

JUNE 1989

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JUNE 1989

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

Utah Power & Light Company v. Secretary of Labor, MSHA, Docket No. WEST 89-161-R.
(Judge Morris, April 24, 1989)

Roger L. Stillion v. Quarto Mining Company, Docket No. LAKE 88-91-D. (Judge
Fauver, May 9, 1989)

Ozark-Mahoning Company v. Secretary of Labor, MSHA, Docket No. LAKE 88-128-RM.
(Judge Koutras, May 9, 1989)

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

Stenson Begay v. Liggett Industries, Inc., Docket No. CENT 88-126-D. (Judge
Maurer, May 17, 1989)

COMMISSION DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

June 15, 1989

UTAH POWER AND LIGHT COMPANY,	:	
MINING DIVISION	:	
	:	
v.	:	Docket No. WEST 89-161-R
	:	
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	

BEFORE: Ford, Chairman; Backley, Doyle, Lastowka and Nelson,
Commissioners

ORDER

BY THE COMMISSION:

In this contest proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982) ("Mine Act" or "Act"), Utah Power and Light Company, Mining Division ("UP&L"), pursuant to the provisions of section 105(b)(2) of the Mine Act and Commission Procedural Rules 45 and 46, has filed with the Commission an Application for Temporary Relief from an enforcement action taken against it by the Secretary of Labor. 1/ For the following reasons, we deny UP&L's

1/ Section 105(b)(2) of the Mine Act provides:

An applicant may file with the Commission a written request that the Commission grant temporary relief from any modification or termination of any order or from any order issued under section [104] of this [Act] together with a detailed statement giving the reasons for granting such relief. The Commission may grant such relief under such conditions as it may prescribe, if --

(A) a hearing has been held in which all parties were given an opportunity to be heard;

Application.

Briefly, the relevant factual and procedural background is as follows. On March 16, 1989, an inspector of the Department of Labor's Mine Safety and Health Administration ("MSHA") issued to UP&L at its Cottonwood underground coal mine a citation containing significant and substantial and unwarrantable failure findings made pursuant to section 104(d)(1) of the Mine Act, 30 U.S.C. § 814(d)(1). With this citation as

(B) the applicant shows that there is substantial likelihood that the findings of the Commission will be favorable to the applicant; and

(C) such relief will not adversely affect the health and safety of miners.

No temporary relief shall be granted in the case of a citation issued under subsection (a) or (f) of section [104] of this [Act]. The Commission shall provide a procedure for expedited consideration of applications for temporary relief under this paragraph.

30 U.S.C. § 815(b)(2).

Commission Procedural Rules 45 and 46 implement section 105(b)(2) of the Act and state:

45 Procedure.

(a) When to file. An application for temporary relief may be filed at any time before the issuance of a final order in the proceeding to which the application relates.

(b) Statements in opposition. The parties opposing the application shall file statements in opposition within 3 days after receipt of the application.

(c) Prior hearing required. Temporary relief shall not be granted prior to a hearing.

46 Contents of application.

(a) An application for temporary relief shall contain: (1) A statement of the specific relief requested; (2) a showing of substantial likelihood that the findings and decision of the Judge or the Commission in the matters to which the application relates will be favorable to the applicant; and (3) a showing that such relief will not adversely affect the health and safety of miners in the affected mine.

(b) An application for temporary relief may be supported by affidavits or other evidentiary matter.

29 C.F.R. §§ 2700.45 & .46.

a predicate, MSHA issued a section 104(d)(1) order of withdrawal at the same mine on March 20, 1989. The order alleges that UP&L violated 30 C.F.R. § 75.400, a mandatory safety standard dealing with accumulation of combustibles, and also charges that the violation was significant and substantial and resulted from UP&L's unwarrantable failure to comply with the standard. The order was terminated within an hour of issuance upon UP&L's abatement of the alleged violative conditions. In separate proceedings, UP&L challenged both alleged violations. The two proceedings were assigned to Commission Administrative Law Judge John J. Morris.

In an expedited decision issued on April 12, 1989, Judge Morris vacated the special finding of unwarrantable failure contained in the March 16 citation, and modified the citation to one issued pursuant to section 104(a) of the Mine Act, 30 U.S.C. § 814(a). Utah Power and Light Co., 11 FMSHRC 586 (April 1989)(ALJ). Neither party sought review of that decision. In an expedited decision issued on April 24, 1989, Judge Morris upheld the cited violation and the validity of the March 20 section 104(d)(1) withdrawal order. 11 FMSHRC 710 (April 1989)(ALJ). The April 24 decision makes no reference to the judge's modification of the March 16 citation in his earlier decision.

UP&L filed its Application for Temporary Relief with the Commission on May 12, 1989. The Secretary filed an Opposition to UP&L's Application for Temporary Relief and we permitted UP&L to file a Reply to the Secretary's Opposition. UP&L also petitioned the Commission for discretionary review of the judge's decision challenging, inter alia, the judge's upholding of the special finding of unwarrantable failure. On June 2, 1989, we granted UP&L's petition for discretionary review.

In its Application for Temporary Relief, UP&L specifically seeks relief from the finding of unwarrantable failure set forth in the March 20 citation. It argues that, because the judge's decision leaves intact the finding of unwarrantable failure, the Cottonwood mine is exposed to closure under the section 104(d) "chain" in the event that unwarrantable failure allegations are made in subsequent enforcement actions taken by the Secretary pending Commission review of the judge's April 24 decision. Both UP&L and the Secretary agree that, because of the judge's modification of the March 16 predicate citation, the section 104(d)(1) order in this matter should be deemed to be modified by operation of law to a citation. UP&L App. 4-5; S. Opp. 3-4. See Consolidation Coal Co., 4 FMSHRC 1791, 1794-96 (October 1982). The Secretary argues in opposition that the express language of section 105(b)(2) of the Mine Act provides for temporary relief only from orders issued pursuant to section 104 and, because the order was modified to a citation by operation of law, the Commission lacks jurisdiction to grant the temporary relief requested. Further, the Secretary asserts that relief under section 105(b)(2) is obtainable only from unabated withdrawal orders and the order in this case was abated within an hour of its issuance. In reply, UP&L contends that the plain language of section 105(b)(2) also provides for relief from modifications of orders issued under section 104, which UP&L claims is the case here. UP&L also argues that only citations issued under subsections (a) and (f) of section 104 are expressly excluded from temporary relief under the

language of section 105(b)(2). According to UP&L, because the enforcement action presently at issue is a "section 104(d)(1) citation," resulting from the modification of the original section 104(d)(1) order, temporary relief is not precluded by the terms of section 105(b)(2).

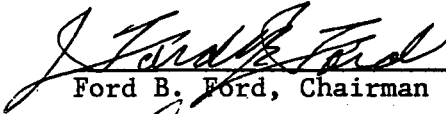
We conclude that the plain language of section 105(b)(2) requires denial of UP&L's Application. Section 105(b)(2) sets forth the conditions under which temporary relief may be granted under the Act and Commission Procedural Rules 45 and 46 merely implement this statutory provision. Section 105(b)(2) of the Act provides for temporary relief from "any modification or termination of any order or from any order issued under section [104]" of the Act, and specifically states that "[n]o temporary relief shall be granted in the case of a citation issued under subsection (a) ... of section [104]" of the Act. The legislative history of section 105(b)(2)'s nearly identical predecessor provision in the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 et seq. (1976)(amended 1977) ("1969 Coal Act"), indicates that Congress intended, as the language of the Mine Act and the 1969 Coal Act clearly reflects, that temporary relief lie only from withdrawal orders, not from citations or from the equivalent "notices of violation" under the 1969 Coal Act. See Senate Subcommittee on Labor, Committee on Labor and Public Welfare, 94th Cong. 1st Sess., 1 Legislative History of the Federal Coal Mine Health and Safety Act of 1969, at 1603 (1975) ("1969 Coal Act Legis. Hist."). We recently made clear in denying a request for section 105(b)(2) temporary relief that such relief applies only to orders of withdrawal issued under section 104 of the Act. Pennsylvania Electric Co., Docket No. PENN 88-227, Order at 1-2 (May 8, 1989).

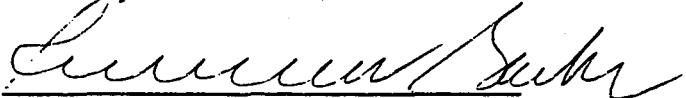
Moreover, the enforcement action in question is, contrary to UP&L's characterization, a citation issued pursuant to the authority of section 104(a) of the Act. As such, it is expressly excluded from the reach of temporary relief. As discussed below, the commonly used phrase "section 104(d)(1) citation" is merely a term of convenience and does not indicate a separate basis for issuance of citations independent from section 104(a).

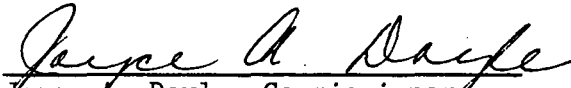
Section 104(a) is the source of the Secretary's power to issue citations for alleged violations of the Act. See, e.g., Nacco Mining Co., 9 FMSHRC 1541, 1545 & n. 6 (September 1987); Consolidation Coal Co., 6 FMSHRC 189, 191-92 (February 1984). Section 104(d)(1) states that if an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard and "if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under the Act." (Emphasis added). Thus, the statutory language makes clear that "significant and substantial" and "unwarrantable failure" determinations by MSHA inspectors constitute special findings that are "includ[ed]" in any citation issued under the authority otherwise conferred upon the Secretary by the Act.

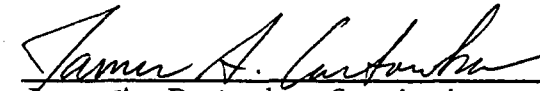
This view of the Act is reinforced by the legislative history of section 104(a)'s predecessor provisions in the 1969 Coal Act, in which a key House Committee report explained that when a "representative [of the Secretary] finds a violation of a standard and further finds that the violation is caused by an unwarrantable failure on the part of the operator in complying with the particular standard, he includes such additional finding in the notice [of violation] issued under subsection (b)" [section 104(b) of the 1969 Coal Act essentially now is section 104(a) of the Mine Act]. H. Rep. No. 653, 91st Cong. 1st Sess. 8 (1969), reprinted in 1969 Coal Act Legis. Hist. 1038. This relationship between citations issued pursuant to section 104(a) and the special findings provided for in section 104(d) was also discussed in Consolidation Coal, supra, 6 FMSHRC at 191-92, in which we approved the inclusion of significant and substantial findings in a citation issued under section 104(a). Finally, in Nacco, supra, we expressly referred to a "citation issued with section 104(d) findings" and explained that the term "section 104(d) citation" was used for convenience to distinguish it from a section 104(a) citation not containing such findings. 9 FMSHRC at 1545 n.6.

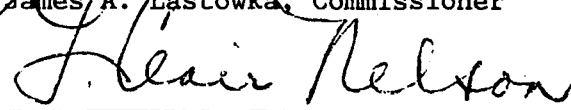
Accordingly, we hold that the citation from which temporary relief is sought by UP&L is a section 104(a) citation with special findings and as such is not within the purview of section 105(b)(2) relief. Accordingly, UP&L's Application for Temporary Relief is denied. 2/


Ford B. Ford, Chairman


Richard V. Backley, Commissioner


Joyce A. Doyle, Commissioner


James A. Lastowka, Commissioner


L. Clair Nelson, Commissioner

2/ UP&L also argues that it may seek relief from the modification, by operation of law, of the original section 104(d)(1) order to a citation containing special findings. We disagree. This modification operated to UP&L's benefit, not harm. Therefore, the need to consider temporary relief from an order that is no longer extant is not apparent. Further, we express no opinion as to the Secretary's alternative assertion that temporary relief may be obtained only from unabated orders. Similarly, we intimate no view at this time as to whether temporary relief may lie from the effect of special findings contained in section 104(d) orders.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

June 15, 1989

SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), on behalf :
of JERRY DALE ALESHIRE, et al. :
: :
v. : Docket No. WEVA 84-344-D
: :
WESTMORELAND COAL COMPANY :

BEFORE: Ford, Chairman; Backley, Doyle, Lastowka and Nelson,
Commissioners.

DECISION

BY THE COMMISSION:

This is a discrimination proceeding brought under section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982) (the "Mine Act") by the Secretary of Labor ("Secretary") on behalf of Jerry Dale Aleshire and six other miners (the "complainants"). 1/ The issue presented is whether individuals who obtain safety training while on layoff, on their own time and at their own expense, are entitled to be compensated for their time and

1/ Section 105(c) provides in pertinent part:

(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 ... of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this [Act.]

30 U.S.C. § 815.

reimbursed for their expenses by the operator after being rehired.

The Secretary contends that Westmoreland Coal Company ("Westmoreland") violated section 115 of the Mine Act by refusing to compensate complainants for the time spent in obtaining the training and by refusing to reimburse them for out-of-pocket costs incurred. 2/ Commission Administrative Law Judge James Broderick concluded that laid-off individuals are not "miners" entitled to the training rights of section 115 of the Act, and, therefore, that the complainants are not entitled to compensation or reimbursement from Westmoreland for the time and expense of such training. 10 FMSHRC 653 (May 1988)(ALJ). For the reasons that follow, we affirm the judge's decision.

The facts are not in dispute. On December 17, 1982, the seven complainants were laid off from their surface mining jobs at Westmoreland's Ferrell Mine Complex in Boone County, West Virginia. All of the complainants had been employed at the mine in surface positions for three or more years prior to December 17, 1982. Each had previously worked underground prior to working on the surface but, because of the length of time they had worked as surface miners, six of the seven needed MSHA-approved underground new miner training before they could

2/ Section 115 of the Mine Act, 30 U.S.C. § 815, requires mine operators to establish a health and safety training program for every "miner," which term is defined in section 3(g) of the Act, 30 U.S.C. § 802(g), as "any individual working in a coal or other mine." Under section 115(a) "new miners ... shall receive no less than 40 hours of training if they are to work underground." 30 U.S.C. § 815(a). In addition, section 115(b), 30 U.S.C. § 815(b), provides:

Any health and safety training provided under subsection (a) ... shall be provided during normal working hours. Miners shall be paid at their normal rate of compensation while they take such training, and new miners shall be paid at their starting rate when they take the new miner training. If such training shall be given at a location other than the normal place of work, miners shall also be compensated for the additional costs they may incur in attending such training sessions.

The Secretary has promulgated training and retraining regulations implementing the requirements of section 115. 30 C.F.R. Part 48. 30 C.F.R. § 48.2(c) defines a "new miner" as "a person who is not an experienced miner." 30 C.F.R. § 48.2(b) in part defines an "experienced miner" as "a person who is employed as an underground miner on the effective date of these rules, or a person who has had at least 12 months experience working in an underground mine during the preceding 3 years ..." The regulations describe the requisite training for each type of miner. A new miner working underground may not assume his or her duties until receiving 40 hours of training. 30 C.F.R. § 48.5(a). The regulations do not refer to laid-off miners or to applicants for underground mine employment.

again work underground. Because the seventh was an experienced underground miner on October 13, 1978, when 30 C.F.R. Part 48 became effective, he did not need new miner training to work underground again.

After the complainants were laid off, at least one of them attended a union meeting where a representative of Westmoreland stated that laid off miners might improve their chances for recall if they were to obtain underground new miner training at their own expense while they were laid off. In May and June 1983, the complainants obtained the training at the Boone County Career and Technical Center. The complainants' training was paid for by the Boone County Board of Education except for two of the complainants, each of whom claims to have paid \$20.

At the time the complainants were trained, Westmoreland and the United Mine Workers of America (UMWA) were parties to the National Bituminous Coal Wage Agreement of 1981 (the "Agreement"). Under terms of the Agreement, miners were to be recalled to work in order of seniority -- seniority being defined in the Agreement as "length of service and the ability to step into and perform the work of the job at the time the job is awarded." Stip. 7. The complainants were recalled to work in underground positions on October 21, 1983. They would not have been recalled had they not obtained the underground new miner training. After they were rehired, they sought reimbursement from Westmoreland for the cost of the training and compensation for their time.

When Westmoreland refused to compensate or reimburse them, the complainants filed a complaint with the Secretary's Mine Safety and Health Administration ("MSHA") alleging that Westmoreland had discriminated against them in violation of section 105(c) of the Act by not providing the training and not compensating them for the time and expense of obtaining it themselves. Subsequently, the Secretary filed a complaint of discrimination on the complainants' behalf with the Commission, making the same allegations and requesting that Westmoreland be ordered to compensate the complainants for the time they had spent in obtaining the training and to reimburse those of the complainants who had incurred costs. The Secretary also requested that Westmoreland be required to pay interest to the complainants and be assessed a civil penalty for violating section 105(c).

Both the Secretary and Westmoreland moved for summary decision. Because section 115 requires operators to provide training to "miners" and to pay "miners" at their normal rates of compensation while taking such training, the judge focused first upon the question of whether or not the complainants were "miners" when they obtained the training. The judge noted that the Commission had concluded in Emery Mining Corp., 5 FMSHRC 1391, 1396-97 (August 1983), rev'd sub nom. Emery Mining Corp. v. Secretary of Labor, 783 F.2d 155 (10th Cir. 1986), that an operator may not refuse to compensate new miners for training undertaken on their own but relied on by the operator to satisfy MSHA training requirements. He further noted, however, that the United States Court of Appeals for the Tenth Circuit reversed the Commission, holding that such individuals were not "miners" at the time they undertook their prehire training and

thus were not covered by section 115's requirement for operator paid training.

The judge further observed that, prior to the Tenth Circuit's decision in Emery the Commission in Peabody Coal Company, 7 FMSHRC 1357 (September 1985) and Jim Walter Resources, 7 FMSHRC 1348 (September 1985), aff'd sub nom. Brock v. Peabody Coal Co., 822 F.2d 1134 (D.C. Cir. 1987), held that: (1) an operator's policy requiring laid-off miners to obtain statutorily-mandated new miner training on their own prior to rehire does not violate section 115 of the Act because laid-off individuals are not "miners" protected under section 115 until they are rehired; and (2) an operator who relies on the prehire training of those whom it rehires to satisfy its statutory training obligations with respect to "new miners" is required by section 115 of the Act to reimburse the rehired miners for the expenses of their training. 10 FMSHRC at 657. The judge noted that the United States Court of Appeals for the District of Columbia Circuit upheld the Commission's determination in Peabody and Jim Walter that the laid-off individuals were not "miners" entitled to training under section 115 of the Act, even though they might have been contractually entitled to reemployment under a collective bargaining agreement. The judge also noted that the compensation aspect of the issue now before us was not before the court for resolution. Id. 3/

The judge concluded that nothing required him to go beyond the Mine Act and its legislative history to determine whether individuals recalled from layoff are entitled to compensation for section 115 training. He held that individuals on layoff are not "miners" for whom an operator is required to provide health and safety training, nor are they entitled to compensation for the time and reimbursement for the expense of training taken on their own. 10 FMSHRC at 658.

We granted the Secretary's petition for discretionary review. The Secretary asserts that the judge erred in concluding that the complainants were not entitled to compensation for the time and reimbursement for the expenses of their training and she argues that the Commission's decisions in Peabody and Jim Walter resolve the issue. Westmoreland responds that the rationale of the Tenth Circuit's decision in Emery applies to miners rehired from layoff as well as to newly hired miners. We agree with Westmoreland.

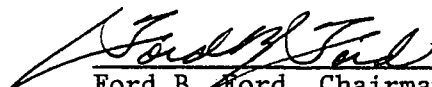
Section 115 grants training rights to "new miners" and "miners." As noted, the Commission has held that because job applicants and individuals on layoff who obtain training prior to hire are not "miners," as defined by section 3(g) of the Act, they have no statutory right to training. Emery, 5 FMSHRC at 1395-96; Peabody, 7 FMSHRC at 1363; Jim Walter, 7 FMSHRC at 1354. This holding has been upheld by the courts. Emery, 783 F.2d at 158-159; Peabody, 822 F.2d at 1148-1149.

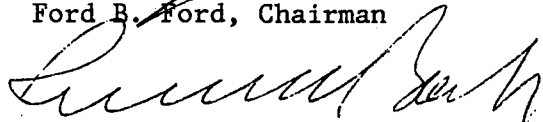
3/ In Peabody the operator compensated the rehired miners for the training they obtained on their own. In Jim Walter, the operator did not appeal the Commission's compensation order. See Brock v. Peabody Coal Co., supra, 822 F.2d at 1136 n.3.

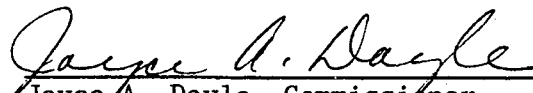
As the judge noted, the Tenth Circuit rejected the Commission's conclusion that an operator who relies upon the prehire training of newly hired miners to satisfy its statutory training obligations must reimburse the miners for their training expenses. In deciding whether newly hired miners are entitled to compensation, the Tenth Circuit found their status at the time they were trained to be conclusive. If they are not "miners" when they take the training they are not entitled to compensation from the operator: "[n]othing in the Act or the legislative history suggests that a new employee must be paid wages and expenses for the time spent in a course he voluntarily took prior to the time he was employed." Emery, 783 F.2d at 159.

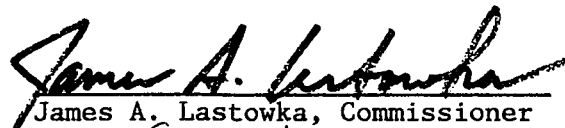
The Secretary would have us distinguish the Tenth Circuit's decision in Emery on the basis that the complainants in this case, unlike the newly hired miners in Emery, have had "an established relationship with Westmoreland" through their contractual recall rights under the Agreement. Sec. Pet. for Discretionary Review at 6. The Commission has previously rejected similar arguments. The Commission stated in Peabody and Jim Walter that the Mine Act is a health and safety statute, not an employment statute. 7 FMSHRC at 1364; 7 FMSHRC at 1354. As the D.C. Circuit stated, "[w]e certainly cannot infer from the Act that Congress intended privately-bargained contracts to determine who is and who is not entitled to receive section 115 training.... [I]t would be peculiar in the extreme for us to import a contractual criterion to determine who is entitled to training when the Congress has explicitly considered the question and decreed a statutory criterion." Peabody, 822 F.2d at 1148. The court added that "an individual is not a 'miner' who can claim a training right under section 115(a) unless he or she is employed in a mine." Peabody, 822 F.2d at 1149 (footnote omitted). We therefore find no persuasive basis upon which to distinguish this case from the Tenth Circuit's decision in Emery and in the absence of contrary judicial precedent we will follow that decision.

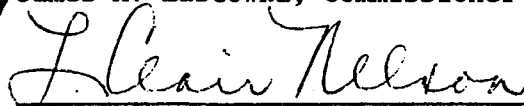
Accordingly, we hold that because the claimants were not "miners" under the Act at the time they undertook training, they were not granted training rights by section 115 and were not entitled to be compensated by Westmoreland for such training. We therefore affirm the decision of the judge.


Ford B. Ford, Chairman


Richard V. Backley, Commissioner


Joyce A. Doyle, Commissioner


James A. Lastowka, Commissioner


L. Clair Nelson, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

June 27, 1989

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
v.	:	Docket No. VA 87-27
	:	
CONSOLIDATION COAL COMPANY	:	

BEFORE: Ford, Chairman; Backley, Doyle, Lastowka and Nelson,
Commissioners

DECISION

BY: Ford, Chairman; Backley, Doyle and Nelson, Commissioners

In this civil penalty proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 801 et seq. (1982)("Mine Act"), the issue before us is whether Consolidation Coal Company ("Consol") violated 30 C.F.R. § 50.20(a), a standard that requires reporting lost work days resulting from occupational injuries. 1/ In

1/ 30 C.F.R. § 50.20(a) states in part:

Each operator shall maintain at the mine office a supply of MSHA Mine Accident, Injury, and Illness Report Form 7000-1.... Each operator shall report each accident, occupational injury, or occupational illness at the mine. The principal officer in charge of health and safety at the mine or the supervisor of the mine area in which an accident or occupational injury occurs, or an occupational illness may have originated, shall complete or review the form in accordance with the instructions and criteria in §§ 50.20-1 through 50.20-7.... The operator shall mail completed forms to MSHA within 10 working days after an accident or occupational injury occurs or an occupational illness is

lieu of a hearing, the parties submitted the case for decision on the basis of the written record. Commission Administrative Law Judge James A. Broderick granted the Secretary's motion for summary decision, holding that Consol violated the standard. The judge assessed a civil penalty of \$200. 10 FMSHRC 560 (April 1988)(ALJ). We granted Consol's petition for discretionary review. Because we hold that substantial evidence does not support the judge's finding of a violation, we reverse.

Consol owns and operates the Buchanan No. 1 mine, an underground coal mine located on Keen Mountain, Buchanan County, Virginia. Timothy Smith, the miner whose injury gave rise to the allegation of violation, had been employed at the mine since June 24, 1986, as a general inside laborer on the midnight to 8 a.m. shift. Smith's usual duties included building cribbing, loading conveyor belts, shoveling belts and loading cable. 2/ At about 1:45 a.m., on the morning of August 25, 1986, Smith was setting timbers for cribbing in the 2 West left return when his right hand was caught between two timbers. Smith's fellow worker escorted him to the service shaft where he was met by the shift foreman, who took him to the surface. After observing that Smith's hand was swollen and the nail on the right thumb was smashed, the foreman ordered that Smith be driven to Buchanan General Hospital in Grundy, Virginia, a distance of 15 or 20 miles, requiring about 30 minutes' travel time.

At the hospital, Smith was examined by Dr. Yusuf Chanhbry, whose report listed the injury as a "Fracture (R) Hand 5th Finger." JX-4. The report also stated that Smith could return to "light work" by September 1, 1986, and to "regular work" on September 15, 1986. Id. The doctor placed a splint on the finger and referred Smith to an orthopedist, Dr. L. Bendigo, in Richlands, Virginia.

Smith was driven from the hospital back to the mine, arriving there shortly before 5 a.m., and was told by the shift foreman that he could go home. Smith, however, had to wait until the end of the shift for a ride home. Smith left the mine at about 8:45 a.m., and arrived at his home in North Tazwell, Virginia, at about 9:30 a.m. He then telephoned Dr. Bendigo's office, obtained a 2:00 p.m. appointment, and was told to get an x-ray by 1:00 p.m.

diagnosed.

30 C.F.R. § 50.2(e) defines "occupational injury" as:

[A]ny injury to a miner which occurs at a mine for which medical treatment is administered, or which results in death or loss of consciousness, inability to perform all job duties on any day after an injury, temporary assignment to other duties, or transfer to another job.

2/ The facts relevant to Smith's injury and subsequent absence from work are based, except as indicated, upon Smith's deposition testimony under questioning by counsel for the Secretary.

Smith slept for "a few hours," got up about noon, and made the 30 minute drive to Richlands, Virginia, for an x-ray, after which he was seen by Dr. Bendigo, at about 3:00 p.m. Dr. Bendigo's report diagnosed the injury as a fracture of the right 5th finger and subungual hematoma of the right thumb. JX-4. Dr. Bendigo aspirated the thumb, drilling two small holes in the nail to relieve the discomfort, and fitted a hard cast to the palm of Smith's hand and arm. The cast covered Smith's third and fourth fingers, extending from the base of the thumb up the right arm to within about three inches of the elbow. Smith was also fitted with an arm sling and given a prescription for an analgesic, which he had filled that same afternoon. Smith took only two of the tablets, and never returned to the doctor, removing the cast himself several weeks later.

Smith arrived home about 5:00 p.m. and ate dinner "around 6:00 or 7:00 p.m." Dep. 19. He stated that he normally left home for work "a little after 10:00 p.m., and would arrive at the mine "around 11:00 or about 15 after 11:00." Dep. 20. Smith stated that because he "hadn't been in bed very much" he decided, while eating dinner, that he would just call in and tell them I wouldn't be in." Dep. 19. 3/ When Smith was unable to reach Roy Duty, the shift foreman, at Duty's home, to advise him that he would not be coming to work, he called utility foreman Kenny Maxfield at home, telling him he wouldn't be in to work that night. Maxfield replied: "O.K." Dep. 20. Smith testified that he gave no explanation to Maxfield as to why he would not work his shift telling Maxfield that he "was going to take a Consol day." Smith did not offer Maxfield any further explanation because "I didn't think there was any need to, because they said we could take two days when we wanted them." 4/ Dep. 23.

Smith explained why he decided to take a "Consol day" in the following exchange with counsel for the Secretary:

Q. Why did you decide to take a Consol day?
Why didn't you go to work that night?

3/ In response to questioning by counsel for the operator, Smith stated he normally got about seven hours sleep between shifts, but on the evening in question, while eating dinner, he had decided "I was comfortable at home, and decided I'd stay there." Dep. 38.

4/ Smith described a "Consol day" as two days per year given to employees, in addition to other holiday or vacation days, to be taken by an employee as desired, for any personal reason, including illness, subject only to the personnel requirements of Consol for the particular shift missed. Dep. 21-26, 36-38. Mine Superintendent Joseph Amar, in his Affidavit, described "Consol days" as two paid days per calendar year, taken at the discretion and prerogative of the employee that can be requested at any time by the employee, subject to the "sufficiency of manpower that exists on the shift the employee expects to miss." Amar stated that there is no requirement that the request be in writing or that it be submitted "within a certain amount of time prior to an employee's request." Affidavit 1-2.

A. Well, I hadn't had much sleep, and I just felt like, you know -- I don't like working, without having the amount of sleep that I like to have.

Q. Did you feel that you could safely work?

A. Yeah. I could have worked. I mean I've went in to work with a lot less sleep.

Dep. 22.

On his return to work the next day, Smith told Roy Duty that he had not had much sleep and since he had two days that he had to use sometime, he had decided to take the day off. When asked by Duty if he could have come to work, Smith replied, "Yes." Dep. 23, 31.

On September 2, 1986, Consol's mine safety inspector, Richard French, filed with MSHA a Mine Accident, Injury and Illness Report Form 7000-1, reporting Smith's occupational injury. The form indicated "0" as the "Number of Days Away from work" after the injury. 5/ As required, a copy of the form was kept at the mine office. See 30 C.F.R. § 50.20-1; JX-2.

During April 1987, MSHA Inspectors Kenneth Shortridge and Ronald Blankenship conducted an audit at the Buchanan No. 1 mine of all the Forms 7000-1 filed by Consol in order to review Consol's compliance with Part 50. In reviewing the form filed for Smith's accident, Shortridge noticed that Smith had not worked the shift following the injury. Shortridge stated that when he asked why Smith did not work on the shift following the injury, he was told that Smith "hadn't had his sleep" and had asked for and was granted the next day off. Dep. 21. 6/

5/ 30 C.F.R. §§ 50.20-1 through 50.20-7 list the instructions and criteria for completing MSHA Form 7000-1. With regard to Item 30 on Form 7000-1, number of days away from work, section 50.20-7(c) states:

Item 30. Number of days away from work. Enter the number of workdays, consecutive or not, on which the miner would have worked but could not because of occupational injury or occupational illness. The number of days away from work shall not include the day of injury or onset of illness or any days on which the miner would not have worked even though able to work. If an employee loses a day from work solely because of the unavailability of professional medical personnel for initial observation or treatment and not as a direct consequence of the injury or illness, the day should not be counted as a day away from work.

6/ Under questioning by counsel for Consol, Shortridge stated that he had not interviewed Smith at the time of the audit and had not talked with him since that time. Dep. 10. Shortridge also stated he had not

In December 1986, MSHA had issued instructional guidelines for completing MSHA Form 7000-1. 7/ The 1986 guidelines replaced guidelines issued by MSHA in 1980. Shortridge stated that he used the 1986 guidelines in conducting the Part 50 audit at the mine. Dep. 12. Shortridge also stated that, as he interpreted the 1986 guidelines for determining the number of days away from work, only if an employee had "pre-arranged" a day off prior to the occurrence of an injury could the employee's absence not be counted as a lost-time accident. Id. 8/

reviewed any of the medical reports on Smith's injury.

7/ The 1986 instructional guidelines are contained in MSHA Report on 30 C.F.R. Part 50. The guidelines for determining the number of lost workdays to be indicated in Item 30 of form 7000-1 state:

Item 30: Enter the number of workdays, consecutive or not, that the employee would have worked but could not because of the occupational injury or illness. The number of days away from work should not include the day of injury or onset of illness or any days that the employee would not have worked even though able to work. If an employee loses a day from work solely because of the unavailability of professional medical personnel for initial observation or treatment and not as a direct consequence of the injury or illness, the day should not be counted as a day away from work. If an employee, who is scheduled to work Monday through Friday, is injured on Friday and returns to work on Monday, the case does not involve any "Days Away From Work" even if the employee was unable to work on Saturday or Sunday. If this same employee had been scheduled to work on Saturday, even if that Saturday constituted overtime, the Saturday would be counted in the "Days Away From Work", and the case would be classified as Lost Workday Case. [An injured or ill employee cannot avoid accumulating lost workdays by being placed on vacation or personal leave. If the employee had been scheduled to work, the days the employee lost due to his or her injury or illness would be counted as lost workdays.] Do not include in the lost workday count holidays or any days on which the mine was not operating for any reasons.

(Emphasis in original). JX-7, p.7. The two sentences within the brackets were not contained in the 1980 guidelines. The rest of the paragraph is essentially the same.

8/ The 1986 guidelines also state that "If the employee had been scheduled to work, the days the employee lost due to his or her injury ... would be counted as lost workdays." The preceding sentence states that an injured employee "cannot avoid accumulating lost work days by being placed on vacation or personal leave." This restriction has no

Based on his conversations with Consol's management and his interpretation of the guidelines, Shortridge concluded that Smith's accident and consequent loss of sleep "indirectly" caused him to miss a day's work. Dep. 21-22. Therefore, Shortridge issued to Consol a citation charging a violation of section 50.20(a), which states:

An inaccurate mine accident, injury and illness report, Form 7000-1 was submitted to MSHA concerning an accident on 8/25/86 that injured Timothy W. Smith which resulted in one lost workday. The accident was reported as no lost workdays.

This citation was issued as the result of a Part 50 audit.

In support of her motion for summary decision, the Secretary argued that Smith's absence was caused by his lack of sleep due to the time spent seeking medical treatment for his injury and that his absence was required to be reported as a lost workday. Br. 9. Consol contended that Smith's decision not to work was entirely voluntary.

The judge upheld the violation, finding that, as a result of a significant injury to his hand, Smith had to receive initial and specialized medical treatment which resulted in his being awake "during nearly all of the period he usually slept." 9 FMSHRC at 563. The judge found Smith's opinion that he could have worked, but chose not to do so, "of some significance" but "not conclusive." Id. He further found "not determinative, or even relevant," the fact that both Smith and Consol regarded the day off as a "Consol day." Id. The judge concluded that "the lost work day resulted from a loss of sleep, which resulted from the necessary medical care which resulted from the injury," and that it should have been reported as a day away from work because of the injury. Id.

On review, Consol argues that Smith's decision not to work was entirely voluntary and uninfluenced by management, and that his testimony demonstrates that he was able to work the next shift had he so desired. The Secretary argues that the judge's decision is supported by substantial evidence of record and that Consol violated section 50.20 by failing to report Smith's absence as a lost workday.

Section 50.20(a) requires each operator to "report each accident [or] occupational injury at the mine ... in accordance with the instructions and criteria of §§ 50.20-1 through 50.20-7." Section 50.20-7(c) requires the operator to "[e]nter the number of workdays ... on which the miner would have worked but could not because of

bearing on the "direct consequence" relationship that must be established between an injury and a lost workday (see p.7 infra), but we note that it might cloud the issues in this case if read in isolation. In any event, we need not consider in this case the effect of this restriction on lost work days reporting since the challenged report by Consol was made and submitted several months before the 1986 guidelines were issued.

occupational injury." Thus, the question before the judge was whether Smith's absence from work on the day following the injury constituted a day away from work because of the occupational injury. The judge concluded that it was. The question before us on review is whether substantial evidence supports this conclusion.

In resolving the question, we first look to the language of the Secretary's regulations to determine what constitutes a "lost workday" reportable on MSHA Form 7000-1. 30 C.F.R. § 50.1 explains that the purpose of requiring operators to maintain and file with MSHA reports of occupational injuries is to implement MSHA's authority "to investigate and to obtain and utilize information pertaining to accidents, injuries and illness occurring or originating in mines." Specifically as to "days away from work," section 50.1 states: "MSHA will develop data respecting injury severity using days away from work activity ... as criteria." Under section 50.20-7(c), an operator is required to report as "days away from work" the number of workdays on which the miner "would have worked but could not because of occupational injury." The last sentence of section 50.20-7(c) provides that a lost workday should not be counted if it is not "a direct consequence of the injury or illness" and specifically excludes days lost solely because of the unavailability of medical personnel for initial observation or treatment. This exclusion recognizes that the unavailability of medical treatment is not a "direct consequence" of an injury and that it does not reflect the severity of the injury involved, MSHA's stated concern under this regulation. In other words, MSHA recognizes that other factors may result in lost work days, apart from the severity of the injury. Similarly, where, as here, the scheduling of medical treatment results in loss of sleep, such an event bears no relationship to the severity of the injury involved and is tantamount to another form of unavailability of medical treatment.

The Secretary's instructional guidelines also emphasize that there must be a direct cause and effect relationship between the "days away from work" reported under Item 30, and the inability of the injured miner to work as the result of an occupational injury. Under both the 1980 and 1986 guidelines, the operator is instructed to "Enter the number of work days ... that the employee would have worked but could not because of the occupational injury." (Emphasis in original.) Both guidelines reiterate that, if the lost workday is not the "direct consequence of the injury or illness, the day should not be counted as a day away from work." JX 7, p.7.

We find no basis either in the Secretary's regulations or guidelines to support a conclusion that, absent a direct cause and effect relationship between an injury and a lost workday, an employee's failure to work following an injury necessarily constitutes a reportable day away from work. Thus, to establish a violation, the Secretary must prove that such a connection exists, i.e., that the lost workday is the direct consequence of the injured miner's inability to work as the result of the injury. In the case at hand, this means that in order to establish the alleged violation of section 50.20(a), the Secretary must establish that Smith "would have worked but could not because of occupational injury." 30 C.F.R. § 50.20-7(c).

The judge found a violation of section 50.20(a) based on his conclusion that the lost workday resulted from the loss of sleep caused by the time and travel involved in receiving necessary medical treatment for the injury. 9 FMSHRC at 563. We agree with the judge that Smith's injury required treatment that, because of the appointment time, resulted in a loss of sleep. We find, however, that the record does not support a conclusion that because of the loss of sleep, Smith could not work the next day.

Smith's own words weigh heavily against such a finding. When asked by counsel for the Secretary why he decided to take a Consol day following the accident, Smith replied that, while he "had not had much sleep," he "just didn't feel like going to work that day." Dep. 22, 23. When asked by counsel the critical question of whether he could have worked safely the day following the accident, Smith replied "Yeah. I could have worked" and then voluntarily added "I've went into work with a lot less sleep." Dep. 22. In addition, Smith stated that when he was later asked by Consol's mine safety inspector Richard French whether he could have worked the day following the accident, he answered "yes," and when asked by counsel for the Secretary whether he had told management personnel that he had been "up all day" and was having "some pain and ... had taken medication," Smith stated that he could not recall having said that. Dep. 31, 33-34.

Smith's un rebutted testimony, rather than establishing that because of the injury and related loss of sleep he could not have worked the next day, establishes that he considered himself capable of working safely. The sole evidence with respect to Smith's loss of sleep and its effect on his ability to work the next shift was that of Smith himself. A fair summary of his testimony is that although he could have worked, he decided that, rather than work, he would use one of the two Consol days available to him. Dep. 22. 9/

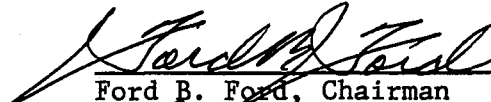
The Mine Act imposes on the Secretary, in a civil penalty proceeding, the burden of proving the violation alleged by a preponderance of the evidence, and imposes a substantial evidence test for Commission review. See 30 U.S.C. § 823(d)(2); Secretary of Labor v. Kenny Richardson, 3 FMSHRC 8, 12 n.7 (January 1981). Here, the Secretary chose to bring her case, and the judge's decision rests, not on the severity of Smith's occupational injury, or the difficulty of performing his regularly assigned duties because of that injury, but on the loss of sleep incurred in receiving medical treatment as a result of the injury. To prove her case, the Secretary was required to establish that as the result of his loss of sleep, Smith could not have worked the

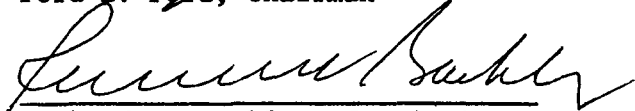
9/ Smith testified that he was away from home obtaining medical treatment for a total of four to five hours during the thirteen-hour period between his arrival home from work and his usual time of departure back to the mine sometime after 10:00 p.m. Although he was obviously inconvenienced as to his normal routine, had he not decided early in the evening to stay home, the actual time available to him for rest would not have been significantly less than his usual seven-hour period.


next shift. As we have noted, the sole witness on this dispositive issue was Smith himself who testified that, although he had not gotten his usual amount of sleep, he could have safely worked his next shift, and who voluntarily reinforced that opinion by stating he had worked previously "with a lot less sleep." If Smith did not mean to say what he clearly said, the Secretary had full opportunity while deposing Smith to correct the record, but did not do so. Nor do we find any record inference or evidence to suggest that Smith's decision not to work, or his testimony at deposition, was motivated by concern for his job or by any other inducement on the part of management. Having produced no probative evidence to overcome Smith's assertions that he could have worked despite his loss of sleep, we conclude that the Secretary has failed to meet the requisite burden of proof necessary to establish the alleged violation.

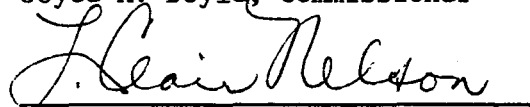
The substantial evidence standard of review requires a weighing of all probative record evidence and an examination of the fact finder's rationale in arriving at the decision. See Universal Camera Corp. v. NLRB, 30 U.S. 474 (1951); Arnold v. Secretary of HEW, 567 F.2d 258, 259 (4th Cir. 1977). Judges must sufficiently summarize, analyze and weigh the relevant testimony of record, and explain their reasons for arriving at their decision. See Secretary v. Michael Brunson, 10 FMSHRC 594 (May 1988), Bjes v. Consolidation Coal Co., 6 FMSHRC 1411 (June 1984), Robinette v. United Castle Coal Co., 3 FMSHRC 803 (April 1981). Here, the judge summarily dismissed without explanation as "not conclusive" Smith's testimony that he could have worked and he ignored Smith's statements that he could have worked safely, that he had done so in the past on less sleep, and that he had told his shift foreman that he could have worked. While the judge found that the lost workday resulted from loss of sleep, there is no evidence in this record that Smith's loss of sleep prevented him from being able to work safely the day after his injury. Smith stated unequivocally that he could have worked safely and his testimony is the entire evidence of record on this issue. While we have previously stated that we do not lightly overturn a judge's factual findings and credibility resolutions, neither will we affirm such findings if there is no evidence or dubious evidence to support them. See e.g., Krispy Kreme Doughnut Corp. v. NLRB, 732 F.2d 1288, 1293 (6th Cir. 1984); Midwest Stock Exchange, Inc. v. NLRB 635 F.2d 1255, 1263 (7th Cir. 1980).

Accordingly, and for the foregoing reasons, we find that the judge's decision is not supported by the substantial evidence of record and we reverse.


Ford B. Ford, Chairman


Richard V. Backley, Commissioner


Joyce A. Doyle, Commissioner


L. Clair Nelson, Commissioner

Commissioner Lastowka, dissenting:

While performing his duties as a general inside laborer at Consolidation Coal Company's Buchanan No. 1 Mine, Timothy Smith suffered a fractured finger when his right hand was caught between two timbers being set as roof support. Because Smith worked on the midnight to 8:00 a.m. shift, the medical treatment necessitated by his injury was administered during the period of his daily routine normally devoted to sleep. As a result, Smith, with notice to Consol, stayed home rather than reporting to work for his next scheduled shift.

My colleagues conclude that the administrative law judge erred in upholding the Secretary of Labor's assertion that Consol's failure to report Smith's absence as a lost workday resulting from his injury violated the Secretary's accident and injury reporting regulations. They conclude that the judge's finding that Smith's absence occurred because of his injury is not supported by substantial evidence. Instead, they conclude that a "direct cause and effect relationship between [the] injury and [the] lost workday" was not established by the Secretary. Slip op. at 7.

I must respectfully disagree. In my opinion, the Secretary's interpretation of her regulation concerning the reporting of accidents and injuries is reasonable and deserving of weight. Secretary on behalf of Bushnell v. Cannelton Industries, 867 F. 2d 1432 (D.C. Cir., 1989). Furthermore, the judge's application of the law to the facts not only is supported by substantial evidence, but also is eminently sensible. Therefore, the judge's opinion should be affirmed.

The dispute in this case is not over whether Smith suffered an occupational injury; Consol duly reported Smith's injury to the Secretary. Instead, the issue is whether in reporting the injury Consol accurately represented that the injury had not resulted in a lost workday. It seems to me that the material facts establish, on their face, that Smith's injury resulted in a lost workday, to wit: while performing his job Smith's hand was caught between two timbers; upon "observing that Smith's hand was swollen and the nail on the right thumb was smashed," Smith's foreman sent him to the hospital (slip op. at 2); Smith's injury was diagnosed as a "Fracture (R) Hand 5th Finger" (Exh. JX-4); the hospital report recommended a return to light work in one week and a return to regular work in three weeks (Id.); later that same day, Smith's hand was x-rayed confirming a fracture of his little finger, his thumbnail was aspirated, his arm placed in a cast from his hand to within three inches of the elbow, and pain medication prescribed (10 FMSHRC at 561); since Smith worked the midnight to 8:00 a.m. shift this medical treatment was administered during the time of day he normally slept; therefore, following his injury Smith stayed home from work for one scheduled shift by invoking his right to a day of personal leave. 10 FMSHRC at 562. (Consol does not provide sick leave and Smith had not yet earned any vacation time. Id.)

On these facts, I believe that it certainly was reasonable for the Secretary to insist, and for the judge to find, that Consol should have reported Smith's absence as a lost workday caused by his accident. The majority concludes otherwise, however, and their rationale must therefore be examined. As discussed below, I find the grounds relied on for reversal unconvincing.

The violation in this case turns on whether Item 30 on MSHA Form 7000-1 was correctly completed. Item 30 provides: "Number of Days Away From Work (if none, enter 0)." As previously indicated, Consol represented that Smith was away from work "0" days despite his absence on the day following his injury. My colleagues base their rejection of the Secretary's and the judge's determinations that Smith's one day absence should have been indicated in item 30 on their interpretation of 30 C.F.R. § 50.20-7(c), which sets forth "criteria" for completing item 30. This section provides:

Item 30. Number of days away from work. Enter the number of workdays, consecutive or not, on which the miner would have worked but could not because of occupational injury or occupational illness. The number of days away from work shall not include the day of injury or onset of illness or any days on which the miner would not have worked even though able to work. If an employee loses a day from work solely because of the unavailability of professional medical personnel for initial observation or treatment and not as a direct consequence of the injury or illness, the day should not be counted as a day away from work.

(Emphasis added).

Although the majority concludes that the emphasized portion of these instructions proves fatal to the Secretary's charge of violation, I submit that their conclusion stems from a too narrow reading of the Secretary's reporting requirements and a shortsighted view of the facts. Reduced to its essence, the majority's position is that Smith's absence on the day following his injury was not due to his injury, but rather to a lack of sleep, and that even given his loss of sleep Smith still "could" have worked. In their view, Smith's lack of sleep is an intervening event interrupting the "direct cause and effect relationship between an injury and a lost workday" that is the intended focus of item 30. Slip op. at 7. Thus, in their view, the Secretary did not prove "that the lost workday [was] the direct consequence of the injured miner's inability to work as the result of the injury." *Id.*

On the basis of the record before us, I would find, as did the Secretary and the judge, that Smith's absence was a direct consequence of his injury. In fact, no reason or motivation for his absence other than his injury is even remotely suggested or alluded to in the record. My colleagues downplay and diminish the impact of the disruption in Smith's daily routine caused by his injury and medical treatment (see, e.g., slip op. at 8 n.9), but this view proves too grudging. To make the point, I must ask: if one of my colleagues were to suffer a similar injury on the job and found it necessary to spend the night obtaining necessary medical treatment, would they not be surprised to have their absence from work on the following day challenged on the ground that it was not caused by their work-related injury?

Insofar as Smith's statement that he "could have worked" is concerned, I believe that the judge's assessment that this remark "is of some significance, but is not conclusive" (10 FMSHRC at 563), is closer to the mark than is the majority's view that it proves fatal to the Secretary's case. Smith himself

explained that he wondered why he was being asked this question. Smith deposition at 31; 10 FMSHRC at 562 . Furthermore, in purely literal terms, Smith's response is probably true; despite his injury and lack of sleep, it was physically possible for him to report to work. I doubt, however, that the "could not work" phraseology in the Secretary's instructional criteria was meant to be read that an injured miner must be totally incapacitated before any resulting "day away from work" must be reported. Such a constrained reading would mean that only the most debilitating injuries absolutely precluding a miner's arrival at the job site would be reportable under item 30. Nothing in the Secretary's regulations, instructions or Form 7000-1 suggests that such a narrow scope was intended, and the Secretary disavows this reading of her requirements. Instead, a reasonable reading must be given to this safety and health regulation and under such a reading, and the facts before us, the view that Smith could not work his next shift due to his injury certainly is plausible. Secretary v. Cannellton Industries, supra, 867 F. 2d at 1435, 1438.

My colleagues acknowledge that they are bound by the substantial evidence standard of review. Slip op. at 9; 30 U.S.C. §823(d)(2)(a)(ii)(I). They nevertheless proceed to substitute their finding as to whether Smith "could" work for that of the judge by claiming that "there is no evidence" to support the judge's finding that Smith's lost workday resulted from the loss of sleep caused by his injury. Slip op. at 9 (emphasis in original). Contrary to this assessment, however, ample support for the judge's finding is found in the extensive record evidence describing Smith's injury, the nature of the medical treatment necessitated by the injury and the major disruption in Smith's daily routine caused by the injury and its treatment. Smith's statement that he could have worked, viewed by the majority as "the entire evidence of record on this issue" (Slip op. at 9), was correctly viewed by the judge as only part of the record evidence bearing on the factual question before him. Because the evidence relied on by the judge constitutes "such relevant evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion", the substantial evidence standard imposed on us by the Mine Act requires affirmance of the judge's finding. Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938); Chaney Creek Coal Corp. v. FMSHRC, 866 F. 2d 1424, 1431 (D.C. Cir. 1989).

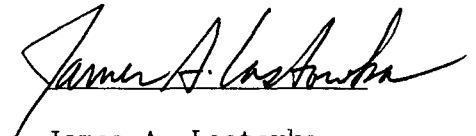
In the end, the soundness of the judge's conclusion is perhaps most effectively demonstrated by setting forth his own words. As he stated:

The facts in this case are clear and uncomplicated. A miner received a significant injury to his hand at work. He was given initial medical treatment and referred for specialist treatment. As a result of the referral, he was awake during nearly all of the period when he usually slept. In fact, he slept for about one and a half hours. Because of his lack of sleep, he decided to take the following day off, although he testified that he could have worked. The employee's opinion that he could have worked is of some significance, but is not conclusive. In fact he did not work, and his failure to work is related to the injury because it is related to the medical treatment which was necessary because of the injury. I conclude that the employee's absence from work on August 26, 1986, resulted from his occupational injury on August 25, 1986. ****

Consol seems to argue that the day away from work resulted from the unavailability of professional medical personnel for initial observation and treatment and therefore should not be recorded as a day away from work resulting from the occupational injury. I do not so interpret the facts. Professional medical personnel were available for initial observation and treatment. Whether or not the referral to the orthopedist was part of the initial observation and treatment, the lost workday did not result from the unavailability of the orthopedist. The orthopedist was available. The lost work day resulted from the time spent receiving treatment and diagnosis, including necessary travel, all of which resulted in a loss of sleep. Therefore, I conclude that the lost workday resulted from the loss of sleep, which resulted from the necessary medical care which resulted from the injury. It should have been reported as a day away from work because of the injury. The citation properly charged a violation of 30 C.F.R. § 50.20(a).

10 FMSHRC at 563.

I believe that this analysis by the judge reflects a reasonable interpretation of the reporting requirement and arrives at a conclusion supported by substantial evidence of record. Accordingly, I dissent from the reversal of the administrative law judge. I would affirm Judge Broderick's finding of a violation.

A handwritten signature in dark ink, reading "James A. Lastowka". The signature is fluid and cursive, with the first name "James" and last name "Lastowka" clearly legible.

James A. Lastowka
Commissioner

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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 2 1989

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 89-28-D
ON BEHALF OF ROBERT VAUGHN,	:	
Complainant	:	
v.	:	
	:	
SUMCO, INC. AND R.E. SUMMERS,	:	
Respondents	:	

DECISION

Appearances: Mary K. Spencer, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, on behalf of Complainant; Rodney E. Buttermore, Jr., Esq., Forester, Buttermore, Turner & Lawson, Harlan, Kentucky, on behalf of Respondents.

Before: Judge Broderick

STATEMENT OF THE CASE

On November 18, 1988, the Secretary of Labor (Secretary) filed a complaint on behalf of Robert Vaughn under section 105(c) of the Federal Mine Safety and Health Act of 1977 (the Act). The complaint alleges that Vaughn was discharged on June 30, 1988, for activity protected under the Act. In addition to the complaint, the Secretary filed an Application for Temporary Reinstatement. On November 28, 1988, I issued an order directing Respondent Sumco, Inc. to immediately reinstate Vaughn to the position from which he was discharged or to an equivalent position. On December 16, 1988, Respondent Sumco filed a answer to the complaint and a request for hearing. Pursuant to notice the case was called for hearing in Harlan, Kentucky on March 21, 1989. Robert Vaughn, Richard Davis, Ronnie Brock, George Vaughn, and Winston Madden testified on behalf of Complainant. Robert Earl Summers and Dianne Swanner testified on behalf of Respondents. Both parties have filed post hearing briefs. I have considered the entire record and the contentions of the parties and make the following decision.

FINDINGS OF FACT

Respondent R.E. Summers incorporated Sumco, Inc. some time in 1975. The operation involved in this proceeding commenced in January 1988. Summers assumed that the corporation was valid and continuing. In fact it was not, because it had failed to pay certain state fees. Legally, Summers was operating as an individual proprietor. The work consisted of reclaiming coal from an existing refuse pile, by removing slate and other waste, and washing and crushing the coal. The actual coal preparation work commenced about February 1, 1988. Approximately 15 miners were employed in the operation.

Complainant Robert Vaughn began working for Sumco on February 10, 1988, as a night watchman at the mine site. On or about May 9, 1988, he was transferred to a job as slate picker, working on the afternoon shift. He was paid \$4.00 an hour. His duties involved removing slate and rock from the refuse on a picking table and throwing it into a hole at the end of the table. Robert Vaughn had not received any surface mine safety training prior to beginning this job, but in 1984 he had received inexperienced new miner training for underground mines.

Shortly after it began to operate the coal reclamation project, Sumco engaged a Mr. Arnold Gilbert who was to perform noise and dust monitoring and to set up a training plan for the employees. He contacted the Harlan Vocational School to conduct safety training classes, but was unable to arrange a program until about August 1, 1988.

On or about June 8, 1988, complainant Vaughn injured his thumb in a fall at home. He was treated in a hospital emergency room and a splint was placed on his thumb. He was excused from work because of the injury. During the time he was off work, he was called to jury duty. On June 22, 1988, while still under treatment for his thumb, he visited the mine site after returning from jury duty. The mine site was near his residence, and he rode to the mine with a truck driver. Two federal inspectors were at the mine at this time. Summers saw Vaughn and ordered him off the mine property. Vaughn testified that he was told to leave because the inspectors "were checking mining training papers." (Tr. 14) Summers testified that he told him to leave because he was in the loading area without a hard hat or hard toed shoes. Summers admitted that he "possibly told him they [the inspectors] were there checking papers." (Tr. 113). I find as a fact that Summers directed Vaughn to leave the mine site because he was not properly attired and because the Federal inspectors were checking the miners' training papers. On June 23, 1988, a citation was issued to Sumco for failure to submit a training plan to MSHA. The citation was terminated the

same date when a plan (prepared by Arnold Gilbert) was submitted. The training was to commence in August. Before the training began, citations were issued to Sumco, because some of the miners did not have up-to-date safety training papers.

On June 27 or 28, Vaughn took a medical record indicating that he could return to work on June 28 to the mine and asked Summers if he could resume work. Summers told him he could return the following day. Vaughn later realized he had jury duty the following day and he called Summers at home. He was directed to return on June 30. Vaughn did so, bringing with him another doctor's certificate, authorizing his return to work June 28, 1988. There is a dispute as to whether his thumb was still in a splint. I find that it was not. Summers told Vaughn to report for work the following Monday. Vaughn asked whether he would receive the 70 cent per hour premium that others received on the evening shift. Summers rejected the request and there was a heated discussion between the two concerning the request and the fairness of paying Vaughn less than the other miners. Finally, Summers told Vaughn to go on home "since he didn't have any training and he still had his thumb in a cast." (GX5). Vaughn left the office and was told to leave his hard hat which he threw back in through the door. Summers testified that the reference to training in his statement to the MSHA investigator (GX5) meant work experience and not safety training. I reject this explanation since the same word is used three times in the three page statement clearly referring to safety training. I find that Summers discharged Vaughn (Vaughn did not quit) for two reasons: (1) he was upset at Vaughn's request for a raise because Summers felt he was teaching Vaughn a new job "so he could go on to do something with his life" (Tr. 117); (2) Sumco had been cited for not having submitted a training plan and for having employees who had not received the proper training, and Summers was concerned about receiving another citation.

The Secretary filed an application for temporary reinstatement, and I issued an order on November 28, 1988, to Sumco to reinstate Robert Vaughn. He returned to work on December 5, 1988. He worked December 5, 6 and 8, shovelling around the belt lines on the washer. On December 9, 1988, Vaughn and 11 or 12 others were laid off because a defect in Sumco's permit from the State Department of National Resources prevented it from continuing the job. Some employees were retained on an irregular basis to wash screened coal and dismantle the equipment. In early January 1989, the entire operation ceased. I find as a fact that Respondents did not have work for which complainant Vaughn was qualified after December 8, 1988.

ISSUES

1. Whether Complainant Vaughn was discharged for activities or status protected by the Act?

2. If so, to what remedies is he entitled?

CONCLUSIONS OF LAW

I

At all times pertinent hereto, Respondents were mine operators and Complainant Vaughn was a miner. They were subject to and protected by the Mine Act, and specifically section 105(c) of the Act. I have jurisdiction over the parties and subject matter of this proceeding.

II

Section 115 of the Act requires each mine operator to submit a training plan to MSHA for approval. The Act requires that such a training plan provide among other things that new miners having no surface mining experience shall receive no less than 24 hours of training if they are to work on the surface. It requires that the training be provided during normal working hours and that miners be paid at their normal rates while receiving such training. 30 C.F.R. § 48.23 requires that in the case of a new mine or a reopened or reactivated mine, the operator shall have an approved training plan prior to opening, reopening or reactivating the mine. Each new miner shall receive no less than 24 hours of training before being assigned to work duties, unless the MSHA District Manager permits a portion of the training to be given after assignment to work duties. The required courses are set out in § 48.23(b).

III

Section 104(g) of the Act provides that if an inspector finds a miner who has not received the safety training required under Section 115, he shall issue an order requiring that the miner be withdrawn and prohibited from reentering the mine until he has received such training. A miner who is ordered withdrawn shall not be discharged or otherwise discriminated against, nor shall he suffer a loss of compensation during the period of training. The Commission held in Secretary/Bennett v. Emery Mining Corp., 5 FMSHRC 1391, 1395, (1983), rev'd in part sub nom. Emery Mining Corp. v. Secretary of Labor, 783 F.2d 155 (10th Cir. 1986) that Section 105(c) of the Act "prohibits interference with rights provided by the Act, including rights provided under section 115." Unlike the situation in Emery, where applicants for employment were involved or in Secretary/Williams v. Peabody Coal Co., 822 F.2d 1134 (D.C. Cir. 1987), involving former

employees who had been laid off, Vaughn was clearly a miner when he was discharged, and therefore was protected under section 115.

IV

In order to establish a prima facie case of discrimination under section 105(c), a complainant has the burden of establishing that his activity or status was protected under the Act and that the adverse action complained of was motivated in any part by the protected activity or status. See Secretary/Pasula v. Consolidation Coal Co., 2 FMSHRC 2786 (1980) rev'd on other grounds sub. nom. Consolidation Coal Co. v. Secretary, 663 F.2d 1211 (3d Cir. 1981). In the present case, I have found as a fact that the discharge of complainant was motivated in part because Respondent had failed to provide the statutorily mandated training. Therefore, complainant has established a prima facie case of discrimination. The operator may rebut such a prima facie case if he establishes that he was also motivated by unprotected activity, and that he would have taken the adverse action because of the unprotected activity alone. Pasula, supra; Secretary/Robinette v. United Cattle Coal Co., 3 FMSHRC 803 (1981). The evidence in the present case does establish that Respondent's discharge of complainant was motivated in part by unprotected activity, namely by Summer's reaction to complainant's request for a 70 cents an hour raise. Respondent Summers has not, however, carried his burden of establishing that he would have discharged complainant for this reason alone. On the contrary, the evidence is clear that a major factor motivating his visiting the adverse action on complainant, was the fact the complainant had not received safety training and Respondent feared that he would receive another citation or closure order because of this. I conclude that Complainant was discharged in violation of section 115 and 105(c) of the Act.

V

Complainant is entitled to back pay with interest from June 30, 1988 to December 4, 1988. I conclude that he was laid off for economic reasons on December 8, 1988, and is not entitled to back pay thereafter. The evidence in the record is not sufficiently clear as to the monetary amount of the back pay to which complainant is entitled. The interest on the back pay should be determined in accordance with the Commission decision in UMWA v. Clinchfield Coal Co., 10 FMSHRC 1493 (1988).

In determining an appropriate penalty for the violation, I am considering the facts that Respondent began operating in January 1988 and was not familiar with the MSHA training requirements, that the Harlan MSHA office was confused as to the

training requirements, and that Respondent has ceased operating the mine. I conclude that a penalty of \$100 is appropriate.

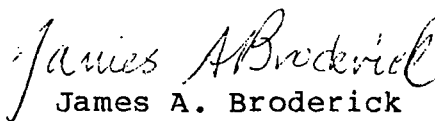
ORDER

Based on the above findings of fact and conclusions of law IT IS ORDERED:

1. Respondents shall pay to claimant Vaughn back wages from June 30, 1988 to December 4, 1988 inclusive, with interest thereon computed in accordance with the Commission decision in UMWA v. Clinchfield Coal Co., supra. Counsel shall confer within 15 days of the date of this decision, in an effort to stipulate the amount due complainant under this order. 1/ If they are unable to so stipulate, Complainant shall submit within 30 days of the date of this decision, its statement of the amount due. Respondent may respond within 10 days thereafter.

2. Respondents shall, within 30 days of the date this decision becomes final, pay a civil penalty in the amount of \$100.

3. The above decision will not become final until a subsequent order is issued awarding back pay and declaring the decision to be final.


James A. Broderick
Administrative Law Judge

1/ Respondents' stipulation of the amount due hereunder will not, of course, limit their right to seek review of this decision.

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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 5 1989

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 88-152
Petitioner	:	A.C. No. 15-13469-03658
v.	:	
	:	Green River Coal No. 9 Mine
GREEN RIVER COAL COMPANY,	:	
Respondent	:	

DECISION ON REMAND

Appearances: Joseph B. Lockett, Esq., Office of the Solicitor,
U.S. Department of Labor, Nashville, Tennessee,
for the Petitioner;
B. R. Paxton, Esq., Paxton & Kusch, Central City,
Kentucky, for the Respondent.

Before: Judge Koutras

Statement of the Case

On April 24, 1989, I issued a decision in this matter, 11 FMSHRC 685 (April 1989). However, through an oversight, the decision was issued before the receipt of the posthearing briefs subsequently filed by the parties. As a result of the premature issuance of the decision, MSHA filed a petition for discretionary review with the Commission claiming that a prejudicial error was committed when the decision was issued prior to the May 3, 1989, date set by me for the filing of briefs by the parties.

On May 10, 1989, the Commission granted MSHA's petition for review, vacated my decision, and remanded the case to me for further consideration in light of the posthearing briefs filed by the parties.

Discussion

MSHA only takes issue with my prior decision concerning a section 104(A) "S&S" Citation No. 3227259, March 21, 1988, which cites an alleged violation of the safeguard provisions of mandatory safety standard 30 C.F.R. § 75.1403(5)(g). The posthearing

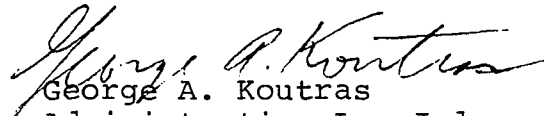
briefs filed by the parties address this citation, and the interpretation and application of two prior safeguarding decisions in Secretary v. Southern Ohio Coal Company, 7 FMSHRC 509 (April 1985), and Secretary v. Mid-Continent Resources, Inc., 7 FMSHRC 1457 (September 1985).

I have now reviewed and considered the written posthearing briefs filed by the parties. The issue raised in the briefs is the same as that raised by the respondent during oral arguments in the course of the hearing, and it is the same issue discussed and disposed of in my prior decision at 11 FMSHRC 696 through 703. Under the circumstances, I find no basis for changing my prior dispositive findings and conclusions with respect to the citation, and my prior decision in this regard is herein incorporated by reference and REAFFIRMED.

ORDER

In view of the foregoing, IT IS ORDERED THAT:

My prior findings and conclusions with respect to the contested citations in this proceeding, including the civil penalty assessments for the citations which have been affirmed, are incorporated by reference, and REAFFIRMED as my dispositive decision in this matter. See: 11 FMSHRC 704-705.


George A. Koutras
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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JUN 5 1989

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. WEVA 89-14
Petitioner	:	A. C. No. 46-01433-03504 C70
v.	:	
	:	Loveridge Preparation Plant
FRANK IREY JR., INC.,	:	
Respondent	:	

DECISION

Appearances: Charles M. Jackson, Esq., Office of the Solicitor,
U.S. Department of Labor, Arlington, Virginia
for Petitioner;
William H. Howe, Esq., Loomis, Owen, Fellman &
Howe, Washington, D.C. for Respondent.

Before: Judge Melick

This case is before me upon the petition for civil penalty filed by the Secretary of Labor pursuant to section 105(d) of the Federal Mine Safety and Health of 1977, 30 U.S.C. § 801 et seq., the "Act," in which the Secretary has charged Frank Irej Jr., Inc., (Irej) with two violations of regulatory standards. The parties have submitted a motion to approve a settlement agreement with respect to Citation No. 3106975 in which the Respondent has agreed to pay the proposed penalty of \$500 in full. I have considered the documentation submitted in support of the motion and find that it comports with the requirements set forth under section 110(i) of the Act. Accordingly the motion is approved.

Order No. 3106979 remains at issue. The order, issued pursuant to section 104(d)(1) of the Act^{1/} charges a "significant and substantial" violation of the standard at 30 C.F.R. § 48.28 and of section 115(a) of the Act. More specifically the order, as amended at hearing, alleges as follows:

follows: ^{1/} Section 104(d)(1) of the Act reads as follows:

If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such

The following personnel were observed performing maintenance and repair duties in the preparation plant, the tripper belt, and conveyor belt underneath the coal storage bins: Jack Byron, Joe Barskite, Dennis Hanzeley, Paul Lasko, Jim Shaffer, Robert Sigwalt, Robert Susick, John Williams, Jr., John Burch, Ron Clark, Jim Fine, John Pollack, Steve Supko, John Woods, Robert Kondratowicz, and Lawrence Vizzence and has [sic] not received the requisite safety training as stipulated in Section 115 of the Act.

The above name employees are experienced and have worked with the company more than three years and had received little or none of the required 24 hours of training. In the absence of such training the employees are declared to be a hazard to themselves and others and are to be immediately withdrawn from mine property work areas until they have received the required training.

Section 115(a) of the Act provides in relevant part as follows:

Each operator of a coal or other mine shall have a health and safety training program which shall be approved by the Secretary of Labor. The Secretary

Cont'd fn.1

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

shall promulgate regulations with the respect to such health and safety training programs not more than 180 days after the effective of the Federal Mine Safety and Health Amendment Act of 1977. Each training program approved by the Secretary shall provide as a minimum that-*** (3) all miners shall receive no less than 8 hours of refresher training no less frequently than once each twelve months, except that miners already employed on the effective date of the Federal Mine Safety and Health Act Amendments of 1977 shall receive this the refresher training no more than 90 days after the date of approval of the training plan required by this section ***.

30 C.F.R. § 48.28(a) provides that "each miner shall receive a minimum of 8 hours of annual refresher training as prescribed in this section." Moreover 30 C.F.R. § 48.28(b) sets forth the specific courses of instruction that must be included in the annual refresher training program.

While there is no dispute that the cited Irex employees did not have the current training under these regulations Irex maintains that all of its employees at the Loveridge Mine project here at issue were "construction" workers and not "miners" and were therefore excluded from coverage under the training regulations at 30 C.F.R. §§ 48.23 through 48.30.

The definition of "miner" for the purposes of 30 C.F.R. Part 48 Subpart B is set forth in 30 C.F.R. § 48.22, which provides in pertinent part as follows:

For the purposes of this subpart B--

(a)(1) "Miner" means, for purposes of §§48.23 through 48.30 of this subpart B, any person working in a surface mine or surface areas of an underground mine and who is engaged in the extraction and production process, or who is regularly exposed to mine hazards, or who is a maintenance or service worker employed by the operator or a maintenance or service worker contracted by the operator to work at the mine for frequent or extended periods. This definition shall include the operator if the operator works at the mine on a continuing, even if irregular, basis. Short-term, specialized contract workers, such as drillers and blasters, who are engaged in the extraction and production process and who have received training under §48.26 (Training of newly employed experienced miners) of this subpart B, may in lieu of subsequent training under that section of each new employment, receive training under

§48.31 (Hazard training) of this subpart B. This definition does not include:

(i) Construction workers and shaft and slope workers under subpart C of this part 48;

The Secretary argues with equal conviction that the Irey employees were indeed subject to the noted training requirement as "maintenance" workers "contracted by the operator to work at the mine for frequent or extended periods." Whether these workers are found to be "maintenance" workers or "construction" workers is significant because the Secretary has yet to develop training regulations for the latter.

The parties agree that the terms "maintenance" worker and "construction" worker are not defined in the regulations. The Secretary urges however that the definition in her program policy manual be followed. That manual provides the following descriptions:

Construction work includes the building or demolition of any facility, the building of a major addition to an existing facility, and the assembling of a piece of new equipment, such as installing a new rotary pump or the assembling of a major piece of equipment such as a dragline.

Maintenance or repair work includes the upkeep or alteration of equipment or facilities. Replacement of a conveyor belt would be considered maintenance or repair.

MSHA Program Policy Manual, U.S. Department of Labor, Vol. III, Page 14 (Release III-1; July 1, 1988).

Irey, on the other hand suggests that the term "maintenance" be defined as work performed to keep a building or structure from deteriorating or falling into a state of disrepair. Even if the definition advanced by Irey is applied to the facts of this case however it is clear that the work performed by its employees at the Loveridge Preparation Plant was indeed "maintenance". There is no dispute that the work performed by Irey involved essentially six projects performed before, during, and after the two week period ending on or about July 8, 1988, when the Loveridge No. 1 Mine was shut down for miners' vacation. The replacement of steel beams inside the Preparation Plant was performed before, during, and after the vacation period and involved 6 to 8 Irey employees. The steel beams had become rusted and deteriorated to the point that some had holes in them. The evidence shows that the basic structural design was not changed by Irey and the only changes made were the

replacement of the rusted beams and deteriorated structural members with new materials.

During and before the vacation Irey also replaced concrete on the second floor of the plant using 4 to 6 employees. The existing concrete floor was leaking and had holes in it exposing the reinforcing wire. Irey removed the deteriorated concrete and replaced it with new reinforcing steel and concrete. There was some change in design in that three wells were built under the belts where the floor had previously been flat.

Four Irey employees also worked during the vacation period straightening the structure on the tripper. The structure had become bent with only temporary bracing added. Irey employees removed some of the temporary support structure and renovated the earlier repairs with heavier materials.

Four of the Irey employees also replaced the tail roller on the No. 15 belt in the raw coal bin area during the vacation period. The tail roller had become badly worn and Irey removed the old tail roller (pulley) and replaced it with a new tail roller. The new tail rollers were standard equipment and of a similar nature to those replaced.

Approximately 4 to 6 Irey employees also worked during the vacation period on the No. 15 belt support structure. The structure had become twisted and rusted and had holes in it. Some of the legs had also rusted off. The Irey employees replaced pieces of the "C channel" and new legs were welded under the belt. There is some dispute as to whether there was any change in the basic structural design of the support structure.

Finally, the evidence shows that approximately 4 Irey employees were involved during the vacation period sand-blasting and painting steel beams in the preparation plant that had become rusted.

Within this framework of evidence it is clear that the work performed by Irey at the Loveridge Preparation Plant was "maintenance" work even within the meaning of Irey's proffered definition and that while the Irey employees were performing that work they were "maintenance" workers within the scope of the MSHA training regulations under 30 C.F.R. §§ 48.28 through 48.30. Since the work was performed over more than a two-week period I also find that the work was contracted for an "extended" period of time within the meaning of Section 48.22(a)(1). The failure of Irey to have had the cited employees trained in accordance with the noted regulations therefore constituted a violation.

I note that while some of the work performed by Irej might broadly be construed to be "construction" work, e.g. the erection of new steel beams to replace deteriorated beams, the overall purpose and intent of all of the work was for the "maintenance" of the existing preparation plant. Thus, in any event, I find that the cited Irej workers were indeed "maintenance" workers subject to the existing MSHA training regulations.

I do not find however on the facts of this case that the violation was the result of the "unwarrantable failure" of Irej to comply with the law. "Unwarrantable failure" means aggravated conduct constituting more than ordinary negligence in relation to a violation of the Act. Emery Mining Corp., 9 FMSHRC 1997 (1987) appeal pending (D.C. Circuit No. 88-1019). In the Emery case the Commission compared ordinary negligence as conduct that is "inadvertent", "thoughtless", or "inattentive" with conduct constituting an unwarrantable failure, i.e. conduct that is not "justifiable" or "excusable".

In this case the evidence is undisputed that several months before the beginning of the Loveridge project Irej contacted the MSHA district manager to inquire about the necessity for training on the particular project. It is not disputed that Irej was informed that training would not be required under the circumstances of the particular project. I also observe that Irej's interpretation of the regulations was not frivolous and the instant case is apparently one of first impression on the precise issue. Under the circumstances it cannot be said that Irej was either negligent or that the violation was the result of its "unwarrantable failure". Order No. 3106979 must accordingly be modified to a citation under section 104(a) of the Act.

While the Secretary also alleged that the violation was "significant and substantial" it has failed to address this issue in her brief. In order to find that a violation is "significant and substantial" the Secretary has the burden of proving an underlying violation of a mandatory safety standard, a discreet safety hazard (a measure of danger to safety) contributed to by the violation, a reasonable likelihood that the hazard contributed to will result in an injury, and a reasonable likelihood that the injury in question will be of a reasonably serious nature. See Mathies Coal Co., 6 FMSHRC 1 (1984).

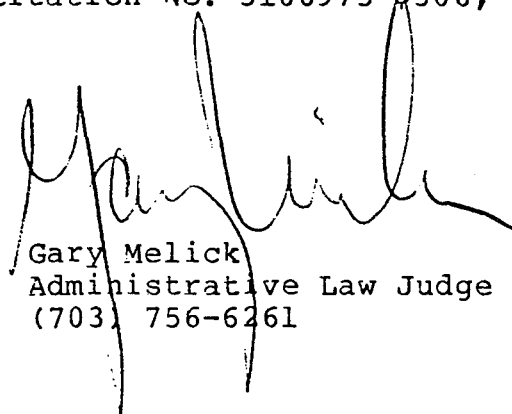
In this case the existence of another violation found at the same work site where the untrained miners were working clearly illustrates the "significant and substantial" nature of the instant violation. The admitted violation under Citation No. 3106975 was as follows: Burning and welding operations were being done in the tripper belt enclosure in

the presence of float coal dust ranging from 2 to 4 inches in thickness on the structure within the enclosure. The "significant and substantial" nature of this violation was likewise not disputed.

The existence of that violation is illustrative of the discreet safety hazard existing from the failure to have the Irex employees trained. It may also reasonably be inferred that the hazard contributed to would result in an injury of a reasonably serious nature. According to the undisputed testimony of MSHA inspector Alex Volek the ignition of the existing float coal dust from the welding operations would likely result in fatalities. Within this framework of evidence I conclude that indeed the violation was "significant and substantial" and serious. In assessing a civil penalty in this case I have also considered the size of the operator, its history of violations, and its good faith abatement of the violation. Under the circumstances I find that a civil penalty of \$200 is appropriate.

ORDER

Order No. 3106979 is modified to a citation under section 104(a) of the Act. Frank Irex, Jr., Inc., is directed to pay the following civil penalties within 30 of the date of this decision: Citation No. 3106975-\$500, Citation No. 3106979-\$200.



Gary Melick
Administrative Law Judge
(703) 756-6261

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

COLONNADE CENTER
ROOM 280, 1244 SPEER BOULEVARD
DENVER, CO 80204

JUN 6 1989

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 88-62-M
Petitioner	:	A.C. No. 05-03950-05505
	:	
	:	Docket No. WEST 88-64-M
v.	:	A.C. No. 05-03950-05506
	:	
	:	Docket No. WEST 88-120-M
COBBLESTONE, LTD.,	:	A.C. No. 05-03950-05507
Respondent	:	
	:	Cobblestone Ltd

DECISION

Appearances: James H. Barkley, Esq., Office of the Solicitor,
U.S. Department of Labor, Denver, Colorado,
for Petitioner;
Mr. Leonard Lloyd, Cobblestone LTD., Pagosa
Springs, Colorado,
pro se.

Before: Judge Cetti

These cases are before me upon the petitions for civil penalties filed by the Secretary of Labor, pursuant to Section 105(b) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act", charging the operator Cobblestone LTD., with 21 violations of regulatory standards, set forth in Part 56, Title 30, Code of Federal Regulations.

The respondent filed a timely answer contesting the citations and the proposed civil penalty assessments. Pursuant to notice served on the parties an evidentiary hearing was held on the merits. The primary issues are whether the respondent violated the cited mandatory safety standards, and if so, the appropriate civil penalties to be assessed for the violations based on the criteria found in Section 110(i) of the Act.

MSHA Inspector Ronald John Renowden and Roy Trujillo inspected the Cobblestone pit and crusher on August 11th and 12th, 1987. During the two day inspection MSHA issued 21 citations alleging violations of mandatory standards found in Part 56, Title 30 Code of Federal Regulations.

The Secretary of Labor on behalf of the Mine Safety and Health Administration seeks affirmation of each of the citations and proposed civil penalty assessments.

STIPULATIONS

After taking the testimony of MSHA Inspector Ronald John Renowden as to certain violative conditions he observed during MSHA's inspection, the parties stipulated that the facts recorded on the face of each citation by the MSHA inspectors "truly and accurately represent the conditions as they existed at the time of the inspection". Cobblestone while stipulating that the facts alleged in the citations are "true and accurate" and in existence as recorded in the citations at the time of inspection, denies there was any violation on the basis that the crushing equipment was never operated in the violative condition observed at the time of the inspection. It is undisputed that the crushing equipment was not operated at any time during the two days of inspection. The parties agree that these stipulations apply to each of the citations in docket numbers, WEST 88-62-M, WEST 88-64-M and WEST 88-120-M.

The parties also stipulated that the operator's business was small.

DOCKET NO. WEST 88-62-M

Citation No. 2636670

Citation No. 2636670 alleges a "serious and significant" violation of 30 C.F.R. § 56.18002. After taking testimony from Inspector Trujillo, the Secretary moved to vacate the citation on the grounds that it was duplicative in that the citation was based solely upon the observation of specific violative conditions for which the operator had already been cited. There was no objection to the motion. The motion to vacate the citation was granted.

Citation No. 2636670 and its related proposed civil penalty are each vacated.

The Electrical Related Citations Nos. 2636579, 2636580, 2636581, 2636582, 2636583, 2636584, 2636585, 2636586, 2636662, 2636665, 2636667, 2636668, 2636669, and 2636587.

The remaining 14 citations of Docket No. 88-62-M are all electrical related citations involving the crusher plant and equipment. The operator's primary defense for these citations as well as all the other citations was that he had just moved the crusher from one location at the site to another, and had not operated the crusher at the new location. He had been trying but said he was unable as of the time of the inspection to get an electrician to come to the remote area where the plant was located to do the necessary electrical work and testing. The operator testified in detail how three weeks before the

inspection he had moved his crusher from one location to another location at the site so that it was closer to the electric shed. It was the operator's contention and testimony that he had not operated the crushing plant since he moved the crusher and therefore the plant was never in operation at a time when the violative conditions observed by the inspector were in existence. He also contended that the crusher's toggle plate had been removed for modification and consequently that the crusher was inoperable.

The MSHA inspectors Renowden and Trujillo testified about their long experience in mining and their observations during the inspection including the size and location of muck piles. Based upon their experience and their observation they testified that the crusher had been in operation after it was moved and that it was clear to them from their observations that the crushing plant had been in operation while the violative condition they observed during their inspection were in existence.

Mr. Lloyd, the operator, contended that there was only one pile of material of any substance and that was a pile of material he transported to a conveyor and used to adjust or "train" the conveyor.

I credit the testimony of Inspectors Renowden and Trujillo and on the basis of their testimony and expertise find that the crushing plant was in operation at least for a limited period of time, after the crusher had been moved and the violative conditions observed by the MSHA inspectors were present. In addition, it is undisputed that the crushing plant was fully energized at the time of inspection and that none of the equipment was locked out or tagged out.

Seven of the remaining 14 citations allege a violation of 30 C.F.R. § 56.12008, which provides as follows:

Power wires and cables shall be insulated adequately where they pass into or out of electrical compartments. Cables shall enter metal frames of motors, splice boxes, and electrical compartments only through proper fittings. When insulated wires, other than cables, pass through metal frames, the holes shall be substantially bushed with insulated bushings.

The seven citations which charged a violation of the above quoted 30 C.F.R. § 56.12008 are Citation Nos. 2636579, 2636583, 2636584, 2636585, 2636586, 2636662, and 2636587.

Citation No. 2636579 charges as follows:

The 2/4 G-GC, 600-2000V, rubber power cable exiting the motor starter enclosure for the jaw crusher, 50 h.p.,

60 amp, 480 VAC motor branch circuit was not properly installed in its respective fitting. The loose cable fitting has allowed the cable to slide out of the squeeze zone and exposed the interval wires to the fitting edge and strain relief clamp, not to mention that the cable weight was being supported by the power connection in the enclosure. No vibration or flexing occurs at this location. Should the cable insulation fail and cause an arcing fault a person could be exposed to arc flashing. The box had a ground circuit via conduit at the panel.

In view of the stipulation of the parties that the citation accurately documents the conditions observed by the inspector and my finding that the crusher had been in operation while those conditions existed. I find that a violation of 30 C.F.R. § 56.12008 was established. Citation No. 2636579 is affirmed.

The appropriate penalty for this violation and each of the established violations discussed below will be found and discussed in due course under the heading "penalty".

Citation No. 2636583 charges as follows:

The 10/4 type 50 rubber power cable exiting the 480 VAC 3 phase motor starter at the switch house for the "stacker feed" conveyor drive motor was observed not being provided with a cable entrance fitting. Tape had been gobbled on the cable in an effort to support and protect it where it entered the sharp metal hole at the bottom of the enclosure.

I credit the testimony of the MSHA inspectors. I find and conclude on the basis of their credible testimony, the stipulation that the citation accurately describes the conditions existing at the time of the inspection and my finding that the crusher plant and equipment had been in operation while those conditions existed, that there was a violation of 30 C.F.R. § 56.12008. Citation No. 2636583 is affirmed.

Citation No. 2636584 charges as follows:

The 12/4 and 10/4 type 50 rubber power cables entering and exiting the 480 VAC, 3 phase motor starter enclosure which serviced 480 volts to the "fines stacker" motor circuit were observed not being provided with cable entrance fittings to protect the cable from sharp metal hole edges, and to support the cable to prevent strain on the starter 480 volt terminate tape had been gobbled in areas around the cable to protect the wiring from sharp edge wear.

In view of the stipulation of the parties that the citation accurately documents the conditions observed by the inspector and

my finding that the crusher had been in operation while those conditions existed. I find that a violation of 30 C.F.R. § 56.12008 was established. Citation No. 2636584 is affirmed.

Citation No. 2636585 charges as follows:

The 12/4 type 50 rubber power cables entering and exiting the 480 volt, 3 phase motor starter enclosure for the stacker motor circuit, were not provided with cable fittings to protect the cable wiring and prevent strain at on 480 volt terminations. Tape had been used to provide some protection against damage.

I credit the testimony of the MSHA inspectors. I find and conclude on the basis of their credible testimony, the stipulation that the citation accurately describes the conditions existing at the time of the inspection and my finding that the crusher plant and equipment had been in operation while those conditions existed, that there was a violation of 30 C.F.R. § 56.12008. Citation No. 2636585 is affirmed.

Citation No. 2636586 charges as follows:

A strain relief cable fitting was not provided at the 2 hp, 480 VAC, 3 phase fines discharge motor junction box for the 14/4 type "50" rubber power cable. A rubber grommet existed which afforded damage protection.

In view of the stipulation of the parties that the citation accurately documents the conditions observed by the inspector and my finding that the crusher had been in operation while those conditions existed. I find that a violation of 30 C.F.R. § 56.12008 was established. Citation No. 2636586 is affirmed.

Citation No. 2636662 charges as follows:

Ground continuity and resistance of the grounding system had not been done at the plant. It was evident that quite a bit of crushing had been done.

I credit the testimony of the MSHA inspectors. I find and conclude on the basis of their credible testimony, the stipulation that the citation accurately describes the conditions existing at the time of the inspection and my finding that the crusher plant and equipment had been in operation while those conditions existed, that there was a violation of 30 C.F.R. § 56.12008. Citation No. 2636662 is affirmed.

Citation No. 2636587 charges as follows:

The 10/4 50 power cable servicing 480 VAC, three phase power to the 5 hp, 480 VAC, fines stacker motor was not

provided with a cable entrance fitting. The damage was observed and tape had been gobbled around the cable to provide damage protection.

In view of the stipulation of the parties that the citation accurately documents the conditions observed by the inspector and my finding that the crusher had been in operation while those conditions existed. I find that a violation of 30 C.F.R. § 56.12008 was established. Citation No. 2636587 is affirmed.

The next two citation Nos. 2636580 and 2636581 each allege a violation of the safety standard 30 C.F.R. § 56.12030, which provides as follows:

When a potentially dangerous condition is found it shall be corrected before equipment or wiring is energized.

Citation No. 2636580 charges as follows:

The 5 h.p. 7 amp, 480 VAC, 3 phase motor starter at the switch-house for the "feed hopper" motor branch circuit was observed having an arcing ground fault condition existing in the remote/local control circuit. The white 480 VAC control phase conductor in a 12/4 cable was observed being damaged and exposed the bare conductor. The bare damaged area had been laying against the right inside edge of the motor starter where it had been arcing to ground, in the unreliaibly grounded wire 480 VAC system. The control circuit was tapped to the line side of the starter and the circuit was protected by a 20 amp inverse time circuit breaker. This condition created a likelihood for a serious electrical accident or possible fatality to occur... .

In view of my findings that the crushing plant had been in operation while the condition described in the citation was in existence, it is found that a violation of 30 C.F.R. § 56.12030 was established. Citation No. 2636580 is affirmed.

Citation No. 2636581 charges as follows:

The 12/3 and 12/4 type 50 cables used between the circuit breaker panel and the motor starter switchgear at the switch-house was observed being cracked and brittle which exposed bare 480 volt conductor. In some cases the bare wiring was exposed to metal enclosure framework and covers, and because the cover panel was off the main 225 amp 480 volt panel the cracked defective wiring was exposed in an accessible manner. Arc flash burns and electric

shock could result in the event of unintentional contact or a faulted condition. Gravity of this condition was increased by the unreliable safety grounding circuits. The stacker circuit tested high resistance phase to phase on the cable from the breaker to the starter.

In view of my findings that the crushing plant had been in operation while the condition described in the citation was in existence, it is found that a violation of 30 C.F.R. § 56.12030 was established. Citation No. 2636581 is affirmed.

Citation No. 2636582, issued under section 104(a), alleges a violation of 30 C.F.R. § 56.12002. The citation charges as follows:

The General Electric, CR206B1, NEMA Size "O" motor controller rated at maximum use of 5 HP at 480 volts was observed being used beyond the design intended by the manufacturer, in that, a 3 hp 460 VAC "under jaw" conveyor motor, a 2 hp 460 volt "fines" discharge conveyor motor, and the jaw shaker screen, 10 or 15 hp (manplate missing) were all operated simultaneously by the underrated Size "O" starter. The total horsepower was calculated to be at least 15 hp.

Additionally, because of this condition the motor running overload protection provided at the controller unit (sized C15.18) was rated at 12.9 amps, trip @ 16.12 amps for the 10 hp motor. Therefore, the two smaller motors were not properly protected against overload. The circuit breaker for the branch circuit was 20 amps.

The cited regulatory standard 30 C.F.R. § 56.12002 provides as follows:

Electric equipment and circuits shall be provided with switches or other controls. Such switches or controls shall be of approved design and construction and shall be properly installed.

The record, including the stipulations and my findings that the crusher plant was operated while in the condition observed by the inspector were in existence establishes a violation of 30 C.F.R. § 56.12002. This citation was issued as S & S violation. However, the MSHA inspector on the same day he issued the citation modified the citation from an S & S to a non S & S violation. As modified to a non S & S violation, Citation No. 2636582 is affirmed.

Citation No. 2636662 charges as follows:

Ground continuity and resistance of the grounding system had not been done at the plant. It was evident that quite a bit of crushing had been done.

The cited mandatory standard 30 C.F.R. § 56.12028 provides as follows:

Continuity and resistance of grounding systems shall be tested immediately after installation, repair, and modification; and annually thereafter. A record of the resistance measured during the most recent tests shall be made available on a request by the Secretary or his duly authorized representative.

In view of the parties stipulation and my finding that the crushing plant had been in operation while the condition alleged in this citation was in existence a violation of 30 C.F.R. § 56.12028 was established. Citation No. 2636662 is affirmed.

Citation No. 2636665 as amended reads as follows:

"A bad splice was observed on the 14/4 SO cable that was spliced to a 12/4 SO cable that was not (b) insulated to a degree at least equal to that of the original and sealed to exclude moisture and (c) provided with damage protection as near as possible to that of the original, including good bonding to the outer jacket. This splice was approximately three feet from front discharge conveyor motor."

The cited safety standard 30 C.F.R. § 56.12013 provides as follows:

Permanent splices and repairs made in power cables, including the ground conductor where provided, shall be:

- (a) Mechanically strong with electrical conductivity as near as possible to that of the original;
- (b) Insulated to a degree at least equal to that of the original, and sealed to exclude moisture; and
- (c) Provided with damage protection as near as possible to that of the original, including good bonding to the outer jacket.

It is clear from the record including the stipulation of the parties that the citation accurately describes the condition observed by the inspector and my finding that the crusher plant had been in operation while those conditions were in existence that there was a violation of the provisions of 30 C.F.R. § 56.12013. Citation No. 2636665 is affirmed.

Citation 2636667 charges as follows:

The 20 amp circuit breaker, the principle power switch for the stacker motor was not labeled to show what unit it controlled. Identification could not be readily made by location.

The cited mandatory standard provides as follows:

Principle power switches shall be labeled to show which units they control, unless identification can be made readily by location.

I credit the testimony of the MSHA inspectors. I find and conclude on the basis of their credible testimony, the stipulation that the citation accurately describes the conditions existing at the time of the inspection and my finding that the crusher plant and equipment had been in operation while those conditions existed, that there was a violation of 30 C.F.R. § 56.12018. Citation No. 2636667 is affirmed.

Citation No. 2636668 alleges a violation of 30 C.F.R. § 56.12008 as follows:

The 2/4 power cable entering jaw crusher motor terminal box was not properly installed in that the restraining strap had come loose allowing the weight of the cable to put a strain on the 480 V conductor connection inside the junction box. There is a lot of vibration in this area from the jaw crusher.

In view of my findings that the crushing plant has been in operation while the condition described in the citation was in existence, it is found that a violation of 30 C.F.R. § 56.12008 was established. Citation No. 2636668 is affirmed.

Citation No. 2636669 alleges a violation of 30 C.F.R. § 56.12004 as follows:

The power cable laying alongside feed conveyor and feed hopper had been subjected to mechanical damage from rock falling from conveyor. Some damage was observed on cables where they had been hit by falling rocks.

The cited mandatory standard 30 C.F.R. § 56.12004 provides as follows:

Electrical conductors shall be of a sufficient size and current-carrying capacity to ensure that a rise in temper-

ature resulting from normal operations will not damage the insulating materials. Electrical conductors exposed to mechanical damage shall be protected.

Inspector Trujillo testified that the electrical conductors along side the feed conveyor and feed hopper were exposed to mechanical damage and were not protected. Mr. Lloyd testified that he put the boulders on the cable to protect the cable and that he did not see any damage to the cable.

The Secretary presented evidence that there were dents in the power cable where 20 to 25 pounds boulders had fallen on the cable. The boulders were intermittently on the cable where you would normally expect to find boulders falling off the side of an incline conveyor. Mr. Trujillo stated that if someone were going to try to protect the power cable with boulders they would have put them all along the length rather than intermittently and they would not have put the boulder right on top of the cable because when another rock hits that rock on the cable it would damage the cable.

I credit the testimony of Inspector Trujillo. The electrical conductors in question were unprotected and exposed to mechanical damage. The violation of 30 C.F.R. § 56.12004 was established. Citation No. 2636669 is affirmed.

DOCKET NO. WEST 88-64-M

Citation No. 2636577

Citation No. 2636577, when issued charged the employer with a "significant and substantial" violation of safety standard 30 C.F.R. § 56.12032 for failure to keep the cover panel for a circuit breaker distribution panel in place.

The citation in relevant part reads as follows:

The enclosure/cover panel for the general electric 480/277 volt AC, 3 phase, 225 amp, 4 wire, circuit distribution panel board, located at the main motor control switch house was not in place. This exposed the bare terminal (partially) of the 480 VAC load-side terminals, and cracked-brittle "50" cable bare wiring at the panel. The panel contained approximately 9 circuit breakers for motor circuits and no testing or repairs were being performed in the panel at the time of inspection.

Should an electric fault occur at the panel, with the cover off, and a worker was exposed to the event, it is reasonably likely he would receive serious electric arc flash burns.

The cited standard 30 C.F.R. § 56.12032 provides:

Inspection and cover plates on electrical equipment and junction boxes shall be kept in place at all times except during testing or repairs.

Inspector Renowden testified that the cover panel for the general electric 480/277 VAC, 3 phase, 225 ampere, 4 wire, circuit breaker panel board was not in place at the time of his inspection. No testing or repairs were being done. The bare, energized conductors within the panel board were readily accessible.

The citation when issued characterized the violation as "significant and substantial". At the hearing after both sides presented their evidence on this citation the Secretary's counsel conferred off the record with the inspector and then moved to amend the citation to reflect a non S & S violation rather than an S & S violation. There was no objection to the motion. The motion was granted.

Inspector Renowden's testimony clearly shows that there was a violation of 30 C.F.R § 56.12032. Citation No. 2636577 as amended by the Secretary to a non S & S violation, is affirmed.

Citation No. 2636664

Citation No. 2636664 issued under section 104(a) of the Act, alleges a violation of the mandatory safety standard 30 C.F.R. § 56.14001. The citation reads as follows:

The V-Belt drive on head pulley on INT Conveyor was not provided with a guard. This V-Belt drive could be contacted very easily. Some crushing had been done.

The cited safety standard § 56.14001 mandates that head pulleys "which may be contacted by persons and which may cause injury to persons", shall be guarded. Inspector Roy Trujillo testified that the guard on the intermediate conveyor head pulley was not in place at the time of the inspection. The V-Belt in question came from an electric motor that was "bigger" than a 3/4 quarter horsepower motor. The V-Belt drive was used to operate an intermediate conveyor that carried rocks over to the stacker conveyor. There were many cobblestones in the area ranging from 4 to 8 inches in diameter and bigger. Consequently, the footing in the area was not secure. He observed footprints in the area but he could not determine whether anyone was walking through the area when the plant was running. Mr. Trujillo testified that if someone should stumble while walking by when the belt was running and try and catch himself by putting a hand out where it would be

caught by the pinch point, it would probably tear his arm off. In his opinion a fall in the area was reasonably likely. It would be a serious injury that would involve hospitalization and many lost work days.

Mr. Trujillo testified that he was sure the plant had been crushing a short time before the inspection but could not testify that the guard was off at a time when the belt was in operation. The operator told the inspector that the guard was not in place because it was being repaired. When the inspector return the next day to complete the inspection the guard was in place. The inspector testified however, that he did not notice anything that indicated to him that the guard had been repaired.

Mr. Lloyd testified the guard was off because it was being repaired and the belt in question had not been operating while the guard was off. There was no contrary evidence. I find no persuasive evidence that the belt and pulley had been operated with its guard off. Under the circumstance there is no persuasive evidence of a violation of the cited safety standard which expressly requires the pulley be guarded only when the moving parts may be contacted by persons and which may cause injury to the persons. Since the guard was off while the pulley and belt were not moving there is no violation of the cited safety standard. Citation No. 2636664 is vacated. The decision on this citation turns not on the issue of credibility but on the safety standard's express requirement of exposure and the insufficiency of the evidence to establish exposure.

DOCKET NO. WEST 88-120-M

Citation No. 2636578

Citation No. 2636578 charges the operator of Cobblestone with a "significant and substantial" violation of the mandatory safety standard 30 C.F.R. § 56.12025. The cited standard provides as follows:

All metal enclosing or encasing electrical circuits shall be grounded or provided with equivalent protection. This requirement does not apply to battery-operated equipment.

Citation No. 2636578 charges as follows:

Inspection of the safety grounding system has revealed that improper and unsafe grounding existed as described in the following discussion. The power to the crushing plant was supplied by three pole mounted 50 KVA, high voltage single phase transformers connected Y-Y. The secondary was connected in a 480 volt grounded WYE (STAR) service and was "earth" grounded at the power pole butt ground. The four

service conductors was a Quadraplex aerial drop of approximately 30-35 feet to the main 200 amp service fused disconnect outside on the side of the electrical switch house. The fourth wire, or system grounding conductor was fed directly through the main 200 amp service switch and was terminated to the NEUTRAL terminal bar at the 225 amp, 3 phase 400 480 VAL distribution panel inside the switch house. The NEUTRAL bar was INSULATED from the metal panel enclosure and no bonding jumper existed. A bare ground wire was terminated to the panel frame and extended to the main switch outside, where it was also connected to the metal box frame, and it was there connected/terminated to an earth driven copper ground rod below the 200 amp switch. This wiring method created a high resistance/impedance value in the safety ground system between the ground transformer location at the power pole, and the ground rod beneath the 200 amp main disconnect at the switch house. This unsafe practice/condition was detected by visual observation and verified with electrical testing instruments: OHMMETER @ megohms; "Biddle" insulation tester, on ohms scale @ 200 ohms. In the event of a ground fault condition it is highly likely that the circuit protective devices will not function as needed, and could expose electrocution hazards to the workers at the plant. ... (The electrical system was tested for a ground fault by this electrical inspector, and none was detected - otherwise a imminent danger closure order would have been issued) On 8/12/87 @ 1400 hrs during an impedance test it was found that the fines stacker drive motor was not grounded.

The record satisfactorily established that there was a violation of the mandatory grounding requirements of the safety standard 30 C.F.R. § 56.12025. The violation could have contributed to a fatal electric shock by allowing the electric current to flow through a miner's body rather than through the grounding conductor. The violation resulted from the operator's negligence. The violation of the provisions of 30 C.F.R. § 56.12025 was established. Citation No. 2636578 is affirmed.

The appropriate penalty for this violation and each of the established violations will be discussed below under the heading "penalty".

Citation No. 2636661

Citation No. 2636661 (as well as Citation No. 2636663) alleges a 104(a) violation of 30 C.F.R. § 56.14001. The citation charges:

The V-Belt drive and pulleys were not provided with guards on the fines discharge conveyor. This V-Belt was approximately 3 to 4 feet from the ground level and the pinch points could be contacted easily.

The cited regulation, 30 C.F.R. § 56.14001 provides as follows:

Gears; sprockets; chains; drive, head, tail, and takeup pulleys; flywheels; couplings; shafts; sawblades; fan inlets; and similar exposed moving machine parts which may be contacted by persons, and which may cause injury to persons, shall be guarded.

Inspector Trujillo testified that the V-Belts were 3 to 4 feet above ground and the pinch points could be easily contacted by a person and could easily cause injury. The violation of 30 C.F.R. § 56.14001 was established. Citation No. 2636661 is affirmed.

Citation No. 2636663

Citation No. 2636663, issued under section 104(a) of the Act, charges the operator with a violation of 30 C.F.R. § 56.14001 which is quoted above under the heading "Citation No. 2636661". Citation No. 2636663 alleges that the V-Belt drive and pulleys on the jaw crusher were not provided with guards. The evidence presented by petitioner established that there was an unguarded pinch point was about 5 1/2 feet above the ground that was readily accessible. The operator testified that the bull wheel of the crusher traveled in the opposite direction from the direction claimed by the inspector and thus that the pinch point was 3 feet higher than the height asserted by the inspector. Respondent claimed therefor that the pinch point was protected by location. Petitioner contends that there was no protection by location even if the the pinch point was 8 1/2 feet high rather than 5 1/2 feet high. Petitioner also presented evidence that in addition to the pinch point hazard there was the hazard from the unguarded revolving spokes of the bull wheel.

I credit the testimony of the mine inspector and find there was a violation of 30 C.F.R. § 56.14001. Citation No. 2636663 is affirmed.

Citation No. 2636666

Citation No. 2636666 issued under section 104(a) of the Act, alleges a violation of mandatory standard 30 C.F.R. § 56.12018. The citation reads as follows:

The 20 amp 3 pole circuit breaker, the principal power switch for the fines stacker was not labeled to show what unit it controlled. Identification could not be readily made by location.

The cited standard 30 C.F.R. § 56.12018 provides:

Principal power switches shall be labeled to show which unit they control, unless identification can be made readily by location.

It clearly appears from the record that the principal power switch for the fines stacker was not labeled as required by the cited mandatory safety standard. The violation of 30 C.F.R. § 56.12018 was established. Citation No. 2636666 is affirmed.

PENALTY

Section 110(i) of the Act mandates consideration of six criteria in assessing appropriate civil penalties:

- (1) The size of the business and the appropriateness of the penalty to the size;
- (2) The effect on the operator's ability to continue in business;
- (3) The operator's history of previous violation;
- (4) Whether the operator was negligent;
- (5) The gravity of the violations;
- (6) Whether the good faith was demonstrated in attempting to achieve prompt abatement of the violation.

With respect to size, Cobblestone is owned and operated by Leonard Lloyd. It is almost a one-man operation. Mr. Lloyd does practically all of the mining and milling work with a little help from his son and one other part-time person. Mr. Lloyd testified that he has no employees.

The gravel pit and crushing equipment is located on ten acres of Mr. Lloyd's 120 acre homesite. Evidence was presented that Cobblestone grossed \$45,000 from January 1, 1988 to October 5, 1988. It has three or four thousand dollars outstanding accounts receivable. Mr. Lloyd has additional income of \$2,000 to \$3,000 from his jewelry business which he works at during the winter months.

Mr. Lloyd testified that he was four months delinquent in his payments on a \$366,000.00 note that is secured by his acreage, his residence, and business of Cobblestone including all equipment. Mr. Lloyd stated that Cobblestone has not been able to gross the amount needed to cover the notes. In view of his delinquency of four mortgage payments the mortgagor has asserted

its right of acceleration on the note and turned it over to its attorney's for collection. The amount due is \$366,000.00 plus interest at 11.25 percent per annum. Cobblestone has a second mortgage in the sum of \$50,000.00. The annual amount due on these two notes is approximately \$50,000.00 a year.

The operator's history of previous violations is set forth in Exhibit P-1 which is the printout of the assessed violations in the history report. The printout shows that the operator has at least a moderate history of previous violations.

With respect to the gravity of the violations Inspector Renowden testified that in the electrical related citations which he characterized as significant and substantial the gravity is high. The hazards that resulted from these violations are primarily potential electric shock and electrocution and thermal arc flash burns. He believed there was a substantial possibility that the injuries would either be an electrocution, electrical shock or flash burns. There was a likelihood of loss work days or restricted duty from such an injury.

With respect to each citation that he marked S & S it was his opinion based on his occupational background and expertise that injuries would be reasonably likely to occur and there was a reasonable likelihood of a serious injury.

Each of the citations on its face indicate that the number that could be exposed to the potential hazard was one. The person most likely to be exposed to the hazard is the operator himself since he is the one who does practically all the work. Irrespective of the number of persons exposed to the hazards the gravity of the violation is high in view of the seriousness of the potential injury.

Mr. Lloyd, the operator moved the crusher from one location to another approximately three weeks prior to the inspection. He testified that he had been attempting to get an electrician to check over and correct the electrical work he performed in moving the crusher to its new location. He contends that any equipment he operated was in the nature of alignment and adjustment so the plant would be able to go into production. He states that at the time of the inspection he was still preparing the equipment for commercial production. I have found however, on the basis of the testimony the MSHA inspectors that while he may still have been in the process of making some adjustments and corrections, that he was operating his crushing equipment. I find that the violations cited were the result of the operator's negligence. I characterized negligence as ordinary negligence which is also known as moderate negligence.

The operator presented evidence of his difficulty in meeting the payment due on the notes secured by his heavily mortgaged property and equipment and his inability to pay the proposed penalties. The operator has financial difficulties. However, I do not believe the appropriate penalties assessed in this case will constitute the difference between the operator continuing or not continuing in business.

Mr. Lloyd's good faith was demonstrated by his abatement of each of the cited violations within the extended time MSHA allowed him for abatement of the violations.

Based on the statutory criteria set forth in section 110(i) of the Act and also taking into consideration that the operator was essentially engaged in a one-man operation, had recently moved the crusher from one location to another and was trying to obtain the services of an electrician to check the work and correct any hazards and the business's serious financial difficulty I find that the appropriate civil penalty for each of the violations as follows:

<u>Citation No.</u>	<u>30 C.F.R. Violated</u>	<u>Assessed Penalty</u>
2636578	56.12025	\$ 250.00
2636661	56.14001	100.00
2636663	56.14001	50.00
2636666	56.12018	20.00
2636577	56.12032	50.00
2636579	56.12008	20.00
2636580	56.12030	40.00
2636581	56.12030	30.00
2636582	56.12002	20.00
2636583	56.12008	20.00
2636584	56.12008	20.00
2636585	56.12008	20.00
2636586	56.12008	20.00
2636662	56.12028	20.00
2636665	56.12013	30.00
2636667	56.12018	20.00
2636668	56.12008	30.00
2636669	56.12004	20.00
2636587	56.12008	20.00
		<u>\$800.00</u>

ORDER

1. Citation No. 2636577 is modified to delete the characterization "significant and substantial" and as so modified affirmed.

2. Citation Nos. 2636664 and 2636670 and their related proposed penalties are each vacated.

The respondent Cobblestone Ltd is directed to pay the civil penalties assessed in these proceedings within forty (40) days of the date of these decisions. Upon receipt of payment, these proceedings are dismissed.



August F. Cetti
Administrative Law Judge

Distribution:

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/bls

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

COLONNADE CENTER
ROOM 280, 1244 SPEER BOULEVARD
DENVER, CO 80204

JUN 6 1989

MID-CONTINENT RESOURCES, INC.,	:	CONTEST PROCEEDING
Contestant	:	
	:	Docket No. WEST 89-3-R
v.	:	Order No. 3077666; 9/23/88
	:	
SECRETARY OF LABOR,	:	Dutch Creek No. 1 Mine
MINE SAFETY AND HEALTH	:	Mine ID No. 05-00301
ADMINISTRATION (MSHA),	:	
Respondent	:	

DECISION

Appearances: Edward Mulhall, Jr., Esq., Delaney & Balcomb, P.C.,
Glenwood Springs, Colorado,
for Contestant;
James H. Barkley, Esq., Margaret A. Miller, Esq.
Office of the Solicitor, U.S. Department of Labor,
Denver, Colorado,
for Respondent.

Before: Judge Morris

This contest proceeding is before me under Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., (the "Act"). Contestant, Mid-Continent Resources, Inc., (Mid-Continent) has challenged an order issued under Section 104(d) of the Act.

Issues

The broad issues presented here involve allegations of "MSHA enforcement abuse". Specifically, the issue is whether the Commission has jurisdiction to consider such allegations. Further, did Mid-Continent violate the escapeway regulation, 30 C.F.R. § 75.1704, and was the 104(d)(2) order appropriate under the circumstances here.

Procedural History

1. Mid-Continent contested Order No. 3077666 which alleges a violation of 30 C.F.R. § 75.1704.

2. In addition to its contest Mid-Continent further alleged that the order is part of a persuasive ongoing policy of abuse against Mid-Continent by the Secretary through MSHA's District Manager. Said alleged abuse, implemented by MSHA's supervisors and inspectors, seeks to subject Mid-Continent to shutdowns of its major mining units whenever possible, and whether properly or improperly. Mid-Continent further asserts that the order issued herein by MSHA was arbitrary.

3. When Mid-Continent filed its notice of contest it further requested an expedited hearing.

4. The motion for an expedited hearing was granted and a two-day hearing, commencing October 12, 1988, was held in Glenwood Springs, Colorado.

5. At the hearing both parties presented evidence concerning the contested order. The evidentiary record was closed on that phase of the case (Tr. 442-443). At the hearing Mid-Continent, over the Secretary's objection, also presented evidence in support of its view that the Secretary abused her statutory discretion in enforcing the Act at Mid-Continent's mine.

6. At the close of Mid-Continent's evidence the Secretary orally moved the judge to dismiss all issues involving MSHA enforcement abuse.

The issues involving abuse were initially raised in the expedited hearing. Accordingly, after the entry of an order on the issue of jurisdiction, the judge indicated he would grant the Secretary time to consider whether she would stand on her motion to dismiss or seek an evidentiary hearing to present her evidence on that issue (Tr. 444).

7. On October 17, 1988, the judge sua sponte directed the parties to file briefs addressing the issue of whether the Commission has jurisdiction to consider the allegations of MSHA enforcement abuse. Such briefs were filed.

8. On December 22, 1988, the judge issued an order dismissing Mid-Continent's broad allegation of "MSHA enforcement abuse," 10 FMSHRC 1798. The parties were further directed to file their briefs as to the merits of the contested order.

9. On January 17, 1989, during the course of other hearings involving the same parties and counsel, Mid-Continent orally moved and was granted permission to file a motion to reconsider dismissal of the "MSHA enforcement abuse" issues. (Request made in Docket Nos. WEST 88-230 and 88-231).

10. On January 25, 1989, Mid-Continent filed its post-trial brief addressing the merits of Order No. 3077666. The Secretary did not file any post-trial briefs addressing the merits of the order.

11. On February 15, 1989, the judge extended Mid-Continent's time to file its motion to reconsider to February 17, 1989, not including mailing time.

12. On February 21, 1989, Mid-Continent filed its motion to reconsider the order of dismissal previously entered on December 22, 1988.

The Secretary did not file in opposition to Mid-Continent's motion to reconsider but relied on the judge's order of December 22, 1988. (Letter, December 27, 1989).

Mid-Continent's position

Mid-Continent's position, as stated in its motion to reconsider, is that MSHA's policy directed at Mid-Continent results in 104(d)(2) closure orders for conditions which by Commission precedent justify no more than 104(a) citations. These closure orders are coupled with an enforcement intensity which is per se pervasive. It is claimed that MSHA's actions adversely affect the ability of Mid-Continent to produce coal and to continue in business. The excessive use of orders and abuse of enforcement authority constitutes harassment. The closure orders and harassment have in turn cost Mid-Continent millions of dollars in lost production which may be the death knell of the company. 1/

The company seeks to show that it is within the Commission's power to hear and consider evidence that MSHA is harassing it with its excessive enforcement activities. That MSHA is, in effect, upgrading all citations all for the improper purpose of attempting to substantially hinder the production of coal, keep the mine closed and/or drive Mid-Continent out of business. Mid-Continent argues the judge is empowered to consider such evidence in proving the invalidity of the order herein which the operator has timely contested.

It is argued that at least some of the citations and orders MSHA issued are the fruit of improper enforcement, therefore Mid-Continent should be entitled to an order declaring such actions unlawful and enjoining MSHA from doing it further in the future. Or, stated another way, the judge is not being asked to enjoin MSHA from inspecting or citing violations as its statutory duty. Rather, the judge is being asked to issue a declaratory judgment that the contested order in this docket is invalid because it was not issued because of a violation of

1/ Mid-Continent's motion to reconsider at 2.

the regulations but because of a pervasive intent to punish/close Mid-Continent that is unlawful. Mid-Continent further asks the judge to order MSHA to cease and desist from issuing improper citations and orders and abusing its statutory authority under the 1977 Mine Act.

Mid-Continent further submits the evidence of abuse will establish that the contested order would not have been issued but for this abusive enforcement policy.

The operator also contends that MSHA's improper enforcement policy stands in direct contradiction to the Congressionally established policy enunciated in sections 2 and 110(i) of the 1977 Mine Act, 30 U.S.C. §§ 801 and 820(i). Therefore, Mid-Continent submits that its evidence of abuse is reviewable under section 113(d)(2)(A)(ii) of the 1977 Mine Act, 30 U.S.C. § 823(d)(2)(A)(ii), as a matter concerning "[a] substantial question of law, policy and discretion ..." and it is relevant in order to fully determine the validity of the contested order pursuant to section 105(d), 30 U.S.C. § 815(d). If the enforcement is abusive and improper, then this poisoning taints its corollary inspection activities.

Mid-Continent argues that consideration by the Commission of the issue of abuse is consistent and mandated under the purposes charged by Congress in creating the Commission. The company further submits that should such abuse be established, then the Commission has the power and corollary duty to declare such abuse unlawful under the 1977 Mine Act and issue declaratory and remedial orders under its authority to grant "other appropriate relief."

In support of its views Mid-Continent cites various portions of the Mine Act. These parts will be considered infra in the same sequence as presented in Mid-Continent's motion to reconsider.

Evidence Concerning MSHA Enforcement Abuse

For the reasons hereafter stated the presiding judge has concluded that the Commission lacks jurisdiction to consider Mid-Continent's allegations of MSHA enforcement abuse. However, the judge considers it appropriate to set forth the relevant evidence for any reviewing authority.

John A. Reeves, Diane Delaney, Mark E. Skiles, Jimmie E. Kiser and David A. Powell testified for Mid-Continent.

JOHN A. REEVES, a mining engineer and a person experienced in mining, has served as President of Mid-Continent for the last 28 years. He was originally hired as a manager in 1957 (Tr. 129-132).

Mid-Continent's Dutch Creek Mines were developed from the outcrop of the coal seams with portals at an elevation of 10,000 feet. The mines contain the only medium volatile coking seam in the western United States. The seams themselves are pitched at approximately 13 degrees and they are interlaced with volcanic intrusions and geographic faults. The overburden ranges between 2500 and 3000 feet. Because of the depth of the mines they are extremely gassy. These conditions present a very difficult mining environment and probably one of the most difficult in the United States. On numerous occasions the witness has visited mines in other countries. For example, he has visited Poland, England, Germany, Belgium, France, Hungary, Mexico and Japan, to study peat mining technology and techniques in order to develop suitable techniques and technologies (Tr. 132-135).

As President of Mid-Continent and throughout his mining career the witness has maintained a close relationship with MSHA, MESA and the Bureau of Mines.

However, after the Wilberg Mine fire disaster ^{2/} the MSHA District was severely and unfairly criticized at the Senate oversight hearings. The Senate Investigating Committee blamed MSHA's District 9 for the fire (Tr. 147). After the hearings a marked change occurred in MSHA's attitude (Tr. 145-158). This change was exemplified in an overly stringent enforcement policy which was biased and in many situations unprofessional (Tr. 148). This change in attitude and policy was felt at Mid-Continent in the form of saturation inspections with as many as 17 inspectors per day specifically directed to issue citations and orders (Tr. 148). MSHA's stringent enforcement policy has had a drastic effect upon the operations at Mid-Continent. The saturation inspections basically took over management of Mid-Continent's mines.

^{2/} This coal mine disaster occurred on December 19, 1984.

Instead of being able to run the coal mining operations in an organized manner and according to planned policies, supervisory personnel at Mid-Continent are, as a result of inspections relegated to the role of "re-active management" (Tr. 149-150). In this situation the foremen are frustrated and due to threats of criminal liability they are hesitant in the performance of their duties (Tr. 150). As might be expected, morale has reached an all-time low with many good qualified miners becoming exasperated and quitting (Tr. 149-150).

During this saturation enforcement, entire mining units were unnecessarily shut down over minor infractions and incorrect interpretations of the law. These, in turn, cost Mid-Continent thousands of tons of production and made the drafting of accurate business plans impossible. Finally, this stringent enforcement policy exercised by MSHA in the Dutch Creek Mine has not resulted in any increased safety in the workplace.

With its management reacting to MSHA's demands, the company has neither the resources nor the time to continue its excellent prevention program. Despite the inspection saturation, the accident rate in the Dutch Creek Mines in this time period increased (Tr. 149-170). MSHA's new increased enforcement or as described by the witness, "abusive enforcement policy" has been conducted at a time when dramatic safety improvements have been achieved. During the last 12 months Mid-Continent made a quantum leap towards a safer operation (Tr. 151).

Mid-Continent has just completed a \$40,000,000 modernization of mining operations in the coal basin. This modernization involves two 15,000 foot rock tunnels (called the Rock Tunnel Project) which intersect the coal seams. These tunnels greatly improve mine ventilation, water drainage and operations. They give the workers a level fireproof corridor for escape in the event of a mine emergency. Previously, the only escape had been up 7,000 feet of the 13 degree steep slope entries of the coal seam (Tr. 151). In addition to these improvements, Mid-Continent also implemented major organizational change designed toward improved safety. After recommendations by Herchel Potter, formerly MSHA's Chief of Safety, the company hired Jimmie Kiser to direct and implement an expanded and high-profile safety department (Tr. 152-153).

The new safety department was emphasized by the establishment of a mine rescue team of competitive quality and use, consisting of professional mine instructors from Colorado Mountain College to insure more comprehensive training of Mid-Continent's work force. Finally, the operational manager

was replaced. Mark E. Skiles was hired as the mine manager with the commitment that Mid-Continent should be totally committed to safety (Tr. 155).

Despite these measures MSHA has refused to "turn down the heat" or curb its abusive enforcement policy. Despite meetings with MSHA at the District and Arlington levels, MSHA has refused to delineate a course of action which the company must follow to alleviate or address what MSHA considers to be a problem (Tr. 155).

Reeves considers the current situation to be ironic. Coal operators are told they must invest in capital expenditures in order to meet foreign competition. Mid-Continent has invested over \$40,000,000 in modernizing the mine to become competitive and it has obtained contracts with the Republic of Korea and with U.S. Steel. However, because of the overreaching enforcement by MSHA, Mid-Continent was required to invoke the force majeure with the Korea/Pohang Iron and Steel Company "POSCO" (Tr. 157). It appears that Mid-Continent may have to walk away from its Korean contract (Tr. 156-157). If MSHA's overreaching enforcement continues, MSHA will have achieved an end result of putting a legitimate coal operator out of business (Tr. 156-158).

DIANE DELANEY is the Manager of Government Affairs at Mid-Continent. Her duties include lobbying at the Colorado legislature and communicating with government entities. She has been so employed for the last 10 years (Tr. 291-292).

The witness was present at a meeting in Arlington, Virginia on July 22, 1987, between MSHA Administrator Jerry L. Spicer and representatives of Mid-Continent. During the discussions Mr. Spicer stated that the increased enforcement level taking place at the Dutch Creek Mine was MSHA's response to rumors that Mid-Continent was mining in methane gas (Tr. 298-299).

Discussions disclosed that these rumors were in reality deductions derived from inspector reports the day the inspectors had difficulty attempting to observe Mid-Continent mine coal. Specifically, the company had shut down producing sections while inspectors were in the mine (Tr. 299).

The witness was present at the meeting with MSHA officials in Denver, Colorado attended by Mr. Spicer and the current MSHA District Manager for MSHA District 9, John M. DeMichiei. This meeting concerned the fact that Mr. Spicer had determined to put to rest the issue of whether or not Mid-Continent was mining in methane. In order to accomplish this objective Mr. Spicer stated

he would direct a task force of unbiased MSHA inspectors accustomed to gas and gassy mining conditions in an intensive inspection/enforcement effort at Mid-Continent's Dutch Creek Mines (Tr. 299-300).

During this meeting Ms. Delaney communicated to Mr. Spicer and Mr. DeMichiei that MSHA had lost sight of its primary objective. Much of what was occurring in the Dutch Creek Mines through the inspections seemed to be lacking in common sense and was counter-productive. Mr. Spicer and Mr. DeMichiei stated that MSHA would be willing to look into the specific instances of situations where the company felt the inspectors were not using good judgment. In fact, a meeting to explore these issues took place in Glenwood Springs, Colorado, on August 19, 1988 (Tr. 300, 301). During the meeting Ms. Delaney presented Mr. DeMichiei with a list of examples questioning inspector conduct (Tr. 301-302, Ex. C-11). While this list was far from all-inclusive it included some of the concerns Mid-Continent previously communicated to MSHA (Tr. 301-303). Although Mr. DeMichiei reviewed the list and listened to comments, he did not, as of the date of the hearing on October 12, 1988, respond to them (Tr. 305).

MARK E. SKILES is the General Manager of the Dutch Creek Mine. He has been in the coal mining industry since 1970 and he has a degree in mining engineering from Penn State. He served for two years as a MESA inspector (Tr. 311-319).

When serving as an inspector he went to work for U.S. Steel as a section foreman and was eventually promoted, in varying stages, to the position of general mine foreman in charge of the entire mine (Tr. 312). He has also served as special trouble-shooter for U.S. Steel inspecting all of their coal mines for production and safety matters. He has served as superintendent of the entire Cumberland District (Tr. 312, 314).

When he served as a MESA inspector, Skiles worked out of a MESA District 3 field office in Morgantown, West Virginia; he had frequent interaction with MSHA District 2 field office in Williamsburg, Pennsylvania and with the MSHA District office in Pittsburgh, Pennsylvania (Tr. 314, 315). Skiles is also well acquainted with most of the MSHA District 2 employees, particularly while serving as mine rescue trainer and team captain (Tr. 314, 315).

Before joining Mid-Continent, Skiles mined with gassy coal seams. While he was an inspector he frequently inspected mines in northern West Virginia, particularly the Pittsburgh-seam which liberates approximately 5 to 11 million cubic feet of methane per day (Tr. 313, 314).

Despite his familiarity with conditions similar to the Dutch Creek Mines, Mr. Skiles has difficulty making sense out of the situation at Mid-Continent. When he began with the company, it appeared to him no one was actually running the mining operation. Management was preoccupied with reacting to MSHA inspectors who were regularly shutting down the mining operations for what he considered to be doubtful or minor infractions of the law (Tr. 316, 317). In order to alleviate the problems, Skiles instituted both operational and organizational changes. He caused extensive work to be done on the ventilation system. This resulted in approximately doubling the quantity of air being brought to the working faces. Nine sub-level managers were brought into the organization and strategically located to effectively address the operator's management problem (Tr. 317, 318).

In addition to the organizational changes, Skiles took steps to open up and improve communication between MSHA and Mid-Continent. Skiles and other Mid-Continent representatives have met with MSHA officials a number of times at the field office as well as the District office and on the Washington, D.C. level (Tr. 318, 319).

In attempts to understand the situation and the evident conflict, the witness has met on numerous occasions with MSHA District 9 Manager John DeMichiei. Finally adopting the practice he used successfully at U.S. Steel, the witness instituted an open disclosure policy. In this policy management, after identifying operational problems, would disclose those problems to MSHA and further disclose what action management felt should be taken to address them (Tr. 318-319). Despite these measures MSHA has continued to saturate the Dutch Creek Mine with inspectors. In September and October 1988 there have been approximately 12 to 15 inspectors on the property daily. These inspections disrupt operations and place management in a reactive posture where a large percentage of the company's work force and resources are directed towards orders and citations and away from normal operations (Tr. 323-324).

In his communications with Mr. Skiles, MSHA District 9 Manager John DeMichiei justified his saturation inspections on his perception that they are necessary in order to keep the company from mining in methane gas. It was Mr. DeMichiei's expressed opinion that normal inspection schedules are not adequate because the company was shutting down actual mining operations during these infrequent inspections (Tr. 323). Through his experience with the MSHA District 9 hierarchies, Mr. Skiles has concluded that Mr. DeMichiei does not possess a good understanding of mining operations (Tr. 323). Furthermore, it is Mr. Skiles' view that Mr. DeMichiei places entirely too much relevance on speculation and innuendo rather than on actual facts. Addressing the accusation that Mid-Continent mines had methane gas, Mr. Skiles has found this perception on the part of Mr. DeMichiei to be both insulting and unreasonable. There is nothing in Mr. Skiles' background to suggest that he has allowed such practices in the past or that he would allow such practices now. Skiles has always maintained a policy that would result in the immediate discharge of any section or mine foreman that would permit mining operations in methane gas. In the months of April and May, 1988, during the saturation inspections, Mid-Continent produced 100,000 and 123,000 tons of coal respectively for each month (Tr. 329-330, 336).

Under his current program MSHA has reacted in a hostile and uncooperative manner toward all management attempts to correct problems at the Dutch Creek Mine. Mr. Skiles finds the current attitude and policy evidenced in MSHA District 9 to be in sharp contrast with his previous experience. In his previous work experience MSHA had been willing to work with management to solve problems, as well as to aid and assist management in the practical operation of the mine (Tr. 321-322).

Mr. Skiles feels the gains his management team has made at Mid-Continent have been made in spite of MSHA (Tr. 322). It is the witness' opinion that the MSHA current enforcement program has nothing to do with the establishment of a safe work environment in the mines. It is making a "mockery" of safety (Tr. 324). In Mr. Skiles' opinion MSHA activities at the mine have very little to do with mine safety and health. He does not know the reason but what is going on at the mine is making a mockery out of safety and that makes him "sick" (Tr. 324).

JIMMY E. KISER has been the Safety Director at Mid-Continent since January 15, 1988. He is experienced in underground coal mining and for the last 15 years has been exclusively involved in safety matters (Tr. 35-37). The witness has held safety

positions with Island Creek Coal Company (Virginia Pocahontas Division), Jewell Smokeless Coal Corporation, Leckie Smokeless Coal Corporation, Westmoreland Coal Company, Kaiser Coal Company. His field of expertise has been dealing in safety problems and he has a degree in mining engineering (Tr. 35-37).

During his career the witness has become well versed in establishing comprehensive safety programs in underground coal mines. He was hired by three companies expressly to establish safety programs. Mid-Continent hired him for that purpose. In each of the companies where Kiser was hired he was dealing with, prior to his arrival, above average injury rates and above average MSHA violation rates (Tr. 339).

In Kiser's view, in order to implement a comprehensive safety program, one must deal with human nature. A program to be successful must on a workforce wide basis and change communicative techniques, habits, attitudes and beliefs (Tr. 343). Accordingly, the process of establishing good work habits and a safe environment is a long one. At Westmoreland Coal Company it took approximately six to seven years to put together the programs that resulted in an improved safety performance (Tr. 342).

Kiser was recruited by Mr. Reeves in order to establish a new comprehensive and higher profile safety program at Mid-Continent (Tr. 153). When he began at Mid-Continent, Kiser immediately expanded both the manpower and resources allocated to the safety department. Safety inspectors were trained to provide in-house safety inspections. Further, they were to serve as liaison to facilitate an understanding of communication between Mid-Continent and MSHA by traveling with MSHA personnel on inspections. In this expansion, resources were put in place to attempt a more thorough and comprehensive training for Mid-Continent workers, supervisors, and mine rescue personnel (Tr. 344). Unfortunately, the inspection saturation was an interference which precluded Kiser and members of the safety department from implementing the new safety program. Current MSHA policy appears to Kiser to be a decision by MSHA to handle Mid-Continent safety concerns without allowing cooperation or feedback from the company. Mid-Continent's new safety program has not been effective because of MSHA (Tr. 345).

Kiser has found MSHA's adversarial stance to be "totally different" from his previous experiences in other areas. Kiser believes Mr. DeMichiei and his inspectors do not understand Mid-Continent's safety concerns (Tr. 346, 347).

DAVID A. POWELL has been continually employed by Mid-Continent since May of 1983. He has held the position of assistant superintendent at Dutch Creek Mine No. 1 and he is currently the Manager of Budget and Planning (Tr. 164-165). He is a graduate from the Colorado School of Mines in mining engineering and has successfully completed the professional engineering examination. Also he is a registered professional engineer in the State of Colorado (Tr. 164-168).

During Mr. Powell's tenure as Safety Director and continuing into his present duties he has, with counsel's help, kept records of the ongoing computerized data files concerning mine act violations issued at Dutch Creek mines and its supporting facilities (Tr. 169).

These records were kept in order to insure timely abatements and as a method of evaluating Mid-Continent's compliance with the law (Tr. 169).

Beginning in September 1987, Mid-Continent experienced a significant increase in the number of citations and orders issued by MSHA. Tabular summaries of MSHA citations and orders by month, by quarter and all units of Mid-Continent for the years 1983, 1984, 1985, 1986, 1987 and 1988 were received in evidence (Contestant's Exh. C-6 consisting of 6 pages; Tr. 171-175).

The inspection increase is readily illustrated by comparison of the graphic depictions of MSHA citations and orders, the vertical bar charts for the years 1983-1988. (Tr. 173-175, (Contestant's Exhibit C-7A, C-7B, C-7C).

The exhibits establish a measured increase in inspection activity clearly from September 1987 onward, a consequence of which can only be the result of a major change of enforcement policy by MSHA in the coal basin. The enforcement activities are disproportionate to the levels of production at Mid-Continent as the graphs for production indicate (Tr. 176-177).

MSHA's enforcement policy change was verbally confirmed to the witness on two separate occasions by MSHA officials (Tr. 171). The first occasion was during a November 1987 meeting at Mid-Continent's office in Carbondale, Colorado between company officials and the then interim MSHA District Manager Ron Shell. During the meeting Shell stated that the Inspector General had decided that Mid-Continent should be "singled out and cleaned up" (Tr. 224).

Further, in February 1988 in the MSHA office in Arlington, Virginia, company officials met with MSHA Administrator Jerry L. Spicer to discuss proposed ventilation regulations and increased enforcement at Mid-Continent. Spicer confirmed that he had "turned the heat on" in September 1987 when Ron Shell became interim District Manager for District 9 and that he, Spicer, could "turn the heat off" (Tr. 180).

During the numerous inspections that were the result of MSHA's change of policy, an MSHA inspector told Powell that they had been instructed to write Section 104(d)(2) orders; further, an S&S citation classification would be the least serious violation written (Tr. 228).

As a part of this increased enforcement policy, MSHA changed operational policies as well. Rather than implementing the changes in a normal businesslike manner, MSHA announced and implemented such changes in an ex post facto fashion by issuing orders and citations. Some of these policies affected long-standing practices such as the outby inspections of permanent seals which had been an accepted policy in Dutch Creek mines for decades (Tr. 228-231).

Since 1985 Mr. Powell, in his capacity as Safety Director and as Manager of Budget and Planning, formulated and submitted to MSHA any required plans. In order to perform this function Powell is required to deal personally with the MSHA District 9 Manager, now John DiMichiei (Tr. 276). Through these dealings and through other information Powell has come to the conclusion that Mr. DiMichiei possesses neither the practical experience nor the engineering expertise needed to adequately analyze the mining conditions in the coal basin with which Mid-Continent must deal. As a result the witness is unable to formulate a reasonable and correct enforcement program for the Dutch Creek mines (Tr. 276).

Because of DiMichiei's inexperience and the lack of engineering expertise, it is Powell's belief that many aspects of MSHA's current enforcement policies are unreasonable when applied to the unique mining conditions in the Dutch Creek mines. For example, the witness believes Mr. DiMichiei's actions in the area of rib control in the Dutch Creek Mine provides a good, although not exclusive, example (Tr. 276).

To illustrate: because of different coal characteristics, the process of supporting coal ribs along mine entries, a common practice in Eastern mines, is not commonly used in mines in the western United States. Despite the different geologic areas and conditions involved, Mr. DiMichiei has repeatedly told Powell that Dutch Creek mines need rib control. To satisfy DiMichiei's demands, Mid-Continent would have to institute a program in which the coal ribs would be bolted. This practice, if performed in mines with overburden characteristics as contained in the Dutch Creek mines, would create dangerous bursting conditions (Tr. 278).

Due to the magnitude of overburden resting on the coal seam, entries in the Dutch Creek Mines should be developed through the creation of "yielding-pillars". By this mining technique pillars are developed in a configuration to prevent the dangerous accumulations of pressure. When this pressure is released geologic events commonly described in the industry as "bounces" or "bursts" occur.

To avoid dangerous accumulations of pressure and the danger of bursts, a yielding pillar gives under the pressure of the overburden and crushes out slowly over a period of time. This yielding is evidenced by rib sloughage. But should a yielding pillar be bolted it would prevent or reduce rib sloughage. As a result the pillar would accumulate huge pressures and present the possibility of a violent burst (Tr. 276-279).

Mr. Powell has on numerous occasions explained the need to utilize yielding pillars in the Dutch Creek mines to Mr. DiMichiei. Despite this, Mr. DiMichiei continues to insist that Mid-Continent management somehow contain its pillars to prevent sloughing. In this context it appears to Powell that Mr. DiMichiei has insisted that Mid-Continent create a hazardous situation in place of a practice the operator has demonstrated to be effective in eliminating pillar outbursts (Tr. 279-280).

Since he assumed the duties as MSHA's District Manager, Mr. DiMichiei has demonstrated great concern about the rumors that Mid-Continent does not follow its approved ventilation plan and mined in gas (Tr. 299-327). During a meeting on July 11, 1988, at the Denver MSHA office Mr. DiMichiei outlined his program of saturation inspections to determine Mid-Continent's compliance with its ventilation plan and the ventilation regulations (Tr. 203-204). At the meeting DiMichiei threatened to revoke Mid-Continent's violation plan should Mid-Continent refuse to agree to the saturation inspections (Tr. 287).

The MSHA District 9 saturation inspections began September 22, 1988. During this saturation inspection program an inspector was stationed each day in each producing section on every shift. The inspection lasted through October 1988 and did not conclude until the end of the calendar year. The BAB saturation inspection followed on the heels of the Spicer-saturation inspection; namely, the BAA inspection.

The inspectors conducting the BAA saturation inspections were not employed in MSHA District 9 and came from outside the District. All the inspectors had experience in gassy mines. The BAA inspectors had just completed an inspection at Jim Walters' Alabama mines which, together with Mid-Continent's, are considered to be some of the gassiest mines in the nation (Tr. 204-211). During the BAB inspection a District 9 inspector was assigned to every producing section on every shift throughout the balance of the month of September 1988 (Tr. 204-211).

Powell's records showed that during the 22 days of the BAA ventilation saturation inspection, a total of 66 citations, orders and safeguards were issued (See Exh. C-10A, Appendix D). However, only 39 of these citations, orders and safeguards related to the ventilation saturation inspection itself (Contestant Exh. C-10D, Appendix D). However, no citation, order or safeguard was issued relating to mining in explosive methane mixtures.

The witness believes the inspectors are under pressure to write orders. They often say they have no choice. However, the inspectors rely on their own judgment (Tr. 235-237).

Mid-Continent has received the following citations and orders for the months indicated:

	<u>Citations</u>	<u>Orders</u>
September 1987	111	37
October 1987	158	31
November 1987	134	15
December 1987	87	23
January 1988	135	19
February 1988	114	18
March 1988	88	41
April 1988	70	40
May 1988	50	6
June 1988	77	12
July 1988	123	100
August 1988	99	150
September 1988	135	34

(Tr. 236-238; Ex C-6)

Mid-Continent also presented extensive exhibits. The exhibits relevant to allegations of MSHA enforcement abuse are as follows:

- C 6: Monthly MSHA citation and orders 1983 through 1988.
- C 7(a): Graph, citations and orders 1983 and 1984.
- C 7(b): Graph, citations and orders 1985 and 1986.
- C 7(c): Graph, citations and orders 1987 and 1988.
- C 8: 1988 MSHA inspections.
- C 9: Citations, Orders and Safeguards issued in September 1988 (6 pages).

- C 10: Citations, Orders and Safeguards issued September 1, 1988 through September 21, 1988.
- C 10(b): Ventilation Violations September 1, 1988 through September 18, 1988.
- C 10(c): Orders re Special Ventilation Inspections September 1, 1988 through September 19, 1988.
- C 10(d): Special Ventilation Inspection. BAA Orders/ Citations in September 1988.
- C 11(a): All Citations and Orders (Noise/dust) issued September 22, 1988 through September 30, 1988 (4 pages).
- C 11(b): Citations and Orders September 22, 1988 through September 30, 1989 (Noise/dust).
- C 11(c): Citations and Orders September 22, 1988 through September 30, 1988 (Noise/dust).
- C 11(d): Citations and Orders issued September 22, 1988 through September 1988 (Noise/dust).
- C 12: Memo prepared by Diane Delaney re Mining Association Meeting on June 28, 1988 (5 pages).
- C 13: 5 page exhibit entitled "MSHA Orders."
- C 14: Coding for various MSHA mandatory inspections and investigations.

Discussion and Conclusions

The initial issue presented here is whether the Commission has jurisdiction to consider Mid-Continent's allegations that MSHA abused its statutory authority in enforcing the Mine Act.

In Kaiser Coal Corporation, 10 FMSHRC 1165 (1988) the Commission clearly articulated its jurisdictional authority. At 1169 the Commission stated as follows:

We begin with the fundamental principle that, as an administrative agency created by statute, we cannot exceed the jurisdictional authority granted to us by Congress. See, e.g., Civil Aeronautics Board v. Delta Airlines, 367 U.S. 316, 322 (1961); Lehigh & New England R.R. v. ICC, 540 F.2d 71, 78 (3rd Cir. 1976); National Petroleum Refiners Assoc. v. FTC, 482 F.2d 672, 674 (D.C. Cir. 1973). The Commission is an independent adjudicative agency created by section 113 of the Mine Act, 30 U.S.C. § 823, to provide trial-type proceedings and administrative appellate review in cases arising under the Act. Several provisions of the Mine Act grant subject matter jurisdiction to the Commission by establishing specific enforcement and contest proceedings and other forms of action over which the Commission judicially presides: e.g., section 105(d), 30 U.S.C. § 815(d), provides for the contest of citations or orders, or the contest of civil penalties proposed for such violations; section 105(b)(2), 30 U.S.C. § 815(b)(2), provides for applications for temporary relief from orders issued pursuant to section 104; section 107(e), 30 U.S.C. § 817(e), provides for contests of imminent danger order of withdrawal; section 105(c), 30 U.S.C. § 815(c), provides for complaints of discrimination; and section 111, 30 U.S.C. § 821, provides for complaints for compensation. Specific provisions, such as these, delineate the scope of the Commission's jurisdiction.

The Commission's statement of the law would appear to conclude the matter; however, it is nevertheless appropriate to consider Mid-Continent's arguments in greater detail.

Mid-Continent states that section 113, 30 U.S.C. § 823 (d)(1), 3/ supports its position.

The section, as indicated, addresses the province of Commission's administrative law judges. The precise issue urged here was ruled contrary to Mid-Continent's position in Kaiser Coal Corporation, supra. Specifically, the Commission ruled that section 113(d)(1) is procedural in nature. Further, the language in the Act "describes the scope of the judge's authority to hear and decide matters in those proceedings otherwise properly filed pursuant to the Act. In short, section 113(d)(1) does not constitute an independent grant of subject matter jurisdiction", 10 FMSHRC at 1169, 1170.

The Commission's pronouncement is clear and articulate. As a judge of the Commission I am bound to follow established precedent.

3/ The cited portion reads as follows:

(d)(1) An administrative law judge appointed by the Commission to hear matters under this Act shall hear, and make a determination upon, any proceeding instituted before the Commission and any motion in connection therewith, assigned to such administrative law judge by the chief administrative law judge of the Commission or by the Commission, and shall make a decision which constitutes his final disposition of the proceedings. The decision of the administrative law judge of the Commission shall become the final decision of the Commission 40 days after its issuance unless within such period the Commission has directed that such decision shall be reviewed by the Commission in accordance with paragraph (2). An administrative law judge shall not be assigned to prepare a recommended decision under this Act.

With an emphasis stressing and relying on section 105(d), 30 U.S.C. § 815(d), ^{4/} Mid-Continent contends its view of subject matter jurisdiction is correct.

In particular, the operator relies on the statutory statements that "the Commission shall afford an opportunity for a hearing" and "thereafter shall issue an order, based on findings of fact, affirming, modifying, or vacating the Secretary's citation, order, or proposed penalty, or directing other appropriate relief."

4/ The cited portion of the Act provides as follows:

(d) If, within 30 days of receipt thereof, an operator of a coal or other mine notifies the Secretary that he intends to contest the issuance or modification of an order issued under section 104, or citation or a notification of proposed assessment of a penalty issued under subsection (a) or (b) of this section, or the reasonableness of the length of abatement time fixed in a citation or modification thereof issued under section 104, or any miner or representative of miners notifies the Secretary of an intention to contest the issuance, modification, or termination of any order issued under section 104, or the reasonableness of the length of time set for abatement by a citation or modification thereof issued under section 104, the Secretary shall immediately advise the Commission of such notification, and the Commission shall afford an opportunity for a hearing (in accordance with section 554 of Title 5, United States Code, but without regard to subsection (a)(3) of such section), and thereafter shall issue an order, based on findings of fact, affirming, modifying, or vacating the Secretary's citation, order or proposed penalty, or directing other appropriate relief. Such order shall become final 30 days after its issuance. The rules of procedures prescribed by the Commission shall provide affected miners or representatives of affected miners an opportunity to participate as parties to hearings under this section. The Commission shall take whatever action is necessary to expedite proceedings for hearing appeals of orders issued under section 104. [Emphasis added by Mid-Continent.]

The portions of the Act relied on by Mid-Continent fall within the rationale as stated in Kaiser Coal Corporation, supra. In addition, the legislative history indicates that the Congress viewed this section as procedural rather than one conferring subject matter jurisdiction. See S.Rep. No. 181, 95th Cong., 1st Sess. 14 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2nd Sess., Legislative History of the Federal Mine Safety and Health Act of 1977 at 636. ("Legis. Hist.")

The reliance by Mid-Continent on section 113(d)(2)(A)(ii), 30 U.S.C. 823(d)(2)(A)(ii) ^{5/} is also misplaced. If followed to its logical conclusion this section would confer virtually unlimited jurisdiction on the Commission. In short, the Commission would no longer be limited to the jurisdictional authority granted it by Congress.

Section 113(d)(2)(A)(ii) merely delineates appellate procedure if the proceedings are otherwise properly filed pursuant to the Act. On this point see Legis. Hist. at 636 and 1338 (1978); See also footnote 5 in Kaiser Coal Corporation, 10 FMSHRC at 1170.

5/ The cited portion reads as follows:

(ii) Petitions for discretionary review shall be filed only upon one or more of the following grounds:

- (I) A finding or conclusion of material fact is not supported by substantial evidence.
- (II) A necessary legal conclusion is erroneous.
- (III) The decision is contrary to law or to the duly promulgated rules or decisions of the Commission.
- (IV) A substantial question of law, policy or discretion is involved.
- (V) A prejudicial error of procedure was committed.

[Emphasis added by Mid-Continent].

Further Arguments by Mid-Continent

Mid-Continent also states that under the statutory scheme evidence of claimed abuse falls within the jurisdiction of the Commission in two additional different respects. 6/

First, it is urged that evidence of abuse is relevant under section 105(d) to the extent that it affects the validity of the contested order. In this docket, Mid-Continent argues the evidence of abuse is relevant to rebut MSHA's claim that the contested escapeway order was properly issued.

Evidence of abuse, according to Mid-Continent, sets the inspection and the entire inspection activity in its true context. The evidence presented would allow the Commission to make an accurate and informed decision whether the conditions cited by MSHA in this docket in fact constitute a violation of any regulation, or whether alleged circumstances are nothing more than a pretext, improperly used, in an attempt to justify the interruption of coal production.

Second, in determining the validity of a contested order under section 105(d) the Commission is authorized under section 113(d)(2)(A)(ii) to review matters involving "[a] substantial question of law, policy and discretion"

Under the facts presented in this docket, Mid-Continent asserts it has alleged the invalidity of Order No. 3077666. It has brought this contest on the basis that it was the tainted product of a policy designed to improperly issue closure orders and curtail production. The extent to which this policy contributed to the invalidity of the subject order is clearly within the jurisdictional purview of section 113(d)(2)(A)(ii).

6/ Mid-Continent motion to consider at 5.

It is argued that consideration of Mid-Continent's abuse claim is entirely consistent with the purpose for which the Commission was established. In reporting the conference changes of the 1977 Mine Act, the House, mindful of the alleged shortcomings of Interior's Board of Mine Operations Appeals, characterized the functions of the new Commission as follows:

The conference substitute provides for an independent Federal Mine Safety and Health Review Commission. This Commission is assigned all administrative review responsibilities and is also authorized to assess civil penalties. The objective in establishing this Commission is to separate the administrative review functions from the enforcement functions, which are retained as functions of the Secretary. This separation is important in providing administrative adjudication which preserves due process and installs confidence in the program. This separation is also important because it obviates the need for de novo review of matters in the courts, which has been a source of great delay. [Emphasis supplied by Mid-Continent].

123 Cong. Rec. H 11644 (daily ed. October 27, 1977) (Remarks of Rep. Gaydos). See also, S. Rep. No. 95-181, Committee on Human Resources on S. 717, Federal Mine Safety and Health Act of 1977, as amended, at 8-9, 47, 95th Cong., 1st Sess. (1977).

According to Mid-Continent the legislative history of the 1977 Mine Act shows also that it was a consistent intention of the Congress that this new, independent Commission be created as a check on possible abuse in the enforcement of the Act by the Secretary. As the Senate Committee explained its plan a full year before the Act was enacted:

The bill provides to an operator the right to contest any citation, order or penalty before the Commission, which is established under section

114 [sic] of the Act. The Committee believes that an independent Commission is essential to provide impartial adjudication of these matters and protect the constitutional rights of operators. Although the Commission is patterned after the Occupational Safety and Health Review Commission, the Committee believes that the heavy caseload of that commission and the peculiar technical matters involved with mine health and safety problems warrant the establishment of an independent Commission. [Emphasis supplied.]

S. Rep. 94-1198, Committee on Labor and Public Welfare, Federal Mine Safety and Health Amendments Act of 1976, at 40, 94th Cong., 2nd Sess. (1976).

Further Discussion

Contestant's arguments concerning "MSHA enforcement abuse" are not persuasive.

Mid-Continent has failed to distinguish between "MSHA enforcement abuse" and inspector abuse in connection with a given order or citation.

Certainly an MSHA inspector may abuse his individual discretion in issuing a given order or citation. Abuse of discretion can exist in many areas. 7/

7/ For example, under Commission Rule 51, 29 C.F.R. § 2700.51, a Commission judge may select a hearing site. In Lincoln Sand and Gravel Company it was held the judge did not abuse his discretion in setting a hearing at a location 150 miles from the mine. On the other hand, in Cut Slate, 1 FMSHRC 796 (1979), a judge abused his discretion by requiring a small quarry operator to attend a prehearing conference about 450 miles from the operator's mine.

The operator states that the violative conditions involving the escapeway cited by Inspector McDonald constituted a pretext to justify the interruption of coal production. In support of its view Mid-Continent states that "(i)n this regard, it should be recalled from the evidence that the inspector and his supervisor set out to examine an ostensible roof support problem in the 103 longwall section (Kiser, Tr. 40, 44). When no roof problem was found (Kiser, Tr. 48, 50) the MSHA supervisor became belligerent and issued a verbal closure order 'because the escapeway was blocked' (Kiser, Tr. 51). The escapeway was not blocked, and it was passable as the evidence shows (Kiser, Tr. 62-63), but the MSHA supervisor refused to permit Mid-Continent's Safety Director to demonstrate that an injured person could be littered out of the section (Kiser, Tr. 52)." 8/

I am not persuaded by this argument. As a threshold matter, it is not reasonable to conclude that the evidence relied on establishes that Inspector McDonald intended to interrupt coal production. In addition, as will be noted infra, the order mentions "heavy roof problems" but the Secretary's evidence (which was not objected to) basically only addresses the condition of the escapeway.

Mid-Continent, citing Helen Mining Co., 1 FMSHRC 219 (1979), also asserts the Commission is the final interpreter of policy under the Act.

Contrary to the operator's view, in a recent decision, the Court of Appeals for the District of Columbia 9/ ruled that when the Secretary of Labor and the Commission disagree over the interpretation of a regulation and both views are plausible "the Secretary rather than the Commission is entitled to the deference described in Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984)."

8/ Footnote 2, page 6, Mid-Continent motion to reconsider.

9/ Secretary of Labor, et al, on behalf of John W. Bushnell v. Connelton Industries, Inc., 867 F.2d 1432 (1989).

In support of its position Mid-Continent also relies on the penalty criteria provisions as contained in section 110(i), 30 U.S.C. § 820(i) 10/.

I completely agree the Commission is bound to consider the effect of a penalty on the operator's ability to continue in business. However, we are dealing here with subject matter jurisdiction. In addition, I fully concur with Mid-Continent's statement that "section 110(i) cannot be viewed as an independent basis upon which to justify Commission review of Agency action." 11/ Accordingly, it is not necessary to further explore Section 110(i).

In support of its position Contestant also relies on section 105(d)(2) of the Act, 12/ the legislative history, and Commission's broad scope of its authority under this section as expressed in Northern Coal Co., 4 FMSHRC 126, 142 (1982).

10/ The cited portion reads as follows:

(i) 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. (Emphasis added by Mid-Continent)

11/ Motion at 8.

12/ (2) Any miner ... who believes that he has been ... discriminated against by any person in violation of this subsection may, within 60 days after such violation occurs, file a complaint with the Secretary If upon such investigation, the Secretary determines that the provisions of this subsection have been violated, he shall immediately file a complaint with the Commission The Commission shall afford an opportunity for hearing ... and thereafter shall issue an order, based upon findings of facts, affirming, modifying, or vacating the Secretary's proposed order, or directing other appropriate relief (Emphasis added by Mid-Continent).

Mid-Continent's argument is misplaced. The statute, the legislative history and the cited case law all relate to discrimination cases which are otherwise properly before the Commission within its grant of authority. In short, and to answer the operator's position: ^{13/} a cease-and-desist order may be appropriate in a discrimination case but a discrimination claim does not bear a remote relationship to MSHA's enforcement abuse as alleged here.

Finally, the operator states the reasoning in the judge's prior order is too narrow. ^{14/} In particular, the order is wrong for three reasons. First, any injury to Mid-Continent from an improperly issued order is not cured by invalidating the order in a contest proceeding. For example, the cost of the legal proceedings and lost coal production can never be recovered.

Second, the wrong inflicted by MSHA's misconduct is not remedied by empowering the injured party repeatedly to take the wrongdoer to court. It is argued that equitable injunctive remedies such as cease-and-desist orders were developed to address this very inequity.

Third, there is simply no way an operator can match the resources of the United States. Simply put, it is not possible for a small operator like Mid-Continent to litigate the 1,244 citations and 235 orders issued to it by MSHA during the calendar year 1988. ^{15/} The sheer enormity of the numbers make individual contests an impossibility and a remedy which is no remedy at all.

I am aware of Mid-Continent's eloquent arguments. But for the reasons previously stated I do not find the requisite authority to issue a cease-and-desist order against the Secretary in her enforcement of the Act.

The fundamental cornerstone of Mid-Continent's position is that the Commission has jurisdiction to issue injunctive relief against the Secretary. The foregoing portion of this decision addresses all the issues raised by Mid-Continent. But a persuasive argument against Mid-Continent is contained in

^{13/} Motion at 11.

^{14/} Motion at 10-12.

^{15/} Mid-Continent motion at 12 asserts total numbers are not available for October, November and December, 1988, at the evidentiary hearing held October 12 and 13, 1988.

Section 108(a), 30 U.S.C. § 818, where Congress clearly indicated it means how to provide injunctive relief. But in this section such relief is only in favor of the Secretary against an operator. The section reads as follows:

Injunctions

Sec. 108(a)

- (1) The Secretary may institute a civil action for relief, including a permanent or temporary injunction, restraining order, or any other appropriate order in the district court of the United States for the district in which a coal or other mine is located or in which the operator of such mine has his principal office, whenever such operator or his agent -

- (A) violates or fails or refuses to comply with any order or decision issued under this Act.

- (B) interferes with, hinders, or delays the Secretary or his authorized representative, or the Secretary of Health, Education and Welfare or his authorized representative, in carrying out the provisions of this Act.

- (C) refuses to admit such representatives to the coal or other mine.

- (D) refuses to permit the inspection of the coal or other mine, or the investigation of an accident or occupational disease occurring in, or connected with, such mine.

- (E) refuses to furnish any information or report requested by the Secretary or the Secretary of Health, Education, and Welfare in furtherance of the provisions of this Act, or

(F) refuses to permit access to, and copying of, such records as the Secretary or the Secretary of Health, Education and Welfare determines necessary in carrying out the provisions of this Act.

(2) The Secretary may institute a civil action for relief, including permanent or temporary injunction, restraining order, or any other appropriate order in the district court of the United States for the district in which the coal or other mine is located or in which the operator of such mine has his principal office whenever the Secretary believes that the operator of a coal or other mine is engaged in a pattern of violation of the mandatory health or safety standards of this Act, which in the judgment of the Secretary constitutes a continuing hazard to the health or safety of miners.

(b) In any action brought under subsection (a), the court shall have jurisdiction to provide such relief as may be appropriate. In the case of an action under subsection (a)(2), the court shall in its order require such assurance or affirmative steps as it deems necessary to assure itself that the protection afforded to miners under this Act shall be provided by the operator. Temporary restraining orders shall be issued in accordance with rule 65 of the Federal Rules of Civil Procedure, as amended, except that the time limit in such orders, when issued without notice, shall be seven days from the date of entry. Except as otherwise provided herein, any relief granted by the court to enforce any order under paragraph (1) of subsection (a) shall continue in effect until the completion or final termination of all proceedings for review of such order under this title, unless prior thereto, the district court granting such relief sets it aside or modifies it. In any action instituted under this section to enforce an order or decision issued by the Commission or the Secretary after a public hearing in accordance with section 554 of title 5 of the United States Code, the findings of the Commission or the Secretary, as the case may be, if supported by substantial evidence on the record considered as a whole, shall be conclusive.

The legislative history concerning this section does not assist Mid-Continent's position. Legis. Hist. at 602.

In sum, Congress knows how to provide for injunctive relief. It did so in connection with the Mine Act. However, Congress did not vest subject matter jurisdiction with the Commission to address the issue of MSHA enforcement abuse.

For the foregoing reasons Mid-Continent's allegation of MSHA enforcement abuse should be dismissed.

Attorney's fees and lost coal production

At the hearing contestant sought to offer evidence of its costs incurred in attorney's fees and lost coal production (Tr. 6-14).

The judge refused to hear such evidence and required contestant to submit an offer of proof as to these matters.

The judge's order entered at the hearing is affirmed in this decision. Attorney fees and lost coal production are not recoverable in this forum. Rushton Mining Company, PENN 85-253-R (May 10, 1989) (Commission); Beaver Creek Coal Co., 10 FMSHRC 758 (1988).

Merits of Order No. 3077666

The order contested here alleges Mid-Continent violated 30 C.F.R. § 75.1704. 16/ The alleged violative condition was

16/ The cited regulation provides as follows:

§ 75.1704 Escapeways - [Statutory Provisions]

Except as provided in §§ 75.1705 and 75.1706, at least two separate and distinct travelable passageways which are maintained to insure passage at all times of any person, including disabled persons, and which are to be designated as escapeways, at least one of which is ventilated with intake air, shall be provided from each working section continuous to the surface escape drift opening, or continuous to the escape opening, or continuous to the escape shaft or slope facilities to the surface, as appropriate, and shall be maintained in safe condition and properly marked. Mine openings shall be adequately protected to prevent the entrance into the underground area of the mine of surface fires, fumes, smoke and floodwater. Escape facilities approved by the Secretary or his authorized representative, properly maintained and frequently tested, shall be present at or in each escape shaft or slope to allow all persons, including disabled persons, to escape quickly to the surface in the event of an emergency.

described in the order as follows:

The intake air escapeway was not maintained in a safe travelable condition. Part of the escapeway has heavy roof problems, however, it is supported by truss bolts, resin bolts, some 6" x 6" timber and 3 cribs. The bottom has heaved for approximately 800 feet causing problems in traveling or moving disabled persons quickly to the surface in the event of an emergency. The travelway needs to be cleaned with equipment to make it safe.

Secretary's Evidence Concerning Order No. 3077666

GRANT McDONALD, an MSHA inspector, is a person experienced in mining.

On September 23, 1988, he was directed to do some health surveys at Mid-Continent. During the inspection he traveled the length of the 103 longwall. The longwall has an intake escapeway which is also a travelway (Tr. 389-393).

Inspector McDonald's primary purpose was to check on a supposedly bad roof. As he went into the area he observed the bottom was heaved and there were some water holes containing floating material consisting of blocks and wooden wedges (Tr. 394). Along the ribs there were a lot of tin cans, boards, steel rods and different things strewn about. The witness also noted it was difficult to walk in the area because it was heaved. Heaving, he explained, was where the pressure pushed down and as a result the floor was pushed up. There was heaved bottom for approximately 800 to 900 feet. The heaved conditions made traveling difficult. The steeper slope hampers your traveling ability (Tr. 394-395).

This escapeway is pitched at an angle and you can step on particles and trip or slide. If the area is well rock-dusted you can also slide in the rock dust. In the witness' opinion a hazard existed since you couldn't exit quickly from the area (Tr. 395).

The heaving in the area makes it slicker and harder to stand. Slippery conditions make it more difficult to quickly leave the area (Tr. 396).

Except for the two water holes there was rock dust throughout the 800 foot length of the escapeway.

The water hole in the escapeway was approximately 8 inches deep where the inspector measured it (Tr. 396). There was a board floating in the water; also the board had some nails protruding from it. The water wasn't over the inspector's boots. But the objects floating on the water created a tripping hazard. Also there were lumps of coal in the water that a person could stumble on (Tr. 397).

The pieces floating on the water were 8 to 15 inches long (Tr. 398).

Towards the longwall face there were timbers, steel rods used for bolting and 5-gallon containers, as well as some rock dust paper sacks. Most of the debris was on the lower side of the ribs.

The inspector issued the order because of the accumulations of the material and the heaving. He felt it was unsafe to make a quick exit from the area in case of an emergency (Tr. 399).

The fact that the distance between the heaved floor and roof was less than five feet did not affect the inspector's decision to issue the order (Tr. 399, 400).

The entry itself was probably 16 to 18 feet wide. He issued the order because of the travel conditions and the material floating on the water, not because of the height or width of the escapeway (Tr. 400, 401).

In the inspector's opinion the supposedly bad roof in the area was adequately supported (Tr. 400, 401). The roof itself was sufficiently high to provide an escapeway.

The purpose of an escapeway is to provide a quick exit from the area or quickly remove someone that is injured. It also introduces fresh air into the mine (Tr. 401).

On two occasions Inspector McDonald had carried an injured person on a stretcher out of a mine. The footing in this instance was slippery because of coal and rock dust (Tr. 403).

The escapeway was not impassable. The angle of the floor prevented quick passage.

The inspector was not told to issue this order as an S&S violation. He determined the violation should be S&S because it was known, or should have been known, to the operator (Tr. 403, 404, 408). From the hazard he observed, the inspector concluded a miner traveling the entry could trip, fall, slip or get a puncture [wound] (Tr. 404). He considered these possibilities to be reasonably likely to occur (Tr. 404). Also a man carrying a stretcher could slip and drop it (Tr. 405). Dropping someone can aggravate a prior injury to the person being carried (Tr. 407).

On the day of the inspection Mid-Continent's safety director slipped and fell in the entry. But he was not injured (Tr. 409).

On his own judgment Inspector McDonald issued his order under 104(d)(2) as an unwarrantable failure (Tr. 409). The inspector initially noted the operator's negligence as moderate. Inspector Steve Miller later marked the negligence as high. Inspector McDonald felt the material in the escapeway had been allowed to accumulate for some time (Tr. 410-411). The numerous buckets and steel rods could not accumulate in one or two days, but it would take several days (Tr. 411).

The area was subject to a preshift examination (Tr. 412).

Inspector McDonald in his sole decision terminated the order the following day. In terminating the order he required the operator to gather up the materials and stack them; to remove the blocks and stumbling hazards. Where the floor was severely heaved he required the operator to lower it and level the walkways as nearly as possible (Tr. 413, 414).

The company leveled the floor heaves by using pick and shovels. They also hand carried the debris out of the area, removed the floating material and pumped down the water holes (Tr. 413). All of the abatement work was done for the entire distance of 800 to 900 feet (Tr. 413).

The inspector did not take any measurements of the escapeway after the order was terminated.

Mid-Continent's Evidence on the Merits

JIM KISER, Mid-Continent's safety director, accompanied the inspectors in the 103 headgate. Inspector Miller said there was a major roof control problem in the area. After looking at the roof area the group went to the tailgate. Mr. Miller became belligerent and ordered Kiser to remove everyone from the face (Tr. 39-51).

He then issued a 104(d)(2) order because the escapeway was blocked. The witness replied it was not blocked (Tr. 51).

At the face miners were drilling to prevent outbursts (Tr. 55).

Kiser took a four-foot lathe stick and traveled the area. There was no debris in the area except for about 150 feet. The witness believed the escapeway was passable beginning at the 103 longwall intake escapeway to the 103 longwall at the face. (Tr. 62).

The order did not refer to any stumbling hazards. Except for about a distance of 200 feet the height of the escapeway was seven feet (Tr. 63).

The heaving of the floor caused a domed effect. The crown was about a foot wide; at the crown it measured 4½ feet to the roof (Tr. 65). The most restricted area of the escapeway was 4½ feet high by 8 feet wide (Tr. 93).

Kiser offered to demonstrate to Inspector McDonald that the area could be traveled and was passable by an injured person on a stretcher. The inspector replied that the only thing to be done was to clean up the passageway (Tr. 52).

In addition, Mid-Continent's evidence established that an injured miner was successfully evacuated via the escapeway from the 103 longwall headgate on June 8, 1988. At the time walking through the area was a "chore." On the other hand, the conditions were one hundred percent better on the day the instant order was issued (Tr. 67-70).

MICHAEL W. HORST, a Mid-Continent safety inspector, travels with federal inspectors ninety percent of the time. On the date of this inspection he accompanied Inspector McDonald and Inspector John S. Miller.

Mr. Miller pointed out to the witness that the escapeway was neither six feet wide nor five feet high (Tr. 95-100). Miller, who took measurements, said the escapeway didn't meet the criteria (Tr. 101-102, 115-116).

As a result of the order the company had to expand the escapeway in a half dozen places (Tr. 116).

Bill Porter, a mine foreman, was in charge of doing the work necessary to terminate the order. Water holes were pumped and garbage was moved from the low rib to the high rib (Tr. 117-119). It took about 22 hours to abate the order (Tr. 122). The heaving in the floor was abated by the use of pick and shovel. The company was not permitted to use machines. The witness did not know who prohibited the use of machines (Tr. 127-128).

Discussion

The evidence on the merits of the order is essentially uncontroverted.

Specifically, on an uneven domed mine floor we find tin cans, boards, steel rods, 5-gallon containers, rock dust paper sacks, nails protruding from boards and wooden blocks floating in an 8-inch deep water hole. These conditions, essentially uncontroverted, constitute stumbling hazards that failed to "insure passage of miners at all times" within the mandate of § 75.1704.

Mid-Continent's position focuses on the views that no violation of § 75.1704 occurred; further, the escapeway was passable as described in Utah Power and Light Company, 10 FMSHRC 71 (1988). In addition, the contested order would not have been issued if the inspector had not erroneously interrupted the regulation to require "quick" passage to the surface. Finally, the circumstances here are inappropriate to support a section 104(d)(2) order.

As a threshold matter Utah Power and Light Company, supra, supports the Secretary and not Mid-Continent. The UP&L case involves three cases and separate factual scenarios. These should be reviewed: In WEST 87-210-R tripping and stumbling hazards existed. The hazards were lumps of coal together with an 8 to 10 inch offset in the escapeway bottom. In WEST 87-211-R tripping hazards consisted of loose coal and sloughage, the toe of a rib extending into the escapeway and a 6-inch waterline obstructing the escapeway.

In the above two cases the undersigned judge held that the foregoing conditions failed "to insure passage at all times of any person, including disabled persons," 10 FMSHRC at 84.

On the other hand, in WEST 87-224-R there was no evidence of any stumbling hazards. In addition, the Secretary agreed the escapeway was fully adequate. But the citation was written solely because the escapeway did not meet the 5 foot by 6 foot criteria contained in § 75.1704-1.

Based on the record in WEST 87-224-R the undersigned held that MSHA could not, at least without the benefit of rule-making, substitute its own design; that is, specific linear foot requirements for the height and width of escapeways, 10 FMSHRC at 74. Accordingly, the contest in WEST 87-224-R was sustained.

To further consider Mid-Continent's argument in the instant case, it is necessary to divide the separate parts of § 75.1704 17/.

17/ Mid-Continent divides the regulation into three sentence; As divided it reads:

[1] Except as provided in §§ 75.1705 and 75.1706, at least two separate and distinct travelable passageways which are maintained to insure passage at all times of any person, including disabled persons, and which are to be designated as escapeways, at least one of which is ventilated with intake air, shall provide from each working section continuous to the surface escape drift opening, or continuous to the escape shaft or slope facilities to the surface, as appropriate, and shall be maintained in safe condition and properly marked. [2] Mine openings shall be adequately protected to prevent the entrance into the underground area of the mine of surface fires, fumes, smoke, and floodwater. [3] Escape facilities approved by the Secretary or his authorized representative, properly maintained and frequently tested, shall be present at or in each escape shaft or slope to allow all persons, including disabled persons, to escape quickly to the surface in the event of an emergency. [Bracketed sentence numbers supplied.]

Mid-Continent further contends the structure of 30 C.F.R. § 75.1704 establishes the following:

1. The first sentence addresses what travelable passageways can be designated as escapeways, and how these escapeways are to be maintained.
2. The second sentence addresses how mine openings are to be maintained.
3. The third sentence addresses itself to slope and shaft escape facilities, their location, maintenance and testing.

Mid-Continent argues the "quick" passage is not a description or requirement contained in the pedestrian escapeway portion of the regulation. In short, to accomplish the result reached by Inspector McDonald one must construe the term "travelable passageway" as being synonymous with the third sentence term of "escape facility." It is urged that such a term is clearly inconsistent with both the common terminology used in the coal mining industry and the plain reading of the regulation.

It is further stated that in industry parlance, slopes and shafts are commonly associated with steeply pitched or vertical entries extending to the surface. And because of their grade or pitch, they are difficult if not impossible to travel by foot. In such entries, mechanical equipment such as a hoist or an elevator (an "escape facility") must be in place to facilitate a "quick" escape from the mine. See, 30 C.F.R. § 75.1704-1(b).

In addition, the language of section 75.1704 recognizes the above distinction. It does not treat the terms "escape facility" and "travelable passageway" as being synonymous. It is argued that if there was not meant to be a real distinction there is no reason to use distinctive terms in the first-sentence vis-a-vis the third-sentence. Mid-Continent argues there is no other logical reason for the distinctive terminology. Compare, 30 C.F.R. § 75.1704-1(a) and -1(b).

I concur with Mid-Continent that a fair reading on the inspector's testimony indicates he believes "quick passage" is required by the regulation. However, his views are not

binding on the Commission. Basically, the plain words of § 75.1704 require that travelways be maintained to "insure" passage. "Insure," according to Webster, ^{18/} means "to make certain esp. by taking necessary measures and precautions." To like effect see Utah Power and Light Company, supra.

For these reasons Mid-Continent's "quick" escape arguments are rejected.

Mid-Continent also states that if the debris from expended mining materials constitutes a genuine issue then the operator should have been cited under 30 C.F.R. § 75.400-2. ^{19/}

This argument is rejected. It is well established that an operator cannot shield itself from liability for the violation of a mandatory standard simply because the operator violated a different but related standard, El Paso Rock Quarries, Inc., 3 FMSHRC 35, 40 (1981).

The Secretary alleges the violation herein was "significant and substantial." Such a violation is described in section 104 (d)(1) of the Mine Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." A violation is properly designated significant and substantial "if, based upon the particular facts surrounding the violation there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (April 1981).

^{18/} Webster's New Collegiate Dictionary, at 595.

^{19/} The regulation relied on reads as follows:

§ 75.400-2 Cleanup program

A program for regular cleanup and removal of accumulations of coal and float coal dusts, loose coal, and other combustibles shall be established and maintained. Such program shall be available to the Secretary or authorized representative.

In Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984), the Commission further explained its interpretation of the term "significant and substantial" as follows:

In order to establish that a violation of a mandatory safety standard is significant and substantial under National Gypsum the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard--that is, a measure of danger to safety--contributed to by the violation (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

In the case at bar the Secretary has failed to establish evidence to support a finding required in the third and fourth paragraphs as contained in Mathies Coal.

For the foregoing reasons the designation of S&S should be stricken.

Finally, Mid-Continent states that the order was improvidently designated as an "unwarrantable failure" under Section 104(d).

I agree. The Commission has defined unwarrantable failure as "aggravated conduct, constituting more than ordinary negligence, by a mine operator in relation to a violation of the Act. Emery Mining Corporation, 9 FMSHRC 1997, 2004 (1987), The Helen Mining Company, 10 FMSHRC 1672 (1988). In the case at bar I find no aggravated conduct by the operator and the unwarrantable failure designation for Order No. 3077666 should be stricken.

For the following reasons I enter the following:

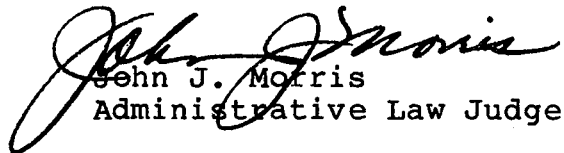
ORDER

1. Contestant's motion to reconsider the judge's ruling of December 22, 1988, is denied and Contestant's allegations of "MSHA enforcement abuse" are dismissed for lack of subject matter jurisdiction.

2. Order number 3077666 is affirmed as a violation under Section 104(a) of the Act.

3. The allegations that the violation was significant and substantial are stricken.

4. The allegations that the contestant unwarrantably failed to comply with the regulation are stricken.


John J. Morris
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 7 1989

SECRETARY OF LABOR	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 89-89-D
ON BEHALF OF	:	
DAVID S. HAYNES	:	MORG CD 88-18
Respondent	:	
v.	:	Mine No. 6
DECONDOR COAL COMPANY,	:	
	:	
	:	

DECISION APPROVING SETTLEMENT

On May 30, 1989, the Secretary filed a Motion to Withdraw Complaint of Discrimination. This Motion indicates that the above matter has been settled by the Parties. I have read the Settlement Agreement attached to the Motion, and find it fairly disposes of the issues herein. Accordingly, the Secretary's Motion is GRANTED.

It is ORDERED that the Parties shall abide by all the terms of the Settlement Agreement dated May 12, 1989, and attached to the Secretary's Motion To Withdraw Complaint of Discrimination. It is further ORDERED that the above case be DISMISSED with prejudice.


Avram Weisberger
Administrative Law Judge

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FALLS CHURCH, VIRGINIA 22041

JUN 9 1989

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 88-174
Petitioner	:	A. C. No. 15-13469-03670
v.	:	
	:	Docket No. KENT 88-183
GREEN RIVER COAL COMPANY,	:	A. C. No. 15-13469-03671
Respondent	:	
	:	Docket No. KENT 89-3
	:	A. C. No. 15-13469-03683
	:	
	:	Docket No. KENT 89-11
	:	A. C. No. 15-13469-03684
	:	
	:	Mine No. 9

DECISION

Appearances: Joseph B. Luckett, Esq., Office of the Solicitor,
Department of Labor, for the Secretary of Labor;
B. R. Paxton, Esq., Paxton and Kosch, P.S.C.
for Green River Coal Company.

Before: Judge Fauver

These consolidated proceedings were brought by the Secretary of Labor for civil penalties under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq.

At the beginning of the hearing the parties moved for approval of a settlement that would have included reduction of the proposed penalties from \$7,100 to \$5,400 and changing two § 104(d)(1) orders to § 104(a) citations.

The settlement was approved in part and denied in part. Testimony of the federal mine inspector and documentary evidence from the government were then received concerning the two § 104(d)(1) orders. Further discussions on and off the record led to an amendment to the settlement motion to propose settlement at the original assessments for the two § 104(d)(1) orders without changing the orders and total payment of \$6,800. The amended motion was approved in a bench decision. This Decision confirms the bench decision.

ORDER

WHEREFORE IT IS ORDERED that:

1. The citations and orders involved in these proceedings are AFFIRMED.

2. Respondent shall pay the approved civil penalties of \$6,800 within 30 days of this Decision.

William Fauver

William Fauver
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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JUN 9 1989

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 88-118-M
Petitioner	:	A. C. No. 33-00091-05503
v.	:	
	:	White Rock Quarry Mine
EDWARD KRAEMER & SONS, INC.,	:	
Respondent	:	
	:	

DECISION

Appearances: Kenneth Walton, Esq., Office of the Solicitor,
U. S. Department of Labor, Cleveland, Ohio,
for the Secretary;
Willis P. Jones, Jr., Esq., Jones & Bahret, Toledo,
Ohio, for Respondent.

Before: Judge Weisberger

Statement of the Case

In this case the Secretary (Petitioner) seeks civil penalties for alleged violations by the Operator (Respondent) of 30 C.F.R. § 56.20011, and § 103(a) of the Federal Mine and Health Act of 1977 (the Act). Pursuant to notice, the case was heard in Detroit, Michigan, on February 1, 1989. Robert G. Casey and David Allen Bright testified for Petitioner, and Edward Steven Kraemer testified for Respondent.

On May 15, 1989, Petitioner filed Proposed Findings of Fact and a Post-Trial Brief. On May 19, 1989, Respondent filed a Proposed Findings of Fact and Conclusions of Law and Post-Trial Brief.

Stipulations

1. The White Rock Quarry is owned and operated by the Respondent, Edward Kraemer & Sons, Inc.

2. The White Rock Quarry is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, and the applicable regulations promulgated thereunder.

3. The presiding Administrative Law Judge has jurisdiction over these proceedings pursuant to section 105 of the Act.

4. Any citations, orders, modifications, and terminations, if any, were properly served by the Petitioner through its duly appointed representative upon an agent of the Respondent.

Citation No. 3060362

Robert G. Casey testified that he is presently a specialist in special investigations employed by the Mine Safety and Health Administration, and that in March 1988, he was a mine inspector for MSHA. Casey testified that, on March 29, 1988, he performed an inspection of Respondent White Rock Quarry. He said that approximately 200 to 300 feet from the East Highwall, which was approximately 100 feet high, and was not being actively worked, he observed various equipment and also observed access to the highwall. He testified that he observed loose unconsolidated material on the highwall and that it was unattended. He indicated, in essence, that the "loose" material he observed was immediately obvious. He further indicated that there were no barricades or warnings. Casey issued a citation which, as pertinent, alleges that the highwall ". . . has ground conditions that will warrant correction prior to exposing persons below it." The Citation further alleges that there were no warning signs or hazards ". . . to display the nature of the aforesaid hazard."

At the conclusion of the Petitioner's case Respondent made a Motion for a Directed Verdict. For the reasons that follow, the Motion was granted.

The above citation alleged a violation of 30 C.F.R. § 56.20011 which provides, as pertinent, as follows: "Areas where health or safety hazards exist that are not immediately obvious to employees shall be barricaded, or warning signs shall be posted at all approaches" The only evidence of record with regard to the existence of any health or safety hazard consists of Casey's testimony that he observed "loose unconsolidated material" on the highwall. The evidence does not describe in any detail the nature of the material, its location, or its relative size. As such, the evidence is woefully inadequate to establish Petitioner's burden of proving the existence of any health or safety hazard. Furthermore, section 56.20011, supra, provides for posting of warning signs or barricading of areas where health or safety hazard exists "that are not immediately obvious to employees." The only evidence on this point consists of Casey's statement that the loose material was immediately obvious. Thus, Petitioner has not established that there was any health or safety hazard in existence that was not immediately obvious to employees. Accordingly, Petitioner has failed to establish that Respondent violated section 56.20011.

Findings of Fact and Discussion

I.

David Allen Bright, an MSHA Inspector, indicated that, in general, surface mines are subject to two inspections each fiscal year. He said that with regard to Respondent's White Rock Quarry, in the fiscal year 88, until February 1988, it had not undergone any inspections. He indicated that on February 23, 1988, he went to inspect the White Rock Quarry, as it was located within the area of his responsibility, and his supervisor told him to do a regular inspection there. He also indicated that there was an outstanding citation on the West Highwall of the quarry, and a computer print-out indicated to him that this citation had not been corrected within 90 days of its issuance. According to Bright, he thus went to the quarry on February 23, for the purpose of making a regular inspection "that would encompass looking into the abatement of the outstanding citation" (Tr. 108). (i.e. the conditions on the West Highwall.)

According to Bright, on February 23, 1988, when he arrived at Respondent's quarry, at approximately 9:30 in the morning, he spoke to its foreman and advised him that he was there for a regular inspection. Bright indicated that the foreman told him that the only activity at the quarry consisted of some repair work in the mill and the loading of the materials in some piles. Bright then went to see Respondent's vice president and general manager of the quarry, Edward Steven Kraemer, and requested entry to inspect the mine. In response, according to Bright, Kraemer informed him that he had to talk with his attorney, and upon speaking to his attorney, Kraemer asked Bright if the inspection included the West Highwall. When Bright indicated the inspection would include the West Highwall, Kraemer stated that, based upon his attorney's advice, this would not be allowed. Bright then, in essence, cited the Act, and Kraemer still refused to allow him to enter the premises. Bright left and returned between 10 and 11 a.m., and presented Kraemer with a citation alleging a violation of section 103(a) of the Act. Kraemer returned the citation and indicated that Respondent's attorney advised him not to accept it. Subsequently, Bright returned after 2:00 p.m., on February 23, and again asked Kraemer if he was denying entry. When Kraemer indicated in the affirmative and that he would not accept the Citation, Bright issued a section 104 Order and sent it to him via registered mail.

On cross-examination, it was elicited from Bright that on August 18, 1987, he had issued Respondent a citation requiring a 1500 foot section of the West Highwall to be barricaded pending the scaling of the wall, as it allegedly contained loose areas of ground. By terms of the citation it was to be abated August 18, 1987, but the deadline was extended to November 4, 1987. Bright indicated that "possibly in October" (Tr. 142) it came to his attention that Respondent was contesting this citation. On October 6, 1987, Bright went to Respondent's quarry along with a technical support group, consisting of Don Kirkwood and Calvin K. Wu, in order to get a second opinion with regard to complying with the above citation as to the West Highwall. Kraemer informed Bright that he (Bright) would be allowed to make an inspection, but Kirkwood and Wu were not allowed to go on the premises upon advice from Respondent's attorney. (Bright did not perform any inspection at that time.).

Kraemer explained that Respondent's attorney advised him not to allow Kirkwood and Wu on the premises on October 6, 1987, in order to limit the entry of Petitioner's experts for purposes of preparing for trial. Essentially, according to Kraemer, in the last week of January 1988, an agreement had been reached between Respondent's attorney and Mureen M. Cafferkey, a Trial Attorney with the Office of the Solicitor, wherein a meeting was set for March 24, 1988, with Counsel for Respondent, Trial Attorney for the Solicitor, along with Bright, Kirkwood, Wu, Trig Coombs, Al Hooper, and Kraemer to try and resolve the outstanding citation. Kraemer indicated that there was no agreement for Bright to return to look at the West Highwall.

According to Kraemer, on February 23, 1988, Bright had indicated to him that he was at the quarry for an annual inspection, but since the quarry was not running he wanted to do a compliance inspection. Kraemer indicated that he did not tell Bright that he (Bright) could not do a semiannual inspection, but indicated that he would have to confer with his attorney, who advised him not to permit Bright to inspect for "that purpose," (Tr. 215) as there was an agreement for a future inspection of the West Highwall. Kraemer indicated that subsequent to Respondent's attorney talking with the Office of the Solicitor, Bright was allowed on the quarry for a semiannual inspection.

Section 103(a) of the Act, unequivocally provides for the inspection of mines for the purposes of . . . "determining whether there is compliance with the mandatory health or safety standards or with any citation . . . issued under this title or other requirement of this Act." The above section further provides that in carrying out this requirement, the Secretary shall inspect a surface mine in its entirety at least two times a year.

According to the uncontradicted testimony of Bright, as of February 1988, the subject quarry had not yet been inspected for the fiscal year 1988. I find credible Bright's testimony that his purpose in visiting the mine on February 23, 1988, was to conduct a semiannual inspection which encompassed, in essence, checking the status of the West Highwall, as the time for compliance with a prior citation had already expired. Although the quarry operation was not in production at the time of Bright's visit, and Bright could not perform a health or dust inspection, his testimony stands uncontradicted that a health inspection is not performed at every inspection, and he still could do a full inspection. In this connection, Bright was informed by Respondent's foreman essentially that workers were present repairing and loading.

It appears to be Respondent's argument, that Bright told Kraemer that inasmuch as the quarry was not in production, he then would do a compliance inspection. Respondent appears to maintain that such an inspection should not be permitted, as it's purpose was to check on a violation being contested by Respondent, and subject to negotiations with the Solicitor, and consequently is beyond the purview of a semiannual inspection. Whether Bright's stated purpose to Kraemer was to conduct a semiannual inspection encompassing the West Highwall, or whether it was, as testified to by Bright, to perform a "compliance" inspection, I find that either type of inspection is clearly within the purview of section 103(a) which, in essence, gives the representative of the Secretary the right to perform an inspection to determine whether there is compliance with a mandatory safety hazard or with any citation. In this connection, I note that there is no documentary evidence setting forth the terms of such an agreement. Further, Kraemer, who was Respondent's only witness, did not have personal knowledge of the terms of such an agreement, nor were its terms established through Petitioner's witnesses. I thus find that it has not been established that there was any specific agreement between the Petitioner and Respondent's Counsel to the effect that Bright would not be allowed to inspect the West Highwall either as part of a semiannual inspection, or to see whether Respondent was in compliance with the prior citation of August 1987, concerning the West Highwall.

Based upon all of the above, I conclude that the Respondent violated section 103(a) of the Act, when it denied Bright permission to enter the quarry on February 23, 1988.

II.

As a consequence of not being permitted to inspect the quarry on February 23, 1988, Bright was unable to determine if there were any safety hazards in existence at that time. However, at the time of Bright's original requests to enter the premises, the quarry was not in active production. I thus find the gravity of the violation herein to be only moderate. Although Kraemer should have permitted

Bright to enter on February 23, I find that there is no evidence that he acted in other than good faith in relying upon the advice of Counsel in not permitting Bright entry. Accordingly, I find that Respondent herein acted with only a low degree of negligence. I considered this a most significant factor in assessing a penalty for the violation herein. I have considered the remaining factors set forth in section 110(i) of the Act, and accordingly find that Respondent shall pay a civil penalty of \$50 for the violation found herein.

ORDER

It is ORDERED that Citation 3060362 be DISMISSED. It is further ORDERED that Respondent shall, within 30 days of the Decision, pay \$50 as civil penalty for the violation found herein.



Avram Weisberger
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FALLS CHURCH, VIRGINIA 22041

JUN 9 1989


SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 89-73-DM
ON BEHALF OF	:	
THOMAS H. GILLE,	:	MD 89-28
Complainant	:	
v.	:	
	:	
YELLOW RIVER SUPPLY	:	
CORPORATION,	:	
Respondent	:	
	:	

ORDER OF DISMISSAL

Before: Judge Weisberger

On June 5, 1989, the Secretary filed a Motion to Withdraw Application for Temporary Reinstatement. The Motion indicated that the Complainant has secured other employment and "is no longer interested in being temporarily reinstated with Respondent (Yellow River Supply Corporation) until such time as a decision on the merits is issued." Accordingly, the Motion is GRANTED.

It is ORDERED that the above case be DISMISSED.


Avram Weisberger
Administrative Law Judge

Distribution:

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Mr. Dennis Nordstrand, President, Yellow River Supply Corporation, 210 Sommers Landing Road, Hudson, WI 54016 (Certified Mail)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JUN 9 1989

FLORENCE MINING COMPANY,	:	CONTEST PROCEEDING
Contestant	:	
v.	:	Docket No. PENN 86-297-R
	:	Order No. 2697882; 8/14/86
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Florence No. 2 Mine
ADMINISTRATION (MSHA),	:	
Respondent	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION,	:	Docket No. PENN 87-16
Petitioner	:	A.C. No. 36-02448-03575
v.	:	
	:	Florence No. 2 Mine
FLORENCE MINING COMPANY,	:	
Respondent	:	

DECISION ON REMAND

On May 9, 1989, the Commission affirmed my decision finding a violation of 30 C.F.R. § 75.1704 and reversed the "unwarrantable failure" and "significant and substantial" findings in the decision, remanding the cases for reconsideration of the civil penalty of \$400.

Having considered all of the criteria for a civil penalty in § 110(i) of the Act, I find that a penalty of \$100 is appropriate for the violation.

ORDER

WHEREFORE IT IS ORDERED that Florence Mining Company shall pay the above civil penalty of \$100 within 30 days of this Decision.

William Fauver
William Fauver
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JUN 9 1989

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 89-167-D
ON BEHALF OF	:	
JOHN L. JONES, JR.,	:	HOPE CD 89-07
Complainant	:	
v.	:	Mine No. 4
	:	
VIRGINIA CARBON, INC.,	:	
Respondent	:	

DECISION

Appearances: Mary K. Spencer, Esq., Office of the Solicitor,
U.S. Department of Labor, for the Secretary;

Lawrence E. Morhous, Esq., Bluefield, WV, for
Respondent.

Before: Judge Fauver

The Secretary of Labor filed an application for temporary reinstatement of John L. Jones, Jr., as a scoop operator at Respondent's Mine No. 4 in McDowell County, West Virginia. The application, brought under § 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, is supported by an affidavit of Dennis M. Ryan of the Mine Safety and Health Administration and a copy of the complaint.

Respondent opposed the application and requested a hearing, which was held on May 15, 1989, at Big Stone Gap, Virginia. The date was selected for the convenience of the parties, and it was agreed that if an order of temporary reinstatement is granted, it will be retroactive to May 1, 1989.

Due to a mix-up in communication, the reporter did not appear at the hearing. The parties stipulated that they would waive a transcribed hearing with the understanding that the judge would summarize the evidence relied upon for his decision. The hearing included the testimony of the Complainant and documentary evidence.

At the close of the evidence, oral arguments were heard and a decision was entered from the bench. This Decision confirms the bench decision.

Complainant's testimony, in relevant part, may be summarized as follows:

1. Complainant, John L. Jones, Jr., was first employed by Respondent as a scoop operator in February 1988, on the evening shift, at \$90 a shift plus time and a half his hourly rate for over eight hours a day. After five days, he was included in a layoff which lasted about three weeks. He was reemployed on the day shift, to perform several functions: to conduct preshift and onshift examinations and sign the examination book, to operate a scoop, and to perform any other duties assigned to him. Because of the additional responsibility of conducting preshift and onshift examinations and signing the examination book, he was paid \$110 a shift (plus overtime for hours over eight a day) instead of \$90 a shift.

2. In October, 1988, Complainant was transferred to the evening shift. He was relieved of the responsibility of preshift examinations, but continued making onshift examinations, signing the examination book, operating a scoop, and performing other assigned duties.

3. In November, 1988, Complainant had a dispute with his section foreman, Marshall Keen, who accused him of claiming one-half hour more than he actually worked on a certain day. Complainant insisted that he worked 9 1/2 hours as reported, instead of nine hours as contended by Mr. Keen. The foreman was very angry and verbally abusive of Complainant, to the point that Complainant quit on the spot.

4. About three weeks later, after making a number of calls seeking reemployment, Complainant was reemployed on the evening shift, with the same responsibilities and pay he had before he quit. He was so employed until he was discharged on February 17, 1989.

5. It was a common or frequent practice for the section foreman, Marshall Keen, to order men (sometimes including Complainant) to clean coal beyond supported roof. The roof was dangerous, soft and dribbly.

6. Complainant's strong safety concern about this practice reached a peak on February 16, 1989, when the section foreman, Marshall Keen, ordered Complainant to bring a scoop up to the working section and clean coal "up to the face," meaning that he should scoop coal beyond the last row of roof supports. Complainant told the foreman that he was too busy with another job and the foreman then ordered two other employees (Jerry Stump

and Gary Cook) to do the clean up work beyond supported roof. When Complainant discovered that Stump and Cook had cleaned coal beyond supported roof, he tried to reprimand them for this unsafe practice, but they "made a joke about it," telling Complainant they took orders from Marshall Keen and not from Complainant. Complainant then decided that he could not continue to sign the onshift examination book because of this unsafe practice and his belief (from past experience with mine management) that Respondent would fire him if he made truthful reports of safety hazards or violations in the examination book. He therefore wrote a note to the mine superintendent, Carlos Keen, and stuck it between pages in the examination book where he expected Carlos Keen to find it.

7. Complainant does not have a copy of the note. His best recollection of its contents is as follows (written by Complainant at the hearing at the judge's request and marked as Judge's Exhibit No. 1):

Carlos:

I cannot sign the onshift Report any more because Marshall is ordering men to go out from [sic] under unsupported roof to clean places up. I am afraid someone is going to be killed or hurt, and that my papers will be taken away from me. I will continue my job as a scoop operator.

8. Carlos Keen read the note. On February 17, 1989, he fired Complainant because he had refused to sign the examination book and because he had left a note which a government mine inspector might have found and could use "to bankrupt" Respondent.

After Complainant testified, the Secretary rested. Respondent introduced no evidence.

Section 105(c)(2) of the Act provides that if a miner believes he has been discharged or otherwise discriminated against, he may file a complaint with the Secretary of Labor. The Secretary may apply for temporary reinstatement. If it is found, after an opportunity for a hearing before the Commission, that "the complaint was not frivolously brought the Commission shall order the immediate reinstatement of the miner pending final order on the complaint."

The scope of a temporary reinstatement hearing is narrow, being limited to a determination as to whether a miner's discrimination complaint was frivolously brought. 30 U.S.C. § 815(c)(2); 29 C.F.R. § 2700.44(c).

The hearing evidence indicates that Complainant was discharged because he complained to his mine superintendent of a hazardous and violative practice of having miners work under unsupported roof. If unanswered, this evidence would support a finding of a discriminatory discharge in violation of § 105(c) of the Act.

I hold that the testimony of the Complainant, the documentary evidence, pleadings, and the record as a whole establish that the complaint was not frivolously brought.

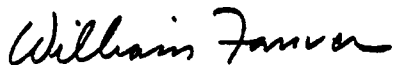
Complainant is therefore entitled to temporary reinstatement.

I make no determination at this point as to the ultimate merits of the complaint.

Other matters were raised in Complainant's testimony that may be explored in the full evidentiary hearing on the merits of the case, but are not necessary to consider here. These include the accuracy of Complainant's entries in the examination book, a question whether various tests for ventilation and methane were actually made, the extent of management's participation in any inaccuracies or failures to take tests, and the practice of other examiners concerning similar tests and the accuracy of their book entries. These matters do not affect my conclusion that the evidence and record as a whole show a substantial, nonfrivolous basis for the complaint.

ORDER

WHEREFORE IT IS ORDERED that, pending a final order on the complaint, Respondent shall immediately reinstate John L. Jones, Jr., to the position of scoop operator at its Mine No. 4 at the same rate of pay and shift assignment that he would now have as scoop operator if he had not been discharged on February 17, 1989. Inasmuch as Complainant does not seek reinstatement as a shift examiner, and Respondent has assigned another employee to make and record shift examinations, Respondent may reinstate Complainant at the pay rate of a scoop operator. Respondent is FURTHER ORDERED to pay back wages of \$1,184.16 to John L. Jones, Jr., covering the period from May 1-15, 1989.



William Fauver
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

2 SKYLINE, 10th FLOOR

5203 LEESBURG PIKE

FALLS CHURCH, VIRGINIA 22041

JUN 14 1989

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 89-25-D
ON BEHALF OF	:	
MIKE E. AMMERMAN,	:	MADI CD 88-19
Complainant	:	
v.	:	Camp No. 2 Mine
	:	
PEABODY COAL COMPANY,	:	
Respondent	:	
	:	

DECISION

Before: Judge Weisberger

Statement of the Case

This case is before me based upon a Complaint filed by the Secretary on November 14, 1988, alleging that the Operator, Peabody Coal Company, discriminated against Mike E. Ammerman in violation of section 105(c) of the Federal Mine Safety and Health Act of 1977, (the Act), in that the Operator (Respondent) violated section 103(f) of the Act. An Amended Complaint was filed on December 15, 1988, seeking a Civil Penalty of \$600. An Answer was filed January 18, 1989.

The Parties engaged in prehearing discovery, and pursuant to notice, a hearing in this matter was scheduled for April 11, 1989, in Nashville, Tennessee. On March 30, 1989, the Secretary filed a Motion for Summary Judgment, and in a telephone conference call on April 11, 1989, between the undersigned and the attorneys for both Parties, the Parties agreed to waive oral argument, and to present this matter for disposition based on Motions for Summary Decision. The hearing set for April 11, 1989, was canceled, and Respondent filed its Motion for Summary Decision on April 10, 1989. The Secretary filed a Response to Respondent's Motion on May 17, 1989.

Findings of Fact

Peabody Coal Company's Camp No. 2 Mine is an underground facility located in Henderson, Union County, Kentucky. Camp No. 2 is a single mine with two entrances or portals designated as the East and West Portals.

The United Mine Workers of America (UMWA) has represented the miners of Camp No. 2 since the mine opened in 1971. The members of the UMWA Safety Committee, elected by the local's rank and file members, are the miners' designated representatives for walk-around federal inspections at Camp No. 2. That is, by electing individual miners to the four-person Safety Committee, the miners at Camp No. 2 Mine designate such persons as their representatives to accompany Federal Inspectors on their inspections. In the latter part of March 1988, Respondent's management was advised by UMWA that only members of UMWA's Safety Committee would be allowed to accompany MSHA Inspectors.

If none of the four Safety Committeemen are present at the mine at the same shift as the inspection, or if there is more than one inspector, thus requiring more than one representative, each Safety Committeeman is empowered to designate another miner as a miners' representative. In such instances, the Safety Committeemen act on behalf of the miners in naming an alternative (or additional) representative. Designees, however, are never named just because a Safety Committeeman does not want to go on an inspection, or to avoid a situation where a Safety Committeeman would have to travel from one portal of the mine to the other.

At all relevant times, Douglas Rowans was the superintendent of the Camp No. 2 Mine, Matt Haaga was the assistant superintendent, and John Jost was the mine foreman on the West Portal.

In the Spring of 1988, the Safety Committee at Camp No. 2 Mine consisted of Terry Miller, Norman Pleasant, Mike E. Ammerman, and Roger Ennis. Miller, Pleasant, and Ammerman all work at the West Portal of the mine. Roger Ennis is an East Portal worker.

On April 7, 1988, Ammerman reported at his check-in point at the West Portal shortly before 8:00 a.m., and was told, via mine telephone, by East Portal worker Ricky Newcom, that the MSHA inspectors were at the East Portal. Ammerman was the only one of the four Safety Committeemen at the mine, at either portal, on that day. Ammerman designated Newcom as the other miners' representative to accompany MSHA Inspector Ronald Oglesby, and said he would come over to the East Portal to accompany MSHA Inspector Walter Leppen. The MSHA inspectors rode into the mine with the crew at the beginning of the shift at 8:00 a.m.

Ammerman told West Portal Mine Foreman John Jost that he was going to the East Portal, in his capacity as miners' representative in order to accompany an MSHA inspector. Jost told Ammerman that he would not be paid for his time spent traveling from the West Portal to the East Portal, and that he could not furnish

Ammerman with transportation. Ammerman then went above ground and traveled to the East Portal elevator by car. This is approximately a 10-15 minute drive. Ammerman took a man trip from the East elevator to Unit 2, where the MSHA inspectors had already arrived. It was approximately 9:00 a.m. when Ammerman met up with them.

On April 8, Ammerman again came in early and reported to his check-in point at the West Portal. This time at approximately 7:30 a.m. He went underground and called over to the East Portal. An East Portal miner told Ammerman that Oglesby was there to continue the inspection, and that he was the only inspector that day. Ammerman said he would be there as soon as he could. Ammerman again told Jost he was going to the East Portal. Jost again said he would not be paid for travel time, but did allow him the use of a man trip for transportation.

Ammerman took the man trip along the belt line, and met Matt Haaga somewhere along the way to the West Portal. Haaga told him that he would not be paid for travel time, and that in the future he would not be provided transportation. Ammerman arrived at the East Portal at approximately 8:45 a.m., and accompanied Oglesby. He returned to the West Portal at 4:45 p.m.

When Ammerman received his paycheck for the week of April 4 - 8, 1988, he had been docked 1 hour for April 7 (7 hours listed) and 15 minutes on April 8 (7.75 hours listed).

Issues

The general issue in this case is whether Peabody Coal Company discriminated against Mike E. Ammerman in violation of section 105(c) of the Act, and if so, what is the appropriate relief to be awarded Ammerman, and what are the appropriate civil penalties to be assessed against Respondent for such discrimination.

The specific issue is whether Respondent violated section 103(f) of the Act in denying Ammerman pay for the time to travel from his work site at the West Portal to the East Portal, where he was to serve as a miners' representative in accompanying an MSHA inspector.

Discussion

The affidavits accompanying the Motions for Summary Decision establish that on April 7 - 8, 1988, Mike E. Ammerman, a designated walk-around representative, was denied by Respondent, travel

pay from his work site at the West Portal to the East Portal where he was to accompany an MSHA inspector on an inspection. In essence, it is the Secretary's position that Respondent has violated section 103(f), which, as pertinent, provides that the walk-around, Ammerman, ". . . shall suffer no loss of pay during the period of his participation in the inspection made under this subsection." In essence, it is Respondent's position that section 103(f), supra, does not require it to pay Ammerman for the time spent traveling from portal to portal, as the travel time, preceded, and is not included in ". . . the period of his participation in the inspection" Respondent further argues that it is entitled to ". . . use East Portal workers as representatives," in reliance on previous history in which miners not on the Safety Committee accompanied MSHA inspectors. (Respondent's Memorandum P. 12.) For the reasons that follow, I do not find much merit in Respondent's arguments, and I accept the position of the Secretary.

In essence, according to the affidavits of Ammerman, Ricky Newcom, Terry Glenn Miller, and Norman Lee Pleasant, Sr., members of the UMWA Safety Committee are elected by the miners, and are the miners' designated representatives for mine inspections. According to the affidavits of Haaga and Douglas Rowans, management was informed by the Union on March 30, 1988, that only Safety Committee members would be allowed to accompany inspectors on their inspections. As such, it is clear that on April 7 - 8, 1988, Ammerman, as a member of the UMWA Safety Committee, was, within the purview of section 105, supra, the representative authorized by the miners to accompany the MSHA inspector on an inspection. Further, according to the affidavit of Ammerman, he was the only Safety Committeeman present at the mine at either portal on April 7, 1988. Therefore, he was the sole representative of the miners, and as such had to be accorded all the rights set forth in section 103(f) of the Act. Thus, in order for the miners to have their authorized representative (Ammerman) accompany the inspector, it was necessary for Ammerman to travel from his work site at the West Portal to the East Portal, the site of the inspection. Management clearly did not have option, as essentially argued by Respondent in its Brief, of utilizing miners already located at the East Portal, as Ammerman, being the sole member of the Safety Committee present, was the authorized representative. In this connection, it is noted that the miners, acting through their Union, and not the Operator, have the authority to designate a representative for the purpose of accompanying an inspector. (See, Truex v. Consolidation Coal Company, 8 FMSHRC 1293, 1298 (1986); See also, Consolidation Coal Co., 6 FMSHRC 458).

It now must be decided whether Respondent, by virtue of section 103(f), supra, had the obligation to pay Ammerman for the travel time from the West Portal to the East Portal. In this connection, section 103(f) provides that the miners' representative accompanying the inspector ". . . shall suffer no loss of pay during the period of his participation in the inspection" It appears that, in general, Congress intended a broad construction to be placed on this phrase. In this connection, it is noted that the Senate Report accompanying S. 717, (S. Rept No. 181, supra, at 28-29, 95th Cong. 1st Sess. 28-29 (1977)), as reprinted in Legislative History of the Federal Mine Safety and Health Act (Leg. Hist.) at 616-617), provides with regard to the intent behind Section 103, supra, that "To encourage such miner participation it is the Committee's intention that the miner who participates in such inspection and conferences be fully compensated by the operator for the time thus spent. To provide for other than full compensation would be inconsistent with purpose of the Act and would unfairly penalize the miner for assisting the inspector in performing his duties." (Emphasis added).

Thus, inasmuch as Ammerman's travel from the West to the East Portal was for the sole purpose of accompanying an MSHA inspector on an inspection, and inasmuch as the exercise of this right could not have been performed without traveling from his work site to the inspection site, it is clear that to deny him pay for the travel time would deprive him of the full compensation contemplated by section 103(f), supra. I find it unduly restrictive, to hold, as argued by Respondent, that Ammerman be denied pay for travel as it occurred prior to his "participation" in the inspection. To disallow pay for the travel time from portal to portal might have the effect of discouraging miners' participation in inspections, and as such would thwart the Congressional intent behind section 103(f) of the Act, of encouraging miner's participation in inspections.

Therefore, I conclude that Respondent, in not paying Ammerman for the travel on April 7 - 8, from his work site to the inspection site, caused him to suffer a loss of pay in violation of section 103(f), supra, and thereby discriminated against him in violation of section 105(c)(1) of the Act.

In assessing a penalty to be imposed against Respondent, I have considered the fact that although the refusal by Respondent to pay for Ammerman's portal to portal travel to accompany an inspector on April 7- 8, might tend to discourage miners' participation in inspections. However, there is no evidence before me that such actually occurred. Ammerman, in his affidavit, indicated that Mine Foreman John Jose (Jost) and Assistant Superintendent Matt Haaga, both informed him that he

would not be paid for portal to portal travel to accompany the inspector. However, Ammerman in his affidavit did not indicate that either Jost or Haaga informed him of the reason for this decision. John Jost, Respondent's mine manager of the West Portal, indicated in his affidavit that he advised Ammerman that he would not be paid for the travel as a result of a directive received from management that such time was not compensable. Douglas Rowans, the superintendent of Respondent's Camp No. 2, indicated in his affidavit that he advised Safety Committee members on March 30, 1988, that they would not be paid for travel from portal to portal based on his opinion that the Act did not require payment as "a miner is not traveling with an inspector when he is traveling to meet an inspector." Further, paragraphs 7, 8, 9, and 10 of his affidavit set forth various business problems affecting Respondent's operation as a consequence of UMW's policy of requiring the representative of the miners accompanying an inspector to be exclusively the Safety Committeeman.

Thus, I conclude that the act of discrimination against Ammerman, by denying him full pay for travel in violation of section 103(f), supra, was motivated solely by business reasons. Also, there is no evidence before me to conclude that there was any bad faith on Respondent's part in interpreting section 103(f) as not requiring pay for portal to portal travel. Taking these factors into account, I conclude that a penalty herein of \$100 is appropriate.

ORDER

It is hereby ORDERED that:

1. Respondent shall pay a penalty of \$100 within 30 days of this Decision.

2. Respondent shall, within 15 days of the date of this Decision, pay Mike E. Ammerman for the 1 hour he had been docked on April 7, 1988, and for the 15 minutes he had been docked on April 8, 1988, with interest at a rate to be calculated in accord with LOC. U. 2274, UMW v. Clinchfeild Coal Co., 10 FMSHRC 1443 (November 1988), pet. for review filed, No. 88-1873 (DC Cir. December 16, 1988), and based on the formula set forth in Secretary on behalf of Bailey v. Arkansas - Carbona Co., 5 FMSHRC 2042, 2051-53 (December 1983).

3. The Respondent shall immediately cease and desist from further refusing to pay representatives of miners for travel time from their work site portal to the portal site of an MSHA inspection.

4. The employment record of Mike E. Ammerman shall, immediately, be expunged of all references to the circumstances involved in this matter.



Avram Weisberger
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JUN 13 1989

JIM WALTER RESOURCES, INC.	:	CONTEST PROCEEDINGS
Contestant	:	
v.	:	Docket No. SE 89-18-R
	:	Citation No. 3188009; 10/26/88
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Mine No. 7
ADMINISTRATION (MSHA),	:	
Respondent	:	
AND	:	
UNITED MINE WORKERS OF	:	
AMERICA, (UMWA),	:	
Intervenor	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. SE 89-39
Petitioner	:	A.C. No. 01-01401-03734
AND	:	
	:	Mine No. 7
UNITED MINE WORKERS OF	:	
AMERICA (UMWA),	:	
Intervenor	:	
v.	:	
JIM WALTER RESOURCES, INC.,	:	
Respondent	:	

DECISION AND
ORDER DISMISSING PROCEEDINGS

On May 26, 1989, an Order to Show Cause was issued in these proceedings stating as follows:

At issue in the captioned cases is a citation alleging as follows:

A citation is hereby issued in that the mine operator is intending to adopt System, Methane and Dust Control Plan dated 8/15/88 which has not been approved by the MSHA District Manager. (Refer to cover letter 9-lv-52 dated September 29,

1988 and response cover letter 9-1V-52
delivered to the mine operator 10-25-88.

The violation charged is thus one of "intending" to violate the cited regulation. Accordingly the Secretary is directed to establish on or before June 8, 1989, what legal authority she relies upon to provide the basis for a violation of "intending" to violate a regulatory standard and why the citation should not be vacated and this case be dismissed.

On June 6, 1989, the Secretary responded to the show cause order stating as follows:

The subject citation was issued in accordance with MSHA's policy regarding Mine Plan Approval Procedures which was sent to all coal mine operators. ... In general, this policy sets forth basic principles that are to be applied in the administration of each District's mine plan and program approval responsibilities.

The policy also describes several scenarios wherein disputed plan provisions can be challenged by operators with the resulting violation being "technical" in nature. Such a policy provides a vehicle for operators to contest disputed plan provisions while maintaining the stability of continued, safe mining operations under an approved and familiar plan.

With respect to a contest of mine plan approval actions, such as occurred in this case, the policy states as follows:

In the case of an operator-proposed change to an existing approved mine plan, if approval of the change is denied, the operator could notify the District that, as of a certain date, the mine's existing approved plan is no longer adopted by the operator, and that the operator intends to adopt the proposed change which is not approved. On that date, a 104(a) citation would be issued for the operator's failure to have and adopt an approved plan. Abatement would be achieved by the operator promptly adopting the provisions of the most

recently approved plan for the mine. Again, there need not be any changes made in the actual mining procedures, and the violation would be "technical" in nature. (emphasis added)

Here, the operator, on September 29, 1988, submitted a supplement to its ventilation system, methane and dust control plan for approval by MSHA. The supplement was reviewed by MSHA but was not approved for incorporation into the operator's existing ventilation plan. As set forth on the face of the subject citation, MSHA's determination with respect to the supplement was communicated to the operator on October 25, 1988 by letter identified as 9-lv-S2.

On October 26, 1988, JWR informed MSHA that it no longer adopted its existing approved plan for the No. 7 mine. Since the operator's explicit statement constituted a violation of 30 CFR 75.316, the subject citation was immediately issued. The operator promptly abated the violative condition by readopting its ventilation plan that had become effective in August, 1988.

Although the wording of the subject citation is not a model of clarity, the foregoing sequence of events makes clear that the subject citation was issued because the operator unequivocally stated that, as of October 26, 1988, it no longer adopted its existing ventilation plan which had previously been approved by MSHA. ... Irrespective of the operator's "intentions" to adopt the unapproved supplement, JWR's action in not adopting an approved plan constituted violation a of 30 CFR 75.316 since the regulation requires an operator to do so.

Thus, the use of the words "intending to adopt" on the face of the citation should not be construed as an allegation that MSHA is charging the operator with a speculative violation which hinges on JWR's future actions. Rather, the citation, when viewed in the context of MSHA policy and the documents attached hereto, properly charges JWR with not adopting an approved ventilation plan pursuant to 30 CFR 75.316. The violation is admittedly technical in nature and permitted the operator to safely continue its mining operations uninterrupted under a familiar, approved plan while

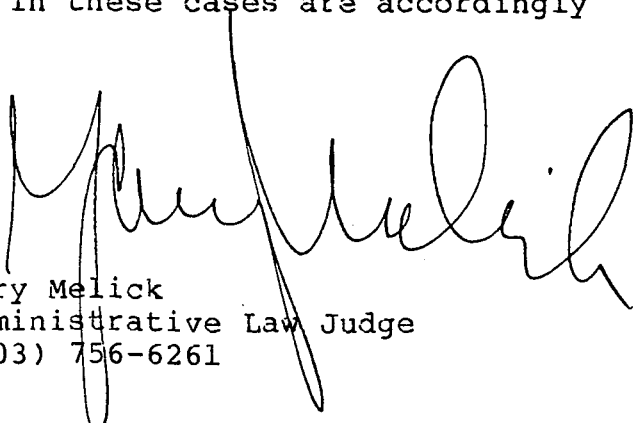
enabling the specific supplement to be addressed in another forum.

The Secretary's response to the show cause order is, in essence, that she did not mean what she said when charging the operator with "intending" to violate the cited regulatory standard. She does not however seek to amend the citation so that it reflects the apparent intended meaning. Since the cited regulatory standard does not create a violation of "intending" to violate it there can be no violation as charged. The citation is accordingly vacated.

I further note that the proceedings described in the Secretary's response to the Order to Show Cause are a clear attempt to accomplish indirectly what the Commission has forbidden directly i.e. obtain a declaratory judgment. In Kaiser Coal Corporation, 10 FMSHRC 1165 (1987), the Commission held that it does not have jurisdiction to entertain an application for declaratory relief independent of any of the enforcement or contest proceedings or other forms of action authorized under the Federal Mine Safety and Health Act of 1977. In this case the citation was simultaneously "issued" and "abated" and according to the Secretary, the mine operator continued its mining operations uninterrupted under its approved plan--thereby contradicting any claims of a violation. Thus in effect the parties in this case are seeking a declaratory judgment that cannot be obtained under existing law. For this additional reason then these cases must be dismissed.

ORDER

Contest Proceeding Docket No. SE 89-18-R and Civil Penalty Proceeding Docket No. SE 89-39 are dismissed. The hearings previously scheduled in these cases are accordingly cancelled.



Gary Melick
Administrative Law Judge
(703) 756-6261

Distribution:

H. Thomas Wells, Jr., Esq., Maynard, Cooper, Frierson & Gale,
P.C., 12th Floor, Watts Building, Birmingham, AL 35203
(Certified Mail)

William Lawson, Esq., Office of the Solicitor, U.S.
Department of Labor, Suite 201, 2015 2nd Avenue, N.,
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Mary Lu Jordan, Esq., United Mine Workers of America, 900
15th Street, NW, Washington, DC 20005 (Certified Mail)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
COLONNADE CENTER
ROOM 280, 1244 SPEER BOULEVARD
DENVER, CO 80204

JUN 14 1989

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. WEST 88-235-M
Petitioner : A.C. No. 42-01975-05502
v. : Lakeview Rock Products Pit
LAKEVIEW ROCK PRODUCTS, INC., :
Respondent :

DECISION

Appearances: Margaret A. Miller, Esq., Office of the Solicitor,
U.S. Department of Labor, Denver, Colorado,
for Petitioner;
Mr. Glenn E. Hughes, President, Lakeview Rock
Products, Inc., North Salt Lake City, Utah,
for Respondent.

Before: Judge Lasher

This matter came on for hearing in Salt Lake City, Utah, on May 11, 1989. At the commencement of hearing, the parties met and discussed the amicable resolution of this matter. A settlement of the four violations involved was ultimately reached in which Respondent agreed to pay in full 3 of the 4 initial penalty assessments (\$20 each for Citations numbered 2650178, 2650179, and 2650217) and to pay a penalty of \$50 in lieu of the originally assessed \$68.00 penalty for Citation No. 2650216. Respondent established to Petitioner's satisfaction the presence of economic difficulties and the parties agreed that this small mine operator with a relatively modest history of prior violations (See Court Exhibit 1) should be allowed a 90-day period within which to pay the penalties agreed on and here assessed. The settlement appears appropriate and its approval at the hearing is here affirmed.

Respondent, if it has not previously done so, is ordered to pay to the Secretary of Labor within 90 days from the date of receipt hereof the total sum of \$110.00 as and for the civil penalties above assessed.

Michael A. Lasher Jr.
Michael A. Lasher, Jr.
Administrative Law Judge

Distribution:

Margaret A. Miller, Esq., Office of the Solicitor, U.S. Department of Labor, 1585 Federal Building, 1961 Stout Street, Denver, CO 80294 (Certified Mail)

Mr. Glenn E. Hughes, President, Lakeview Rock Products, Inc., P.O. Box 258, 900 N. Redwood Road, North Salt Lake City, UT 84054 (Certified Mail)

/bls .

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JUN 15 1989

TROY W. CONWAY, JR., : DISCRIMINATION PROCEEDING
Complainant :
v. : Docket No. KENT 88-127-D
:
PEABODY COAL COMPANY, : MADI CD 88-02
Respondent : Camp 9 Preparation Plant

DECISION

Appearances: C. Terry Earle, Esq., Earle & Baird, Greenville, Kentucky, for Complainant;
Eugene P. Schmittgens, Jr., Esq., Peabody Holding Company, St. Louis, Missouri, for Respondent.

Before: Judge Melick

This case is before me upon the Complaint by Troy W. Conway, Jr., under section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act," alleging discrimination by the Peabody Coal Company (Peabody) in violation of section 105(c)(1) of the Act.^{1/} Mr. Conway alleges that he was laid-off on October 30, 1987, in unlawful retaliation for his reporting of safety and health related complaints to Peabody.

^{1/} Section 105(c)(1) of the Act provides as follows:

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

In order to establish a prima facie case of discrimination under section 105(c) of the Act, a complaining miner bears the burden of production and proof in establishing that (1) he engaged in protected activity and (2) the adverse action complained of was motivated in any part by that activity. Secretary on behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2797-2800 (1980), rev'd on other grounds, sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3d Cir. 1981); Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 803, 817-18 (1981). The operator may rebut the prima facie case by showing either that no protected activity occurred or that it was not motivated in any part by protected activity. If the operator cannot rebut the prima facie case in this manner, it nevertheless may defend affirmatively by proving that it also was motivated by the miner's unprotected activity and would have taken the adverse action in any event for the unprotected activity alone. Pasula, supra; Robinette supra; see also Eastern Assoc. Coal Corp. v. FMSHRC, 813 F.2d 639, 642 (4th Cir. 1987); Donovan v. Stafford Construction Co., 732 F.2d 954, 958-59 (D.C. Cir. 1984); Boich v. FMSHRC, 719 F.2d 194, 195-6 (6th Cir. 1983) specifically approving the Commission's Pasula-Robinette test). Cf. NLRB v. Transportation Management Corp., 462 U.S. 393, 397-413 (1983) approving a nearly identical test under the National Labor Relations Act.

The evidence shows that Troy Conway, Jr., a 30 year old miner, was employed by Peabody during relevant times as a non-union lab technician at the Camp No. 9 Preparation Plant. It is undisputed that in the course of his work in testing coal samples and specifically in performing float/sink analyses, the chemical perchlorethylene was used. Further it is undisputed that perchlorethylene can be hazardous and that protective clothing should be worn when performing such analyses (See Exhibit R-1).

cont'd fn.1

of medical evaluations and potential transfer under a standard published pursuant to section 101 or because such miner, representative of miners or applicant for employment has instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding, or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this Act.

According to Conway, he learned on October 8, 1986, from Warehouse Clerk Markham that Markham had received a "breakdown sheet," apparently the manufacturer's document explaining the hazards related to perchlorethylene, but Conway was unable to obtain the sheet from Markham.

Conway claims that he then went to company Safety Director Larry Cleveland and Acting Superintendent Kenny Luckhurst on October 9 or 10, to obtain the information but that Cleveland told him "he didn't get anything new that day". Conway testified that he then went to see his father, Troy P. Conway, Sr., who was Chairman of the Union Safety Committee, to help obtain the "breakdown" or "MSDS Sheet" on the subject chemical. Conway acknowledges that three days later he received a copy of the requested "MSDS Sheets" from his foreman Keith McNew.

According to Conway, lab conditions also changed that same day when McNew posted warning signs throughout the preparation plant noting as follows: "Do not enter without respirator, or protective clothing". Conway also testified that 2 or 3 days after he received the "MSDS" sheet the lab workers also received additional respirators, protective gloves, splash goggles and full-length protective aprons. Conway believed that he was responsible for these changes as a result of his request for the "MSDS" sheet.

Conway maintains that thereafter Mine Superintendent Wes Shirkey harrassed him, verbally abused him and accused him of failing to perform his work. Shirkey purportedly also told Conway that he had an "attitude problem", hung around the union people too much, and stirred up too much trouble.^{2/}

^{2/} Conway also testified that he complained to Shirkey in 1985 after he became sick from fumes in the preparation plant and on another ocassion asked Shirkey for a fan to suck the coal dust out of the raw coal room of the preparation plant where they worked. While Conway at first alleged that because of these complaints Shirkey retaliated by complaining that he was "stirring up the lab people" Conway concedes that Shirkey later told his father that he made a mistake and was no longer accusing him (Conway) of stirring up the lab people as a result of these complaints. Conway accordingly appears to acknowledge that these accusations and activities no longer have a bearing on the instant case.

Troy P. Conway, Sr., was, during relevant times, chairman of the mine committee and member of the safety committee of the local union, and preparation plant mechanic. The senior Conway testified that on October 10 his son reported that he had been refused a copy of the health sheet breakdown (presumably for perchlorethylene). Conway senior testified that the next day he went to see Cleveland and Luckhurst. Luckhurst purportedly told Conway that "you and little Troy is [sic] going to have to quit stirring up the union and the company people over this perc". Shirkey later told him that he knew of Troy, Jr.'s complaint about the breakdown sheets.

The senior Conway also testified about a later incident, on March 24, 1989, following a complaint about alleged violations in failing to provide rubber mats to protect welders from electrocution. It is not disputed that Shirkey said in regard to the complaint that it was "bull shit" and that he would have to fire someone on the safety committee over this. It is also not disputed that Shirkey on another occasion referred to a miner who filed a "103(g)" safety complaint as a "dirty mother fucker".

Within this framework of evidence it is clear that the Complainant made protected safety and health complaints to a representative of miners, Troy Conway, Sr., concerning the failure of Peabody to provide "breakdown" or "MSDS" sheets describing the hazardous nature of the chemical perchlorethylene being used by the Complainant at that time. Furthermore the testimony of Troy Conway, Sr., is undisputed that Shirkey acknowledged to him that he knew of Troy, Jr.'s complaint to the Union Safety Committee. Moreover the senior Conway's testimony that Assistant Mine Superintendent Kenny Luckhurst told him that "you and little Troy are going to have to stop stirring up the union and the Company people over this perc" is not disputed. When this evidence is considered in conjunction with the undisputed testimony of the senior Conway that Shirkey cursed and threatened other employees for reporting safety violations, it may reasonably be inferred that Peabody management would have been motivated to retaliate against the junior Conway for his protected activities.

The credible evidence also shows that in 1986, mine management was reluctant to reveal to its lab personnel the hazardous nature of the chemical perchlorethylene. Whether or not the posting of warning signs and the issuance of a memorandum preceded the Complainant's request of the specific "MSDS" warning data issued by the chemical manufacturer it is clear that this request triggered a retaliatory threat communicated to the senior Conway by Assistant Mine Superintendent Luckhurst. It is also clear that following these protected activities by the Conways, additional protective gear was provided to lab personnel. Under the

circumstances Conway has established a prima facie case of unlawful discrimination. Pasula, supra.

On the facts of this case however I find that the operator has proven by its affirmative defense that it would have taken the adverse action of laying-off the Complainant in any event for the stated economic reasons and not based upon any protected activity. Pasula, supra. The evidence in this regard is as follows. Wesley Shirkey testified that he was sent in July 1984, to supervise the Camp No. 9 Preparation Plant because the plant had not been up-to-par. He explained that before the lay-offs in October 1987, they had been receiving coal to be processed at the No. 9 Preparation Plant from the Camp No. 1, No. 2, and No. 11 Mines. In October 1987, the Camp No. 11 Preparation Plant closed down and the entire sampling process changed because the analytical value of the coal changed. Accordingly testing was no longer needed every 30 minutes and one senior lab technician job on each shift was no longer needed. The lay-off of Conway and another senior lab technician therefore followed.

In determining which personnel would be laid off Shirkey testified that he considered company-wide seniority and job evaluations. According to the undisputed testimony of Shirkey, Conway, Jr. was the second least senior lab technician company-wide. As a result Conway and Paul Brown, the least senior company-wide lab technician, were laid off. In addition to the Complainant's lack of seniority, Shirkey noted that Conway had been reprimanded for failing to perform significant job duties in early 1987. Conway had reportedly falsified coal samples and failed to have taken samples.

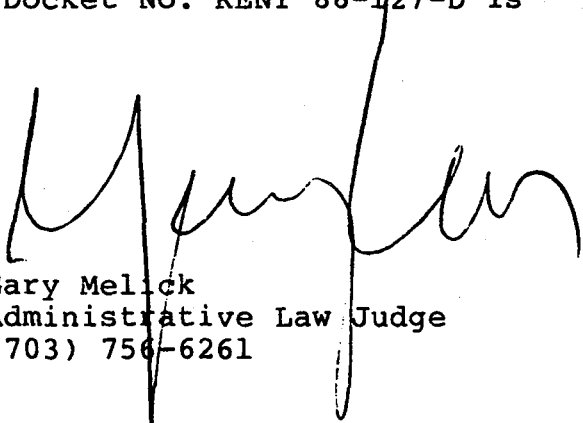
Peabody Foreman William McNew testified that he was not involved in the decision to lay-off employees in October 1987. McNew testified that he caught Conway in September 1986, and again in February 1987, failing to collect his required coal samples. In February 1987 he verified Conway's neglect of duty by marking the level and the weights of the samples in Conway's sampling buckets. There was no change in the level of the material in Conway's sampling buckets after several days and some of the weights of the samples actually decreased. If proper sampling was being performed the weights of the samples and the quantity of samples in the buckets should have been increasing. Conway was issued a letter of reprimand for this neglect in his work and the related false entries he made in his logs.

The operator's evidence in support of its lay off decision is credible and has not been rebutted by Conway. Under the

circumstances the operator has successfully defended itself by affirmatively proving that it would have taken the adverse action of laying off Mr. Conway in any event for unprotected reasons alone. Pasula, supra., Robinette, supra.

ORDER

Discrimination Proceeding Docket No. KENT 88-127-D is hereby dismissed.



Gary Melick
Administrative Law Judge
(703) 756-6261

Distribution:

C. Terry Earle, Esq., Earle & Baird, P.O. Box 141, Greenville, KY 42345 (Certified Mail)

Eugene P. Schmittgens, Jr., Esq., Peabody Holding Company, Inc., 301 North Memorial Drive, P.O. Box 373, St. Louis, MO 63166 (Certified Mail)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

COLONNADE CENTER

ROOM 280, 1244 SPEER BOULEVARD

DENVER, CO 80204

JUN 15 1989

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. WEST 88-233
Petitioner : A.C. No. 42-01211-03544
 :
v. : Trail Mountain #9 Mine
 :
BEAVER CREEK COAL COMPANY, :
Respondent :

DECISION

Appearances: Robert J. Murphy, Esq., John J. Matthew, Esq.,
Office of the Solicitor, U.S. Department of Labor,
Denver, Colorado,
for Petitioner;
Charles W. Newcom, Esq., Sherman & Howard, Denver,
Colorado,
for Respondent;
David M. Arnolds, Esq., Atlantic Richfield Company,
Denver, Colorado,
for Respondent.

Before: Judge Cetti

This case is before me upon a petition for assessment of civil penalty under Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act". The Secretary of Labor, on behalf of the Mine Safety and Health Administration, (MSHA), charged the operator of the Beaver Creek Coal Company, Trail Mountain Mine #9 (Beaver Creek) with violating three safety regulations of Title 30 Code of Federal Regulations.

The operator filed a timely appeal contesting the existence of the alleged violations and the appropriateness of the proposed penalties.

The case was set for hearing on the merits at the same place and time as other cases involving the same parties were heard on the merits. At the hearing counsel for the Secretary on the record stated the parties had reached an agreement and the parties jointly moved for approval of the proposed settlement disposition which provides as follows:

Citation No. 3224935

This citation alleges a violation of 30 C.F.R. § 75.316. Beaver Creek moved to be permitted to withdraw its contest and pay in full the Secretary's proposed penalty of \$20.00.

Order No. 3224936

The Order alleges a violation of 30 C.F.R. § 75.316. The Secretary moved to redesignate this 104(b) Order to a Section 104(a) - S & S Citation. Beaver Creek Coal Company agreed to withdraw its contest to the newly designated Section 104(a) S&S-Citation and pay the new proposed penalty of \$100.00.

Citation No. 3227100

The citation alleges a violation of 30 C.F.R. § 75.902. The Secretary moves to vacate this citation and its related proposed penalty due to an insufficiency of evidence.

Discussion

There was no objection to the motions of the parties. The motions are granted. In support of this proposed disposition of the case the parties submitted information pertaining to the six statutory civil penalty criteria found in section 110(i) of the Act. After careful review and consideration of the pleadings, arguments, and submissions I find that the proposed disposition is reasonable, appropriate, and in the public interest.

ORDER

The joint motion for approval of the agreed settlement disposition is granted. The respondent is directed to pay a civil penalty in the sum of \$120.00 within 30 days of the date of this decision.


August F. Cetti
Administrative Law Judge

Distribution:

Robert J. Murphy, Esq., Office of the Solicitor, U.S. Department of Labor, 1585 Federal Building, 1961 Stout Street, Denver, CO 80294 (Certified Mail)

Susan K. Grebeldinger, Esq., Sherman & Howard, 3000 First Interstate Tower North, 633 Seventeenth street, Denver, CO 80202 (Certified Mail)

David M. Arnolds, Esq., Thomas F. Linn, Esq., 555 Seventeenth Street, Denver, CO 80202 (Certified Mail)

/bls

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

COLONNADE CENTER

ROOM 280, 1244 SPEER BOULEVARD

DENVER, CO 80204

JUN 15 1989

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 88-159
Petitioner	:	A.C. No. 42-01211-03540
	:	
v.	:	Trail Mountain #9 Mine
	:	
BEAVER CREEK COAL COMPANY,	:	
Respondent	:	

DECISION

Appearances: Robert J. Murphy, Esq., John J. Matthew, Esq.,
Office of the Solicitor, U.S. Department of Labor,
Denver, Colorado,
for Petitioner;
Charles W. Newcom, Esq., Sherman & Howard, Denver,
Colorado,
for Respondent;
David M. Arnolds, Esq., Atlantic Richfield Company,
Denver, Colorado,
for Respondent.

Before: Judge Cetti

This case is before me upon a petition for assessment of civil penalty under Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act". The Secretary of Labor, on behalf of the Mine Safety and Health Administration, (MSHA), charged the operator of the Beaver Creek Coal Company, Trail Mountain Mine #9 (Beaver Creek) with violating nine safety regulations of Title 30 Code of Federal Regulations.

The operator filed a timely appeal contesting the existence of the alleged violations and the appropriateness of the proposed penalties.

The case was set for hearing on the merits at the same place and time as other cases involving the same parties were heard on the merits. At the hearing counsel for the Secretary on the record stated the parties had reached an agreement and the parties jointly moved for approval of the proposed settlement disposition which provides as follows:

Citation No. 3227086

This citation alleges a violation of 30 C.F.R. § 75.400. The Secretary moved to vacate this citation and its related proposed \$98.00 penalty due to an insufficiency of evidence.

Citation No. 3227087

This citation alleges an accumulation of combustible materials in violation of 30 C.F.R. § 75.400. Beaver Creek Coal Company moved to withdraw its contest of the existence of the violation and penalty and pay in full without change the Secretary's \$147.00 proposed penalty.

Citation Nos. 3227090, 3227092, 3227093, 3227094, 3227095, 3227096, and 3227098


The Secretary advises that these recordkeeping citations were issued to Beaver Creek Coal Company in error. The Secretary moved to vacate the citations with respect to Beaver Creek. The citations have been modified and reissued to Beaver Creek's predecessor operator of Trial Mountain #9 Mine, Arch Minerals.

Discussion

There was no objection to the motions of the parties. The motions are granted. In support of this proposed disposition of the case the parties submitted information pertaining to the six statutory civil penalty criteria found in section 110(i) of the Act. After careful review and consideration of the pleadings, arguments, and submissions I find that the proposed disposition is reasonable, appropriate, and in the public interest.

ORDER

The joint motion for approval of the agreed settlement disposition is granted. The respondent is directed to pay a civil penalty in the sum of \$147.00 within 30 days of the date of this decision.


August F. Cetti
Administrative Law Judge

Distribution:

Robert J. Murphy, Esq., Office of the Solicitor, U.S. Department of Labor, 1585 Federal Building, 1961 Stout Street, Denver, CO 80294 (Certified Mail)

Charles W. Newcom, Esq., Sherman & Howard, 3000 First Interstate Tower North, 633 Seventeenth Street, Denver, CO 80202 (Certified Mail)

David M. Arnolds, Esq., Thomas F. Linn, Esq., 555 Seventeenth Street, Denver, CO 80202 (Certified Mail)

/bls

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

COLONNADE CENTER
ROOM 280, 1244 SPEER BOULEVARD
DENVER, CO 80204

JUN 15 1989

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 88-300-M
Petitioner	:	A.C. No. 05-03211-05502
	:	
v.	:	Breezy Mine
	:	
URRALBURU MINING COMPANY,	:	
Respondent	:	

DECISION

Appearances: Jim D. Rogers, Esq., Robert J. Murphy, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner.

Before: Judge Lasher

This matter arises upon the filing of a proposal for penalty by the Secretary of Labor on September 26, 1988, seeking assessment of a civil penalty against Respondent for a violation of 30 C.F.R. 57.5039 contained in Citation No. 2640417, dated May 4, 1988. The subject citation was issued by Inspector Dennis J. Tobin pursuant to the provisions of Section 104(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d) (1977), and charged the Respondent with the following violative condition or practice:

"The two miners working in the heading were exposed to 5.78 W.L. radon in the 3004 haulage and 1.38 W.L. radon in the incline. The maximum allowable exposure is 1.0 W.L. radon. A re-sample indicated 2.72 W.L. at the bottom of the incline and 1.13 W.L. in the 3003 haulage. Levels in the incline were measured at nil. A close examination of the ventilation indicated recirculation of the mine air at the fan."

At the hearing in this matter in Denver, Colorado on April 26, 1989, Petitioner, as above indicated, was represented by legal counsel. Respondent, which the record shows received actual notice of the hearing (a Postal Service green card attached to the notice of hearing in the Commission's official case file reflects receipt of the notice of hearing by certified mail on March 27, 1989), neither appeared nor advised the Presiding Judge or counsel for Petitioner of its intent not to

appear. In such circumstances, the testimony of the issuing inspector, Dennis J. Tobin, was submitted on the record under oath in support of the Petitioner's position together with certain documentary evidence. Based thereon, at the close of hearing, this bench decision was issued.

Turning specifically to Citation No. 2640417, the record indicates that the citation in question was issued by Inspector Tobin on May 4, 1988, during an inspection of Respondent's Breezy Mine. At this time, Inspector Tobin went underground at Respondent's uranium mine and observed two miners picking up broken ore. Inspector Tobin took three radon samples on three calibrated devices for measuring such, all in accordance with his prior training related to the detection of airborne contaminants and matters involving toxicology. Inspector Tobin, whose experience in mining generally and in the field involved here specifically is impressive, testified that upon returning to the surface he encountered Mr. Urralburu, the operator of the mine, and that Mr. Urralburu was alarmed at his readings which indicated high radiation. The inspector returned underground with Mr. Urralburu and "resampled" in his presence the readings, all of which are reflected in the citation.

The regulation charged by MSHA to have been infringed in this instance, 30 C.F.R. § 57.5039, entitled Maximum Permissible Concentration, provides: "Except as provided by standard Section 57.5005, persons shall not be exposed to air containing concentrations of radon daughters exceeding 1.0 W.L. in active workings."

In his only communication in this matter, a letter dated October 21, 1988, Mr. Urralburu indicated that he felt a penalty was not called for since there had been a cave-in the night prior to the inspection and that because of the cave-in the exhaust fan in the mine had been restricted to a half flow "in the borehole." Mr. Urralburu went on to point out that the cave-in was repaired and ventilation was properly restored. Inspector Tobin, who testified under oath, indicated that the explanation for the violation, if such it be, contained in Mr. Urralburu's letter was not meritorious because the violation would have continued if the excessive radon levels had not been detected during his inspection and Inspector Tobin was of the opinion that it was as a result of his radon sampling that Respondent became aware of the excessive radon levels cited. It does appear, and Petitioner concedes, as Mr. Urralburu indicates in his letter that abatement of the violative condition was achieved and that Respondent proceeded in good faith to achieve rapid compliance with the violated standard after notification of the violation.

Accordingly, it is found that the violation cited in Citation No. 2640417 occurred as charged and that an appropriate

penalty must be assessed. Based on information in this record, it is concluded that this mine operator was found to be a small mine operator who had operated the subject Breezy Mine for a period of at least 15 years. Looking at the Respondent as a specific individual, that is, Mr. Ben Urralburu, it is found based on the inspector's testimony that he has a limited education and that this was the first time he had been cited for this specific type of violation. These factors entered the inspector's judgment in attributing a "moderate" degree of negligence to the violation, and I agree. This violation is found to be serious in deference to the inspector's opinion as to the propriety of this characterization and also his evidence indicating that inhalation of radioactive radon gases at the levels detected and documented by him exposed the two miners who were present on May 4, 1988, to the hazard of lung cancer.

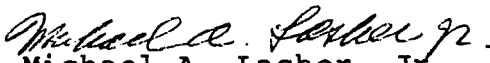
The record does not reflect, and Respondent has not established, of course, at the hearing, or in pre-trial submissions prior to the hearing, that assessment of penalties at the level sought by Petitioner would jeopardize its ability to continue in business. The Respondent mine operator has a history of two previous violations (Exhibit P-1).

In the premises, Petitioner's initial assessment of \$20.00 for this violation is found appropriate and is here assessed.

ORDER

Citation No. 2640417 is affirmed.

Respondent is ordered to pay to the Secretary of Labor within 30 days the sum of \$20.00.


Michael A. Lasher, Jr.
Administrative Law Judge

Distribution:

Robert J. Murphy, Esq., Jim D. Rogers, Esq., Office of the Solicitor, U.S. Department of Labor, 1585 Federal Building, 1961 Stout Street, Denver, CO 80294 (Certified Mail)

Mr. Ben Urralburu, Urralburu Mining, P.O. Box 310, Nucla, CO 81424 (Certified Mail)

/bls

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JUN 19 1989

PAULA L. PRICE,	:	DISCRIMINATION PROCEEDING
Complainant	:	
	:	Docket No. LAKE 86-45-D
v.	:	VINC CD 85-18
	:	
MONTEREY COAL COMPANY,	:	Monterey No. 2 Mine
Respondent	:	

DECISION

Appearances: Linda Krueger MacLachlan, Esq., and
Michael J. Hoare, Esq., 314 N. Broadway,
St. Louis, Missouri for the Complainant
Thomas C. Means, Esq., Crowell & Moring,
Washington, D.C. for the Respondent.

Before: Judge Melick

This proceeding is before me to determine the amount of attorney's fees and costs to be allowed based upon the April 12, 1989, decision finding that Monterey Coal Company discriminated against the Complainant in violation of Section 105(c)(1) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act".

The Complainant first cites expenses of \$187.36 incurred in connection with the prosecution of her grievance proceeding below in which she obtained lost pay resulting from the acts of Monterey Coal Company also held to have been discriminatory in this case. She also seeks reimbursement for her costs in prosecuting the instant case of \$28,758.77 including attorney's fees and expenses of \$24,107.79.

Monterey opposes the award of fees and expenses maintaining that (1) an award of fees and expenses is unauthorized under the circumstances of the case and (2) the requested fees and expenses radically exceed any conceivable fee and expense entitlement.

Section 105(c)(3) of the Act provides in part as follows:

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 prson committing such violation.

The evidence shows that the Complainant first raised the issue of her lost pay in a grievance proceeding under the corresponding collective bargaining agreement for essentially the same reasons and based on the same grounds as her successful complaint herein. As the record indicates she prevailed in those proceedings to the extent that she obtained four days back pay--but she was denied her related expenses in prosecuting that case. It may reasonably be inferred however because of the close similarity of issues that those expenses were also directly related to the development of evidence necessary for the instant case. I therefore find that those expenses were sufficiently "in connection with the institution and prosecution" of the instant proceedings to warrant assessment of such expenses against Monterey.

Monterey also maintains that the Complainant's grievance was settled by the union without agreement to compensate her for the cost of the proceedings and that therefore she may be deemed to have waived any right to reimbursement for those expenses. The evidence in the case shows however that Ms. Price did not consent to the settlement of her grievance by the union and had no choice in the matter -- the decision to settle was made by the union.

Next, Monterey challenges the amount of grievance proceeding expenses cited by the Complainant on the grounds that she had previously estimated those expenses to be only \$25. The Complainant cannot fairly be bound however by a rough estimate of expenses made from the witness stand without her documentation. In the absence of any other challenge to the amount of the expenses claimed, the Complainant is awarded her full claim of \$187.36.

I find however that reduction of the claimed attorney's fees and trial expenses is clearly warranted in this case. The Complainant is entitled to only those costs and expenses "reasonably incurred". Section 105(c)(3) supra.

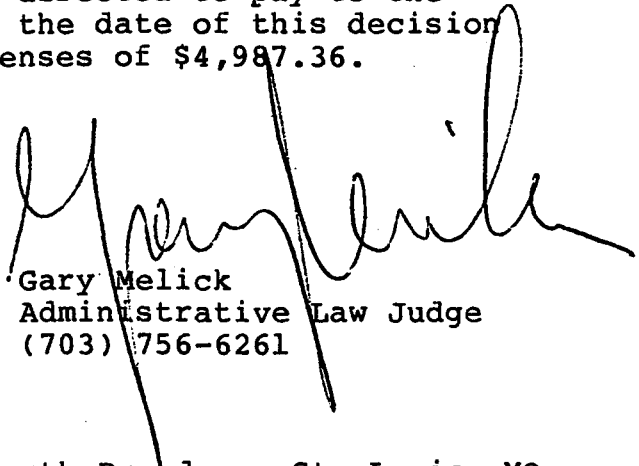
In determining a reasonable attorney fee the most useful starting point is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate. Hensley v. Eckerhart, 461 U.S. 424 (1983). Copeland v. Marshall 641 F.2d 880 (D.C. Cir. 1980). Where the prevailing party has achieved only partial or limited success however the product of hours reasonably expended in litigation as a whole times a reasonable hourly rate may be an excessive amount. Hensley, supra. There is no precise rule or formula for making a determination for reduction of an award to account for a limited success and the court necessarily has discretion in making this equitable judgment. Hensley, supra. In this regard it is noted that while the Complainant herein alleged 31 protected activities and 14 acts of discrimination she prevailed on only one allegation of discrimination. Many of the unsuccessful claims were indeed facially frivolous.

Another factor that may be considered in determining an appropriate fee is the quality of representation. See Copeland, supra. at 906 - 908. I find in this case that the inordinate length of trial i.e. 12 days, in a case that should have been tried in no more than two days, is chargeable to Complainant's trial counsel. Her lack of preparation, lack of focus, lack of understanding of the law, frequent and extraordinary delays between questions and her repeated failure to promptly appear and be ready for trial sessions in this case clearly justifies a significant reduction in the hours reasonably spent both for attorney's fees and the Complainant's own expenses.

Considering the above factors I find that attorney's fees and expenses in the amount of \$4,000 and Complainant's other expenses in the amount \$800 are appropriate.

ORDER

Monterey Coal Company is directed to pay to the Complainant within 30 days of the date of this decision attorney's fees and other expenses of \$4,987.36.



Gary Melick
Administrative Law Judge
(703) 756-6261

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JUN 19 1989

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 89-22
Petitioner	:	A.C. No. 46-01453-03831
v.	:	
	:	Humphrey No. 7 Mine
CONSOLIDATION COAL COMPANY	:	
Respondent	:	Docket No. WEVA 89-24
	:	A.C. No. 46-01968-03782
and	:	
	:	Blacksville No. 2 Mine
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 89-39
Petitioner	:	A.C. No. 46-01437-03643
v.	:	
	:	McElroy Mine
McELROY COAL COMPANY,	:	
Respondent	:	

DECISION

Appearances: Page H. Jackson, Esq., Robert S. Wilson, Esq.,
Office of the Solicitor, U.S. Department of Labor,
Arlington, Virginia, for the Petitioner;
Michael R. Peelish, Esq., Consolidation Coal Co.,
Pittsburgh, Pennsylvania, for the Respondents.

Before: Judge Maurer

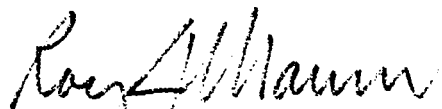
These cases are before me upon petitions for assessment of civil penalty under Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, et seq., (the Act).

Pursuant to notice, a hearing was commenced in Morgantown, West Virginia on April 18, 1989. At that hearing, prior to the taking of any testimony, the parties proposed a settlement agreement. The petitioner proposed reducing the specially assessed penalty for Order No. 3113502 from \$1000 to \$800 based on a reduced likelihood of occurrence upon re-examination of the factual circumstances surrounding the violation. I approved that motion at the hearing and that disposed of Docket No. WEVA 89-22. In Docket No. WEVA 89-24, I approved a reduction in the aggregate

civil penalty from \$412 to \$256 for two § 104(a) citations, one of which was changed from significant and substantial (S&S) to non-S&S. In Docket No. WEVA 89-39, Order No. 2943749 was modified to a citation issued pursuant to § 104(a) of the Act and the civil penalty proposal reduced from \$900 to \$300. Petitioner also proposed reducing the specially assessed penalty for § 104(d)(2) Order No. 3106822 from \$1000 to \$800 based on a reduction in the number of persons affected by the violation. The respondent has agreed to pay these amounts in full settlement of the cases. I have considered these matters in that light and under the criteria for civil penalties contained in § 110(i) of the Act and I conclude that the proffered settlements are appropriate.

Pursuant to the Rules of Practice before this Commission, this written decision confirms the bench decision I rendered at the hearing, approving the settlements.

WHEREFORE IT IS ORDERED that respondent shall pay the approved civil penalty of \$2156 within 30 days of this decision and upon such payment, these proceedings ARE DISMISSED.



Roy J. Maurer
Administrative Law Judge

Distribution:

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/ml

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

June 20, 1989

CONSOLIDATION COAL COMPANY,	:	CONTEST PROCEEDING
Contestant	:	
	:	Docket No. WEVA 88-290-R
v.	:	Order No. 3106688; 6/6/88
	:	
SECRETARY OF LABOR,	:	Blackville No. 1 Mine
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA)	:	Mine ID 46-01867
Respondent	:	
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA)	:	Docket No. WEVA 89-4
Petitioner	:	A. C. No. 46-01867-03772
	:	
v.	:	Blackville No. 1 Mine
	:	
CONSOLIDATION COAL COMPANY,	:	
Respondent	:	

DECISION

Appearances: Michael R. Peelish, Esq., Pittsburgh, Pennsylvania, for Consolidation Coal Company;
Jack F. Strausman, Esq., Office of the Solicitor, Arlington, Virginia, for the Secretary of Labor.

Before: Judge Merlin

These cases are a petition for the assessment of a civil penalty filed by the Secretary of Labor against Consolidation Coal Company and the related notice of contest filed by Consolidation against the Secretary pursuant to section 110 of the Federal Mine Safety and Health Act of 1977 and sections 2700.20 et seq., and 2700.25 et seq., of Commission regulations; 30 U.S.C. § 820; 29 C.F.R. § 2700.20 et seq. and 29 C.F.R. § 2700.25 et seq. At issue is an alleged violation of section 75.322 of the Secretary's regulations which is a restatement of section 303(u) of the Act. 30 C.F.R. § 75.322; 30 U.S.C. § 863(u). Also in question is whether the alleged violation which was cited in a withdrawal order issued under section 104(d)(2) of the Act, 30 U.S.C. § 814(d)(2), resulted from unwarrantable failure. Additional issues are whether the asserted violation was significant and substantial and the appropriate amount of civil penalty, if any, to be

assessed. A hearing was held on May 9, 1989, and post-hearing briefs have now been filed.

In accordance with the stipulations agreed to by the parties and in light of other information submitted by them at the hearing I find (1) I have jurisdiction in this matter; (2) the operator's size is large; (3) the operator's history is as submitted by the Solicitor; (4) imposition of a penalty will not affect the operator's ability to continue in business; and (5) the alleged violation was abated in good faith.

The subject section 104(d)(2) withdrawal order, No. 3106688, dated June 6, 1988, sets forth the allegedly violative condition as follows:

Work was started on changing the ventilation of the main air currents of the P-6 and P-5 areas while power was on the affected areas and with 14 persons working on setting up the new longwall equipment in the affected area. Pete Turner foreman was instructed by the mine foreman Jack Lowe to erect a permanent stopping across the P-5 supply track haulage to the longwall set-up. At the same time the mine foreman was having check curtains installed on the P-6 area and was taken [sic] air reading of the air currents.

30 C.F.R. § 75.322 and 30 U.S.C. § 863(u) provide:

Changes in ventilation which materially affect the main air current or any split thereof and which may affect the safety of persons in the coal mine shall be made only when the mine is idle. Only those persons engaged in making such changes shall be permitted in the mine during the change. Power shall be removed from the areas affected by the change before work starts to make the change and shall not be restored until the effect of the change has been ascertained and the affected areas determined to be safe by a certified person.

The MSHA Inspector's Manual (March 1978) states the policy applicable to section 75.322 in this manner:

Changes in mine ventilation which affect any split or main air current, including any change which increases or decreases the volume of air flowing to any split or main air current, shall be thoroughly checked to insure that no split has been affected in such a way as to cause a hazard to the miners.

Any ventilation change in which any split of air is to be increases [sic] or decreased by an amount equal to or in excess of 9,000 c.f.m. shall be made only when the mine is idle. Before mine power can be restored in all areas affected by such ventilation changes, an examination is required as in Section 75.303.

MSHA Inspector, George Phillips, arrived on the P-6 section of the operator's Blacksville No. 1 Mine at about 8:15 a.m., June 6, 1988 (Tr. 16). At that time the operator intended to begin mining the new P-6 longwall face (Tr. 16, 325). The mine is on a section 103(i), 30 U.S.C. § 813(i), inspection cycle since it liberates the amount of methane specified in the Act (Tr. 13, 38). Mr. Phillips proceeded up entry 3, the track, of the P-6 section (Tr. 17).^{1/} After he passed the last open crosscut on his left, he noticed that air was flowing in an outby direction and hitting him in the face (Tr. 17). It is agreed that this outby air flow was wrong and that it should have been going inby on the P-6 entries and thereafter along the longwall face from the headgate to the tailgate (Tr. 18-19, 282). The inspector testified that the airflow was reversed on both sides of the block of coal (F) which was immediately outby the headgate and between entries 3 and 4 (Tr. 28-29). He walked around that block of coal and found a check curtain (E) missing on the left side (Tr. 22). The inspector took air readings at two locations (A and B) on the P-6 section and was satisfied with the air movement he found (Tr. 29-30). From these readings he calculated the reverse airflow as 7,560 c.f.m. (Tr. 30, 32, 33).

The operator's mine foreman, Jack Lowe, arrived on the section at roughly 8:30 a.m. and therefore was on the P-6 section at the same time as the inspector (Tr. 264). He took several air and methane readings all of which, like the inspector's readings, were satisfactory (Tr. 265-270). The foreman then walked inby on entry 1 of the P-6 section until he reached the door (W) and went through that door which he said was cracked open 6 to 8 inches, into bleeder entry 3 (Tr. 269, 270). He proceeded all the way down bleeder entry 3 out into

^{1/} All references are to the mine map admitted as Joint Exhibit No. 1 and to the markings made thereon by the witnesses. MSHA witnesses used letters and operator witnesses used numbers to mark locations. A facsimile of this map is attached to this decision as an Appendix. For added convenience, the bleeder entries have been numbered in accordance with the testimony (Tr. 235).

a crosscut in the P-5 section (Tr. 271). This crosscut was between P-5 entries 3 and 4^{2/} and just inby the tailgate area of the new longwall face (Tr. 271). In other words, the foreman went from P-6 to P-5 by crossing through the bleeders. He had previously given orders that a stopping (J) be built at this crosscut, but at this time actual building had not yet begun (Tr. 271). At about 9:30 a.m. he took an air and methane reading (5) near where the stopping was going to be erected, and another reading (6) near the regulator (R) (Tr. 271, 275)^{3/}. He took additional readings further inby P-5 (Tr. 276)^{4/}. The foreman then returned to the bleeders where in the crosscuts at the longwall face he found a loose check curtain (K), a down curtain (L) which he put back, and a very loose curtain (M) (Tr. 277). He took readings at the longwall and found that the air direction was from the headgate to the tailgate which was the way it was supposed to be (Tr. 278). He then backtracked the way he had originally come down bleeder entry 3 and through the door (W), once again into P-6 entry 1 (Tr. 279).

It was at this point that the inspector and the foreman met (Tr. 28, 278-279). The inspector told the foreman about the reverse airflow (Tr. 28). The foreman said he would try to correct the situation by moving some check curtains (Tr. 29, 280). The foreman made some curtain adjustments, but they did not affect the reverse airflow (Tr. 282-283).

The inspector then travelled across bleeder entry 4 to the P-5 section where he took an air and methane reading (C) inby the tailgate area in entry 4 of P-5 (Tr. 39, 46-47). He then walked through a mandoor (H) back into the bleeders (Tr. 45, 47). Proceeding a short distance down the nearest bleeder crosscut, he found three men building a permanent stopping (J) in the crosscut between entries 3 and 4 in the bleeder tailgate area (Tr. 49). As already noted, this is the stopping the mine foreman testified he had ordered built. At the time the inspector arrived, only the two top tiers of the

^{2/} Entries in the P-5 section are marked in reverse order on the map. Since the error was not discovered until late in the hearing, I ruled that for purposes of this case we would keep the map marked the way it was (Tr. 273).

^{3/} The letter R was used on the map to designate the regulator in P-5 as well as an outby roof fall in P-6, noted infra.

^{4/} Because the location of these readings are far inby on P-5, they do not appear on the facsimile map attached as an appendix to this decision, but they do appear on Joint Exhibit 1.

stopping (about 16 inches) had not been installed (Tr. 55). The inspector observed that the door in the stopping was open (Tr. 109-110). The inspector then went into bleeder entry 3 where he took an air reading (D) (Tr. 54). The air velocity was 23,220 c.f.m. . The inspector did not remember whether he issued the subject withdrawal order before or after he took this reading (Tr. 109). The order bears a time of 11:20 a.m. (Govt. Exh. 4).

There is no dispute that the operator's ventilation plan required that the stopping (J) be built before mining on the new longwall face started (Tr. 215-216). The purpose of the stopping was to reduce the air flowing into the bleeders directly from the P-5 section and instead force the air outby P-5 and then up the P-6 intake entries so it would flow across the longwall face with sufficient velocity for mining to begin (Tr. 165-166, 287, 293). It was also thought that erection of the stopping would correct the reverse airflow which the inspector found (Tr. 64, 287).

The operator admits that power was on and that there were 14 people in the area (Tr. 74). The inspector believed that the change in air direction and/or the increase in air velocity caused by erection of the stopping could possibly push methane out of two roof fall cavities (R and S) outby in P-6 and out of one fall cavity (T) in the bleeders, thereby causing an ignition (Tr. 76-79). Also, because the inspector thought the stopping would cut off the airflow from P-5 into the bleeders, he believed it questionable whether enough of the air flowing inby on the P-6 section would get back into the bleeder entries to prevent an accumulation of methane there (Tr. 91-93, 94-95). Accordingly, he testified dead air in the bleeders was a possible danger (Tr. 92). In the inspector's opinion, the resulting changes in air direction which would have resulted from the erection of the stopping fell within the purview of 30 C.F.R. § 75.322 as an air change that was material and affected safety (Tr. 75, 76).

The inspector's conclusions about the possible adverse consequences from building the stopping without shutting off the power were based upon his belief that once the stopping was completed, the door in the stopping would be closed and as a result there would be a complete cut off of air from P-5 into the bleeders. (Tr. 95, 108, 111, 117). As already noted, the inspector had obtained an air velocity reading of 23,220 c.f.m. in this area (D) (Tr. 54). Similarly, the mine foreman obtained an air velocity reading of 22,160 c.f.m. at that location (5) (Tr. 271). It was this air the inspector

feared would be lost to the bleeders all at once. The inspector observed that the door in the stopping that was open, but he did not ask whether the operator would leave the door open when construction was finished (Tr. 111).

The inspector's crucial assumption that the door in the stopping would be closed, was wrong. The mine foreman testified that when the stopping was completed, the door would be left open all the way (Tr. 280, 284, 310). Once the stopping was built, it was the foreman's intent to adjust the air flow by gradually closing the door in conjunction with opening the regulator (R) which controlled the air coming across the longwall face (Tr. 262). The foreman testified that he would continuously take air readings until he was satisfied with the velocity (Tr. 291-293). By proceeding in this manner sufficient air would keep coming directly into the bleeders from P-5 through the door in the stopping to ventilate them until enough air was driven down P-5 and up the P-6 intake entries to ventilate the longwall face and bleeders from that direction (Tr. 293-295).

I find the foreman's testimony convincing and I accept it. The inspector's position cannot be justified on the ground that no one told him the door would be open (Tr. 111). He should have asked, particularly since he saw that the door was open while the stopping was being built (Tr. 109). Before an inspector issues a citation for an alleged violation, he should take steps to apprise himself of the relevant facts. This is especially true where the situation is a serious one and the inspector undertakes to close the operator down with an unwarrantable order. The inspector's assertion that doors in stoppings are very seldom left open and that they make poor regulators is without merit. On these matters the inspector was contradicted by MSHA's ventilation supervisor, who stated that the use of doors in stoppings as regulators is not unusual (Tr. 230). The ventilation supervisor described how doors are used as regulators in accordance with the ventilation plan (Tr. 230-231). His testimony is therefore, consistent with the mine foreman's statement that the door in the subject stopping would have been used as a regulator, controlling the amount of air going directly into the bleeders from P-5 (Tr. 305).

In addition, the foreman pointed out that the door (W) at the P-6 end of bleeder entry 3 was open and that the door in P-6 entry 1 near the headgate (marked "door off" on the map) was intentionally left off (Tr. 266-267, 286-287). It nowhere appears that the inspector was cognizant of these circumstances. With these doors, open and off respectively, and with the door in the subject stopping open and only closed gradually as air was constantly monitored, the foreman explained how at all times there would be an airflow throughout

the bleeders with no dead airspace (Tr. 286-288, 293-296, 301). The foreman showed that as increased air came up the P-6 entries it would ultimately cross the longwall face and then ventilate bleeders with certain stoppings (X and 14) removed and another one installed to seal off the gob (Tr. 295-300).

I am convinced by the foreman's description of how ventilation would have been maintained in the bleeders and by his testimony that under the circumstances presented here there would be no dead airspace in the bleeders. The inspector's conclusions must be rejected because they were based upon erroneous assumptions and inadequate knowledge of the facts.

Since the inspector erred in believing that erection of the subject stopping would create a sudden and complete cut-off of air from P-5 to the bleeders, his fear of a corresponding initial onrush of air up the P-6 intake entries, was unfounded. Therefore, his resulting concern that methane from the roof fall cavities (R, S, T) could be pushed out by such an onrush was misplaced and is rejected. In this connection, it must also be noted that the roof falls outby in P-6 (R and S) were on intake air and had never shown methane, despite being checked at least once or twice each week by the foreman (Tr. 269).

In light of the foregoing, I conclude that on the facts presented in this case, the gradual air changes which were to have been made would not have been material and would not have affected the safety of the miners and that therefore, the inspector's finding of a violation cannot stand and his withdrawal order must be vacated.

The foregoing is dispositive. However, it should also be noted that the inspector displayed great uncertainty over what the mandatory standard means. As quoted above, 30 C.F.R. § 75.322 directs that the mine be idle when there are ventilation changes which "materially" affect the main current or a split thereof and which "may affect the safety of persons in the mine." In attempting to justify his finding of "material" in this case the inspector relied upon the fact that the operator's activities were planned (Tr. 121, 122, 162-163) and asserted that if the operator had just come upon an unplanned air change, it would not have been material (Tr. 116, 124). He also stated that if the operator could fix something quickly it would not be a material change (Tr. 162). I do not find these considerations persuasive. "Material" means "being of real importance or great consequence." Webster's Third International Dictionary (1988). The issue of whether a

change came about intentionally or whether it could be rectified quickly, does not affect the actual characteristics of the change itself.

Nor does the Inspector's Manual help. It is well established that the manual is not binding upon the Commission. Alabama By-Products, 4 FMSHRC 2128 (Dec. 1982); U. S. Steel, 5 FMSHRC 3 (Jan. 1983); U. S. Steel, 10 FMSHRC 1138 (Sept. 1988). If MSHA wishes the manual to be accorded weight, a showing must be made that it is consistent with and furthers the purposes of the mandatory standard. The portion of the manual involved in this case does not define "material" or explain what "affecting safety" means. It merely directs that air changes of more than 9,000 c.f.m. in a split of air can only be made when the mine is idle.

Because I have found that the operator could have controlled the air change gradually, I conclude that any change would not have exceeded 9,000 c.f.m. . Nevertheless, mention should be made of the confusion shown by MSHA witnesses over how the manual should be interpreted. The MSHA ventilation expert testified that all inspectors were told to follow the 9,000 c.f.m. rule, but he did not know where the rule came from and said only that he had been told it was related to the requirement of air velocity in the last open crosscut (Tr. 198-199). No analysis was offered with respect to this alleged relationship. Moreover, there was no understanding of when the 9,000 c.f.m. policy would be followed. For example, the inspector and the ventilation expert indicated that air changes of more than 9,000 c.f.m. could be made at the bottom of the main shaft and at exhaust fans without shutting off power, but that power would have to be shut off even where less than 9,000 c.f.m. was involved if the total percentage of air being changed was great (Tr. 172-173, 199-201, 204). Operator's counsel suggested at the hearing that the differences in following the 9,000 c.f.m. rule could be due to the fact that some of examples considered may not have involved a split of air (Tr. 203). However, MSHA witnesses themselves did not rely upon any such distinction. Rather the thrust of their testimony was that 9,000 c.f.m. is a relative term and only a guide that is not all inclusive (Tr. 170, 199). Such an open-ended approach is really no guide at all.

If the policy statement is to be meaningful, it must give some advice that will enable inspectors to know when the 9,000 c.f.m. is to be followed and when it is not. Insofar as the record in this case is concerned, there is no such guidance. Indeed, the ventilation expert agreed that the policy statement was confusing (Tr. 202). If 30 C.F.R. § 75.322 is to play its proper role in enforcement of the Act, it must be

interpreted and implemented by informed inspectors in an uniform and intelligible manner.

Although I have found that there was no violation, mention must be made of the issuance of an unwarrantable withdrawal order. The Commission now has defined unwarrantable as "aggravated conduct constituting more than ordinary negligence." Emery Mining Corporation, 9 FMSHRC 1997, 2001 (December 1987), Youghiogeny and Ohio Coal Company, 9 FMSHRC 2007, 2010 (December 1987). With the confusion and lack of clear guidelines detailed herein, and in light of the operator's gradual approach toward the air change, issuance of the subject order with its attendant harsh sanctions was particularly inappropriate.

The posthearing briefs filed by the parties have been reviewed. To the extent that the briefs are inconsistent with this decision, they are rejected.

ORDER

In light of the foregoing, it is hereby ORDERED that Order No. 3106688 be VACATED.

It is further ORDERED that the operator's notice of contest be GRANTED.

It is further ORDERED that the Solicitor's petition for assessment of civil penalty be DISMISSED.

A handwritten signature in black ink, reading "Paul Merlin". The signature is fluid and cursive, with a large initial "P" and "M".

Paul Merlin
Chief Administrative Law Judge

Distribution:

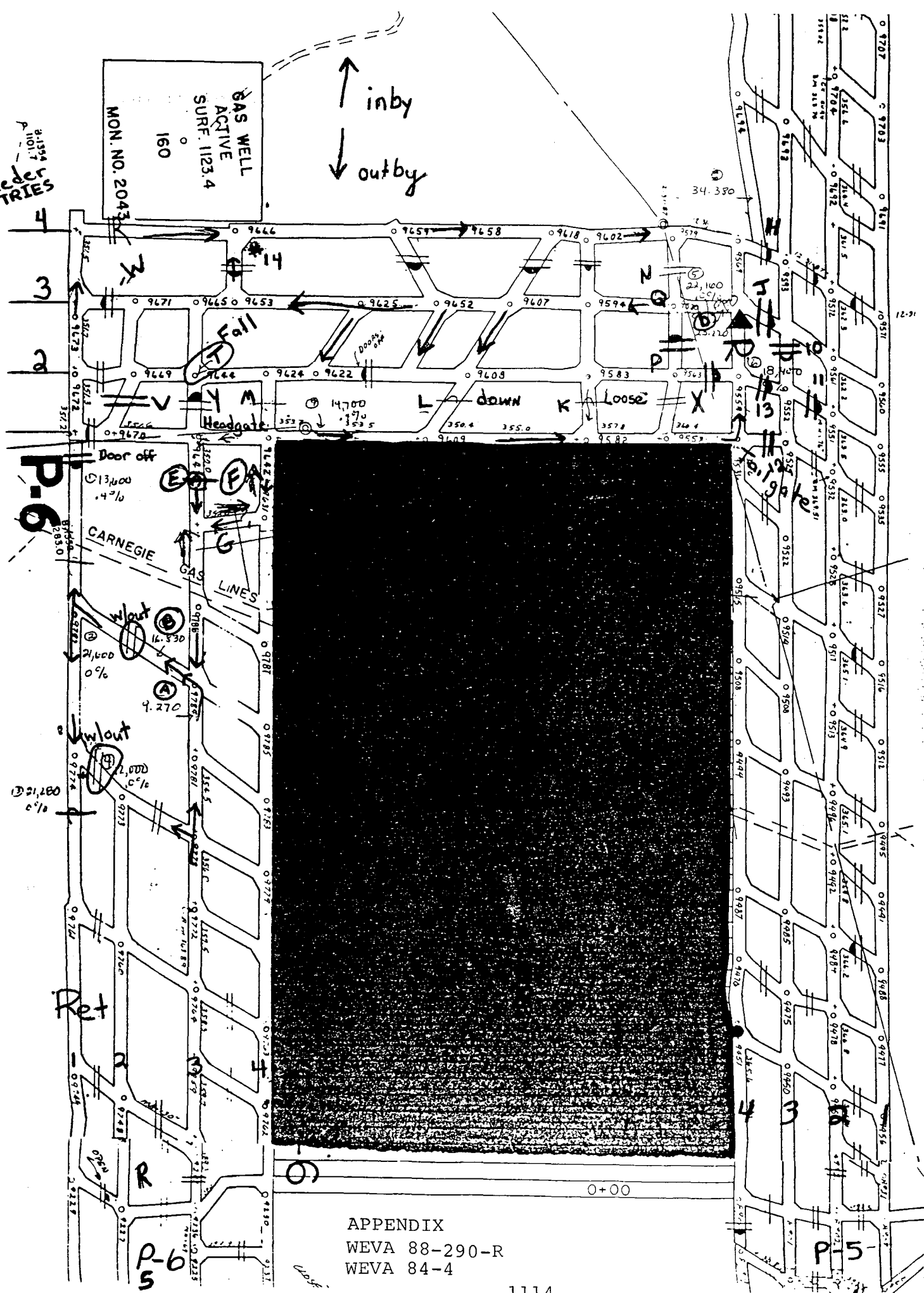
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/gl

Bleeder
ENTRIES



FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

June 20, 1989

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 89-51
Petitioner	:	A. C. No. 46-01318-03849
	:	
v.	:	Robinson Run No. 95 Mine
	:	
CONSOLIDATION COAL COMPANY,	:	
Respondent	:	

DECISION

Appearances: Ronald Gurka, Esq., Office of the Solicitor,
U. S. Department of Labor, Arlington, Virginia
for Petitioner;
Michael R. Peelish, Esq., Consolidation Coal
Company, Pittsburgh, Pennsylvania, for
Respondent.

Before: Judge Merlin

This case is a petition for the assessment of civil penalties filed by the Secretary of Labor against Consolidation Coal Company under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d), for two alleged violations of the Act.

A hearing was held on May 10, 1989, and the parties have filed post hearing briefs.

Order No. 3117607

Order No. 3117607 dated August 16, 1988, charges a violation of 30 C.F.R. § 75.202(a), for the following condition or practice:

Condition: There was loose, hanging, unsupported pieces of mine roof between the wire screen and the rib along the bolted rib lines in the 3 West section belt conveyor entry.

30 C.F.R. §75.202(a), 53 F.R. 2354, 2355, 2375 (January 27, 1988), provides as follows:

(a) The roof, face and ribs of areas where persons work or travel shall be supported or otherwise controlled to protect persons from hazards related to falls of the roof, face or ribs and coal or rock bursts.

Also in question is whether the alleged violation which was cited in a withdrawal order issued under section 104(d)(2) of the Act, 30 U.S.C. § 814(d)(2), resulted from unwarrantable failure. Additional issues are whether the asserted violation was significant and substantial and the appropriate amount of civil penalty, if any, to be assessed.

In accordance with the stipulations agreed to by the parties and in light of other information submitted by them at the hearing I find (1) I have jurisdiction in this matter; (2) the operator's size is large; (3) the operator's history is as set forth by the Solicitor; (4) imposition of a penalty will not affect the operator's ability to continue in business; and (5) the alleged violation was abated in good faith.

The cited belt conveyor entry was in an area that was being rehabilitated (Tr. 17, 94, 100-101). It had originally been mined several years previously (Tr. 17, 99). The top had deteriorated and fallen (Tr. 17, 77, 79, 99). The operator had mined over the old roof falls, cleared them up with a continuous mining machine and was in the process of installing a new roof support system (Tr. 17, 98-99, 145). The intent was to rehabilitate the area for the life of the mine, opening up the cited entry for travel and installation of a belt so as to reach coal in another area (Tr. 17, 99-100).

There is a dispute between MSHA's witnesses and the operator's witnesses over the portion of the belt conveyor entry involved, the condition of the roof, and the effect of posted danger signs. The issuing inspector testified that from the No. 18 block extending inby for 200 feet, including the No. 19 block, there was a roof cavity from 7 to 12 feet high (Tr. 15, 16; "C" to "D" on Jt. Fxhs. 1, and 2). At this location wire screening had been installed pursuant to the roof control plan along the center of the entry in the roof cavity to catch loose or broken materials that might fall (Tr. 18). However, according to the inspector the screening did not extend to the rib lines (Tr. 15, 19). Rather there was a 20" gap on each side where there was no support for the roof (Tr. 15, 19, 20). Irregularly shaped pieces of broken rock were caught in crevices, in the ribs, and at the edge of the wire on both sides of the entry (Tr. 21, 22).

The issuing inspector's description of the condition was corroborated by an MSHA supervisory inspector who accompanied him on the inspection (Tr. 76, 87). The supervisor walked on the opposite side of the belt entry while the inspector walked on the

side toward the adjacent track entry. According to the supervisor, loose rock was present on both sides of the entry and that the track side was worse (Tr. 79, 80). He further said that not only were 20" not screened but there was an additional 20" on the sides which extended past the last roof support (Tr. 84).

The issuing inspector testified that two danger signs were hung at each end of the No. 18 block (Tr. 24). The roof condition he cited extended further inby than the danger signs (Tr. 26; Jt. Exhs. 1 and 2). According to the inspector, the signs which were 6" x 12" x 12" were installed about 5' from the ground on the track side of the entry (Tr. 26, 30). Each sign was attached to a cable or wire which draped across the entry until it was lying down on the floor on the opposite side of the entry (Tr. 27-30). In the inspector's opinion the signs were meant to danger off the entire entry (Tr. 30). The MSHA supervisor stated that the cable from the danger sign did not extend to the opposite side and would not impede anyone's travel on that side of the belt (Tr. 80).

Contrary to MSHA's witnesses, the operator's safety escort testified that the only affected area was 119 feet from the end of the No. 16 block to the middle of the No. 18 block where there was a roof cavity (Tr. 102). He maintained that in this area screening was installed tight against roof held with bolts and planks (Tr. 96-98). He said that the distance from the screen to the rib was only 6" to 12" (Tr. 105-106). In his opinion, nothing remained to be done in the screened area which was safe (Tr. 116). According to the escort, from the middle of the No. 18 block and through the No. 19 block there was no roof cavity and the top was in good condition (Tr. 97-98). The escort testified that there were two danger signs anchored to the rib on the track side of the entry by a wire which went across to the belt structure (Tr. 107-108).

After listening to the witnesses and reviewing the transcript, I accept the extent of the area involved and the description of the condition given by MSHA witnesses. The escort's contention that the screened area was safe cannot be reconciled with the many pre-shift examiner's reports, beginning August 12, all of which reported bad top (Resp. Exh. 2). So too, the escort's delineation of the affected area is at odds with the pre-shift examiner's reports which give the affected area as the Nos. 18 and 19 blocks. On cross-examination the escort stated he disagreed with his own pre-shift examiners who reported bad top and said he would have removed this condition from the fire boss book and reported only an obstructed roadway (Tr. 119). Finally, if the area were safe, as the escort asserted, there would have been no need for any danger signs.

It is clear that the pre-shift examiners were correct. The escort offered no support for his opinion that everything that could fall, had fallen (Tr. 117). If the area was completely safe, as the escort said, it would not have taken five shifts to install the planks necessary to abate (Tr. 120). The mine foreman testified that the planks used to abate were to prevent falling materials from coming down into the entry (Tr. 153).

In addition, I find that references to the walkway in the pre-shift examiner's reports encompass both sides of the entry and that, as the MSHA supervisor stated, the track side was worse (Tr. 80). I also accept MSHA's evidence that rocks do not always fall straight down and that a rock falling from the roof on the track side of the entry could injure someone walking on the opposite side (Tr. 33, 83, 84). As set forth above, loose rock was present on both sides of the entry indicating the existence of danger throughout the entry. Since a hazard existed on both sides of the entry, the entire entry should have been dangered off. By all accounts the signs were only present on the track side (Tr. 26, 30, 80, 107, 108, 150-152). The wire holding the signs just draped across the entry ranging from 5 feet off the floor on the track side down toward the opposite side where it was no impediment to travel. I accept the inspector's statement that the wire did not extend across the whole width of the entry (Tr. 28). Accordingly, I find the signs did not danger off both sides of the entry.

I also accept the inspector's testimony regarding location of the signs at each end of the No. 18 block (Tr. 23, 25). Therefore, the signs did not cover the No. 19 block where the screening also was inadequate and rocks had fallen.

Based upon the foregoing, I conclude that a violation of 30 C.F.R. § 75.202(a) existed because the roof and ribs of the cited area where the pre-shift examiner and belt cleaner worked and travelled, were not supported or controlled to protect persons against roof falls.

The next issue is whether the violation was significant and substantial. The Commission has held that a violation is properly designated significant and substantial if, based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (April 1981). In Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984), the Commission explained.

In order to establish that a violation of a mandatory safety standard is significant and substantial under National Gypsum, the Secretary of Labor must prove: (1) the underlying violation of 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.

The Commission subsequently explained that the third element of the Mathies formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury" U. S. Steel Mining Co., 6 FMSHRC 1834, 1836 (August 1984).

The danger of falling rock from the roof through the gaps in the mesh screening presented a discrete safety hazard. The roof had deteriorated. There were stress cracks on both sides of the entry which increased the potential of a roof fall (Tr. 82-83). Jagged pieces of rock already were caught in ribs and crevices at the edge of the screening (Tr. 20-21). Based upon this evidence, I find there was a reasonable likelihood that the feared hazard of falling rock, would occur. There was also a reasonable likelihood the hazard of falling rock would result in a reasonably serious or fatal injury. The hanging rocks weighed 30-35 pounds, with some heavier and some lighter (Tr. 21). Although men were not working in the area at the time, I accept the inspector's testimony that the machinery was energized and that the operator intended to use the belt (Tr. 34, 35-36). The operator's escort admitted the belt was used periodically (Tr. 130-131). Moreover, pre-shift examiners and belt cleaners travelled the area (Tr. 36).

The foregoing evidence also demonstrates that the violation was serious. Roof falls have long been recognized as a major cause of serious injury and fatality in the mines, Consolidation Coal Company, 6 FMSHRC 34 (January 1984).

The violation was not the result of unwarrantable failure on the part of the operator. Unwarrantable failure has been interpreted by the Commission as "aggravated conduct constituting more than ordinary negligence." Fmery Mining Corporation, 9 FMSHRC 1997, 2004 (December 1987); Youghiogheny and Ohio Coal Company, 9 FMSHRC 2007, 2010 (December 1987). The supplies necessary to correct the cited condition would have had to be brought in through the track entry (Tr. 153). However, the track entry was closed down from August 9 until 9 a.m. August 15 due to a section 104(d)(2) order relating to shelter holes (Tr. 114, 120-121). The order in this case was issued 25 hours later on August 16. The operator's escort did not notify the mine foreman until 3 p.m. that the track order had been lifted (Tr. 125). After the order on the track was terminated, flat cars which were needed to transport the supplies, were used to transmit supplies to abate a third order previously issued on August 3 which involved venti-

lation (Tr. 121-122, 128). It appears that despite the effort involved in abating the ventilation order, other flat cars were still available to correct the cited roof condition. Cars were being used at that time to deliver rock dust and other supplies so that mining could continue (Tr. 130, 156-157). Nevertheless, the 25-hour interval was not sufficiently attenuated to justify a finding of unwarrantable failure, especially since the operator was engaged in abating the ventilation order. Also, nothing in the record suggests that the failure to extend the danger signs to control the entire entry was due to aggravated conduct of the sort required by Commission precedent. The finding of unwarrantable failure must be vacated.

The operator was guilty of ordinary negligence. The operator's escort should have notified the mine foreman as soon as the track entry became available to transport supplies instead of waiting several hours. Also flat cars should have been used to transport materials to correct the roof, instead of carrying rock dust and other supplies. The operator also was negligent in not insuring that the danger signs controlled both sides of the entry.

The post-hearing briefs filed by the parties have been reviewed. To the extent that the briefs are inconsistent with this decision, they are rejected.

In light of the foregoing and in accordance with the six statutory criteria set forth in section 110(i) of the Act. I conclude that a penalty of \$900 is appropriate.

Order No. 3117438

This 104(d)(2) order dated August 9, 1988, was issued for a violation of 30 C.F.R. § 75.1403(g). The order recites that under the applicable safeguard, shelter holes were not provided at the required 105 foot intervals. This is the order which shut down the track entry, as described above.

The original assessment was \$1,200 and at the hearing the parties proposed a settlement of \$950 (Tr. 164-165). The Solicitor explained that the violation was not as serious as originally thought, because most miners in the area would be in cars and not walking. Also, miners would have adequate warning a car was coming because the entry was long and straight (Tr. 166).

I accept the Solicitor's representations and approve the recommended settlement, which remains a substantial amount, as consistent with the criteria set forth in section 110(i) of the Act, 30 U. S. C. § 820(i).

ORDERS

No. 3117607

It is ORDERED that the finding of a violation be AFFIRMED.

It is further ORDERED that the finding of significant and substantial be AFFIRMED.

It is further ORDERED that the finding of unwarrantable failure be VACATED.

It is further ORDERED that the subject 104(d)(2) order be MODIFIED to a 104(a) citation.

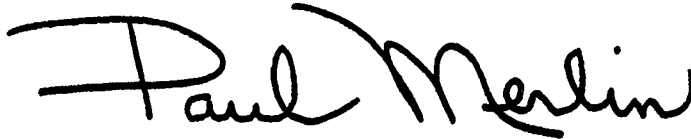
It is further ORDERED that a penalty of \$900 be ASSESSED.

No. 3117438

It is ORDERED that the proposed settlement of \$950 be APPROVED.

ORDER TO PAY

It is further ORDERED that the operator PAY \$1,850 within 30 days from the date of this decision.

A handwritten signature in black ink that reads "Paul Merlin". The signature is fluid and cursive, with the first name "Paul" and last name "Merlin" clearly distinguishable.

Paul Merlin
Chief Administrative Law Judge

Distribution:

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/gl

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JUN 20 1989

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 88-108
Petitioner	:	A.C. No. 16-01031-03507
v.	:	
	:	Dolet Hills Lignite Mine
DOLET HILLS MINING VENTURE,	:	
Respondent	:	

DECISION

Appearances: Anthony G. Parham, Esq., Office of the
Solicitor, U.S. Department of Labor, Dallas,
Texas, for the Petitioner;
Bruce P. Hill, Esq., Sturgis, Kentucky, for the
Respondent.

Before: Judge Koutras

Statement of the Case

This proceeding concerns proposals for assessment of civil penalties filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a), seeking civil penalty assessments in the amount of \$1,000, for two alleged violations of mandatory training standard 30 C.F.R. § 48.28(a). A hearing was held in Shreveport, Louisiana, and the respondent filed a posthearing brief. Although the petitioner did not file a brief, I have considered its oral arguments made on the record during the course of the hearing in my adjudication of this matter.

Issues

The issues presented in this case include the following: (1) whether the respondent violated the cited mandatory training standard; (2) whether the violations resulted from an unwarrantable failure by the respondent to comply with the requirements of the cited standard; and (3) whether or not the

violations were significant and substantial. Assuming the violations are affirmed, the question next presented is the appropriate civil penalties to be assessed pursuant to the penalty criteria found in section 110(i) of the Act. Additional issues raised by the parties are identified and disposed of in the course of this decision.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 301, et seq.
2. Sections 110(a), 110(i), 104(d), and 105(d), of the Act.
3. Commission Rules, 29 C.F.R. § 2700.1, et seq.

Stipulations

The parties stipulated to the following (Tr. 11-13):

1. The respondent operates a surface coal lignite mine, with 83 employees.
2. The respondent's mine produces 2.5 to 2.75 million tons of coal annually, and it is a small-to-medium sized mining operation.
3. Payment of the proposed civil penalty assessments for the violations in question will not adversely affect the respondent's ability to continue in business.
4. The respondent's history of prior violations for the 24-month period prior to the issuance of the violations in this case consists of seven (7) violations, none of which are for violations of the training requirements found in Part 48, Title 30, Code of Federal Regulations.

Discussion

The contested section 104(d)(1) citation and section 104(d)(2) order were issued by MSHA Inspector Donald R. Summers in the course of an inspection which he conducted at the mine on January 19, 1988. In addition to the citation and order, the inspector issued two section 104(g)(1) orders withdrawing the two miners in question from the mine until they received

the required training. These orders were not contested and the petitioner does not seek civil penalty assessments for them. The citation and order in issue are as follows:

Section 104(d)(1) "S&S" Citation No. 2929494, January 19, 1988, cites a violation of mandatory training section 30 C.F.R. § 48.28(a), and the cited condition or practice states as follows:

Harold Mellott, Maintenance Supervisor, was working on the mine, performing supervisor duty at the mine office. Training records show Mr. Mellott received no training since 8-30-85. Discussions with Judy Tate, MSHA training spec. and Dennis Haeuber, Safety & Training instructor (Dolet Hills) had received no annual refresher training or first aid, as outline in the company training plan for supervisors and 77.1706(b). Dennis Haeuber, Company Training Instructor.

A 104(g)(1) order (2929493) has been issued in conjunction with this citation.

Section 104(d)(2) "S&S" Order No. 2929496, January 19, 1988, cites a violation of mandatory training standard 30 C.F.R. § 48.28(a), and the cited condition or practice states as follows:

Randy Rhodes, operation foreman, was working on the mine performing foreman duty. Records show Mr. Rhodes has received no annual refresher training or first-aid since 8-23-85, hire date 7-8-85, first aid training as outline in 30 C.F.R. § 77.1706(b). Mr. Dennis Haeuber, Company Training Instructor.

A 104(g)(1) Order (2929495) has been issued in conjunction with this order.

Petitioner's Testimony and Evidence

Dennis A. Haeuber, respondent's safety training coordinator, testified that he is responsible for the planning and development of the respondent's training program, training compliance, and the conduct of all training.

Mr. Haeuber confirmed that he was present when Inspector Donald Summers conducted an inspection on January 19, 1988, and issued two citations for the failure to provide training for

Mr. Harold Mellott and Mr. Randy Rhodes. Mr. Haeuber confirmed that he advised Mr. Summers that he had not trained these individuals, and he explained that he could provide no training records to indicate that they received 8 hours of formal classroom training for the year 1987. However, Mr. Haeuber believed that these individuals were trained on an informal basis, but received no formal refresher course training for 1986 and 1987 (Tr. 15-19).

Mr. Haeuber stated that his "informal" training of Mr. Mellott and Mr. Rhodes consisted of "frequent conversations dealing with the entire safety and health area of 83 miners." Mr. Haeuber explained that the "informal" training is non-documented and he could produce no notes supporting these conversations (Tr. 19).

Mr. Haeuber stated that subsequent to the issuance of the citations, he has developed a computerized system for recording the training and retraining of all miner's (Tr. 21, exhibit R-8).

Mr. Haeuber stated that during his informal discussions with Mr. Mellott and Mr. Rhodes in 1986 and 1987, they discussed transportation controls and communications systems, escape and emergency evacuation plans, and fire fighting procedures. However, he could recall no dates when these conversations took place, and he confirmed that the conversations lasted from 10 to 15 minutes, to an hour (Tr. 26-31).

Mr. Haeuber confirmed that he could produce no training records to show that Mr. Mellott and Mr. Rhodes received any refresher course training for the years 1986 and 1987, and he confirmed that he advised Mr. Summers that these individuals had not received their annual refresher training (Tr. 32). He also confirmed that MSHA education and training specialist Judy Tate visited the mine on January 15, 1988, and informed him that these individuals had not received their annual refresher training for 1987 (Tr. 33).

Mr. Haeuber stated that he trained other employees with a formal refresher class, and that Mr. Mellott and Mr. Rhodes were scheduled for training on December 21, 1987, but he could not train them because he was sick (Tr. 34). Mr. Haeuber acknowledged that he was aware of the fact that the training was required, but could not explain why the training was not given during the period after he was informed by Ms. Tate that it was required, and prior to the issuance of the violations (Tr. 36).

On cross-examination, Mr. Haeuber confirmed that he was previously employed by MSHA from 1978 through May 1982 as a mine inspector and special investigator, and that he previously served as a safety director for another mining operation prior to his present job with the respondent (Tr. 37).

Mr. Haeuber confirmed that the mine operated 6 days a week in 1987, except for shut down periods in August and December, and that it operated in excess of 250 days that year. He also confirmed that Mr. Mellott and Mr. Rhodes were involved in no accidents or injuries in 1986 or 1987 (Tr. 40).

Mr. Haeuber reviewed a portion of the respondent's training plan which he submitted to MSHA in 1985, and he confirmed that he would speak with maintenance manager Mellott approximately an hour each day, and that 50 percent of the conversation dealt with safety. He also confirmed that Mr. Mellott spent 95 percent of his time in his office and that he spoke with him for more than an hour on the subject of mandatory health and safety standards in each of the years 1986 and 1987, and also spoke with him about transportation controls and communication during those same years (Tr. 43). He further confirmed that he covered each of the subjects shown in the training plan during his conversations with Mr. Mellott (Tr. 51-53).

Mr. Haeuber identified exhibit R-1 as an MSHA training guideline explaining the annual refresher training for certain categories of miners, and he believed that Mr. Mellott occupied an "administrative position" and that he received more than hazard training for the years 1986 and 1987, but had no record of this informal training (Tr. 59-60).

Mr. Haeuber identified exhibit R-8 as an example of his computerized training record keeping which was developed as a result of his "administrative oversight" of 1987 with respect to documenting training records (Tr. 62-64). He confirmed that MSHA's training specialist Judy Tate spent 3 days at the mine in January reviewing training records, and that when she left she told him that "you need to get these people trained" (Tr. 67). Mr. Haeuber further explained his position as follows at (Tr. 68-69):

JUDGE KOUTRAS: So you say when you talked to Ms. Tate you took the position that yes, these people were trained. Did she ask you about Mellott and Rhodes specifically, do you remember?

THE WITNESS: She did not ask about Mellott and Rhodes specifically but as she would go through my training records, they were available to her. I had to show her everything that was in my file, then the point did come out, yes. But there was no paperwork to show training for '87.

JUDGE KOUTRAS: No paperwork to show training for '87 for who?

THE WITNESS: For Mr. Mellott and Mr. Rhodes.

JUDGE KOUTRAS: Mr. Rhodes.

THE WITNESS: And just before she left on Thursday, she indicated that I needed to get those people training, and that was --

JUDGE KOUTRAS: Needed to get them trained, that implies that they weren't trained.

THE WITNESS: Well, I guess that's probably true, Your Honor.

JUDGE KOUTRAS: Did you tell her that they were not trained? Or did she just come to the conclusion that she couldn't find records that they weren't trained.

THE WITNESS: I feel that's -- that's basically what she did, check my records. It shows up that there's no record for '87, and I'm the person --

JUDGE KOUTRAS: She's going to come to the conclusion that they weren't trained.

THE WITNESS: That's right.

JUDGE KOUTRAS: Did you explain to her that these people were trained?

THE WITNESS: No, I did not.

In response to further questions, Mr. Haeuber confirmed that the section 104(g)(1) orders issued by Inspector Summers on January 19, 1988, withdrawing Mr. Mellott and Mr. Rhodes from the mine were not contested by the respondent (Tr. 74). He also confirmed that exhibit R-2 is an MSHA approved training

plan which has been in effect from 1985 to the present (Tr. 75-76).

Mr. Haeuber stated that he had no notes concerning the precise number of hours or occasions that he spent with Mr. Mellott and Mr. Rhodes discussing the safety topics shown on the training plan, and he confirmed that during these discussions he did not inform them that they were part of any refresher training classes, and spent in excess of 30 minutes on each of the safety topics (Tr. 79).

Mr. Haeuber explained Mr. Mellott's duties, and confirmed that he has three maintenance supervisors working directly for him, and that these supervisors are in direct contact with the hourly miners. He also confirmed that Mr. Mellott spends less than an hour a week out of his office and in the mine, and relies on his supervisors (Tr. 82). He confirmed that Mr. Mellott has been a coal miner for over 24 years, and that Mr. Rhodes has been a miner for 4 years and previously served as a construction superintendent and has in excess of 8 years of experience (Tr. 86).

Mr. Haeuber confirmed that both Mr. Mellott and Mr. Rhodes received formal training in 1985 and 1988, but that in 1986 and 1987, he relied on his informal sessions with them in lieu of the 8-hour classroom sessions (Tr. 88). He believed that his informal safety discussions with Mr. Mellott and Mr. Rhodes were as good as the formal classroom training sessions utilizing a "canned training program" (Tr. 89). He confirmed that during an MSHA conference with Inspector Summers' supervisor with respect to the citations, the supervisor took the position that since he could not document the training in question, the citations would stand as written. Mr. Haeuber also confirmed that at the time the citations were issued he said nothing to Mr. Summers about his informal safety discussions with Mr. Mellott and Mr. Rhodes (Tr. 91).

Harold Mellott, respondent's maintenance manager, confirmed that he has been so employed since 1984, and he explained his duties. He also confirmed that he has 25 years of coal mining experience, and has worked in maintenance since 1970. He stated that he established the preventive maintenance program for the mine, and has three maintenance foremen who report to him. In addition to his maintenance duties, he is also responsible for parts purchases, and in 1986 and 1987, he worked 48 to 60 hours a week implementing the preventive maintenance program. Except for spending 2 hours a day in the shop during two 5-day shut down periods for each of these years, he estimated that he devoted 1 hour a day in the actual

work areas where maintenance was being performed. He confirmed that during these years his office was located in the main shop area (Tr. 93-107).

Mr. Mellott testified that he received formal refresher training in 1984 and 1985, and that it lasted 8 hours, or one full day. With regard to any training received in 1986 and 1987, Mr. Mellott stated as follows (Tr. 108-109):

Q. And, during '86 and '87, you didn't receive any formal refresher training, did you?

A. -- wasn't directing any work for us, but I did not, no.

Q. You didn't --

A. Other than Dennis and I have conversations of probably 30 minutes to an hour every day about different things at the mines. And we go on tours at the mines and he'll find something that needs to be done at the mine and he'll come in and discuss it. Maybe go on a trip and look at it.

Q. I'm talking about formal safety refresher class like you had in '85, you didn't have that for '86 and '87, did you?

A. No.

Mr. Mellott agreed that refresher training decreases the likelihood of employee injuries, and while he did not directly supervise the work of his maintenance crews, he does supervise his foremen and is involved in setting up and taking down the drag line. He confirmed that he has built 15 to 16 drag lines in the past, and has had direct supervision over 350 employees and 40 foremen during his years of experience in the mining business (Tr. 114-117).

On cross-examination, Mr. Mellott confirmed that during his past work in dismantling and erecting drag lines, he has never experienced any serious injuries. He also confirmed that he spends 95 percent of his time at his desk in his office, and that his foremen do all of the maintenance follow-up work (Tr. 119). He stated that he speaks with safety director Haeuber daily, and explained further as follows (Tr. 120-121):

Q. When you have your discussions with Dennis, what do you talk about?

A. He may see if fire extinguishers been knocked, see if glass broke out or something that somebody else hasn't seen and he comes to discuss it and we'll get in line to get fixed.

Q. What percent of your time do you spend talking to Dennis during that hour a day that you say you talk with him, what percent of time do you talk to him about safety?

A. Well, sometimes we measure a quick run around of the mine and he may see something down in the pit, down the mine that he wants to go look at so to pinpoint it, that'll be hard to do. But today it may be 30 minutes, tomorrow maybe 45, the next day maybe ten minutes.

Q. Would you say ten percent, 50 percent, 100 percent? What would you say percent of?

A. At least 50 percent of the time is safety when he's with me.

Mr. Mellott referred to the safety topics listed in the training plan (exhibit R-2), and explained how these topics are covered during his discussions with Mr. Haeuber. He confirmed that these discussions take place while they are walking around the mine site looking at various problems, or in their respective offices, and that they are not conducted in a structured classroom environment (Tr. 121-129). He believed that his daily contacts and discussions with Mr. Haeuber "is the best teacher there is," and that he received more out of these discussions than any formalized structured classroom training sessions (Tr. 130). Mr. Mellott confirmed that during his informal discussions with Mr. Haeuber, no reference was ever made to any of the "lesson outlines" referred to in the training plan (Tr. 132). With regard to the subject of first aid, Mr. Mellott confirmed that he received no "practical demonstrations" concerning CPR, and that he is not certified in CPR or first aid (Tr. 139). He also confirmed that during his 1986 and 1987 discussions with Mr. Haeuber, he received no course materials or other documents concerning any of the courses shown in the training plan, and that at no time did Mr. Haeuber inform him that their discussions were a part of any refresher training course (Tr. 141-142).

Randall L. Rhodes, testified that he has been employed by the respondent as a first line operations supervisor for 5 years, and that he supervises 15 to 20 people on alternating day and night shifts. Most of these individuals operate equipment such as coal haulers and bulldozers, and he conducts safety meetings with these individuals on a daily and weekly basis, and he explained his daily work routine. He confirmed that he spends most of his work time driving around the mine site in his pick-up communicating with his employees in various work areas of the mine, and that he spends approximately an hour each day out of his truck walking around on the ground (Tr. 144-149).

Mr. Rhodes confirmed that he received a formal refresher training course in 1985 and 1988, but did not receive any such formal refresher course in the years 1986 or 1987 (Tr. 149-150). He further confirmed that his 1985 and 1988 formal course training included all of the topics shown on the training plan (exhibit R-2). He believed that he received a CPR course in 1986, which included training with a CPR "dummy," but he received no course materials other than MSHA "Fatalgrams" (Tr. 151-156).

On cross-examination, Mr. Rhodes stated that neither he or any of his personnel were involved in any accidents during 1986 and 1987, and he believed that there is nothing to indicate that formal training, as opposed to informal training, made him a more safe or unsafe miner (Tr. 157). He confirmed that he spoke with Mr. Haeuber on a daily basis for 45 minutes to an hour, and that 15 minutes of the conversation was related to safety (Tr. 158). He also confirmed that the conversations covered the topics listed on the training plan (Tr. 159-163). Mr. Rhodes confirmed that he kept no records of the actual time spent discussing safety topics with Mr. Haeuber, but that it was an "every day thing" (Tr. 164-166).

MSHA Inspector Donald R. Summers, testified as to his training and experience, and he confirmed that he visited the mine after his supervisor informed him that MSHA education and training specialist Judy Tate had visited the mine during the week of January 11, 1988, and found that Mr. Mellott and Mr. Rhodes had not received their annual refresher training (Tr. 180). Mr. Summers stated that he spoke to Mr. Haeuber and asked to see the MSHA Training Form 5023 for Mr. Mellott and Mr. Rhodes. Mr. Summers reviewed the forms and found that Mr. Mellott and Mr. Rhodes had not been trained, and he stated that Mr. Haeuber informed him that he had them scheduled for training but was sick and had not retrained them (Tr. 183). Mr. Summers stated further that Mr. Haeuber confirmed to him

that Mrs. Tate had found that Mr. Mellott and Mr. Rhodes had not received the annual refresher training, and that Mr. Haeuber said nothing to him about any informal training for these two individuals (Tr. 184).

Mr. Summers confirmed that after Mr. Haeuber informed him that Mr. Mellott and Mr. Rhodes had not received any annual refresher training and indicated that there were no records of any such training, he informed Mr. Haeuber that he was going to issue a section 104(g)(1) order for the two individuals and a section 104(d)(1) citation (Tr. 184). Mr. Summers explained his reasons for issuing the unwarrantable failure citation, with special "significant and substantial" findings (Tr. 185-187).

Mr. Summers confirmed that after issuing the section 104(d)(1) citation for the violation concerning Mr. Mellott, he issued a section 104(d)(2) order for the violation concerning Mr. Rhodes, and that he did so because it "fell into the criteria" and "the operator knew the condition and didn't correct it" (Tr. 196). Mr. Summers stated that he based his unwarrantable failure order on the fact that Mr. Rhodes had not been trained or retrained since 1985, and that he was scheduled for training on December 21, but that Mr. Haeuber was sick and was unable to give the training (Tr. 197). He explained his "significant and substantial" finding with respect to Mr. Rhodes (Tr. 197-199).

Mr. Summers believed that the respondent's failure to train Mr. Mellott and Mr. Rhodes constituted more than simple negligence for the following reason (Tr. 200):

A. Those two individuals for the past two (sic) had received no formal training. Dennis was aware of this situation, and like I say, made a statement that he had them scheduled but that he was sick. Then Ms. Tate came and checked the records and Dennis told her that he hadn't gave any annual refresher training. On the day that I showed up there was still no record to indicate this. And when I asked Dennis he said, no, I haven't given them the annual refresher training for the reasons I just stated.

Mr. Summers confirmed that his review of the respondent's training records reflected that all other employees classified as miners had received their training except for Mr. Mellott and Mr. Rhodes (Tr. 200-201). He did not believe that the informal discussions between Mr. Haeuber and Mr. Mellott and

Mr. Rhodes during the years 1986 and 1987 constituted a formal training program because it did not comply with the MSHA approved training plan because "they've got to be in 30 minute segments and the individual that this training is given to has to be told that this is a part of your annual refresher training" (Tr. 201). Mr. Summers also believed that the informal discussions did not comply with the cited training standard, and that "if it was some type of formal instruction on a one-on-one basis, I don't see why it wouldn't work just as good" (Tr. 202).

On cross-examination, Mr. Summers confirmed that he had previously inspected the mine 10 to 12 times since it opened in 1984, and he considered the mine conditions to be "average." The number of citations that he has issued during his inspection are "below average," and compared to other mines of comparable size, the mine is "a well run mine" (Tr. 204). He also confirmed the mine has experienced no serious accidents or injuries since his last inspection, and while it has an "average" accident record, it has had some reportable accidents in 1985 and 1986, but he could not state how many (Tr. 204-206).

Mr. Summers stated that he issued a section 104(d)(1) citation on June 13, 1988, for the lack of guardrails on a working platform, and that Mr. Mellott admitted to the violation (Tr. 209). However, he never personally observed Mr. Mellott or Mr. Rhodes working in any unsafe manner, and to his knowledge they have never been injured on the job (Tr. 210). Mr. Summers believed that the lack of training could result in Mr. Mellott or Mr. Rhodes possibly getting themselves in a situation where they would not recognize a hazard (Tr. 212).

Mr. Summers stated that he was instructed by his supervisor to go to the mine and issue the section 104(d) and 104(g) citations and orders "if it met the criteria." He confirmed that the instructions were given before he went to the mine, but that he agreed with the citations and orders. He also confirmed that his supervisor was aware of the fact that Mrs. Tate had been to the mine previously and found that the two individuals had not been trained, and that this was the basis for his supervisor's instructions to go to the mine and issue the citations and orders (Tr. 212-214).

Mr. Summers confirmed that he wrote up the citations and orders at the mine after he had spoken with Mr. Haeuber who confirmed that Mr. Mellott and Mr. Rhodes had received no training and that there were no records of this training (Tr. 215, 217). Mr. Summers reiterated that Mr. Haeuber admitted that he

had not given the two individuals their annual refresher training, and said nothing about any informal training discussions (Tr. 224). Mr. Summers confirmed that he did not review the training plan with Mr. Haeuber (Tr. 225).

Mr. Summers stated that the training plan does not contain any prohibitions concerning the number of people to be trained, but does require that such training be given at the mine office (Tr. 227). He confirmed that the effect of the "G" orders was to require the immediate removal of the cited individuals from the mine until they have received the training prescribed by section 115 of the Act (Tr. 231).

Mr. Summers conceded that he could have issued section 104(a) citations rather than unwarrantable failure violations, but that he did not do so because he knew that Mrs. Tate had been at the mine the week before and he expected Mr. Haeuber to insure that the two individuals were trained (Tr. 247-249). He further explained as follows (Tr. 251):

Q. So, what constitutes this significant and substantial and the aggravated conduct on the operator from the one week that Ms. Tate was there to the following week to when you issued these G's and the D's.

A. The operator had full knowledge of what was going on at the particular time, and didn't take any corrective action to abate or correct this situation. He knew the training of those two individuals had not been -- had not received their annual refresher training, and he did not make any effort to train those individuals up to the first --

Mr. Summers confirmed that Mrs. Tate did not issue any citations because she is not an inspector (Tr. 257). He also reconfirmed his view that the failure by Mr. Mellott and Mr. Rhodes to receive training for 2 years constitutes significant and substantial violations, and the fact that they have had no accidents during this time period makes no difference since the failure to receive the training constitutes a hazard for those individuals (Tr. 259).

Mr. Summers confirmed that the training standards contain exceptions for mine supervisors who are State certified in those states approved by MSHA, but that this exception does not apply to Louisiana because it has no such certification authority (Tr. 266). He also confirmed that Mr. Haeuber conducted

the requisite training to abate the violations and filled out the required forms (Tr. 267).

Mr. Summers confirmed that Mr. Haeuber produced an MSHA training Form 5023 for Mr. Mellott and Mr. Rhodes at the time he inspected the records, but that the last entry only reflected training up to 1985. The forms for all other employees were current and reflected current training. When asked why the forms for Mr. Mellott and Mr. Rhodes were not up to date, Mr. Summers responded as follows (Tr. 269):

THE WITNESS: I think it was an oversight up until the end of the year was rolling around and time caught them. They were going to get it -- like Dennis had testified in December the 21st, Dennis was sick. This is the problem of waiting until the last minute to get the job done.

Findings and Conclusions

Fact of Violation

The respondent is charged with two alleged violations of mandatory training standard 30 C.F.R. § 48.28(a), which states that "Each miner shall receive a minimum of 8 hours of annual refresher training as prescribed in this section."

Subsection (b) provides that the annual refresher training shall include the following ten subjects:

1. Mandatory health and safety standards.
2. Transportation controls and communication systems.
3. Escape and emergency evacuation plans; firewarning and firefighting.
4. Ground control; working in areas of highwalls, water hazards, pits, and spoil banks; illumination and night work.
5. First aid.
6. Electrical hazards.
7. Prevention of accidents.
8. Health.

9. Explosives.
10. Self-rescue and respiratory devices.
11. Such other courses as may be required by the District Manager based on circumstances and conditions at the mine.

Subsection (d) states that "Where annual refresher training is conducted periodically, such sessions shall not be less than 30 minutes of actual instruction time and the miners shall be notified that the session is part of annual refresher training."

Section 48.23 requires that each mine operator have an MSHA approved training plan containing programs for annual refresher training, and the detailed requirements for such plans are found in this regulation. In the instant case, the respondent's approved training plan for annual refresher training is exhibit R-2, submitted by Mr. Haeuber in his capacity as the mine safety and training coordinator to Mrs. Tate by cover letter dated February 20, 1985. Except for the subject of "explosives," the plan provides for subject matter training for each of the remaining nine subjects listed in section 48.28(b)(1) through (10). Pursuant to the approved plan, Mr. Haeuber is listed as the approved training instructor, training is to be given in February in the mine office, and the duration of each training session is shown as "no longer than 8 hrs. 15 min." The course materials to be used for training are set forth in the plan, and the teaching methods are shown as "lecture and discussion." The subjects of first aid, electrical hazards, and self-rescue and respiratory devices include a "demonstration" requirements, in addition to lectures and discussions. Under the plan, maximum number of trainees at any training session is 20, and a "question and answer" evaluation is shown for each of the subjects covered during the training sessions.

I take note of the fact that in the answers filed by the respondent in this case by Mr. Haeuber and Mr. Richard F. Grady, Jr., respondent's general manager, they stated that "Management of the Dolet Hills Mining Venture does not deny that two training violations did exist at the time of the January 19, 1988, inspection." However, they took the position that the violations were "administrative in nature" and contended that each of the cited individuals had received the required training, but that the training had not been documented. They further stated that although the respondent

admits that violations occurred, they occurred only from "an administrative, bookkeeping perspective," and the thrust of their defense is the contention that the violations were not unwarrantable failure or significant and substantial violations.

During the course of the hearing, petitioner's counsel took the position that the respondent is bound by its pleadings and the admission in its answer that the violations occurred as charged. After careful review and consideration of the answer, while it is true that the respondent did not deny the violations, it seems clear to me that the respondent's admissions are qualified and less than unequivocal. The respondent contended that the two cited miners did in fact receive the requisite training, but that it failed to document the training through an "administrative or bookkeeping" oversight. In any event, my findings and conclusions with respect to the merits of the alleged violations are based on the credible and probative evidence presented at the hearing, rather than the respondent's answers (Tr. 49-51).

The respondent's assertion that the two cited individuals received the required training is based on the argument that MSHA's training regulations, and the approved training plan for the mine, do not require that the training be administered in a formal classroom setting or in accordance with any formalized or structured course curriculum (Tr. 44-49). The respondent maintains that under its plan, Mr. Haeuber, as the approved training instructor, has total flexibility as to the manner in which formal or informal training is conducted as long as no more than the maximum number of employees are in attendance, the class is held in the specified location and is taught by a certified instructor, and the training plan is followed. In support of its position, the respondent contends that the discussions which took place between Mr. Haeuber and Mr. Mellott and Mr. Rhodes during their daily contacts at the mine throughout 1986 and 1987, included discussions of each of the safety and health subjects listed in the mine training plan, and in fact constituted the annual refresher training required by section 48.28(a) and the approved training plan (Tr. 54). The respondent further relies on the belief by Mr. Mellott and Mr. Rhodes that these "on the job" discussions proved to be more effective than any formalized classroom instruction, and that the respondent's accident and injury record attests to this fact.

The petitioner takes the position that the respondent is required to adhere to the requirements of its approved training plan for annual refresher training and must insure that each

miner receives the formalized classroom instruction for all topics listed in the plan. Although the petitioner's counsel agreed that MSHA's training regulations do not specifically provide for "formal" or "informal" training instruction, he stated that the intent of the annual refresher training requirement is that the respondent follow its approved plan. Inspector Summers' view is that the respondent must follow its approved training plan, and he characterized the plan as a "formal" training plan that required structured course training in a class room environment, including the demonstrations, course materials, and "question and answer" sessions detailed in the plan. He did not believe that the informal discussions in question met the requirements of the plan or MSHA's regulations (Tr. 218-223).

Mr. Haeuber conceded that Mr. Mellott and Mr. Rhodes received no formal annual refresher training for the years 1986 and 1987 through the formal administration of any of the safety courses shown on the respondent's approved training plan, and he confirmed that he advised Inspector Summers that these individuals had not received any annual refresher training at the time of his inspection. Mr. Haeuber further confirmed that all other employees received formal annual refresher training classes, but that he could not train Mr. Mellott and Mr. Rhodes as scheduled because he was ill. Mr. Haeuber took the position that both Mr. Mellott and Mr. Rhodes were trained informally by means of daily discussions in which each of the safety topics listed in the mine training plan were discussed, and that this informal training was in lieu of formal classroom instruction and met the requirements of MSHA's regulations and the plan. Although Mr. Haeuber testified as to the time spent on each of the subjects discussed, he could not document the precise time, and he kept no records. Further, he conceded that during his discussions with Mr. Mellott or Mr. Rhodes, he never informed them that these discussions were a part of any annual refresher training courses, and he admitted that at the time the citations were issued, he did not inform Inspector Summers about his informal safety discussions.

Mr. Mellott confirmed that he received his annual formal refresher training for the years 1984 and 1985, and that this training consisted of 8 hours, or one full day of training, in each of the 2 years. He further confirmed that for the years 1986 and 1987, he received no formal refresher classroom training similar to that he received in the prior 2 years, and that he and Mr. Haeuber had daily discussions for approximately 30 minutes to an hour each day either in their offices or while walking around the mine site looking into various "problems."

In explaining his discussions with Mr. Haeuber, Mr. Mellott alluded to the fact that they discussed equipment which was causing problems, such as dust and dirt in welders, shop ventilation, brake problems with haulage equipment, radios, fire extinguishers in need of repair, trash clean-up, emergency exit signs over doors, occasional employee injuries, extension cords in need of repair, electrical problems, and accident prevention (Tr. 121-129). However, Mr. Mellott conceded that he never received any practical demonstrations concerning first aid, or any course materials or other documents concerning any of the subjects listed in the training plan, and that Mr. Haeuber never informed him that any of their discussions were a part of any annual refresher training.

Mr. Rhodes also confirmed that he received formal annual refresher training in 1985 and 1988, but not in 1986 or 1987. Although he believed he received a CPR course in 1986, including training with a CPR "dummy," he received no classroom training materials, and in 1987 received no first aid classroom demonstrations, but did receive information on first aid during his weekly safety meetings. He also confirmed that during the years 1986 and 1987 he received no course materials for any of the safety topics listed on the training plan other than MSHA fatal-grams.

Mr. Rhodes confirmed that he spoke with Mr. Haeuber on a daily basis for an hour or 45 minutes, and that 15 minutes of the conversation was related to safety. He kept no records of these conversations, or the actual time spent in discussing safety, and confirmed that at no time during these conversations during the years 1986 or 1987, did Mr. Haeuber ever indicate to him that their discussions fulfilled the requirements of the annual refresher training courses.

Mr. Rhodes confirmed that he and Mr. Haeuber covered all of the topics listed on the training plan during their safety discussions, and as examples he cited the fact that transportation controls and communications systems were "brought up every day," that employees were continually reminded about escape-ways, emergency evacuations, fire warnings and fire fighting, and that ground control, working near high walls, and water hazards was discussed on a daily basis. He also alluded to the fact that when electrical problems occur, "you go over safety precautions," and that accident prevention is discussed daily through a safety awareness program, and signs and slogans are posted to remind employees about accident prevention (Tr. 159-161). Mr. Rhodes also confirmed that he regularly consulted with Mr. Haeuber on all of these matters, including

preparation for weekly safety meetings covering the topics listed on the training plan (Tr. 162).

After careful consideration of the respondent's arguments, they are rejected. I conclude and find that the respondent is bound by its own MSHA approved training plan, and must follow it to the letter. I find nothing in the plan that allows the respondent to use daily informal conversations between an approved training instructor and miners required to receive annual refresher training in lieu of the formalized and structured training program found in the plan. Although I do not dispute the fact that Mr. Haeuber, Mr. Mellott, and Mr. Rhodes may have discussed various and sundry "safety matters" during the course of their daily routines, such conversations obviously taken place every day in a mine and I reject any notion that they may be used in lieu of the approved plan.

The record here reflects that Mr. Mellott and Mr. Rhodes received annual refresher training in 1984 and 1985, and that this training was administered in a class room environment which was completed in the course of 8 hour days. Exhibit R-8, a computerized print-out reflecting training administered to other miners at the mine during intermittent periods from 1985 to 1988, reflects training received by miners in concentrated hourly sessions held on the specific dates shown on the training records. Further, the record also establishes that except for Mr. Mellott and Mr. Rhodes, the respondent had trained all other miners in accordance with MSHA's requirements and had records which it produced for MSHA's scrutiny. Thus, it would appear to me that with the exception of Mr. Mellott and Mr. Rhodes, the respondent's normal training procedures and practices included formalized and structured training sessions administered on specific days set aside for these purposes. I find nothing in the record to even suggest that the respondent has ever advanced any argument that daily conversations among miners and a training instructor or safety director were deemed by the respondent to be adequate to satisfy MSHA's training requirements.

Mr. Haeuber conceded that he did not administer any formalized or structured training to Mr. Mellott or Mr. Rhodes during 1986 and 1987, and they candidly admitted that they received no such formalized training. The evidence clearly establishes that the purported training received by these individuals did not include the use of any of the course materials detailed in the plan, did not include any evaluation sessions or practical demonstrations, and I find nothing to suggest that Mr. Haeuber utilized the lecture training method required by the plan in the course of his discussions with Mr. Mellott and Mr. Rhodes.

The evidence also establishes that Mr. Haeuber never informed Mr. Rhodes and Mr. Mellott that their conversations were part of any refresher training sessions, and both of these individuals confirmed that they were never informed that they were receiving their annual refresher training during any of these conversations. Subsection (d) of section 48.28 requires that miners receiving training during any periodic sessions be notified that such sessions are part of their annual refresher training. Section 48.29 requires that all training be recorded and documented on MSHA form 500-23, and that the miner be given a copy of a training certificate. None of this was done in this case.

During the course of the hearing, respondent's counsel suggested that Mr. Mellott, in his capacity as the respondent's maintenance manager, was an "administrative type" who spent 95 percent of his time in his office, and was therefore not regularly exposed to mine hazards. Under these circumstances, counsel argued that Mr. Mellott is excluded from the requirements for annual refresher training (Tr. 55-59). Counsel also argued that even assuming that Mr. Mellott were required to receive training, he would only be required to have hazard recognition training (Tr. 60-61). In support of his arguments, counsel produced a copy of a portion of an undated MSHA Training Guideline, containing the following "Question and Answer" (exhibit R-1):

Question

For training purposes, are mine superintendents (not certified by the state), president, general manager, etc., considered miners?

Answer

Anyone working on mine property is considered a miner for training purposes. The amount of training a miner receives depends on his exposure to the mining hazards. If the President of the company came only to the office, there is probably no exposure, and he would not be required to take any training. If he goes into a mine occasionally he is probably exposed to the mining hazard in a limited way and is required to receive hazard training. If he works along side with other miners, he is subject to full training.

The definition of a "miner" required to receive annual refresher training is stated in relevant part as follows in section 48.22:

[A]ny person working in a surface mine or surface areas of an underground mine and who is engaged in the extraction and production process, or who is regularly exposed to mine hazards

Supervisory personnel subject to MSHA approved state certification requirements are excluded from the definition of a miner required to receive annual refresher training (48.22(a)(1)(ii)). Subsection 48.22(a)(2), also excludes such supervisory personnel from the hazard training requirements of section 48.31, as well as miners covered under section 48.22(a)(1).

The record establishes that Mr. Mellott is responsible for the maintenance activities at the mine. Although his testimony reflects that he spends most of his time in the office, he confirmed that he regularly and routinely spends at least an hour each day in the actual work areas where maintenance is being performed. He also confirmed that he tours the mine when problems arise, is responsible for the direct supervision of at least three maintenance foremen, including involvement with the erection and dismantling of the drag line. Under these circumstances, I conclude and find that Mr. Mellott's duties are directly connected with the mine extraction and production process, and that his daily visits to the mine maintenance work areas constitutes a regular exposure to mine hazards. Further, the fact that he received annual refresher training in years prior to the time the violations here were issued while serving in his capacity as the maintenance manager raises a strong inference that the respondent has never taken the position that he was excluded from the annual refresher training requirements. Under all of these circumstances, I conclude and find that Mr. Mellott is not excluded from these requirements, and the respondent's argument to the contrary is rejected.

Insofar as Mr. Rhodes is concerned, the evidence reflects that as a first line operations supervisor he is directly involved in the supervision of the work of 15 to 20 miners engaged in the operation of coal haulers and bulldozers, and is in daily contact with these miners and their work while driving around the mine in his pick-up truck. The fact that he may spend only 1 hour a day out of his truck walking around on the ground is irrelevant. He is directly engaged in the mine extraction and production process, and he is regularly exposed

to mine hazards. Accordingly, I conclude and find that he is not excluded from the annual refresher training requirements.

With respect to the training exclusion for supervisory personnel subject to MSHA State certification requirements, Mr. Mellott and Mr. Rhodes do not qualify for this exception because the State of Louisiana where they are employed does not have MSHA approval for any such state certifications.

In view of the foregoing findings and conclusions, I conclude and find that the preponderance of the evidence adduced in this case establishes that Mr. Mellott and Mr. Rhodes were subject to the annual refresher training requirements of the cited section 48.28(a), and that they failed to receive such training for the years 1986 and 1987. Accordingly, the violations issued by Inspector Summers ARE AFFIRMED.

The Section 104(g)(1) Order Issue

The record in this case reflects that after determining that Mr. Mellott and Mr. Rhodes had not received the requisite annual refresher training, Inspector Summers issued two section 104(g)(1) orders requiring their withdrawal from the mine until they were trained. These orders were not contested by the respondent, and they are not the subject of the instant civil penalty proceeding.

The respondent argues that since Mr. Mellott and Mr. Rhodes were withdrawn from the mine pursuant to section 104(g)(1), and since the withdrawal sanction provided for by this section specifically addresses a training violation, any sanctions imposed by MSHA for this violation is limited to the issuance of the order. Respondent suggests that once the withdrawal orders were issued, compliance was achieved by the withdrawal of Mr. Mellott and Mr. Rhodes until they were trained, and that the concurrent issuance of the section 104(d)(1) citation and order charging it with the violations of the identical training standard which formed the basis for the section 104(g)(1) withdrawal orders was unauthorized and illegal.

Respondent argues that section 104(g)(1) does not authorize the issuance of any additional citations or orders for training violations, and that by issuing the section 104(d)(1) citation and order, it has been "double barreled" and subjected to "double jeopardy." The respondent points out that with the exception of an imminent danger order issued pursuant to section 107(a) of the Act, MSHA does not "piggyback" citations or orders, and that in this case, the section 104(d)(1) citation and order were not issued in conjunction with the

section 104(g)(1) order, but were issued for the identical condition.

During the course of the hearing, respondent's counsel asserted that since a miner who is withdrawn for lack of training is deemed to be an immediate hazard to himself and to his fellow miners, this is somewhat akin to an imminent danger situation, and there is a suggestion that since untrained miners pose an imminent danger, a section 104(d)(1) citation or order cannot be issued because the finding of no imminent danger is a prerequisite to the issuance of such citations and orders (Tr. 231-235). I find no merit to this argument, and it is rejected. Respondent's counsel also alluded to the fact that MSHA's policy of issuing citations and orders in conjunction with section 104(g)(1) orders "has been done away with" and that its "new policy" does not address this issue (Tr. 235). However, counsel has presented no further arguments or evidence with respect to this asserted policy, and none has been forthcoming in his posthearing brief.

The respondent's arguments are rejected. I find nothing illegal or procedurally defective in the action taken by the inspector in this case. The record reflects that the issuance of the section 104(d)(1) citation and order complied with the procedural requirements of the Act with respect to the issuance of such citations and orders. MSHA's training standards are duly promulgated mandatory standards under the Act, and violations of these standards are subject to the citation sanctions provided for in sections 104(a) and (d)(1) and (d)(2) of the Act, as well as the civil penalty assessment sanctions provided for in section 110(a). As noted above, the petitioner is seeking civil penalty assessments for the violations noted in the section 104(d)(1) order and citation, and not the section 104(g)(1) order.

The Unwarrantable Failure Issue

The governing definition of unwarrantable failure was explained in Zeigler Coal Company, 7 IBMA 280 (1977), decided under the 1969 Act, and it held in pertinent part as follows at 295-96:

In light of the foregoing, we hold that an 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.

In several recent decisions concerning the interpretation and application of the term "unwarrantable failure," the Commission further refined and explained this term, and concluded that it means "aggravated conduct, constituting more than ordinary negligence, by a mine operator in relation to a violation of the Act." Emery Mining Corporation, 9 FMSHRC 1997 (December 1987); Youghiogheny & Ohio Coal Company, 9 FMSHRC 2007 (December 1987); Secretary of Labor v. Rushton Mining Company, 10 FMSHRC 249 (March 1988). Referring to its prior holding in the Emery Mining case, the Commission stated as follows in Youghiogheny & Ohio, at 9 FMSHRC 2010:

We stated that whereas negligence is conduct that is "inadvertent," "thoughtless" or "inattentive," unwarrantable conduct is conduct that is described as "not justifiable" or "inexcusable." Only by construing unwarrantable failure by a mine operator as aggravated conduct constituting more than ordinary negligence, do unwarrantable failure sanctions assume their intended distinct place in the Act's enforcement scheme.

In Emery Mining, the Commission explained the meaning of the phrase "unwarrantable failure" as follows at 9 FMSHRC 2001:

We first determine the ordinary meaning of the phrase "unwarrantable failure." "Unwarrantable" is defined as "not justifiable" or "inexcusable." "Failure" is defined as "neglect of an assigned, expected, or appropriate action." Webster's Third New International Dictionary (Unabridged) 2514, 814 (1971) ("Webster's"). Comparatively, negligence is the failure to use such care as a reasonably prudent and careful person would use and is characterized by "inadvertence," "thoughtlessness," and "inattention." Black's Law Dictionary 930-31 (5th ed. 1979). Conduct that is not justifiable and inexcusable is the result of more than inadvertence, thoughtlessness, or inattention. * * *

Respondent's argument that its negligence is found in the lack of adequate record keeping, which it claims was inadvertent, is not well taken. The respondent is not charged with a violation of the record keeping requirements of MSHA's training regulations. It is charged with the failure to give refresher training to two individuals for two successive years, and I have rejected its assertion that the "discussion and conversation" training satisfied the requirements of the cited training standard. Therefore, the issue presented is whether or not the respondent's failure to train Mr. Mellott and Mr. Rhodes constituted aggravated conduct exceeding ordinary negligence.

Inspector Summers testified that he based his unwarrantable failure findings on the fact that Mr. Mellott and Mr. Rhodes had received no annual refresher training for a period of 2 years and 5 months. Mr. Summers considered Mr. Haeuber's admissions that he knew that these two individuals had not received any formal training during this time period, and the fact that after Mrs. Tate visited the mine and informed Mr. Haeuber that these individuals had not been trained, Mr. Haeuber took no immediate action to insure that they received the training (Tr. 194-197). Mr. Summers also considered the fact that other employees, including Mr. Mellott and Mr. Rhodes, had previously received formal training, and this obviously led him to further conclude that Mr. Haeuber was well aware of the requirements for such formal training.

Mr. Haeuber confirmed that Mrs. Tate had visited the mine on January 15, 1988, and informed him that Mr. Mellott and Mr. Rhodes had not received their annual refresher training. The only explanation he could offer for not training them previous to this time was his assertion that they were scheduled for such training on December 21, 1987, but that he could not train them because he was ill. Mr. Haeuber acknowledged that he had trained other employees through refresher training classes, and that he was aware of the fact that such training was required. When asked why he had not trained Mr. Mellott and Mr. Rhodes after he was advised by Mrs. Tate that they had not received such training, Mr. Haeuber responded "I can't answer that. I don't know" (Tr. 36). He also acknowledged that he said nothing to Mrs. Tate about taking care of the training for Mr. Mellott and Mr. Rhodes (Tr. 37).

The record reflects that Mr. Haeuber was formerly employed by MSHA as a mine inspector and special investigator from 1978 to 1982, and that he was previously employed as a safety director for another mining company prior to his employment with the respondent. His current duties include the planning and development of all training at the mine, including the

conduct of such training, and the responsibility of insuring compliance with MSHA's training requirements. In view of Mr. Haeuber's background, I doubt that he really believed that his informal discussions and conversations with Mr. Mellott and Mr. Rhodes satisfied MSHA's training requirements. If this were truly the case, anyone in his position would have offered some explanation to Mrs. Tate and to the inspector.

I conclude and find that Mr. Haeuber was well aware of the requirements for formalized training of all employees, and that he was aware of the fact that Mr. Mellott and Mr. Rhodes had not received such training for over 2 years. Although one may excuse and mitigate Mr. Haeuber's failure to train Mr. Mellott and Mr. Rhodes when he was ill, I find nothing to mitigate or excuse his failure to take immediate measures to properly train them after he was notified by Mrs. Tate that such training was lacking. Under the circumstances, I conclude and find that his failure to do so constitutes aggravated conduct supporting the unwarrantable failure findings made by the inspector. Accordingly, those findings ARE AFFIRMED.

Significant and Substantial Violations

A "significant and substantial" violation is described in section 104(d)(1) of the Mine Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 C.F.R. § 814(d)(1). A violation is properly designated significant and substantial "if, based upon the particular facts surrounding the violation there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (April 1981).

In Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984), the Commission explained its interpretation of the term "significant and substantial" as follows:

In order to establish that a violation of a mandatory safety standard is significant and substantial under National Gypsum the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard--that is, a measure of danger to safety-contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury

in question will be of a reasonably serious nature.

In United States Steel Mining Company, Inc., 7 FMSHRC 1125, 1129, the Commission stated further as follows:

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

The question of whether any particular violation is significant and substantial must be based on the particular facts surrounding the violation, including the nature of the mine involved, Secretary of Labor v. Texasgulf, Inc., 10 FMSHRC 498 (April 1988); Youghiogheny & Ohio Coal Company, 9 FMSHRC 2007 (December 1987).

During the course of the hearing, respondent's counsel took the position that a significant and substantial violation finding is a prerequisite to the issuance of a section 104(d)(1) citation and order (Tr. 253). In Youghiogheny & Ohio Coal Company, 10 FMSHRC 603 (May 1988), the Commission, citing UMWA v. Kleppe, 532 F.2d 1403 (D.C. Cir. 1976), cert denied sub nom. Bituminous Coal Operator's Assn., Inc. v. Kleppe, 429 U.S. 1405, held that while a significant and substantial finding is a prerequisite for the issuance of a section 104(d)(1) citation, there is no such requirement for the issuance of a section 104(d)(1) order.

The respondent takes the position that the violations were not significant and substantial because the informal training received by Mr. Mellott and Mr. Rhodes was better and more effective than that found in the formal training plan, that the individuals in question had never suffered any injuries, and that the mine accident record attests to the effectiveness of the informal training received by them. The respondent further argues that Mrs. Tate obviously did not believe that it was reasonably likely that an accident would occur since she failed

to contact her supervisor who would have issued a verbal order over the telephone, and MSHA let a week go by before dispatching Inspector Summers to the mine. The respondent also points to the admission by Mr. Summers that the "possibility" of serious injuries flowing from a lack of training does not equate to "reasonably likely" (Tr. 211-212).

With regard to Mrs. Tate, the fact that she took no enforcement action is irrelevant. Mrs. Tate was not authorized to take any direct enforcement action through the issuance of violations, and she obviously reported the lack of training to MSHA's district office. Inspector Summers confirmed that this was the case (Tr. 214). He also confirmed that the fact that Mr. Mellott and Mr. Rhodes have never personally been involved in any accidents would make no difference as to whether or not the violations were significant and substantial (Tr. 259).

Inspector Summer's confirmed that the mine has had MSHA reportable accidents in 1985 and 1986 (Tr. 206). He believed that the failure to train Mr. Mellott and Mr. Rhodes presented the possibility that they would overlook or not recognize hazardous situations (Tr. 211-212). Mr. Summers confirmed that during his prior mine inspections, he seldom observed Mr. Mellott in his office, and he usually observed him in the maintenance shop area (Tr. 207). He also testified that he has observed Mr. Mellott in situations where individuals around him were working in an unsafe manner, and that he discussed this with Mr. Mellott and has issued citations and orders in these instances (Tr. 207). Mr. Summers confirmed that he issued a section 104(d)(1) citation involving the maintenance of a piece of equipment that Mr. Mellott was responsible for, and that this occurred on June 13, 1988, when he cited a violation for a work platform which did not have handrails. Mr. Summers further confirmed that after discussing this with Mr. Mellott, he admitted that miners were working on the platform without hand rails (Tr. 208-209).

Inspector Summers also testified with respect to an accident which occurred at the mine when a miner lost part of his finger while using a paint gun sometime in 1986. Mr. Summers explained that the miner sustained nerve damage to his finger by the paint which was injected into his finger, and he believed that annual refresher training would have presented an opportunity to discuss this incident and to alert miners about the hazards of using such equipment (Tr. 259-262).

Inspector Summers believed that Mr. Mellott would be exposed to various hazards in the pit, and along the drag line and belt line. He confirmed that during prior inspections, he

has observed Mr. Mellott near the equipment and work areas, and he believed that he would be exposed to the same hazards as other miners in those mining areas. Mr. Summers emphasized the fact that the failure by Mr. Mellott to receive refresher training since 1985 constituted a hazard to himself, and that his failure to receive such training would result in the likelihood that he would overlook or not be aware of hazardous conditions or situations without taking corrective action (Tr. 186-187).

With regard to Mr. Rhodes, Inspector Summers believed that his lack of training since 1985 was in itself a hazard, and that training was essential to "refresh his memory on the hazards that he's possibly overlooking out in the mine itself" (Tr. 197). Mr. Summers also alluded to the fact that in his experience as a mine inspector, case histories have established that annual refresher training, or the lack thereof, is directly related to the cause and prevention of accidents (Tr. 198-199). Mr. Summers pointed out that Mr. Rhodes works in the pits and highwall areas around heavy equipment, and is in contact with coal haulers and other heavy equipment during his work throughout the mine. Should an accident occur, Mr. Rhodes would be exposed to an injury which "could very well be fatal" (Tr. 199).

Unlike other mandatory safety and health standards covering specific mine conditions and potential hazards which are for the most part readily recognizable, and which are intended to promote mine safety by requiring compliance with a specific standard, MSHA's overall training requirements are intended to promote safety by providing a means for training miners through training classes covering many safety and health subjects. The requirements for training new miners are intended to train miners who have no prior mining experience. Newly employed experienced miners are trained so that they may be familiar with a new work environment which may be different from their last place of employment. Task training is provided to train miners who are required to operate equipment or perform job tasks for which they have had no prior experience. Annual refresher training is intended to provide a means for experienced miners to keep informed and to be always aware of the work hazards incident to their work.

I take note of the fact that in enacting the section 104(g)(1) withdrawal provision for miners who have not received the requisite training, Congress declared that such miners are hazards to themselves as well as others. In this case, the inspector's credible testimony establishes that Mr. Mellott and Mr. Rhodes are exposed to potential mine hazards on a daily basis, and I conclude and find that their failure to receive

the requisite annual refresher training is in itself a hazard. As the overall manager for mine maintenance, and aside from his own safety, Mr. Mellott is under a duty and obligation to be alert for mine hazards affecting those who work in his department. Likewise, Mr. Rhodes, as a first line operations supervisor, has a duty and obligation for the safety of his work crews. Their failure to receive the requisite training is a poor example for the rank and file miners, and does little to promote mine safety. Given the fact that mine conditions change from day to day, I find merit in the inspector's belief that the lack of such training may lead to complacency, or the overlooking of otherwise routine situations that may be potentially hazardous, not only to the two individuals in question, but to others. On the facts of this case, the hazard is exacerbated by the fact that Mr. Mellott and Mr. Rhodes failed to receive the requisite refresher training for a period in excess of 2 years. Under all of these circumstances, I agree with the inspector's findings that the failure by Mr. Mellott and Mr. Rhodes to receive their annual refresher training over an extended period of time presented a reasonable and potential likelihood of an accident or injury of a reasonable serious nature. Accordingly, the inspector's significant and substantial findings ARE AFFIRMED.

On the basis of the foregoing findings and conclusions, section 104(d)(1) Citation No. 2929494, and section 104(d)(1) Order No. 2929496, both issued on January 19, 1988, for violations of the annual refresher training requirements of 30 C.F.R. § 48.28(a), ARE AFFIRMED.

Size of Business and Effect of Civil Penalty Assessment on the Respondent's Ability to Continue in Business

The parties have stipulated that the respondent is a small-to-medium size surface mine operator, and that the civil penalty assessments for the violations in question will not adversely affect the respondent's ability to continue in business. I adopt these stipulations as my findings and conclusions on these issues.

History of Prior Violations

The parties have stipulated that the respondent's history of prior violations for the 24-month period prior to the issuance of the contested violations in this case consists of seven citations, none of which are for violations of the training requirements found in Part 48, Title 30, Code of Federal Regulations. Under the circumstances, I conclude and find that the respondent has an otherwise good compliance

record and that additional increases in the proposed civil penalty assessments are not warranted.

Good Faith Compliance

The record supports a finding and conclusion that Mr. Mellott and Mr. Rhodes were immediately trained after they were withdrawn from the mine, and that the violations were timely abated by the respondent in good faith.

Gravity

In light of my significant and substantial findings, I conclude and find that the failure by Mr. Mellott and Mr. Rhodes to receive their annual refresher training constitutes serious violations of the cited training standard.

Negligence

The inspector concluded that the violations resulted from a high degree of negligence on the part of the respondent and were the result of an unwarrantable failure by the respondent to comply with the training requirements of the cited standard. I agree with these findings and they are affirmed.


Civil Penalty Assessments

On the basis of the foregoing findings and conclusions, and taking into account the requirements of section 110(i) of the Act, I conclude and find that the following proposed civil penalty assessments filed by the petitioner for the violations in question are reasonable and appropriate:

<u>Citation/Order No.</u>	<u>Date</u>	<u>30 C.F.R. Section</u>	<u>Assessment</u>
2929494	01/19/88	48.28(a)	\$ 500
2929496	01/19/88	48.28(a)	\$ 500

ORDER

The respondent IS ORDERED to pay civil penalty assessments in the amounts shown above within thirty (30) days of the date of this decision. Upon receipt of payment by the petitioner, this matter is dismissed.


George A. Koutras
Administrative Law Judge

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/fb

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JUN 20 1989

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 88-104
Petitioner	:	A.C. No. 15-16245-03501
v.	:	
	:	Docket No. KENT 88-159
S H M COAL COMPANY,	:	A.C. No. 15-16245-03502
Respondent	:	
	:	No. 1 Surface Mine

DECISIONS

Appearances: Mary Sue Ray, Esq., Office of the Solicitor,
U.S. Department of Labor, Nashville, Tennessee,
for the Petitioner;
John T. Aubrey, Esq., Aubrey and Bowling,
Manchester, Kentucky, for the Respondent.

Before: Judge Koutras

Statement of the Proceedings

These proceedings concern proposals for assessment of civil penalties filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a). In Docket No. KENT 88-159, the petitioner seeks a civil penalty assessment in the amount of \$400, for an alleged violation of mandatory new miner training standard 30 C.F.R. § 48.25(a). In Docket No. KENT 88-104, the petitioner seeks a civil penalty assessment of \$20, for an alleged violation of mandatory Notification of Legal Identity standard 30 C.F.R. § 41.10, and a civil penalty assessment of \$195 for an alleged violation of mandatory training standard 30 C.F.R. § 48.23(a)(3), for failing to file a mine training plan.

The respondent filed timely answers denying and contesting the alleged violations, and it denied that it was operating a coal mine subject to the jurisdiction of the Act at the time the citations were issued. A hearing was held in London, Kentucky, and the parties were afforded an opportunity to file

posthearing briefs. The petitioner filed a brief, but the respondent did not. In addition to the briefs, I have considered all of the oral argument made by the parties during the hearing in my adjudication of these matters.

Issues

The principal issues presented in these proceedings is whether the respondent's alleged coal mining operation constitutes mining as defined by the Act, whether the alleged mining activity involved interstate commerce, and whether the respondents, as independent contractors, are accountable for the alleged mining activity conducted on the land owned by someone else, and whether they are chargeable for the owner's intent to extract such coal.

Assuming it is found that the respondent was engaged in coal mining as defined by the Act, the next issue presented is (1) whether the respondent has violated the provisions of the Act and implementing regulations as alleged in the proposals for assessment of civil penalties, and, if so, (2) the appropriate civil penalties that should be assessed against the respondent for the alleged violations based upon the criteria set forth in section 110(i) of the Act. Additional issues raised by the parties are identified and disposed of in the course of these decisions.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, Pub. L. 95-164, 30 U.S.C. § 801 et seq.
2. Section 110(i) of the 1977 Act, 30 U.S.C. § 820(i).
3. Commission Rules, 20 C.F.R. § 2700.1 et seq.

Stipulations

The parties stipulated that on October 27, 1987, Mr. Eugene Mills purchased a case of dynamite from Laurel Explosives, Inc., and that on November 11, 1987, Mr. Curtis Smith purchased a case of dynamite from this same company (Tr. 6-7).

Discussion

In Docket No. KENT 88-159, MSHA Inspector Alex R. Sorke, Jr., issued section 104(g)(1) "S&S" Order No. 3004622, dated November 16, 1987, pursuant to section 115(a)(2) of the Act, and it states as follows:

Eugene Mills, James Harris and Curtis Smith, laborers at the No. 1 Surface Mine, have not received the requisite safety training as stipulated in section 115 of the Act. All of these men have been determined to be new miners which have received none of the required 24 hours of new miner training. In the absence of such training each man is declared to be a hazard to himself and others and is to be withdrawn from the mine until he has received the required training. A citation (No. 3004623) for a violation of 30 C.F.R. § 48.25(a) has been issued in conjunction with this order. This is an illegal mining operation.

Inspector Sorke also issued section 104(d)(1) "S&S" Citation No. 3004623, on November 16, 1987, and he cited a violation of 30 C.F.R. § 48.25(a). The cited condition or practice is as follows:

Eugene Mills, James Harris and Curtis Smith determined to be new miners working in the 001 pit have not received any of the required 24 hours of new miners training. All of these men stated it had been 6 years or longer since they had any training. This is an illegal mining operation and has no training plan.

A 104(g)(1) Order (No. 3004622) has been issued in conjunction with this citation.

Docket No. KENT 88-104, concerns a section 104(a) citation and a section 104(d)(1) order issued by the Inspector to the respondent. The citation and order is dated November 16, 1987, and they are as follows:

Section 104(a) Non-"S&S" Citation No. 3004621, cites a violation of 30 C.F.R. § 41.10, and the condition or practice states as follows:

Mining operations have commenced at the mine and the operator has not submitted a legal identity report to the MSHA District Manager. This is an illegal mining operation.

Section 104(d)(1) "S&S" Order No. 3004624, cites a violation of 30 C.F.R. § 48.23(a)(3), and the condition or practice states as follows:

Mining Activities have commenced at the mine and the operator has not submitted a training plan for approval by the MSHA District Manager. This is an illegal mining operation.

Petitioner's Testimony and Evidence

Pansy Hamm, General Manager, Laurel Explosives, Inc., East Bernstadt, Kentucky, confirmed from copies of her records that she sold a case of dynamite to Mr. Eugene Mills on October 27, 1987, and a case of dynamite to Mr. Curtis Smith on November 11, 1987. She identified a photograph of a case of dynamite as the type she sold (Exhibit P-1). She also explained the procedure for purchasing explosives, and confirmed that a purchaser need only show a driver's license and fill out a form, and that the company does not verify how the explosives were used (Tr. 8-14).

On cross-examination, Mrs. Hamm stated that the explosives purchased by Mr. Mills and Mr. Smith are typical of purchases made by many small mine operators, and that she deals with many such companies. She also indicated that more potent explosives are purchased by mine operators depending on their intended use, and that explosives are also purchased for agricultural use, stump removal, or for small strip mine operations. Mrs. Hamm confirmed that she does not personally know Mr. Mills or Mr. Smith (Tr. 14-17).

Thomas Spellman, Special Investigator, State of Kentucky Department of Natural Resources, testified as to his duties, and he confirmed that they included flying in a helicopter to view "illegal" mine sites. Mr. Spellman identified photographic exhibits P-3, as photographs which he took from the helicopter on November 18, 1987, and he confirmed that he recognized MSHA Inspector Sorke's truck on the ground and recognized him standing in the roadway near the site in question.

Mr. Spellman stated that a legal mining operation pursuant to state law requires a permit, and that it is usually identifiable by markers. He confirmed that the site in question had no permit, and he observed no markers. He confirmed that he has investigated more than 1,000 such sites during his 7 years as a special investigator, and that the site in question had all of the usual characteristics of a surface mining operation, including a highwall, an exposed coal pit, and heavy equipment parked in the area. He stated that the site was approximately 122 feet long and 50 feet wide, and that the exposed coal depth was approximately 2 feet.

Mr. Spellman stated that in his opinion, the depth of the excavation at the site, and in particular the 40 foot highwall, was not necessary for the construction of a house seat. He also was of the opinion that the site in question looked like a typical mining operation (Tr. 17-31).

On cross-examination, Mr. Spellman stated that he did not speak with Inspector Sorke on the day that he took the photographs, and that he had no knowledge that any MSHA citations were issued. Mr. Spellman confirmed that his discovery of the site in question was made during a routine "fly-over" of the area and that his office had received no complaint about any mining operation at the site.

Mr. Spellman confirmed that while he observed that coal was exposed, as shown in the large photograph, he saw no evidence that any of it had been removed or stockpiled, and could not determine whether any explosives had been used at the site.

Mr. Spellman stated that another separate state department has regulatory enforcement jurisdiction over surface mining operations, but only in cases where more than 450 tons of coal is exposed, extracted, and removed from the property with the intent to sell it. In these instances, the state would prosecute the offending party. In the instant case, Mr. Spellman confirmed that he had no knowledge that any coal had been removed and taken off the property, and that all of the information that he obtained with respect to the site in question was turned over to special investigator Michael Hall, a fellow enforcement officer in his department (Tr. 31-46).

MSHA Inspector Alex R. Sorke, Jr., testified that his duties include the investigation of illegal mining activities, and that he went to the site in question after receiving an anonymous call. He considered the operation to be illegal because no mine plan or other paperwork had been filed with MSHA (Tr. 47). He visited the site with State of Kentucky Mine Investigators George Eugene Hollis and Herman Williamson, and found that the mine "was working." He observed a dozer, a tractor with a scraper pan on the rear, and a highlift. He also found explosives which were used to shoot and create the highwall, and push brooms were being used to sweep the coal in preparation for its removal.

Mr. Sorke identified exhibit P-1 as a photograph of an empty box of explosives, and he confirmed that the explosives had already been used and were not at the site. He confirmed that he spoke with Mr. Mills, Mr. Harris, and Mr. Smith, at the site, and established that they were the operators (Tr. 49).

Mr. Sorke confirmed that he observed "leg wires," which are used to detonate explosives, in the overburden after it had been shot. He also confirmed that most of the equipment was removed from the site during his initial visit on November 16, 1987, and that when he next returned to the site on November 18, all of the equipment had been removed (Tr. 51).

Mr. Sorke stated that when he left the site on November 16, he believed that the three individuals in question were going to visit the local UMWA office to determine what was required to complete their training, and they informed him that they had cleared the site. However, at this time they said nothing to him about preparing a house seat or building a house, and during the course of his conversation with the individuals, Mr. Sorke believed that they agreed to do what was necessary to obtain their mine plans and complete the required preliminary work (Tr. 54).

Mr. Sorke identified exhibits P-4(a) through P-4(g) as photographs of the equipment, the site, and the pit, and he explained the procedure which would have been used to prepare the coal for removal, and he confirmed that they were taken on November 16 (Tr. 55-59).

Mr. Sorke stated that he served the citations on November 18, because he had to first obtain a mine legal ID number to place on the citation forms. He confirmed that he helped the three individuals fill out the necessary MSHA legal Mine ID form on November 16, and that he filled out the information for them (Tr. 60-61).

Mr. Sorke confirmed that after completing the Mine ID form (exhibit ALJ-1), he returned to his office to complete the citations (exhibits P-5 through P-8), and he then took them to the site on November 18. However, he confirmed that he issued the citations "verbally" on November 16, and that "I told them everything" (Tr. 66). He confirmed that he was aware of the fact that there was no mine ID number on file with MSHA before he visited the site (Tr. 68).

Mr. Sorke confirmed that the effect of his section 104(g)(i) order was to close the site because it removed everyone from the site until they could be trained. He also confirmed that he issued Citation No. 3004623, because the individuals admitted that they had not received the required new miner training (Tr. 68-69). He issued Citation No. 3004624, because no mine training plan was on file with MSHA's district office (Tr. 70).

Mr. Sorke stated that when he returned to the site on November 18, the individuals in question for the first time "started talking about it being a house seat" (Tr. 73). He then served the citations on them. Mr. Sorke confirmed that he subsequently returned to the site and made certain measurements. He determined that the pit averaged 150 feet long, 50 feet wide, and that the coal was approximately 2 feet in depth. The highwall center was 60 feet high, and the ends measured approximately 42 feet in height. Based on these measurements, he estimated that the pit contained approximately 488 tons of exposed coal (Tr. 75). He believed that the highwall and coal "was freshly exposed" and was not there for any length of time. He estimated that all of the exposed coal could have been removed in one day (Tr. 75-76).

Based on his prior experience with similar operations, and the equipment which was present, he estimated that the three individuals could have constructed the highwall, exposed the pit, and removed the coal in 2 weeks, working 40 hours a week (Tr. 76). He also confirmed that in the course of his prior investigations of similar sites, "I have been told hundreds of times that it is going to be a house seat, trailer park, a pond. I can show you a shopping center," but that he never saw any of these structures actually erected on these sites (Tr. 77).

Mr. Sorke was of the opinion that the site was a mine site and not a house seat because the spoil was pushed over the hill and into the trees, and the trees were all knocked over. Anyone constructing a house seat would clear the land first and then smooth out the site and would not simply push the spoil over the hill. He also indicated that the grade leading to the site was very steep, and although there was a good road, it was not ditched, and was not the type of road that one would construct for access to a house because one would need a tractor or four-wheel drive to reach the site (Tr. 79). He also confirmed that an old inactive strip pit was located below the site in question (Tr. 80).

On cross-examination, Mr. Sorke stated that he communicated and spoke with Mr. Clarence Mills, the individual who had an ownership interest in the property, and the person who purportedly contracted with the respondents to construct the house seat, but was not certain whether he contacted him before or after he issued the citations (Tr. 85). Mr. Sorke confirmed that Mr. Mills told him that he was having a house seat built and that he was interested in being able to remove the coal (Tr. 86). He indicated that he met with Mr. Mills before and

after the site was closed, during his investigation of other illegal mining operations on his property (Tr. 87).

Mr. Sorke confirmed that Mr. Mills told him that the three respondents were building a house seat, and that when he told him this the mine had been closed. Mr. Sorke stated that Mr. Mills asked him whether or not he could remove up to 250 tons of coal as permitted by the State of Kentucky, and also asked him about leaving the coal. Mr. Sorke stated that he advised Mr. Mills that no coal could be removed under MSHA's regulations because the site was closed (Tr. 90-96). Mr. Mills also advised him that the respondents were instructed not to take any of the coal (Tr. 97).

Mr. Sorke confirmed that although no coal was actually removed from the site in question, had he not acted and closed the site, he believed the coal would have been removed (Tr. 98). He believed that all of the preparation work for coal removal had been completed at the time he issued the order, and that the sweeping of the coal was the last step immediately prior to taking out the coal. At this point in time, it was Mr. Sorke's opinion that the site was in fact a coal mine (Tr. 99).

Mr. Sorke stated that his estimate that the coal in the pit was 24 inches deep was based on a hole that was dug in one section of the pit, but he did not know who dug the hole (Tr. 107, Exhibit P-4(h)). He also agreed that "nobody in their right mind would build a house on coal" (Tr. 101). When asked whether a violation would occur if the coal were pushed aside in order to reach solid ground for a house seat, Mr. Sorke responded as follows (Tr. 101-102):

A. It depends on what else is involved. If there's equipment used on the site, or if there's explosives used on the site, or there's other means to connect the site to Interstate Commerce, then yes.

If they went up there and they hand-shoveled it all off and got down to the coal --

Q. Let's say they had four D-9s up there, and pushed it off to the side.

A. Yes, pushed it to the side and they got to the coal and they pushed it up, we would still consider it a mine.

Q. You would assume that at some time it would enter Interstate Commerce?

A. It's the fact that the coal itself does not have to enter Interstate Commerce to make it an inspectible (sic) site under MSHA regulations.

Q. So anybody that would be clearing an area on their land in eastern Kentucky that pushed the coal aside would be written up for not having a mine license, training and what these gentlemen have been written up for?

A. Depending on the circumstances involved, yes.

Q. And Mr. Mills told you the circumstances were, number one, he wanted a house seat; and number two, these boys weren't to remove any coal?

A. That's correct. He also said that he got on to them for getting down -- they weren't supposed to go down to the coal level.

Mr. Sorke confirmed that he made no inquiries of any local tipples to determine whether the respondents had in fact sold any coal because he saw no need to in view of the fact that no coal was ever removed from the pit (Tr. 103). Mr. Sorke had no personal knowledge that the respondents were ever connected with any prior coal mining activities (Tr. 103). He confirmed that he suggested the initials "S H M" be used for the name of the respondent company because he needed a company name in order to obtain a mine ID number, and that the respondent's agreed to the use of the initial's of their last names. Mr. Sorke denied that they said anything about any construction company, and he denied that the respondents told him on November 16, that they were clearing a house seat for Mr. Clarence Mills (Tr. 104-105).

In response to further questions, Mr. Sorke confirmed that he did not completely discount the possibility that a house could have been placed on the site which was being excavated because "when you make a level spot out, you can put a house on it" (Tr. 115). He reiterated that in his 10-1/2 years of experience, he has never seen a house constructed on any site similar to the one in this case. However, he agreed that it would not be unusual to level out enough of a spot on a

hillside to build a home, and that the site in question could have been developed further in either direction (Tr. 116).

Mr. Sorke confirmed that it would have been economically feasible to move the available 488 tons of coal out of the site over a 2-week period, and at the then-prevailing market price of \$23 a ton, the coal would sell for close to \$9,000 (Tr. 117). He also confirmed that he did not discuss with the respondent's their reasons for digging down to expose the coal seam, and he confirmed that they offered no explanation as to why this was done (Tr. 120).

George Eugene Hollis, Investigator, Kentucky Department of Natural Resources, confirmed that he visited the site in question on November 16, 1987, with his partner Mr. Herman Williamson, and Mr. Sorke. Mr. Hollis stated that he observed that the pit had been opened up, the coal was exposed, and he observed a highlift or loader, a small farm tractor, and a small bulldozer at the site. He also observed James Harris sweeping off the top of the exposed coal with a broom, and that was all of the work which was taking place. Mr. Hollis stated that "By virtue of cleaning it off, by all appearances, they were getting ready to load it, break it up and load it" (Tr. 129-130).

Mr. Hollis stated that based on his experience in investigating illegal mines since 1982, the site he observed on November 16, 1987, was in all general appearances, the same as any other site he has investigated. He considered the site in question to be a mine operation, and for that reason he posted a closure order on the site, "and that prohibits them from hauling the coal" (Tr. 131).

In response to a question as to what led him to conclude the site in question was a mining operation, Mr. Hollis responded as follows at (Tr. 131-134):

A. As we said already, from all appearances of mining equipment, cleaning the coal off to get rid of the hash, to make the coal as good a quality as possible, and also when we first went up, if I remember correctly, the men wouldn't talk to us hardly at all to start with.

They just sort of hee-hawed around. But eventually -- well, one of our first questions when we go on any site is who's the operator? Whose job is this? Of course, they wouldn't tell us to start with. But after a while, after

we began to talk and things get a little bit more at ease, then they finally said, "Yes, it's our job."

Q. Did they say "It's our job building a house seat?" Did anybody mention a house seat when you were up there?

A. No.

Q. Were there any other things that led you to believe that it was a coal mine operation?

A. Well, again, we just -- all of the assumptions that were made in all the appearances is that it was a coal mine, and when we asked them what name they wanted to put it in, the closure itself by virtue of it, was saying that this was a coal mine.

We are going to write this closure to prohibit you from hauling the coal. You don't have a mine license on it with the Department of Mines and Minerals. The closure itself states that fact. Also what name do you want to put this in. Well, put it in S H M.

Q. They told you to put it in S H M?

A. Yes.

Q. When you were giving them all these papers that said all this stuff about coal operations and mining coal, did they give you any indications by the conversation that they knew that you considered it a coal mine operation?

A. Yes, as a matter of fact, when we began to explain our recommendations are the they did not have a license; they did not have mine maps; and also, that no coal would be produced. In explaining these, in other words, we show them the closure and give them a copy of the closure.

* * * * *

Q. When you left that, did you expect to have them come in the office in a short time and acquire a mine license?

A. Yes, we told our supervisor, and the way my partner and myself, and I suppose Mr. Sorke, felt that within probably a week to two weeks' time that they would be in. That's the feeling, you know, again that we had.

Q. Did they express anything about removing the coal? Did they say anything to you about removing the coal?

A. Not exactly because all of the entire conversation was that as far as the mine closure and everything was the fact that it was going to prohibit them from hauling the coal.

And, at (Tr. 145-146; 148-149):

A. Just on first notice, just on the top of my head, two things. The site on Mills Creek where the coal was exposed, it was pitted back. It had two sides to it. It was pitted back, the highwall, actually on either end and the back.

Coal was exposed. They were cleaning the coal for market use. You know, if the coal was just going to be generally taken up, you wouldn't have to worry about it. If you are going to take coal and market it, then that coal has to be as clean as possible, especially in a poor market, as it has been.

* * * * *

Q. Has the State of Kentucky or the Department of Mines and Miners ever received any kind of notice from these three gentlemen that they were building a house seat? Have they ever filed anything with the State of Kentucky?

A. No, no, we have not.

* * * * *

Q. Did you see anything on November 16th when you were there with Mr. Sorke and Mr. Williamson that would indicate to you that these gentlemen intended to do more than just push the coal over to the side and leave it sit?

A. Yes, with the loader there, and again, the fact that they were cleaning the coal. If they were going to dump it over the hill, or take it and even stockpile, there wouldn't be any purpose in cleaning it.

On the lefthand side of the pit, water -- there was some water that had drained over the coal, you know, and it had the mud and what you could not scrape off it with the grader blade that was on the little farm tractor, he had the broom sweeping the coal, cleaning off the remainder of that water and mud and so forth.

Q. In your experience, if a person was going to use that coal for house coal, would they take such action and use a pushbroom to clean the coal?

A. In my opinion, no.

Mr. Hollis stated that when he returned to the site on March 10, 1988, with Mr. Sorke, they spoke with Mr. Clarence Mills, and he identified the notes and communications made while communicating with Mr. Mills (Tr. 134-135, exhibit P-9). Mr. Hollis confirmed that he explained the mining law to Mr. Mills, and answered his questions concerning the taking of "house coal," requirements for obtaining mine permits, and the filing of mine plans (Tr. 138-144).

Mr. Hollis confirmed that the State of Kentucky has not received any notice from the respondents with respect to the construction of any house seat at the site in question, and that they have not challenged the issuance of the closure order. The closure order is still in effect, and the respondents would have to obtain a license in order to haul the coal or remove the closure order (Tr. 147-148).

On cross-examination, Mr. Hollis confirmed that if Mr. Clarence Mills had exposed the coal in the pit and simply pushed it aside, or shoved it over the hill, he would not be in violation of any state regulation (Tr. 150). Mr. Hollis confirmed that he observed no coal trucks at or near the site waiting to haul the coal away (Tr. 150). He also confirmed that anyone preparing a house seat who comes across a coal seam is not required to notify his department (Tr. 151).

Mr. Hollis stated that on March 10, 1988, Mr. Clarence Mills did not inform him that he had hired the respondents to build him a house seat, and that he was only interested in learning whether he could use the coal for his own purposes or moving out 250 tons or more (Tr. 153). He confirmed that the respondents told him to use the initials "S H M" for his state report, and that the respondents have not evidenced any desire to remove the coal from the site in question (Tr. 155).

Michael L. Hall, Investigator, State of Kentucky Natural Resources Academy of Special Investigations, testified that he has never investigated the S H M Coal Company, or any of the three respondents in this case. However, he confirmed that after receiving an anonymous call on November 18, 1987, he went to the site in question on November 23, 1987, and spoke with Mr. Clarence Mills. At that time, he had no knowledge that MSHA or the State Department of Mines and Minerals had investigated the site, but learned about this after speaking with Mr. Mills (Tr. 163).

Mr. Hall confirmed that he made notes of his conversation with Mr. Mills but did not have them with him at the hearing because he was notified about the hearing at 8:00 a.m. on the same day it was scheduled. However, he testified from his recollection, and confirmed that Mr. Mills informed him that he owned the property and intended to build a house seat at the site in question and that "they ran into coal" (Tr. 165). Mr. Hall stated that he explained the coal permit regulations to Mr. Mills and advised him that with the exception of extracting 250 tons for his personal use, he would need a permit to take more (Tr. 167). Mr. Hall confirmed that Mr. Mills was concerned about complying with the law and that he read him his Miranda rights, and that Mr. Mills wanted to know what he had to do to stay out of trouble (Tr. 167).

Mr. Hall stated that Mr. Mills informed him that Federal and State mining people had visited the site, but said nothing to him about the closure of the site (Tr. 168). Mr. Hall estimated that the pit contained approximately 370 tons of coal, and based on his examination of the site, he was of the opinion that it was a mine site (Tr. 170). He based this conclusion on the fact that coal was exposed, overburden was pushed out over the outcrops, and extensive overburden had been removed to reach the coal (Tr. 170).

On cross-examination, Mr. Hall stated that he did not believe Mr. Mills' assertion that he had a house seat built at the site in question. He confirmed that he did not charge Mr. Mills with any violation and did not seek any advice from

the county or the Commonwealth attorney. Mr. Hall also confirmed that no coal was removed from the site and no law which he enforces was violated on November 23, 1987 (Tr. 171).

Mr. Hall confirmed that he has recently built a house, and in all house sites he has observed, all that is necessary is to dig down to a clay surface rather than to go as deep as the site in question was dug (Tr. 174).

Respondent's Testimony and Evidence

Eugene Mills, testified that Mr. Clarence Mills is his uncle, and that sometime in July or August, 1987, his uncle asked him about the cost to build a house seat at the site in question, and although no price was agreed to, he and Mr. Curtis Smith, and Mr. James Harris worked together at the site to build a house seat for his uncle. Mr. Mills stated that they worked on the site periodically over a 3-month period (Tr. 179-182).

Mr. Mills stated that when Mr. Sorke and the two state mining inspectors come to the site, Mr. Sorke looked at the exposed coal and remarked that "it looks to me like you are mining coal." Mr. Mills stated that he informed Mr. Sorke that they were not mining coal and were building a house seat, and that if they were doing anything wrong, they should be taken to jail. Mr. Mills stated that Mr. Sorke replied that "I'll try to help you out" (Tr. 183).

Mr. Mills conceded that brooms were being used to clean off the coal when Mr. Sorke arrived at the site, and that the cleaning was necessary to remove the mud so the coal could burn. He stated that his uncle wanted the coal for his house, and he did not know the depth of the coal, but estimated that it was 8 inches deep (Tr. 184).

Mr. Mills stated that the respondents had no interest in the coal, and that he offered to push it aside for his uncle's use, but Mr. Sorke stated that it was "a shame to waste the coal," and that he would try to find a way for the respondents to remove it legally and take it to the foot of the hill. Mr. Mills stated that Mr. Sorke informed him that he would need a Mine ID number, and that he and the other respondents signed the required MSHA form (exhibit ALJ-1), but that it was not filled out when they signed it (Tr. 185). Mr. Sorke informed him that he would need a company name, and Mr. Mills stated that "S H M Construction sounds good to me," and that he advised Mr. Sorke to use that name if he needed to have one.

Mr. Mills also confirmed that Mr. Sorke did not fill out the form in his presence (Tr. 185-186).

Mr. Mills stated that no coal had been removed from the site, or even broken up and made ready to be moved, and that he hired no trucks, or had any trucks waiting to pick up the coal (Tr. 186). He denied that he and the other respondents had any interest in removing the coal, and confirmed that that they made no effort to remove the closure order. Although they discussed obtaining a mining permit, "there were more obstacles in our way, and it was just out of the question. In order to do that, . . . we were admitting to something that we weren't doing as far as mining" (Tr. 188).

Mr. Mills stated that the access road to the site was not wide enough to allow coal trucks to come and go. He confirmed that he has never engaged in any coal mining business or sold any coal (Tr. 190-191). He stated that he has constructed other house sites and that he generally has to cut out the side of a mountain in most areas where this has been done (Tr. 192).

Mr. Mills confirmed that he and Mr. Curtis Smith purchased two cases of explosives, and it was used for shooting ditch lines, fill stone, and rocks. This work was done at the same time that he was on his uncle's property (Tr. 193). Mr. Mills stated that no coal was ever broken or removed from the site, and he had no intention of removing it from the property (Tr. 194).

On cross-examination, Mr. Mills confirmed that in July and August, 1987, immediately preceding the work for his uncle, he was working on removing creek rock and that he was using the same equipment. The rock was shipped to Lexington and sold, and it was removed by hand and loader and trucked out. The rock business was not good, and he engaged in some farming on his father's and grandfather's land. The house seat for Mr. Mills was never completed, and none of the respondents were ever paid for the work (Tr. 196).

Mr. Mills stated that his uncle did not intend to sell the coal, and that he simply wanted it moved so the house seat could be completed. Mr. Mills confirmed that he had an oral agreement with his uncle, had worked for him in the past, and had expected to be paid for the house seat work (Tr. 200).

Mr. Mills stated that when he began the construction of the house seat he had no idea that any coal was at the site, and that his intent was to build a house seat (Tr. 202). When asked about his intentions with respect to the coal had

Mr. Sorke and the other investigators not arrived at the site on November 16, 1987, Mr. Mills responded "our intent was to break it up, pile it to the side, finish the house seat, get our money and try to get a new pair of shoes" (Tr. 203). He stated that when his uncle first asked him about constructing a house seat, they did not discuss the disposition of any coal which may have been found, and his uncle said nothing about stockpiling any coal or taking it for his own use. Mr. Mills confirmed that he would have to dig another 6 to 8 feet through the exposed coal in order to reach a suitable house seat (Tr. 203).

Mr. Mills stated that the words "Coal Company" were inserted on the MSHA Mine ID form by Mr. Sorke, and that he told Mr. Sorke that he and the other respondents were not a coal company, and that they were constructing a house seat for his uncle and simply ran into the coal seam (Tr. 206). Mr. Mills stated that Mr. Sorke replied "Don't give me that bull crap" (Tr. 207). When asked why he was cleaning the coal if he simply intended to bulldoze it aside so that his uncle could have it, Mr. Mills stated that his uncle wanted to burn it, and rather than breaking it up, he decided that the simple solution was to push it aside, and that was his intent (Tr. 209).

Mr. Mills stated that he "checked out" the price of low quality coal in 1987, and that it sold for \$12 or \$13, and that "wildcat" coal was \$6 or \$8, and he questioned how he would benefit by "trying to haul it off" (Tr. 208). He stated that his uncle came to the site after the coal seam was exposed, and asked if there would be a problem for him to break up and burn the coal (Tr. 209). Mr. Mills stated that his uncle wanted the house seat so that he could build a house for his son (Tr. 211). Mr. Mills confirmed that the son was 16 years old at the time the house seat was built (Tr. 213).

With regard to the training citations, Mr. Mills confirmed that the respondents "hired a safety man" and had some preliminary discussions with an individual who provides training for the Chaney Creek Coal Company (Tr. 223). Respondent Curtis Smith, who was present at the hearing, but was not called to testify, confirmed that while this was true, the respondents have not in fact taken any training (Tr. 223). When asked why an inquiry would be made about training, if as claimed by the respondents, that they were not engaged in a mining operation, Eugene Mills responded "We were confused, and we didn't know which way to go. Finally, we came to the point that we sought legal help" (Tr. 224).

Mr. Mills confirmed that some of the explosives in question were used to shoot some rock out of the road to the site in question, and that some was used to blast sandstone from the highwall. He also confirmed that the rest of the overburden was removed and pushed away with the bulldozer and highlift (Tr. 233).

Inspector Sorke was recalled in rebuttal, and he testified that he filled out the MSHA Mine ID form in question in the presence of Mr. Eugene Mills on the same day of his initial visit to the site on November 16, 1987, and that the respondents signed it at that time. Mr. Sorke explained that since the form was completed that day, he terminated Citation No. 3004621, that same day (Tr. 215). Mr. Sorke reiterated that the subject of the house seat was not discussed on November 16, and that this issue was first discussed on November 18, 1987 (Tr. 215).

Mr. Sorke confirmed that he wrote in the words "Coal Company" on the mine ID form, and that when he asked the respondents for a company name to insert on the form, they responded "Call us S H M Coal Company," and that is what he put on the form (Tr. 218). Mr. Sorke stated that he still does not believe Mr. Mills' assertion that the respondents were building a house seat at the site, and after hearing Mr. Mills' testimony that he inquired about the price of coal in 1987, Mr. Sorke remarked "I even believe it less now" (Tr. 219). Mr. Sorke had no knowledge with respect to the abatement of the training citations, and although he stated that the respondents may have since received training, he was not certain (Tr. 221-222).

Mr. Sorke explained the hazard ramifications connected with untrained persons who engage in strip mining, and the use of explosives. MSHA considers such untrained individuals to be hazards to themselves and to each other. Mr. Sorke confirmed that he based his unwarrantable failure finding on the fact that he believed that the respondents knew that they were required to be trained before beginning any mining (Tr. 228). He reiterated that he first spoke with Clarence Mills when he was with Mr. Hollis on March 10, 1988, and that he did not speak with him earlier because he had no reason to and did not know who owned the property (Tr. 228). Mr. Sorke stated further that when he left the site on November 18, 1987, after speaking with Eugene Mills, he assumed that the respondents would go ahead and obtain their training (Tr. 230).

Mr. Sorke confirmed that after Mr. Eugene Mills told him in November 18, that he was building a house seat for his

uncle, he did not contact the uncle at that time (Tr. 230). Mr. Sorke further confirmed that he had no knowledge that Mr. Hall had spoken with Clarence Mills until the day prior to the hearing in this case (Tr. 230). When asked if he were aware of the fact that Clarence Mills has been hauling building materials to the foot of the site in question, Mr. Sorke replied "No, but it will not surprise me in the least. If I was hunting a way out, I'd be hauling, too" (Tr. 231).

Mr. Sorke confirmed that although the equipment previously mentioned was at the site on November 16, 1987, the only work he observed being done was the sweeping of the exposed coal with pushbrooms. When he returned on November 18, the equipment had been removed from the site, and Mr. Sorke confirmed that he permitted the respondents to remove the equipment "as long as they didn't touch that coal" (Tr. 248).

Findings and Conclusions

The Jurisdictional Question

The definition of "coal or other mine" found in 3(h)(1) of the 1977 Mine Act is as follows:

"[C]oal or other mine" means (A) an area of land from which minerals are extracted in non-liquid form or, if in liquid form, are extracted with workers underground, (B) private ways and roads appurtenant to such area, and (C) lands, excavations, underground passageways, shafts, slopes, tunnels and workings, structures, facilities, equipment, machines, tools, or other property including impoundments, retention dams, and tailings ponds, on the surface or underground, used in, or to be used in, or resulting from, the work of extracting such minerals from their natural deposits in nonliquid form, or if in liquid form, with workers underground, or used in, or to be used in, the milling of such minerals, or the work of preparing coal or other minerals, and includes custom coal preparation facilities (emphasis added).

The definition of "coal or other mine" is further clarified by the Legislative History of the Act. The Senate Report No. 95-181 (May 16, 1977) provides that:

Finally, the structures on the surface to be used in or resulting from the preparation of the

extracted minerals are included in the definition of "mine." . . . [B]ut it is the Committee's intention that what is considered to be a mine and to be regulated under the Act be given the broadest possibly (sic) interpretation, and it is the intent of this Committee that doubts be resolved in favor of inclusion of a facility within the coverage of the Act.

S. Rep. No. 181, 95th Cong., 1st Sess. 602, reprinted in [1977] U.S. CODE CONG. & ADMIN. NEWS 3401, 3414.

The Joint Conference Committee continued along these same lines in stating that related structures, equipment or facilities, even though not yet in use in connection with mining activities, but which were to be used in connection with such mine related activities, are to be included in the definition of a mine. (Conference Rep. No. 461, 95th Cong., 1st Sess. (1977) reprinted in LEGISLATIVE HISTORY OF THE FEDERAL MINE SAFETY AND HEALTH ACT 1279, 1316 (1977)).

As a remedial statute, the Act has been given broad interpretation and has been found to apply to a broad spectrum of activities, including prospecting, assessing value of ore bodies and quarrying in one's backyard. Marshall v. Wait, 628 F.2d 1255, 1258 (9th Cir. 1980) (backyard rock quarry is within the definition of a mine); Marshall v. Stoudt's Ferry Preparation Co., 602 F.2d 589, 592 (3d Cir. 1979), cert. denied, 444 U.S. 1015 (1980) (sand and gravel preparation plant is a "mine" within the meaning of the Act); Secretary of Labor v. Cyprus Industrial Minerals Corporation, 3 FMSHRC 1 (January 1981), aff'd by the Ninth Circuit Court of Appeals, December 28, 1981, Cyprus Industrial Minerals v. FMSHRC and Donovan, 2 MSHC 1554 (digging of a tunnel to assess the value of talc deposits within the definition of a "mine").

The Commission has held that the actual extraction of minerals is not a precondition for jurisdiction to apply. See: Carolina Stalite Company, 3 MSHC 1759 (September 12, 1984); Secretary of Labor v. Alexander Brothers, 4 FMSHRC 541 (April 1982). See also Marshall v. Stoudt's Ferry Preparation Co., supra, and Marshall v. Tacoma Fuel Company, No. 77-10104-B (W.D. Va. June 29, 1981, holding that extraction is not required under the Act for coverage of preparation facilities.

In its posthearing brief, the petitioner cites the case of Godwin v. Occupational Safety and Health Review Commission, 540 F.2d 1013 (9th Cir. 1976), a case arising under the Occupational Safety and Health Act relating to the growing of grapes.

In that case the court found that the activity of clearing land was a necessary part of the growing process, and that waiting until the grapes were planted to find that the operation was covered would be a meaningless gesture. Petitioner argues that in like manner, the clearing and preparation of land for the removal of coal is an integral and necessary activity in the extraction of coal, and that in a strip mining operation the majority of the work and effort involved in the mining operation is in such preparatory activities. I agree with the petitioner's position and I conclude and find that the preparation of the land is an integral and necessary process in the extraction of coal and that such activities constitute mining and are covered by the Act.

The thrust of the respondent's defense in this case is that it was not conducting a strip mining operation, and that it was engaged in clearing a site for the construction of a house seat. I find this contention to be lacking in credibility and it is rejected. For the reasons which follow, I conclude and find that the preponderance of the evidence establishes that the respondent was engaged in a strip mining operation and was in the last phase of land preparation prior to the actual removal of coal at the time Inspector Sorke arrived on the scene and issued the citations.

The evidence in this case establishes that two of the respondents, Eugene Mills and Curtis Smith, purchased explosives which were used in part to clear the site in question. Inspector Sorke found evidence at the site that explosives had in fact been used, and although some of the explosives were used for other purposes, Eugene Mills admitted that some of it was used to construct a roadway to the site and to blast sandstone from the highwall. Mr. Mills also admitted that the rest of the overburden was removed and pushed away with a bulldozer and highlift which were used at the site.

State of Kentucky Department of Natural Resources Special Investigator Thomas Spellman testified that he flew over the site in question and took aerial photographs of the site. Mr. Spellman, who had previously investigated over 1,000 illegal strip mining operations, testified that the site, which he described as approximately 122 feet long and 50 feet wide, had all of the characteristics of a surface mining operation, including a highwall, an exposed coal pit, and heavy equipment parked in the area.

Kentucky Special Investigator Michael Hall, testified that when he visited the site he observed the pit containing approximately 370 tons of exposed coal, overburden pushed over the

site outcrops, and he indicated that extensive overburden had been removed to expose the coal. He was of the opinion that the operation was a mine site.

Kentucky investigator George Hollis testified that when he visited the site in the company of MSHA Inspector Sorke, he observed an open and exposed coal pit and a highlift or loader, a small tractor, and a bulldozer. He also observed one of the respondents, James Harris, sweeping off the top of the exposed coal with a broom, and he believed that this was being done in preparation of breaking up and loading out the coal. He testified that if the respondents merely intended to remove and push the coal aside, there would be no need for cleaning it, and in his opinion the site was an illegal strip mining operation similar to many that he has observed during his experience as an investigator. He confirmed that he posted a state closure order at the site prohibiting the removal of any coal, and that the order is still in effect and would require the respondents to obtain a license before they could remove any of the coal.

Inspector Sorke, who visited the site on at least two occasions, testified that the respondents admitted that they had cleared the site, and he found evidence that explosives were used to shoot and create the highwall. He also observed a bulldozer, a tractor with a scraper pan attached to the rear, and a highlift at the site, and further observed that push-brooms were being used to sweep the coal in preparation for its removal. He stated that the sweeping of the coal would be the last step in preparing it for removal. After taking measurements, he estimated that the coal pit was approximately 150 feet long and 50 feet wide, and that the exposed coal was approximately 2 feet in depth. He confirmed that the highwall was approximately 60 feet high at its center, and approximately 42 in height at each end. He further estimated that the coal pit contained approximately 488 tons of freshly exposed coal, and he believed that it could have been removed in one day. Based on his observations, and prior experience, Mr. Sorke concluded that the site in question was in fact a mine site.

Mr. Clarence Mills, the owner of the property where the site in question is located, did not testify in this case, and the record establishes that he has impaired hearing and is mute. At the request of the respondent's counsel, a hearing impaired interpreter was provided at the hearing, but counsel did not call Mr. Mills as a witness. The only witness testifying for the respondent at the hearing was Eugene Mills, one of the three individuals who cleared the site in question. None of the other partners in this venture testified.

Eugene Mills testified that the respondents never intended to mine any coal, and that they cleared the site in expectation of constructing a house seat for his uncle who wanted to build a house for his 16 year old son. Mr. Mills confirmed that he had an "oral contract" with his uncle to construct the site and that he has never been paid for the work. There is no evidence that a building or clearing permit was obtained for the work, and no proposed house plans were ever produced. Mr. Mills testified that when Inspector Sorke arrived at the site with the two state inspectors, he informed Mr. Sorke that the respondents were constructing a house seat. Mr. Sorke testified that when he initially visited the site on November 16, 1987, none of the respondents said anything to him about building a house seat, and that they told him this when he next returned on November 18, 1987. Special Investigator Hollis testified that when he visited the site on November 16, 1987, in the company of Mr. Sorke, none of the respondents mentioned anything about building a house seat. I find Mr. Sorke's testimony, corroborated by Mr. Hollis, to be more credible than that of Eugene Mills, and I conclude and find that Mr. Mills did not inform Mr. Sorke that he was constructing a house seat at the time Mr. Sorke initially visit the site, and that this contention on Mr. Mills' part came at a later time.

Investigator Hall, who interviewed Clarence Mills on November 23, 1987, testified that Mr. Mills informed him that he was having a house seat constructed on the site, but Mr. Hall did not believe him because he had recently constructed a house and found that it was unnecessary to dig as deep as the site in question was being dug for a house seat. Mr. Hall also testified that Mr. Mills informed him that although he intended to have a house seat constructed, the respondents "ran into coal," and Mr. Mills wanted to know what he could do to "stay out of trouble."

Investigator Hollis testified that he spoke with Clarence Mills on March 10, 1988, in the company of Mr. Sorke, and that Mr. Mills said nothing about hiring the respondents to construct a house seat. Mr. Hollis stated that Mr. Mills was only interested in knowing whether he could use the coal for his own purposes, and that he (Hollis) answered Mr. Mills' questions about removing "house coal" and the state requirements for obtaining a mine permit and filing mine plans.

Inspector Sorke, who spoke with Clarence Mills on more than one occasion before and after the site was closed, confirmed that Mr. Mills informed him that the respondents were constructing a house seat. Mr. Mills also inquired as to whether it would be legal to remove any of the coal from the

site, and Mr. Sorke explained MSHA's requirements to him. Although Mr. Sorke did not completely discount the possibility that a house could be constructed on the site in question, he obviously did not believe that this was the case. Mr. Sorke commented that "no one in their right mine would build a house on coal," and he stated that in his 10-1/2 years of experience he has never seen a house constructed on a site similar to the one in question. He also alluded to the fact that in prior instances when he has encountered illegal strip mines, he has been told "hundreds of times" that house seats were being constructed, but he never saw a house built at any of these sites. Mr. Sorke was also of the opinion that the site in question was not conducive to the construction of a house because of steep terrain, the manner in which the site was being cleared, and the fact that one would need a tractor or four-wheel drive vehicle to reach the site.

Mr. Eugene Mills further testified that he had no prior knowledge of the existence of any coal seam at the site in question, and that once the coal was exposed, the respondents only intended to remove it and pile it aside to finish the house seat (Tr. 202). He confirmed that he had no knowledge as to the actual depth of the exposed coal seam, and that in order to remove the coal to reach a suitable house seat depth, he would have had to dig another 6 or 8 feet, or "maybe more" (Tr. 184, 203). In my view, such further digging would create an even higher highwall, and I seriously doubt that anyone would have constructed a house at the site in question. Having viewed the site at the conclusion of the hearing, I found that access to the purported location of the house seat was extremely difficult, even on foot while walking up to the site along steep inclines.

Mr. Mills also confirmed that in July or August of 1987, and prior to the clearing of the purported house seat, the respondents were engaged in the business of removing creek rock from Mill Creek, using the same equipment, and that the rock was trucked to Lexington for sale on the open market (Tr. 194-195). I believe that the respondents intended to do the same thing with the coal which they were cleaning prior to its extraction, and that they would have done so had the inspectors not discovered the site.

After careful consideration of all of the evidence and testimony presented in this case, I reject the respondents contention that they were clearing the site for a house seat, and I conclude and find that they were engaged in a surface mining operation subject to the Act.

Interstate Commerce Issue

Article I, Section 8, Clause 3, of the Constitution gives Congress the power to "regulate commerce . . . among the several States." The U.S. Supreme Court has a long history of upholding Federal regulations of ostensibly local activity on the theory that such activity may have some affect on interstate commerce. Local activities, regardless of their size and their appearance as purely intrastate, may in fact affect interstate commerce if the activity falls within a class of regulated activity. See: Wickard v. Filburn, 317 U.S. 111 (1942); Fry v. United States, 421 U.S. 542 (1975). In Perez v. United States 402 U.S. 146, 155 (1971), the court held that where a class of activities is regulated and that class is within the reach of Federal power, the courts have no power to exclude "as trivial" individual instances of the regulated activity.

Section 4 of the 1969 Coal Act, which is applicable in this case, states as follows with regard to the mines subject to the Act: "Each coal or other mine, the products of which enter commerce, or the operations or products of which affect commerce, and each operator of such mine, and every miner in such mine shall be subject to the provisions of this Act."

The 1977 Mine Act is intended to assure safe and healthful working conditions for miners, and Congress clearly stated its findings and purposes in this regard in the 1969 Coal Act, as well as in the 1977 Act which extended jurisdiction of the Coal Act to all mining activities. The Congressional findings and purposes are set forth in section 2 of the 1969 Act, and they are equally applicable to all mines. Some of these findings and purposes are as follows:

* * * * *

(c) there is an urgent need to provide more effective means and measures for improving the working conditions and practices in the Nation's coal mines in order to prevent death and serious physical harm, and in order to prevent occupational diseases originating in such mines;

(d) the existence of unsafe and unhealthful conditions and practices in the Nation's coal mines is a serious impediment to the future

growth of the coal mining industry and cannot be tolerated;

* * * * *

(f) the disruption of production and the loss of income to operators and miners as a result of coal mine accidents or occupationally caused diseases unduly impedes and burdens commerce. [Emphasis added.]

Perez v. United States, 402 U.S. 146 (1971), held that Congress may make a finding as to what activity affects interstate commerce, and by doing so it obviates the necessity for demonstrating jurisdiction under the commerce clause in individual cases. Thus, it is not necessary to prove that any particular intrastate activity affects commerce if the activity is included in a class of activities which Congress intended to regulate because that class affects commerce.

Mining is among those classes of activities which are covered by the Commerce Clause of the United States Constitution and thus is among those classes which are subject to the broadest reaches of Federal regulation because the activities affect interstate commerce. Marshall v. Kraynak, 457 F. Supp. 907, (W.D. Pa. 1978), aff'd, 604 F.2d 231 (3d Cir. 1979), cert. denied, 444 U.S. 1014 (1980). Further, the legislative history of the Act, and court decisions, encourage a liberal reading of the definition of a mine found in the Act in order to achieve the Act's purpose of protecting the safety of miners. Westmoreland Coal Company v. Federal Mine Safety and Health Review Commission, 606 F.2d 417 (4th Cir. 1979). See also: Godwin v. Occupational Safety and Health Review Commission, 540 F.2d 1012 (9th Cir. 1976), where the court held that unsafe working conditions of one operation, even if in initial and preparatory stages, influences all other operations similarly situated, and consequently affect interstate commerce.

The courts have consistently held that mining activities which may be conducted intrastate affect commerce sufficiently to subject the mines to Federal control. See: Marshall v. Kilgore, 478 F. Supp. 4 (E.D. Tenn. 1979); Secretary of the Interior v. Shingara, 418 F. Supp. 693 (M.D. Pa. 1976); Marshall v. Bosack, 463 F. Supp. 800, 801 (E.D. Pa. 1978). Likewise, Commission judges have held that intrastate mining activities are covered by the Act because they affect interstate commerce. See: Secretary of Labor v. Rockite Gravel Company, 2 FMSHRC 3543 (December 1980); Secretary of Labor v. Klippstein and Pickett, 5 FMSHRC 1424 (August 1983); Secretary

of Labor v. Haviland Brothers Coal Company, 3 FMSHRC 1574 (June 1981); Secretary of Labor v. Mellott Trucking Company, 10 FMSHRC 409 (March 1988).

A state highway department operating an intrastate open pit limestone mine, the product of which is crushed, broken and used to maintain county roads was held to be subject to the Act. Ogle County Highway Department, 1 FMSHRC 205 (January 1981).

A crushed stone mine operation that had an MSHA "Mine ID" number and was inspected by MSHA was held to be subject to the Act because the sales of rock products, as well as the use of equipment manufactured out of state, affected commerce within the meaning of the Act's jurisdictional language. Tide Creek Rock Products, 4 FMSHRC 2241 (December 1982). See also: Southway Construction Co., 6 FMSHRC 174 (January 1984).

A gravel mine operator conducting activities solely within a state was held to be subject to the Act because its local mining activity had an impact on interstate market. Rockite Gravel Co., 2 FMSHRC 2543 (December 1980), Commission Review Denied January 13, 1981; Scoria Products Branch, Ultro, Inc., 6 FMSHRC 788 (March 1984); Southway Construction Co., supra.

I conclude and find that the intent of the 1977 Mine Act, as well as the preceding 1969 Coal Act, as manifested by the legislative history, is that it is to be broadly construed so as to apply to all of the nation's mines as a class of activity which affects commerce, and the cited cases supports this conclusion. Accordingly, I further conclude and find that the respondent's mining operation is covered by the 1977 Mine Act and affects commerce within the meaning of the Act, and that the respondent is within reach of the Act.

The Respondent's Liability

In response to the petitioner's pretrial discovery requests, counsel for the respondents submitted a copy of a Commonwealth of Kentucky Certificate of Incorporation, and Articles of Incorporation, for a Corporation identified as the "SHS Corporation," and the registration agent is shown as James Harris, one of the individuals who along with Curtis Smith and Eugene Mills, were engaged in the mining activity in question in this case. However, I find no particular connection with this corporation and the work being performed by these individuals in connection with the mine site in question.

Exhibit ALJ-1 is a copy of an MSHA Mine Legal Identification form, and it reflects that Mr. Harris, Mr. Smith, and

Mr. Mills were partners operating the SHM Coal Company, under MSHA Mine Identification Number 15-16245. There is a dispute as to who prepared and filled out the form. Although Eugene Mills conceded that he and the other individuals signed the form, he claimed that it was not filled out when they signed it. He also claimed that after Inspector Sorke informed him that he needed a company name to put on the form, he told Mr. Sorke that "SHM Construction sounds good to me," and asked Mr. Sorke to use that name on the form. Mr. Sorke claimed that he filled out the form in the presence of Mr. Mills on the same day of his initial visit to the site on November 16, 1987, and that all three individuals signed it that same day. Mr. Sorke further claimed that Mr. Mills told him to use the name "SHM Coal Company," and that he inserted this name on the form.

The form in question, on its face, is dated November 16, 1987, the same day that Mr. Sorke issued Citation No. 3004621, citing the respondent with a violation of section 41.10, for not submitting the legal identity form to MSHA. Mr. Sorke explained that he terminated the citation that same day after the form was executed by the respondents, and he confirmed that he knew that no legal identity form was on file with MSHA before he visited the site. He also indicated that he had verbally issued all of the citations on November 16, but reduced them to writing and actually served them on the respondent on November 18, and that he did so because he had to include the mine identity number on the citations forms. I find Mr. Sorke's explanation to be reasonable and credible.

Irrespective of the information on the form, the evidence adduced in this case establishes that the three individuals in question were conducting a mining operation, and that they were doing so in association with each other as independent contractors. As such, they are clearly accountable and liable for their actions, including the violations and any civil penalty assessments for those violations.

Fact of Violations

Docket No. KENT 88-159

In this case the respondent is charged in a section 104(d)(1) "S&S" citation with a single violation of the training requirements of 30 C.F.R. § 48.25(a), because Mr. Mills, Mr. Harris, and Mr. Smith had not received the new miner training required by this regulation. The respondent has not rebutted the reliable and probative evidence presented by the petitioner in support of the violation, and I conclude and find

that it establishes a violation. Accordingly, the violation IS AFFIRMED.

Docket No. KENT 88-104

In this case, the respondent is charged in a section 104(a) non-"S&S" citation with a violation of the mine operator notification requirements found in 30 C.F.R. § 41.10. The reliable and probative evidence presented by the petitioner clearly establishes that the respondent did not file the required report in compliance with the cited regulation. Accordingly, I conclude and find that a violation has been established, and it IS AFFIRMED.

The respondent is also charged in a section 104(d)(1) "S&S" order with a failure to submit a training plan as required by mandatory training standard 30 C.F.R. § 48.23(a)(3). The reliable and probative evidence presented by the petitioner establishes that the respondent did not file any training plan, and I conclude and find that a violation has been established. Accordingly, it IS AFFIRMED.

Significant and Substantial Violations

A "significant and substantial" violation is described in section 104(d)(1) of the Mine Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 C.F.R. § 814(d)(1). A violation is properly designated significant and substantial "if, based upon the particular facts surrounding the violation there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (April 1981).

In Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984), the Commission explained its interpretation of the term "significant and substantial" as follows:

In order to establish that a violation of a mandatory safety standard is significant and substantial under National Gypsum the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard--that is, a measure of danger to safety-contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury

in question will be of a reasonably serious nature.

In United States Steel Mining Company, Inc., 7 FMSHRC 1125, 1129, the Commission stated further as follows:

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

The question of whether any particular violation is significant and substantial must be based on the particular facts surrounding the violation, including the nature of the mine involved, Secretary of Labor v. Texasgulf, Inc., 10 FMSHRC 498 (April 1988); Youghiogheny & Ohio Coal Company, 9 FMSHRC 2007 (December 1987).

Unwarrantable Failure

The governing definition of unwarrantable failure was explained in Zeigler Coal Company, 7 IBMA 280 (1977), decided under the 1969 Act, and it held in pertinent part as follows at 295-96:

In light of the foregoing, we hold that an 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.

In several recent decisions concerning the interpretation and application of the term "unwarrantable failure," the

Commission further refined and explained this term, and concluded that it means "aggravated conduct, constituting more than ordinary negligence, by a mine operator in relation to a violation of the Act." Emery Mining Corporation, 9 FMSHRC 1997 (December 1987); Youghiogeny & Ohio Coal Company, 9 FMSHRC 2007 (December 1987); Secretary of Labor v. Rushton Mining Company, 10 FMSHRC 249 (March 1988). Referring to its prior holding in the Emery Mining case, the Commission stated as follows in Youghiogeny & Ohio, at 9 FMSHRC 2010:

We stated that whereas negligence is conduct that is "inadvertent," "thoughtless" or "inattentive," unwarrantable conduct is conduct that is described as "not justifiable" or "inexcusable." Only by construing unwarrantable failure by a mine operator as aggravated conduct constituting more than ordinary negligence, do unwarrantable failure sanctions assume their intended distinct place in the Act's enforcement scheme.

In Emery Mining, the Commission explained the meaning of the phrase "unwarrantable failure" as follows at 9 FMSHRC 2001:

We first determine the ordinary meaning of the phrase "unwarrantable failure." "Unwarrantable" is defined as "not justifiable" or "inexcusable." "Failure" is defined as "neglect of an assigned, expected, or appropriate action." Webster's Third New International Dictionary (Unabridged) 2514, 814 (1971) ("Webster's"). Comparatively, negligence is the failure to use such care as a reasonably prudent and careful person would use and is characterized by "inadvertence," "thoughtlessness," and "inattention." Black's Law Dictionary 930-31 (5th ed. 1979). Conduct that is not justifiable and inexcusable is the result of more than inadvertence, thoughtlessness, or inattention. * * *

In Youghiogeny & Ohio Coal Company, 10 FMSHRC 603 (May 1988), the Commission, citing UMWA v. Kleppe, 532 F.2d 1403 (D.C. Cir. 1976), cert. denied sub nom. Bituminous Coal Operators' Assn., Inc., v. Kleppe, 429 U.S. 1405, held that while a significant and substantial finding is a prerequisite for the issuance of a section 104(d)(1) citation, there is no such requirement for the issuance of a section 104(d)(1) order.

The petitioner's posthearing brief does not address in any detail the alleged unwarrantable nature of the section 104(d)(1) citation and order, or the significant and substantial findings made by the inspector. The brief is limited to the following argument made at page 5:

The failure of the respondent to obtain miner training and file mine plans prior to beginning mining was likely to result in a fatality because of the use of explosives, because of the lack of inspection of equipment used on the site, and because of the failure to use basic safety equipment such as hard hats and steel toe shoes on the site. The requirement of training and the filing of pre-mining plans are basic to the Federal Mine Safety regulatory scheme. Allowing respondent to mine without meeting these requirements defeats the purpose of the Act.

During the direct questioning and cross-examination of Inspector Sorke, no testimony was forthcoming with respect to his unwarrantable failure and significant and substantial findings, and he offered no reasons for making these findings. However, when called in rebuttal by the petitioner, and after questions from the court, Mr. Sorke testified as follows with respect to the hazard ramifications in connection with the lack of training (Tr. 225-227):

Most people that do strip mining, and we've heard them say they are not strip miners, they are not miners, have had initial training for new hired miners.

This alerts them to the dangers involved in this work, and what could happen to them during this type of work, considering the type of machinery they use, the area, and the control that they must provide for the highwall, and all those type things.

Q. If you assume that this is a mining operation, what kind of hazards would you expect them to be exposed to that the training would help them in dealing with?

A. Falling material from the highwall; as far as knowing how to properly operate the equipment, knowing that when you are using equipment

on elevated roadways and everything that berms are required; to keep over travel of equipment; knowing the condition the equipment is supposed to be in, and that's supposed to be handled; what records are required for that type of equipment.

Q. What about the use of explosives on that site?

A. Explosives are also in the training. Besides getting the training that I mentioned, they get first aid training for any accident that would happen on the site. They also would receive the proper use, handling and storage of explosives. If there is a site, and this one is not, where electricity is there, they get the proper use of electricity on a certain installation.

There are several areas; you know, I could keep going on and on and tell you things that they would get in training that just the normal construction worker has no idea about.

Q. What kind of accidents would you foresee as a result of working without that miner training?

A. Anytime that MSHA finds an untrained person, we consider him a hazard to himself and everybody there. We feel like we could have a fatality, just from him not knowing the things about safety at a mining operation that he needs to know. That's why we always issue the G Order and remove those people until they have had this proper training.

When asked whether the withdrawal of the respondents pursuant to section 104(g)(1) of the Act was the reason for his significant and substantial and unwarrantable failure findings, Inspector Sorke responded as follows (Tr. 227):

Q. Is that why you also found the unwarrantable and the S & S in this case?

A. Part of it. I mean, there's a lot of things that you have to consider.

Q. What other factors did you consider in issuing the unwarrantable?

A. In an unwarrantable failure, you have to consider: one, that it's either a violation of mandatory safety health standards or not; and the two, the operator either knew or he should have know --

JUDGE KOUTRAS: Is that your position here that knew or should have known this was a mining operation?

THE WITNESS: Yes, sir. It's that they knew, not should have known.

Inspector Sorke testified that after his initial contact with the respondents at the mine site, he assumed that they would take the necessary steps to obtain a legal mine plan and to receive training, and he believed that the respondents may have visited another MSHA inspector at his home to obtain further information in this regard (Tr. 54, 71). At the hearing, the respondents who were present confirmed that they had made an initial contact with an individual who conducts training for another coal company, but that they did not avail themselves of any training (Tr. 223). Respondent Eugene Mills confirmed that he had a preliminary talk with a "safety man" who was hired, and when asked why he did not follow through with any training, he responded "everyone we talked to kept advising this and that. We were confused, and didn't know which way to go. Finally, we came to the point that we sought legal help" (Tr. 224).

Inspector Sorke confirmed that while it is common for mine operators who are operating illegal mines to have someone serving "in the woods as a watch-out," he was not aware of any such activity at the site in question. He also confirmed that in such situations, both he and the operator are apprehensive and scared, and that in this case the individuals at the site did not flee or attempt to run from the site (Tr. 215-217). Mr. Sorke confirmed that although several other individuals present at the scene "scattered and walked off the hill," the three named respondents stayed (Tr. 52). He also confirmed that no harsh words were spoken, and that he engaged in a friendly conversation with the respondents (Tr. 54). Further, aside from the inspector's mentioning the fact that one of his fellow inspectors had seen Mr. Harris on "some jobs," he had no

knowledge that any of the respondents had any previous connection with any other mining activities, or had ever been employed in coal mining (Tr. 103-104).

After careful review and consideration of all of the evidence in these proceedings, I cannot conclude that it supports any finding or conclusion that the violation concerning the respondent's failure to receive new miner training (48.25(a)), or the violation for the failure to submit a mining training plan (48.23(a)(3)), constitute unwarrantable failure violations. I find no aggravated conduct on the part of the respondents, and the inspector confirmed that he based his findings in this regard on the fact that the respondent "knew or should have known" about the cited training regulations in question. Further, although the inspector marked the citation and order "high negligence," no testimony was forthcoming as why he did this, other than his belief that the respondent "knew" about the training regulations. Under the circumstances, the inspector's unwarrantable failure findings ARE REJECTED AND VACATED.

With respect to the inspector's significant and substantial finding relating to the lack of new miner training (48.25(a)), there is no credible evidence showing that any of the individuals who were engaged in the mining activity in question were experienced miners, or had ever worked in the mining industry. Although none of the other respondents testified in this case, Eugene Mills confirmed that he had never before been involved in any coal mining (Tr. 191).

The intent of the new miner training regulations is to promote mine safety by insuring that new miners are trained in a number of safety and health subjects, including their new work environment, ground control, working around highwalls, hazard recognition, and the use of explosives in a mining environment. In enacting the withdrawal provisions for untrained miners pursuant to section 104(g)(1) of the Act, Congress recognized and declared that untrained miners are hazards to themselves and to others, and I conclude and find that the failure of new miners to receive the requisite training pursuant to the Act and MSHA's regulations is in itself a safety hazard.

The evidence in this case establishes that the respondents had engaged in work activities connected with the blasting and removal of overburden, the use of a bulldozer and other equipment, and the establishment of a 60 foot highwall. Mr. Mills confirmed that explosives were used to shoot the slate, stone, and large rocks from the highwall (Tr. 193). He also confirmed that the equipment was used to remove the overburden and push it over the steep hill and embankment adjacent to the site.

Under these circumstances, I conclude and find that the individuals in question were exposed to the hazards inherent in such activities, and that their lack of training presented a reasonable likelihood of an injury or accident of a reasonably serious nature. Accordingly, I conclude and find that the violation was significant and substantial, and the inspector's finding in this regard IS AFFIRMED.

With regard to the inspector's significant and substantial finding in connection with the violation for the failure to file a training plan (48.23(a)(3)), I find no credible probative evidence to establish that the failure to file such a plan constituted a significant and substantial violation. The inspector's testimony in this case is totally lacking in any support for such a finding. Under the circumstances, the inspector's finding IS REJECTED AND VACATED.

In view of the foregoing findings and conclusions, including the rejection of the inspector's unwarrantable failure findings, section 104(d)(1) Order No. 3004623, November 16, 1987, citing a violation of 30 C.F.R. § 48.25(a), for the failure to provide training for the three cited individuals in question is modified to a section 104(a) citation, with "S&S" findings, and IT IS AFFIRMED.

Section 104(d)(1) Order No. 3004624, November 16, 1987, citing a violation of 30 C.F.R. § 48.23(a)(3), for the failure to submit a mine training plan is modified to a section 104(a) citation, with non-"S&S" findings, and IT IS AFFIRMED.

Section 104(a) non-"S&S" Citation No. 3004621, November 16, 1987, citing a violation of 30 C.F.R. § 41.10, for failing to submit the required mine legal identity report IS AFFIRMED AS ISSUED.

Size of Business and Effect of Civil Penalty Assessment on the Respondent's Ability to Continue in Business

The evidence establishes that the mining operation in question was very small and was being operated by three individuals of unknown means and assets. The site has been closed by the State of Kentucky and MSHA's withdrawal orders. The individuals in question submitted no evidence with respect to the impact of any civil penalty assessments on their ability to pay such assessments. Aside from Mr. Eugene Mills, who testified in this case, there is no information as to whether or not the other individuals engaged in the mining activity in question are gainfully employed. Absent any evidence to the contrary, I

cannot conclude that the payment of the civil penalty assessments will adversely affect the respondents.

History of Prior Violations

The respondent has no known history of prior violations.

Gravity

With the exception of the new miner training violation, I conclude and find that the remaining two violations were non-serious. With respect to the new miner training violation, I conclude and find that it was serious.

Negligence

In view of my unwarrantable failure findings, I conclude and find that all of the violations which have been affirmed in these proceedings resulted from the respondent's failure to exercise reasonable care, and that this constitutes ordinary negligence.

Good Faith Compliance

As stated above, the mine site in question is closed, and the violations remain unabated because of that closure. Under the circumstances, I cannot conclude that the respondents have abated the violations in good faith, and I doubt very much that they will have any opportunity to do so, or ever intend to.

Civil Penalty Assessments

On the basis of the foregoing findings and conclusions, and taking into account the requirements of section 110(i) of the Act, I conclude and find that the following civil penalty assessments for the violations which have been affirmed are reasonable and appropriate in the circumstances of these proceedings:

Docket No. KENT 88-104

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. Section</u>	<u>Assessment</u>
3004621	11/16/87	41.10	\$ 20
3004624	11/16/87	48.23(a)(3)	\$ 20

Docket No. KENT 88-159

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. Section</u>	<u>Assessment</u>
3004623	11/16/87	48.25(a)	\$150

ORDER

The respondent IS ORDERED to pay civil penalty assessments in the amounts shown above within thirty (30) days of the date of these decisions. Upon receipt of payment by the petitioner, this matter is dismissed.


George A. Koutras
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JUN 20 1989

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 89-6-M
Petitioner	:	A.C. No. 41-03449-05501
v.	:	
	:	Tanner Sand & Gravel
TANNER SAND & GRAVEL,	:	
Respondent	:	

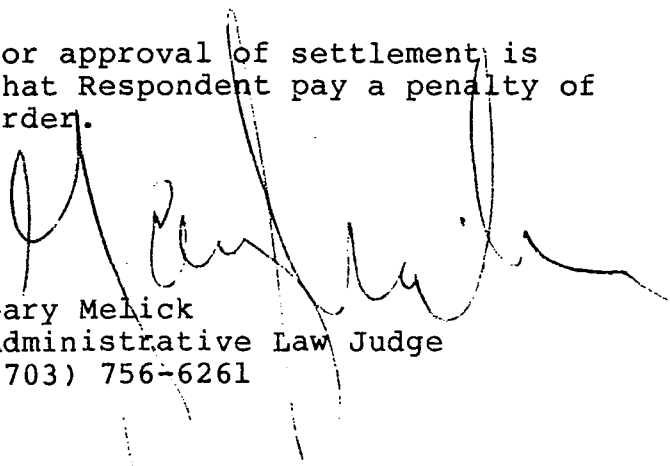
DECISION APPROVING SETTLEMENT

Appearances: Sara D. Smith, Esq., Office of the Solicitor
U.S. Department of Labor, Dallas, Texas for
the Secretary of Labor;
Mr. Sammy Tanner, pro se, Hutchins, Texas.

Before: Judge Melick

This case is before me upon a petition for assessment of civil penalty under Section 105(d) of the Federal Mine Safety and Health Act of 1977 (the Act). At hearing Petitioner in effect moved to approve a settlement agreement and to dismiss the case. Respondent has agreed to pay the proposed penalty of \$40 in full. I have considered the representations and documentation submitted in this case, and I conclude that the proffered settlement is appropriate under the criteria set forth in Section 110(i) of the Act.

WHEREFORE, the motion for approval of settlement is GRANTED, and it is ORDERED that Respondent pay a penalty of \$40 within 30 days of this order.


Gary Melick
Administrative Law Judge
(703) 756-6261

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JUN 20 1989

WILLIAM WAYT,	:	DISCRIMINATION PROCEEDING
Complainant	:	
v.	:	Docket No. WEVA 89-114-D
	:	MORG CD 89-2
CONSOLIDATION COAL COMPANY,	:	
Respondent	:	Ireland Mine

ORDER OF DISMISSAL

Before: Judge Maurer

The Complainant, William Wayt, requests approval to withdraw his Complaint in the captioned case on the grounds that he has reconsidered his decision to proceed with the Complaint and no longer desires a hearing concerning this matter. Under the circumstances herein, permission to withdraw is granted. 29 C.F.R. § 2700.11. The case is therefore dismissed.

Accordingly, the hearing presently scheduled for June 29, 1989, in Morgantown, West Virginia, is cancelled.


Roy J. Maurer
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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JUN 20 1989

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 89-25-D
ON BEHALF OF CHARLES	:	DENC CD 88-14
ARLES HERREN,	:	
Complainant	:	Jewett Mine
v.	:	
	:	
DON GRIFFITH CONSTRUCTION,	:	
Respondent	:	

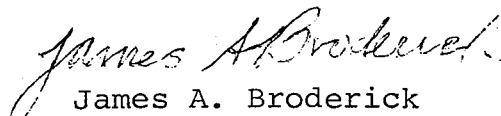
DECISION APPROVING SETTLEMENT
ORDER OF DISMISSAL

Before: Judge Broderick

On June 18, 1989, the Secretary filed a new motion to approve settlement and an amended settlement agreement. By the settlement agreement, Respondent will pay to Charles Herren the sum of \$2000 "in full payment of all backwages and damages alleged dur in this case." The \$2000 represents three weeks back wages. Respondent completed its job and laid off all its crew at the worksite, three weeks after Herren left its employ.

I have considered the motion in the light of the purposes of section 105(c) of the Act and conclude that it should be approved.

Accordingly, the settlement agreement is APPROVED, and, subject to the payment by Respondent of \$2000 to complainant Herren, this proceeding is DISMISSED.


James A. Broderick
Administrative Law Judge

Distribution:

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Mr. Robert Hollenshead, President, Don Griffith Construction, Inc., P.O. Box 189, Carthage, TX 75633 (Certified Mail)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FALLS CHURCH, VIRGINIA 22041

JUN 20 1989

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 88-113
Petitioner	:	A.C. No. 15-15665-03512
v.	:	
	:	Docket No. KENT 88-114
K T K MINING AND CONSTRUCTION,	:	A.C. No. 15-15665-03513
COMPANY,	:	
Respondent	:	Docket No. KENT 88-125
	:	A.C. No. 15-15665-03514
	:	
	:	Docket No. KENT 88-130
	:	A.C. No. 15-15665-03515
	:	
	:	Docket No. KENT 88-141
	:	A.C. No. 15-15665-03516
	:	
	:	K T K No. 2 Mine

DECISION

Appearances: W. F. Taylor, Esq., Office of the Solicitor,
U.S. Department of Labor, Nashville, Tennessee
for Petitioner;
Barbara Krause, Esq., Smith, Heenan & Althen,
Washington, D.C., for Respondent.

Before: Judge Melick

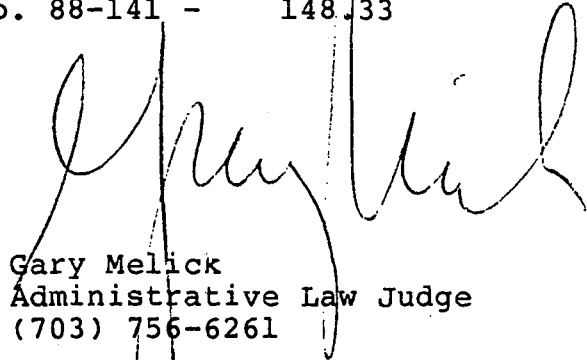
These cases are before me upon petitions for civil penalty under Section 105(d) of the Federal Mine Safety and Health Act of 1977 (the Act). At hearing and post hearing Petitioner filed motions to approve settlement agreements and to dismiss the cases. The following reductions in penalty have been proposed:

<u>Original Proposed Penalty</u>	<u>Agreed Penalty</u>
Docket No. KENT 88-113 - \$3,157	\$ 335.00
Docket No. KENT 88-114 - 16,331	2,826.00
Docket No. KENT 88-125 - 80	13.32
Docket No. KENT 88-130 - 1,294	824.33
Docket No. KENT 88-141 - 460	148.33

I have considered the representations and documentation submitted in these cases, and I conclude that the proffered settlement is appropriate under the criteria set forth in Section 110(i) of the Act.

WHEREFORE, the motions for approval of settlement are GRANTED, and it is ORDERED that Respondent pay the following penalties within 30 days of this order:

Docket No. 88-113	- \$	335.00
Docket No. 88-114	-	2,826.00
Docket No. 88-125	-	13.32
Docket No. 88-130	-	824.33
Docket No. 88-141	-	148.33



Gary Melick
Administrative Law Judge
(703) 756-6261

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JUN 21 1989

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 89-30-M
Petitioner	:	A.C. No. 41-01786-05525
v.	:	
	:	Docket No. CENT 89-42-M
BANDAS INDUSTRIES INCORPORATED:	:	A.C. No. 41-01786-05526
Respondent	:	
	:	Nolanville Quarry Plant

DECISION

Appearances: Michael Olvera, Esq., Office of the Solicitor,
U.S. Department of Labor, Dallas, Texas,
for Petitioner;
Robert Bandas, Vice President Bandas
Industries, Inc., Temple, Texas for
Respondent.

Before: Judge Melick

These cases are before me upon the petitions for 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," charging Bandas Industries, Inc., (Bandas) with 24 violations of regulatory standards. The general issues before me are whether Bandas violated the cited regulatory standards and, if so, the appropriate civil penalty to be assessed in accordance with section 110(i) of the Act.

At hearing the Secretary moved for the approval of a settlement agreement with respect to 18 of the citations at bar. She has submitted sufficient information to show that the proffered settlement is appropriate under the criteria set forth in section 110(i) of the Act. Accordingly an order will be incorporated in this decision approving the proposed settlement and directing payment of the agreed upon penalties.

At hearing the Secretary also moved to withdraw and vacate Citation No. 3276776 acknowledging that she did not have the necessary expert testimony to support the citation. Under the circumstances the motion to withdraw was granted. In addition, the inspector who issued Citation

No. 3276766 acknowledged at hearing that he could not recall the specific facts regarding the nature of the alleged violative conditions. Accordingly, in the absence of probative evidence in support of the alleged violation the citation was dismissed at hearing. Three citations therefore remain at issue.

Citation No. 3276600 alleges a "significant and substantial" violation of the standard at 30 C.F.R. § 56.9087 and charges as follows:

Allegation: A caterpillar 988A front-end loader was provided with a back-up alarm which was not automatic. Violation: the caterpillar 988A front-end loader company number 145 was not provided with an operable back-up alarm. The unit was operating in the pit area loading haul trucks. The driver's view to the rear was obstructed and no ground observer was used to signal the driver when backing up. No evidence was found to indicate the back-up alarm was not automatic.

The cited standard, 30 C.F.R. § 56.9087, provides as follows:

Heavy duty mobile equipment shall be provided with audible warning devices. When the operator of such equipment has an obstructed view to the rear, the equipment shall have either an automatic reverse signal alarm which is audible above the surrounding noise level or an observer to signal when it is safe to back up.

Inspector Robert Lemasters of the Federal Mine Safety and Health Administration (MSHA) testified that he had observed the cited the front-end loader at about 1300 hours on September 13, 1988, operating without an operable back-up alarm and with no one in the area acting as a ground observer. Lemasters also observed that the view to the rear of the front-end loader was obstructed for about 15 feet behind. He testified that he had observed some of the haul truck drivers outside of the truck cabs walking in the vicinity of the front-end loader. According to Lemasters these drivers were thereby exposed to the hazard of being run over. Based on this evidence and reports of "Fatalgrams" (MSHA reports involving similar violations causing fatalities) Lemasters opined that a fatality was reasonably likely under the circumstances.

Lemasters found only low negligence because of evidence that the cited equipment had been examined before the shift began and had been reported as properly functioning at that time. The violation was promptly abated when a ground wire was reconnected. These findings are not disputed.

Robert Bandas, Vice President of the Respondent, testified that in his opinion it would be extremely remote for the back-up alarm to not function. According to Bandas the area in which the front-end loader was operating had no pedestrian traffic. Moreover the truck drivers were forbidden by company policy to leave their trucks. Bandas had personally never seen any driver outside of his truck in this area.

In evaluating the above evidence I find that the violation is proven as charged. I further conclude that the uncontradicted testimony of Inspector Lemasters concerning his observation of truck drivers outside of their cabs in the vicinity of the front-end loader is to be credited. Bandas testified only that it was contrary to company policy to do so and that he had never personally observed any driver outside of his truck in the area. This evidence does not contradict the direct observations of Lemasters. Accordingly I find under the circumstances that injuries of a reasonably serious nature, including fatalities were reasonably likely. Under the circumstances I find that the violation was serious and "significant and substantial". Secretary v. Mathies Coal Co., 6 FMSHRC 1 (1984). Under the circumstances and considering the size of the operator, its history of violations, and the fact that the violation was abated in accordance with the Secretary's directive, I find that a civil penalty of \$136 is appropriate.

Citation No. 3276515 alleges a "significant and substantial" violation of the standard at 30 C.F.R. § 56.14003 and charges that "the guard on the tail pulley of the by-pass conveyor at No. 1 plant did not extend far enough to cover the pinch points."

The cited standard provides as follows:

Guards at conveyor-drive, conveyor-head, and conveyor-tail pulleys shall extend a distance sufficient to prevent a person from accidentally reaching behind the guard and becoming caught between the belt and the pulley.

According to MSHA Inspector John Carter the cited guard on the tail pulley in fact did not cover the pinch points as noted in the photograph admitted in evidence. (See Exhibit PX-16). According to Carter, workmen in the area such as miners cleaning-up around the cited tail pulley would be exposed to entanglement in the pinch point suffering loss of, or broken, limbs. Carter acknowledged however that the pinch point was not directly accessible because of the belt structure. At the same time he opined that there was no obstruction "that couldn't be gotten around".

According to Robert Bandas there was very little foot traffic in the cited area and in any event it was nearly impossible because of the belt structure itself for an employee to get close enough to the cited pinch point to become entangled. Bandas also noted that at the time of the violation and since then the belt has not been cleaned while in motion. In light of the firsthand knowledge and experience of Bandas, corroborated in significant respects by Inspector Carter, I find but limited exposure to this hazard. Accordingly while I find that the the violation is proven as charged, I find that exposure to the cited hazard was so remote as to make it unlikely that an employee would become entangled in the cited tail pulley. Accordingly I do not find the violation to be "significant and substantial" or of high gravity. In the absence of any evidence of negligence I am unable to evaluate this criterion. Under the circumstances I find that a civil penalty of \$75 appropriate.

Citation No. 3276517 alleges a "significant and substantial" violation of the standard at 30 C.F.R. § 56.9054 and charges that "there was a build up of material at the bumper block at No. 3 Plant dump station."

The cited standard, 30 C.F.R. § 56.9054, provides that "berms, bumper blocks, safety hooks, or similar means shall be provided to prevent overtravel and overturning at dumping locations." It may reasonably be inferred that the cited standard requires that the safety devices not only be provided but must also be maintained "to prevent overtravel and overturning at dumping locations".

According to MSHA Inspector John Carter there was indeed a buildup of material at the cited bumper block in an amount sufficient to enable a truck backing up to the dumping location to pass over the block and into the dumping station. According to Carter however, at most the driver would only be

"shaken up" if his truck backed over into the dumping station. Carter also observed that the plant was not then in operation.

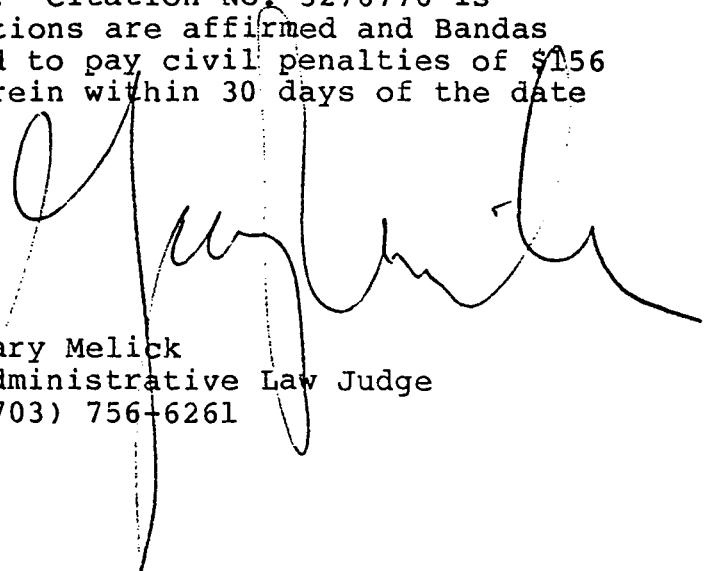
According to Robert Bandas the blocks were 18 inches high and there was only 6 inches of material buildup so that the likelihood of the truck backing over the block was "very slim". He also noted that sufficient protection still remained in spite of the buildup to hinder the rear movement of any truck.

Within this framework of evidence I find that a violation existed as charged. In light of the testimony however that, at worst, the truck driver would only be "shaken up" I cannot find that the violation was of high gravity or "significant and substantial". I am also unable to find negligence in light of the absence of any evidence on this issue. Within this framework I find that a civil penalty of \$50 is appropriate.

ORDER

Docket No. CENT 89-30-M: Citation No. 3276766 is vacated. The remaining citations are affirmed and Bandas Industries, Inc., is directed to pay civil penalties of \$1,482 for the violations cited therein with 30 days of the date of this decision.

Docket No. CENT 89-42-M: Citation No. 3276776 is vacated. The remaining citations are affirmed and Bandas Industries, Inc., is directed to pay civil penalties of \$156 for the violations cited therein within 30 days of the date of this decision.



Gary Melick
Administrative Law Judge
(703) 756-6261

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

June 22, 1989

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. VA 89-3-M
Petitioner	:	A. C. No. 44-02965-05516
	:	
v.	:	Louisa Plant
	:	
A. H. SMITH STONE COMPANY,	:	Docket No. VA 89-4-M
Respondent	:	A. C. No. 44-03995-05511
	:	
	:	Culpeper Plant

DECISION

Appearances: Jack Strausman, Esq., Office of the Solicitor,
U. S. Department of Labor, Arlington, Virginia,
for Petitioner;
Lisa M. Wolff, Representative for A. H. Smith
Stone Company, Branchville, Maryland, for
Respondent.

Before: Judge Merlin

These cases are petitions for the assessment of civil penalties filed by the Secretary of Labor against A. H. Smith Stone Company pursuant to section 110 of the Federal Mine Safety and Health Act of 1977, 30 U. S. C. § 820. A hearing was held on June 6, 1989, and the parties waived submission of post-hearing briefs.

Penalty proceedings before the Commission are entirely de novo. Sellersburg Stone Company v. Federal Mine Safety and Health Review Commission, 736 F.2d 1147, 1152 (7 Cir. 1984). Tennessee Chemical, Inc., 11 FMSHRC ___, at ___, (May 30, 1989).

Section 110(i) of the Act, 30 U.S.C. § 820(i), provides that where a violation is proved the Commission in determining the amount of penalty shall consider, (1) the operator's history of previous violations; (2) the appropriateness of the penalty to the size of the operator; (3) negligence; (4) the effect of any penalty upon 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 a violation.

In accordance with the evidence of record and the uncontroverted submissions of the Solicitor, I find the operator's size is moderate.

In the absence of evidence to the contrary, I find that imposition of penalties herein will not affect the operator's ability to continue in business. The unsupported and unverified financial statements submitted by the operator do not establish that the operator will be forced out of business due to payment of civil penalties under the Act. At the hearing in Docket No. VA 89-13-M, Administrative Law Judge William Fauver told the operator's representative what type of evidence was required to prove this defense. I adhere to the views expressed by Judge Fauver.

I further find the operator's history is as set forth in the Solicitor's pre-hearing statement, with the exception of the last two sentences of subparagraph 11(f).

Pursuant to the stipulations I conclude that the violations were abated in a timely manner.

VA 89-3-M

Citation No. 3045443

This citation sets forth the alleged violative condition or practice as follows:

"The guard for the drive pulley and V belts for the #1 jaw crusher had parts of the guard missing. This is along a travelway and would be hazardous to anyone traveling in the area. This condition was cited on the last regular inspection 1-27-88."

Section 56.14006 of the regulations, 30 C.F.R. § 56.14006, provides:

Except when testing the machinery, guards shall be securely in place while machinery is being operated.

The inspector testified that two portions of the guard were missing, one on the drive belt for the electric motor of the jaw crusher and the other for the drive pulley of the crusher itself (Tr. 28, 30, 59). The operator's former plant manager remembered as missing only the portion of the guard for the electrical motor, but admitted that there could very well have been two missing pieces (Tr. 62). I accept the inspector's testimony that two pieces of the guard were missing. I further adopt the inspector's statement that when he issued the citation the machinery was running and the plant was in full operating condition

(Tr. 31, 38). Based upon the foregoing, I find a violation of 30 C.F.R. § 56.14006.

The inspector stated that a ladder, which was used to go to and from the control booth of the crusher, was one foot in front of where the guard for the pulley of the jaw crusher was missing (Tr. 27, 35, 38). He believed there was a danger that if the belt broke, an individual on the ladder could be killed before he could get out of the way (Tr. 35, 38). He had read of fatal accidents where belts like the ones in this case had weakened and broken (Tr. 43). There was also a risk that an employee could lose his footing on the ladder and fall with his foot becoming caught in the drive pulley (Tr. 40). He saw employees going up and down the ladder (Tr. 41). The operator's former manager agreed that any injury would be permanently disabling or fatal (Tr. 54). Based upon the possibility of serious or fatal injuries from the missing guard, I find the violation was serious.

The inspector also found that the violation was significant and substantial. The Commission has held that a violation is properly designated significant and substantial if, based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (April 1981). In Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984), the Commission explained.

In order to establish that a violation of a mandatory safety standard is significant and substantial under National Gypsum, the Secretary of Labor must prove: (1) the underlying violation of 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.

The Commission subsequently explained that the third element of the Mathies formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury" U. S. Steel Mining Co., 6 FMSHRC 1834, 1836 (August 1984).

As set forth above, the evidence shows a violation and discrete safety hazards. What is lacking however, is proof of a reasonable likelihood that the hazards will result in injury. When asked why he believed injury or illness was reasonably likely, the inspector merely referred to previous accidents and

fatalities in other operations (Tr. 34-35). He did not indicate the frequency of those occurrences. Moreover, he did not address the circumstances which led him to conclude that in this case there was reasonable likelihood. He spoke only of the possibility of an individual on the ladder becoming caught in a pinch point or losing his footing on the ladder due to grease or water, without indicating the condition of the ladder or surrounding areas at the time (Tr. 39-40). The statement of the operator's former manager that injury was reasonably likely to an individual on the work platform must be discounted because he made clear that a person would be on this platform only for pre-shift inspection and maintenance and not during normal operations (Tr. 48, 57-58). Accordingly, the finding of significant and substantial must be vacated.

As set forth herein, a violation may be serious while not satisfying the criteria required by Commission precedent for establishing significant and substantial. Quinland Coals, Inc., 9 FMSHRC 1614, 1622, n. 11 (September 1987); Youghiogheny and Ohio Coal Company, 9 FMSHRC 2007, 2013 (December 1987); Columbia Portland Cement, 10 FMSHRC 1363, 1373; 1375, 1384-1385; 1387, 1397; 1399, 1403; 1405, 1409 (September 1988). As also explained supra, penalty proceedings are de novo before the Commission which is bound to determine penalty assessments in accordance with the six criteria in section 110(i) of the Act. The Commission is not bound by the Secretary's penalty assessment regulations.

I accept the inspector's testimony that the foreman observed this violation but took no action to correct it (Tr. 35-36). On this basis I find the operator was negligent.

In light of the foregoing, a penalty of \$175 is assessed for this violation.

Order No. 3045449

This order sets forth the alleged violative condition or practice as follows:

"The disconnecting device for the electrical distribution box for the jaw crusher was broken. The device would not connect or disconnect the electrical current. This is an order of withdrawal [sic] all employees shall be withdrawn from in and around the electrical control house for the #1 jaw crusher until repairs are made to the electrical disconnect device. The repairs must be made by an electrician that understands the hazards of working on electrical devices. The repairs must be inspected by an authorized representative of the Secretary of Labor before the plant can be restarted".

Section 56.12030 of the regulations, 30 C.F.R. § 56.12030 provides:

When a potentially dangerous condition is found it shall be corrected before equipment or wiring is energized.

The inspector testified that after he issued the citation for missing guards discussed supra, he went back to the area to see how the employees were coming along in correcting that situation (Tr. 66). He inquired whether power was disconnected from the electrical motor on the jaw crusher and was told it had been (Tr. 67). The foreman and the crusher operator then accompanied the inspector to the switchhouse where the electrical control boxes were located (Tr. 66-67). The inspector stated that the disconnect handle on the outside of the control box was not working and just flopped up and down (Tr. 67-68). The crusher operator then opened the box and pulled the inside switch down (Tr. 68-69). According to the inspector, contrary to what he had been told power had not in fact been disconnected and the equipment was energized (Tr. 69). Moreover, a plate that was supposed to be inside the box covering wires was missing (Tr. 69-70). The wires inside the box were uninsulated, live and exposed (Tr. 70, 72-73). The wires carried 480 volts which were sufficient to kill or seriously injure anyone who touched them (Tr. 72, 90-91). The inspector further reported that the wires were only 2" from the crusher operator's hand when he reached in to pull the inside switch (Tr. 72). The operator's former manager did not dispute the inspector's account of what he saw (Tr. 98, 104). I accept the inspector's testimony on the foregoing matters.

The condition of the control box including the broken outside handle, missing inside plate and exposed live wires was potentially very dangerous. The wires which could cause death or serious injury by electrocution were just a few inches away from the hand of anyone who would use the inside switch to disconnect power. The cited mandatory standard requires that this condition be corrected before equipment or wiring is energized. Based upon the evidence that power was not disconnected, I find a violation.

Because of the close proximity of the live and uninsulated wires to an individual disconnecting the inside switch as the crusher operator did, there was a very real danger of injury or death from electrocution. I find the violation was very serious.

The requirements necessary to support a finding of significant and substantial have already been explained. In this instance there was a violation. Second, the danger of electrocution presented a discrete safety hazard. Third, a reasonable likelihood existed that the hazard would result in an injury because a person's hand inside the box would be only 2" from live

wires. It would not be at all unusual for an individual to place his hand in that dangerous position since the inside switch would be used every time power was disconnected (Tr. 80). Indeed, the crusher operator told the inspector that for the past six months it had been his practice to shut off power in this manner (Tr. 81). Fourth, there was a reasonable likelihood the injury would be of a reasonably serious nature since electrocution by the 480 volts would cause serious injury or death. Accordingly, pursuant to Commission precedent I conclude the violation was significant and substantial.

The violation existed for six months. It was the crusher operator's practice to use the inside switch (Tr. 81). He did so in the presence of not only the inspector but also of his foreman who was not surprised, did not dispute this was the procedure followed, and did not attempt to stop him (Tr. 82). These circumstances demonstrate that supervision, training and discipline were all far from what was required. The negligence of the rank and file crusher operator is therefore, attributable to the operator. A. H. Smith Stone Company, 5 FMSHRC 13 (January 1983); Southern Ohio Coal Company, 4 FMSHRC 1459 (August 1982). The foreman also was extremely negligent and, as a supervisor, his negligence is attributable to the operator. Wilmot Mining Company, 9 FMSHRC 684 (April 1987), affirmed in part, reversed and remanded in part, per curiam Wilmot Mining Company v. Secretary of Labor, (6 Cir. No. 87-3480) (May 17, 1988). Finally, the plant manager who was responsible for all operations was not even aware that employees were disconnecting power with the inside switch (Tr. 97-98). In light of the foregoing, I find that at all levels the operator was highly negligent.

The operator's assertion that the main power switch was used to disconnect power is without merit. The crusher operator's conduct and statements demonstrate that the main was not being used to disconnect power (Tr. 81). In addition, I do not find it plausible that the main would be used in this manner because it would be impractical and expensive (Tr. 92-93).

A violation such as this is cause for great concern. The likelihood of grievous bodily harm was very great and the operator condoned perilously unsafe practices.

A penalty of \$1,800 is assessed for this violation.

Citation No. 3045442

This citation was issued for a violation of 30 C.F.R. § 56.15002 because employees in the plant area were observed not wearing hard hats. The original assessment was \$168 and the recommended settlement is \$150. The Solicitor explained that the violation was significant and substantial as well as serious

because employees were working in areas where there was a danger of falling materials. According to the Solicitor the operator was negligent because the violation was obvious. The Solicitor stated he agreed to the slight reduction because the plant was not operating at the time the citation was issued (Tr. 12-14). At the hearing I accepted the Solicitor's representations and approved the recommended settlement (Tr. 14).

Citation No. 3045444

This citation was issued for a violation of 30 C.F.R. § 56.9087 because the back-up alarm on the front-end loader was inoperative. The original assessment was \$147 and the recommended settlement is for the same amount. The Solicitor explained that the violation was significant and substantial as well as serious because customers and truck drivers in the area were subject to a risk of injury. According to the Solicitor the operator was negligent because the foreman himself was operating the loader (Tr. 14-16). At the hearing I accepted the Solicitor's representations and approved the recommended settlement (Tr. 16).

Citation No. 3045445

This citation was issued for a violation of 30 C.F.R. § 56.15003 because an employee was observed wearing tennis shoes in areas where a hazard existed which could cause an injury to the feet. The original assessment was \$74 and the recommended settlement is for the same amount. The Solicitor explained that the violation was significant and substantial as well as serious because of the risks posed to feet by heavy hand-held tools. According to the Solicitor the operator was negligent because the violation was obvious (Tr. 16-17). At the hearing I accepted the Solicitor's representations and approved the recommended settlement (Tr. 17).

Citation No. 3045447

This citation was issued for a violation of 30 C.F.R. § 56.12016 because two employees were observed working on electrically powered equipment without the power switches being properly locked out. The original assessment was \$178 and the proposed settlement is \$168. The Solicitor explained that the violation was significant and substantial as well as serious because employees could be injured if the conveyor belt were started from push button switches without the employees' knowledge. According to the Solicitor the operator was negligent since the foreman observed the condition. The Solicitor stated that he agreed to the slight reduction because the feared injury was not quite as serious as had originally been thought (Tr. 19). At the hearing I accepted the Solicitor's representations and approved the recommended settlement (Tr. 19).

Citation No. 3045448

This citation was issued for a violation of 30 C.F.R. § 56.16005 because four compressed gas cylinders were not secured. At the hearing the operator offered to settle this violation for the \$20 original assessment and the Solicitor accepted. At the hearing I approved the recommended settlement (Tr. 65).

VA 89-4-M

Citation No. 2852770

This citation was issued for a violation of 30 C.F.R. § 56.15003 because employees including the plant superintendent were observed not wearing proper footwear in areas where a hazard existed which could cause injury to the feet. The original assessment was \$68 and the settlement is for the same amount. The Solicitor explained that the violation was significant and substantial as well as serious because hazards to the feet existed in the plant at the time the citation was issued. Employees were engaged in various tasks using heavy hand-held tools. According to the Solicitor the operator was negligent, especially since the superintendent himself was not wearing the required shoes (Tr. 6-7). At the hearing I accepted the Solicitor's representations and approved the recommended settlement (Tr. 7).

Citation No. 2852771

This citation was issued for a violation of 30 C.F.R. § 56.16005 because there were two unsecured gas cylinders in the area of the primary crusher where four employees were working. The original assessment was \$157 ^{1/} and the recommended settlement is for the same amount. The Solicitor explained that the violation was significant and substantial as well as serious because the tasks being performed by the employees required the use of compressed gas (Tr. 8-9). According to the Solicitor the operator was negligent, because the superintendent was in the area. At the hearing I accepted the Solicitor's representations and approved the recommended settlement (Tr. 9).

Citation No. 2852772

This citation was issued for a violation of 30 C.F.R. § 56.12016 because employees were observed working on the crusher without the electrically powered switches being properly locked out and tagged. The original assessment was \$178 and the proposed settlement is for the same amount. The Solicitor explained

^{1/} The transcript erroneously gives the amount as \$175 (Tr. 9).

the violation was significant and substantial as well as serious because the crusher could be inadvertently started while work was being performed. According to the Solicitor the operator was negligent because the superintendent should have known and probably did know that the employees were working on electrically powered equipment (Tr. 11). At the hearing I accepted the Solicitor's representations and approved the recommended settlement (Tr. 13).

Order

Citation No. 3045443

It is ORDERED that the finding of a violation be AFFIRMED.

It is further ORDERED that the finding of significant and substantial be VACATED.

It is further ORDERED that a penalty of \$175 be ASSESSED.

Order No. 3045449

It is ORDERED that the finding of a violation be AFFIRMED.

It is further ORDERED that the finding of significant and substantial be AFFIRMED.

It is further ORDERED that a penalty of \$1,800 be ASSESSED.

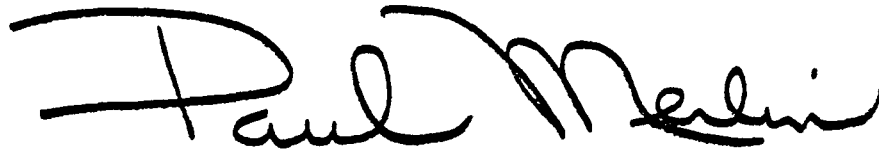
Citation Nos. 3045442, 3045444, 3045445, 3045447, 3045448
2852770, 2852771 and 2852772

It is ORDERED that the recommended settlements for these citations be APPROVED.

ORDER TO PAY

It is ORDERED that the operator pay the following amounts within 30 days from the date of this decision.

<u>Citation or Order No.</u>	<u>Amount</u>
3045443	\$175
3045449	\$1,800
3045442	\$150
3045444	\$147
3045445	\$74
3045447	\$168
3045448	\$20
2852770	\$68
2852771	\$157
2852772	\$178
Total	<u>\$2,937</u>

A large, stylized handwritten signature in black ink, reading "Paul Merlin". The signature is fluid and cursive, with the first name "Paul" and last name "Merlin" clearly distinguishable.

Paul Merlin
Chief Administrative Law Judge

Distribution:

Jack Strausman, Esq., Office of the Solicitor, U. S. Department of Labor, 4015 Wilson Boulevard, Room 516, Arlington, VA 22203 (Certified Mail)

Ms. Lisa M. Wolff, Director of Safety/Government Affairs, A. H. Smith Associates, 9101 Railroad Avenue, Branchville, MD 20740 (Certified Mail)

/gl

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

COLONNADE CENTER

ROOM 280, 1244 SPEER BOULEVARD

DENVER, CO 80204

JUN 23 1989

BEAVER CREEK COAL COMPANY,	:	CONTEST PROCEEDINGS
Contestant	:	
	:	Docket No. WEST 88-84-R
	:	Citation No. 3044384; 12/17/87
	:	
v.	:	Docket No. WEST 88-104-R
	:	Order No. 3044357; 1/6/88
	:	
SECRETARY OF LABOR,	:	Docket No. WEST 88-106-R
MINE SAFETY AND HEALTH	:	Citation No. 3227085; 1/6/88
ADMINISTRATION (MSHA),	:	
Respondent	:	Trail Mountain Mine No. 9
	:	Mine ID 42-01211

DECISION

Appearances: David M. Arnolds, Esq., Beaver Creek Coal Company, Denver, Colorado, for Contestant;
Robert J. Murphy, Esq., John J. Matthew, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Respondent.

Before: Judge Cetti

Contestant, Beaver Creek Coal Company, filed Notices of Contest on Citation Nos. 3044384, 3044357 and 3227085 in a timely manner to initiate contest proceedings which are respectively Docket Nos. WEST 88-84-R, WEST 88-104-R and WEST 88-106-R. Beaver Creek, however, failed to file the "Blue Cards" with respect to those citations which were attached to Proposed Assessments. Upon realizing Beaver Creek's failure to file the appropriate Blue Cards, the attorney for Beaver Creek filed a Motion to Vacate the Orders to Pay on the basis of excusable neglect.

The Federal Mine Safety and Health Review Commission has ruled in a similar case Rivco Dredging Corporation v. MSHA, 10 FMSHRC 624. (May 26, 1988), that the operator should be granted relief in that situation "because innocent procedural missteps alone should not operate to deny a party the opportunity to present its objection to citations." In that case, the operator had timely filed a notice of contest relating to the citation but failed to contest the civil penalty proposal and the Administrative Law Judge had issued an order of dismissal. In ruling

for the operator, the Commission cited Kelley Trucking Co., FMSHRC 1867, [MSHC 1223] (December 19, 1986) and M.M. Sundt Construction Co., 8 FMSHRC 1269 [4 1117] (September 1986) with approval. In Kelley, the Commission stated as follows:

"As to the substantive aspects of Kelley Trucking's request, we have observed repeatedly that default is a harsh remedy and that if the defaulting party can make a showing of adequate or good cause for the failure to respond, the failure may be excused and appropriate proceedings on the merits permitted." 4 MSHC 1225.

The Commission also quoted in pertinent part the standard set forth in Federal Rule of Civil Procedure 60(b)(1) as follows:

"On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: . . . mistake, inadvertence, surprise or excusable neglect; . . . or . . . any other reason justifying relief from the operation of the judgment." (4 MSHC 1225).

The Secretary in her initial response to the motion to vacate order to pay attempted to distinguish Rivco in that there the operator was acting pro se and was unaware that it should file an objection to the proposed penalty. The Secretary argued that Beaver Creek can not claim it misunderstood the requirement because Beaver Creek is a large operator which appears regularly before the Commission. The Secretary further argues that the attorneys for Beaver Creek are experienced, appear regularly before the Commission, and are fully aware of the requirements to file the blue cards.

Beaver Creek contends, however, that the Secretary's argument fails because it is both factually inaccurate and legally wrong. Although Beaver Creek is represented in these contests by an attorney, he is new to the coal industry and has never handled MSHA matters before. Beaver Creek's attorney did not know that, after he initiated a contest proceeding on the citations, he would be denied a hearing and remedy if the mine personnel failed to file the blue cards that were sent to them. MSHA did not send the Notice of proposed assessment to the attorney and, therefore, he was unable to respond to it.

Beaver Creek asserts that the safety supervisor at the mine in Price, Utah who received the proposed assessment with the blue cards and was responsible for handling them was unaware of the procedural requirement of filing blue cards for already initiated contests. The safety supervisor has been in his position at Beaver Creek since the middle of 1985 and during his tenure, Beaver Creek had contested no citations. In 1986 Beaver Creek received four citations, in 1987 it received 13 citations,

all of which Beaver Creek considered to be valid. As of March 29, 1988, the date of the proposed assessment for the citations at issue, Beaver Creek had received 95 citations or orders for the year 1988.

Beaver Creek also contends that the Secretary's argument is also legally wrong because it ignores the fact that F.R.C.P. 60(b)(1) applies to a party "or his legal representative." Therefore, the fact that Beaver Creek is represented by an attorney is irrelevant to the issue of whether the ruling in Rivco should be followed.

The reasoning of the Commission in Rivco, Kelley and Sundt plus that of F.R.C.P. 60(b)(1) all are focused on the situation in which Beaver Creek finds itself. Beaver Creek clearly intended to seek review of the subject citations and initiated contest proceedings to do so. However, due to the number of citations being received, the lack of experience of Beaver Creek's people in contesting citations, and the geographical distance between the mine in Price, Utah and the attorney's office in Denver, Colorado, Beaver Creek admittedly "failed to jump through the procedural hoop" of filing the Blue Cards.

A grant of Beaver Creek's motion does not prejudice MSHA because contest proceedings were already pending with respect to these citations.

MSHA's practice of sending the proposed assessment for a contested citation, which is in effect a pleading, to the mine personnel instead of the attorney, can result in the blue card not being filed through no fault of the attorney. Only careful coordination between the mine personnel and the attorney could ensure that a proposed assessment does not inadvertently slip by on a pending contest case.

The cases were set for hearing on the merits at the same place and time as other cases involving the same parties and their attorneys were heard on the merits. At the hearing, counsel for the Secretary on the record stated the parties had reached an agreement and the parties jointly moved for approval of the proposed settlement dispositions which provides for granting Beaver Creek's motion to vacate the automatic final order to pay that resulted from the inadvertent failure to file the blue card with respect to the contested citations. The agreement also provides as follows:

Docket No. WEST 88-84-R

Citation No. 3044384

This citation alleges a violation of 30 C.F.R. § 75.301. The Secretary agreed and moved to redesignate this Citation from

Section 104(d)(1) to Section 104(a) - S & S. Beaver Creek Coal Company agreed and moved to withdraw its contest to the newly redesignated Section 104(a) - S & S citation and pay the Secretary's new proposed penalty of \$100.00.

Citation No. 3044357

This citation alleges a violation of 30 C.F.R. § 75.316. The Secretary agreed and moved to redesignate this Citation from Section 104(d)(1) to Section 104(a) - S & S. Beaver Creek Coal Company agreed and moved to withdraw its contest to the newly redesignated Section 104(a) - S & S citation and pay the Secretary's new proposed penalty of \$100.00.

Docket No. WEST 88-106-R

Citation No. 3227085

This citation alleges a violation of 30 C.F.R. § 75.400. The citation and Docket No. 106-R were stipulated to be tried during the above referenced hearing. Beaver Creek Coal Company agreed and moved to withdraw its contest and pay a proposed penalty of \$50.00.

Further Discussion

There was no objection to the motions of the parties. The motions are granted. In support of this proposed disposition of the cases the parties submitted information pertaining to the six statutory civil penalty criteria found in Section 110(i) of the Act. After review and consideration of the pleadings, arguments, and submissions I find that the proposed disposition is reasonable, appropriate, and in the public interest.

ORDER

The joint motion for approval of the agreed settlement dispositions is granted. The contestant is directed to pay a civil penalty in the sum of \$250.00 within 30 days of the date of this decision.


August F. Cetti
Administrative Law Judge

Distribution:

**David M. Arnolds, Esq., 555 Seventeenth Street, Denver, CO 80202
(Certified Mail)**

**Robert J. Murphy, Esq., John Matthew, Esq., Office of the
Solicitor, U.S. Department of Labor, 1585 Federal Building, 1961
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/bls

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JUN 26 1989

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. PENN 88-200
Petitioner	:	A.C. No. 36-07230-03541
v.	:	
	:	Bailey Mine
CONSOL PENNSYLVANIA COAL	:	
COMPANY,	:	
Respondent	:	

DECISION

Appearances: Anita D. Eve, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for the Secretary of Labor (Secretary); Michael R. Peelish, Esq., Pittsburgh, Pennsylvania, for Consol Pennsylvania Coal Co. (Consol).

Before: Judge Broderick

STATEMENT OF THE CASE

The Secretary seeks a civil penalty for an alleged violation of 30 C.F.R. § 75.1101-8(a) which requires that at least one water sprinkler be installed above each belt drive, belt take-up, electrical control, and gear reducing unit. The Secretary cited Consol because it did not have sprinklers installed above nine combination belt starter-transformer units. Consol takes the position that such units are not electrical control units, but rather are power centers and not covered by the regulation. Pursuant to notice, the case was heard in Washington, Pennsylvania on March 28, 1989. Robert G. Santee testified on behalf of the Secretary. John F. Burr and Carl H. Trickett testified on behalf of Consol. Consol filed a posthearing brief; the Secretary did not. I have considered the entire record and the contentions of the parties in making the following decision.

FINDINGS OF FACT

Consol is the owner and operator of an underground coal mine in Greene County, Pennsylvania. Consol is a large mine operator, producing over 10 million tons of coal annually. The subject mine produces over 2 million tons annually. The subject mine has a history of 106 paid violations in the 24 months prior to the

violation involved herein. None of these prior violations involved 30 C.F.R. § 75.1101. This history is not such that penalties otherwise appropriate should be increased because of it.

In the belt entry in the subject mine, there are belt drives, drive motors, belt takeups, gear-reducing units, spill switches, contractor controls, on-off switches and fire detection systems. These five latter named units are forms of electrical controls. The adjacent entry contains a combination unit sometimes called a combination belt starter-transformer, and sometimes called a combination power center. This unit supplies power to the belt entry; it also contains a belt starter. The entry in which this unit is located is separated from the belt entry by a permanent stopping.

In October 1982, Consol filed a Petition for Modification under section 101(c) of the Act requesting that the application of 30 C.F.R. § 75.1101-8 be modified to permit the use of a single line of automatic sprinklers at all main and secondary belt-conveyor drives in the subject mine. Drawings accompanied the Petition showing the location and configuration of the sprinkler system along the belt line, particularly at the belt drive and the car spotter areas. Neither the Petition nor the drawings referred to or depicted the combination belt-starter/transformer units which were not in the belt entry. MSHA investigated the Petitioner in November 1984, and a Report of Investigation was made January 9, 1985. In June 1985, a Proposed Decision and Order was issued by MSHA granting the modification. Neither the Investigation Report nor the Decision and Order referred to the combination belt-starter/transformer units.

On March 31, 1987, Federal mine Inspector Robert Santee issued a citation alleging a violation of 30 C.F.R. § 75.1101-8(a) because combination belt electrical control starter transformers in nine locations in the subject mine were not provided with at least one water sprinkler. All of these units were in entries adjacent to the belt entries. All were housed in fireproof structures, vented to the return aircourse.

Prior to the issuance of the citation referred to above, Consol on February 5, 1987, filed a Petition for Modification of 30 C.F.R. § 75.1101-8(a) to permit it to install a thermostat device inside the belt starter box which would deenergize the equipment at a certain temperature. This would be in lieu of an overhead sprinkler. The citation was continued during the period the Petition was investigated, and was terminated when the Petition was granted, on or about March 17, 1988.

REGULATION

30 C.F.R. 75.1101-8(a) provides:

(a) At least one sprinkler shall be installed above each belt drive, belt take-up, electrical control, and gear reducing unit, and individual sprinklers shall be installed at intervals of no more than 8 feet along all conveyor branch lines.

ISSUES

1. Whether the combination belt-starter-transformer units in the subject mine are electrical controls and covered by the standard set out above?

2. If the units are covered, what is the appropriate penalty for the violation?

CONCLUSIONS OF LAW

Respondent is subject to the provisions of the Mine Safety Act in the operation of the subject mine. I have jurisdiction over the parties and subject matter of this proceeding.

The facts in this case are not in dispute. The legal issue is a very narrow one: whether the combination belt starter transformer units are covered by 30 C.F.R. § 75.1101-8(a) as electrical control units. These units are not in the belt entry; the entry in which they are placed is separated from the belt entry by a permanent stopping. The units have two functions: they supply high voltage power to the belt entry, and low voltage power to the belt drive. 30 C.F.R. § 75.1105 requires underground transformer stations to be housed in fireproof structures, and air currents used to ventilate the structures must be coursed directly into the return. Belt starter boxes and transformers need not be enclosed in the same structure. Where they are separate, normally the belt starter box is in the belt entry and under the required sprinkler system. The newer units are in combination and enclosed in a fireproof structure outside of the belt entry.

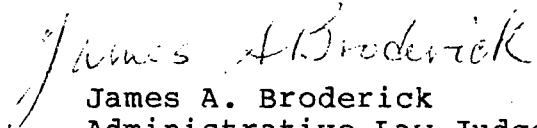
The regulations contained in 30 C.F.R. § 1101-1 and following were designed to prevent and contain fires primarily in underground belt entries where the danger of fire is particularly great: the rollers and bearings can get hot; the belt itself can burn; oil and grease are present; coal is transported on the belt; the belt can slip. For these reasons a sprinkler system is required. None of these reasons would support having a sprinkler over a belt starter unit which is enclosed in a fireproof

structure along with a high voltage transformer, and is located outside the belt entry. Furthermore, permitting water to contact a high voltage power unit could cause a ground fault which is an extremely dangerous condition in an underground coal mine. For these reasons, I conclude that the standard contained in 30 C.F.R. § 75.1101-8(a) was not intended to apply to the combination belt starter-transformer units involved in this case. Therefore, I conclude that the violation charged in the citation did not occur, and the citation must be vacated.

ORDER

Based on the above findings of fact and conclusions of law,
IT IS ORDERED:

Citation 2684504 issued March 31, 1987, is VACATED, and no penalty may be assessed.


James A. Broderick
Administrative Law Judge

Distribution:

Anita D. Eve, Esq., U.S. Department of Labor, Office of the Solicitor, 3535 Market Street, Philadelphia, PA 19104 (Certified Mail)

Michael R. Peelish, Esq., Consol Pennsylvania Coal Co., 1800 Washington Road, Pittsburgh, PA 15241 (Certified Mail)

slk

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

June 27, 1989

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. SE 89-51-M
Petitioner	:	A. C. No. 40-02968-05502
	:	
v.	:	Moltan Company
	:	
MOLTAN COMPANY,	:	
Respondent	:	

DISAPPROVAL OF SETTLEMENT
PARTIAL APPROVAL OF SETTLEMENT

Before: Judge Merlin

This case involves two violations. Citation No. 3253027 was originally assessed at \$20 and I approve the settlement for this item.

However, I am unable to approve the recommended settlement for Citation No. 03252473 which was originally assessed at \$98 and for which \$20 now is the recommended settlement. The Solicitor advises as follows regarding this item:

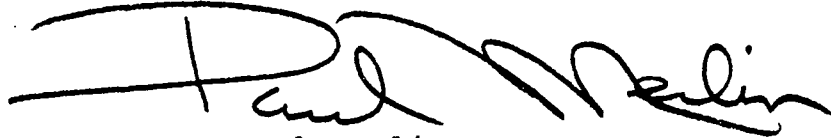
"* * * the No. 1 cooler control electrical cabinet's three circuit breakers and six starter relays could only be operated and/or reset by opening the cabinet door and reaching inside the cabinet. Employees thus exposed themselves to the bare 480 volt terminals and conductor ends inside the cabinet."

I recently considered a comparable situation in A. H. Smith Stone Company, 11 FMSHRC _____ dated June 22, 1989 (copy enclosed), wherein it was shown that 480 volts would cause serious injury or death. A penalty of \$1,800 was assessed in that case. The Solicitor has provided no basis for her representation that in this instance occurrence of an accident would be unlikely.

The parties should be aware that I have repeatedly held that significant and substantial is not synonymous with gravity for purposes of determining an appropriate penalty assessment. A. H. Smith Stone Company, supra.

In light of the foregoing, it is ORDERED that the \$20 settlement for Citation No. 3253027 be APPROVED and that the operator pay \$20 within 30 days from the date of this order.

It is further ORDERED that within 30 days from the date of this order the Solicitor submit information sufficient to support her settlement recommendation for Citation No. 3252473.

A handwritten signature in black ink, appearing to read "Paul Merlin". The signature is fluid and cursive, with a large initial "P" and "M".

Paul Merlin
Chief Administrative Law Judge

Enclosure:

Distribution:

G. Elaine Smith, Esq., Office of the Solicitor, U. S. Department of Labor, 2002 Richard Jones Road, Suite B-201, Nashville, TN 37215 (Certified Mail)

Mr. Edward J. Lucas, Moltan Company, Post Office Box 9, Middleton, KY 38052 (Certified Mail)

/gl

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JUN 29 1989

JAMES L. WOODY,	:	DISCRIMINATION PROCEEDING
Complainant	:	
v.	:	Docket No. VA 89-14-D
	:	
CLINCHFIELD COAL COMPANY,	:	Moss No. 3 Prep Plant
Respondent	:	

DECISION

Appearances: Jerry O. Talton, Esq., Front Royal, Virginia, for Complainant; W. Challen Walling, Esq., Penn, Stuart, Eskridge & Jones, Bristol, Virginia, for Respondent.

Before: Judge Broderick

STATEMENT OF THE CASE

Complainant contends that he was discriminated against in violation of section 105(c) of the Federal Mine Safety and Health Act of 1977 (the Act), 30 U.S.C. § 815(c), in that he was required to work beyond his regular shift on August 4, 1988. Respondent denied that Complainant suffered any adverse action and asserted that if he did, it was not because of activity protected under the Act. Pretrial discovery was had, and both parties responded to my prehearing order. Pursuant to notice the case was heard on the merits in Abingdon, Virginia, on April 25, 1989. Billy L. Bise, James L. Woody, Jerry D. Hearl, and James W. Hicks testified on behalf of Complainant; Thomas Asbury, Danny Lee Cromer, Samuel Glen Sanders, and John Bel, Jr., testified on behalf of Respondent. Both parties have filed post hearing briefs. I have considered the entire record and the contentions of the parties, and make the following decision.

FINDINGS OF FACT

I

At all times pertinent hereto, Respondent was the owner and operator of a coal mine in the State of Virginia known as the Moss No. 3 Preparation Plant. Complainant was employed by Respondent at the Preparation Plant as a boom shack operator and was a miner as defined in the Act. Complainant worked at the mine for approximately 28 years. The preparation plant is one of

the largest such facilities in the country. It employs approximately 150 people, and processes and ships out approximately three-and-a-half million tons of coal in a three year period.

II

In the latter part of 1987, Complainant Woody and others complained on several occasions about excessive dust in their working area. When the amount of coal coming from the mine to the preparation plant is reduced, the dryer (part of the prep plant) will, unless its heat is reduced, over-dry the coal. The result is excessive dust in the area. During such periods, the dust severely limited Woody's vision from the boom shack. It also resulted in respirable dust entering the boom shack where Woody worked. On December 15, 1987, Woody and two other miners filed a grievance alleging that Clinchfield had not controlled the dust problem at the loading out area. Woody complained that on December 14, 1987, the dust was so bad he could not see to load the railroad cars. A meeting was held concerning the grievance on January 19, 1988. Four company representatives, two union representatives and the three grievants attended. Respondent presented a written dust control plan which was accepted by the union as a settlement of the grievance. Woody testified that the condition was "a lot better" after the meeting (Tr. 127). However, he also testified that "some days it (the dust control plan) works, some days it doesn't." (Tr. 122) No further grievances were filed and no section 103(g) complaints were filed with the Mine Safety and Health Administration alleging a dust violation.

III

Beginning in late 1987, miners in the subject plant worked a mandatory six day week. Coal was processed five days a week and the sixth day (Saturday) was devoted to maintenance. Prior to that time, work on Saturday and Sunday was voluntary. The workers were paid time-and-a-half for Saturday work and double time for Sunday work. A sufficient number of workers volunteered for overtime or Sunday work to enable Respondent to maintain its five day coal production schedule. At some time in 1987 or 1988, the number of employees volunteering for Sunday work declined; this resulted in Respondent establishing what was called a mandatory overtime policy. This policy referred only to work beyond the normal work day of 7-1/2 or 8 hours. Saturday work was being performed as a matter of course. A notice was posted notifying the employees that all employees were subject to mandatory overtime effective August 1, 1987. (RX3) The policy was not implemented until the summer of 1988, when the number of volunteers for overtime and Sunday work sharply fell off.

IV

Complainant Woody is 60 years of age. He has worked for Respondent almost 29 years. He is a member of the United Mine Workers of America. He has been an officer in the union and was mine committeeman until 1984. He worked the majority of Saturdays and 13 Sundays in 1987. In 1988, he worked 20 Saturdays and two Sundays; however, he only worked one additional overtime hour (beyond his normal workday) in 1987 and 4-1/2 such hours in 1988.

V

The Union objected to the mandatory overtime policy established in 1987, and prepared a protest form. (CX1) Woody and most of the union employees signed the forms and submitted them to management. Among other things the form advised management "that because of the unsafe conditions which the extended day will create, I contend that this policy of involuntary overtime interferes with my safety rights under the Federal Mine Safety and Health Act. If my health and safety are jeopardized by this policy, I may file a 105(c) discrimination complaint . . . under the authority of Eldrige v. Sunfire Coal Company, 5 FMSHRC 480 (1983)."

VI

Beginning in July 1988, the mandatory overtime policy was implemented at the preparation plant. This was done because of large orders for coal, higher than normal absenteeism, the failure of employees to volunteer for overtime and other factors. Woody was scheduled to work four hours (4 p.m. to 8 p.m.) on Thursday, August 4, 1988 (RX7). When the schedule was posted, Woody protested to his immediate supervisor and to the acting plant superintendent. He also protested to the union safety committeeman, telling him that he had doctors' statements excusing him from working overtime. The Safety Committeeman asked Sam Sanders, the Plant Superintendent on August 3 for a meeting on the matter. Sanders said he would review the doctors' statements and tell Woody the next morning of his decision. The letters (Comp. Ex. 13 and 14) were addressed to Sanders. Dr. James Cross concluded that if possible Woody should not work more than 8 hours per day and that "12 hour days . . . I feel would cause excessive fatigue, aggravation of his hiatal hernia, increased anxiety, and deterioration of his health." Dr. W.A. Davis stated that in his opinion Woody "is able to work eight hours a day for six days a week but . . . is not able to work 12 hours a day, due to his physical condition and his age." Sanders was not satisfied with the reports, and he called Dr. Davis.

Davis told him that Woody had requested that he write the letter because Woody did not feel like working over eight hours and "felt exhausted if he worked over eight hours." (Tr. 281) Based on the letters and this conversation, Sanders concluded that there was no bona fide medical reason for Woody not working overtime. He so notified Woody during the morning shift. At the conclusion of the shift, Sanders met with Woody and the mine committee, and the evening shift foreman. Sanders repeated his decision, and Woody reacted angrily. When Woody threatened to go home and not work the overtime, Sanders told him that before he returned to work, he would have to bring a doctor's slip stating that he was "100 percent able to perform [his] . . . work." (Tr. 290). Woody took this to mean that he had to work overtime or be discharged. For this reason, he went to the job and worked the remaining 3 or 3-1/2 hours (the meeting took 30 to 45 minutes, and Woody was permitted to leave 30 minutes early because he did not take a lunch hour). He was paid four hours at the overtime rate. His work involved cleaning and washing the tipple floor with a water hose. The hose was approximately 1-1/4 or 1-1/2 inches in diameter. The floor was wet and slippery. He returned to his regular work in the boom shack the following day, and was not requested to work beyond his 8 hour day thereafter.

VII

As a boom shack operator, Woody worked in an enclosed area, operating levers to fill railroad cars with coal coming from the dryers. The work does not involve heavy lifting or other strenuous activity. When he worked on Saturdays or other overtime hours, he had various duties, including washing and cleaning the tipple floor, cleaning track, working on pumps or other machinery. Some of the work is strenuous. There are normal mining hazards in connection with some of it. Woody has a hiatal hernia, and had surgery for the removal of polyps in July 1988. He also complained of the symptoms of an ulcer. He testified that after he worked his regular shift on Saturdays, he was exhausted and had to rest all day Sunday.

ISSUES

1. Did complainant Woody suffer adverse action by being required to work 4 hours overtime on August 4, 1988?
2. If he did, was the adverse action the result of activity protected under the Mine Act?
3. If it was, what are the appropriate remedies?

CONCLUSIONS OF LAW

I

Complainant and Respondent are subject to and protected by the provisions of the Mine Act, complainant as a miner and Respondent as a mine operator. I have jurisdiction over the parties and subject matter of this proceeding.

Under the Act, a miner establishes a prima facie case of discrimination if he proves that (1) he was engaged in protected activity, and (2) was subjected to adverse action, which (3) was motivated in any part by the protected activity. Secretary/Pasula v. Consolidation Coal Co., 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). The mine operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was not motivated in any part by the protected activity. If the operator cannot rebut the prima facie case in this manner, it may defend affirmatively by proving that it was also motivated by the miner's unprotected activity, and would have taken the adverse action for that activity in any event.

II

Complainant Woody was not discharged, did not lose any pay, was not reprimanded or otherwise disciplined. So far as the record shows, his personnel file does not contain any reference to the incident involved here. He was required to work 4 hours overtime to which he objected ostensibly for health reasons. But he did work and was paid for the work. So far as the record shows, he did not suffer any ill effects and no safety problems were encountered. He returned to his regular work the following day and worked continually until the mine went on strike April 5, 1989.

For many personal reasons Woody disliked working overtime. The Union objected on behalf of all its members to the mandatory overtime policy of the operator. But neither Woody's distaste nor the Union's objection establishes an adverse action. Had Woody refused to work the 4 hours overtime and been disciplined, he would have suffered adverse action and, if he could show that it was related to protected activity, could make out a prima facie case of discrimination. But the facts are that he did not refuse, and was not disciplined. I conclude that Complainant James Woody has failed to show that adverse action was visited on him when he was required to work overtime on August 4, 1988.

III

Assuming that requiring Woody to work 4 hours overtime constituted adverse action, the next question is whether it resulted in any part from activity protected under the Mine Act. Complaints of excessive dust detailed in Findings of Fact II above clearly constitute protected activity. Refusal to work is protected if it results from a good faith reasonable belief that the work is unsafe or unhealthful. Pasula, supra. Refusal to perform overtime work because of a reasonable good faith belief that a miner's physical and mental exhaustion would present a safety hazard to himself and others is protected. Eldridge v. Sunfire Coal Company, 5 FMSHRC 408 (1983) (ALJ). Cf. Secretary/Bryant v. Clinchfield Coal Company, 4 FMSHRC 1379 (1982) (ALJ).

IV

There is no credible evidence that Respondent's requiring Woody to work overtime on August 4, 1988, was in any way related to his complaints of excessive dust in 1987 and thereafter. I conclude that it was not.

V

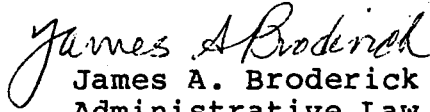
Complainant objected to the overtime work because he believed that his age, poor health and physical exhaustion, would result in safety hazards to himself or his co-workers. Although the objection to mandatory overtime was sponsored by the union, and Respondent tried to create the inference that Woody was a front or stalking horse for the union, I conclude that Complainant Woody's objections to the overtime were made in the good faith belief that his health would be endangered. The work Woody was asked to perform on August 4, 1988 after his shift was not more onerous or hazardous than the work he normally performed on Saturdays. There was nothing about the nature of the work that created special hazards, nor is the discrete (4 hours) period of overtime so onerous as to create health or safety problems per se. I conclude that in the terms of the Mine Act, complainant's objection to overtime work though made in good faith was not reasonably related to a health or safety hazard.

VI

For all the above reasons, I conclude that Complainant has failed to establish that he was subjected to adverse action because of activity protected under the Mine Act.

ORDER

Based on the above findings of fact and conclusions of law
IT IS ORDERED that the complaint of discrimination filed herein
is DISMISSED.


James A. Broderick
Administrative Law Judge

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