts of record in any decisions that I render in connection with these cases, including the civil penalty assessments that are warranted on the basis of those facts. Just as Commissioner Lawson saw fit to dissent in the previous cases, and just as the other Judges adjudicated their cases on the basis of the evidence and facts presented to them during the course of the hearings, so too will I decide these cases.

It should be noted at the outset that the instant cases do not concern settlement proposals agreed to by the parties. In most of these cases, respondent Davis Coal Company does not contest the fact of violations, and has admitted that the violations occurred. In three of the dockets, testimony was presented by both sides, and all of the citations in those cases have been affirmed. Further, in each of the cases, either the parties have stipulated to all of the statutory criteria found in section 110(i), except for the effect of the penalties on the respondent's ability to remain in business, or I have made findings on these issues. The crucial question presented in all of these dockets is the appropriate civil penalties which I should assess in these dockets, taking into account all of the statutory criteria found in the Act, and in particular the question of respondent's ability to pay and the effect of any civil penalties on its ability to remain in business.

It is clear that in litigated civil penalty proceedings, the determination of appropriate civil penalty assessments for proven violations is made on a de novo basis by the presiding judge and he is not bound by any assessment method of computation utilized by MSHA's Assessment Office, Boggs Construction Company, 6 IBMA 145 (1976); Associated Drilling Company, 6 IBMA 217 (1976); Gay Coal Company, 7 IBMA 245 (1977); MSHA v. Consolidated Coal Company, VINC 77-132-P, IBMA 78-3, decided by the Commission on January 22, 1980.

In the instant proceedings, the initial civil penalty assessments which appear as part of the petitioner's initial pleadings and civil penalty proposals in the form of "assessment worksheets" as exhibits to the proposals, reflect proposed penalty amounts derived from either the application of "points" assessed for each of the statutory criteria set out in section 110(i) of the Act, or from a "special assessment" made pursuant to Part 100, Title 30, Code of Federal Regulations. It is clear that I am not bound by those initial assessments, and the assessments which I have imposed have been made after full disclosure of all of the facts, and in particular evidence concerning the respondent's present financial condition and ability to pay.

The record adduced in this case reflects that the mine has been closed since December 1981, and is no longer actively producing coal. Petitioner's counsel confirmed the fact that the mine is in a "B" status, which means that MSHA considers that it is active but not producing coal. Counsel also indicated that since the mine has been closed, MSHA inspectors are no longer inspecting the mine, no production is going on, and far as MSHA knows, no power has been supplied to the mine since its closure (Tr. 159-160).

With regard to the respondent's financial condition, the unrebutted testimony of the mine operator reflects that the Davis Coal Company is on the brink of bankruptcy, that it is presently unable to resume active coal production because of the lack of additional capital, that some of its mine equipment has been repossessed and sold at auction to satisfy debts, that some equipment has been attached and removed from the mine by another creditor and is awaiting sale to satisfy debts, and that the remaining equipment at the mine is encumbered by a personal note in excess of \$500,000 held by a bank which advanced the money to purchase it. In addition, with the exception of two security guards being paid personally by the mine owner to protect the equipment from theft and vandalism, no one is working at the mine and the normal workforce of 50 miners have all been laid off since the mine closed approximately seven months ago. */

After careful review of all of the evidence adduced in these proceedings, I conclude and find that the imposition of the full amount of the initial civil penalty assessments proposed by MSHA in these dockets, totalling approximately \$32,773, would have a further adverse impact on the respondent's ability to reopen the mine and continue its coal mining business. Considering the fact that the respondent is a small operator and is in serious financial difficulties, as attested to by the unrebutted credible

*/ On June 16, 1982, petitioner's counsel advised me that the respondent has in fact now filed for bankruptcy.

evidence adduced herein, I find that the imposition of the proposed civil penalties would, in the aggregate, jeopardize respondent's ability to remain in business. While it may be argued that, in view of the respondent's past history of violations, which reflects a poor compliance record, as well as a marginal mining operation, it would be better off for the respondent to stay out of the coal mining business, that is a judgment that I prefer not to make. As the principal enforcer of the Act and its mandatory safety and health standards, the petitioner has at its disposal ample statutory authority through the enforcement process to assure future compliance should the respondent resume production, or in the alternative, to close the mine down for non-compliance.

In addition to the financial condition of the respondent, and aside from the seriousness of some of the conditions or practices cited as violations in these dockets, I take particular note of the fact that none of the violations issued in these proceedings resulted in any injuries to miners; nor did they result in any mine fires or accidents (Tr. 146). In addition, in all instances, the respondent promptly corrected the conditions or practices cited, and in many cases respondent demonstrated extraordinary compliance by immediately correcting the conditions brought to its attention by the inspectors. Under the circumstances, I have also considered these factors, in addition to the effect of the initial assessments on the respondent's business, in assessing civil penalties for all of the violations which have been affirmed.

Penalty Assessments

In view of the foregoing findings and conclusions, respondent is assessed civil penalties for the violations which have been established as follows:

WEVA 80-565

<u>Citation No.</u>	<u>Date</u>	<u>30 CFR Section</u>	<u>Assessment</u>
0677798	11/30/79	75.517	\$25
0677799	11/30/79	75.517	25
0677861	12/04/79	75.313	25
0677862	12/04/79	75.1722	15
0677863	12/04/79	75.1722	50
0677865	12/06/79	75.316	50
0673584	3/06/80	75.512	25
0673585	3/06/80	75.300-4(a)	30
0673591	3/11/80	75.703	20
0673592	3/11/80	75.200	60
0673593	3/17/80	75.512	60
0673594	3/17/80	75.508	25
0673596	3/17/80	77.502-2	25
0673597	3/17/80	77.800-2	25
			<u>\$460</u>

WEVA 81-106

<u>Citation No.</u>	<u>Date</u>	<u>30 CFR Section</u>	<u>Assessment</u>
910981	4/24/80	75.324	\$15
910982	4/24/80	75.305	15
910983	4/24/80	75.303	15
910984	4/25/80	75.1704	10
910985	4/28/80	75.515	10
910986	4/28/80	75.701	20
910987	4/28/80	75.400	50
910988	4/28/80	75.1722(a)	20
910989	4/28/80	75.503	20
910990	4/30/80	75.503	20
910991	4/30/80	75.1107	15
910992	4/30/80	75.503	15
910993	4/30/80	75.605	30
910994	4/30/80	75.604	25
910995	4/30/80	75.1107	20
911000	5/08/80	77.400(a)	40
			<u>\$340</u>

WEVA 81-249

<u>Citation No.</u>	<u>Date</u>	<u>30 CFR Section</u>	<u>Assessment</u>
910319	7/23/80	75.316	\$30
911658	7/23/80	75.400	20
911659	7/23/80	75.403	25
911660	7/23/80	75.313	15
912802	7/30/80	75.400	30
912803	7/30/80	75.1722(b)	40
			<u>\$160</u>

WEVA 81-377

<u>Citation No.</u>	<u>Date</u>	<u>30 CFR Section</u>	<u>Assessment</u>
9915076	1/15/81	70.207(a)	\$20
9915114	2/17/81	70.207(a)	15
9915115	2/17/81	70.207(a)	15
9915116	2/17/81	70.207(a)	15
			<u>\$65</u>

WEVA 81-429

<u>Citation No.</u>	<u>Date</u>	<u>30 CFR Section</u>	<u>Assessment</u>
912726	11/06/80	75.205	\$30

WEVA 81-449

<u>Citation No.</u>	<u>Date</u>	<u>30 CFR Section</u>	<u>Assessment</u>
918334	2/17/81	75.503	\$25
9915203	3/17/81	70.207(a)	35
9915266	4/13/81	70.208(a)	20
9915267	4/13/81	70.208(a)	20
9915268	4/13/81	70.208(a)	20
			<u>\$120</u>

WEVA 81-457

<u>Citation No.</u>	<u>Date</u>	<u>30 CFR Section</u>	<u>Assessment</u>
916648	11/13/80	75.323	\$15
916581	11/18/80	75.512	20
916582	11/18/80	75.1103-8(b)	20
916583	11/18/80	75.305	20
916584	11/18/80	75.515	15
916585	11/18/80	77.504	20
916586	11/18/80	77.1104	30
916588	11/18/80	75.200	35
916589	11/18/80	75.200	40
916592	11/19/80	75.901(a)	40
916593	11/20/80	75.1103	25
916594	11/20/80	75.400	25
916596	11/24/80	75.200	25
916597	11/25/80	75.400	35
916599	11/26/80	75.1103	30
916600	11/26/80	75.1103	30
918001	11/26/80	75.1103	30
918002	11/26/80	75.1101-3	20
918003	12/01/80	75.1101-3	30
918005	12/01/80	75.1101-3	30
			<u>\$535</u>

WEVA 81-458

<u>Citation No.</u>	<u>Date</u>	<u>30 CFR Section</u>	<u>Assessment</u>
918004	12/02/80	75.1101-3	\$60
918006	12/02/80	75.1725	75
918007	12/02/80	75.400	50
918008	12/03/80	75.701	25
918009	12/04/80	75.316	75
876570	12/10/80	77.505	50
912395	1/06/81	75.316	20
912396	1/06/81	75.1200	20
910293	1/22/81	75.1725(a)	80
918321	2/12/81	77.205(b)	30
918322	2/12/81	77.208(e)	25
918323	2/12/81	77.504	30
918324	2/12/81	75.512	15
918325	2/12/81	75.1400-4	15
918326	2/12/81	75.1106-16(c)	15
918327	2/12/81	77.502	15
918328	2/12/81	77.509(c)	20
918329	2/12/81	77.504	45
918331	2/12/81	77.1104	25
917621	2/17/81	75.400	25
			<u>\$715</u>

WEVA 81-459

<u>Citation No.</u>	<u>Date</u>	<u>30 CFR Section</u>	<u>Assessment</u>
917622	2/17/81	75.313	\$10
917623	2/17/81	75.503	20
918335	2/17/81	75.400	30
918336	2/17/81	75.400	30
918337	2/17/81	75.503	15
918338	2/17/81	75.503	15
918339	2/17/81	75.313	15
918340	2/17/81	75.503	15
917627	2/24/81	75.515	15
917628	2/24/81	75.1725(a)	20
917629	2/24/81	75.904	60
917630	2/24/81	75.400	100
917631	2/24/81	75.503	30
917632	2/24/81	75.1107-16(b)	20
917633	2/24/81	75.523-2(c)	15
917634	2/24/81	75.1725(a)	15
917635	2/24/81	75.503	10
917636	2/24/81	75.904	50
917637	2/24/81	75.1725(a)	20
917638	2/24/81	75.400	25
			<u>\$530</u>

WEVA 81-460

<u>Citation No.</u>	<u>Date</u>	<u>30 CFR Section</u>	<u>Assessment</u>
917639	2/24/81	75.514	\$35
917640	2/24/81	75.1722(a)	40
917641	2/24/81	75.1722(a)	30
917643	2/24/81	75.904	25
917644	2/24/81	75.1725(a)	20
917645	2/24/81	75.1105	30
917646	2/27/81	75.326	25
917649	2/27/81	75.516	20
917650	2/27/81	75.516	20
917651	2/27/81	75.515	10
917652	2/27/81	75.807	25
917654	3/02/81	75.807	20
917655	3/02/81	75.516	25
917656	3/02/81	75.514	30
917658	3/04/81	75.1100-2(e)	20
917659	3/04/81	75.515	25
917660	3/04/81	75.1100-2(e)	20
917741	3/04/81	75.515	30
917742	3/04/81	75.515	30
			<u>\$480</u>

WEVA 81-461

<u>Citation No.</u>	<u>DATE</u>	<u>30 CFR Section</u>	<u>Assessment</u>
917743	3/04/81	75.1725(a)	\$20
917744	3/05/81	75.1725(a)	20

WEVA 81-461 (cont.)

<u>Citation No.</u>	<u>Date</u>	<u>30 CFR Section</u>	<u>Assessment</u>
917745	3/05/81	75.515	\$20
917746	3/05/81	75.1722(a)	25
917747	3/05/81	75.515	25
917748	3/06/81	75.516	15
917749	3/06/81	75.516-2(c)	15
917750	3/06/81	75.517	15
917751	3/06/81	75.1722(a)	75
917752	3/06/81	75.515	65
917754	3/06/81	75.807	20
917755	3/06/81	75.200	60
917756	3/06/81	75.515	20
917757	3/06/81	75.516-2(c)	25
917758	3/06/81	75.807	25
917759	3/06/81	75.1100-2(e)(1)	25
917760	3/06/81	75.1722(a)	20
917761	3/06/81	75.1722(a)	60
917762	3/06/81	75.515	25
			<u>\$575</u>

WEVA 81-462

<u>Citation No.</u>	<u>Date</u>	<u>30 CFR Section</u>	<u>Assessment</u>
917763	3/06/81	75.400	\$30
917764	3/06/81	75.400	30
917765	3/06/81	75.515	15
917766	3/06/81	75.1722(a)	45
917767	3/06/81	75.200	40
917768	3/17/81	77.1605(1)	35
			<u>\$195</u>

WEVA 81-506

<u>Citation No.</u>	<u>Date</u>	<u>30 CFR Section</u>	<u>Assessment</u>
916587	11/18/80	77.506	\$35
918330	2/12/81	77.1109(a)	25
			<u>\$60</u>

WEVA 81-601

<u>Citation No.</u>	<u>Date</u>	<u>30 CFR Section</u>	<u>Assessment</u>
911888	6/02/81	75.316	\$15

WEVA 82-25

<u>Citation No.</u>	<u>Date</u>	<u>30 CFR Section</u>	<u>Assessment</u>
918561	5/11/81	75.403	\$25
918566	6/24/81	75.400	65

WEVA 82-25 (cont.)

<u>Citation No.</u>	<u>Date</u>	<u>30 CFR Section</u>	<u>Assessment</u>
918567	6/24/81	75.516	\$20
918568	7/07/81	75.1725(a)	20
918570	7/09/81	77.205(a)	15
9915346	8/13/81	70.208(a)	10
9915347	8/13/81	70.208(a)	10
9915348	8/13/81	70.208(a)	10
			<u>\$175</u>

WEVA 82-24

<u>Citation No.</u>	<u>Date</u>	<u>30 CFR Section</u>	<u>Assessment</u>
918010	12/08/80	75.1101-23(a)	\$20
918011	12/08/80	75.1713	15
918012	12/08/80	75.523	60
918013	12/09/80	77.207	15
			<u>\$110</u>

WEVA 81-504

<u>Citation No.</u>	<u>Date</u>	<u>30 CFR Section</u>	<u>Assessment</u>
918017	12/9/80	77.701	\$250

WEVA 81-505

<u>Citation No.</u>	<u>Date</u>	<u>30 CFR Section</u>	<u>Assessment</u>
916590	11/18/80	75.302-1	\$ 95
916591	11/18/80	75.301	100
918015	12/09/80	77.701	85
0640145	12/10/80	77.506	90
0640146	12/10/80	77.506	90
0640147	12/10/80	77.506	95
0640148	12/10/80	77.506	95
876569	12/10/80	77.506	95
			<u>\$745</u>

WEVA 81-600

<u>Citation No.</u>	<u>Date</u>	<u>30 CFR Section</u>	<u>Assessment</u>
0917653	3/02/81	75.807	\$ 85
0917657	3/04/81	75.518	95
			<u>\$180</u>

TOTAL \$5740

ORDER

Citation No. 917642, February 24, 1981 (Docket WEVA 81-460), was vacated by MSHA prior to the filing of its civil penalty proposals, and it is therefore DISMISSED (Tr. 151-152).

Citation No. 917753, March 6, 1981 (Docket WEVA 81-461), was also vacated by MSHA prior to the filing of the civil penalty proposals, and it is also DISMISSED (Tr. 153; Exh. A).

Respondent IS ORDERED to pay the civil penalties assessed by me in these dockets, in the amounts shown above, totalling \$5740, within thirty (30) days of the date of these decisions, and upon receipt of payment by the petitioner, these proceedings are DISMISSED.


George A. Koutras
Administrative Law Judge

Distribution:

Paul E. Pinson, Esq., P.O. Box 440, Williamson, WV 25661 (Certified Mail)

Covette Rooney, Esq., U.S. Department of Labor, Office of the Solicitor,
3535 Market Street, Philadelphia, PA 19104 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

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

JUN 28 1982

SECRETARY OF LABOR, MINE SAFETY AND
HEALTH ADMINISTRATION (MSHA),

Petitioner,

v.

SAN JUAN COUNTY HIGHWAY DEPARTMENT,

Respondent.

CIVIL PENALTY PROCEEDING

DOCKET NO. WEST 79-290-M

MSHA CASE NO. 42-01482-05001

MINE: Lems Draw S & G Pit

Appearances:

Katherine Vigil, Esq., Office of Henry C. Mahlman, Associate Regional
Solicitor, United States Department of Labor, Denver, Colorado

for the Petitioner,

Bruce K. Halliday, Esq., San Juan County Attorney, Monticello, Utah

for the Respondent.

Before: Judge John J. Morris

DECISION

The Secretary of Labor, on behalf of the Federal Mine Safety and Health Administration, charges respondent, San Juan County Highway Department, with violating Title 30, Code of Federal Regulations, Section 56.9-2 1/, a safety regulation adopted under the Federal Mine Safety and Health Act, 30 U.S.C. 801 et seq.

After notice to the parties a hearing on the merits was held in Monticello, Utah on August 20, 1981.

1/ The cited regulation provides as follows:

56.9-2 Mandatory. Equipment defects affecting safety shall be corrected before the equipment is used.

ISSUES

The issues are whether respondent is subject to the Act; whether it violated the regulation, and, if so, what penalty is appropriate.

SUMMARY OF THE EVIDENCE

The 10 acre Lems Draw sand and gravel pit is owned by the United States Government and leased to San Juan County, a political subdivision of the State of Utah. The lease is managed by the Bureau of Land Management (Tr 6, 13, 21-22, 28).

On the date of the inspection MSHA representative Kenneth Joslin was told by respondent's truck driver that its Ford diesel truck #32 would jump out of low gear. This would allow the truck to runaway on a down grade (Tr. 13).

On the same occasion a woman truck driver trainee told the inspector that the brakes on her truck were inadequate (Tr. 12). This portion of the citation was later withdrawn as a supervisor and the MSHA inspector road tested the truck. They concluded that the trainee excessively pumped the brakes causing the air to bleed off. The brakes were adequate (Tr. 16).

The inside door latch on the driver's door of the truck was broken (Tr. 15, 17).

DISCUSSION

The uncontroverted evidence shows the truck gear was defective and the door latch was broken.

Respondent contends that it is not subject to the Act, that it is not a mine operator, and the proposed penalty is excessive.

Respondent's contentions concerning liability under the Act have all been ruled contrary to respondent's views in Island County Highway Department, 2 FMSHRC 3227 (November, 1980). Respondent has cited Island County in its brief but has failed to demonstrate why the decision is not applicable in the factual settings presented here. The citation should be affirmed.

CIVIL PENALTY

Respondent further contends that the proposed civil penalty is excessive.

Section 110(i) of the Act [30 U.S.C. 820(i)] provides as follows:

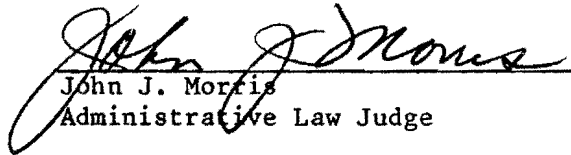
The Commission shall have authority to assess all civil penalties provided in this Act. In assessing civil monetary penalties, the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

In reviewing the facts I note that respondent abated the defective conditions and there is no prior adverse history. In addition, the record does not reflect whether the proposed penalty of \$66 considered the later withdrawal of that portion of the citation relating to defective brakes. In view of the low gravity of the violations and in considering the statutory criteria, I conclude that a penalty of \$40 is appropriate.

Based on the foregoing findings of fact and conclusions of law I enter the following:

ORDER

1. Citation 335924 is affirmed.
2. A penalty of \$40 is assessed.


John J. Morris
Administrative Law Judge

Distribution:

Katherine Vigil, Esq., Office of the Solicitor
United States Department of Labor
1961 Stout Street, 1585 Federal Building
Denver, Colorado 80294

Bruce K. Halliday, Esq.
San Juan County Attorney
P. O. Box 850
Monticello, Utah 84535

