JUNE 1984

Commission Decisions

Administrative Law Judge Decisions

JUNE

The following cases were directed for review during the month of June:

Dilip Paul v. P.B.-K.B.B., Inc., Docket No. CENT 83-42-DM. (Judge Kennedy, Interlocutory Review of April 24, 1984 order.)

Secretary of Labor, MSHA v. U.S. Steel Mining Company, Docket No. WEVA 82-390-R, etc. (Judge Steffey, April 30, 1984)

United Mine Workers of America v. Peabody Coal Company, Docket No. LAKE 83-69-D, KENT 82-103-D, etc. (Judge Kennedy, Interlocutory Review of April 24, 1984 order.)

Secretary of Labor, MSHA v. Pittsburg & Midway Coal Mining Company, Docket No. CENT 83-65. (Judge Broderick, May 17, 1984.)

Secretary of Labor, MSHA v. Duval Corporation, Docket No. CENT 80-312-M. (Judge Morris, May 22, 1984).

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

George Jack v. Mid-Continent Resources, Inc., Docket No. WEST 83-72-D. (Judge Carlson, April 26, 1984).

Secretary of Labor, MSHA v. Metric Constructors, Inc., Docket No. SE 80-31-DM. (Judge Koutras, April 26, 1984)

Lawrence Everett v. Industrial Garnet Extractives, Docket No. YORK 83-6-DM. (Judge Broderick, May 14, 1984).

COMMISSION DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

June 1, 1984

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	Docket No. SE 84-4-M
v.	:	
BELCHER MINE, INC.	:	

ORDER

The administrative law judge's letter of May 25, 1984, purporting to explicate his April 26, 1984, decision in this matter is rejected as an improper circumvention of the Commission's Rules of Procedure, and is hereby returned to him. Cf. Pontiki Coal Corp., Docket No. KENT 83-181-R, etc. (Order, May 23, 1984); Canterbury Coal Co., 1 FMSHRC 335 (1979); Peabody Coal Co., 2 FMSHRC 1035 (1980); Penn Allegh Coal Co., Docket No. PITT 79-97-P (Order, January 3, 1979).

Rosemary M. Collyer, Chairman

Richard V. Backley, Commissioner

Frank F. Jestrab, Commissioner

A. E. Lawson, Commissioner

J. Clair Nelson, Commissioner

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

June 5, 1984

ROGER E. SAMMONS	:	
	:	
v.	:	Docket No. SE 82-15-D
	:	
MINE SERVICES CO., a wholly-owned subsidiary of Drummond Coal Co.	:	

DECISION

This discrimination case arises under section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982), and involves an operator's alleged discriminatory discharge of a miner. A Commission administrative law judge concluded that the operator did not violate the Mine Act by discharging the miner, and dismissed the miner's discrimination complaint. 4 FMSHRC 1713 (September 1983)(ALJ). We affirm the judge's decision.

Mine Services Company, a wholly-owned subsidiary of Drummond Coal Company, performs construction work at surface coal mines and coal preparation facilities. The complaining miner, Roger Sammons, was employed as an ironworker by Mine Services at its Short Creek, Alabama, surface coal mine construction project from August 27 through September 21, 1981. Mine Services, a signatory to the National Coal Mine Construction Agreement ("the Construction Agreement") between the United Mine Workers of America ("UMWA") and the Association of Bituminous Contractors, hired Sammons and six other ironworkers from a UMWA District Panel. Under Art. XVI(h) of the Construction Agreement, an employer could refer a new employee back to the panel during the first 30 days of employment "if the [e]mployer decides that the employee is not able to step into and perform the work of the job...."

Mine Services first utilized Sammons to load and unload steel beams. Sammons then was assigned to work as an ironworker connector 1/ for about two weeks at a partially completed "sample house," a structure where mined ore was to be sorted and sampled. He worked with Billy Canada and Donald Gravlee, also connectors.

In early September, Sammons, acting as Union Grievance Committeeman, asked Project Superintendent Edward Bates to post certain boom truck operator jobs for bidding, rather than unilaterally assigning such operators. Sammons stated that qualified operators were needed for safety reasons. Boom trucks were used to load steel onto flatbed trucks for transportation to work areas. Bates, who considered Sammon's request governed by the Construction Agreement, informed Sammons that the agreement allowed Mine Services a grace period of 60 days before the jobs had to be posted for bidding, and that the two operators Bates had initially assigned to the jobs were qualified. Sammons also complained that the safety belt provided to him by Mine Services was too large and did not fit properly. Sammons was permitted to use his own safety belt after this complaint.

About September 14, 1981, after construction on the sample house was almost completed, Superintendent Bates assigned Sammons, Canada, Gravlee, and other connectors to do connecting work on a large refuse bin. The structure was to consist of a rectangular paneled bin tapering on its underside to a dump chute. The bin was to be supported above ground level by four vertical steel beams located at the four corners of the bin and reinforced on each side by two sets of diagonal steel braces. The connecting work involved on the refuse bin was more complicated than that done on the sample house.

As the braces for the refuse bin were hoisted by crane, the connectors were expected to guide the braces into place and to bolt the ends of the braces to the vertical beams, using bolt holes pre-cut in the steel. This work sometimes required the connectors to climb and to straddle or stand on the steel about 30-32 feet above the ground. Ordinarily, connectors were expected to make such connections by climbing the steel. On occasion, the pre-cut holes in the diagonal braces were "out of plumb" and did not match up with the holes in the vertical steel beams. In such

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1/ An ironworker connector steadies and guides structural steel members or beams as they are hoisted into position by crane or other means for the framework of a building or other structure. See Webster's Third New International Dictionary (Unabridged) 481 (1971). Typically, the connector installs at least one bolt into each end of the steel member to connect it in place. A "bolt-up man," a lower-paid ironworker, finishes the bolting work after the initial connection.

cases, it would be necessary for the connectors to pull or pry the steel members into alignment by inserting a spud wrench through the holes (a procedure called "spudding the beams") or to burn new holes in the steel in order to make a proper connection. New holes could be burned by a connector while working on the steel or from a basket (a structure with posts and handrails) hoisted by a second crane. However, burning new holes was a last resort. If too many extra holes were burned, the building would be out of plumb when complete.

After observing the connectors' work on the refuse bin for the first few days following their assignment to that project, Bates became dissatisfied with their slow progress. The foreman on the refuse bin project complained to Bates that "he couldn't get [the refuse bin] together with the people that he had." Tr. 91. Accordingly, on the afternoon of September 16, 1981, Bates met with Sammons, Canada, and Gravlee, the three connectors whose lack of progress was the focus of Bates' concern, and expressed disappointment over the slowness of their work. According to management's contemporaneous notes of the meeting, Sammons responded that the connectors needed another crane and a basket from which to make the connections in order "to speed it up." Sammons then stated, "The going was slow mainly because of a safety situation." Bates replied, "The safety part of the job I agree with but not with extra equipment." (Bates testified at the hearing that connecting work was not to be performed out of a basket except under abnormal conditions.) Gravlee conceded that he could not do the connecting work. Bates thanked Gravlee for his "honest" answer and stated, "I want honest answers as to the progress of the erection. There were only four pieces of iron hung today." Canada offered as an explanation the fact that the steel had been wet until approximately 9:45 a.m. Bates replied, "I understand about steel being wet. [Y]ou don't work on wet steel ever. The problem is I need connectors that can do the job." Sammons testified that he repeated his complaint that the safety belt supplied by Mine Services did not fit properly, and the notes of the meeting reflect that he also stated, "I won't do anything unsafe, if that means working slow, then that's the way I'll do it." Bates responded, "All I ask is that you give me your best shot." The record on the meeting contains no more specific testimony regarding safety. 2/

Bates tested all seven connectors two days later by observing and evaluating them as they performed connecting work on the refuse bin. Bates had Sammons and Canada erect one diagonal brace. Bates concluded that they did not appear to be comfortable on the steel and did not

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2/ Sammons' contention on review that he also complained to Bates at this meeting that there were no taglines (a rope tied around the steel beams to pull them into place) is not supported by the record. It was Canada who complained, and he complained to a foreman, not to Bates.

handle their tools properly. In a subsequent report to his superior, Bates stated, "They had difficulty with [the lower] connection, and wanted to burn holes. The connection was made but it was apparent they did not know exactly how to utilize their tools to the best advantage." Sammons, assisted by Canada, then moved to the middle section of the diagonal and made the connection at the "X" point of intersection between the two diagonal braces. However, contrary to what Bates believed should have been done next, Sammons did not proceed to climb to the top of the diagonal, where the brace was resting in place over a gusset plate, to make the needed upper connection, nor did he climb the diagonal to remove a loose "choker" (a wire rope connected to a crane that holds a steel member). Instead, Sammons and Canada started to hook a basket to the crane. 3/ Bates ordered them down. He did not ask why they needed the basket and they did not offer an explanation. Bates then directed Ralph Smith, another connector, to climb the diagonal to make the connection. Smith climbed the steel and discovered that the holes were out of plumb. The connection was eventually made by another connector working from a basket.

After the test, Bates concluded that of the seven connectors tested, two were good and two were acceptable, but that Sammons and Canada lacked the ability to perform as connectors. The remaining connector, Gravlee, admitted that he was afraid to climb the steel and later was allowed to bid on another, lower-paying job. Bates terminated Sammons' and Canada's employment on September 21, 1981, before their 30-day probationary period ended, by referring them back to the UMWA District Panel pursuant to the referral-back provisions of the Construction Agreement. Bates' personnel memorandum on the subject stated, "They do not perform as connectors." 4/

Sammons filed a discrimination complaint under the Mine Act with the Secretary of Labor on September 24, 1981. After the Secretary declined to prosecute the complaint on his behalf, Sammons filed his own discrimination complaint with this independent Commission pursuant to section 105(c)(3) of the Mine Act, 30 U.S.C. § 815(c)(3). The complaint stated:

3/ Sammons testified that he needed the basket because it was apparent that the holes were out of plumb and new holes would have to be burned in order to make the connection, and also because the diagonal was not secure enough to climb. Canada's testimony corroborates Sammons'.

4/ Sammons and Canada filed grievances under the Construction Agreement after Bates referred them back. On October 19, 1981, after Sammons had filed his Mine Act discrimination complaint with the Secretary of Labor, Mine Services and the UMWA local union settled the two grievances by agreeing that Mine Services would reinstate Canada with full pay and that Sammons' grievance would be withdrawn. Sammons' grievance was withdrawn by the local union and Canada was reinstated. Sammons filed a charge with the National Labor Relations Board regarding the union's withdrawal of his grievance. The record does not disclose the outcome of that complaint.

> While employed with [Mine Services, Inc., at] the Short Creek project, there were no complaints made to me about my work. I feel therefore that the only reason for me being relieved of my duties was the complaints which I made about getting safe operators, safety belts, building cages and getting taglines to be used on the larger pieces of steel.

At the hearing before the Commission administrative law judge, Sammons contended that he was discharged in retaliation for making safety complaints. In his post-hearing brief to the judge, Sammons' counsel suggested for the first time, with reservations discussed below, that Sammons also was discharged because he engaged in a protected work refusal during the September 18 test when he did not climb the upper end of the diagonal brace. In his decision, the judge characterized the major issue as whether Mine Services referred Sammons back because Bates believed him to be an incompetent connector, or in retaliation for Sammons' safety complaints. The judge concluded that none of Sammons' complaints was related to safety. He credited Bates' testimony that the boom truck operator complaint in early September was a labor-management dispute over the posting of jobs. He determined that Sammons' safety belt complaints were not safety complaints because Mine Services had not refused to provide safety belts. 4 FMSHRC at 1729-30. The judge further determined that Sammons' request for a basket at the September 16 meeting with Bates was not a safety complaint, but reflected a difference of opinion as to how connecting work should be done. 4 FMSHRC at 1730-31.

The judge also rejected Sammons' alternative argument that Bates terminated him because he engaged in a protected work refusal during the September 18 test. The judge stated that the evidence did not establish that Sammons was required to work in an unsafe manner or that he refused to work for reasons of safety. 4 FMSHRC at 1732-33. In short, the judge credited Bates' testimony as to his reason for referring Sammons back, over Sammons' contrary testimony. Finding nothing suspect in the referral back, the judge concluded that it was based solely on Bates' bona fide belief in Sammons' incompetence as a connector. 4 FMSHRC at 1733-34. Accordingly, the judge dismissed Sammons' discrimination complaint.

We note at the outset that the judge's decision fails to mention and does not apply this Commission's precedent in the area of discrimination law. This omission has needlessly complicated the task of review. We have carefully examined the judge's findings and the record and are satisfied that his decision is consistent with our precedent in principle and in result. However, for the sake of clarity, we reiterate the basic analytical guidelines in this field.

In order to establish a prima facie case of discrimination under section 105(c) of the Mine Act, a complaining miner bears the burden of production and proof to establish (1) that he engaged in protected

activity and (2) that the adverse action complained of was motivated in any part by that activity. Secretary on behalf of Pasula v. Consolidation Coal Co. v. Marshall, 2 FMSHRC 2786, 2799-2800 (October 1980), rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3d Cir. 1981); and Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 803, 817-18 (April 1981). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no way motivated by protected activity. If an operator cannot rebut the prima facie case in this manner it may nevertheless affirmatively defend by proving that (1) it was also motivated by the miner's unprotected activities, and (2) it would have taken the adverse action in any event for the unprotected activities alone. The operator bears the burden of proof with regard to the affirmative defense. Haro v. Magma Copper Co., 4 FMSHRC 1935, 1937 (November 1982). The ultimate burden of persuasion does not shift from the complainant. Robinette, 3 FMSHRC at 818 n. 20. See also Boich v. FMSHRC, 719 F.2d 194 (6th Cir. 1983); and Donovan v. Stafford Constr. Co., No. 83-1566, D.C. Cir. (April 20, 1984)(specifically approving the Commission's Pasula-Robinette test). The Supreme Court has approved the National Labor Relations Board's virtually identical analysis for discrimination cases arising under the National Labor Relations Act. NLRB v. Transportation Management Corp., ___ U.S. ___, 76 L.Ed. 2d 667 (1983).

The judge found that Sammons had not engaged in any protected activity, either in the form of safety complaints or a work refusal, and that he was referred back to the District Panel during his probationary period of employment solely because Bates believed him to be an incompetent connector. Thus, in effect, the judge concluded that Sammons had failed to prove either element of the prima facie case. Sammons has challenged both of these findings.

Sammons contends that the judge erred in holding that his complaint in early September regarding the posting of the boom truck operators' jobs, his complaints that Mine Services had provided him with an ill-fitting safety belt, and his generalized complaint at the September 16 meeting with Bates that the connectors needed a basket from which to make the connections on the refuse bin were not protected. We agree that the judge erred in certain aspects of his analysis of these complaints. In part, the judge concluded that Sammons' boom truck and safety belt complaints were not protected because there was no showing that there was, in fact, a safety problem and because Mine Services adequately addressed whatever problem was in issue. That there may have been no objective underlying safety problem does not invalidate a miner's good faith reasonable complaint. Robinette, supra, 4 FMSHRC at 811-12. Similarly, the fact that an operator addressed a safety problem does not remove the Act's protection from a preceding complaint. The judge also appears to have given weight to the fact that Sammons had filed no grievances or written complaints with governmental agencies.

The filing of such formal complaints is not a prerequisite to making a protected safety complaint to an operator. Nevertheless, because of our ultimate conclusion that these complaints were not related to Sammons' dismissal, we do not believe it is necessary to determine which of them were protected, but assume, for purposes of this decision, that they all were.

As to the other protected activity alleged by Sammons, we affirm the judge's conclusion that Sammons did not engage in a protected work refusal. In our Pasula and Robinette decisions, we held that under the Mine Act a miner may refuse to engage in work where he has a reasonable, good faith belief in a hazardous condition, and we have applied this doctrine in various factual contexts to extend the Act's protection to miners' work refusals. See, for example, Secretary of Labor (MSHA) v. Metric Constructors, Inc., 6 FMSHRC 226 (February 1984). Our cases contemplate, however, that the miner has engaged in some form of conduct or communication manifesting an actual refusal to work. As noted above, Sammons did not raise a work refusal theory in this case until after the hearing, and even then his counsel candidly conceded the difficulty of applying that theory to the facts:

> Our position is that this is a retaliation [for safety complaints] case rather than a work refusal case. This is not a work refusal case simply because Sammons never declined an assignment and thereby disrupted production; he performed every task given to him. On the other hand, because at least from management's perspective production was adversely affected, it may be possible to analyze certain incidents as a form of protected work refusal, such as the so-called "refusal to climb" ... on the refuse bin....

Post-hearing brief for the complainant 9-10.

Only Sammons' attempt during the September 18 test to use the basket for the upper connection on the diagonal brace could be characterized as a possible work refusal. However, Sammons was performing his assigned task at the time and never suggested that he was refusing to carry out that task. Bates merely believed that Sammons should have climbed the steel to remove a loose choker and to move to the upper end of the brace preparatory to making the connection.

Even were we to treat Sammons' conduct during the erection of the brace as an implied refusal to perform the work in the manner contemplated by management, we could not conclude that it amounted to protected activity under the Mine Act given the lack of any expression of a safety concern by Sammons at the time. We have held that a miner refusing to work on the basis of a good faith, reasonable belief in a hazard "should ordinarily communicate, or at least attempt to communicate,

to some representative of the operator his belief in the ... hazard at issue." Secretary on behalf of Dunmire and Estle v. Northern Coal Co., 4 FMSHRC 126, 133 (February 1982). See also Miller v. FMSHRC, 687 F.2d 194, 195-96 (7th Cir. 1982)(approving generally the Dunmire and Estle rule requiring communication of a safety concern in connection with a work refusal). On September 18, Sammons neither expressed a safety concern, complained about the conditions for making the connection, nor told Bates after the fact why he had not climbed the diagonal. His failure to communicate any safety concern to Bates leads us to agree with the judge that Sammons' attempt to use a basket instead of climbing the diagonal on September 18 merely reflected a difference of opinion--not pertaining to safety considerations--over the proper way to perform the task at hand. Accordingly, we cannot conclude that Sammons engaged in a protected work refusal during the September 18 test.

Because we have assumed arguendo that Sammons made protected safety complaints, we must decide whether he established the necessary causal connection between the complaints and Mine Services' referral back of Sammons to the panel. We conclude that substantial evidence supports the judge's conclusion that Bates discharged Sammons solely for his perceived incompetence.

Bates' belief in Sammons' incompetence as a connector was based on reasons that the judge found credible and convincing. Bates was seriously concerned over the slow erection of the refuse bin and was determined to improve the situation. There is no evidence in this record to contradict Mine Services' view that progress was unacceptably slow. As the construction supervisor, Bates was authorized and qualified to evaluate his employees. After observing and testing all the connectors, he concluded that Sammons and Canada did not perform competently. Specifically, Bates believed that they were not comfortable on the steel, were afraid to climb, and did not handle their tools to best advantage.

The judge relied, in part, on Bates' testimony concerning his evaluation of Sammons' competence and his right under the Construction Agreement to refer back an unsatisfactory employee during the 30-day probationary period. 4 FMSHRC at 1719-20, 1733-34. The judge credited the testimony of Bates over that of Sammons. On review, Sammons has not persuaded us that anything in the record would justify our taking the extraordinary step of overturning this credibility resolution. 5/

5/ In cases involving an alleged discriminatory discharge, the task of the Commission and its judges is to determine, based on the record, whether the motivation for a discharge was discriminatory, not whether it was fair or based on a correct interpretation of events leading up to the discharge. In fact, after Sammons and Canada were ordered down on September 18, the connection had to be made by use of a basket. We do not by this decision conclude that Sammons was incompetent, merely that Bates' belief that he was not competent motivated the referral back to the panel.

Finally, even if a reasonable inference could be drawn that the referral back were motivated in any part by protected activity, our conclusion would be no different. The judge analyzed certain aspects of the evidence from the standpoint of a "mixed motive" case (see Haro v. Magma Copper Company, supra), and rejected Sammons' contention that, absent his alleged protected activity, he would not have been referred back. The judge found, in effect, that Mine Services' evidence was so strong that it had affirmatively defended by proving that Sammons would have been referred back because he was perceived to be an incompetent connector. 6/

For the foregoing reasons, we affirm the judge's dismissal of Sammons' discrimination complaint.

Rosemary M. Collyer, Chairman

Richard V. Backley, Commissioner

Frank F. Jestrab, Commissioner

A. E. Lawson, Commissioner

L. Clair Nelson, Commissioner

6/ We agree with the judge's rejection of Sammons' argument that Mine Services' reassignment of Gravlee and reinstatement of Canada (n. 4 supra) reflected discriminatory treatment of Sammons. 4 FMSHRC at 1731-32. Gravlee was allowed to bid on another, lower-paying job because he admitted that he could not perform as a connector and was slowing down the work on the refuse bin. This evidence does not add to Sammons' case. Mine Services' personnel director testified that during the course of processing the Sammons and Canada grievances, management determined that Canada was more qualified on paper than Sammons and had a stronger case for reinstatement. Mine Services therefore agreed to settle Canada's case by reinstating him. Sammons has not demonstrated in this proceeding that the reinstatement of Canada is proof of discriminatory treatment within the protection of the Mine Act.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

June 14, 1984

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of JAMES M. CLARKE	:	
v.	:	Docket No. LAKE 83-97-D
T. P. MINING, INC.	:	

ORDER

Administrative Law Judge Joseph B. Kennedy's letter of May 31, 1984, "responding" to the Secretary of Labor's petition for discretionary review in this matter is an improper circumvention of the Commission's Rules of Procedure. Accord, Belcher Mine, Inc., Docket No. SE 84-4-M (Order, June 1, 1984). Therefore, it will not be placed in the official record in this case nor will it be considered by the Commission in ruling on the issues presented by the Secretary's petition for discretionary review.

Unlike the action we took in Belcher, however, we do not at this time return the letter to the judge. Rather, because the letter, on its face, indicates that the judge engaged in a prohibited ex parte telephone conversation with counsel for the operator, 1/ we will retain the letter in a separate file pending appropriate inquiry pursuant to Commission Rule 82. See also Inverness Mining Co., 5 FMSHRC 1384, 1388 n. 3 (August 1983); Knox County Stone Co., 3 FMSHRC 2478 (November 1981).

1/ At page 3 of his letter the judge states:

> It is worth noting that at no time did counsel for the operator join the Solicitor in asserting that an "important ingredient" of the money settlement to Mr. Clarke was "the Secretary's determination to forsake the civil penalty." This was because the basis for the settlement was fully disclosed in a discussion between counsel for the operator and the trial judge to which [counsel for the Secretary] was not a party. [Emphasis added].

Accordingly, the administrative law judge and counsel for the operator are hereby ordered to submit sworn statements providing full disclosure of the details and substance of their telephone conversation of March 28, 1984. It is further ordered that these statements be received by the Commission, and served on counsel for the Secretary, no later than Friday, June 22, 1984.

Rosemary M. Collyer, Chairman

Richard V. Backley, Commissioner

Frank F. Jestrab, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

June 14, 1984

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	Docket Nos. WEST 80-386-RM WEST 81-58-M WEST 80-160-M
v.	:	
UNITED STATES STEEL CORPORATION	:	
and	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	Docket Nos. LAKE 81-116-M LAKE 81-77-RM
v.	:	
UNITED STATES STEEL CORPORATION	:	

ORDER

In these cases arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982), United States Steel Corporation ("U.S. Steel") has filed a motion requesting the Commission's recusal from these proceedings. The motion is based on U.S. Steel's concern regarding the effect on our decisional process of certain ex parte communications engaged in by an employee of this independent Commission with employees of the Department of Labor's Mine Safety and Health Administration ("MSHA") while these cases were pending on review before us. We have filed in the formal records of the cases a memorandum and an affidavit from the participants regarding the communications. These documents satisfy us that the ex parte communications proceeded from innocent motives. While we believe the communications would not prevent us from deciding the cases objectively and fairly solely on the basis of the records developed before the administrative law judges below, we seek to insure that not even an appearance of impropriety or unfairness taints proceedings before this Commission. Accordingly, for the reasons discussed below, we grant the recusal motion and vacate our directions for review.

We first briefly summarize the factual background of the cases and the facts surrounding the ex parte communications. The cases involve citations issued to U.S. Steel by MSHA alleging violations of 30 C.F.R. § 55.12-14 at two different U.S. Steel mines. This mandatory safety standard, which guards against shock and electrocution hazards, in relevant part requires that when power cables energized to potentials in excess of 150 volts "are moved manually, insulated hooks, tongs, ropes, or slings shall be used unless suitable protection for persons is provided by other means." The essential question in dispute between the parties is whether a ground fault protection system used by U.S. Steel constituted "suitable protection" within the meaning of the standard. After U.S. Steel contested the citations issued by MSHA, the cases separately proceeded to hearings before two administrative law judges of this independent Commission.

Each administrative law judge issued a decision finding that U.S. Steel's ground fault protection system was not "suitable protection" within the meaning of the cited standard. Both judges concluded that U.S. Steel had violated the standard and assessed civil penalties. 4 FMSHRC 954 (May 1982) (Docket Nos. LAKE 81-116-M, et al.)(ALJ); 4 FMSHRC 814 (April 1982)(Docket Nos. WEST 80-386-R, et al.)(ALJ). We granted U.S. Steel's petitions for discretionary review of the judges' decisions.

After an administrative law judge's decision has been directed for review by the Commission, the Commission's Office of General Counsel normally prepares a "decisional memorandum" to assist the Commission in its deliberations. Decisional memoranda are drafted by attorneys working under the supervision of the Commission's General Counsel. A decisional memorandum describes the record evidence, the decision below, the issues on review, and the parties' contentions concerning the issues. The memorandum also presents analysis and normally a recommended resolution of the issues. Thus, the memoranda play a role in our decisional process, but are purely advisory and do not purport to, nor do they, control in any way the resolution of cases before the Commission.

On June 1, 1983, while preparing a decisional memorandum in Docket No. WEST 80-386-R, et al., an attorney in the General Counsel's office initiated three telephone calls to two MSHA offices, and engaged in conversations with two MSHA electrical engineering specialists. The specific contents of these conversations are related in the memorandum and affidavit that have been filed in the records of these cases. Briefly, the Commission staff attorney posed questions seeking information of a general nature pertaining to electrical principles and technology relevant to ground fault protection systems. The information obtained from the MSHA engineers was of a general nature and duplicative of information already contained in the official records in these cases. The staff attorney states in her memorandum regarding the conversations that she personally believed that the conversations were general discussions not pertaining to the merits of the cases under review. No other employee of the Commission was aware that the conversations had occurred.

The Commission's Office of the General Counsel subsequently circulated to the Commissioners a decisional memorandum in Docket No. WEST 80-386-R, et al., prepared by the staff attorney in question. This case was scheduled to be considered at a public Commission meeting on June 15, 1983. On June 13, 1983, counsel for the Secretary of Labor sent to the Commission, and served on the operator, a letter and affidavit concerning two of the telephone conversations. The affidavit was given by one of the MSHA electrical engineers with whom the staff attorney had spoken. Counsel for the Secretary stated that the conversations were ex parte communications prohibited by Commission Procedural Rule 82, 29 C.F.R. § 2700.82. 1/ Counsel did not seek disqualification or recusal of the Commission, but requested that the Commission make the letter and affidavit part of the public record. The scheduled meeting was postponed by the Commission.

On June 15, 1983, the staff attorney involved prepared a memorandum setting forth her recollection of the details of the conversations. Copies of this memorandum were served on the parties and placed in the records of the cases. On July 12, 1983, counsel for U.S. Steel filed a motion requesting that the Commission recuse itself from decision in these cases because of the communications. Counsel for the Secretary of Labor filed a response stating that the Commission would be required to determine whether the communications had tainted irrevocably the Commission's decisional process.

1/ Commission Procedural Rule 82 states:

> (a) Generally. There shall be no ex parte communication with respect to the merits of any case not concluded, between the Commission, including any member, Judge, officer, or agent of the Commission who is employed in the decisional process, and any of the parties or intervenors, representatives, or other interested persons.
> (b) Procedure in case of violation.
> (1) In the event an ex parte communication in violation of this section occurs, the Commission or the Judge may make such orders or take such action as fairness requires. Upon notice and hearing, the Commission may take disciplinary action against any person who knowingly and willfully makes or causes to be made a prohibited ex parte communication.
> (2) All ex parte communications in violation of this section shall be placed on the public record of the proceeding.
> (c) Inquiries. Any inquiries concerning filing requirements, the status of cases before the Commissioners, or docket information shall be directed to the Office of the Executive Director of the Commission.

We have previously addressed the subject of ex parte communications. Knox County Stone Co., Inc., 3 FMSHRC 2478, 2482-86 (November 1981). The principles that we enunciated in that decision guide our course in this matter. In Knox County, in addressing ex parte communications at the hearing level before our judges, we held that Commission Rule 82 and section 557(d) of the Administrative Procedure Act, 5 U.S.C. § 557(d) ("the APA"), prohibit ex parte communications between members of the Commission, its judges, other employees and interested persons outside the Commission regarding the merits of pending cases, and also require that any such communications be placed on the public record. 3 FMSHRC at 2483-85. 2/ We stated:

> The rules against ex parte communications serve important goals essential to the integrity and fairness of Commission proceedings. As Congress explained in enacting section 557(d):
>
> > The purpose of the provisions in the bill prohibiting ex parte communications is to insure that agency decisions required to be made on a public record are not influenced by private, off-the-record communications from those personally interested in the outcome.
> >
> > * * *
> >
> > In order to ensure both fairness and soundness to adjudication ..., the ... [APA] require[s] a hearing and decision on the record. Such hearings give all parties an opportunity to participate and to rebut each other's presentations. Such proceedings cannot be fair or soundly decided, however, when persons outside the agency are allowed to communicate with the decisionmaker in private and others are denied the opportunity to respond.

2/ As we noted, although our procedural rules do not expressly define ex parte communications, section 551(14) of the APA defines the term as follows:

> "[E]x parte communication" means an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given, but it shall not include requests for status reports on any matter or proceeding ....

As we further stated, Congress intended the phrase, "merits of the proceeding," in section 551(14) and 557(d) to be broadly construed. See H.R. Rep. No. 880, Parts I & II, 94th Cong., 2d Sess. 20 (Part I), 20 (Part II)(1976), reprinted in 1976 [3] U.S. Code Cong. & Ad. News 2202, 2229 ["1976 U.S. Code Legis. Hist."].

1976 U.S. Code Legis. Hist. 2184, 2227. See also Raz Inland Navigation Co., Inc. v. ICC, 625 F.2d 258, 260 (9th Cir. 1980). The implications of the purposes mentioned by Congress are obvious: improper ex parte contacts may deny a party "his due process right to a disinterested and impartial tribunal." Rinehart v. Brewer, 561 F.2d 126, 132 (8th Cir. 1977). Diminishing public confidence in the affected tribunal is the likely and unacceptable result.

* * *

We recognize that innocent or de minimis ex parte communications can, and do, occur. When ex parte communications occur, however, they shall be placed on the public record in accordance with appropriate procedure.

In short, ... we expect that the rules on ex parte communications will be respected in both letter and spirit and that judges and lawyers will avoid even the appearance of impropriety in these matters.

3 FMSHRC at 2485-86 (footnote omitted). See also PATCO v. FLRA, 685 F.2d 547, 561-65 (D.C. Cir. 1982).

In the present cases, communications of a Commission staff attorney with one of the parties in the cases were conducted. The communications were off the public record without notice to the opposing party. The conversations involved substantive matters at issue in these cases. The conversations were prohibited ex parte communications under Commission Rule 82 and section 557(d) of the APA.

As required, the ex parte communications have been placed on the public record. In the exercise of our discretion, we may make such orders or take such further action as fairness requires, including disciplinary action against persons who "knowingly and willfully" engage in such communications. 29 C.F.R. § 2700.82(b)(1). The record indicates to our satisfaction that the staff attorney engaged in a good faith, but misguided, attempt to obtain a better general understanding of technical data as background to these cases. In our view, this attorney did not "knowingly and willfully" cause the communication to be made within the meaning of Rule 82. The communication was a first time occurrence for the attorney involved. Therefore, we conclude that disciplinary measures are not warranted. Nevertheless, we also conclude that the Commission's recusal from further consideration of these cases is an appropriate resolution.

The stringent policies we announced in Knox County with reference to proceedings before our judges apply equally, of course, to ourselves and Commission staff at the review stage of litigation before this Commission. Public trust in the integrity and fairness of this independent adjudicatory agency is a vital resource that we are deeply committed to protect. Therefore, although we are convinced that we could, in fact, proceed to resolve the cases before us without having the substance of our staff attorney's conversations affect our independent deliberations, we wish to avoid even the appearance of impropriety in these proceedings. For this reason, and because by filing a petition for review in an appropriate court of appeals, the parties may, if they so desire, obtain further review of the decisions of our administrative law judges (30 U.S.C. §§ 816(a) and 823(d)), we conclude that vacation of our orders granting review and reinstatement of the judges' decisions as the Commission's final orders in these proceedings are appropriate.

For the foregoing reasons, we recuse ourselves from further consideration and decision in these cases. Accordingly, our directions for review in these dockets are vacated. The administrative law judges' decisions are reinstated as the final orders of this Commission.

Rosemary M. Collyer, Chairman

Richard V. Backley, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

June 15, 1984

RICHARD E. BJES	:	
	:	
v.	:	
	:	Docket No. PENN 82-26-D
CONSOLIDATION COAL COMPANY	:	

DECISION

This case arises under section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982), and involves the discharge, subsequently converted to a 30-day suspension, of Richard Bjes for refusing to operate a low profile shuttle car. The Commission's administrative law judge sustained Bjes' discrimination complaint against Consolidation Coal Company ("Consol"), concluding that Bjes' work refusal constituted protected activity under the Mine Act. 4 FMSHRC 2043 (November 1982)(ALJ). The judge ordered that Consol compensate Bjes "for the period of his thirty-day suspension by paying him in full the salary which he would have received had he not been disciplined." 4 FMSHRC at 2068. The judge did not award Bjes interest on the back pay, hearing expenses, or attorney's fees. For the reasons that follow, we affirm the judge's finding that Consol's discipline of Bjes violated the Mine Act. However, as discussed below, we remand to afford the parties the opportunity to present further evidence and argument, consistent with our decision, with respect to a complete and appropriate remedy.

Consol operates the Laurel Mine, an underground coal mine located near Central City, Pennsylvania. Bjes had worked at this mine for six and a half years prior to the incidents at issue in this proceeding. For most of the first six months of 1981, Bjes operated a scoop during retreat mining operations in the mine. During this period Bjes was classified as a scoop operator, but also occasionally operated, on a fill-in basis, the high profile No. 4 high shuttle car. High profile cars were higher and had more comfortable cabs (or "kitchens") for the operator than low profile cars. Bjes, who is 6' 1" tall and weighs 195 lbs., experienced no difficulty in operating the No. 4 shuttle.

In July 1981, the regular continuous miner operator in Bjes' work crew, Cecil Wall, was recovering from an injury and his vacancy resulted in each crew member being "bumped" into a more senior temporary position. When this realignment occurred, Bjes was permitted upon his request to operate the high profile No. 4 shuttle car. Bjes earned the same income as a shuttle operator as he had as a scoop operator.

On Monday, July 27, 1981, Wall, the regular continuous miner operator, returned to Bjes' crew. When Wall resumed his duties, the other crew members were bumped back into less senior positions. Bjes was directed to operate the No. 9 shuttle car, a standard low profile shuttle. Like all other shuttle cars used in the mine, the No. 9 shuttle contained two operator's seats in its cab, one facing the inby end of the car used when driving the shuttle inby ("the outby seat"), and one facing the outby end of the car used when driving the shuttle outby ("the inby seat"). In the standard configuration of the No. 9 shuttle, the outby seat (used when driving inby) was on the right side of the cab, the cab's single steering wheel was to the driver's left, and the brake pedal was also to the driver's left--in line with, and beyond and below, the steering wheel. The distance from the outby seat to the brake pedal was three feet. (When seated in the inby seat driving outby, the cab's steering wheel was to the driver's right and the other brake pedal used when driving outby was to his left.)

On Tuesday, July 28, during the afternoon shift, Bjes told his section foreman, Wayne Ross, that he was having trouble with the No. 9 shuttle and was running it in low gear. Bjes testified that when he sat in the outby seat, the position of the steering wheel on the left side of the car in front of the brake made it difficult for him to reach the brake pedal with his left leg and that his leg was in the way of his reaching the steering wheel. Bjes also experienced difficulty getting into and out of the shuttle cab and in changing seat positions. Primarily because of his problems in reaching the brake and in steering, Bjes believed that it would be safer for him to operate the No. 9 shuttle at a slow speed in low gear. Later during that same shift, shift foreman Bill Ross (the brother of Wayne Ross) visited the section where Bjes was working and was informed by Wayne Ross that Bjes was operating the shuttle in low gear. Bill Ross flagged Bjes down and asked him what the problem was. Bjes responded that he could not run the shuttle in second gear. By moving his feet, Bjes attempted to demonstrate to the section foreman his problem in reaching the brake. Later in the shift, the No. 9 shuttle was taken out of service for repairs because its hydraulic hoses had been severed. The cause of the severance is in dispute. Bjes testified that because he "could not get the wheel turned correctly," he drove the shuttle car too close to the rib and the hoses were cut when they caught on the corner of the rib.

On Wednesday, July 29, prior to the afternoon shift, Wayne Ross met with the acting mine superintendent, Tom Hofrichter, and informed him of the incidents involving Bjes on the previous day. Shortly thereafter, Bjes met with Hofrichter in the latter's office. Bjes explained that he was having difficulty reaching the brake on the No. 9 shuttle and asked if there were anything Hofrichter could do to alleviate the problem. John Adams, a safety committeeman of Local Union 1979, District 2, United Mine Workers of America ("UMWA"), which represented the Laurel Mine miners for collective bargaining and Mine Act safety and health purposes, was present at the meeting. Hofrichter also called in Bill Young, the mine's master mechanic, to join the meeting. The four discussed possible modifications to the No. 9 shuttle. Hofrichter testified that he told Bjes that he would look into possible solutions to the situation. Bjes testified that at this meeting Hofrichter authorized him to operate the high profile No. 4 shuttle car. Hofrichter testified that he did not authorize such a change.

Later that day, at the beginning of the afternoon shift, section foreman Wayne Ross noticed that the No. 4 and No. 9 shuttles were not in operation. Ross asked Bjes and Tim Peterman, the operator of the No. 4 shuttle, what had happened. Bjes responded that he would not operate the No. 9 shuttle because his inability to work the brake pedal made his operation of the shuttle unsafe. Bjes stated that he was invoking his safety rights under the collective bargaining agreement between the UMWA and Consol. 1/ For the rest of the shift, Bjes was permitted to operate the No. 4 high profile shuttle car.

Prior to the afternoon shift on Thursday, July 30, Wayne Ross advised mine superintendent Hofrichter that Bjes had refused to operate the No. 9 shuttle on the previous day. Hofrichter called a meeting with Bjes. Bill Ross, Wayne Ross, and Carson Bruening, a union representative, attended. Hofrichter stated to those present that he had not authorized a switch in assignments during his July 29 meeting with Bjes, but had said only that he would look into possibilities for resolving the situation. Bjes again announced that he would not operate the No. 9 shuttle because it was unsafe, and that he was invoking his safety rights under the collective bargaining agreement. Bruening stated that an inspector from the Department of Labor's Mine Safety and Health Administration ("MSHA") would be contacted in an effort to solve the problem. Bjes was temporarily assigned laborer's work.

Around 6:00 p.m. that day, Hofrichter, accompanied by safety committeeman Adams and the maintenance foreman, met with Bjes in his working section. Hofrichter instructed Bjes to sit in the shuttle and demonstrate the problems he had operating the shuttle. Bjes got into the shuttle car and, sitting in the outby seat, simulated the operational problems he had when driving it in the inby direction. Bjes also sat in the inby seat and stated that he did not have an operational problem driving the car outby, because when seated in that position the other brake pedal was not under the steering wheel and he had more leg room. Hofrichter testified that neither he nor safety committeeman Adams believed that Bjes' operation of the shuttle presented an "imminent danger" within the meaning of the collective bargaining agreement (n. 1 supra).

At about this time, MSHA inspector Charles Burke arrived. Another meeting occurred, involving Bjes, Hofrichter, Burke, Bill Ross, Wayne Ross, Consol safety supervisor Jeff Kazura, Adams, and another safety committeeman, Rick Borella. Inspector Burke sat in the shuttle and then had Bjes sit in it to demonstrate the problem he had operating the controls. While neither Inspector Burke nor safety committeeman Borella thought that Bjes' operation of the shuttle car constituted an "imminent danger," they both told Hofrichter that they perceived some hazards in Bjes' operation of the No. 9 shuttle.

1/ Consol and the UMWA were signatories to the National Bituminous Coal Wage Agreement of 1981 ("the collective bargaining agreement" or "the agreement"). Complainant's Exh. No. 2. The agreement permitted a miner to refuse work "under conditions he has reasonable grounds to believe to be abnormally and immediately dangerous to himself beyond the normal hazards inherent in the operation which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated." Id., Art. III(i)(1)(p. 15).

Those present then discussed possible shuttle modifications, including raising the canopy and moving the seats and/or the brake pedal. Hofrichter decided that because Bjes previously had operated the No. 9 shuttle and Hofrichter had not observed "anything that was abnormally hazardous to him in operating that car," Bjes could continue to operate it "until such a time that we could look at the possibility of making it more comfortable for him by making these changes." Tr. 181. Concluding that it was "safe for ... Bjes to run that car," Hofrichter instructed Bjes to run the shuttle. Id. Bjes replied that operating the shuttle would be unsafe and that he was not going to run it. Adams and Borella asked Hofrichter if he intended to suspend Bjes with intent to discharge him, and Hofrichter replied in the affirmative. Borella, acting in his capacity as a safety committeeman, recommended that Bjes not operate the No. 9 shuttle.

At a subsequent meeting held outside the mine that day, Hofrichter told Bjes that if he did not operate the shuttle, he would be suspended with intent to discharge. Bjes refused and the meeting broke up. In a July 31, 1981 letter to Bjes, Hofrichter stated that Bjes was suspended with intent to discharge for breach of Consol's Employee Conduct Rule 4--"Refusal to perform work assigned or to comply with a supervisor's directive."

Bjes filed a grievance over Consol's action and his case went to arbitration pursuant to the collective bargaining agreement. (The transcript of testimony presented at the arbitration hearing was not entered into evidence in the present proceeding.) On August 25, 1981, the arbitrator issued a written award which directed that the discharge be converted to a 30-day suspension. In mid-August, shortly before issuance of the arbitrator's decision, Bjes filed a discrimination complaint with MSHA, pursuant to section 105(c) of the Mine Act. 30 U.S.C. § 815(c). Bjes' complaint stated:

> I was removed from the mine ... on July 30, 1981, and informed that I was being suspended with intent to discharge effective immediately for refusing to run a shuttle car, that in the opinions of the mine safety committee, Federal Inspector Charles Burke and myself was a hazard to myself and members of my crew. The problem was caused by my size and the lack of room in the car. ... I feel that my individual safety rights were violated and that I was disciplined illegally under Federal law protecting my right to a safe working place.

On September 14, 1981, while MSHA's investigation of Bjes' complaint was proceeding, Bjes returned to work after his 30-day suspension and was directed to operate the No. 9 shuttle again. Section foreman Wayne Ross testified that after two to three hours of work on the shift, Wall, the continuous miner operator, complained to him that Bjes was not operating the shuttle safely. (Bjes denied at the hearing that Wall had complained about the safety of his operation of the shuttle; Wall did not testify at the hearing.) Ross removed Bjes from the No. 9 shuttle and assigned him

to shoveling coal. Bjes testified that before he was removed from the shuttle he had injured his left knee by striking it against the shuttle steering wheel while trying to reach the brake pedal. Bjes testified that he noticed a swelling in his knee about five minutes after he began shoveling coal, and that the pain eventually forced him to sit down. Bjes was subsequently carried out of the mine on a stretcher and taken to a hospital emergency room. Bjes' workman's compensation form states that the nature of the injury was "soft tissue injury with possible ligament damage--left knee." Complainant's Exh. No. C-3. Consol does not dispute the fact that Bjes sustained an injury of some degree to his knee, but contests the credibility of Bjes' explanation of the manner of his injury.

In October 1981, following his injury, Bjes received a letter from MSHA informing him that MSHA's investigation of his discrimination complaint had not uncovered a violation of section 105(c) of the Mine Act. On November 23, 1981, Bjes filed his own discrimination complaint with this independent Commission pursuant to section 105(c)(3) of the Mine Act. 30 U.S.C. § 815(c)(3). 2/ Bjes underwent an operation for his injury and was absent from work for five months recuperating. When he returned to work, Bjes found that his work crew had again undergone another realignment. This resulted in his attaining higher seniority and being permitted to operate a different shuttle car.

In his decision, the administrative law judge found that Bjes had a good faith, reasonable belief that his operation of the low profile No. 9 shuttle car was hazardous to himself and others, and that he had communicated his safety concerns in this respect to management. 4 FMSHRC at 2063-66. The judge "accept[ed] ... Bjes' testimony that the configuration of the machine, coupled with its operational limitations, restricted his movements while seated at the controls, thereby contributing significantly to his inability to reach the brake pedals." 4 FMSHRC at 2066. The judge rejected Consol's defense that Bjes' work refusal stemmed not from safety concerns, but from "his dislike for a machine which he found to be uncomfortable." 4 FMSHRC at 2067-68. The judge resolved a number of credibility disputes in Bjes' favor and stated, "Having viewed ... Bjes on the stand during the course of the hearing ... I find him to be a straightforward and credible witness." 4 FMSHRC at 2064. Pursuant to his findings, the judge concluded that Bjes' refusal to operate the No. 9 shuttle was a protected work refusal under the Mine Act and, accordingly, Consol's discipline of Bjes for the refusal was in violation of section 105(c) of the Act. 4 FMSHRC at 2067.

2/ At the subsequent hearing before the Commission's administrative law judge, Bjes was represented by UMWA representative Carson Bruening, who is not a lawyer.

In his post-hearing arguments, Bjes' lay representative, Bruening, requested the following remedies: (1) reimbursement of all wages lost as a result of Bjes' suspension; (2) deletion from Bjes' personnel file of all record of discipline for the work refusal; and (3) an order that Bjes not be required to operate the No. 9 shuttle in the future. 4 FMSHRC at 2068. The judge ordered Consol to compensate Bjes for the period of his suspension "by paying him in full the salary which he would have received had he not been disciplined." 4 FMSHRC at 2068. The judge stated, "The rate of pay should be at the rate of pay Bjes was earning when he was suspended, and [the parties] are directed to confer ... for the purpose of calculating the amount due ... Bjes ...." Id. The judge also ordered Consol to purge Bjes' personnel file of any record of this event, but denied Bjes' request to direct Consol not to require Bjes to operate the No. 9 shuttle in the future. Id. The judge did not award interest on the back pay, hearing expenses, or attorney's fees.

On review Consol contends that, as a general proposition, a miner's work refusal may not be based upon an alleged hazard attributable to the miner's own physical condition or limitations. Consol also argues that substantial evidence does not support the judge's findings and credibility resolutions that Bjes' work refusal was made in good faith and based on a reasonable belief that it was hazardous for him to operate the No. 9 shuttle. 3/ The UMWA, which has filed a brief on Bjes' behalf, contests Consol's arguments and also maintains that the judge erred in not awarding interest on back pay, hearing costs, or attorney's fees. The issues before us are whether substantial evidence supports the judge's findings that Consol violated section 105(c) of the Mine Act by disciplining Bjes for engaging in a protected work refusal and, if so, whether the judge awarded remedies consistent with the Mine Act's remedial provisions and goals.

We first address the substantive issues pertaining to the violation. The crucial question is whether Bjes engaged in a protected work refusal. At the outset, we are met with Consol's contention that even if Bjes had a good faith, reasonable belief in a hazard, his work refusal was outside the protection of the Mine Act because the perceived hazard, if any, resulted from his own physical idiosyncracies and not from any safety defect in Consol's equipment or in the physical environment of the mine. The UMWA objects to our consideration of this issue on the ground that Consol failed to present this argument to the judge and is therefore barred by section 113(d) of the Mine Act from raising it for the first time on review. See 30 U.S.C. § 823(d)(2)(A)(iii).

3/ On review, Consol does not contest the judge's finding that Bjes communicated his safety concerns to management.

Determinations as to whether the judge was "afforded an opportunity to pass" on questions of law or fact (30 U.S.C. § 113(d)(2)(A)(ii)) must be decided on a case-by-case basis. We agree with the UMWA that the legal challenge in question was not expressly developed below by Consol. Nevertheless, this case poses the question of whether Bjes' work refusal, which was premised in part on his own physical limitations, enjoyed the Act's protection. Nearly every work refusal consideration addressed by the judge touches on or implicates this larger question. Therefore, we are satisfied that the issue was before the judge, notwithstanding Consol's failure to articulate this defense more clearly. Further, the issue, as addressed by Consol on review, is a legal one, and the UMWA has responded fully to it.

We conclude that, under appropriate circumstances, such as here presented, a miner may refuse to work on the basis of a perceived hazard arising from his own physical condition or limitations. In our previous decisions we have recognized the right to refuse work but have not had occasion to decide this specific issue. Our determination today is founded both on the broad protective purpose of section 105(c) and on the underlying mandate of the Mine Act that operators, with the assistance of miners, strive to create safe working conditions in the mine. Safety in particular mining contexts may be affected by a miner's physical condition or limitations. The mine is an interactive environment involving human beings, equipment, and the mine's physical setting itself. The human factor cannot be ignored in the evaluation of hazards. A significant physical limitation or condition may affect a miner's ability to perform his normal work tasks and create a hazard justifying a refusal to work.

In this case, the judge determined that the Bjes' physical attributes (6' 1" tall, 195 pounds in weight) in association with the "cramped shuttle car kitchen" (4 FMSHRC at 2064) and the configuration of the controls prevented Bjes from safely applying the shuttle's brake when driving inby. The record supports the judge's finding that a hazard was created by Bjes' operation of the shuttle. We note that the hazard in this case was not solely attributable to Bjes' body build, but arose also from the configuration of the equipment that he was required to operate. The hazardous situation resulting from this interaction of human and technical factors was not the result of any questionable conduct on Bjes' part. We conclude that, in the circumstances of this case, Bjes' work refusal did not lose its claim to protection under the Act merely because the hazard resulted in part from factors intrinsic to Bjes himself.

A miner's work refusal is protected under section 105(c) of the Mine Act if the miner has a good faith, reasonable belief in a hazardous condition. See Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 803, 807-12 (April 1981). Good faith in this context simply means an honest belief that the hazard exists. Accompanying the good faith requirement is the additional requirement that the belief in a hazard be a reasonable one under the circumstances.

The judge found that Bjes had "an honest belief" that a hazard existed. The judge's finding is premised on his credibility resolution, noted above, that Bjes was a "straightforward and credible witness." 4 FMSHRC at 2064. The judge stated that Bjes was "sincere when he initially complained about the cramped shuttle car kitchen and the fact that he had problems reaching some of the controls." Id. When reviewing a judge's credibility resolutions our role is necessarily limited. We have carefully reviewed Consol's "bad faith" allegations, and conclude that Consol has not offered evidence so compelling that we should take the exceptional step of overturning findings resting on credibility resolutions.

In evaluating the judge's findings concerning good faith, we are mindful of the testimony of mine superintendent Hofrichter that during the July 30 meeting in the mine, when Bjes demonstrated his problems with the shuttle and also announced his work refusal, both Inspector Burke and safety committeeman Borella stated that they perceived hazards in Bjes' operation of the shuttle. Indeed, Hofrichter's own willingness at the time to consider modifications to the No. 9 shuttle bespeaks some recognition of an operational problem.

The evidence on which Consol relies to demonstrate bad faith is not persuasive. Consol argues that other miners, as large or nearly as large as Bjes, had operated the No. 9 shuttle without complaint. As the judge noted, these other miners did not testify. Therefore, like the judge, we cannot attribute weight to Consol's bare allegation concerning others' experiences or beliefs. Further, other miners' experience with the shuttle may not have been identical to Bjes' and their failure to vocalize a complaint to management, without further explanation, does not prove that Bjes acted in bad faith.

Consol also notes that at the hearing Bjes offered to drive another low profile shuttle car, the No. 10 shuttle. Consol argues that there were no significant differences between the two low profile cars, and that this consideration demonstrates the insincerity of Bjes' refusal to drive the No. 9 shuttle. The judge analyzed this contention and concluded that there were operational differences between the two cars. 4 FMSHRC at 2067. There is substantial record support for this finding. Unlike the standard No. 9 car, the No. 10 shuttle was off-standard in design. When driven inby, the No. 10 car's steering wheel and brake were on opposite sides of the cab. While the record lacks some detail on this point, both Borella and Bjes

testified that Bjes could have operated the No. 10 car safely. Therefore, we find no reason to disturb the judge's finding that Bjes acted in good faith.

With regard to the reasonableness of Bjes' belief in the hazard, the evidentiary considerations discussed above also establish the required reasonableness. The judge found, and we agree, that the evidence showed that there was a hazard presented by Bjes' operation of the shuttle. While there is no requirement under our precedent that a miner's belief be objectively verified, when such verification is demonstrated it constitutes additional persuasive evidence. See Robinette, 3 FMSHRC at 811-12. We again note that two participants in the July 30 meeting in the mine believed that hazards were associated with Bjes' operation of the shuttle. The judge also credited Bjes' testimony that upon his return to work in September 1981, he seriously injured his left knee when he struck it against the shuttle's steering wheel while experiencing difficulty in reaching the brake. The judge found that this accident "bolster[ed] [Bjes'] argument that requiring him to operate the shuttle car while he was cramped into the operator's kitchen ... presented a real safety hazard." 4 FMSHRC at 2066. Consol attacks the judge's credibility resolution, but has presented no controverting evidence that would warrant our reversal on this point. Cf. Robinette, 3 FMSHRC at 813-14. 4/

We thus affirm the judge's findings that Bjes had a good faith, reasonable belief in the existence of a hazard and that his refusal to work, based on that belief, was protected by the Mine Act. There is no dispute that Consol disciplined Bjes solely for engaging in the work refusal. Because the refusal was protected, the discipline was done in violation of section 105(c) of the Mine Act. See, for example, Secretary of Labor, Mine Safety and Health Administration (MSHA) v. Metric Constructors, Inc., 6 FMSHRC 226, 230-31 (February 1984). To the extent that Consol has argued that the discipline was legitimate because Bjes' concern rested on his comfort rather than safety, that contention is rejected.

We turn to the question of remedy. Section 105(c)(3) of the Mine Act expressly requires that if the Commission sustains the discrimination complaint of a miner proceeding on his own behalf, the Commission:

> shall issue an order ... granting such relief as it deems appropriate, including, but not limited to, an order requiring the rehiring or reinstatement of the miner to his former position with back pay and interest or such remedy as may be appropriate.... Whenever an order is issued sustaining the complainant's charges under [section 105(c)(3)] a sum equal to the aggregate amount of all costs and expenses (including attorney's

4/ Consol also contends that on July 28 Bjes did not accidentally sever the shuttle's hydraulic hoses as a result of a steering problem, but rather severed them as a result of running over a large rock. The judge did not resolve the conflict in testimony on this point. Regardless of the reason for this accident, it would not affect our conclusions in this case.

> fees) as determined by the Commission to have been reasonably incurred by the miner ... for, or in connection with, the institution and prosecution of such proceedings shall be assessed against the person committing such violation....

30 U.S.C. § 815(c)(3). As our cases have emphasized, our statutory mandate requires us to restore victims of discrimination to the status they would have occupied but for the discrimination. However, we may not unjustly enrich a discriminatee. See Secretary of Labor on behalf of Cooley v. Ottawa Silica Company, 6 FMSHRC 516, 523-25 (March 1984); Secretary of Labor v. Metric Constructors, Inc., 6 FMSHRC 226, 231-34 (February 1984); Secretary of Labor on behalf of Bailey v. Arkansas-Carbona Company, 5 FMSHRC 2042, 2049-56 (December 1983); Secretary on behalf of Dunmire and Estle v. Northern Coal Company, 4 FMSHRC 126, 142-44 (February 1982). These principles dictate remand.

In holding that Bjes was entitled to back pay during the period of his 30-day suspension, the judge did not specify what job classification or pay rate applied for calculation of the award. Any remedial relief due to Bjes must be determined, however, on the basis of whatever non-discriminatory status he would have occupied, during the 30-day period of time following his work refusal, had he not been disciplined. See Secretary on behalf of Cooley v. Ottawa Silica Co., 5 FMSHRC at 522-23. The record in this case suggests that Consol, in accord with the collective bargaining agreement, its past practice in analogous situations, and its normal business policies, had available and might have adopted any of a variety of options, e.g., assigning Bjes to operate a different shuttle car; reassigning him to scoop work; or assigning him totally different work. Other legitimate options may have been available, as indicated by Hofrichter's initial willingness to consider modifications to the shuttle. 5/ We remand so that the parties may stipulate or offer additional evidence and argument, and so that the judge may make appropriate findings, as to what Bjes' status would have been following his refusal to work had he not been discriminatorily disciplined.

As noted, the judge did not award Bjes interest on his back pay award, hearing expenses, or attorney's fees. Unless compelling reasons point to the contrary, all should be recovered by a discriminatee. The failure of Bjes' lay representative to request such relief cannot serve as a bar to its recovery. See for example, Secretary on behalf of Dunmire and Estle v. Northern Coal Co., 4 FMSHRC at 144. Accordingly, on remand, the judge shall award interest on any back pay award pursuant to the principles enunciated in our decision in Secretary on behalf of Bailey v. Arkansas-Carbona Co., supra. See Secretary on behalf of Cooley v. Ottawa Silica Co., 6 FMSHRC at 523. The judge shall also permit the parties to offer stipulation, evidence, and/or argument as to the amount, if any, of the hearing expenses, including expenses in the nature of attorney's fees, incurred by Bjes. See Secretary of Labor v. Metric Constructors, Inc., 6 FMSHRC at 233-34.

5/ Because of this initial willingness to consider modification, and because there may have been a number of alternatives available to this operator, we need not and do not decide whether the operator would be required under the Mine Act to modify the equipment, which was otherwise in full compliance with applicable regulations, as a matter of last resort.

Accordingly, for the foregoing reasons, we affirm the judge's conclusion that Consol violated the Mine Act. We remand the case to the judge for expeditious proceedings to determine appropriate relief due Bjes in accordance with the principles enunciated in this decision.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

June 26, 1984

UNITED STATES STEEL CORPORATION	:	Docket Nos. LAKE 81-102-RM
	:	LAKE 81-103-RM
v.	:	LAKE 81-114-RM
	:	LAKE 81-115-RM
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
	:	
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket Nos. LAKE 81-152-M
	:	LAKE 81-167-M
v.	:	LAKE 81-168-M
	:	
UNITED STATES STEEL CORPORATION	:	

DECISION

This consolidated proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982), presents three major issues: whether United States Steel Corporation ("U.S. Steel") violated section 103(a) of the Mine Act, 30 U.S.C. § 813(a), by restricting access by the Department of Labor's Mine Safety and Health Administration ("MSHA") to the scene of a truck rollover; whether U.S. Steel violated the same section of the Act by insisting on the presence of a corporate attorney during an investigative interview of one of its foremen; and whether it unwarrantably violated 30 C.F.R. §§ 55.9-1 and 55.9-2 by failing to record a defect affecting safety in the truck involved in the accident and by continuing to operate the truck after its foreman was aware that the truck had a defective rear end. The Commission's administrative law judge determined that U.S. Steel violated section 103(a) of the Act and the mandatory safety standard as alleged, and imposed civil penalties. 4 FMSHRC 616 (April 1982)(ALJ). For the reasons that follow, we affirm in part and reverse in part.

I.

U.S. Steel operates an open pit taconite mining operation in Iron Mountain, Minnesota, known as the Minntac Mine. During the day shift on January 21, 1981, Martin Kaivola, a field millwright, noticed that the dual rear wheels of the 2½-ton pickup truck he was driving had shifted in the wheel well. He informed his foreman, Cedric Roivanen, of the vehicle's condition. Roivanen acknowledged the report, but due to the press of other business he failed to record the defect and have it repaired. The truck was subsequently used on at least the next shift, where it was observed to be "doglegging," or steering from the rear.

On the morning of the next day, January 22, 1981, Kaivola visually inspected the truck on the ready line. Believing that the truck had been repaired, he proceeded to use it in the course of his work on a shovel repair crew. The crew used the truck on two jobs that morning. On their way back to the central shop, they drove over a rail crossing and proceeded along a straightaway. Kaivola happened to glance at the rear view mirror and noticed that the rear tires were smoking in the wheel wells. Within seconds the rear end started to steer itself around the cab. Kaivola let up on the gas pedal, the truck's drive shaft dropped loose, and the truck overturned.

Shortly thereafter, James Barmore, a U.S. Steel safety engineer, Larry Claude, a miners' representative, and James Bagley, an MSHA inspector, arrived at the mine office to take a lunch break from a regular mine inspection which MSHA was then conducting. Barmore, in the company of the other two men, was informed that a truck carrying three employees had rolled over in the pit. Barmore prepared to investigate the accident and requested that Claude accompany him. As Barmore and Claude proceeded toward the door with the inspector close behind, Barmore turned and asked the inspector where he thought he was going. Inspector Bagley said that he intended to go into the pit and examine the scene of the rollover. At this point, Barmore and Bagley entered into a verbal exchange as to whether the inspector would accompany Barmore and Claude.

Bagley and Claude testified that Barmore used profanity when addressing the inspector. Barmore denied this allegation. Bagley asserted that he had a right to go into the pit to observe the site. Barmore and Claude testified that Barmore said that Bagley could not go along with them. Barmore testified that he did not want the arrival of an inspector on the scene to be misinterpreted as the initiation of an MSHA accident investigation. Barmore and Claude proceeded to the scene of the rollover together, having stated to Bagley that on their return they would show him photographs of the site and fill him in on the details.

At the time, Bagley did not have a government vehicle at his disposal. He had arrived at the mine site that morning with MSHA Inspector Thomas Wasley, who used their vehicle for his separate purposes. It was customary practice for U.S. Steel to provide transportation to MSHA personnel in the form of a company car driven by a company safety engineer. MSHA personnel relied on this practice. Signs at the mine indicated that only authorized vehicles were allowed in the pit.

By the time that Barmore and Claude reached the scene of the truck rollover, other U.S. Steel personnel had already arrived, had taken the shovel repair crew to the clinic for treatment, and were in the process of evaluating the rollover. Kaivola, the driver, and one of the passengers, Richard Boucher, a millwright apprentice, sustained back strain injuries. Another passenger, Richard Woullet, also a millwright apprentice, received a chipped elbow fracture. The truck had landed right side up on its wheels. The box of the truck had been torn off and was lying upside down. The drive shaft had separated and was lying on the ground. The rear axle had shifted, the spring package had broken, and spring leaves were scattered about the

scene. Barmore took photographs of the wreckage and the surrounding area and returned with Claude to the mine office after some 20-45 minutes. They discussed the rollover with Bagley and showed him the photographs taken at the scene. Bagley was told that the employees involved in the rollover had received restricted duty injuries.

The next day, after consulting with his supervisor, Bagley returned to the mine and issued a citation to U.S. Steel under section 104(a) of the Mine Act, 30 U.S.C. § 814(a). The citation alleged that U.S. Steel violated section 103(a) of the Act because Barmore had denied Bagley "the opportunity to evaluate the cause of the accident or to determine if any mandatory safety or health standard had been violated." 1/ MSHA did not proceed with its

1/ Section 103(a) of the Act provides:

> Authorized representatives of the Secretary or the Secretary of Health, Education, and Welfare shall make frequent inspections and investigations in coal or other mines each year for the purpose of (1) obtaining, utilizing, and disseminating information relating to health and safety conditions, the causes of accidents, and the causes of diseases and physical impairments originating in such mines, (2) gathering information with respect to mandatory health or safety standards, (3) determining whether an imminent danger exists, and (4) determining whether there is compliance with the mandatory health or safety standards or with any citation, order, or decision issued under this title or other requirements of this Act. In carrying out the requirements of this subsection, no advance notice of an inspection shall be provided to any person, except that in carrying out the requirements of clauses (1) and (2) of this subsection, the Secretary of Health, Education, and Welfare may give advance notice of inspections. In carrying out the requirements of clauses (3) and (4) of this subsection, the Secretary shall make inspections of each underground coal or other mine in its entirety at least four times a year, and of each surface coal or other mine in its entirety at least two times a year. The Secretary shall develop guidelines for additional inspections of mines based on criteria including, but not limited to, the hazards found in mines subject to this Act, and his experience under this Act and other health and safety laws. For the purpose of making any inspection or investigation under this Act, the Secretary, or the Secretary of Health, Education, and Welfare, with respect to fulfilling his responsibilities under this Act, or any authorized representative of the Secretary or the Secretary of Health, Education, and Welfare, shall have a right of entry to, upon, or through any coal or other mine.

30 U.S.C. § 813(a).

own independent investigation of the rollover. However, on February 5, 1981, MSHA received a miner's request, pursuant to section 103(g) of the Act, 30 U.S.C. § 813(g), that the rollover accident be investigated.

In response to the section 103(g) request, Inspectors Bagley and James King returned to the mine on February 9, 1981. They gave a copy of the section 103(g) request to Steve Starkovich, safety supervisor for U.S. Steel's Minnesota ore operations. Starkovich provided the inspectors with a copy of the company's accident report. The inspectors informed Starkovich that they wanted to look at the truck, speak with members of the shovel repair crew, and speak with the crew foreman. Starkovich said that there would be no difficulty in viewing the truck and in interviewing the hourly employees, but that he could not let them interview Roivanen, the foreman, unless a U.S. Steel attorney were present. Bagley informed him that it would be necessary to interview Roivanen, and that arrangements should be made to provide an attorney as soon as possible.

The inspectors examined the truck. When Kaivola, the driver, could not be located, Bagley asked Ron Rantala, a U.S. Steel safety engineer, if they could interview Roivanen. Rantala also advised them that they could not interview the foreman unless a U.S. Steel attorney were present. Kaivola was subsequently located and interviewed.

On February 11, 1981, Inspectors Bagley and Wasley returned to the mine and again informed Starkovich that they wanted to interview Roivanen. Starkovich said that they could not interview him unless a U.S. Steel attorney were present and that he had not yet received word from U.S. Steel headquarters as to when an attorney would be available.

The inspectors told Starkovich that they wished to interview Boucher and Woullet, the passengers in the truck. Starkovich testified that he informed them that Boucher and Woullet were in training at a vocational technical school and that they would return on February 17, 1981. Starkovich stated that he discussed with the inspectors the possibility of interviewing the two miners on their return to work and the possibility that a U.S. Steel attorney could be present that same day to allow MSHA to interview Roivanen. Bagley and Wasley testified that Starkovich made no mention of when Boucher and Woullet would return to work, nor when a U.S. Steel attorney would be available. Starkovich advised the inspectors that Roivanen would not talk to them about the accident.

Bagley returned to the mine the next day, February 12, 1981, and issued a section 104(a) citation to U.S. Steel alleging another violation of section 103(a) of the Mine Act. The citation alleged that Starkovich's refusal on February 9 and February 11 to allow the MSHA inspectors the opportunity to confer with Roivanen "constitutes interference with and impedance of ... an MSHA accident investigation." Upon receiving the citation, Starkovich telephoned company headquarters and informed the inspectors that a U.S. Steel attorney would be present the following day. Based upon this information, Bagley set the termination date on the citation for the next day. The inspectors then went to the vocational technical school and interviewed Boucher and Woullet.

On February 13, 1981, Ronald Fischer, a U.S. Steel attorney who primarily handled worker's compensation matters, came to the mine and was present while the inspectors interviewed Roivanen. Roivanen informed them that he had been advised by his supervisor that the company preferred that he have the benefit of counsel concerning the truck rollover. Roivanen told the inspectors that the shifting condition of the rear wheels had been reported to him and that he failed to record the problem and failed to effect any repairs because he forgot.

On March 9, 1981, as a result of MSHA's truck rollover accident investigation, Bagley issued two orders of withdrawal to U.S. Steel under section 104(d)(1) of the Mine Act, 30 U.S.C. § 814(d)(1). 2/ The orders alleged violations of 30 C.F.R. §§ 55.9-1 and 55.9-2, mandatory safety standards concerning the reporting and recording of safety defects in equipment and the correction of safety defects before the equipment is used. 3/ Additionally, the orders charged that the violations were both

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2/ Section 104(d)(1) of the Act provides:

> If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation does not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this Act. If, during the same inspection or any subsequent inspection of such mine within 90 days after the issuance of such citation, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsection (c) to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.

30 U.S.C. § 814(d)(1).

3/ 30 C.F.R. § 55.9-1 provides:

> Mandatory. Self-propelled equipment that is to be used during a shift shall be inspected by the equipment operator before

(Footnote continued)

"significant and substantial" and caused by the operator's "unwarrantable failure" to comply with the cited mandatory safety standards. In the withdrawal order alleging a violation of 30 C.F.R. § 55.9-1, the inspector found:

> [Roivanen] confirmed that the shifting rear end had in fact been reported to him on January 21, 1981, but that he had forgotten about it. The company could produce no records of the unsafe condition being reported, hence, did not demonstrate reasonable care in recording or maintaining a record of an equipment defect which was reported and which affected the safety of three employees.

In the withdrawal order alleging a violation of 30 C.F.R. § 55.9-2, the inspector found:

> The truck was not removed from service to correct the reported defect, but continued to be used for the remainder of the shift on which it was reported. The truck was also used on the following afternoon shift and again during the shift on which the accident occurred. The failure of the operator to act on information that gave him knowledge, or reason to know, that an unsafe condition existed, which affected the safety of three employees, is unwarrantable.

The Commission administrative law judge to whom these cases were originally assigned conducted two days of hearings. Post-hearing briefs were submitted by the parties. However, prior to issuing a decision, the presiding judge left the Commission. The cases were reassigned to a substitute Commission administrative law judge. After notice to the parties of the substitution and of his intention to decide the case, the judge issued an extensive 62-page decision based upon the existing record. 4/

Fn. 3/ continued

> being placed in operation. Equipment defects affecting safety shall be reported to, and recorded by the mine operator. The records shall be maintained at the mine or nearest mine office for at least 6 months from the date the defects are recorded. Such records shall be made available for inspection by the Secretary of Labor or his duly authorized representative.

30 C.F.R. § 55.9-2 provides:

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

4/ Prior to the issuance of the substitute judge's decision, the section 104(d)(1) withdrawal order alleging a violation of section 55.9-1 was modified by the Secretary to a section 104(d)(1) citation, and the other withdrawal order was modified to reflect that it was based on that citation.

In his decision, the judge held that U.S. Steel violated section 103(a) of the Mine Act when Barmore prevented Bagley from going to the scene of the rollover. 4 FMSHRC at 626-37. He also held that U.S. Steel violated section 103(a) of the Act when Starkovich prevented Bagley from interviewing Roivanen until a U.S. Steel attorney could be present. 4 FMSHRC at 643-59. With regard to the remaining contests, the judge held that U.S. Steel violated 30 C.F.R. § 55.9-1 when Roivanen failed to record the equipment defect reported to him by Kaivola, and that it violated 30 C.F.R. § 55.9-2 when the equipment defect in the truck was not corrected before the equipment was used. 4 FMSHRC at 663-72. The judge also held that these violations were unwarrantable.

II.

As a preliminary matter, U.S. Steel argues for the first time on review that the substitute judge erred in resolving conflicts in the testimony of Barmore, Bagley, and Claude concerning what Barmore told Bagley on the day he refused to allow him access to the scene of the truck rollover. U.S. Steel asserts that the judge should not have resolved this testimonial conflict because he did not preside at the hearing and, thus, did not have the opportunity to observe the witnesses' demeanor. The Secretary of Labor contends that U.S. Steel is precluded from raising this objection to the substitute judge's decision because it failed to raise it before the judge.

Under the Administrative Procedure Act ("APA"), agencies are authorized to have a case decided by a substitute judge when, as in this case, the presiding judge becomes unavailable to the agency. 5 U.S.C. § 554(d). Cf. Fed. R. Civ. P. 63. If the case is one in which the resolution of material conflicting testimony requires a determination of the credibility of witnesses, a de novo hearing may be procedurally necessary, unless the parties consent to dispense with, or waive, a rehearing. See, e.g., New England Coalition on Nuclear Pollution v. NRC, 582 F.2d 87, 99-100 (1st Cir. 1978); Gamble-Skogmo, Inc. v. FTC, 211 F.2d 106, 113-15 (8th Cir. 1954); Van Teslaar v. Bender, 365 F. Supp. 1007, 1012 (D. Md. 1973). However, under the APA, a party must object to a substitute judge's proceeding at a time appropriate under that agency's practice. Braswell Motor Freight Lines, Inc. v. United States, 271 F. Supp. 906, 910-11 (W.D. Tx. 1967). Further, the Mine Act and the Commission's Rules of Procedure provide:

> ... Except for good cause shown, no assignment of error by any party shall rely on any question of fact or law upon which the administrative law judge has not been afforded an opportunity to pass....

30 U.S.C. § 823(d)(2)(A)(iii); Commission Procedural Rule 70(d), 29 C.F.R. § 2700.70(d).

U.S. Steel admits in its brief that it was notified on February 4, 1982, of the substitute judge's intention to render a decision. The judge's decision was issued on April 15, 1982, thus giving U.S. Steel approximately 65 days within which to object to the substitution of this judge. Having been put on notice and having failed to raise any objection prior to the issuance of his decision, U.S. Steel can fairly be found to have consented to, or waived any objection to, this procedure. The judge was properly substituted, gave the

parties notice of his intention to render a decision on the existing record, and afforded them ample time within which to object. 5/ We discern no "good cause" to give further consideration to this procedural challenge of U.S. Steel on review. Thus, we conclude that the judge was properly substituted and properly proceeded to decide the case. Nevertheless, we have specific reservations about certain findings of the judge and the civil penalty consequences which flow from those findings. We address these problems below.

III.

U.S. Steel contends that the judge erred in concluding that it violated section 103(a) of the Mine Act by preventing Inspector Bagley from inspecting or investigating the site of the truck rollover on January 22, 1981. U. S. Steel's argument centers around the Secretary's authority to investigate accidents. U.S. Steel argues that the Secretary, by his regulations at 30 C.F.R. Part 50, restricted the Act's definition of the term "accident" to a manageable administrative threshold. 6/ According to U.S. Steel's theory, because the injuries sustained by the truck's occupants did not meet the "reasonable potential to cause death" standard found at 30 C.F.R. § 50.2(h)(2), it was under no obligation to take the Secretary's representative to the site of the rollover.

We find it unnecessary in reaching our decision to discuss whether or not Part 50 imposes any limits on the Secretary's accident investigation authority under section 103(a) of the Act. Under the facts of this case, sufficient grounds existed for Inspector Bagley, as the authorized representative of the Secretary, to inspect the site of the rollover pursuant to section 103(a) of the Act. Section 103(a) confers on the

5/ A party cannot be permitted to reserve its objection "if it should develop that the [findings] of the [judge] ... were not to his liking." Braswell Motor Freight Lines, Inc. v. United States, 271 F. Supp. at 911, cited in Merchants Fast Motor Lines Inc. v. ICC, 528 F.2d 1042, 1044 (5th Cir. 1976). However, the procedural concerns triggered by the substitution of the judge in this case suggest that it would be a desirable practice in future substitution situations, arising after the hearing has been conducted, for the substitute judge to include in his notice of intent to render a decision on an existing record, a specific time within which objections to the substitute judge rendering a decision may be filed. Any objection must be founded on a showing of a need for resolution of material conflicting testimony requiring demeanor-based credibility determinations. In addition, any rehearing should be limited, so far as practicable, to the testimonial areas in dispute. See generally New England Coalition on Nuclear Pollution v. NRC, 582 F.2d at 99-100.

6/ Section 3(k) of the Act, 30 U.S.C. § 802(k), states that the term "accident" "includes a mine explosion, mine ignition, mine fire or mine inundation, or injury to, or death of, any person." 30 C.F.R. § 50.2(h)(2) defines an "accident" as: "An injury to an individual at a mine which has a reasonable potential to cause death."

Secretary's representatives authority to make "frequent inspections and investigations" for the purpose of determining whether an imminent danger exists, or whether there is noncompliance with mandatory safety or health standards, citations, orders or decisions issued under the Act, or "other requirements" of the Act. 30 U.S.C. § 813(a). Bagley was present on the mine property to conduct a regular mine inspection required by the Act and had authority to inspect the mine in its entirety. Section 103(a) places no boundary on the areas of a mine that an authorized representative may inspect or limitations on the sequence he may employ to complete his inspection. In light of the equipment rollover and, as even Barmore's testimony reflects, the attendant possiblity of a fuel tank explosion, Bagley also had authority to determine whether an imminent danger existed. He likewise had authority to determine whether there was compliance with mandatory safety or health standards, or other requirements of the Act.

U.S. Steel also argues that the words and actions of Barmore, U.S. Steel's safety engineer, did not amount to a refusal to grant Bagley access to the scene of the rollover. While some of the events that transpired at the mine office prior to Barmore's departure to the rollover site are in dispute, the judge's finding that Barmore prevented Bagley from going to the scene of the accident is supported by substantial evidence. Uncontroverted evidence makes it clear that U.S. Steel had customarily provided MSHA personnel on mine property with a company vehicle driven by a company representative and that MSHA had come to rely on this practice. Barmore claimed that Bagley could have requested permission to use a company vehicle. However, Starkovich, Barmore's supervisor, testified that even if the inspector had requested a vehicle to go to the scene of the truck rollover, he would have refused pending an examination of the accident by a U.S. Steel safety engineer to determine the type of accident involved. Barmore's refusal to allow the inspector to accompany him in a company vehicle effectively left the inspector without any means of transportation to the site of the truck rollover. Barmore's denial of transportation, and Starkovich's testimony that he would have confirmed that decision, provide substantial evidence to support the judge's conclusion that U.S. Steel violated section 103(a) of the Act by preventing Bagley from inspecting the scene of the truck rollover.

While the uncontroverted evidence of record supports the judge's conclusion that there was a violation, we conclude that certain findings the judge made in assessing the civil penalty for the violation are not supported by substantial evidence. Notwithstanding Barmore's denials, the judge found that Barmore employed a "sudden, hostile and arrogant manner" in precluding Bagley from visiting the scene of the rollover; that Barmore had "a certain amount of disdain" for Bagley; that Barmore was "indifferen[t]" about the way he treated inspectors; that Barmore used "rough language" in addressing Bagley; and that U.S. Steel's violation of section 103 was "done with considerable animosity and hostility." The judge also opined that U.S. Steel's actions had an adverse impact on MSHA's inspection program in general. These findings figured prominently in the judge's assessment of a civil penalty with regard to the gravity and negligence criteria of section 110(i) of the Mine Act. 30 U.S.C. § 820(i). He based $1,500 of his $1,510 assessed penalty on those two criteria.

In assessing the penalty, the judge considered each of the six statutory penalty criteria. With the exception of the gravity and negligence elements, we find that substantial evidence in the record supports the judge's findings. On the issue of gravity, we agree with the judge that the violation was serious because it thwarted an authorized representative's attempts to insure compliance with the Act. However, it is apparent that he exaggerated "the demoralizing effect which Barmore's action had on MSHA's inspection responsibilities." Whether Bagley's hesitance in asserting his authority to inspect the scene of the truck rollover was due to Barmore's statements or to his own inhibitions is difficult to determine. Moreover, we find no evidence to suggest that Barmore's actions had any negative effect on MSHA's enforcement program in general. Thus, we conclude that the judge's penalty assessment overstated the gravity of the violation.

Regarding the operator's negligence, we agree with the judge that the violation was deliberate, but note that U.S. Steel's refusal to allow MSHA access to the site of the rollover was based, at least in part, on its erroneous legal interpretation of the Secretary's authority to inspect. To support his conclusion that Barmore had "a certain amount of disdain" for Bagley, and thus demonstrated a high degree of negligence imputable to U.S. Steel, the judge relied on an extract from Barmore's own testimony. 4 FMSHRC at 641-42. In this passage, Barmore confessed to an inability to evaluate Bagley's subjective mental reaction to Barmore's refusal to allow him to proceed to the site of the rollover. However, the cold words of the transcript are susceptible to various interpretations, at least as valid as the disdain attributed to them by the judge. The judge did not have the opportunity to observe Barmore's demeanor on the stand, and we do not find that the cold record provides a sufficient basis upon which to reach this conclusion. Similarly, Barmore also denied swearing at Bagley (Tr. 182-185), and yet the judge failed to explain why he disbelieved Barmore, whose testimony was not inconsistent or contradictory. Finally, the judge concluded that Barmore's treatment of the inspector would not have provided as strong a basis for adversely evaluating the operator's negligence had Starkovich, Barmore's supervisor, evinced disagreement with the manner in which Barmore proceeded. However, the record indicates that Starkovich agreed with Barmore's actions only as a matter of company policy. Although that policy proved to be in error, there is nothing in Starkovich's testimony to indicate hostility or disdain on his part, or condonation of any such behavior by Barmore. Given a lack of substantial support in the record, the judge's conclusion that the operator exhibited a high degree of negligence cannot stand. We, therefore, disavow his comments.

While a judge's assessment of a penalty is an exercise of discretion, assessments lacking record support, infected by plain error, or otherwise constituting an abuse of discretion are not immune from reversal by this Commission. See Sellersburg Stone Co., 5 FMSHRC 287, 292-94 (March 1983), affirmed, No. 83-1630 (7th Cir. June 11, 1984); Southern Ohio Coal Co., 4 FMSHRC 1459, 1465 (August 1982); Knox County Stone Co., Inc., 3 FMSHRC 2478, 2480-81 (November 1981). Discounting the judge's findings analyzed above, we conclude that a penalty assessment of $400, the figure originally proposed by the Secretary for the violation, is appropriate and consistent with the statutory criteria. See Southern Ohio Coal Co., 4 FMSHRC 1459, 1465 (August 1982).

IV.

The next issue is whether the judge erred in holding that U.S. Steel violated section 103(a) of the Act by insisting on the presence of a U.S. Steel attorney when MSHA sought to interview foreman Roivanen. U.S. Steel argues on review that the APA provides for a right to counsel when a company supervisor is interviewed by a representative of the Secretary during the course of an investigation. The Secretary argues that the right to counsel is not an issue in this case because the right is a personal one and Roivanen himself never sought to be represented by counsel. Rather, the Secretary contends that U.S. Steel sought to have its counsel present when Roivanen was interviewed and impeded the investigation when it failed to notify MSHA within a reasonable time when the Secretary's representative could interview Roivanen.

The issue of whether a non-party witness involved in an MSHA investigation has a right to benefit of counsel during a non-compulsory, investigative interview is not directly before us because Roivanen did not seek to be represented by counsel and never asserted a personal right to representation during an MSHA interview. Assuming, however, for the sake of discussion, that the APA provides such a right, and that the right is incorporated by reference under the Mine Act, the right would have to be exercised in a reasonable manner. See United States ex rel. Baskerville v. Deegan, 428 F.2d 714, 716 (2nd Cir. 1970), cert. denied, 400 U.S. 928 (1970). Cognizant of that principle, we address the issue of whether the actions of Starkovich constituted an unreasonable impedance of the MSHA accident investigation.

The evidence shows that on February 9, 1981, after receiving a miner's section 103(g) request for an investigation, Inspectors Bagley and King returned to the mine to investigate the rollover accident. Starkovich told them that they could not interview foreman Roivanen unless a U.S. Steel attorney were present. Bagley informed Starkovich that it would be necessary for MSHA to interview Roivanen and that arrangements should be made to provide an attorney as soon as possible. Starkovich indicated that he would let the inspectors know when an attorney would be available, but did not offer any date on which the inspectors could proceed with their investigation and interview Roivanen. These facts indicate that MSHA was willing to accommodate, at least temporarily, U.S. Steel's desire for the presence of a U.S. Steel attorney during the interview with its foreman. Two days later the inspectors returned to the mine and Starkovich informed them that he had not yet received word from U.S. Steel headquarters as to when an attorney would be available. Such an open-ended response to the inspector's instruction that an attorney be provided as soon as possible was unreasonable. This conclusion is bolstered by the fact that after receiving the citation, Starkovich made a single telephone call and was able to inform the inspectors that a U.S. Steel attorney would be present the next day.

Even assuming that U.S. Steel was within its rights in insisting on the presence of a company attorney, Starkovich's failure to specify a date certain when an attorney would be present, combined with the failure to produce an attorney, had the effect of unreasonably delaying the accident investigation. We therefore conclude that substantial evidence supports the judge's conclusion that U.S. Steel impeded the MSHA investigation in violation of section 103(a) of the Act.

U.S. Steel also argues that in assessing a penalty of $80 for this violation, the judge erred in considering arguments contained in its post-hearing brief. The judge determined that U.S. Steel's complaints about having to send an attorney somewhat less experienced in the field of mine safety law in order to abate the violation largely offset any conclusion that the speed it had exhibited in abating the citation demonstrated "good faith" that should be used as a reason for reducing the penalty otherwise assessable.

We agree with U.S. Steel that under the Mine Act "good faith" should be judged in terms of objective attempts to achieve rapid compliance after notification of a violation. We also note that the parties stipulated that U.S. Steel demonstrated good faith in abating the citation at issue within the time provided. Therefore, we reverse the judge on this point and reduce the assessed penalty from $80 to $70.

V.

With respect to the judge's findings that U.S. Steel violated 30 C.F.R. §§ 55.9-1 and 55.9-2 (n. 3, supra) in connection with the truck rollover, U.S. Steel argues that the judge misconstrued the phrase "defect affecting safety" contained in those standards by defining it in terms of injury or loss to the vehicle. The operator also contends that the alleged violations could not have been "significant and substantial" within the meaning of our Cement Division, National Gypsum Co. decision, 3 FMSHRC 822 (April 1981), because the judge characterized the probability of injury as remote. Finally U.S. Steel maintains that substantial evidence does not support the judge's conclusion that the alleged violations were the result of its unwarrantable failure to comply with the cited standards.

Relying on ordinary usage, the judge applied the dictionary definition of the term "defect" to the dictionary definition of the term "safety." He found that failed brakes and disconnected drive shafts were "shortcomings" or "imperfections" in a truck with a shifted rear end, and that these defects constituted conditions which would prevent persons riding in a vehicle from feeling "safe from undergoing" an "injury or loss." The judge intimated that because an accident occurred, it was certain that the truck's shifted rear end was a defect affecting safety. He nonetheless went on to state that inasmuch as a shifted rear end was a defect and because the potential consequences of its presence affected safety, the record supported a finding that the shifted rear end of the truck constituted a defect affecting safety.

We find the judge's legal reasoning to be generally in accord with our decision in Ideal Basic Industries, Cement Division, 3 FMSHRC 843 (April 1981), in which we construed 30 C.F.R. § 56.9-2, a regulation identical to section 55.9-2 and applicable to sand, gravel, and crushed stone mining operations. There we held "that use of a piece of equipment containing a defective component that could be used and which, if used, could affect safety, constitutes a violation of 30 C.F.R. § 56.9-2." 3 FMSHRC at 844. Substantial evidence also supports the judge's conclusion that the shifted rear end of this truck was a defect affecting safety within the meaning of the two standards involved in this case. There is evidence in the record that a shifted rear end is a sign of mechanical defect, with a potential to cause an accident. Also, at some point, a shift in a vehicle's rear end will affect safety. John Primozich,

the foreman of the auto repair shop at the Minntac Mine, testified that he would not operate a truck in which the rear end had shifted two and one half inches because he would not feel safe. In this particular instance, the shifted rear end caused the spring package to break, a punctured rear tire, the broken drive shaft to separate from the vehicle, and the truck to roll over. The truck rollover caused several back strain injuries and a chipped elbow fracture. There is no question that the rollover had the potential for more serious injury. All of these facts point to a defect affecting safety.

It is also clear that, as the judge found, U.S. Steel violated the two standards by not recording information regarding the shift in the truck's rear end and by failing to correct the defects before the truck was used. Kaivola, the driver, orally reported the condition to his foreman, Roivanen. Roivanen acknowledged the report, but made no attempt to report or record the complaint because he was preoccupied with other affairs and simply forgot. Kaivola testified that the shovel repair shop had always had an oral system of reporting complaints to the supervisor. Roivanen testified that normally he would have informed the afternoon shift foreman of the complaint and he, in turn, would have sent the truck to the auto repair shop in order to have it repaired and back in service by the next day shift.

In his decision, the judge referred to these and other facts. Thus, substantial evidence supports the judge's conclusion that U.S. Steel failed to record the defect affecting safety as required by 30 C.F.R. § 55.9-1. It is undisputed that U.S. Steel did not correct the shift in the rear end before the truck was used and, therefore, violated 30 C.F.R. § 55.9-2 as well.

U.S. Steel contends that the alleged violations of these standards could not have been "significant and substantial" within the meaning of National Gypsum because the judge characterized the probability of injury as remote. The judge found that a significant and substantial violation required "at least a remote possibility of injury and, additionally, that there should exist a reasonable likelihood of occurrence of an injury or illness of a reasonably serious nature." He concluded that the violations were significant and substantial because shifting rear ends "were associated with a remote possibility of an injury which would have a reasonable likelihood of occurrence and be of a reasonably serious nature."

In National Gypsum, the Commission defined a significant and substantial violation as requiring the existence of "a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." 3 FMSHRC at 825. As we stated recently:

> In order to establish that a violation of a mandatory safety standard is significant and substantial under National Gypsum, the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard--that is, a measure of danger to safety--contributed to

by the violation; [7/] (3) a reasonable likelihood that the hazard contributed to will result in injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

Consolidation Coal Co., 6 FMSHRC 189, 193 (February 1984).

It is obvious that the judge's definition of what constitutes a significant and substantial violation differs from that employed by the Commission in National Gypsum. The judge obscured the necessary probability element by addressing it in terms of both a "remote possibility" and a "reasonable likelihood." Nevertheless, substantial evidence supports the judge's ultimate conclusion that the violations were significant and substantial within the meaning of National Gypsum. There is evidence that a shifted rear end is a sign of mechanical defect, with a potential to cause an accident. There are statements that at some point, a shift in a vehicle's rear end will affect safety. There is also the testimony of Primozich, the auto repair shop foreman, that he would not operate a truck in which the rear end had shifted two and one half inches because he would not feel safe. Further, the presence of this kind of defect affecting safety in equipment that is subsequently used presents at least a reasonable likelihood that an injury will result. We, therefore, conclude that substantial evidence supports the judge's ultimate conclusion that the violations were significant and substantial within the meaning of National Gypsum.

By contrast, the issue of whether the violations were the result of the operator's unwarrantable failure is more straightforward. U.S. Steel argues that the Secretary failed to prove that Roivanen knew or should have known that the shift in the truck's rear end could affect safety. It maintains that this mechanical problem was not normally considered to be a defect affecting safety, but rather a maintenance item to be corrected in the normal course of operations. The judge repeatedly rejected that argument and found that Roivanen was aware of the fact that wheels could rub in the wheel wells, smoke, and even stall a vehicle's engine. He concluded that the evidence controverted U.S. Steel's claim that prior experience with shifted rear ends would not have enabled Roivanen to foresee the possibility that the vehicle's mechanical condition was more than a maintenance item and could affect safety. The judge also found that Roivanen, under the pressure of other duties, forgot about Kaivola's having reported the shifted rear end to him, and that he failed to report and record the defect and failed to remove the affected equipment from service.

We note that the Interior Board of Mine Operations Appeals interpreted an identical reference to "unwarrantable failure" in the 1969 Coal Act, 30 U.S.C. § 801 et seq.(1976)(amended 1977). Zeigler Coal Co., 7 IBMA 280 (March 1977). There the Board stated:

7/ We note that this case involves the violation of mandatory safety standards. We have pending before us a case raising a challenge to the application of National Gypsum to a violation of a mandatory health standard. Consolidation Coal Co., FMSHRC Docket No. WEVA 82-209-R, etc. We intimate no views at this time as to the merits of that case.

> [A]n inspector should find that a violation of any mandatory standard was caused by an unwarrantable failure to comply with such standard if he determines that the operator involved has failed to abate the conditions or practices constituting such violation, conditions or practices the operator knew or should have known existed or which it failed to abate because of a lack of due diligence, or because of indifference or lack of reasonable care.

7 IBMA at 295-96. 8/ The Senate Committee largely responsible for drafting the bill that became the Mine Act specifically approved the Zeigler interpretation of the term unwarrantable failure. S. Rep. No. 181, 95th Cong., 1st Sess. 31-32 (1977) reprinted in Subcommittee on Labor, Senate Committee on Human Resources, 95th Cong., 2nd Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 619-20 (1978). This case does not require us to examine every aspect of the Zeigler construction, but we concur with the Board to the extent that an unwarrantable failure to comply may be proved by a showing that the violative condition or practice was not corrected or remedied, prior to issuance of a citation or order, because of indifference, willful intent, or a serious lack of reasonable care.

Roivanen's testimony indicates that he was aware that a shifted rear end could cause a truck's wheels to rub in the wheel wells, smoke, and even stall a vehicle's engine. These facts, as previously discussed, are consistent with the judge's finding of a defect affecting safety, rather than a maintenance item. Roivanen also admitted that normally he would have taken the truck to the repair shop at the end of the shift or left instructions with the afternoon shift foreman to see to the repairs, but that he simply "forgot." Roivanen's lapse in memory can be regarded as demonstrative of a serious lack of reasonable care. His failure to take corrective action to remedy the violations ultimately contributed to the occurrence of the rollover. In sum, all these facts provide substantial support for the judge's conclusion that the violations were the result of the operator's unwarrantable failure to comply with the cited standards. Contrary to U.S. Steel's position, we agree with the judge and find substantial support for his conclusion that the shifted rear end of this truck was a defect affecting safety within the meaning of 30 C.F.R. §§ 55.9-1 and 55.9-2, and not an item of maintenance. Therefore, we affirm the judge's conclusion as to the violations of the standards, as well as his assessment of $255 for each of the violations.

8/ The Board's use of the term "abate" refers to correction of the violative condition or practice prior to issuance of a citation or order.

VI.

Based on the foregoing reasons, the decision of the administrative law judge is affirmed in part and reversed in part. His penalty assessment is consequently reduced from $2100 to $980.

Rosemary M. Collyer, Chairman

Richard V. Backley, Commissioner

L. Clair Nelson, Commissioner

Commissioner Jestrab, concurring in part:

I concur in this decision, except that I would not reduce the civil penalties assessed by the administrative law judge.

Frank F. Jestrab, Commissioner

Commissioner Lawson dissenting:

The majority properly affirms the conclusion of the judge below that U. S. Steel violated section 103(a) of the Act and the cited mandatory safety standards, as indeed it must given the facts of this case. 1/ However, no credible rationale has been advanced for either the penalty reductions for this operator's deliberate flouting of the Act, or for the majority's disregard of the substantial evidence found by the judge below to support imposition of the penalties he assessed. Henceforth, an operator's deliberate defiance obviously generates reduced penalties. This error is compounded by uncritical acceptance of the Secretary's "proposed" penalty assessment of $400, without discussion or explanation of how that figure is "appropriate and consistent with the statutory criteria." Slip op. at 10. 2/

Section 110(i) of the Act provides:

> 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 proposing civil penalties under this Act, the Secretary may rely upon a summary review of the information available to him and shall not be required to make findings of fact concerning the above factors.

It is clear from the statutory language that, although the Secretary is not required to make findings of fact concerning the statutorily enumerated penalty factors, the Commission is. In a penalty proceeding before the Commission, the Secretary's proposed penalties are merely suggestive, and the amount of the penalty to be assessed is a de novo determination based on the six statutory criteria. United States Steel Mining Co., Inc., Docket No. PENN 82-328 (May 31, 1984); Sellersburg Stone Co., 5 FMSHRC 287, affirmed, No. 83-1630 (7th Cir. June 11, 1984); see also Rushton Mining Company, Inc., 1 FMSHRC 794 (1979); Shamrock Coal Co., 1 FMSHRC 799 (1979); Pittsburgh Coal Co., 1 FMSHRC 1468 (1979); Co-op Mining Company, 2 FMSHRC (1980).

1/ On the basis of the criteria set forth in my separate opinion in Cement Division, National Gypsum Co., 3 FMSHRC 822 (April 1981), the violations of the mandatory safety standards are, as found, significant and substantial.

2/ The Act nowhere mandates nor even recommends acceptance of the Secretary's proposed penalties. To the contrary, the Act unambiguously provides that the sole authority to assess all civil penalties provided in the Act resides with the Commission. Section 110(i).

The majority has determined, for reasons unknown or at least unexplained, that a $1,510 penalty, assessed because U. S. Steel violated the Act by preventing Inspector Bagley from inspecting the accident site, is too high, but $400 is "appropriate." It reaches this result by concluding--without record support--that the judge improperly based $1500 of his penalty assessment on inappropriate negligence and gravity criteria findings.

The obvious difficulty with this rationale is that the majority has failed to make any findings under the statutory criteria of negligence or gravity. From all that can be discerned from the majority opinion, $1 or nothing would be equally "appropriate" under the "negligence" rubric, or $400 or nothing under that of "gravity." Indeed any arbitrarily selected figure between these extremes would be equally valid, or invalid. This hardly meets either the section 110(i) mandate or any other criteria founded upon a rational relationship between the statute and the penalty amounts required to be assessed thereunder.

In contrast, the judge below made specific findings which are in conformity with the stipulation of the parties and substantial evidence of record. With respect to four of the six statutory criteria for penalty assessment; viz, U. S. Steel's ability to continue in business, the good faith demonstrated, the operator's history of previous violations, and the size of this operator, the findings are unchallenged by my colleagues. However, the majority asserts that certain other "findings" the judge made in these penalty assessments that "figured prominently" in the judge's penalty assessment were not supported by substantial evidence. Slip op. at 9.

Finding support in Commission precedent that permits reversal of a judge's penalty assessment for lack of record support, 3/ my colleagues conclude that the judge overstated the gravity of the violation and lacked substantial record support for his findings of a high degree of negligence. With respect to gravity, the judge found:

> The violation of section 103(a) was moderately serious because Barmore's refusal to permit Inspector Bagley to accompany him and Claude to the scene of the truck's rollover prevented an MSHA inspector from being able to carry out his functions as an inspector, those functions being, as hereinbefore explained, the checking of accident sites to determine whether an imminent danger exists and whether violations of the mandatory health and safety standards have occurred.

* * *

3/ My consistent, and statutorily supported, position has been that the Commission may not substitute its view of the statutory penalty factors for that of the judge below. See Southern Ohio Coal Co., 4 FMSHRC 1459 August 3, 1982)(dissenting opinion).

> The citation was not terminated until February 9, 1981, when the inspector was permitted to examine the truck after it had been towed or hauled to USS's auto repair shop. The delay which resulted in the inspector's being able to examine the truck and interview witnesses not only prevented the inspector from being able to get first-hand information at the scene of the accident, but brought about a considerable duplication of effort which could have been avoided if the inspector had been permitted to accompany Barmore to the scene of the accident in the first instance.
>
> Considering the demoralizing effect which Barmore's action had on MSHA's inspection responsibilities, a penalty of $500 is warranted under the criterion of gravity.

4 FMSHRC 616, 640-41. The judge's characterization of Barmore's conduct to which the majority refers, relates not to gravity, but to his rejection of U. S. Steel's contention that the inspector was not precluded from making the inspection because he had the power to go anywhere on mine property to inspect without U. S. Steel's consent. The judge concluded that the inspector was precluded from inspecting the rollover site because of Barmore's "sudden, hostile, and arrogant manner of forbidding the inspector to accompany him," the lack of transportation, the lack of a U. S. Steel safety engineer as an escort, and the lack of an accompanying miners' representative. 4/ 4 FMSHRC at 641.

The facts and clear record testimony make it evident that the dispute between mine inspector Bagley and U. S. Steel were not legalistic quibbles over statutory application. Despite the lessons of Donovan v. Dewey, 452 U.S. 594 (1981), this operator deliberately decided to challenge the core of the statute, the mine inspector's indisputable right to inspect this mine for not only potential safety violations, but, as in this case, those which have actually caused injury. It is contended--although not explained--that the "cold words of the transcript" are "susceptible to various interpretations" (slip op. at 10). To the contrary, one need hardly strain to find copious and substantial evidence in support of the judge's interpretation. Observation of demeanor (slip op. at 10) is unnecessary given the record before us. Indeed, one need look no further than the transcribed testimony of the operator's own witnesses. The admissions of its chief witness, Barmore, are sufficient in themselves to support the judge's conclusions. 5/

4/ The majority's suggestion that Bagley's hesistance in asserting his inspection authority may have been due to his own inhibitions is more properly addressed to the merits, as was the judge's contrary view. My colleagues would reward Barmore's defiance and penalize "Bagley's hesistance in asserting his authority." Slip op. at 10. Apparently, if Barmore had commandeered a vehicle to travel to the accident scene, that would be less disturbing to the majority than the manner in which he actually proceeded.

5/ Although the testimony is obviously too voluminous for reproduction here in its entirety (transcript pages 179 to 232), the samples quoted accurately reflect, and support at least the "indifference about the way [this operator] treated inspectors," and, indeed, the "disdain" found by the judge below. 4 FMSHRC at 642.

Barmore determined, without investigation, "that it didn't appear that anyone was injured at the time, you know, as far as real bad" (Tr. 182) and concluded that he would deny Bagley access to the accident scene (Tr. 182-84). The majority asserts that there was no "condonation" of Barmore's actions by this operator. More compelling, however, is the fact that nothing in this record reveals even a word of criticism of this "safety engineer's" behavior. Indeed, Starkovich, Barmore's supervisor, specifically agreed with Barmore's barring of access to this mine accident site, testifying that he, too, would object to the MSHA inspector going to the accident site, even in a government vehicle, and that MSHA had no right to go to the scene of the accident (Tr. 274, 279).

Barmore also contends--astonishingly--that he "assumed" Inspector Bagley was "satisfied, a little bit reluctantly," with Barmore's explanation of why Bagley was being denied the access he had requested to the mine accident (Tr. 186); that Bagley could have secured other transportation; "...[a]ll he had to do was use a little initiative" (Tr. 197). Later testimony, however, reveals the obvious futility of any attempt to secure transportation since both Barmore and Starkovich believed Bagley had "no right to investigate this accident" (Tr. 200-01, 279).

Compounding the denial of access to the mine accident site, was U. S. Steel's refusal to permit its employee to give statements concerning the accident, without the presence of an attorney (another new policy, Tr. 80) ordered and employed by U. S. Steel (Tr. 261, 264-66, 307). Whether this too rises to the level of disdain may be open to differing assessments; clearly it does not evidence an attitude of cooperation or willingness to permit unhampered access to the facts of the accident. (Tr. 245).

My colleagues have given unsubstantiated credence to Barmore's denial of the evidence which the judge credited. This no more than substitutes their opinion for that of the judge, who properly evaluated this operator's response to the undisputed evidence that MSHA Inspector Bagley at all times acted with scrupulous professional courtesy in seeking to carry out his duties under the Act.

Thus, although one need not endorse every step of the penalty assessment process taken by the judge below, my colleagues have failed to provide a more reasoned analysis supporting their reducing by more than 70% the penalty assessed by the judge for this violation. The violation was deliberate, not inadvertent. As the majority notes, uncontroverted evidence makes it clear that U. S. Steel had never denied MSHA personnel on mine property transportation by a company vehicle on previous mine inspections, but did so in this instance. One can only speculate as to the reason for this refusal, but the unknown, and later determined to be serious nature of this accident, suggests ample reason for concern. Slip op. at 9.

There is no dispute that U. S. Steel violated section 103(a) of the Act by preventing Bagley from inspecting the accident scene. It is thus established that the MSHA inspector was precluded from carrying out his enforcement functions, even though there existed an acknowledged possibility of a fuel tank explosion. Slip op. at 9. Accordingly, the record contains substantial evidence to support the judge's finding of moderately serious gravity and his corresponding allocation of $500 for this penalty criteria. 6/

With respect to the negligence criteria, the judge stated that Barmore's action was deliberate and thus constituted a high degree of negligence. He also indicated that Barmore's "indifference" may not have been used to evaluate U. S. Steel's negligence, had Barmore's supervisor not supported his denial of Bagley's right to inspect. Whether the judge properly or improperly characterized Barmore's attitude, 7/ substantial evidence clearly supports a finding of a high degree of negligence when an operator deliberately prevents an inspector from carrying out his enforcement functions, as a matter of company policy.

The majority has again embarked upon the uncharted waters of independent penalty assessment. See Southern Ohio Coal Co., 4 FMSHRC 1459 (August 3, 1982)(dissenting opinion). Their opinion fails to cure what they view as judicial deficiencies below by an independent assignment of numerical or other objective indicia to the Act's "negligence" or "gravity" criteria. No guidance is furnished for either mine operators or the Secretary by their conclusorily glossing over the penalty reduction for this violation. This is no doubt attractive, particularly to U. S.

6/ The majority errs when it asserts that it is "apparent" that the judge exaggerated the demoralizing effect which Barmore's action had on MSHA inspection responsibilities. Slip op. at 10. The judge's statement that Barmore's "action" had a demoralizing effect on MSHA's enforcement responsibilities is certainly true as it relates to this case. Moreover, it is hard to conceive of a more "demoralizing" course of conduct than that initiated by this operator, in denying Inspector Bagley his absolute right to investigate this accident. Contrary to the assertion that Barmore's actions had no negative on MSHA's enforcement program, given the size of this operator, the effect of this recalcitrance by U. S. Steel could indeed have a demoralizing effect on inspection responsibilities at a wide range of mining operations, not only the mines of this large and diverse mine operator. 4 FMSHRC at 642.

7/ Before the Commission, U. S. Steel takes exception to certain credibility resolutions regarding Barmore's conduct made by a substitute judge who did not preside at the hearing. U. S. Steel maintains it was error for the judge to base his negligence assessment (his gravity determination is not challenged) on these attitude findings rather than on the operator's action alone. Inasmuch as the Commission rejects U. S. Steel's challenge to these findings, I cannot conclude that the judge erred in relying on these same findings in the only manner to which U. S. Steel objects.

Steel, but falls far short of being either judicially permissible or in accord with the Act. The majority, as in Southern Ohio Coal Co., supra, asserts that its assessed penalties are "appropriate and consistent with the statutory criteria," slip op. at 10. However, it completely fails to evaluate the gravity of the violations, merely parses the negligence for an admittedly deliberate violation, Id., and fails to explicate its reasons, contrary to the careful conformity to the statute exercised by the judge.

The majority's further reduction of the judge's penalty assessment for U. S. Steel's second violation of section 103(a) is similarly deficient. The judge assessed a penalty of $80, which my colleagues have reduced to $70, because they find error in the judge's analysis of U. S. Steel's good faith. The parties stipulated that U. S. Steel demonstrated good faith abatement after being cited. The judge found "normal good-faith abatement," 4 FMSHRC at 663, that warranted neither an increase nor decrease in the penalty otherwise assessable. Whatever disagreement my colleagues may have with the judge's dicussion of U. S. Steel's abatement efforts, his view apparently did not adversely affect his acceptance of the parties' stipulation regarding good faith. The $80 penalty assessed by the judge was properly based on the statutory criteria, with due consideration to the stipulations of the parties. As he stated, his finding of "normal good faith abatement ... is consistent with the parties' stipulation to the effect that U. S. Steel showed good faith abatement as to all violations after the citations were written." Id. Accordingly, the majority's almost frivolous $10 reduction of the assessed penalty for this violation, for reasons irrelevant to the judge's assessment, is unwarranted, and would appear, given the amount involved, to serve no purpose other than to reward this operator for another deliberate violation.

The judge's assessments were based on the premise that "the purpose of assessing penalties under the Act is to deter companies from future violations of the mandatory safety and health standards." 4 FMSHRC at 675. I agree. The penalties imposed by the judge for each violation accurately reflect that rationale and are in accord with Congressional intent expressed in the Act's legislative history. Legis. Hist. at 603, 628-30.

As the Senate Committee Report notes:

> In short, 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.
>
> * * *
>
> In overseeing the enforcement of the Coal Act the Committee has found that civil penalty assessments are generally too low, and when combined with the difficulties being encountered in collection of assessed penalties (to be discussed, infra), the effect of the current enforcement is to eliminate to a considerable extent, the inducement to comply with the Act or the standards, which was the intention of the civil penalty system.

S. Rep. No. 95-181, Legis. Hist. at 629 (emphasis added).

The Commission has stated that,

> The determination of the amount of the penalty that should be assessed for a particular violation is an exercise of discretion by the trier of fact. Cf. Long Manufacturing Co. v. OSHRC, supra, 554 F.2d [903] at 908 [8th Cir. 1977]. This discretion is bounded by proper consideration of the statutory criteria and the deterrent purpose underlying the Act's penalty assessment scheme.

Sellersburg Stone Co., supra, 5 FMSHRC at 294. As in Sellersburg,

> Although the penalties assessed by the judge far exceed those proposed by the Secretary before hearing, based on the facts developed in the adjudicative record [I] cannot say that the penalties assessed are inconsistent with the statutory criteria and the deterrent purpose behind the Act's provision for penalties. Hence, [I] find that the judge's penalty assessments do not constitute an abuse of discretion.

Id at 295, quoted in part, No. 83-1630, slip op. at 11 (7th Cir. June 11, 1984).

I therefore dissent to the reduction of the penalties imposed.

A. E. Lawson, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

June 27, 1984

UNITED MINE WORKERS OF AMERICA On behalf of BILLY DALE WISE	:	
v.	:	Docket No. WEVA 82-38-D
CONSOLIDATION COAL COMPANY	:	

DECISION

This discrimination case arises under section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(1982), and involves an operator's alleged discriminatory suspension of a miner. After investigating the miner's complaint of discrimination the Department of Labor's Mine Safety and Health Administration (MSHA) determined that a violation of section 105(c) had not occurred. Thereafter, pursuant to section 105(c)(3) of the Mine Act, the United Mine Workers of America (UMWA) filed a discrimination complaint on behalf of the miner with this independent Commission. 30 U.S.C. § 815(c)(3). A Commission administrative law judge found that a violation of section 105(c) had not occurred and dismissed the complaint. 4 FMSHRC 1307 (July 1982)(ALJ). The Commission granted the UMWA's petition for discretionary review of the judge's decision. For the reasons that follow, we affirm.

On Friday, July 10, 1981, Billy Dale Wise, Leo Conner and James Siburt were conducting an inspection of the One North Section of Consolidation Coal Company's (Consol) Ireland Mine. Wise and Conner were UMWA safety committeemen at this mine and Siburt was Consol's acting shift foreman. They were conducting the annual safety inspection made at this mine before miners returned to work after a vacation period. During this inspection, they discovered an overcast requiring additional roof support: roof bolts were loose; wire mesh was hanging down; and the overcast was loaded with stone. 1/ Foreman Siburt contacted Robert Omear, the mine superintendent, and explained the situation to him.

1/ An overcast is "an enclosed airway to permit one air current to pass over another one without interruption." A Dictionary of Mining, Mineral, and Related Terms, U.S. Department of Interior, at 780 (1968).

Omear came to the area and examined the overcast. He agreed that additional support was necessary. Omear and Siburt hung a "danger board" to prevent travel in the area until proper support could be provided. Wise, Conner and Siburt then continued with their inspection and Omear began preparations to correct the condition.

Later that day, Wise, Conner and Siburt returned to the overcast. In response to a request by Omear, Conner was carrying a saw needed by the miners repairing the overcast. A man-door had been erected in the overcast. Wise could see two miners working outby the door, but from his position outby the danger board he could not see the miners working behind the man-door. Wise and Conner proceeded beyond the danger board. Connor delivered the saw he was carrying and returned outby the danger board. Wise looked inside the man-door and asked the miners inby the door how the work was progressing. While inby the danger board, Wise and Omear had a brief exchange. The testimony of the witnesses to this conversation varies as to its particulars. The judge found that Wise was ordered to leave the area by Omear, Omear's instructions were ignored, and Wise remained in the area until he had completed, to his own satisfaction, his observations of the work being done. Substantial evidence supports these findings.

After Wise returned outby the danger board, Omear told him that he would investigate the matter and determine whether disciplinary action against Wise would be taken for his failure to respond to Omear's instructions. The following Monday, July 13, Wise and Omear discussed the matter again, but no decision regarding disciplinary action was made. On July 14, Wise was told by Omear that he was suspended for three days, effective July 15. Wise was given a suspension letter that stated that he had been insubordinate on July 10 by going past the danger board and refusing to leave the area when ordered, and that his conduct was in violation of state and federal laws and company policy. The disciplinary action was a collective decision made by Consol's management. 2/

Wise filed a grievance under the National Bituminous Coal Wage Agreement of 1981 (Wage Agreement) and the grievance was submitted to arbitration. The arbitrator affirmed Wise's grievance, finding that he

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2/ Although disciplinary decisions are collective decisions by Consol's management, Omear was especially concerned about disciplining Wise. Within the two weeks immediately prior to the incident at issue here, Wise had filed three separate safety complaints with a state mine inspector. As a result of these complaints, Omear was concerned that under state law he personally could be fined if it were determined that his suspension of Wise was a reprisal for the safety complaints. Omear voiced this concern to Consol's management. In his decision, the administrative law judge found that "Mr. Wise does not contend that the disciplinary action taken against him was out of reprisal for his filing safety complaints with the State of West Virginia mining authorities.... The UMWA does not advance an argument that Mr. Omear, or any other mine management official, suspended Mr. Wise because of these complaints." 4 FMSHRC at 1329-30. These findings have not been challenged on review.

had acted properly under the Wage Agreement in his role as a UMWA safety committeeman. The arbitrator ordered Consol to reimburse Wise for lost wages and expunge the suspension from Wise's personnel records. Wise also filed a discrimination complaint with the Coal Mine Safety Board of Appeals for the State of West Virginia alleging that his suspension violated West Virginia law. The State Board of Appeals dismissed the complaint stating that through the contractual arbitration Wise had been granted all of the relief that the Board could grant. The instant complaint alleging discrimination under the Mine Act was filed with the Commission after MSHA determined that discrimination under section 105(c) had not occurred. After a hearing, the Commission's administrative law judge concluded that Wise had not engaged in activity protected under the Mine Act by walking past the danger board and refusing orders to leave the area.

The administrative law judge found that Wise believed he had the right, as a safety committeeman, to enter any area of the mine, including dangered-off areas, for the purpose of insuring compliance with mine safety laws as well as to insure the safety of miners engaging in work connected with the correction of hazardous conditions brought to the attention of mine management. 4 FMSHRC at 1320. The judge also found that Consol conceded that Wise had certain prerogatives as a safety committeeman including access to most areas of the mine to conduct inspections. Consol took the position, however, that Wise's access to areas that are dangered-off is limited by state and federal law to individuals specifically authorized to be there. Id. In arguing whether Wise had a right under the Mine Act to go inby the danger board at issue in this case, the parties relied on sections 303(d)(1) and 104(c)(3) of the Mine Act. 3/

3/ Section 303 (30 U.S.C. § 863) provides in part:

Ventilation

* * * * *

(d)(1) Within three hours immediately preceding the beginning of any shift, and before any miner in such shift enters the active workings of a coal mine, certified persons designated by the operator of the mine shall examine such workings.... If such mine examiner finds a condition which constitutes a violation of a mandatory health or safety standard or any condition which is hazardous to persons who may enter or be in such area, he shall indicate such hazardous place by posting a "DANGER" sign conspicuously at all points which persons entering such hazardous place would be required to pass, and shall notify the operator of the mine. No person, other than an authorized representative of the Secretary or a State mine inspector or persons authorized by the operator to enter such place for the purpose of eliminating the hazardous condition therein, shall enter such place while such sign is so posted....

(footnote continued)

The judge rejected Consol's argument that Wise himself violated the Mine Act. The judge found that Consol's reliance on § 303(d)(1) of the Mine Act was misplaced because there was no evidence that the posting of the danger board resulted from a firebossing examination by a certified mine examiner conducted pursuant to that section. 4 FMSHRC at 1334. The UMWA took the position that under the 1981 Coal Wage Agreement Wise was "qualified" to make mine examinations under section 104(c)(3) and that he was not required to be removed from an area covered by an MSHA withdrawal order. 4 FMSHRC at 1334-35. Consol argued that Wise did not fall within that section of the statute. The judge concluded that being chosen a safety committeeman pursuant to the Wage Agreement did not "necessarily" transform Wise into a certified mine examiner for the purposes of section 104(c)(3) of the Act. He noted that acceptance of the UMWA's theory inevitably would lead to the conclusion that all safety committeemen would be "qualified" or "certified" under that section of the Act.

Thus the judge concluded that the Mine Act granted Wise no right to be in the area beyond the operator-posted danger board and that his refusal to leave the dangered-off area when ordered was not protected activity under the Act. The judge stated: "Since mine management has the primary obligation under the law to insure compliance and to preclude any of its personnel being injured or killed by walking into these areas, I see nothing unreasonable in mine management's requiring that they be allowed to monitor and control these areas." Id. at 1337. Because Wise's action was not protected activity, the judge found no discrimination by Consol and dismissed the case.

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footnote 3 cont'd.

Section 104 (30 U.S.C. § 814) provides in part:

Citations and Orders

* * * * *

(c) The following persons shall not be required to be withdrawn from, or prohibited from entering, any area of the coal or other mine subject to an order issued under this section:

(1) any person whose presence in such area is necessary, in the judgment of the operator or an authorized representative of the Secretary, to eliminate the condition described in the order;
(2) any public official whose official duties require him to enter such area;
(3) any representative of the miners in such mine who is, in the judgment of the operator or an authorized representative of the Secretary, qualified to make such mine examinations or who is accompanied by such a person and whose presence in such area is necessary for the investigation of the conditions described in the order.
(4) any consultant to any of the foregoing.

In order to establish a prima facie case of discrimination under section 105(c) of the Mine Act, a complaining miner bears the burden of production and proof to establish (1) that he engaged in protected activity and (2) that the adverse action complained of was motivated in any part by that activity. Secretary on behalf of Pasula v. Consolidation Coal Co. v. Marshall, 2 FMSHRC 2786, 2799-2800 (October 1980), rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3d Cir. 1981); and Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 803, 817-18 (April 1981). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no way motivated by protected activity. Id. See Boich v. FMSHRC, 719 F.2d 194 (6th Cir. 1983); and Donovan v. Stafford Constr. Co., No. 83-1566, D.C. Cir. (April 20, 1984)(specifically approving the Commission's Pasula-Robinette test). Cf. NLRB v. Transportation Management Corp., ___ U.S. ___, 76 L.Ed. 2d 667 (1983).

In this case there is no dispute that Wise was disciplined for refusing to leave the dangered-off area when ordered to do so by management. Thus, the only issue presented is whether Wise had an express or implied right, protected by the Mine Act, to be in the area beyond the danger board contrary to the operator's orders. If Wise had such a right, then Consol violated section 105(c)(1) by suspending him for exercising this right. If Wise did not have this right, then the judge properly dismissed the discrimination complaint.

The Mine Act does not address expressly the question of whether a safety committeeman, as a representative of miners, may proceed inby a danger board posted by the operator upon discovery of a hazardous condition during an "inspection" conducted by the operator and miners' representatives, rather than by MSHA. The parties suggest on review, as they did before the judge, that sections 104 and 303(d)(1) of the Mine Act are pertinent to this question. We disagree.

The UMWA concedes that the danger board was not posted pursuant to section 104 during an inspection conducted by a federal inspector. Thus, this case does not pose the question of whether Wise could have accompanied a federal inspector inby this or any other danger board. The UMWA's fear that a decision upholding the judge in the present case could be interpreted as prohibiting safety committeemen from accompanying federal inspectors during inspections and investigations is unfounded. The UMWA also alleges that the judge erred in ruling that safety representatives do not fall within the exception provided in section 104(c)(3) of the Act, and that he erred by applying the definition of a "qualified person" in 30 C.F.R. § 75.2 to section 104(c)(3). Because of our conclusion that this case does not involve the interpretation or application of section 104, the judge's analysis concerning that section, and whether safety committeemen in general or Wise in particular fall within the exception in 104(c)(3), is dicta. For this same reason, we need not reach the question of whether the judge erred by applying the definition of a qualified person in 30 C.F.R. § 75.2 to section 104(c)(3) of the Act. We concur with the judge's rejection of Consol's argument that

the inspection conducted by Wise was comparable to a pre-shift examination under section 303(d)(1). The circumstances at issue did not arise from a pre-shift examination conducted by a certified person under section 303(d)(1) of the Act and that section is not applicable to the present case.

Thus, we conclude that neither section 104(c)(3) nor section 303(d)(1) is pertinent in the present situation. We further conclude that the Mine Act does not grant a right to Wise as a union safety committeeman to proceed, contrary to orders of management, inby operator-posted danger boards in these circumstances. The well-recognized purpose of a danger board is to restrict or eliminate access to a hazardous area. Although the inspection team (of which Wise was a part) performed a vital mine safety function in discovering the hazardous overcast, under the Mine Act the statutory responsibility for accomplishing abatement of a hazardous condition is placed on mine operators. In this case, immediately upon discovery of the hazard the operator began abatement work. Where an operator has posted a danger board, and such posting has not occurred as a result of a withdrawal order issued by the Secretary, an operator may restrict access to dangerous areas to such employees as it deems necessary to accomplish effective correction of the hazard. Cf. Ronnie R. Ross v. Monterey Coal Co., 3 FMSHRC 1171 (May 1981). If a safety committeeman, or any miner, has reasonable grounds to believe that abatement work is being performed in a manner contrary to the statute or mandatory standards, and that a danger or hazard is thereby presented, such miner has available the normal statutory procedures for securing an MSHA inspection and, if appropriate, the issuance of any necessary citations and orders. 30 U.S.C. § 813(g). See Local Union 1110, UMWA and Robert L. Carey v. Consolidation Coal Co., 1 FMSHRC 338 (May 1979). 4/

4/ We reject the UMWA's assertion that the judge's decision authorizes an operator to interfere with the exercise of statutorily protected safety activities of a miners' representative, contrary to the holding in Carney. The Commission held in Carney that the operator violated section 110(b) of the Coal Act by disciplining safety committeeman Carney for leaving his assigned work area to contact a federal mine inspector concerning a perceived safety hazard, contrary to the operator's policy that permission by management was necessary before he could leave. The Commission stated that "[t]he Company's policy effectively impedes a miner's ability to contact the Secretary when alleged safety violations or dangers arise." 1 FMSHRC at 341. Unlike the circumstances presented in this case, Carney involved the statutorily protected right to notify the Secretary of any alleged violation or danger. In this case, that right is not at issue.

We agree with the judge's conclusion that, in proceeding into and refusing orders to leave an area dangered-off by the operator, Wise was not engaged in activity protected by the Mine Act. Accordingly, the judge's dismissal of the discrimination complaint for failure to establish a prima facie case is affirmed. 5/

Rosemary M. Collyer, Chairman

Richard V. Backley, Commissioner

Frank F. Jestrab, Commissioner

A. E. Lawson, Commissioner

L. Clair Nelson, Commissioner

5/ The UMWA also argues that because the judge found that Wise's actions did not violate the Mine Act, the judge should not have proceeded to find that Wise's discipline was "reasonable and proper in the circumstances." This statement by the judge is contrary to the arbitrator's finding that disciplinary action under the applicable 1981 Wage Agreement was not warranted. We agree that having concluded that Wise did not engage in activity protected by the Mine Act, the judge's comment concerning the appropriateness of the discipline constitutes dicta on an issue not before him. Further, in light of our conclusion that a prima facie case of discrimination was not established, the various substantial evidence arguments raised by the UMWA are immaterial and we need not and do not reach them.

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 1 1984

ROBERT SIMPSON, Complainant	:	DISCRIMINATION PROCEEDING
v.	:	Docket No. KENT 83-155-D
	:	MSHA Case No. BARB CD 83-06
KENTA ENERGY, INC., & ROY DAN JACKSON, Respondents	:	No. 1 Mine

DECISION

Appearances: Tony Oppegard, Esq., Hazard, Kentucky and Stephen A. Sanders, Esq., Prestonsburg, Kentucky for Complainant; Rudy Yessin, Esq., Frankfort, Kentucky, for Respondents.

Before: Judge Broderick

STATEMENT OF THE CASE

Complainant alleges that he was constructively discharged by Respondents in that he was forced to leave his job as scoop operator on September 21, 1982, because of safety related conditions at the subject mine. He further complains that Respondents refused to reinstate him on or about December 7, 1982. Both the constructive discharge and the refusal to reinstate are alleged to have been in violation of section 105(c)(1) of the Mine Safety Act.

Following extensive pretrial discovery, the case was noticed for hearing and was heard in Hazard, Kentucky on September 8 and 9, 1983 and on January 11 and 12, 1984. Robert Simpson, Henry Quesenberry, Paul David Helton, Marvin Brewer, Charles Patterson, Roy Anthony Gentry and Clyde Gailey were called as witnesses for Complainant. Respondent Roy Dan Jackson was called as an adverse witness. The depositions of Vernon Morgan, Danny Noe, Roy Dan Jackson, and Charlie Patterson were received in evidence pursuant to Rule 32 of the Federal Rules of Civil Procedure. Mike McClure and Roy Dan Jackson testified on behalf of Respondents. Both parties have filed posthearing briefs. Based on the entire record, and considering the contentions of the parties, I make the following decision.

FINDINGS OF FACT

The Operator

The complaint alleges that Respondent Kenta Energy Incorporated ("Kenta") operated the coal mine in which Complainant was employed. It also alleges that Respondent Jackson was the President and owner of Kenta. The record contains some confusing evidence concerning the relationship of Jackson and Kenta, and concerning the relationship of Jackson to the operation of the subject mine. It was decided at the hearing that the issue of the personal liability of Jackson would await a determination of whether a violation of section 105(c) was established. If such a violation was found, the parties would be afforded the opportunity of submitting additional evidence on the question of Jackson's liability.

From January, 1981, until September 20, 1982, Complainant was employed as a scoop operator at the subject mine, variously known as the Kenta No. 1 Mine, the Black Joe Mine, and the No. 1 Mine, and bearing MSHA ID No. 15-12090, located in Harlan County, Kentucky. The mine height varied from 28 to 32 inches, and the coal was extracted by cutting into the face with a cutting machine, drilling and shooting. The coal was then removed by a scoop.

Mine Foreman

Danny Noe was mine foreman at the subject mine from December, 1980 until September 3, 1982. He reported directly to Roy Dan Jackson. Noe performed the preshift and onshift examinations required by law. He called the information out to Charles Patterson, the "outside man," who signed Noe's name on the books. As of September 3, 1982, the mine had been driven over 3,000 feet from the drift mouth. It was contemplated that it would be driven about 4,000 feet to the property line and then turned right toward an abandoned mine property. Noe's last day of work was September 3, 1982. He entered the hospital on September 4, because of a back condition, and did not return to work.

Respondent Jackson testified that Stanley Gilbert, a certified mine foreman, was sent to the subject mine to act in Noe's place. There is also some evidence that Tony Gentry, the bolting machine operator at the subject mine who was attending a foreman's school, did some of the "firebossing" for Gilbert. There is substantial other evidence that

Gilbert was not at the mine between September 3 and September 21, 1983. Respondent did not call Gilbert as a witness. Gentry denied that he performed the required preshift and onshift examinations during this time. Patterson testified that he continued to sign Noe's name to the books although Noe did not come back to the mine. I find that the preponderance of the evidence establishes that there was no supervisor at the subject mine between the time that Noe left and the time Complainant left. I further find that the preshift and onshift examinations were not performed during the same period.

The Old Works

Some time after Noe left (and the record is unclear as to the exact date), the mine headings turned right, toward the old abandoned works. The crew had advanced about 200 to 250 feet in the headings to the right as of September 21, 1982. Test holes were not drilled before the cuts were made. In fact a workable test auger had not been provided at the mine site before September 21, 1982. Complainant and at least two other miners specifically requested that Patterson, who was in charge of supplies and equipment, obtain a test auger. One was ordered but did not arrive at the mine site until some days after September 21. Complainant and at least some of the other crew members had expressed their fear of cutting into the old works on many occasions. The fear related to the possibility of releasing "black damp" (oxygen deficient air), methane or water into the section where the miners were working.

Respondent Jackson testified that he crawled through the old works on two occasions and found them safe, once with his engineer Mike McClure and once with Barry Rogers who became foreman after Noe and Simpson left their employment. There is confusion and dispute as to whether he crawled the old works with McClure before Complainant left. Whether he did or not, it is clear that Complainant and at least some other members of the crew were not informed that he had done so. Complainant had no reason to believe that the old works were safe and free from black damp, methane and water.

Work Refusal

After completing his shift on September 20, 1983, Complainant decided not to return to the job. He stated that he made this decision because there was no boss and no test auger at the mine and this made working dangerous. Two

days later at about mid-shift, he returned to the mine site to pick up his equipment. He talked to Patterson and told him that he had quit. Patterson suggested that he return to work and he would be paid for the whole day. (Patterson was the mine time keeper, but had no supervisory or hiring authority). Complainant asked whether there was a foreman and a test auger. Patterson replied there was not. Complainant said "it still wouldn't help me none" (Tr. 48), and did not return to work. There is no evidence in the record that Complainant notified Jackson or Noe or anyone else in authority that he was quitting or the reasons for his quitting at the time he left or for some weeks thereafter. There is no evidence in the record that Complainant complained to Jackson or anyone else in authority between September 3 and September 20 about the absence of a boss and a test auger at the mine. Complainant lived about 3 or 4 miles from Jackson's home. He had known him for about 15 years. On three or four occasions, Complainant went to Jackson's home to borrow money.

Refusal to Rehire

About 1 month after Complainant quit, Vernon Morgan (a member of the crew at the subject mine) told Complainant's father that a boss had been sent to the mine and a test auger supplied. Complainant then attempted to call Jackson but could not reach him. Thereafter (approximately in December, 1982), Complainant and his father saw Jackson and Complainant asked for his job back. For the first time, he told Jackson that he had been afraid while on the job because there was no boss and no test auger. Jackson told him that he had no opening at that time, and refused to rehire or reinstate Complainant. He also told him, "next time you'll learn not to get a wild hair" (Tr. 51).

Subsequent Work History

Since leaving his job with Respondent, Claimant has worked 3 days at a soft drink plant, about 4 months for a reclamation company on strip mined land, and about 1 month for a coal mine company. He was laid off the latter two jobs and was not working at the time of the hearing in this case. When he left his job with Respondent, Complainant was earning $10.64 per hour.

STATUTORY PROVISION

Section 105(c) of the Act provides in part as follows:

(c)(1) 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 of the exercise by such miner, represenative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this Act.

(2) Any miner or applicant for employment or representative of miners who believes that he has been discharged, interfered with, or otherwise discriminated against by any person in violation of this subsection may, within 60 days after such violation occurs, file a complaint with the Secretary alleging such discrimination. Upon receipt of such complaint, the Secretary shall forward a copy of the complaint to the respondent and shall cause such investigation to be made as he deems appropriate.

* * * * * * *

(3) Within 90 days of the receipt of a complaint filed under paragraph (2), the Secretary shall notify, in writing, the miner, applicant for employment, or representative of miners of his determination whether a violation has occurred. If the Secretary, upon investigation, determines that the provisions of this subsection have not been violated, the complainant shall have the right, within 30 days of notice of the Secretary's determination, to file an action in his own behalf before the Commission, charging discrimination or interference in violation of

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

ISSUES

1. Whether Complainant's leaving work at the end of the shift on September 20, 1982, was activity protected under the Mine Act?

2. Whether Complainant was constructively discharged for protected activity?

3. Whether Respondent's refusal to reinstate or rehire Complainant was a violation of section 105(c) of the Act?

4. If a violation of section 105(c) of the Act is established, to what relief is Complainant entitled?

CONCLUSIONS OF LAW

Refusal to Work

It is no longer a matter of doubt that a miner is protected under the Mine Act where he refuses to perform work which he reasonably and in good faith believes to be hazardous. 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); Secretary/Robinette v. United Castle Coal Co., 3 FMSHRC 803 (1981). It is his refusal to work that constitutes the basis of the complaint in this case. Respondent's argument that Complainant did not make a safety complaint to MSHA is beside the point. Respondent introduced evidence that Complainant quit work because of family problems rather than because of safety concerns. I have considered this evidence, but conclude that it is not sufficient to overcome the credible testimony of Complainant that he quit work in good faith because of concerns for his safety. The evidence very clearly establishes that the work refusal was reasonable. I have found that there was no qualified supervisor at the mine to perform the required preshift and onshift examinations. Complainant and at least some of the other members of the crew believed that they were cutting in the direction of an abandoned mine. The failure to drill test holes in such a situation is hazardous and a clear violation of 30 C.F.R. § 75.1701. If in fact Jackson had crawled through the old works and found them free of hazards, he failed to communicate this fact to Complainant. Complainant's work refusal resulted from a reasonable good faith belief that continuing to work would be hazardous.

Adverse Action

The next issue is whether Respondent took adverse action against Complainant because of his work refusal. Unlike Pasula and Robinette, he was not formally discharged. Two theories are advanced by Complainant to show adverse action: (1) he was constructively discharged because he quit to escape an intolerable situation; (2) he was refused reinstatement or rehiring when he sought it in December, 1982.

Constructive Discharge

The doctrine of constructive discharge as developed in cases under the National Labor Relations Act and Title VII

of the Civil Rights Act holds that if an employee's working conditions are made so intolerable that he is forced into an involuntary resignation, the employer is deemed to have constructively discharged him and is liable as if it had formally discharged the employee. Young v. Southwestern Savings and Loan Association, 509 F.2d 140 (5th Cir. 1975); J. P. Stevens & Co. v. N.L.R.B., 461 F.2d 490 (4th Cir. 1972). The doctrine is applicable under the Mine Act if the "intolerable conditions" are motivated in any part because of activity protected under the Act. Rosalie Edwards v. Aaron Mining Inc., 5 FMSHRC 2035 (1983). The evidence before me establishes intolerable conditions, i.e., a perceived dangerous work environment. There is no evidence that Respondents were "motivated" in maintaining that environment by any protected activity. But this in a way is circular reasoning. The protected activity here is Complainant's refusal to work itself. The intolerable conditions which caused him to quit his employment are the same conditions justifying his work refusal. Under such circumstances, I hold that Respondent's motivation is not controlling.

Communication to Operator

The most difficult question in this case is whether Complainant communicated his safety concerns to Respondent prior to or reasonably soon after his work refusal, or, if he did not, whether unusual circumstances excused his failure to do so. In Secretary/Dunmire and Estle v. Northern Coal Company, 4 FMSHRC 126, 133 (1982), the Commission formulated the rule as follows:

> Where reasonably possible, a miner refusing to 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. 'Reasonably 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 word, '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.

The safety hazards in this case involve (1) approaching the old works without drilling test holes, and (2) working without a foreman and therefore without preshift and onshift examinations being made. Complainant did not directly communicate his belief in the hazard of approaching the old works to Jackson or to anyone in authority before December, 1982. He did ask the outside man, who was not a supervisor (but was related to Jackson), for a test auger and told him that he was quitting because of the perceived hazards. This communication was not relayed to Jackson so far as the record shows. Neither Jackson nor any other management personnel were at the mine site at the time, and therefore communication to the operator may not have been reasonably possible at that time. However, Complainant knew where the mine office was (he drove there every day while working), and he knew where Jackson resided. It was certainly reasonably possible for him to have directly communicated his concerns to Jackson and thus give him an opportunity to correct the situation or to explain that he had crawled the old works and they were hazard-free. See Secretary/Bennett v. Kaiser Aluminum and Chemical Corporation, 3 FMSHRC 1539 (1981) (ALJ).

On the other hand, with respect to the absence of a foreman and the failure to perform the preshift and onshift examinations, Jackson must be charged with actual knowledge of the hazards related to these situations, and communication of them I believe would have been futile. I do not consider that it is necessary in order to invoke the protection of section 105(c), that it be shown that the operator was specifically aware of the reason for a miner's work refusal, if the operator was aware of the hazardous conditions which prompted the refusal.

Refusal to Rehire

Respondent contends that because of a recession in the coal business, Complainant would have been laid off in any event and that he was not rehired in December because there was no job for him. However, no one had been laid off from the mine as of December, 1982, and the two miners who were laid off in January or February, 1983, were not scoop operators.

CONCLUSIONS

I conclude that Complainant's refusal to return to work after September 20, 1982, resulted from a good faith, reasonable belief that continuing on the job would be hazardous. The perceived hazards were cutting toward old works without drilling test holes, and working without a foreman and without preshift and onshift examinations being performed. Although his safety concerns were not communicated to Respondent, Respondents were aware of the hazardous conditions and communication of Complainant's concerns would have been futile. Therefore, the evidence establishes a violation of 105(c) of the Mine Act. The evidence does not show the Complainant would have been laid off for economic reasons. Therefore, he is entitled to reinstatement and back pay.

EVIDENTIARY RULINGS ON EXHIBITS

Respondent offered in evidence a copy of an order of the Kentucky Unemployment Insurance Commission which affirmed a Referee's Decision denying unemployment benefits to Complainant because he voluntarily left his employment without good cause attributable to the employment. Respondent's Exh. 1. I excluded the document on the ground of relevance. A determination that an employee is not entitled to unemployment compensation benefits has no bearing on his rights under section 105(c) of the Mine Act.

Complainant served a subpoena to MSHA Special Investigator Larry Layne who investigated Complainant's discrimination complaint to MSHA. The Solicitor of Labor declined to authorize Layne to testify and the subpoena was not honored. Thereafter, an expurgated copy of MSHA's investigation report was supplied Complainant's attorney and it was offered in evidence, under the Seal of the Department, as Complainant's Exhibit 5. I obtained from the Solicitor an unexpurgated copy of the report (attached to numerous other documents) in camera with the understanding that I would not disclose any part of the report which would give the names of informers. I admitted the exhibit, as supplemented by my reading into the record all the deleted parts of the report (including the conclusions of the Investigator) except those identifying informants. The report is clearly relevant, and the upholding of the government's informer privilege is supported by case law. Usery v. Ritter, 547 F.2d 528 (10th Cir. 1977).

The Depositions of Danny Noe, Vernon Morgan, and Charlie Patterson were admitted in evidence pursuant to Federal Rule of Civil Procedure 32(a)(3) and the Deposition

of Roy Dan Jackson was admitted in evidence pursuant to Rule 32(a)(2).

RELIEF

Based upon the above findings of fact and conclusions of law, I conclude that Claimant was constructively discharged on September 21, 1982, for activity protected under the Mine Safety Act. Respondent's refusal to reinstate or rehire him was a further violation of section 105(c) of the Act. Complainant is entitled to reinstatement in the position he held on September 20, 1982, or a similar position at the same rate of pay and with the same employment benefits. Respondents are ORDERED to reinstate him in such position. Complainant is entitled also to back pay from September 21, 1982 until the date of his reinstatement with interest thereon. His earnings at other employment shall be a credit against his back pay entitlement. Complainant is entitled to be reimbursed by Respondent for reasonable attorneys' fees and costs of litigation. Further proceedings shall be had in this matter to resolve the question of Respondent Jackson's liability and, if necessary, the amount to which Complainant is entitled as back pay and attorneys' fees. In preparation for these proceedings, the following is ordered:

1. Complainant shall on or before June 28, 1984, file a statement explaining with particularity the legal basis for his claim against Respondent Jackson, and the evidence it expects to produce to establish that claim.

2. Complainant shall file a statement on or before June 28, 1984, showing the amount he claims as back pay and interest using the formula set out in the case of Secretary/Bailey v. Arkansas-Carbona, 5 FMSHRC 2042 (1983) to determine the interest due. (A copy of the Arkansas-Carbona decision is appended hereto).

3. Complainant shall file a statement on or before June 28, 1984, showing amount he rquests for attorneys' fees and necessary legal expenses. The attorneys' hours and rates shall be set out in detail.

4. On or before July 14, 1984, Respondents shall reply to the above statements, and, if they object to the amounts claimed as back pay or attorneys' fees, shall state their objections with particularity.

5. Following receipt of the above statements, a further hearing will be scheduled, if it appears necessary.

6. Until the issues of Jackson's liability, if any, the amount due as back pay and interest and the amount due as attorneys' fees are determined, the decision is not final.

James A. Broderick
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

December 12, 1983

attachment to KENT 83-155-D

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
On behalf of MILTON BAILEY	:	Docket No. CENT 81-13-D
v.	:	
ARKANSAS-CARBONA COMPANY	:	
and	:	
MICHAEL WALKER	:	

DECISION

This discrimination case presents four issues: whether the Commission's administrative law judge abused his discretion in severing the Secretary of Labor's request for a civil penalty from the complaint of discrimination; whether the judge erred in awarding 6% interest on the back pay award; whether he erred in tolling the back pay award on the date the Secretary filed a complaint on Bailey's behalf; and whether he erred in refusing to award Bailey tuition and certain miscellaneous expenses.

For the reasons that follow, we hold that the judge did not abuse his discretion in this case when he severed the request for a civil penalty from the discrimination complaint, but we also announce our intention to amend Commission Procedural Rule 42, 29 C.F.R. § 2700.42, to end the need for such severance in future cases. We adopt as the Commission's interest rate formula for back pay awards the interest formula used by the National Labor Relations Board--that is, interest set at the "adjusted prime rate" announced semi-annually by the Internal Revenue Service for the underpayment and overpayment of taxes. We hold that the judge erred in assessing 6% interest on the back pay award and remand for recalculation of the award pursuant to the computation rules announced in this decision. We reverse the judge's order tolling back pay on the date of the Secretary's complaint on behalf of Bailey. We continue the award until the date Bailey informed the Secretary he did not wish reinstatement, and additionally remand for determination of the date when that notification occurred. Finally, we affirm the judge's holding that Bailey was not entitled to payment of college tuition and related expenses.

I. Factual and procedural background

We briefly summarize the facts, which are undisputed, as background for our discussion of this case. Arkansas-Carbona Company, a joint venture, operated a small surface anthracite coal mine in Dardanelle, Arkansas at the relevant time. Milton Bailey was employed by Arkansas-Carbona from May 13, 1980, until his discharge on June 27, 1980. Bailey was the company's safety director and he earned $1,000 per month. Michael Walker was the president of one of the firms comprising the Arkansas-Carbona joint venture, and after June 13, 1980, took over control of mine operations at the mine site. On June 27, 1980, Bailey complained to Walker that the mine's first aid kit, which had been moved from the main office to a screened porch, should remain in the office to prevent its exposure to dust. Walker contended the kit was in a dustproof container. An argument ensued which resulted in Bailey's discharge.

On October 20, 1980, the Secretary of Labor filed a discrimination complaint before this independent Commission on behalf of Bailey against Arkansas-Carbona and Michael Walker. 1/ His complaint alleged that Bailey was unlawfully discharged for exercising rights protected by section 105(c)(1) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1976 & Supp. V 1981). The relief sought included back pay with 9% interest, and reinstatement on the same shift with the same or equivalent duties at a rate of pay "presently proper" for the position. The Secretary's complaint also requested "an order assessing a civil penalty of not more than $10,000 against [the operator] for [the] violation of section 105(c) of the Act." 30 U.S.C. § 815(c)(Supp. V 1981). On January 22, 1981, the Secretary filed a motion to amend his discrimination complaint. The motion stated in part: "Subsequent to his filing of the complaint the Secretary was informed by complainant Bailey that he did not wish to be reinstated by respondents and that in lieu of reinstatement he would accept tuition for one year of college plus an allowance for expenses."

The Commission's administrative law judge first held that Bailey's complaint concerning the first aid kit on the day of his discharge was protected activity and that Bailey's discharge was motivated in part by that protected activity. Thus, the judge held that a prima facie case of discrimination, that is, adverse action motivated in part by protected activity, was proved. 3 FMSHRC 2313, 2318-19 (October 1981)(ALJ). The judge then examined each non-discriminatory ground the operator presented as the cause of Bailey's termination and concluded, "Neither singularly nor in combination do Respondents' contentions establish that Respondents would have discharged Complainant for the reasons given." 3 FMSHRC at 2319. Therefore, the judge determined that Arkansas-Carbona's discharge of Bailey violated section 105(c)(1) of the Mine Act. 30 U.S.C. § 815(c)(1).

The judge awarded Bailey back pay with 6% interest from the date of discharge until October 19, 1980, one day before the Secretary's complaint was filed. 3 FMSHRC at 2323. Because the complaint on behalf of Bailey was amended January 22, 1981, to request one year's college tuition and related expenses in lieu of reinstatement, the judge applied

1/ We refer to the respondents collectively as "the operator."

Rule 15(c), Federal Rules of Civil Procedure, and concluded that the amendment related back to October 20, 1980, the date of the Secretary's complaint. 2/ Therefore, the judge concluded that Bailey did not request reinstatement from that date and that, accordingly, the obligation for back pay ceased on that date. 3 FMSHRC at 2321. The judge also declined to order the payment of one year's college tuition and expenses because Bailey "failed to establish any entitlement to an award of 1 year of college tuition." 3 FMSHRC at 2322. The judge also ordered expunging of all references to "this matter" from Bailey's employment record.

In addition, the judge severed MSHA's proposed assessment of a civil penalty from this proceeding, and he ordered MSHA to proceed under Commission Procedural Rule 25, 29 C.F.R. § 2700.25. 3/ At the outset of the administrative hearing, the judge explained the reason for the severance: "I will sever the civil penalty proceeding because there has not been the required administrative processing of the proposal through the notification to the respondents of the amount of the proposed penalty or the opportunity to discuss this matter with the District Manager's office." Tr. 4.

II. Severance of the civil penalty from the proceedings involving the complaint of discrimination

We first consider the question of how civil penalties for violations of section 105(c) should be proposed and assessed in cases where the Secretary files a complaint on behalf of a miner, and then whether the judge erred in severing the penalty proceeding.

Civil penalties are assessed under the Mine Act to induce compliance with the Act and its standards. See, for example, S. Rep. No. 181, 95th Cong., 1st Sess. 40-41 (1977) ("S. Rep."), reprinted in Subcommittee on Labor, Senate Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 628-29 (1978) ("Legis. Hist."). Penalties are mandatory for violations of

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2/ Rule 15(c), Fed. R. Civ. P., provides in part:
> Relation Back of Amendments. Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading.

3/ Commission Procedural Rule 25 provides:
> The Secretary, by certified mail, shall notify the operator or any other person against whom a penalty is proposed of: (a) the violation alleged; (b) the amount of the penalty proposed; and (c) that such person shall have 30 days to notify the Secretary that he wishes to contest the proposed penalty. If within 30 days from the receipt of the Secretary's notification or proposed assessment of penalty, the operator or other person fails to notify the Secretary that he intends to contest the proposed penalty, the Secretary's proposed penalty shall be deemed to be a final order of the Commission and shall not be subject to review by the Commission or a court.

the Act and its standards. The Act separates the procedures for civil penalty assessment between the Secretary and the Commission. The Secretary proposes the penalty he wishes assessed for a violation and the Commission assesses a penalty of an appropriate amount. See Sellersburg Stone Co., 5 FMSHRC 287, 290-92 (March 1983), pet. for review filed, No. 83-1630, 7th Cir., April 8, 1983; Tazco, Inc., 3 FMSHRC 1895, 1896-98 (August 1981). 4/

This bifurcation of functions is set forth in sections 105 and 110 of the Act. 30 U.S.C. §§ 815 & 820 (Supp. V 1981). Section 105(a) requires the Secretary to take certain steps to notify an operator of the civil penalty "proposed to be assessed under section 110(a) for the violation cited." 30 U.S.C. § 815(a). Section 110(a) provides, in turn, for penalty assessments of not more than $10,000 per violation. 30 U.S.C. § 820(a). Section 110(i) provides, "The Commission shall have authority to assess all civil penalties provided in this Act." 30 U.S.C. § 820(i). After listing the six statutory penalty criteria, section 110(i) concludes, "In proposing civil penalties under this Act, the Secretary may rely upon a summary review of the information available to him and shall not be required to make findings of fact concerning the above [six] factors." 5/

Section 105(a) states that the civil penalty proposal procedures set forth for the Secretary therein are only invoked "[i]f, after an inspection or investigation, the Secretary issues a citation or order under section 104 [30 U.S.C. § 814]." 30 U.S.C. § 815(a). 6/ The Secretary must notify an operator "within a reasonable time" of the penalty he proposes. If the operator chooses to contest a proposed penalty, the Secretary must "immediately advise" the Commission so that a hearing can be scheduled. 30 U.S.C. § 815(d). The statutory procedures for prompt notification

4/ When penalties proposed by the Secretary are not contested, however, a proposed civil penalty is not actually assessed but is deemed to be a final order of the Commission, as if the Commission had assessed it. 30 U.S.C. § 815(a). See also Commission Procedural Rule 25 (n. 3 supra).

5/ The words "shall be assessed a civil penalty by the Secretary" in section 110(a) must be read in pari materia with sections 105(a) and 110(i). Although section 110(a) uses the language "shall be assessed a civil penalty by the Secretary," the express language of sections 105(a) and 110(i) makes clear that this Secretarial function is one of proposal, not disposition. The legislative history bears out this reading of section 110(a). Conf. Rep. No. 461, 95th Cong., 1st Sess. 58 (1977) reprinted in Legis. Hist. 1336; S. Rep. 43, 45-46, reprinted in Legis. Hist. 631, 633-34. Thus, the reference to "shall be assessed" in section 110(a) means "shall be subject to a proposed assessment of a civil penalty by the Secretary." See Sellersburg Stone Co., supra.

6/ Section 104, 30 U.S.C. § 814 (Supp. V 1981), contains the procedures through which an operator's violations of the Act or its standards are enforced. Section 104(a) makes clear that citations shall be issued for violations of "this Act, or any mandatory health or safety standard, rule, order, or regulation promulgated pursuant to this Act." 30 U.S.C. § 814(a).

and contest of a proposed civil penalty assessment reflect Congress' belief that penalty assessment had lagged under the 1969 Coal Act, 30 U.S.C. § 801 et seq. (1976)(amended 1977), and its consequent desire to speed the process. Thus, the thrust of the penalty procedures under the Mine Act is to reach a final order of the Commission assessing a civil penalty for violations without delay.

Cases involving violations of the discrimination provisions, however, are not initiated with the issuance of a citation or order under section 104 but, rather, with filing of special complaints before the Commission under sections 105(c)(2) or 105(c)(3). 30 U.S.C. §§ 815(c)(2) & (3). These two statutory subsections provide for complaint by the Secretary if he believes discrimination has occurred, or complaint by the miner if the Secretary declines to prosecute.

It is clear that a penalty is to be assessed for discrimination in violation of section 105(c)(1). The last sentence of section 105(c)(3) states, "Violations by any person of paragraph (1) shall be subject to the provisions of sections 108 [30 U.S.C. § 818] and section 110(a)." 30 U.S.C. § 815(c)(3). 7/ Section 110(a) requires the Secretary to propose penalties to be assessed for violations of the Act. Neither section 105(c) nor section 110(a), however, states how and when the Secretary is to propose a penalty for a violation of section 105(c)(1).

The Secretary's regulations in 30 C.F.R. Part 100 set forth "criteria and procedures for the proposed assessment of civil penalties under section 105 and 110 of the [Mine Act]." 30 C.F.R. § 100.1. 8/ Section 100.5 lists a number of "categories [of violations which] will be individually reviewed to determine whether a special assessment is appropriate" including "discrimination violations under section 105(c) of the Act." 9/

In spite of this reference to discrimination cases, none of the Part 100 regulations specifies how the Secretary shall propose a civil penalty when he files the complaint of discrimination, and it does not appear that the Secretary contemplated that his administrative review procedures for proposed penalties should apply to a determination that an operator had violated

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7/ Section 108 permits injunctive relief and is not relevant to the issues presented in this case.

8/ In this analysis, for convenience, we will refer to the current Part 100 regulations, which became effective May 21, 1982. They are substantially similar to those in effect when the judge's decision issued. The changes made do not affect our analysis, and we would reach the same conclusions under either version.

9/ A review of the discrimination cases adjudicated by this Commission indicates that the Secretary has used the section 100.5 special assessment procedure in discrimination cases only when the miner has proceeded on his own behalf pursuant to section 105(c)(3) of the Act and prevailed, or when, as here, the judge has severed the penalty proceedings from the discrimination case. In other discrimination cases, the Secretary has requested a penalty in his complaint of discrimination.

section 105(c)(1). Similarly, the Commission's procedural rules do not specifically address penalty procedures for alleged violations of section 105(c)(1). Our rules more generally require the Secretary to notify the operator of "the violation alleged" and the penalty proposed and to afford the operator 30 days in which to notify the Secretary if it wishes to contest the proposal. Commission Procedural Rule 25 (n. 3 supra). See also Commission Procedural Rules 26 through 28, 29 C.F.R. §§ 2700.26 through 28. 10/

The Secretary argues that the penalty proposal procedures in section 105(a) of the Mine Act and Commission Procedural Rule 25 apply only to citations and orders issued under section 104. Violations of the discrimination section, the Secretary urges, are subject only to the provisions expressly mentioned in section 105(c) itself. The Secretary relies on the last sentence in section 105(c)(3), which states that violations of section 105(c)(1) "shall be subject to the provisions of sections 108 [injunctions] and 110(a)." 30 U.S.C. § 815(c)(3). He argues that because section 110(a) contains no reference to section 104 or to section 105(a), the assessment proposal procedures required therein need not be applied in penalty proposals under section 105(c)(3).

Thus, from the language of sections 105(c)(3) and 110(a), the Secretary argues that it is not necessary to have separate penalty proceedings in discrimination cases. Rather, he contends that penalties should be assessed by Commission judges when liability is determined--that is, when an operator is found in a discrimination proceeding to have violated section 105. The Secretary asserts he is "always" prepared to provide the information on the penalty criteria in section 110(i), and that an administrative law judge will never be more competent to decide the penalty question than at the close of a discrimination case in which the judge has determined the existence of a violation.

10/ Commission Procedural Rules 40 through 44 (29 C.F.R. §§ 2700.40 through 44) deal with discrimination complaints, but do not resolve the issue of how a penalty is to be proposed. Rule 42 requires that a discrimination complaint include, among other things, "a statement of the relief requested." The rule tracks section 105(c)(2) of the Act, which requires the Secretary in his complaint to "propose an order granting appropriate relief." 30 U.S.C. § 815(c)(2). The Secretary contends that a civil penalty is part of the "relief" he may request in the complaint, and that inclusion of such a request in a complaint conforms to Rule 42 and section 105(c)(2). We conclude, however, that "relief" as used in section 105(c) and Rule 42 indicates only those remedies available to make the discriminatee whole. Section 105(c)(3) states in part, "The Commission shall ... issue an order ... granting ... relief ... including ... rehiring or reinstatement ... with backpay and interest or such remedy as may be appropriate." 30 U.S.C. § 815(c)(3). The legislative history also supports this reading of "relief." See Secretary on behalf of Dunmire and Estle v. Northern Coal Company, 4 FMSHRC 126, 142 (February 1982), citing to S. Rep. 37, reprinted in Legis. Hist. 625. A civil penalty, on the other hand, is not intended to compensate the victim but rather to deter the operator's future violations.

We agree with the Secretary that it is desirable to adjudicate in one proceeding both the merits of the discrimination claim and the civil penalty. The Mine Act emphasizes, "Proceedings under [section 105(c)] shall be expedited by the Secretary and by the Commission." 30 U.S.C. § 815(c)(3). Because the last sentence of section 105(c)(3) references penalty proposals under section 110(a), we conclude that penalty proposals for section 105(c) violations are to be expedited as well. The express statutory intent to expedite these proceedings is furthered by having the Secretary avoid dual proceedings and incorporate his penalty proposal in his discrimination complaint.

We also conclude, however, that it is incumbent upon the Secretary in a combined proceeding to set forth in the discrimination complaint the precise amount of the proposed penalty with appropriate allegations concerning the statutory criteria supporting the proposed amount. Experience makes us somewhat skeptical about the Secretary's assertion that he has "always" been prepared to present evidence on penalty criteria. Formal penalty allegations in the complaint better afford operators adequate notice of penalty issues in discrimination cases. Because the Secretary may "rely on a summary review of the information available to him" in proposing penalties (30 U.S.C. § 820(i)), the penalty allegations in the discrimination complaint may be stated in summary fashion.

In this case, the Secretary's naked request in his complaint for a penalty of "up to $10,000" is scarcely a penalty proposal at all. Henceforth, we shall require in these cases that the Secretary propose in his complaint a penalty in a specific dollar amount supported by information on the section 110(i) criteria for assessing a penalty. This new rule shall apply to cases pending with our judges as of the date of this decision or filed with the Commission as of, or after, the date of this decision. Leave to amend complaints to add the penalty allegations shall be freely granted. Thus, the operator will be informed not only of the dollar amount proposed, but also the basis therefor. The parties will then be better prepared to litigate at the hearing any disputes concerning the penalty sought.

Because the Secretary did not provide in his complaint sufficient notice to the operator of the amount of the penalty sought and the basis therefor, we cannot say that the judge erred in severing the penalty proposal in order to provide such notice to the operator. Nor do we see the utility of a remand to allow the Secretary to amend his complaint. The judge's approach to the Secretary's inadequate proposal is consistent with the Act's notice requirements and with the position we now enunciate. Accordingly, we affirm the judge's severance of the penalty proposal from the underlying discrimination complaint. 11/

11/ We are presently in the process of adopting an interim amended Rule 42, which will reflect our resolution of the penalty issue. We also note that this case does not raise, and we do not reach, the question of how penalties should be proposed when the Secretary does not file a discrimination complaint on the miner's behalf and the miner files his own complaint under section 105(c)(3).

III. The rate and computation of interest on back pay awards

The next question in this case is whether the judge erred in assessing 6% interest on the back pay award. The remedial goal of section 105(c) is to "restore the [victim of illegal discrimination] to the situation he would have occupied but for the discrimination." Secretary on behalf of Dunmire and Estle v. Northern Coal Co., 4 FMSHRC at 142. As we have previously observed, "'Unless compelling reasons point to the contrary, the full measure of relief should be granted to [an improperly] discharged employee.'" Secretary on behalf of Gooslin v. Kentucky Carbon Corp., 4 FMSHRC 1, 2 (January 1982), quoting Goldberg v. Bama Mfg. Corp., 302 F.2d 152, 156 (5th Cir. 1962).

Included in that "full measure of relief" is interest on an award of back pay. Section 105(c)(3) of the Mine Act expressly includes interest in the relief that can be awarded to discriminatees, while leaving it up to the discretion of the Commission to determine the exact contours of such an award. 12/ The Senate Committee that drafted the section which became section 105(c) stated in its report:

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

S. Rep. 37, reprinted in Legis. Hist. 625 (emphasis added).

Our judges have awarded interest at rates varying from 6% per annum to 12.5% per annum and have used a variety of methods to compute interest awards. At least two of our judges have adopted the NLRB's rate of interest on back pay awards. See, e.g., Bradley v. Belva Coal Co., 3 FMSHRC 921, 925 (April 1981)(ALJ) aff'd in part, remanded in part on other grounds, 4 FMSHRC 982 (June 1982); Secretary on behalf of Smith et al. v. Stafford Construction Co., 3 FMSHRC 2177, 2199 (September 1981)(ALJ) aff'd in part, rev'd in part on other grounds, 5 FMSHRC 618 (April 1983), pet. for review filed, No. 83-1566, D.C. Cir., May 27, 1983. The experience of our

12/ Section 105(c)(3) provides in part:

> The Commission ... shall issue an order, ... if the charges [of discrimination] are sustained, granting such relief as it deems appropriate, including, but not limited to, an order requiring the rehiring or reinstatement of the miner to his former position with back pay and interest or such remedy as may be appropriate.

30 U.S.C. § 815(c)(3).

judges in this area has greatly aided our evaluation of different methods of assessing interest. It has also led us to the conclusion that it is time to adopt a uniform method of computing interest so that all discriminatees will be treated uniformly when they are awarded back pay under the Mine Act.

The miner has not only lost money when he or she has not been paid in violation of section 105(c), but has also lost the use of the money. As the NLRB has stated with regard to interest on back pay awards under the National Labor Relations Act, "The purpose of interest is to compensate the discriminatee for the loss of the use of his or her money." Florida Steel Corp., 231 NLRB 651, 651 (1977). Thus, in selecting an interest rate, we have considered the potential cost to the miner both as a "creditor" of the operator, and as a potential borrower from a lending institution under real economic conditions. We have therefore sought a rate of interest that compensates the discriminatee fully for the loss of the use of money. In addition, we have attempted to select a rate of interest flexible enough to reflect economic and market realities, but not so complex in application as to place an undue burden on the parties and our judges when attempting to implement it.

For all of these reasons we adopt the interest rate formula used by the NLRB: interest set at the "adjusted prime rate" announced semi-annually by the Internal Revenue Service under 26 U.S.C.A. § 6621 (West Supp. 1983) as the interest it applies on underpayments or overpayments of tax. The "adjusted prime rate" of the IRS is the average predominant prime rate quoted by commercial banks to larger businesses as determined by the Federal Reserve Board and rounded to the nearest full percent. 26 U.S.C.A. § 6621 (West Supp. 1983). Under the Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. 97-248, § 345, 96 Stat. 636 (to be codified at 26 U.S.C. § 6621), the adjusted prime rate must be established semi-annually: by October 15 based on the prime rates from April 1 to September 30, and by April 15 based on the prime rates from October 1 to March 31. The rate announced in October becomes effective the following January 1, and the rate announced in April becomes effective the following July 1.

We agree with the NLRB that the IRS adjusted prime rate comes closest to compensating the miner fully for loss of the use of money. On the one hand, if the miner had the money, he or she could invest it or save it and probably earn less than the prime rate. On the other hand, if the miner has to borrow money because he or she is deprived of a paycheck, the rate of interest most likely would be higher than the prime rate. In these circumstances, we concur with the NLRB that the IRS formula "achieves a rough balance between that aspect of remedial interest which attempts to compensate the discriminatee or charging party as a creditor and that which attempts to compensate for his loss as a borrower." Olympic Medical Corp., 250 NLRB 146, 147 (1980). This "rough balance" in our view achieves the goal of making the miner whole for the loss of the use of money.

The IRS adjusted prime rate is also attractive for pragmatic reasons. It is a per annum rate adjusted semi-annually, based on the prime rates for the six months preceding its calculation. In this way, the rate reflects economic conditions with reasonable accuracy. Its announcement well in advance of the effective date offers notice to all parties and our judges. Cf. Olympic Medical Corp., supra.

The relevant adjusted prime rates, which we adopt as the Commission's remedial interest rates, are:

January 1, 1978 to December 31, 1979...6% per year (.0001666% per day)
January 1, 1980 to December 31, 1981...12% per year (.0003333% per day)
January 1, 1982 to December 31, 1982...20% per year (.0005555% per day)
January 1, 1983 to June 30, 1983.....16% per year (.0004444% per day)
July 1, 1983 to December 31, 1983.....11% per year (.0003055% per day)
January 1, 1984 to June 30, 1984.....11% per year (.0003055% per day)

Because the IRS rates of interest are announced as annual rates, it is necessary, as explained below, to convert them to daily rates to calculate interest on periods of less than one year. 13/

There must also be a uniform method of computing the interest on back pay awards under the Mine Act. We have considered a number of possible computational approaches. We are mindful of the NLRB's extensive administrative and legal experience in this area. The NLRB's general back pay methodology is sound and has met with judicial approval. The labor bar is familiar with this system. We conclude that rather than expending administrative resources in attempting to devise a new system, we will best, and most efficiently, effectuate the remedial goals of section 105(c) of the Mine Act by adopting the major features of the NLRB computational system. We are satisfied that this system will do justice to the miner, avoid unnecessary penalization of the operator, and not prove unduly burdensome for our judges and bar to apply.

We therefore announce the following general rules for the computation of interest on back pay.

Back pay and interest shall be computed by the "quarterly" method. See Florida Steel Corp., 231 NLRB at 652; F.W. Woolworth Co., 90 NLRB 289 (1950), approved NLRB v. Seven-Up Bottling Co., 344 U.S. 344 (1953). 14/

13/ Prior to the passage of the Tax Equity and Fiscal Responsibility Act of 1982, the IRS announced the adjusted prime rate in the October of the appropriate year to take effect the following February. For ease of administration under the Mine Act, however, we have bounded certain interest periods at December 31 and January 1 rather than at January 31 and February 1. (The NLRB's General Counsel has followed the same simplifying approach. NLRB Memorandum GC 83-17, August 8, 1983.)

14/ Back pay is the amount equal to the gross pay the miner would have earned from the operator but for the discrimination, less his actual interim earnings. Bradley v. Belva Coal Co., 4 FMSHRC 982, 994-95 (June 1982). The first figure, the gross pay the miner would have earned, is termed "gross back pay." The third figure, the difference resulting from subtraction of actual interim earning from gross back pay, is "net back pay"--the amount actually owing the discriminatee. Interest is awarded on net back pay only.

In a discrimination case where, as here, there has been an illegal discharge, the back pay period normally extends from the date of the discrimination to the date a bona fide offer of reinstatement is made. (As we conclude below, the period may also be tolled when the discriminatee waives the right to reinstatement.)

Under this method (referred to as the "Woolworth formula," after the NLRB's decision in the case of the same name, supra), computations are made on a quarterly basis corresponding to the four quarters of the calendar year. Separate computations of back pay are made for each of the calendar quarters involved in the back pay period. Thus, in each quarter, the gross back pay, the actual interim earnings, if any, and the net back pay are determined. See n. 14.

Interest on the net back pay of each quarter is assessed at the adjusted prime interest rate or rates in effect, as explained below. Like the NLRB, we will assess only simple interest in order to avoid the additional complexity of compounding interest. Interest on the amount of net back pay due and owing for each quarter involved in the back pay period accrues beginning with the last day of that quarter and continuing until the date of payment. See Florida Steel Corp., 231 NLRB at 652. In calculating the amount of interest on any given quarter's net back pay, the adjusted prime interest rates may vary between the last day of the quarter and the date of payment. If so, the respective rates in effect for any quarter or combination of quarters must be applied for the period in which they were operative. The interest amounts thus accrued for each quarter's net back pay are then summed to yield the total interest award.

For administrative convenience, we will compute interest on the basis of a 360-day year, 90-day quarter, and 30-day month. Using these simplified values, the amount of interest to be assessed on each quarter's net back pay is calculated according to the following formula:

> Amount of interest = The quarter's net back pay x number of accrued days of interest (from the last day of that quarter to the date of payment) x daily adjusted prime rate interest factor.

The "daily adjusted prime rate interest factor" is derived by dividing the annual adjusted prime rate in effect by 360 days. For example, the daily interest factor for the present adjusted prime rate of 11% is

.0003055% (.11/360). The daily interest factors are shown in the list of adjusted prime rates above. A computational example is provided in the accompanying note. 15/

15/ The mechanics of the quarterly computation system may be illustrated by the following hypothetical example, in which a miner is discriminatorily discharged on January 1, 1983, and offered reinstatement on September 30, 1983. Payment of back pay and interest is tendered on October 15, 1983. After subtraction of the relevant interim earnings, the net back pay of each quarter involved in the back pay period is as follows:

First quarter (beginning January 1, 1983)	$1,000
Second quarter (beginning April 1, 1983)	$1,000
Third quarter (beginning July 1, 1983)	$1,000
Total net back pay	$3,000

The adjusted prime interest rates in effect in 1983 are:

16% per year (.0004444% per day) from January 1, 1983, to June 30, 1983;
11% per year (.0003055% per day) from July 1, 1983, to December 31, 1983.

The interest award on the net back pay of each of these quarters is as follows:

(1) First Quarter:

(a) At 16% interest until end of second quarter of 1983:
$1,000 net back pay x 91 accrued days of interest (last day of first quarter plus the entire second quarter) x .0004444 = $40.44

Plus,

(b) At 11% interest for entire third quarter through the date of payment:
$1,000 net back pay x 105 accrued days of interest (the third quarter plus 15 days) x .0003055 = $32.07

(c) Total interest award on first quarter:
$40.44 + $32.07 = $72.51

(2) Second Quarter

(a) At 16% interest for the last day of the second quarter
$1,000 x 1 accrued day of interest x .0004444 = $.44

Plus,

(b) At 11% interest for the entire third quarter through date of payment:
$1,000 x 105 accrued days of interest x .0003055 = $32.07

(c) Total = $.44 + $32.07 = $32.51

(3) Third Quarter:

At 11% interest for the last day of the third quarter through date of payment:
$1,000 x 16 accrued days of interest x .0003055 = $4.88 total

(4) Total Interest Award:

$72.51 + 32.51 + 4.88 = $109.90

This amount is added to the total amount of back pay ($3,000), for a total back pay award of $3,109.90.

The major alternative computational approach would involve awarding interest on the total lump sum of net back pay from the date of discrimination to the time of payment. We recognize that this method would involve less complex calculations. We reject the lump sum method, however, because it would penalize the operator by assuming that the entire amount of the back pay debt was due and owing on the first day of the back pay period. We will carefully monitor the experience of our judges and parties in applying the computational system announced in this decision. We will modify the system if that experience over time demonstrates the desirability of adjustment.

In discrimination cases, our judges should advise the parties of the methodology for calculating back pay and interest. The parties shall submit to the judge the requisite back pay figures and calculations, and are urged to make as much use of stipulation as possible. The burden of computation of interest on back pay awards should be placed primarily on the parties to the case, not the judge, in order to comport with the adversarial system.

We apply the foregoing principles in this proceeding because the issue of the appropriate rate of interest in discrimination cases arising under the Mine Act was squarely raised on review. As a matter of discretionary policy in judicial administration, we will otherwise apply these principles only prospectively to discrimination cases pending before our judges as of the date of this decision or filed with the Commission as of, or after, the date of this decision. We do not mean to intimate that any previous awards of interest by our judges in other cases, based on different computational methods, are infirm.

Applying our formula to the present case, we conclude that reversal is necessary. The judge's award of 6% interest is so disparate from the adjusted prime rates in effect from the date of Bailey's discharge on June 27, 1980, as to raise questions concerning whether the complainant would truly be made "whole" if the judge's award stands. Accordingly, we hold that the judge erred in awarding 6% interest, and will remand for recalculation of interest pursuant to the interest formula and computational methods announced in this case.

IV. Tolling of the back pay award

The judge concluded that Bailey was not entitled to back pay after October 20, 1980, the date on which Bailey's complaint was filed. That complaint requested reinstatement, but it was amended January 22, 1981. The amended complaint sought back pay and requested the Commission to "order respondents to pay Mr. Bailey $900.00 for one year college tuition plus $400.00 book and maintenance expense allowance in lieu of reinstatement at respondents' mine." The accompanying motion to amend stated:

> Subsequent to his filing of the complaint the Secretary was informed by complainant Bailey that he did not wish to be reinstated by respondents and that in lieu of reinstatement he would accept tuition for one year of college plus an allowance for expenses.

The judge granted the motion to amend and, when determining the back pay award, applied Rule 15(c), Fed. R. Civ.P., and tolled the award on October 20, 1980. Rule 15(c) provides that where a claim or defense in an amended pleading arises out of the same circumstances set forth in the original pleading, the amendment relates back to the date of the original pleading. Relation back has been generally permitted where the movant seeks to enlarge the basis or extent of a demand for relief. See, for example, Goodman v. Poland, 395 F. Supp. 660, 682-86 (D. Md. 1975)(change of theory of recovery from equity to law permitted); Wisbey v. Amer. Community Stores Corp., 288 F. Supp. 728, 730-32 (D. Neb. 1968)(amendment seeking additional damages in FLSA action permitted). We do not believe that the restrictive application of relation back by the judge was appropriate in this case.

Rather, in determining when back pay should terminate, we look to the date when Bailey informed the Secretary he no longer sought reinstatement at Arkansas-Carbona. We agree with the judge's related conclusion: "It would be unfair and improper to require a mine operator to pay a former employee back pay for a period of time when the employee has unequivocally stated that he does not want to return to his former employment." 3 FMSHRC at 2321. In a case involving similar issues, this judge compared a miner's lack of desire to be reinstated to a rejection of an offer of reinstatement under the National Labor Relations Act. Secretary on behalf of Ball v. B&B Mining, 3 FMSHRC 2371, 2378 (October 1981)(ALJ). We concur with the NLRB rule that an employer is released from his back pay obligations when the employee rejects an appropriate offer of reinstatement, and consider the analogy to the facts of this case appropriate. See, for example NLRB v. Huntington Hospital, 550 F.2d 921, 924 (4th Cir. 1977); NLRB v. Winchester Electronics, Inc., 295 F.2d 288, 292 (2d Cir. 1961); Lyman Steel Co., 246 NLRB 712 (1979).

Tolling the back pay award on the date Bailey informed the Secretary that he no longer desired reinstatement effectuates the preceding principles, while the judge's relation back to the original complaint needlessly and unfairly penalizes Bailey. Therefore, we reverse the judge's relation back to the date of the original pleading. The present record does not reveal the date Bailey informed the Secretary of his waiver of reinstatement. Accordingly, we additionally remand for determination of that date in order that the back pay period may be established and the necessary computations properly made.

V. College tuition and related expenses.

Bailey's remaining contention concerning the award is that the judge erred in not granting him tuition and miscellaneous college expenses. The judge held, "Complainant failed to establish any entitlement to an award of 1 year of college tuition plus $400 book and miscellaneous expense allowance." 3 FMSHRC at 2322. We affirm the judge on this point.

The Secretary argued in his brief before the judge that Bailey would not have paid tuition and expenses, but for his accepting the position at Arkansas-Carbona. 16/ The judge found that, prior to his employment with

16/ The Secretary did not raise this issue on review and, although Bailey briefly raised it in his petition for review, he did not file a brief before us.

Arkansas-Carbona, Bailey worked as a campus security guard at Arkansas Tech, and as a fringe benefit of that campus job did not pay tuition. 3 FMSHRC at 2315. (The judge made no finding on whether Bailey's campus job also entitled him to college expenses.) After Bailey accepted a position at Arkansas-Carbona, and resigned from his campus job, he paid his own tuition.

The remedial goal of section 105(c) of the Act is to return the miner to the status quo before the illegal discrimination. Secretary on behalf of Dunmire and Estle v. Northern Coal, 4 FMSHRC at 142. Had Bailey not been discharged illegally, he would have been working at Arkansas-Carbona and would have had to pay tuition for his classes. We do not see how Arkansas-Carbona can be held responsible for a fringe benefit Bailey did not receive from that company. Although at times we may need to seek alternative remedies to make a miner whole for illegal discrimination (for example, where reinstatement is impossible or impractical), such considerations are not present in this case.

Accordingly, we affirm the judge's refusal to award tuition and college expenses.

VI. Conclusion

For the foregoing reasons, we affirm the judge's severing of the request for a civil penalty from the merits of the discrimination case, and hold that in future cases the Secretary must propose in his discrimination complaints a specific penalty supported by allegations relevant to the statutory penalty criteria. As we have stated above, we are accordingly in the process of amending our Procedural Rule 42 to provide for unified proceedings in the future.

We reverse the judge's assessment of 6% interest on back pay, and remand to the Chief Administrative Law Judge for assignment to a judge for calculation of back pay and interest according to the principles and methodology announced in this decision. 17/ We reverse the judge's tolling of the back

17/ The judge who decided this case has left the Commission.

pay award on the date the complaint was filed, and additionally remand for determination of the date Bailey informed the Secretary he no longer wished reinstatement. Finally, we affirm the judge's denial of Bailey's request for college tuition and related expenses.

Rosemary M. Collyer, Chairman

Richard V. Backley, Commissioner

Frank F. Jestrab, Commissioner

A. E. Lawson, Commissioner

L. Clair Nelson, Commissioner

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

JUN 4 1984

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. CENT 84-8
	:	A.C. No. 34-01358-03506
v.	:	
	:	Checotah No. 1 Mine
TURNER BROTHERS, INC., Respondent	:	
	:	Docket No. CENT 84-9
	:	A.C. No. 34-01317-03508
	:	
	:	Heavener No. 1 Mine

DECISION

Appearances: Richard L. Collier, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas, for Petitioner;
Robert J. Petrick, Esq., Turner Brothers, Inc., Muskogee, Oklahoma, for Respondent.

Before: Judge Melick

These cases are before me upon petitions for assessment of civil penalty filed by the Secretary of Labor, pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act," for alleged violations of regulatory standards. The general issues before me are whether Turner Brothers, Inc., has violated the cited regulatory standards and, if so, what is the appropriate civil penalty to be assessed for those violations. In addition, where the Secretary has alleged that the violation is "significant and substantial" a determination in that regard must also be made. A violation is "significant and substantial" if: (1) there is an underlying violation of a mandatory safety standard, (2) there is a discrete safety hazard i.e. a measure of danger to safety contributed to by the violation, (3) there is a reasonable likelihood that the hazard contributed to will result in an injury, and (4) there is a reasonable likelihood that the injury in question will be of a reasonable serious nature. Secretary v. Mathies Coal Company, 6 FMSHRC 1 (1984).

DOCKET NO. CENT 84-8

Citation No. 2007410 alleges a violation of the regulatory standard at 30 C.F.R. § 71.400 and charges that the mine operator had not provided bathing facilities, clothing change rooms and sanitary flush toilet facilities for the use of the miner's employed at the mine. According to Inspector Boatwright of the Federal Mine Safety and Health Administration (MSHA), the mine operator had previously obtained a waiver of these requirements in accordance with 30 C.F.R § 71.403, however, that waiver had expired the month before. The operator abated the violation by obtaining a new waiver. Under the circumstances, the proposal for settlement of this citation in the amount of $20 is approved.

Citation No. 2077215 alleges a significant and substantial violation of the standard at 30 C.F.R. § 77.1605(b) and reads as follows:

> The 980C Caterpillar front-end loader Company No. 495 being operated in the 002-0 pit cleaning coal was not equipped with adequate brakes in that when the brakes were tested on a small incline, they would not stop or hold the loader. Four rock trucks, two front-end loaders and one water truck was being operated in this area.

The cited standard requires that mobile equipment be equipped with adequate brakes. The testimony of Inspector Boatwright is undisputed. He testified that the cited front-end loader had absolutely no brakes at all, and observed that in addition to the rock trucks and front-end loaders operating in the vicinity of the cited front-end loader, one person was walking about in the vicinity of that loader. In addition, the evidence shows that the cited loader had no front horn and at the beginning of the shift and following the lunch break the cited loader would be driven down an incline into the pit area, thus increasing the hazard. While the inspector acknowledged that there might not have been a serious hazard to the machine operator's so long as they remained in their cabs, there clearly was a grave danger of serious bodily injury or death to any pedestrian walking in the vicinity of the cited loader. Under the circumstances, I find that the violation was "significant and substantial" and a serious hazard.

I further find that the operator was negligent in failing to have the cited equipment removed from service. It is apparent from the uncontested evidence that the brake deficiency had existed for some time and should therefore have been discovered during preshift examinations. The condition was abated immediately by the addition of brake fluid. There was no apparent leak in the system from which brake fluid would have rapidly discharged.

Citation No. 2077216 alleges a significant and substantial violation of the standard at 30 C.F.R. § 77.1605(d) and charges that the front-end loader previously cited also had an inoperable front horn. The cited standard requires that mobile equipment be provided with audible warning devices.

According to the undisputed testimony of Inspector Boatwright, the hazard associated with this violation was significantly increased by the failure of this front-end loader to have brakes. Accordingly, should the equipment lose control because of the absence of brakes, no warning could be given to persons in its path. As previously indicated, there was one pedestrian walking about in the vicinity of this front-end loader. Within this framework, I find that the violation was indeed significant and substantial and a serious hazard.

It is apparent that the operator was negligent in failing to check its equipment since three or four other pieces of equipment at the mine were also without operative horns that morning. The deficiency should have been observed on preshift examination and corrected before the equipment was put into service. The condition was abated by reconnecting a loose wire.

Citation No. 2077219 alleges a violation of the standard at 30 C.F.R. § 77.1110 and charges that the 777 Caterpillar rock truck being operated in the 002-0 pit hauling rock to the spoil area was not provided with a fire extinguisher maintained in an operative condition. The gauge on the fire extinguisher showed the extinguisher to have been discharged. The cited standard requires that fire fighting equipment be continuously maintained in a useble and operative condition.

The undisputed testimony of Inspector Boatwright was that the gauge showed the extinguisher to have been "discharged" and that should have been detected during the preshift examination. Boatwright conceded, however, that the

extinguisher could have discharged between the time of the preshift examination and the time he cited the violation. Under the circumstances, the proof does not support a finding of high negligence. Boatwright also felt that the hazard was minimal in light of the fact that all of the other equipment operating in the pit area had operative fire extinguishers and that little distance would separate these vehicles.

Citation No. 2077220 alleges another significant and substantial violation of the standard at 30 C.F.R. § 77.1605(d) and charges that the 992C Caterpillar front-end loader, Company No. 876, being operated in the 002-0 pit was not provided with an operating front horn. According to Inspector Boatwright, there should not ordinarily be pedestrians in the pit area where the front-end loader was operating, but nevertheless there was nothing to have prevented pedestrian traffic in that area. Moreover, the vehicles are driven in and out of the pit for shift changes, service and refueling so that there is an increased area of exposure to pedestrians. It is reasonably likely that the inability to provide a warning with a front horn could lead to serious injuries and death. The violation is accordingly significant and substantial and serious. It is apparent that the operator was not making thorough preshift checks in his equipment because there were so many defects with horns and back-up alarms on equipment that morning. The operator was accordingly negligent.

Citation No. 2077301 also alleges a violation of the standard at 30 C.F.R. § 77.1605(d) and charges that the other 992C Caterpillar front-end loader was also without a front horn. Since this vehicle was operated in the same manner as the subject of the previous citation, I find that this violation too is significant and substantial and a serious hazard. For the reasons noted above, I also find that the operator was negligent.

Citation No. 2077302 also charges a violation of the standard at 30 C.F.R. § 77.1605(d). The same 992C Caterpillar front-end loader cited for failing to have a front horn in the previous citation also had no backup alarm. Boatwright observed that this equipment is operated in reverse about 50 percent of the time and presented a serious hazard to pedestrians in the pit area or in the fueling area. Under the circumstances, I find that the violation was significant and substantial and serious. Inasmuch as there were indeed so many defective warning devices found during this inspection, I find it unlikely that a proper preshift

examination was done on the equipment and that the operator was accordingly negligent.

Citation No. 2077303 and Citation No. 2077304 charge significant and substantial violations on the same rock truck for having no operative backup alarm and front horn respectively. As previously noted, the rock trucks were used to haul rock out of the pit area to the spoil area and were taken outside the pit to a fueling area during lunch and at the end of the shift. I find it reasonably likely that pedestrians would be placed in danger of serious bodily harm and death from the failiure of this rock truck to have the required alarm equipment. The violation is significant and substantial and serious. For the reasons previously noted, I also find that the operator was negligent in failing to have detected and corrected these violations.

Citation No. 2077305 charges a violation of the standard at 30 C.F.R. § 77.410 charging that the International coal truck, Company No. 126 which was hauling coal from the pit to the coal stock pile area had not been provided with an automatic audible reverse warning device. Boatwright's charges are not disputed by the operator. Based on Boatwright's testimony, I find that it was reasonably likely for a pedestrian to have been struck and killed by this vehicle for failing to have the required warning device. I find the violation to be significant and substantial and serious. I also find the operator to have been negligent. The truck had been on the premises for some period of time and it is not disputed that the operator was aware of the requirement for a backup alarm on this truck.

Citation No. 2077306 charges a violation of the standard at 30 C.F.R. § 77.1109(c)(1) and alleges that no portable fire extinguisher was provided for the coal truck previously cited. Inspector Boatwright found only a minimal hazard in that nearby equipment did have operative fire extinguishers. The operator's explanation is not disputed that it had provided an extinguisher on the equipment, but one of the employees had temporarily removed it without the permission or knowledge of management.

Citation No. 2077307 alleges a violation of the standard at 30 C.F.R. § 77.1707 and charges that the operator did not have a full complement of first-aid equipment available. According to Inspector Boatwright, the operator had at one time the full complement of equipment, but the first-aid kit had been pilferred and that a fully equipped first-aid kit was available within a quarter of a mile.

There is no requirement for the first-aid kit to be examined during preshift examinations. The operator promptly abated all violations. Within this framework, I accept the proffered settlement of $20 for this violation.

DOCKET NO. CENT 84-9

At hearing, the parties proposed a settlement of the one citation at issue, Citation No. 2007409, for $20. The evidence shows that the mine operator had not indeed provided bathing facilities, clothing change rooms and sanitary flush toilet facilities for the use of the miners employed at the mine, however, the operator had previously obtained a waiver of those requirements and had merely failed to apply for a new waiver. The condition was abated upon the operator's obtaining of a new waiver of the requirements. Under the circumstances, I find that the proffered settlement is appropriate.

In determining the amount of penalties in this case, I am also considering that the operator is of medium size and abated all of the cited violations promptly and in good faith. The Secretary has failed to present any evidence of the operator's prior violations, and, therefore, I am not considering that factor in determining the amount of penalties herein.

ORDER

Turner Brothers, Inc. is hereby ordered to pay the following civil penalties within 30 days of the date of this decision:

DOCKET NO. CENT 84-8

Citation No. 2007410	$ 20
Citation No. 2077215	200
Citation No. 2077216	125
Citation No. 2077219	30
Citation No. 2077220	100
Citation No. 2077301	100
Citation No. 2077302	75
Citation No. 2077303	75
Citation No. 2077304	100
Citation No. 2077305	150
Citation No. 2077306	30
Citation No. 2077307	20

DOCKET NO. CENT 84-9

Citation No. 2007409 20

Total Penalties $1,045

Gary Melick
Assistant Chief Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

June 4, 1984

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. WEST 84-66
	:	A.C. No. 02-00533-03507
v.	:	Black Mesa Mine
	:	
PEABODY COAL COMPANY, Respondent	:	Docket No. WEST 84-67
	:	A.C. No. 02-01195-03506
	:	Kayenta Mine

DECISION

Appearances: John C. Nangle, Esq., Associate Regional Solicitor, U.S. Department of Labor, Los Angeles, California, for Petitioner.

Before: Judge Merlin

In accordance with the duly issued Notice of Hearing, the above-captioned cases as well as several others, came on for hearing on May 30, 1984, as scheduled. The Solicitor entered an appearance on behalf of the Mine Safety and Health Administration. Pursuant to permission given in a prior telephone conversation, operator's counsel did not appear.

The Solicitor explained that the citations were improperly cited under 30 C.F.R. 1605(d). On this basis, the Solicitor moved to withdraw the penalty petitions. The Solicitor's motion being well taken, it was granted from the bench.

Accordingly, these cases are Dismissed.

Paul Merlin
Chief Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FALLS CHURCH, VIRGINIA 22041

JUN 5 1984

ROGER LEE WELCH Complainant	:	DISCRIMINATION PROCEEDINGS
v.	:	Docket No: WEVA 84-5-D
CHESTNUT RIDGE COAL COMPANY, Respondent	:	MORG CD 83-22
JAMES H. HARVEY, Complainant	:	Docket No: WEVA 84-6-D
v.	:	MORG CD 83-22
CHESTNUT RIDGE COAL COMPANY, Respondent	:	
MELVIN E. DUNITHAN, Complainant	:	Docket No: WEVA 84-7-D
v.	:	MORG CD 83-22
CHESTNUT RIDGE COAL COMPANY,	:	
RALPH R. LUCAS, Complainant	:	Docket No: WEVA 84-8-D
v.	:	MORG CD 83-22
CHESTNUT RIDGE COAL COMPANY, Respondent	:	Potomac Manor No. 1 Mine

DECISION

Appearances: Mark D. Moreland, Esq., Romney, West Virginia, for Complainants
Thomas R. Lanager, Esq., Elk Garden, West Virginia, for Respondent

Before: Judge Moore

The above case came on for hearing in Cumberland, Maryland, on May 15, 1984. Complainants' counsel Mr. Mark D. Moreland called as his first witness Mr. Thomas Lanager who is the president and majority stockholder of defendent Chestnut Ridge Coal Company. Mr. Lanager testified for approximately 2-3/4 hours, and while he freely admitted that he had, on occasion,

committed violations of certain regulations, Mr. Moreland was unable to impeach him or shake his story to the effect that the only reason that the four complainants had been laid off was economics. They had all indicated that they could not work for less then $12 an hour and he could not afford to pay that much for the type of work they did. He had put a substantial amount of his own money into the company to try to keep it from going under. He could not convince the men that the company was losing money and could not afford to pay $12 an hour when there were others willing to do the same work for eight dollars an hour.

After calling five more witnesses, none of them being a complainant, Mr. Moreland announced that after listening to the approximate five hours of testimony and consultations with his clients, it was apparent to him that there had been a failure in communication between the parties as well as misunderstandings, and that he no longer wished to prosecute the cases. On the basis of the testimony I had heard, I approved his action and announced that the four cases would be dismissed.

I have withheld issuing this decision pending receipt of the transcript. Inasmuch as the transcript has been received, I hereby RATIFY the decision made at the hearings, and these cases are accordingly DISMISSED.

Charles C. Moore, Jr.

Charles C. Moore, Jr.
Administrative Law Judge

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Mr. Thomas R. Lanager, Chestnut Ridge Coal Company, R.D. 1, Box 277, Elk Garden, West Virginia 26717 (Certified Mail)

/db

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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JUN 6 1984

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. KENT 83-131 A. C. No. 15-11065-03502
v.	:	No. 10 Mine
SHAMROCK COAL COMPANY, INC., Respondent	:	

DECISION

Appearances: Thomas A. Grooms, Esq., Office of the Solicitor, U. S. Department of Labor, Nashville, Tennessee, for Petitioner;
Neville Smith, Esq., Smith & Emmons, Manchester, Kentucky, for Respondent.

Before: Judge Steffey

A hearing in the above-entitled proceeding was held on May 1, 1984, in Barbourville, Kentucky, pursuant to section 105(d), 30 U.S.C. § 815(d), of the Federal Mine Safety and Health Act of 1977. At the conclusion of presentation of evidence, counsel for the parties made summations and I rendered a bench decision, the substance of which is set forth below.

The proposal for assessment of civil penalty filed in Docket No. KENT 83-131 seeks to have a penalty assessed for an alleged violation of 30 C.F.R. § 48.5(d). The issues in a civil penalty case are whether a violation occurred and, if so, what civil penalty should be assessed, based on the six criteria set forth in section 110(i) of the Act. The witnesses' testimony and the exhibits in this proceeding support the following findings of fact:

1. Inspector Joe K. Burke went to the No. 10 Mine of Shamrock Coal Company on March 17, 1982. He arrived at the mine about 6:00 a.m. The miners went underground shortly after the inspector arrived, but the mantrip was so crowded that the inspector could not go underground at that time. It was about 8:05 a.m. before the inspector obtained a means of transportation into the underground mine.

2. The inspector proceeded to the 001 Section where mining was in progress. He noticed that a miner who was installing a safety jack was wearing a new hat, a new belt, and new rubber

boots, and the inspector concluded that he was a new miner. He talked to the miner who confirmed the inspector's conclusion that he was working his first day in the No. 10 Mine or any other coal mine. The miner's name was Darrell Brock and he explained to the inspector that he had received 48 hours of new-miner training at the Hazard, Kentucky, Vocational School, but he stated that he had not been given any training at the No. 10 Mine that day. Specifically, he had not been given any training in roof control, or training as to entering and leaving the mine or in the mine escapeway system.

3. Shortly after the inspector had asked the last of the above-described questions about Brock's training, the electrical power for the entire section suddenly went off so that all miners had to be withdrawn. As a result of the power failure, the inspector came out of the mine about noon. On the surface, he talked to the mine foreman, Stanley Couch, who verified Brock's statements to the effect that no specific training had been given to Brock before he went underground.

4. On the basis of the information summarized above, Inspector Burke issued Citation No. 1112116 which alleged a violation of section 48.5(d) of the regulations. The "condition or practice" set forth in the citation reads as follows:

> A newly hired inexperienced miner has commenced work at this mine on the 001 Section of the mine and the miner (Darrell Brock) is assigned duties as a roof bolt machine helper and the miner commenced work on this day. The miner has not been trained in the provisions of Part 48.6(b) and Part 48.7.

Section 48.5(d), the section alleged to have been violated, provides as follows:

> Upon proof by an operator that a newly employed miner has received the courses and hours of instruction set forth in paragraphs (a) and (b) of this section within 12 months preceding initial employment at a mine, such miner need not repeat the training, but the operator shall give and the miner shall receive and complete the instruction and program of training set forth in paragraph (b) of § 48.6 (Training of newly employed experienced miners), and § 48.7 (New task training of miners), if applicable, before commencing work.

5. Exhibits 2 and 3 show that Brock received 48 hours of training at the Hazard Vocational School in compliance with the State of Kentucky's requirements under which a person is given 48 hours of training, instead of the 40 hours of training

required by section 115(a) of the Act and by 30 C.F.R. § 48.5(a). Exhibit 3 is a certification indicating that Brock on March 18, 1982, the day after the citation was issued, was given training in such subjects as "Introduction to Work Environment, Hazard Recognition, H & S Aspects of Tasks Assigned, Statutory Rights of Miners, Self-Rescue & Respiratory Devices, Transport & Communication Systems, Roof/Ground Control & Ventilation, Electrical Hazards, First Aid, Mine Gases, and Prevention of Accidents." That certification is signed by Ikie Whitaker who is an MSHA-approved instructor at Shamrock Coal Company's mines.

6. Gordon Couch was a witness for Shamrock Coal Company. He is the safety director at Shamrock's mines and he testified that, as far as he was concerned, Darrell Brock, the new miner, was given the instruction or training required by section 48.5 (d). He explained that he believes the regulations are ambiguous in directing the sequence in which training must be given before work tasks are assigned. He said that it was not only the practice in March 1982, but is still the practice at the Shamrock No. 10 Mine, for a new miner to be trained on the job, so to speak, by the various people who are in charge of a given area of responsibility. For example, as to Exhibit 3 described above, Couch stated that the first aspect of the training given to Darrell Brock, that is, "Introduction to Work Environment", would have been done by the section foreman as they went underground, because the section foreman at that time would have tried to assure that the experienced miners did not frighten the new miner with erroneous allegations made in jest and the section foreman would have given correct information concerning the hazards which Brock would encounter underground.

7. Gordon Couch explained further that the health and safety aspects of the task assigned to Brock would have been explained by the section foreman on the section. Couch said that training with respect to the specific task to which Brock was to be assigned, that is, the position of helper to the roof-bolting machine operator, would have been given by the roof-bolting machine operator himself. Couch additionally stated that a category of training, such as "Electrical Hazards", would have been given by the mine electrician. Couch also testified that such subjects as "Statutory Rights of Miners, First Aid, Mine Gases, and Prevention of Accidents", would have been covered in Brock's training by the Hazard Vocational School, and that all Whitaker would have had to do before certifying that Brock had been trained in those subjects would have been to have asked Brock if he had been trained in those matters. If Brock had answered Whitaker's questions in the affirmative, those answers would have enabled Whitaker to certify on Exhibit 3 (or MSHA Form 5000-23) that Brock had received training in those areas.

I believe that the findings set forth above are the essential facts which the parties have presented. By way of argument, counsel for the Secretary of Labor stated that he believed that Shamrock was conducting its training of new miners in an entirely erroneous fashion because section 48.6(a) specifically refers to the fact that the program of instruction prescribed by that section has to be given before a new miner 1/ has been assigned to specific work duties. The Secretary's counsel believed that the regulations are so clear in specifying how training will be given that Shamrock operated in a flagrant manner in claiming that new-miner training can be given at random by assorted supervisors and other persons trained in a given position because that procedure fails to assure that the types of training described in the regulations and in Shamrock's training program (Exh. 4) are provided.

Counsel for Shamrock Coal Company responded to the Secretary's arguments by contending that there is no specific sequence set out in the regulations as to the order of training versus the assignment of working tasks. Shamrock's counsel stressed the provisions of section 48.7(e) which states that "All training and supervised practice and operation required by this section shall be given by a qualified trainer, or a supervisor experienced in the assigned tasks, or other person experienced in the assigned tasks."

The Secretary's counsel answered Shamrock's argument by emphasizing that while section 48.7(e) permits a non-MSHA-approved instructor to give training in the performance of a newly assigned task, section 48.6(a), which is also part of the program of instruction to be given to newly employed miners, clearly provides that "A newly employed experienced miner shall receive and complete training in the program of instruction prescribed in this section before such miner is assigned to work duties."

It seems to me that the Secretary's counsel presented a logical argument which is supported by the evidence and by the provisions of the regulations. The section which is alleged to

1/ Section 48.2(b) defines Brock as an "experienced miner" because he had received 48 hours of MSHA-approved training from the Hazard Vocational School within 12 months prior to the time he was hired by Shamrock, but Brock was also a "newly employed experienced miner" within the meaning of section 48.6 and was therefore required to be given "the program of instruction" described in that section. Consequently, my reference to Brock as a "new miner" is a simplified term which at all times should technically be considered the equivalent of saying that Brock was a "newly employed experienced miner" (Tr. 102-103).

have been violated is section 48.5(d) which has been quoted in Finding No. 4 above. If one examines section 48.5(d)'s reference to section 48.6, he finds that subparagraph (a) of that section states that the program of instruction prescribed for a new miner is to be completed before such miner is assigned to work duties. Thereafter, subparagraph (b) lists the instruction which is required to be given.

I can sympathize with the safety director's problems in reading regulations. I am required to read them frequently in order to interpret them and I run into ambiguities myself, but I think that it is clear from subparagraph (a) that the types of training described in section 48.6 must be given before the miner is assigned to work duties. It is true, as the safety director pointed out, that an operator could have a section foreman explain to a new miner the "work environment", referred to in section 48.6(b)(1), while they were going into the mine, and that could be done before a person has been assigned to work on a roof-bolting machine or elsewhere in the mine.

The second provision to be considered is subparagraph 48.6(b)(2) which states that "The course shall include the mandatory health and safety standards pertinent to the tasks to be assigned." It is true, as the safety director claimed, that a supervisor could explain to a new miner underground, before he starts doing assigned tasks, what health and safety standards are associated with such tasks.

Subparagraph 48.6(b)(3) refers to "Authority and responsibility of supervisors and miners' representatives," and that subsection states that "The course shall include a review and description of the line of authority of supervisors and miners' representatives and the responsibilities of such supervisors and miners' representatives; and an introduction to the operator's rules and the procedures for reporting hazards." It is conceivable that a section foreman would have time to do all of the instructing mentioned in the subparagraph I have just quoted, but it is extremely unlikely that such a course would be given on a working section. The section foreman can hardly stop and explain to a new miner all the rights of miners and miners' representatives, and explain the operator's rules for reporting hazards because he has a whole section to run, and I do not believe that those things would be explained underground before a new miner is assigned to work duties.

The next part of the training program is described in subparagraph 48.6(b)(4) which has the caption "Entering and leaving the mine; transportation; communications" and that subsection states that:

> The course shall include instruction in the procedures in effect for entering and leaving the mine; the check-in and check-out system in effect at the mine; and the procedures for riding on and in mine conveyances; the controls in effect for the transportation of miners and materials; and the use of the mine communication systems, warning signals, and directional signs.

Section 48.6(a) requires that all the instruction described above is to be given before any tasks have been assigned. I doubt that such instructions would be given underground on the working section before new miners are assigned to work duties.

Subparagraph 48.6(b)(5) provides that:

> The course shall include a review of the mine map; the escapeway system; the escape, firefighting, and emergency evacuation plans in effect at the mine; the location of abandoned areas; and where applicable, methods of barricading and the locations of barricading materials. The program of instruction for escapeways and emergency evacuation plans approved by the District Manager shall be used for this course.

All of the above-described instruction is required to be given before work duties are assigned. Again, it is conceivable that such detailed instructions could be given by a section foreman underground before work duties are assigned, but there is no evidence in this proceeding to show that the section foreman in Shamrock's No. 10 Mine provided the detailed instructions prescribed by subsection 48.6(b)(5).

Subparagraph 48.6(b)(6) provides that:

> The course shall include an introduction to and instruction on the roof or ground control plan in effect at the mine and procedures for roof and rib or ground control; and an introduction to and instruction on the ventilation plan in effect at the mine and the procedures for maintaining and controlling ventilation.

While the roof-bolting machine operator or section foreman could undoubtedly explain the roof-control plan before assigning a new miner his work duties, I doubt that the section foreman would also explain the ventilation plan before assigning work duties.

Finally, subparagraph 48.6(b)(7) provides for "Hazard recognition" and states that "The course shall include the recognition and avoidance of hazards present in the mine, particularly any

hazards related to explosives where explosives are used or stored at the mine." A new miner could be trained in hazard recognition underground. Since the No. 10 Mine uses a continuous-mining machine, there probably are no explosives stored underground. Nevertheless, the foregoing review of section 48.6 in detail causes me to conclude that the courses prescribed by that section should be given before a new miner is taken underground and it is certain that section 48.6(a) requires that the course has to be provided before any work duties are assigned to a new miner.

It should be noted that certain aspects of the evidence cast considerable doubt on the question of whether Shamrock's section foremen and other personnel were providing new miners with the kind of instruction required by section 48.6 before work duties are assigned. The new miner, Brock, and the other miners had gone into the mine to work about 7:00 a.m. so that they had been underground for about 3 hours and 45 minutes before the inspector observed Brock setting a safety jack. At that time the roof-bolting machine operator was drilling a hole in the roof. He was not just standing there instructing the new miner in the technique of installing safety jacks. There was every indication that the inspector was observing a working section and that Darrell Brock was routinely performing the duties of a helper to the operator of the roof-bolting machine. The mine was otherwise engaged in mining coal and the only reason that Brock went out of the mine at that time, so far as the record shows, is that the electricity went off and all miners had to be withdrawn until power was restored. Consequently, the questions which the inspector might have asked the roof-bolting machine operator about Brock's new-miner training were never asked.

Other aspects of the evidence which cause me to doubt that Shamrock was properly performing new-miner training is that the mine foreman, when asked whether Brock had been given the required training, said that he had not. If the mine foreman knew that the variegated training discussed above was supposed to be provided by the section foreman, the roof-bolting machine operator, the chief electrician, etc., as explained by Gordon Couch, surely the mine foreman would have explained those procedures to the inspector, but he failed to do so.

The evidence, considered in its entirety, causes me to conclude that if Shamrock did intend to train Darrell Brock in all of the subjects which are required by section 48.6, that the company is failing to give the training in the manner required by that section, that is, before work duties are assigned. Additionally, I believe that Shamrock's safety director had failed to instruct his supervisors in the kind of training which they are required to give new miners. The legislative history in Senate Report No. 181, 95th Congress, 1st Session, at page 49, refers to the lack of training provided for the miners who were

working in the Scotia mine at the time it exploded. It was the fact that miners were not being thoroughly trained that caused Congress to insert section 115 into the Act. While it is certain that Darrell Brock had received a lot more training than the Scotia miners had, I fear that the use of underground personnel to provide training, as described by Shamrock's safety director in this proceeding, amounts to a failure to carry out the intent of Congress and the requirements expressed in section 48.5(d). Therefore, I find that a violation of section 48.5(d) occurred.

Section 110(i) of the Act requires consideration of six criteria in assessing civil penalties. There was introduced as Exhibit 6, for the purpose of explaining the criterion of the size of the operator's business, one of the proposed assessment sheets submitted in Docket No. KENT 83-131, and that shows that the No. 10 Mine produces approximately 500,000 tons of coal per year. Exhibit 6 also shows the controlling company's production to be over 13,000,000 tons annually. Counsel for Shamrock stated that the aforesaid figure may or may not be the production of Sun Oil Company and further stated that he believes Shamrock's annual production from all of its mines was in the neighborhood of 2,500,000 tons per year. Those production figures support a finding that Shamrock is a large operator, and to the extent that the penalty is determined under the criterion of the size of the operator's business, it should be in an upper range of magnitude.

The second criterion is whether the payment of penalties would cause the operator to discontinue in business. No specific information was submitted in connection with the operator's financial condition. The Commission held in Sellersburg Stone Co., 5 FMSHRC 287 (1983), that if an operator fails to produce facts about its financial condition, the judge may presume that payment of penalties would not cause the operator to discontinue in business.

The third criterion is the history of the operator's previous violations. There was introduced as Exhibit 5 a sheet from the proposed assessment and that shows that Shamrock had 68 previous violations over an applicable 24-month period during 132 inspection days. If those figures are used in accordance with the provisions of MSHA's assessment formula set forth in 30 C.F.R. § 100.3, the result would be to assign four penalty points under the assessment formula which would indicate a moderate history of previous violations. Therefore, no portion of the penalty will be assigned under the criterion of history of previous violations because of the operator's relatively favorable history.

There was a stipulation by the parties that the operator demonstrated a good-faith effort to achieve rapid compliance after the citation was issued. It has been my practice to

increase a penalty only if there is a showing of a lack of effort to achieve compliance, and to decrease a penalty only if there is evidence indicating some outstanding effort to achieve compliance. In this case, the compliance was normal. Therefore, the penalty should neither be increased nor decreased under that criterion.

The remaining two criteria are gravity and negligence. They are the criteria which normally cause a penalty to be high if either criterion is shown to exist in any serious degree. Counsel for the Secretary emphasized that Shamrock had no basis for proceeding as it did and asserted that there was a rather high degree of negligence involved, but when I discussed above the provisions in section 48.6(b) prescribing the training that is required before a new task is assigned, I found that it would have been within the realm of possibility for an operator to give the required new-miner instruction underground, but the preponderance of the evidence in this proceeding did not show that the training had been given.

In such circumstances, the evidence does not support a finding of gross negligence. Shamrock contested the citation here involved because it believed that its method of training new miners was in compliance with the regulations. Therefore, I cannot conclude that it did anything other than stand by the procedure which its safety director believed was a proper way to provide training to new miners. Nevertheless, at least a low degree of negligence was associated with the violation because the evidence indicates that the safety director had not properly instructed the mine foreman and other personnel in the training methods which he expected them to follow in connection with new miners.

The criterion of gravity remains to be considered. I believe that the violation was serious because Darrell Brock was not aware of having received any training during his first day of employment, based on the inspector's testimony. Of course, as counsel for Shamrock pointed out, only the inspector's version of his conversation with Brock was introduced at the hearing because Brock did not appear as a witness. It is possible that Brock, in retrospect, might say that the section foreman did explain various safety matters to him underground, but the available evidence shows that Brock was not aware of having received any specific training when questioned by the inspector. There were strong indications that Brock had worked as a helper for the roof-bolting machine operator for quite a while before being brought out of the mine after the mine's electrical power was unexpectedly cut off. When the inspector first saw Brock, he was setting a safety jack and appeared to be working as part of a full production crew with no particular emphasis being given to the training of a new miner. The possibility that Brock could have been injured because of a lack of the kind of training which the regulations require causes me to conclude that the violation was serious.

The discussion of the six criteria above shows that Shamrock operates a large business, that payment of penalties will not cause Shamrock to discontinue in business, that Shamrock demonstrated a good-faith effort to achieve compliance after the citation was written, that Shamrock has a favorable history of previous violations, that the violation was serious, and that the violation was associated with a low degree of negligence. In such circumstances, a civil penalty of $500 is warranted.

WHEREFORE, it is ordered:

Shamrock Coal Company, within 30 days from the date of this decision, shall pay a civil penalty of $500.00 for the violation of section 48.5(d) alleged in Citation No. 1112116 dated March 17, 1982.

Richard C. Steffey
Richard C. Steffey
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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JUN 6 1984

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. PENN 83-103
	:	A.C. No. 36-05018-03512
v.	:	
	:	Docket No. PENN 83-142
U.S. STEEL MINING COMPANY, INC.,	:	A.C. No. 36-05018-03516
	:	
Respondent	:	Docket No. PENN 83-199
	:	A.C. No. 36-05018-03522
LOCAL 2300, UNITED MINE WORKERS OF AMERICA, Intervenor	:	Cumberland Mine

DECISION

Appearances: Matthew J. Rieder, Esq., and William M. Connor, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Petitioner;
Louise Q. Symons, Esq., United States Steel Corporation, Pittsburgh, Pennsylvania, for Respondent.

Before: Judge Melick

These cases are before me upon the petitions for civil penalty filed by the Secretary, pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act," for violations of regulatory standards. The general issues before me are whether U.S. Steel Mining Company, Inc. (U.S. Steel) has violated the regulations as alleged, and, if so, whether those violations are of such a nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard i.e. whether the violations are "significant and substantial." If violations are found, it will also be necessary to determine the appropriate penalty to be assessed in accordance with section 110(i) of the Act.

Citation No. 2013059 alleges a violation of the standard at 30 C.F.R. § 75.316 and reads as follows:

> The approved ventilation and methane and dust control plan was not being complied with. Water sprays were inoperative on the section feeder on 13 Butt section (007) located in No. 3 entry approximately 20 feet outby survey spad 6193. The water sprays were inoperative due to a missing water hose. The feeder was in operation at the time of finding.

The relevant provisions of the operator's methane and dust control plan are as follows: "Sprays are provided at shuttle car discharge points, belt conveyor transfer points, and underground dumps to allay dust."

Respondent does not dispute that a violation occurred as charged, but argues that the violation was not "significant and substantial." In order to establish that a violation of a mandatory safety standard is "significant and substantial," the Secretary must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard--that is, a measure of danger to safety--contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature. Secretary v. Mathies Coal Company, 6 FMSHRC 1 (1984).

The essential facts surrounding the violation are not disputed. According to Inspector Thomas A. Woods of the Federal Mine Safety and Health Administration (MSHA), the cited water sprays were not operating because the hose providing water to the feeder had not been extended and connected after the feeder had been advanced on December 2, 1982. Since the condition was cited on December 7, 1983, it is apparent that the condition had existed for 5 days and six production shifts. In addition, according to Inspector Woods, visibility was so impaired by the coal dust in the section that he had to feel his way along the ribs to guide himself. Under the circumstances, supervisory personnel could easily have discovered and corrected the deficiency and were negligent in failing to do so.

According to Woods, the excessive dust at the feeder/crusher was caused by the absence of the water sprays. When combined with potential ignition sources from power

cables, shuttle cars and the continuous miner, the excessive dust created a reasonable likelihood of fire or explosion. The hazard was aggravated by the fact that the Cumberland Mine is a "gassy mine," liberating more than 6,000,000 cubic feet of methane in a 24-hour period. The decreased visibility created by the excessive dust also made it reasonably likely that the shuttle car operator would strike pedestrian miners causing serious injuries or death.

The operator maintains that the violation was not "significant and substantial" because at the time the citation was issued, the belt had not operated for at least 8 hours. According to the operator, when the belt does not run for such a period of time, the bottom of the belt dries out. There is accordingly a dusty period when the shift begins because the sprays have no effect upon dust on the bottom of the belt. It further argues that 36 gallons of water per minute are sprayed on the coal as it is mined, so the coal is already wet when it is dumped at the cited feeder/crusher. This theoretical contention is based upon the testimony of Robert Bohach, a U.S. Steel safety engineer who was not present at the time the violation occurred. Based upon the actual observations of Inspector Woods, the excessive dust was primarily caused by the absence of water spraying over the coal as it was being crushed. I give the greater weight to the first-hand testimony of Inspector Woods.

Under all the circumstances, I find that the violation was "significant and substantial" and constituted a serious hazard. The condition was abated in a timely and good faith manner.

Citation No. 2013060 also charges a violation of the operator's ventilation and methane and dust control plan under the standard at 30 C.F.R. § 75.316. The relevant provisions of the operator's plan read as follows: "[f]low of air in belt may be in the direction of belt flow or against depending on individual section requirements or limitations. If air travels against flow of coal, air will be dumped to return it last crosscut feeder." Citation No. 2014246 and Citation No. 2011680 also charge violations of the operator's ventilation plan for using air coursed through belt haulage entries to ventilate active working places. Violations are additionally charged in these citations under the provisions of 30 C.F.R. § 75.326.

The violations alleged and the facts supporting the preceding three citations are not disputed. The operator

argues that the violations were not "significant and substantial." Inspector Woods, Moats and Sokoloff all testified that belt air ventilating the working section would likely result in smoke from hot rollers on the beltline moving toward the miners working at the face, thereby resulting in serious smoke inhalation hazards to those miners. The operator's witness, Safety Engineer Bohach, acknowledged that the most likely place for a fire in a mine would be the beltline. In addition, Inspector Moats cited experiences in a nearby mine where smoke was caused by a hot roller and a beltline burned through after jamming.

According to Mark Skiles, a U.S. Steel safety inspector, there was no hazard in allowing belt air to move over the face area because belt fires are ordinarily "smokers" and belt fires are therefore easily detectable. Thus according to this view, the miners would be expected to discover the fire hazard before being seriously endangered. The contention is, however, dangerously speculative and without empirical support.

The operator contends in its posthearing brief that the beltlines are subject to preshift examinations, that the belts are fire resistant, that heat sensors are located along the beltline and that Cumberland Mine has never had a belt fire. Assuming that these contentions are accurate, they do indeed serve to mitigate the degree of hazard. They are not, however, sufficient in my opinion to reduce the "significant and substantial" nature of the violation.

U.S. Steel further argues that belt air is permitted by MSHA to ventilate the faces of so-called "pre-1970" mines, such as the Gateway Mine, a mine with a history of belt fires, whereas it is deemed by MSHA to be a "significant and substantial" violation at the Cumberland Mine, a mine with no history of belt fires. MSHA suggests in response that the "pre-1970" mines that are permitted to ventilate the faces with belt air may be required to take other steps to avoid the hazard of belt smoke at the faces though MSHA fails to reveal what those steps might be. Since I am not in any event evaluating whether there has been a "significant and substantial" violation in a "pre-1970" mine and since insufficient evidence has been presented to permit any valid comparisons, I find the operator's argument to be unpersuasive.

Under the circumstances of this case, I am convinced that the violations are "significant and substantial" and a serious hazard. I also find that the operator was negligent

in failing to detect the incorrect air movement during pre-shift examinations. Indeed it appears that the operator intentionally permitted the violation. The conditions were abated in a timely good faith manner.

In determining the amount of penalties in these cases, I am also considering that the operator is large in size and has a fairly substantial history of violations.

ORDER

The U.S. Steel Mining Company, Inc., is hereby ordered to pay the following civil penalties within 30 days of the date of this decision:

Citation No. 2013059	$ 250
Citation No. 2013060	250
Citation No. 2014246	250
Citation No. 2011680	250
Total	$1,000

Gary Melick
Assistant Chief Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
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JUN 8 1984

June 8, 1984

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. YORK 84-8 A.C. No. 18-00655-03516
v.	:	
	:	C-Mine
METTIKI COAL CORPORATION, Respondent	:	

DECISION

Appearances: Sheila K. Cronan, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Petitioner;
Thomas C. Means, Esq., Crowell and Moring, Washington, D.C., for Respondent.

Before: Judge Merlin

This case is a petition for the assessment of a civil penalty filed on March 5, 1984, by the Government against Mettiki Coal Corporation. The operator filed an answer denying the alleged violation and requesting a hearing. By amended notice of hearing issued May 3, 1984, this case was set for hearing on May 17, 1984. The hearing was held as scheduled.

Section 75.329 provides as follows:

> On or before December 30, 1970, all areas from which pillars have been wholly or partially extracted and abandoned areas, as determined by the Secretary or his authorized representative, shall be ventilated by bleeder entries or by bleeder systems or equivalent means, or be sealed, as determined by the Secretary or his authorized representative. When ventilation of such areas is required, such ventilation shall be maintained so as continuously to dilute, render harmless, and carry away methane and other explosive gases within such areas and to protect the active workings of the mine from the hazards of such methane and other explosive gases. Air coursed through underground areas from which pillars have been wholly or partially extracted

which enters another split of air shall not contain more than 2.0 volume per centum of methane, when tested at the point it enters such other split. When sealing is required, such seals shall be made in an approved manner so as to isolate with explosion-proof bulkheads such areas from the active workings of the mine.

Citation No. 2117299 describes the condition or practice as follows:

> In the exploratory butt entries mined to the left of the right sub mains three rooms was mined [sic] to the left off the exploratory butt for a distance of 7 connecting crosscuts which is a distance of 560 feet and the coal in the blocks between the Nos. 1 and 2 rooms were partially extracted without establishing a bleeder system or other equivalent means to ventilate the pillared area.
>
> The coal in the blocks between the Nos. 2 and 3 rooms were not extracted [sic] and a row of permanent stoppings had been erected between these rooms up to the No. 5 connecting crosscut for the purpose of forcing the air over the pillared area up to the No. 7 crosscut and returning back, but due to a massive cave-in in the Nos. 1 and 2 rooms, the concussion of the falls blew the permanent stoppings out in the Nos. 3, 4, and 5 crosscuts, and at the No. 7 crosscut which is the last open between the Nos. 2 and 3 rooms there was .4% methane gas detected when examined with a permissible M-402 hand held methane detector, also a bottle sample was collected for a laboratory analysis, and air measurement was made in this area with a chemical smoke cloud and only 2,000 cubic feet of air per minute could be obtained.

There is no dispute between the parties with respect to the facts. It was explained at the hearing that the air coursing through the One Butt right sub mains was not directed through the bleeder entries so as to carry away methane from gobbed out areas. This misdirection of air happened because metal stoppings in the affected area had been blown out by a roof fall. The operator abated by installing permanent concrete stoppings.

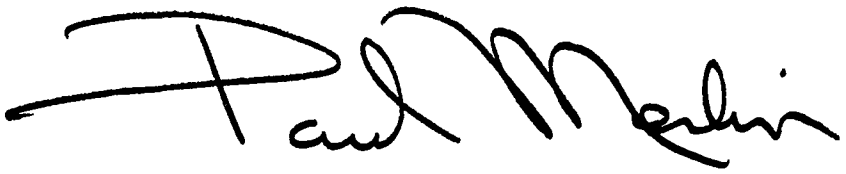
The violation was serious because without a bleeder system, methane would not be carried away but would instead travel to the working areas. The operator was negligent,

although there apparently was some confusion on the operator's part as to whether a bleeder system plan had been approved for this area.

The operator is large in size. Its prior history is average and payment of a penalty will not affect its ability to continue in business.

The operator agreed to pay the original assessed penalty of $1000 which the Solicitor agreed to accept. After being acquainted with all the facts, I approved the recommended settlement from the bench.

The operator is Ordered to pay $1000 within 30 days from the date of this decision.



Paul Merlin
Chief Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

June 8, 1984

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. PENN 83-143
	:	A.C. No. 36-05018-03518
v.	:	
	:	Docket No. PENN 83-154
UNITED STATES STEEL MINING COMPANY, INC., Respondent	:	A.C. No. 36-05018-03520
	:	Docket No. PENN 83-223
	:	A.C. No. 36-05018-03527
	:	Cumberland Mine
	:	Docket No. PENN 83-219
	:	A.C. No. 36-00970-03525
	:	Maple Creek No. 1 Mine
	:	Docket No. PENN 83-226
	:	A.C. No. 36-03425-03536
	:	Docket No. PENN 83-246
	:	A.C. No. 36-03425-03538
	:	Maple Creek No. 2 Mine

DECISION

Appearances: David T. Bush, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Petitioner;
Louise Q. Symons, Esq., Pittsburgh, Pennsylvania, for U.S. Steel Mining Company, Respondent.

Before: Judge Merlin

These cases are petitions for the assessment of civil penalties filed under section 110(a) of the Act by the Secretary of Labor against U. S. Steel Mining Company, Inc. for alleged violations of the mandatory safety standards.

The hearing was held as scheduled and documentary exhibits and oral testimony were received from both parties. At the conclusion of the hearing, I directed the filing of written briefs simultaneously by both parties within 21 days of receipt of the transcript. The briefs have been received and reviewed.

Stipulations

At the hearing, the parties agreed to the following stipulations which were accepted (Tr. 7-8):

1. U.S. Steel Mining Company, Inc. is the owner and operator of the Maple Creek No. 1 Mine.

2. The operator and the mine are subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977.

3. The presiding administrative law judge has jurisdiction over these proceedings.

4. The inspectors who issued the subject citations were duly authorized representatives of the Secretary.

5. The subject citations were properly served on the operator.

6. Copies of the citations may be admitted into evidence for the purpose of establishing their issuance and not for the truthfulness or relevancy of the statements asserted therein.

7. Imposition of penalties will not affect the operator's ability to continue in business.

8. The alleged violations were abated in a timely fashion.

9. The operator's prior history is average.

10. The operator's size is large.

PENN 83-219

Citation No. 2103177

Section 75.701-5 of the mandatory standards provides:

> The attachment of grounding wires to a mine track or other ground power conductor will be approved if separate clamps, suitable for such purpose, are used and installed to provide a solid connection.

The subject citation describes the condition as follows:

> The frame ground for the metallic switch box supplying power to the car spotter and return ground to signal lights at loading ramp in 8 flat 56 room section were connected to the ground (rail) with one clamp. Both were energized.

There is no dispute that the condition described by the inspector existed. Nor does it appear from the testimony that the operator contests that the condition constituted a violation. In any event, it is clear that a violation existed and I so find.

The danger created by the violation was that the metallic switch box could become energized. The current was 550 watts which is enough to electrocute an individual. However, for this to happen both wires would have to come out of the clamp but still remain connected together, which was unlikely. The most likely occurrence would be a break in the electrical circuit shutting off the equipment. Probability was therefore not high. On balance, I find the violation was moderately serious.

The two wires were intentionally put together, but the Solicitor produced no evidence bearing on whether such acts properly could be attributed to the operator under the tests adopted by the Commission. Southern Ohio Coal Company, 4 FMSHRC 1459 (1982); Nacco Mining Company, 3 FMSHRC 848 (1981). The inspector observed the violation when he was walking by; on this basis, I find the operator was negligent.

In light of the foregoing and on the basis of the stipulation relating to the other statutory criteria, a penalty of $70 is assessed.

PENN 83-246

Citation 2106427

Section 75.701-5 of the mandatory standards provides:

> The attachment of grounding wires to a mine track or other grounded power conductor

will be approved if separate clamps, suitable for such purpose, are used and installed to provide a solid connection.

The subject citation describes the condition as follows:

> The electrical and the frame ground wires for the No. 49 water pump located in the 8 Flat 6 Rm. Section MMV 011 were connected to the same clamp where it connected to the mine track.

This is the same type of situation as was present in the preceding citation. Two wires from the water pump were improperly attached to the same clamp. I conclude that a violation existed. Given the danger of electrical shock, the violation was serious.

I also conclude the operator was negligent. The condition existed on a prior shift but the supervisor in charge elected to have it fixed on the following shift.

In light of the foregoing and on the basis of the other statutory criteria, a penalty of $70 is assessed.

Citation 2106428

MSHA vacated this citation and the Solicitor's motion to dismiss the penalty petition with respect to it was granted from the bench.

PENN 83-143

Citation 2011673

Section 75.326 of the mandatory standards provides:

> In any coal mine opened after March 30, 1970, the entries used as intake and return air courses shall be separated from belt haulage entries, and each operator of such mine shall limit the velocity of the air coursed through belt haulage entries to the amount necessary to provide an adequate supply of oxygen in such entries, and to insure that the air therein shall contain less than 1.0 volume per centum of methane, and such air shall not be used to ventilate

> active working places. Whenever an authorized representative of the Secretary finds, in the case of any coal mine opened on or prior to March 30, 1970, which has been developed with more than two entries, that the conditions in the entries, other than belt haulage entries, are such as to permit adequately the coursing of intake or return air through such entries, (a) the belt haulage entries shall not be used to ventilate, unless such entries are necessary to ventilate, active working places, and (b) when the belt haulage entries are not necessary to ventilate the active working places, the operator of such mine shall limit the velocity of the air coursed through the belt haulage entries to the amount necessary to provide an adequate supply of oxygen in such entries, and to insure that the air therein shall contain less than 1.0 volume per centum of methane.

The subject citation describes the condition as follows:

> The belt air ventilating the belt conveyor entry of the 13 Butt West 5 face South (007) was being used to ventilate the active working places on the 13 Butt West 5 Face South (007) Section. Approximately 12,500 cfm of air was measured traveling up the Belt Entry over the Belt feeder and into the Section. The Section foreman is Robert Hall, Supervised by Charles Zabrosky, mine foreman.

The operator admitted the existence of a violation (Tr. 92). Belt air traveling up to the working faces created the danger that if there was a fire on the belt, smoke-filled air would travel inby to where the miners were working, contributing to lung problems and creating difficulties in escaping to fresh air. Accordingly, I conclude the violation was serious. I accept the inspector's evaluation that someone in authority should have known of this condition. The operator was negligent.

However, the record does not contain sufficient evidence to support the finding of significant and substantial. The inspector did not know the definition of "significant and substantial" under governing Commission decisions (Tr. 61-62). He stated that the violation was significant and

substantial because contaminated air coming up the belt " * * * would happen if it was never abated, or never corrected, at some time maybe in our lifetime, that this could possibly happen * * *" (Tr. 63). It is disturbing that at this late date, an inspector is ignorant of the proper definition of the statutory terms he is supposed to enforce. The Solicitor should not call witnesses without preparation.

A penalty of $85 is assessed.

PENN 83-154

Citation 2014207

Section 75.316 of the mandatory standards provides:

> A ventilation system and methane and dust control plan and revisions thereof suitable to the conditions and the mining system of the coal mine and approved by the Secretary shall be adopted by the operator and set out in printed form on or before June 28, 1970. The plan shall show the type and location of mechanical ventilation equipment installed and operated in the mine, such additional or improved equipment as the Secretary may require, the quantity and velocity of air reaching each working face, and such other information as the Secretary may require. Such plan shall be reviewed by the operator and the Secretary at least every 6 months.

The subject citation describes the condition as follows:

> Only 9 sprays out of a total of 16 water sprays (7 not working) was operating [sic] on the Jay 17 CM Set No. 2085 which was cutting and loading coal in the No. 5 entry 24 to 25x cut in the 121 Mains West Sec 001. The approved methane and dust control plan requires water spray systems to be maintained at 75% efficiency.

The operator admitted that seven sprays were not working out of a required total of sixteen and that this constituted a violation of its methane and dust control plan (Tr. 125, 126). This condition would increase the amount of

respirable dust in the air and contribute to the existence of lung disease. Certain sprays that were not working ("C" on Exhibit M-5) were particularly significant in controlling dust at the time the violation was cited because of where the continuous miner was cutting coal (Tr. 138-139). Accordingly, I find the violation was serious. I accept the operator's evidence that the sprays had been working at the beginning of the shift, but I also accept the inspector's testimony that the fact they were not operating was obvious. I conclude that negligence was minimal.

There remains for determination whether the violation was significant and substantial. Dust samples were far better than required. Under such circumstances, I do not believe there was a reasonable likelihood that the increased dust created by the inoperable sprays would result in a reasonably serious injury or illness. I recognize that I have concluded the violation was serious but a violation can have a measure of gravity without meeting the criteria for significant and substantial.

A penalty of $65 is assessed.

PENN 83-223

Citation 2103294

Section 75.1105 of the mandatory standards provides:

> Underground transformer stations, battery charging stations, substations, compressor stations, shops, and permanent pumps shall be housed in fireproof structures or areas. Air currents used to ventilate structures or areas enclosing electrical installations shall be coursed directly into the return. Other underground structures installed in a coal mine as the Secretary may prescribe shall be of fireproof construction.

The subject citation describes the condition as follows:

> The Section belt load center #214 located in the 110 crosscut in the 133 Butt West Section was not properly vented to the return in that the air movement over the load center was toward the intake fresh air.

The inspector testified that he sprinkled rock dust in the air over the power center and that the dust flowed over the top of the power center up towards the section instead of going out into the return air course (Tr. 145, 146). I accept the inspector's testimony and based upon it conclude that there was a violation of the cited standard. I also accept the inspector's testimony that if there was a fire, smoke would go up to the section where people were working (Tr. 147). I find the violation was serious because the smoke could impede escape and is dangerous to health. Finally, I accept the inspector's conclusion that because he did not know how long the violation existed, negligence was low (Tr. 149).

The record does not contain sufficient evidence to support a finding of significant and substantial. This inspector also did not appear to know what the definition of "significant and substantial" is under Commission decisions. He stated that the violation was "reasonably likely" because "there's always a possibility [of fire] in any piece of electrical equipment" (Tr. 150). The fact that something is always possible does not create a reasonable likelihood. Moreover, the inspector did not analyze or explain what was reasonably likely in the manner required by the Commission decisions. It is disturbing to have those charged with the enforcement of the Act show such confusion about elementary terms and fundamental concepts. The Solicitor should not call such witnesses and attempt to rely on their testimony unless he prepares them sufficiently.

A penalty of $126 is assessed.

Citation 2103296

Section 75.503 of the mandatory standards provides:

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

The subject citation describes the condition as follows:

> The S&S battery operated scoop was not maintained in permissiable [sic] condition and being operated in the 133 Butt West Section. All battery cover lids were loose and not fastened down properly.

The inspector testified that the lid covers for the batteries of the scoop and for the battery boxes themselves had corresponding tongues with holes in them on the back and front (Tr. 177). The tongues came on the covers and boxes from the manufacturer. The inspector believed that the standard required that when the covers slid on, the operator should insert some sort of locking device like a bolt through the hole fastening the lid to the box.

The Solicitor argued that section 75.503 which requires that equipment be maintained in permissible condition must be read in conjunction with section 75.2 and 18.44(c). Section 75.2(i) provides that permissible as applied to electrical face equipment means all electrically operated equipment taken into or used by inby the last open crosscut of an entry or room of any coal mine the electrical parts of which including, but not limited to, associated electrical equipment, components and accessories, are designed, constructed, and installed in accordance with the specifications of the Secretary, to assure that such equipment will not cause a mine explosion or a mine fire. Section 18.44(c) of Part 18, 30 C.F.R. 18.44(c), dealing with manufacturers' specifications for approved electrically operated equipment, provides that battery-box covers shall be provided with a means for securing them in closed position.

Assuming that the Solicitor's position regarding section 18.44(c) is correct, I still cannot find a violation. The inspector described how a 2" lip went all around the cover so that the cover slid down over the battery box like a lid on a can or jar (Tr. 194). The inspector agreed that because of the lip, the cover would have to jump up 2 inches before it would slide (Tr. 194). The cover weighs 50 to 100 pounds (Tr. 210-211). In addition, there were tongues on the back of each battery box which stuck out through holes in the cover when the cover was put on (Tr. 201-204). The inspector agreed here too, that this device would secure the cover if the scoop were moving forward (Tr. 206-207). Finally, the battery covers overlapped and interlocked in the center (Tr. 201). I conclude that each of the foregoing devices constituted a means for securing the battery box covers in a closed position within the meaning of section 18.44(c). As section 18.44(c) presently stands, it is sufficiently general to encompass the circumstances presented here. I will not read into the mandatory standards a specificity which they plainly do not have. If the Secretary wants the battery boxes secured in a particular way, it would be a simple enough matter for him to change the regulations to so provide. Judge Melick reached the same conclusion in a case involving the same operator and the Solicitor did not appeal. U.S. Steel Mining Co., FMSHRC Docket No. PENN 82-305, Slip Op. (January 30, 1984).

In light of the foregoing, Citation 2103296 is Vacated.

Citation 2103297

A violation of section 75.503 is alleged here also. The only difference is that in this case, the inspector testified that the locks (or tongues) were actually broken off so there was no means of fastening the covers down (Tr. 197). However, the inspector was unable to specify which fasteners were broken, stating that at least four lugs were broken (1 more or less on both ends) (Tr. 197). Clearly, the inspector did not remember which lugs or tongues were missing. This evidence is too vague to support the citation of a violation. In any event, the missing lugs or tongues appear to relate only to the one device which would require a bolt to be put through the tongues of the battery box and the cover. In this case there is nothing to indicate that the securing devices described in Citation 2103296 were not present here also.

Accordingly, Citation 2103297 is Vacated.

Citation 2103300, Citation 2104061, Citation 2104063, Citation 2104064

The parties agreed that the decision in Citation 2103296 would govern the results in these citations.

Accordingly, these citations are Vacated.

PENN 83-226

Citation 2104311, Citation 2105301

In an off-the-record conference, the Solicitor advised that MSHA had agreed to vacate these citations and I approved a withdrawal of the penalty petition with respect to them.

Order

In light of the foregoing, it is Ordered that within 30 days from the date of this decision, the operator pay $416 in penalties apportioned as follows:

Citation No. 2011673	$ 85
Citation No. 2014207	65
Citation No. 2106427	70
Citation No. 2103177	70
Citation No. 2103294	126

It is further Ordered that Citation Nos. 2103296, 2103297, 2103300, 2104061, 2104063, 2104064, 2104311, 2105301, and 2106428 be Vacated.

Paul Merlin
Chief Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

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

JUN 13 1984

JOSEPH J. CEREMUGA, Complainant	:	DISCRIMINATION PROCEEDING
	:	Docket No. WEST 83-114-DM
v.	:	
	:	MSHA Case No. MD 83-25
COTTER CORPORATION, Respondent	:	Schwartzwalder Mine

ORDER OF DISMISSAL

Before: Judge Carlson

Joseph J. Ceremuga, the pro se complainant herein, has moved for the dismissal of his complaint in this discrimination case on grounds that he does not want to leave his present job in Arizona to attend the hearing scheduled in Denver, Colorado for June 27, 1984. The mine at which the complaint arose is near Denver, Colorado, and the mine operator has previously made clear its wish that the hearing be held near the mine site. The hearing was previously continued from March 21, 1984 at complainant's request.

Since it is now clear that complainant wishes to abandon his claim, the motion will be granted.

Accordingly, the miner's complaint is dismissed with prejudice.

SO ORDERED.

John A. Carlson
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

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

JUN 14 1984

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEST 83-17-M A.C. No. 02-00152-05501
v.	:	Superior Mine
MAGMA COPPER COMPANY, Respondent	:	

DECISION

Appearances: Marshall P. Salzman, Esq., Office of the Solicitor, U.S. Department of Labor, San Francisco, California, for Petitioner;
N. Douglas Grimwood, Esq., Twitty, Sievwright & Mills, Phoenix, Arizona, for Respondent.

Before: Judge Vail

STATEMENT OF THE CASE

Pursuant to provisions of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 802 et seq. (the "Act"), the petitioner seeks an order assessing a civil penalty against the respondent for an alleged violation of 30 C.F.R. § 57.19-128. 1/

An evidentiary hearing was held in Phoenix, Arizona, on March 6, 1984. Both parties filed post-hearing briefs. Based on the evidence presented at the hearing and considering the contentions of the parties, I make the following decision. To the extent that the contentions of the parties are not incorporated in this decision, they are rejected.

1/ Mandatory. Ropes shall not be used for hoisting when they have:
(a) More than six broken wires in any lay.
(b) Crown wires worn to less than 65 percent of the original diameter.
(c) A marked amount of corrosion or distortion.
(d) A combination of similar factors individually less severe than those above but which in aggregate might create an unsafe condition.

ISSUES

The principal issues presented in these proceedings 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 herein; and, if so, (2) the appropriate civil penalty that should be assessed against the respondent for the alleged violations upon the criteria as 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.

STIPULATIONS

This case was heard in conjunction with two other cases. At the outset of the hearing, the parties stipulated to the following:

1. At all times pertinent to these proceedings, respondent was the owner and operator of an underground copper mine and mill near Superior, Arizona, known as the Superior Division, Magma Copper Company.

2. Respondent is subject to the provisions of the Federal Mine Safety and Health Act of 1977 in its operation of the subject mine and mill, and I have jurisdiction over the parties.

3. Respondent is considered a large mining company with a moderate history of past violations. It was stipulated by the parties that any penalty imposed as a result of this citation should neither be increased or decreased because of this history.

4. Payment of the proposed penalty in this case would not affect the respondent's ability to remain in business.

5. The citation involved in this matter was issued on the date indicated thereon and was abated promptly and in good faith.

6. Whether a cited violation is properly designated as a significant and substantial violation is per se irrelevant to a

determination of the appropriate penalty to be assessed. The penalty hereinafter assessed is based on the criteria in section 110(i) of the Act.

FINDINGS OF FACT

1. On June 10, 1982, MSHA inspector Juaguyn G. Sepulvada issued a 104(d)(1) type Citation No. 383670 alleging a violation of 30 C.F.R. § 57.19-128(d) in which it was stated as follows: "The counter balance (weight) wire rope of the No. 9 shaft manhoist had within a distance of 100 ft 64 broken and some distorted wires in different lays. Inspector's reports revealed and employees stated that this condition had been reported on several occasions. Efforts were not made to correct the condition by changing of the rope until 6-8-82 before the inspection." (Exh. P-16).

2. In June 1979, during a regular inspection of the counterweight cable, respondent's cable inspectors reported observing steel slivers throughout its length. Further inspection convinced Joseph L. Clark, maintenance supervisor, that these were not steel slivers on the wire rope, but were fibers from the center core working through the cable strands. Measurements of the cable diameter persuaded Clark that there was no great loss of fiber. (Exh. R-6 and Tr. at 132, 133).

3. A semi-annual electromagnetic test of the entire counterweight cable in February 1982 revealed several anomalies which would indicate broken wires in the following distances above the conveyance; 882 ft., 140 ft., 1475 ft., 1520 ft., 2380 ft., and 2608 ft. Other variations in the test indicated the normal rope pattern with slight lay irregularities (Exh. R-7 and Tr. at 138). A visual inspection of the above locations was performed and according to Clark, no problems were found (Tr. at 140).

4. Early in June 1982, Scott asked Doug Dutton, mechanical engineer, to inspect the counterweight cable to evaluate its condition. On June 3, 1982, Dutton reported the results of his test verbally and later, on June 14, 1982, furnished a written report (Tr. at 140 and Exh. R-8).

5. On June 8, 1982, Scott requested permission from Frank Florez, general manager, to replace the counterweight cable on July 4, 1982. Florez suggested the rope change be done on June 19, 1982. Scott informed the employees in the "shop" and the underground general maintenance foreman that the rope change would occur on June 19, 1982 (Tr. at 144).

6. On June 9, 1982, Scott learned that a citation would be issued on June 10, 1982 against the counterweight cable. A meeting was held the following day between Sepulvada and

respondent's employees including Joe Vindials who told Sepulvada that the rope was to be replaced June 19, 1982. Sepulvada's MSHA subdistrict manager requested that he permit the respondent to wait until June 19, 1982, to replace the rope. Sepulvada agreed to the requested extension of time for abatement of this violation (Tr. at 101, 102).

7. Approximately a month after the cable was removed from the shaft and placed on a storage reel, respondent cut off a 12 foot piece considered to be the "worst section" and sent it to Bethlehem Wire Rope Company for testing. The test results revealed that this section of wire rope had a breaking strength of 355,000 pounds. The catalog breaking strength for this particular type wire rope is 358,000 pounds (Tr. at 150 and Exh. R-9).

8. In February 1983, MSHA representatives, including Roy L. Jameson, examined the wire rope involved in this citation at respondent's mine. They also removed a section of the wire rope for further inspection. Jameson, at that time, was a health and safety specialist with MSHA's Denver Technical Support Center. After conducting an initial examination at the mine and a later analysis at the laboratory facility in Denver, Colorado, Jameson concluded that the continued use of this wire rope had created an unsafe condition (Tr. at 43). This conclusion was based upon the number of fractured wires, loss of wire rope from wear, that it had been "peened" 2/, had a "popped" core, and extended lay length. Jameson found 12 broken wires in one lay length of the wire rope (Tr. at 30, Exh. P-2). He also found the core sticking out of the wires and exceedingly dry (Tr. at 31 and Exh. P-3).

9. At the hearing and following a visual inspection of petitioner's exhibit P-2, Robert Donner, wire rope and sales engineer for Bethlehem Steel Wire Rope Division, counted six broken wires in one strand of Exhibit P-2 (Tr. at 117-118). He also observed some "nicks" and "peening" but was of the opinion that the wire rope could have been used for another three or four weeks.

DISCUSSION

Counsel for respondent argues in his post-hearing brief that § 57.19-128(d), as applied in this case is too vague to convey the standard of conduct required of the mine operator. However, he does concede that subsections (a), (b), and (c) of the cited

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2/ "Peening" is when the metal in the wire, due to pounding of metal against metal, causes an extrusion to the outer edge of the wire, or flattens out.

standard does specifically state objective criteria by which an operator can guide his actions to avoid MSHA sanctions (Resp's brief at p. 15).

If I were to have found from the facts in this case that there was not a violation of one or more of the first three subsections of 57.19-128, and the petitioner was required to rely on subsection (d) to support a violation, I would have to agree with the respondent. In FMC Corporation, Docket No. WEST 80-477-M, _____ FMSHRC _____ (May 4, 1984)(ALJ) involving a similar question, I dismissed a citation for the reason that subsection (d) of 57.19-128 was too vague. However, I find that in the case at issue here a violation of subsection (a) of 57.19-128 was established as the most credible evidence shows there were more than six broken wires in one lay of the cited wire rope on the counterweight. Jameson testified that he counted twelve. Respondent's expert witness, Robert Donner, testified that he could see six broken wires of the wire rope when he examined it visually on the witness stand (Finding Nos. 8 and Tr. at 117-118).

Respondent argued that some of the wires identified by Jameson were identified as "cracked" and should not be considered broken wires as required under the standard. However, Jameson stated that a "crack" must be considered a break within the meaning of the standard for the danger is there has been a loss of a part or percentage of strength in the wire from each crack (Tr. 78). Also, Donner testified that a crack in a wire of a lay of wire rope would constitute a broken wire if it were "significant". He defined "significant" as that which could be seen with the "naked eye" (Tr. 126-127).

Based upon the above evidence, which is not refuted, I find that the violation of 57.19-128(a) occurred. In addition to the broken wires, there was evidence of wear to the rope, peening, and extended lay length as testified to by petitioner's witnesses. Respondent's witnesses contended that these latter factors were not significant. However, the historical facts refute this contention as these same employees had continued to closely examine and observe this wire rope for a period of time prior to the date the citation was issued. The evidence shows that the wire rope had exhibited a deteriorating condition to the extent that it was scheduled for removal and replacement eight days prior to the date the citation was issued.

As to the above, respondent argues that it was complying with 57.19-128 in a manner consistent with conduct of a reasonable and prudent mine operator familiar with the practices in the industry (Resp's brief at p. 12).

I find that this argument fails in light of the requirement of the standard's wording that states in part as follows: "Ropes shall not be used for hoisting when they have: (a) More than six

broken wires in any lay." (Emphasis added). It is clear that replacement of the wire rope is required when such a condition is found. The evidence in this case is not clear as to whether an imminent danger existed from continuing to use this particular wire rope. Petitioner in his brief states that it is not his contention that failure was imminent or immediate (Pet's brief at p. 4). Also, MSHA extended the abatement period for several days to allow the wire rope to be replaced on the date originally scheduled by respondent. I find the question of imminency goes to whether a significant and substantial violation occurred in this violation. Based upon the above evidence, and concession by the petitioner, I find it did not.

PENALTY

Petitioner suggests in his petition proposing a penalty that the amount should be $210.00. He argues that the violation was significant and substantial; that respondent was aware of the condition for several months showing a high degree of negligence.

I disagree that the evidence shows a high degree of negligence. MSHA's requirement at the time of this violation under 30 C.F.R. § 57.19-126 required that operators examine hoist ropes over their entire length at least every month. The respondent had established a practice of having the rope crew inspect the full operating length once per week (Tr. at 135). As to the rope cited here, the evidence shows that respondent was watching the rope carefully and had made a determination to replace it prior to being cited. During the time leading up to this decision, several outside experts were called in to examine the rope and give their opinions as to its continued use. I do not find this history to reveal a high degree of negligence but rather slight negligence in delaying the replacement of the wire rope.

As to gravity, the facts show that the counterweight attached to the rope cited here travels in a vertical steel tube which runs from a point 60 feet above the collar of the shaft to a point 15 feet above the bottom. The counterweight moves at 1500 feet per minute inside the tube. There is a 1/2 inch clearance between the weight and the tube with the force of air passing over the tapered, aerodynamically designed end keeping it centered in the tube.

The 3/8 inch thick steel tube housing the counterweight is in a separate compartment in the shaft from that which houses the hoists used to lift men and materials. Should the rope break, the counterweight would fall to the bottom of the shaft. It is unlikely that it would crash or break through the tube housing it. Also, it is unlikely that anyone would ever be at the bottom of the tube. Also, the counterweight is used to reduce the energy requirements of lifting the load on the hoist and is attached to

a double drum system. The 2000 horse-power motor which drives the hoist is capable of lifting full loads from the bottom of the shaft without assistance of the counterweight should it break away. The evidence also shows that the operator of the hoist would detect any loss of the counterweight should the rope fail.

From the design of the counterweight and its compartment, I do not believe there is a great likelihood of an injury resulting from the wire rope breaking. Therefore, the gravity of this violation is small.

I find from the above that a penalty of $100.00 is reasonable for this violation.

CONCLUSION OF LAW

1. The respondent is subject to the jurisdiction of the Act. The undersigned Judge has jurisdiction over the parties and subject matter of these proceedings.

2. Respondent violated 30 C.F.R. § 57.19-128(a) of the Act as supported by the facts presented in this case.

3. A reasonable penalty is $100.00.

ORDER

Citation No. 383670 is AFFIRMED and respondent is ordered to pay a civil penalty of $100.00 within 40 days of the date of this decision.

Virgil E. Vail
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
333 W. COLFAX AVENUE, SUITE 400
DENVER, COLORADO 80204

JUN 14 1984

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEST 81-163 A.C. No. 48-00900-03018
v.	:	Medicine Bow Mine
MEDICINE BOW COAL COMPANY, Respondent	:	

DECISION

Appearances: James H. Barkley, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
Brent L. Motchan, Esq., Medicine Bow Coal Company, St. Louis, Missouri, for Respondent.

Before: Judge Carlson

This proceeding arose out of an inspection of respondent's surface coal mine on August 12, 1980. The case was transferred to the undersigned judge on June 8, 1983, and was heard in Denver, Colorado on February 15, 1984 under provisions of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., (the "Act"). The parties asked for leave to file post-hearing briefs, but ultimately agreed to waive such submissions. At issue here is whether the respondent, Medicine Bow Coal Company (Medicine Bow), committed three violations of the mandatory safety standard published at 30 C.F.R. § 77.1104. The standard relates to accumulations of combustible materials. 1/ The Secretary contends that two of the three alleged

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1/ 30 C.F.R. § 77.1104 provides:

> Combustible materials, grease, lubricants, paints, or flammable liquids shall not be allowed to accumulate where they can create a fire hazard.

violations were "significant and substantial" under the Act. He seeks civil penalties of $150.00 for one violation, and $160.00 each for the remaining two. 2/

REVIEW AND DISCUSSION OF THE EVIDENCE

The evidence shows that Mine Safety and Health Inspector John E. Thompson visited Medicine Bow's surface coal mine at Hanna, Wyoming on August 12, 1980. In the course of this inspection he examined three pieces of heavy mobile equipment which are the subject of the three citations at issue in this case.

According to the inspector, the government's sole witness, a Caterpillar off-highway dump truck, a Clark front-end loader, and a skidder, had "excessive accumulations" of "combustible materials" on and around the engines, belly pans, transmissions, and rear-end housings. The materials, he testified, were composed chiefly of oil, grease, and related lubricants, along with coal dust and some dirt or soil. His testimony indicated that the composition of the accumulations varied from place to place (e.g. engine oils on engine parts, transmission lubricants on transmissions) but all were mixed with coal dusts. The depths of the deposits, he said, varied from 1/2 to 3 inches. These figures were the product of visual estimates only; he took no measurements. He did not touch or handle the accumulations, nor did he obtain a laboratory analysis. His determination, he acknowledged, was based upon the appearance of the accumulations and their locations.

The inspector maintained that the accumulations constituted a fire hazard because they would burn if ignited. In his belief, ignition could be furnished by exhaust heat, friction heat (brakes for example), malfunctioning electrical components, or engine heat. He further believed that if a fire did occur, from whatever source, the accumulations would serve to fuel and intensify it.

Inspector Thompson was of the further view that heavy equipment fires expose operators and fire fighters to possible injuries in the form of burns, fractures, and smoke inhalation.

2/ The case originally included five citations. At the outset of the hearing the parties announced that two of these, numbers 828415 and 828439, had been settled and would be disposed of by separate written agreement. The citations tried were numbers 828440, 828442, and 828443. The settlement agreement was not received until June 4, 1984. The separate approval of the settlement agreement is issued contemporaneously with this decision.

Through the inspector the Secretary introduced computer print-outs summarizing all reported machine or equipment fires in surface coal mines for the years 1978 through 1983. Prepared by the Mine Safety and Health Administration's Health and Safety Analysis Center, these listings show that such fires ranged in number from a high of 20 in 1981, to a low of 13 in 1978 and 1983. The reports contain a brief description of the cause of each fire. The most frequent single cause was ruptured hydraulic lines. The print-outs (petitioner's exhibit 1) were admitted as demonstrating that fires in surface mining equipment are not uncommon.

Donald E. Burkhart, Jr., Medicine Bow's safety director at the time of inspection, testified for the respondent. Burkhart, who accompanied Inspector Thompson on the inspection, acknowledged that he saw accumulations of lubricating oils and fluids, but insisted that they were only 1/4 to 1/2 inches in depth.

Mr. Burkhart denied that the accumulations constituted a fire hazard. Essentially, his opinion was that fire hazards do not exist without the presence of an ignition source. Measurements of the heat generated by the three pieces of equipment in question, he testified, showed that none generated temperatures sufficient to cause autoignition of the accumulations. The Caterpillar truck, for example, showed temperatures ranging from 35° Farenheit on the belly pan to 327° on the turbocharger (the hottest engine component on most diesels). On the Clark front-end loader, the turbocharger gave a reading on an optical thermometer of 430°. The hottest point on the skidder was the exhaust manifold at 318°.

Mr. Burkhart conceded that equipment fires do occur on mining equipment, but that they nearly always result from broken hydraulic or fuel lines where the fuel or hydraulic fluid is ignited by the heat of the exhaust system. Such a fire, the witness admitted, could then ignite oil or grease accumulations which would intensify the fire hazard "to a minor degree."

Mr. Carl J. Dahn, a consulting engineer, also testified for Medicine Bow. This witness heads a research firm which, he testified, had done extensive studies in engineering hazard analysis with respect to mechanical, chemical, electrical, hydraulic, and pneumatic systems. His work included analysis dealing with equipment fire and explosion hazards, including those involving diesel engines.

According to Mr. Dahn, the autoignition temperature for the oil and grease found around diesel engines ranges from 800° to 1200° Fahrenheit. 3/ Coal in grease tends to increase autoignition temperatures. The witness indicated that the turbocharger is ordinarily the hottest engine part with temperatures ranging 300° and 400°. Mr. Dahn agreed that the accumulations in this case could ignite if exposed to high enough temperatures, but insisted that the facts in the present case showed no likely sources for such ignition. He acknowledged that the most common source of fires in heavy equipment are ruptured fuel or hydraulic lines. While not ignition sources themselves, sprayed fuel or hydraulic fluids may be ignited by exhaust stacks. Electrical shorts, frictional heating, or outside sources such as cigarettes are possible but less likely sources, according to Mr. Dahn.

Repeatedly throughout his testimony Mr. Dahn expressed the opinion that the grease and coal accumulations in this case - including the 1/2 to 3 inch deposits described by the inspector - could not constitute a fire hazard. Behind this reasoning was his conviction that the extent to which the accumulations would intensify or fuel a fire would be so insignificant as to make no real difference. At various times he described the potential intensification as "slight," as "small," and as "secondary." He also stressed that since the Caterpillar and Clark vehicles carried coal, the residues of coal dust in their beds would be significantly more dangerous than the comparative small amount of grease, oil and coal dust on the locations pinpointed by the inspector. In essence, according to Mr. Dahn, even though the accumulations could burn under certain circumstances their hazard potential, compared to primary fire dangers such as ignited fuel or hydraulic fluids, was de minimis.

In deciding whether violation occurred, we should first examine the words of the standard. The inspector, in his testimony, repeatedly referred to "excessive" accumulations of combustible materials, although the standard uses no such term. The inspector was doubtless correct, however, in implying that violations cannot occur with only trivial (as opposed to excessive) accumulations. Even with the best cleaning program, traces of lubricants will likely be present on heavy equipment.

3/ The autoignition point is the lowest temperature at which a material will burn in a closed vessel. Under other than laboratory conditions, the temperature for ignitions would likely be higher.

I find that the accumulations on each piece of equipment were essentially as the inspector described them: from 1/2 inch to 3 inches in depth. Accumulations of that magnitude are large enough to have significance under the standard. I also find that the various areas of excessive accumulations described by the inspector were potential targets for either fuel or hydraulic fluids, or both, sprayed from ruptured, pressurized lines.

Respondent suggests that the Secretary's evidence was insufficient to establish violation because the mixed components of the accumulations were not determined with precision through a laboratory analysis. In support of this claim, counsel cited a case decided by a judge of this Commission where charges were dismissed, in part at least, because of the failure to obtain a laboratory analysis of an allegedly "combustible" solvent. Magma Copper Company, 1 FMSHRC 837 (1979). A question in the case, however, was the propriety of relying on three-year-old label information from a source other than the containers at the worksite.

The evidence in the present case convinces me that the substances in question were of the sort proscribed by the standard. Greases and lubricants are named specifically in the standard, and no one doubts that coal dust qualifies as a "combustible material." I cannot conclude that the admitted fact that some dirt or soil was contained in the mix requires the Secretary to obtain a laboratory analysis when significant amounts of proscribed substances are clearly present. Both witnesses for Medicine Bow conceded that the accumulations would burn if subjected to a fire involving motor fuel or hydraulic fluid.

Medicine Bow also relies upon another judge's decision, Pittsburg and Midway Coal Mining Company, 2 FMSHRC 3049 (1980), in which a lubricant accumulation charge, under the same standard as that cited in the present case, was dismissed. The case is inapposite. There the maximum accumulation was a mere 1/8 of an inch thick, and the chief issue was the "sufficiency" of the accumulation. Moreover, unlike the present case, there were no credible proofs that fuel or hydraulic line breaks are a major cause of equipment fires.

Mr. Dahn suggests that neither a "bad safety practice" nor a "significant fire hazard" results from the presence of up to three inches of grease and coal dust accumulation. This is so, he claims, because the extent to which such accumulations would add to the severity a fuel or hydraulic fluid fire would be "very small" (Tr. 230-239).

On this issue I must agree with the Secretary. Mr. Dahn's argument goes to the gravity of the violation, not its existence. Because the Act is remedial, the mandatory standards promulgated thereunder must be construed in consonance with their underlying purpose - the protection of miners from injury and illness. Nothing in the Act suggests that only major hazards must be suppressed. The evidence here indicates that the accumulations present could sustain or intensify fuel or hydraulic liquid fires. Any fire on a piece of heavy equipment poses some degree of danger to the equipment operator or persons performing rescue or firefighting operations. Additional fuel sources that enhance the intensity or duration of a fire, even marginally, therefore fall within the ambit of the standard. In this connection the word "create," as used in the phrase "create a fire hazard" in the standard, cannot be construed in the narrow or hypertechnical sense of a first cause. Any substance which may reasonably be expected to enlarge, propagate or intensify a fire, "creates" a greater fire hazard. 4/ I therefore conclude that Medicine Bow violated the standard as to all three machines.

4/ In furtherance of the de minimis argument, Mr. Dahn also pointed out that the truck involved in one citation carried loads of coal and that even when empty the bed inevitably contained coal dust residues. The coal in a full load, or the dust in an empty bed, he contended, so dwarfed the potential of grease and coal dust accumulations on engines or undercarriages as secondary fuel sources as to render the latter inconsequential. I reject this reasoning. The purpose of the standard is to minimize fire hazards to the maximum practical extent. The hazard from flammables or combustibles carried as a part of the normal load of a vehicle is essentially unavoidable. Such hazards merely underscore the obvious proposition that some enterprises are inherently more dangerous than others. The standard with which we deal in this present case is aimed at the type of fire hazard which is avoidable. Lubricant accumulations, as the evidence shows, may be removed by routine equipment cleaning procedures. They pose an unnecessary risk. The attempt to introduce a comparative hazard principle, carried to its logical extreme, would produce unacceptably awkward distinctions. It would mean, for example, that water trucks whose loads would rather clearly not burn, would require an engine cleaning program. Fuel trucks, on the other hand, could presumably accumulate grease and oil deposits on the engine and elsewhere indefinitely because of the volatile character of their loads. The standard does not contemplate such an anomalous result. Only if we accept the premise (which this decision does not) that lubricant accumulations are permissible without limit, could respondent's reasoning be accepted.

Although the evidence supports a finding of violations, it does not sustain a finding that the violations were "significant and substantial" under section 104(d)(1) of the Act. Citations 828442 (the Clark loader) and 828443 (the skidder) were alleged by the Secretary to be "significant and substantial" while 828440 (the Caterpillar truck) was not. At the hearing, counsel for the Secretary explained that all three should have been given that classification but, through oversight, were not. (The inspector simply failed to place an "X" in the box on the citation form designated "S and S.") This judge then stated that no motion for amendment would be entertained since any such oversight should have come to the attention of the Secretary during the extensive pre-hearing procedures in this case.

The Commission in Cement Division, National Gypsum Co., 3 FMSHRC 822 (1981), articulated the test to be used in determining whether a violation, in the words of the statute "... could significantly and substantially contribute to the cause and effect of ... a mine safety or health hazard." The violation must be one where there exists "a reasonable liklihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." In the present case, essentially for the reasons urged by Medicine Bow, I must conclude that the violations do not rise to the "significant and substantial" level. Much of the government's case was premised on the notion, rejected in this decision, that the accumulations could be ignited directly by such heat sources as the vehicle engines, turbochargers, or exhaust systems. The evidence demonstrates that the accumulations would burn only if ignited by a fire originating from broken fuel or hydraulic lines. Such fires would likely be quite serious in their own right, made only somewhat more so by the presence of lubricant and coal dust deposits. I agree with Medicine Bow that the additional hazard presented by the burning of such deposits would add in a minor way to a serious fire originating from unrelated causes. Thus, the violations established here cannot be classified as serious and substantial.

We now turn to the matter of penalty. Section 110(i) of the Act requires the Commission, in penalty assessments, to consider the size of the operator's business, its negligence, its ability to continue in business, the gravity of the violation, and the operator's good faith in seeking rapid compliance. Most of the evidence concerning these penalty factors in this case came into the record through stipulations in the settlement agreement entered into with respect to citations 828415 and 828439. The stipulations show that Medicine Bow is a large operator and that in the two years prior to the inspections here it was cited 79 times in 33 days of inspection. The record shows that imposition

of civil penalties of the magnitude proposed by the Secretary would not impair its ability to continue in business, and that it abated the present violations expeditiously.

Upon the evidence, I find that the gravity of the violations was low and that the operator's negligence was moderate. The Secretary seeks a civil penalty of $150.00 for the violation involving the Caterpillar truck and $160.00 each for the violations involving the Clark loader and the skidder. Because of the low gravity of the violations, I find these proposals excessive. On balance, I conclude that $35.00 is an appropriate penalty for each violation.

CONCLUSIONS OF LAW

Based upon the entire record herein, and in accordance with the findings of fact embodied in the narrative portions of this decision, the following conclusions of law are made:

(1) This Commission has the jurisdiction necessary to decide this case.

(2) The respondent, Medicine Bow, violated the mandatory safety standard published at 30 C.F.R. § 77.1104 as alleged in citations 828440, 828442, and 828443.

(3) The violations were not "significant and substantial" within the meaning of section 104(d)(1) of the Act.

(4) The appropriate civil penalty for each of the three violations is $35.00.

ORDER

Accordingly, all citations are ORDERED affirmed, and the respondent Medicine Bow shall pay to the Secretary of Labor civil penalties totaling $105.00 within 40 days of the date of this decision.

John A. Carlson
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

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

JUN 14 1984

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEST 81-163 A.C. No. 48-00900-03018
v.	:	
	:	Medicine Bow Mine
MEDICINE BOW COAL COMPANY, Respondent	:	

DECISION APPROVING SETTLEMENT

Appearances: James H. Barkley, Esq., Office of the Solicitor, U. S. Department of Labor, Denver, Colorado, for Petitioner;
Brent L. Motchan, Esq., Medicine Bow Coal Company, St. Louis, Missouri, for Respondent.

Before: Judge Carlson

The parties have submitted a motion styled "Stipulation, Motion to Withdraw Notice of Contest, and Order Payment." The motion would dispose of two of the five citations comprising Docket No. WEST 81-163. It relates to citations 828415 and 828439. (The remaining citations, 828440, 828442 and 828443, are dealt with in a full decision following hearing on the merits, issued contemporaneously with this present settlement.)

The parties, in the present motion, ask that respondent be granted leave to pay the full penalties originally proposed for the two citations in question, and to withdraw its notices of contest. Under section 110(k) of the Federal Mine Safety and Health Act of 1977 (30 U.S.C. § 801, et seq.), I construe the pleading as one for approval of a settlement agreement.

The agreement is appropriate and is approved in its entirety. Accordingly, citations 828415 and 828439 are affirmed. Respondent shall, within 40 days of the date of this decision, pay a civil penalty of $395.00 in connection with citation 828415 and $345.00 in connection with citation 828439.

SO ORDERED.

John A. Carlson
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FALLS CHURCH, VIRGINIA 22041

JUN 18 1984

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. WEVA 83-271
	:	A.C. No. 46-01369-03516
v.	:	
	:	MacGregor Cleaning Plant
AMHERST COAL COMPANY, Respondent	:	

DECISION

Appearances: William M. Connor, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Petitioner; Edward W. Conch, Esq., Lexington, Kentucky, for Respondent.

Before: Judge Broderick

STATEMENT OF THE CASE

The Secretary seeks civil penalties for four alleged violations of the same mandatory safety standard - that contained in 30 C.F.R. § 77.205(e). The Secretary takes the position that the violations were significant and substantial (although one was not so designated in the citation). Respondent denies that the alleged violations occurred, and asserts that the regulation involved is void and unenforceable because of vagueness. Pursuant to notice, the case was heard on the merits on May 1, 1984, in Charleston, West Virginia. David Francis Mulkey testified on behalf of Petitioner; Robert Doss and Ernest Marcun testified on behalf of Respondent. Both parties waived their rights to file posthearing briefs. Each argued its position on the record at the close of the hearing.

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 hereto, Respondent was the owner and operator of the MacGregor Preparation Plant located in Logan County, West Virginia.

2. Respondent is a wholly owned subsidiary of Diamond Shamrock Coal Company and produces approximately 1.5 millon tons of coal annually. Respondent is a large operator.

3. The imposition of penalties in this proceeding will have no effect on Respondent's ability to continue in business.

4. Between October 15, 1982 and June 2, 1983, the subject mine had a history of 57 paid violations, 31 of which were designated as significant and substantial. Seventeen of these violations were of the safety standard in 30 C.F.R. § 77.205 concerning travelways. This is a significant history of prior violations.

5. The conditions cited as violations in each of the citations involved herein were abated promptly and in good faith after the citations were issued.

6. On June 3, 1983, Federal Mine Safety Inspector David Mulkey issued a citation charging a violation of 30 C.F.R. § 77.205(e) because Respondent failed to provide toe boards on the walkways in the bottom of the "foreign" silo.

7. On June 3, 1983, the walkways in the bottom of the "foreign" silo were not completely provided with toe boards. The foreign silo was a raw coal storage area for coal before it was taken to the preparation plant. Toe boards had been installed, apparently by the contractor who built the silo, on about half of the walkway.

8. The walkway area was in part open to the weather. Rain and snow could blow into the area. Coal dust was present in the area and on portions of the walkway.

9. The walkway was elevated about 6 feet above a cement floor. There was also a conveyor belt running under the walkway.

10. The walkway itself was constructed of expanded metal with holes in it. It was approximately 24 inches wide. It contained a hand rail or top rail approximately 42 inches from the walkway, and a midrail approximately 24 inches from the walkway.

11. The walkway was dry at the time the citation was issued. There were metal guards and feeder top covers lying

against the handrail on part of the walkway at the time the citation was issued.

12. Toe boards were installed along the entire walkway to abate the citation. They were made of metal and were approximately 5 inches high.

13. On June 6, 1983, Inspector Mulkey issued a citation charging a violation of 30 C.F.R. § 77.205(a) because Respondent did not provide toeboards on the walkways of the pan line ramp in the rear area of the preparation plant.

14. On June 6, 1983, the walkways in the pan line ramp in the subject mine did not have toeboards. There was water and mud on parts of the walkways. The area was exposed to the weather. The walkway was elevated about 7 feet above the surface. There were no work areas or travelways beneath this walkway. There was a mid rail about 16 inches from the walkway and a hand rail about 30 inches from the walkway.

15. Toe boards were installed along the walkway to abate the citation. They were metal and were approximately 4 inches high.

16. On June 6, 1983, Inspector Mulkey issued a citation charging a violation of 30 C.F.R. § 77.205(e) because toeboards were not provided in certain areas of the internal part of the preparation plant including the control room, the platform around the raw coal conveyor, the top or roof of the preparation plant, the top of the slate silo, and the No. 2 cut slate belt platform and walkways.

17. On June 6, 1983, toeboards were not present on the walkways described in the citation referred to in Finding of Fact No. 16. (The top or roof of the preparation plant was not designed as a walkway but was used as such). Tools and buckets were present on the control room platform which was about 10 feet above the next level. It was not exposed to the weather. There was a midrail 23 inches from the platform floor and a handrail 41 inches from the floor. There was grease on the platform of the raw coal conveyor. This platform was 52 inches high. The top of the preparation plant was exposed to the weather. There was scrap metal lying around what was used as a walkway. Its height varied from 2 to 60 feet. There was a safety net 8 to 10 feet wide along the edge of the plant under the belt line. The net did not extend all around the plant, however. There was a bottom railing 16 inches from the floor, a second rail 22 inches from the floor and a top rail approximately

10 inches above that. The top of the slate silo was exposed to the weather, and there were pieces of perforated metal lying on the walkway. It was about 30 feet high. There was a midrail 19 inches from the floor and a handrail 38 inches from the floor. The cut slate belt platform had pieces of slate on the walkway. It was 49 inches high. There was a midrail 19 inches from the floor and a handrail 40 inches from the floor.

18. Toeboards were installed in the areas cited to abate the violation. They were constructed of 4 inch metal.

19. On June 7, 1983, Inspector Mulkey issued a citation charging a violation of 30 C.F.R. § 77.205(e) because toeboards were not provided in the entrance platform by the front door of the preparation plant and throughout the entrance level of the plant.

20. On June 7, 1983, toeboards were not present in the entrance platform by the front door of the preparation plant and throughout the entrance level of the plant. The entrance platform was open to the weather. The entrance level of the plant was not exposed to the weather. This area contained steel plates and perforated metal piled against the outside of the plant, and in one area screens were lying against the railing. The entrance platform was approximately 19 feet high. The walkways had midrails 23 inches from the floor, and handrails 39 inches from the floor. The platforms were constructed of metal and concrete. The entrance level was approximately 49 inches above the floor below. There was a mid rail 19 inches from the floor and a top rail 42 inches from the floor.

21. Toeboards were installed to abate the citation. They were constructed of 4 inch metal. Almost 3,000 linear feet of the boards were installed to abate all the citations referred to in this decision.

REGULATION

30 C.F.R. § 77.205(e) provides as follows: "Crossovers, elevated walkways, elevated ramps, and stairways shall be of substantial construction, provided with handrails, and maintained in good condition. Where necessary toeboards shall be provided."

ISSUES

1. Whether the regulatory requirement that toeboards shall be provided where necessary is impermissibly vague?

2. If it is not, whether the evidence shows that toeboards were necessary in the areas cited in this proceeding?

3. If violations were shown, what is the appropriate penalty for each?

CONCLUSIONS OF LAW

Vagueness

The Review Commission has interpreted the mandatory safety standard in 30 C.F.R. § 56.11-2 which is identical with that contained in 30 C.F.R. § 77.205(e). Secretary v. El Paso Rock Quarries, Inc., 3 FMSHRC 35 (1981). It held that the toe board provision was designed to protect persons working below the elevated walkways as well as those using the walkways themselves. Id. at 39. The decision did not indicate that the standard was impermissibly vague because of the general terms, "where necessary." See also Secretary v. UNC Mining & Milling, 5 FMSHRC 1164 (1983) (ALJ). I conclude that a reasonably prudent person familiar with the mining industry should be able to determine whether toeboards were "necessary." Therefore, the standard was not unconstitutionally vague.

Violations

The inspector testified that he cited the absence of toeboards on elevated walkways where (1) there was a slipping or tripping hazard and (2) the walkway was used by employees with some degree of frequency. He found slipping hazards to exist where the walkway was open to the weather and thus subject to snow, rain and ice or where there was oil, grease, or coal dust on the way itself. He found tripping hazards to exist where there were objects present along the walkway over which an employee could trip or stumble. Whether toeboards are necessary in such instances is a matter of judgment. In each case cited, there were handrails and midrails present, which reduced the likelihood of slipping off the walkway. Nevertheless, I accept the inspector's judgment and conclude that in each instance cited, toeboards were necessary. The violations charged were established by a preponderance of the evidence. I distinguish the case of Secretary v. Big Ten Corporation, 2 FMSHRC 2266 (1980) (ALJ), in which the Judge found toeboards unnecessary where the walkway extended 6 inches beyond the rails. Such is not the case here.

Significant and Substantial

Three of the four citations involved in this case were designated as significant and substantial. Much of the testimony and argument of counsel was devoted to the propriety of these designations. However, the issue was not raised in the pleadings or the prehearing submissions. I conclude that the issue is not before me and I do not rule on the question whether the violations were of such nature as could significantly and substantially contribute to the cause and effect of a mine safety hazard.

Penalties

The seriousness of each of the violations is diminished by the fact that hand rails and mid rails were installed on all the walkways in question reducing the likelihood that an employee could slip or fall through to the level below. Should he do so, however, serious injuries could result. The inspector deemed Respondent's negligence to be low, and I concur in this determination, since MSHA inspectors had been through the areas many times previously and had not cited the conditions.

Considering the criteria in section 110(i) of the Act, I conclude that appropriate penalties for the violations are as follows:

1. Citation No. 2141934 involved the foreign silo walkways. The seriousness of this violation is increased because three slipping or tripping factors were present: The area was open to the weather (though it was dry at the time the citation was issued); coal dust was present on portions of the walkways and objects were present on the walkways. The walkways were elevated 6 feet above the surface below. The midrail was 24 inches high. I conclude that an appropriate penalty for this violation is $75.

2. Citation No. 2141938 involved the pan line ramp walkway. Water and mud were on the walkway which was open to the weather. The walkway was elevated 7 feet above the surface below. However, the seriousness of the violation is diminished by the fact that the midrail was only 16 inches above the walkway, making the possibility of slipping off the walkway unlikely. I conclude that an appropriate penalty for this violation is $40.

3. Citation No. 2141939 involved many areas around the control room platform, the raw coal conveyor, the roof of the preparation plant, the slate silo and the cut slate belt platform. Some of these areas were exposed to the weather; there was grease on some of the areas; the elevations varied from 2 feet to 60 feet. The bottom rail height varied from 16 inches to 23 inches. Because of the number of areas involved, I conclude that an appropriate penalty for this violation is $100.

4. Citation No. 2142184 involved the entrance platform and throughout the entrance level. Part of this area was open to the weather and objects were present on the walkways. The elevation varied from 49 inches to 19 feet. The mid-rails varied from 19 inches to 23 inches. I conclude that an appropriate penalty for this violation is $75.

ORDER

Based on the above Findings of Fact and Conclusions of Law, IT IS ORDERED that within 30 days of the date of this decision, Respondent pay the following civil penalties for the violations found herein to have occurred.

CITATION	PENALTY
2141934	$ 75
2141938	40
2141939	100
2142184	75
Total	$ 290

James A. Broderick
James A. Broderick
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

JUN 19 1984

VESTA MINING COMPANY, Contestant	:	CONTEST PROCEEDING
	:	Docket No. PENN 83-122-R
	:	Order No. 2103186
	:	Docket No. PENN 83-123-R
v.	:	Citation No. 2103187
	:	Docket No. PENN 83-125-R
	:	Order No. 2103197
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Vesta Mine

DECISION

Appearances: Michael T. Heenan, Esq., Smith, Heenan, Althen & Zanoli, Washington, DC, for Contestant,

David E. Street, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, PA., for Respondent

Before: Judge Fauver

Vesta Mining contests two orders and one citation issued by the Secretary of Labor (MSHA) on March 2, 1983. Jurisdiction in this proceeding is stipulated, and applies under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, et seq.

The three cases were consolidated and heard in Pittsburgh.

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

FINDINGS OF FACT

Order No. 2103197

1. Federal Mine Inspector Joseph F. Reid issued this withdrawal order under section 104(d)(2) of the Act on March 2, 1983. The order charges a violation of 30 CFR § 75.303(a), based upon the following condition or practice:

> No times, dates and initials of examinations made by certified persons in the No. 10 entry working place of the 9 Butt left 44 Face Section (MMU 037) were being recorded within the last two (2) weeks, as the last date observed on the line canvas in this place was February 15, 1983. According to the section foreman on this shift (Stan Crowson), the examinations have been made for preshift and onshift in this working place, but the time, date and initials were not placed in the area by him and apparently not by the other certified persons on the afternoon and midnight shifts and therefore a proper examination was not being made.

2. The 9 Butt area, where the order was issued, had originally been developed for longwall mining.

3. Because of a rock fault in the area, longwall mining turned out not to be feasible and the company decided to mine the area by the room and pillar method. In accordance with standard practice under MSHA regulations, the company submitted to MSHA a venilation plan which included projections of this mining plan.

4. Included with the company's mining projections were bleeder entries and bleeder projections. The purpose of a bleeder is to provide ventilation to gob areas which result from pillar mining. Bleeder entries are intentionally left on both sides of the area to be pillared so that as mining progresses airways will remain to sweep methane from the gob.

5. Once established, the bleeder entries are required by the regulations to be examined weekly unless the company has a monitoring station where bleeder performance can be evaluated without an examiner specifically traveling the bleeder. Thus, MSHA in approving the ventilation plan, advised the company:

> "Since you did not establish a method to evaluate the back end of 9 Butt 44 gob, it it is assumed you are traveling and examining the bleeder entries weekly."

6. In addition to the bleeders, which were designed and projected to provide air to the gob, the company's ventilation plan projected how ventilation was going to be established on the working section in 9 Butt. The plan was to use curtains to keep fresh air on the section and gob air off the section. Bleeders were also projected to be separated from the section by curtains. Face ventilation, on the other hand, was to be maintained by means of a section fan and tubing leading directly into each working face. This plan was being followed at the time of the inspection in these cases.

7. Exhibit C-2 shows the condition of the section on March 2, 1983. It also shows, along with Exhibit C-1, how the intrusion of the rock fault, which had made longwall mining infeasible, interrupted the room and pillar mining.

8. In mid-February 1983, the place where the company had been mining its bleeder projections pinched out at the rock fault and all mining was terminated in this area by February 15, 1983. Ventilation check curtains were installed in the entries involved, Nos. 9 and 10, and the entire top entry (No. 10) was incorporated into the company's permanent bleeder system.

9. On the day of the inspection, March 2, 1983, Section Foreman Stan Crowsen was in charge of the working section. Crowsen had over 12 years mining experience, and had served as a section foreman (assistant mine foreman) at the Vesta mine for over 7 years.

10. Inspector Reid traveled with Crowsen to the 9 Butt area. On the way in, Crowsen checked all of the stoppings between the track and intake air entries.

11. When they arrived on the section, Crowsen asked the inspector whether he wanted to talk with the miners. The inspector chose instead to accompany Crowsen on his examination of the working faces, located in No. 4 and No. 5 entries.

12. In making his examination of the working faces in the No. 4 and No. 5 entries, Crowsen placed the time, date, and his initials on the ventilation tubing in each face. As he did so, Crowsen noted that the faces had initials showing that the section had been pre-shifted by the previous section foreman. The inspector made a methane check in the No. 5 entry and followed Crowsen as he on-shifted the working faces.

13. The inspector did not dispute the adequacy of Crowsen's inspection or the marking of the date and initials at the faces where mining was being conducted on the section.

14. Crowsen next went to the area "just behind" the fan (see Exhibit C-2) and made a methane check. Crowsen then examined the ventilation check curtain parallel to the fan in crosscut No. 22, and determined that it had been properly installed.

15. After completing these checks, Crowsen examined the Section Load Center which provides power to electrical equipment on the section. Then Crowsen went up to the Battery Charging Station, where he observed an accumulation of water coming from the other side of a stopping which separated the Section Charging Station from the No. 10 bleeder entry.

16. To locate the apparent source of the water, Crowsen walked east to the dead-end of the No. 9 entry, and went around and behind the curtains which separated the working section from the No. 10 return. He then proceeded west up the No. 10 return, which directs bleeder air to the gob areas, until he arrived at the stopping behind the Battery Charging Station.

17. After checking on the water accumulation, Crowsen retraced his steps back down No. 10, around the deflection check curtains in No. 10 and No. 9, and then went to check a mechanical problem with the belt feeder.

18. At this point, Crowsen was informed that the inspector, who was back at the dead-end and extreme east end of the No. 10 entry, was preparing to cite a roof control violation (for an area between Nos. 3 and 4 entries). Crowsen and a mechanic went to the inspector to determine what the problem was about the roof.

19. In their discussion about the roof, the inspector questioned Crowsen with respect to whether the dead-end area of No. 10 entry had been examined regularly and Crowsen indicated that it had been.

20. The inspector then issued the subject order, charging that pre-shift times, dates and initials should have been placed in the east end of No. 10.

21. No mining was being conducted in the No. 10 entry, on March 2, 1983, and that entry was separated from the working section. The inspector observed no mining equipment in the area; there was no evidence of equipment having been there since mining had ceased in mid-February, which was the point at which date, time and initials had last been marked.

22. The No. 10 entry, directing return air to bleeders, was inspected each week by Crowsen or other certified examiners. In making the regular weekly inspections of the No. 10 return, Crowsen and other examiners put their initials at different locations along the entry, and not necessarily in a given spot.

23. Inspector Reid did not examine the No. 10 entry for dates, times and initials of weekly examinations. Rather, he confined his inspection in No. 10 to determining only whether Crowsen had written the date "March 2, 1983" on line brattices separating No. 9 and No. 10.

24. Crowsen considered No. 10 a return entry subject to regular weekly inspections but not pre-shift or on-shift inspections, because no miners were normally required to work or travel there.

25. After mining ceased in mid-February, the No. 10 entry was not in a condition suitable for mining. Apart from the rock intrusion, posts had been set up which would have blocked access necessary for mining operations and the Battery Charging Station had been established only one crosscut away, thus impeding access to the No. 9 and No. 10 dead-end headings. In addition, the No. 10 entry was being relied upon to provide a segregated return to direct bleeder air to the gob behind the section.

26. After the cessation of mining in mid-February, 1983, two weeks before the issuance of the order involved here, the No. 10 return, including the dead-end heading where the subject order was issued, was not an area where any miners other than certified examiners entered or were assigned to enter.

27. On March 2, 1983, the No. 10 return, including the dead-end where the order was issued, was not part of the 9 Butt area working section.

Order No. 2103186

28. During the inspection on February 24, 1983, Inspector Reid entered a crosscut between Nos. 3 and 4 entries, adjacent to the belt feeder. There he saw sandstone roof about 8 to 9 feet high, and observed three pieces of loose and hanging sandstone between roof bolts. These pieces were large enough to kill or seriously injure a miner if one fell on him.

29. Based upon his observations of the roof, Inspector Reid informed a company representative, Calvin Smitley, that he was issuing a section 107(a) ("imminent danger") order because of the roof condition. The 107(a) order states:

> There was loose and hanging pieces of sandstone observed in the middle of the No. 8 room crosscut between Nos. 3 and 4 entries of the 1 Panel East Mains section (MMU 036). This Order is being issued to assure the safety of any persons in this area until the time that it is determined to be safe.

30. Smitley found a piece of drill steel and began prying down the three pieces of roof. The pieces came down. They were about 3 inches thick and, in total, were about 6 square feet.

Citation No. 2103187

31. In the same crosscut where he issued the 107(a) order, Inspector Reid observed what appeared to him to be excessive spaces between roof bolts. The roof ranged from about 8 to 9 feet in height in the crosscut.

32. Inspector Reid used a 6-foot rule to measure the distance between the roof bolts he questioned. Near the No. 3 entry, he saw a large crack about 10 feet long. The roof there was about 8 feet high, and he was able to measure several roof bolt distances by holding both ends of the rule against the roof. I find these measurements to be accurate, and they showed distances of 55 inches, 54 1/2 inches, and 49 inches between roof bolts. He attempted to measure distances in areas where the roof was too high to hold both ends of the rule against the roof. I find that his "measurements" in those areas (ranging from 49 1/2 to 66 inches) were merely estimates and were subject to too much of a margin of error to be reliable figures.

33. Based upon his measurements and attempts to measure the distances between roof bolts, Inspector Reid issued a section 104(a) citation (No. 2103187), which states:

> The approved roof control plan was not being complied [with] in the No. 8 room crosscut between Nos. 3 and 4 entries of the 1 Panel-East Mains section (MMU 036) as there were 10 areas between the conventional roof bolts in the center of the crosscut where the spacing between the bolts exceeded the required 48 inches. Six of the areas ranged from 53 to 59 inches and four of the areas ranged from 60 to 66 inches and there were loose and hanging pieces of sandstone, averaging 3 inches thick, and there was a 10 foot long crack in the sandstone in this crosscut where the height ranged from 8 to 9 feet. This crosscut is a regular tramway for shuttle cars taking coal to the belt feeder.
>
> Note -The Galis roof bolter at 1200 was in the process of starting to bolt the affected areas after the loose and hanging sandstone was taken down and two (2) rows of roof jacks were installed. This citation will not be terminated until the plan is reviewed with the persons on all three shifts that normally work in this section, by management personnel.

The §104(a) citation was issued on February 24, 1983. On February 25, 1983 it was modified as follows:

Citation No. 2103187 issued on February 24, 1983 is hereby modified to include the following statement: The excessive roof bolt spacing observed in the No. 8 room crosscut between Nos. 3 and 4 entries of the 1 Panel-East Mains section was one of the factors that contributed to the issuance of Imminent Danger Order No. 2103186 dated February 24, 1983.

DISCUSSION WITH FURTHER FINDINGS

Order No. 2103197

This MSHA order charges a violation of 30 CFR § 75.303(a) for failure to place time, date, and initials of a preshift examination at the east dead-end of No. 10 entry.

Section 75.303(a) requires preshift examinations and the placing of time, date, and initials at the places preshifted within three hours before a shift begins and "before any miner in such shift enters the active workings of a coal mine." The term "active workings" is defined as:

> any place in a coal mine where miners are normally required to work or travel. [30 U.S.C. § 318(g)(4); 30 CFR § 75.2(g)(4).]

The intake air was split just after it reached the working section in question. Part of it ventilated the working section and part of it became return air to ventilate the gob areas. No. 10 entry, at the point where Inspector Reid charged a preshift violation, was a bleeder entry outside the working section. Mining had ceased there on February 14 or 15, 1983, over two weeks before the date of the citation. The regulations provide that bleeders "shall not include active workings" (30 CFR 75.316-2(c) (2)). They are required to be examined weekly, but not preshifted.

Since no miners, other than certified examiners, were required to enter the No. 10 entry, there was no requirement for a preshift examination under 30 CFR § 75.303(a). Therefore, the Secretary failed to prove a violation as alleged in Order No. 2103197.

Order No. 2103186

Inspector Reid observed the roof in question, and saw several pieces of loose hanging sandstone between roof bolts. Calvin Smitley, the management representative, pried down 3 pieces of roof with a drill steel. He testified that the pieces were not loose and that it took extreme effort to pry them down. It was his opinion that the roof was safe, and that it was actually a danger to try to pry down a solid roof. However, he did not use a roof bar designed to pry down roof. A drill steel is not wedged and tapered, and is not an appropriate device for prying down pieces of a roof. I credit the inspector's testimony that there were loose, hanging pieces and that these were of sufficient size to cause death or serious injury if a piece fell on a miner.

In crediting Inspector Reid's testimony that the roof condition was an imminent danger, I have also considered his supervisor's testimony that Inspector Reid had correctly issued an imminent danger order at another mine, when he observed loose roof that fell very shortly after he caused the mine to be evacvated. The order in that case, as in this one, was issued despite the operator's strong opinion that the roof was safe. I find that Smitley's use of drill steel rather than a proper prying bar lessens the credibility and weight of his testimony as to the actual condition of the roof. I credit Inspector Reid's testimony as to the number, size, and danger of the pieces pried down by Smitley.

Roof falls are one of the chief causes of fatalities in underground coal mining. The inspector's issuance of an imminent danger order was justified by the facts of this case.

Citation No. 2103187

As stated in the findings, the inspector measured some of the roof bolt distances by holding both ends of the 6-foot rule against the roof. As to those, I find that the measurements were accurate, and that a preponderance of the reliable, probative, and substantial evidence establishes that the top three figures in the inspector's drawing in his notes (Exhibit 6), showing distances of 55, 54 1/2 and 49 inches, were reasonably measured and are accurate. However, the rest of the figures were not measured by placing both ends of the rule against the roof. The inspector simply placed one end of the rule against the roof and held the other end of the rule some distance down from the roof and sighted the point of the rule (i.e. the inch mark) which he estimated would be the right place if that end were placed

against the roof. Thus, instead of measuring points A and B (the distance between two roof bolts), he was estimating the distance between point A (on the roof) and Point C, some distance in space beneath the roof. I find that this approach was uncertain and not reliable.

In summary, I find that the top three figures (55, 54 1/2 and 49 inches) in the inspector's drawing were adequately measured and proven by the Secretary. Since the roof-control plan provides a margin of error of 5 inches, the figures 55 and 54 1/2 inches prove violations of the 48-inch standard in the roof control plan, and the figure 49 inches does not. The rest of the figures in the inspector's drawing are rejected as being unreliable estimates and not actual measurements.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction in these proceedings.

2. The Secretary did not meet his burden of proving a violation as alleged in Order No. 2103197.

3. The Secretary met his burden of proving a violation as alleged in Order No. 2103186.

4. The Secretary met his burden of proving two violative roof bolt distances in Citation No. 2103187 (i.e. 55 and 54 1/2 inches), but did not prove a violation as to the other alleged excessive distances.

ORDER

WHEREFORE IT IS ORDERED that:

1. The Secretary's Order No. 2103197 is VACATED.

2. The Secretary's Order No. 2103186 is AFFIRMED.

3. The Secretary's Citation No. 2103187 is MODIFIED by deleting the following language:

> 10 areas between the conventional roof bolts in the center of the crosscut where the spacing between the bolts exceeded the required 48 inches. Six of the areas ranged from 53 to 59 inches and four of the areas ranged from 60 to 66 inches.

and substituting therefor the following language:

> two areas between the conventional roof bolts exceeded the required 48 inches in that one spacing was 55 inches and the other spacing was 54 1/2 inches.

Citation No. 2103187, as so MODIFIED, is AFFIRMED.

William Fauver
William Fauver
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006
June 20, 1984

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of TEDDY W. BENTLEY, Complainant	:	DISCRIMINATION PROCEEDING
	:	Docket No. KENT 84-157-D
	:	No. 26 Mine
v.	:	
BETH-ELKHORN CORPORATION, Respondent	:	

ORDER OF DISMISSAL
DECISION APPROVING SETTLEMENT

This is a discrimination case brought by the Secretary on behalf of Teddy W. Bentley. On May 29, 1984, the Solicitor filed a motion to withdraw the complaint, explaining in detail a settlement agreement reached by the parties. Attached to the Solicitor's motion is a statement signed by Mr. Bentley that he voluntarily entered into the settlement and authorized the Solicitor to withdraw this complaint.

In addition, the Solicitor and the operator have moved for approval of a civil penalty settlement in the amount of $100.

I have reviewed the Solicitor's comprehensive motion to withdraw. It is Granted and the complaint is Dismissed.

I have also reviewed the settlement motion and in light of unusual circumstances set forth therein, determine it proper. The parties' request to delete the last sentence of the penultimate paragraph of the settlement motion is Granted. The settlement motion is Approved and the operator is Ordered to pay $100 within 30 days from the date of the decision.

Paul Merlin
Chief Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

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

JUN 21 1984

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on ON BEHALF OF LOREN E. Nielsen, Sr. Complainant	:	DISCRIMINATION PROCEEDING Docket No. CENT 84-11-DM MSHA Case No. MD 83-34 Bird Quarry & Plant
v.	:	
STEWART STONE, INC., Respondent	:	

DECISION APPROVING SETTLEMENT

Before: Judge Vail

This case is before me upon the complaint filed by the Secretary of Labor on behalf of Loren E. Nielsen, Jr., under section 105(c)(2) of the Federal Mine Safety and Health Act of 1977 (the "Act"), for an alleged unlawful discharge on or about May 13, 1983. The parties have filed a joint stipulation of settlement and proposed order of dismissal in which respondent has agreed to pay Mr. Nielsen $3,000.00 in settlement of, on account of, or arising out of his employment relationship with respondent, specifically the termination of his employment and/or any alleged discriminatory employment practice committed by respondent against the complainant at any time prior to the execution of the agreement. Nielsen seeks to withdraw any and all complaints of discrimination filed with Federal Mine Safety and Health Administration including the complaint above. The Secretary also seeks to withdraw its request for a civil penalty. Each party agrees to bear his own fees and other expenses incurred herein.

I have considered the representations and documentation submitted in this case, and I conclude that the proferred disposition is appropriate.

WHEREFORE, the proposed settement is APPROVED and this case is DISMISSED.

Virgil E. Vail

Virgil E. Vail
Administrative Law Judge

/blc

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